State of Rajasthan

Vs

Kishore

Criminal Appeal No. 265 of 1996

(K. Ramaswamy, S. Saghir Ahmad, G. B. Pattanaik JJ)

27.02.1996

JUDGEMENT

K. RAMASWAMY J.

1.Leave granted.

2. Despite issuance of non-bailable warrant and attachment of the properties, presence of the respondent could not be secured for executing the warrants as it was reported that his whereabouts were not known. Consequently, as per the directions of the Court, the Legal Aid Committee assigned Shri S. K. Pasi to assist the Court as a counsel for the respondent. After hearing the counsel for the State and the respondent, we had reserved the judgment on January 30, 1996. However, on February 2, 1996, the respondent was brought and his counsel Shri Sushil Kumar Jain requested the Court to give an opportunity for hearing. Accordingly we hear the matter again. This case also indicates avoidance on the part of the people like the respondent to delay the disposal of the appeal in this Court. When the attempts were found to be unsuccessful, he made appearance in the Court which gave us an insight to adopt such appropriate procedure for securing presence for early disposal to avoid miscarriage of justice.

3. On June 21, 1984, P. W. 6, Station House Officer, Sodala Police Station in Jaipur, Rajasthan State had received a telephonic message, recorded under Ex. P-22, that Guddi, the deceased was burnt of injuries and was admitted in the hospital. After its entry in the G. D., he proceeded to the hospital and recorded her statemnet Ex. P 16, came back to the police station, issued the F. I. R. and set the investigation in motion. P. W. 8 took over the investigation, went to the deceased and recorded her statement Ex. P-19 under Section 161 of the Code of Criminal Procedure, (Cr. P. C.) and sent the requisition Ex. P-7 to the Chief Judical Magistrate, Jaipur to record her declaration. The latter directed P. W. 1, the Addl. Chief Judicial Magistrate by names Hari Singh Punja to proceed to the hospital and record the statement. Accordingly. P. W. 1 on receipt of the order at 9.45 p. m. proceeded to the hospital and reached the hospital at about 10.10 p. m. on June 21, 1984. He sent a nurse to get the doctor for his proceeding with the recording of her statement. He waited till 10.50 p. m. but no doctor turned up. Consequently, he proceeded to record her statement by way of questions and answers under Ex. P-8. He put 8 questions in all. Relevant questions are : Questions Nos. 1, 2 and 3. They along with answers read as under :

> "(1). Question - What was the time of incident ?
>
> Answer - It was 2 O' Clock at day. After pouring kerosene oil, lit match-box.

2. Question - Who were present at your house at that time ?

Answer - My mother-in-law four sisters-in-law and my daughter. Sister-in-law are Suman, Guddi, Wandhuki, Sampat.

3. Question - How did you get burnt?

Answer - In the morning, my mother-in-law poured kerosene oil on me but I did not get burnt. After this, my husband came for lunch at noon and my mother-in-law asked him to lit match-box on me. Then my husband after pouring kerosene oil on me, lit match-box and my husband came out of the house. My mother-in-law kept on watching."

4. The other questions are not relevant for the purpose of this case; hence omitted. She died on June 22, 1984 due to 80 per cent burn injuries. The crime was covered under Section 302, Indian Penal Code (IPC). P. W. 7, the doctor conducted autopsy and issued post-mortem certificate, Ex. P-21. At the trial, prosecution had examined as many as 8 witnesses including P. W. 3 and P. W. 4, the immediate neighbours and P. W. 2, brother of the deceased to prove motive. P. W. 3 and P. W. 4 turned hostile. The Sessions Judge relied upon the three dying declarations and he has given primacy to the dying declaration recorded by the Judical Magistrate under Ex. P-8 and held that the charge under Section 302, I. P. C. was proved against the respondent and convicted him under Section 302 and sentenced him to undergo rigorous imprisonment for life. But he acquitted the deceased's mother-in-law Pushpa.

5. The State did not file any appeal against the acquittal of the mother-in-law. The respondent filed appeal in the High Court. The Division Bench of the High Court in Criminal Appeal No. 116 of 1986 by order dated May 13, 1988 has acquitted the respondent. Reasons in support thereof are that: the Judicial Magistrate had not recorded her mental condition; he did not get any confirmation of the mental condition of the deceased before recording the declaration; the articles seized at the scene of the offence were not sent for chemical examination; the hair of the deceased sent for chemical examination did not contain the smell of kerosene oil; doctors would normally be available in the ward; the Judicial Magistrate without waiting for the doctor and without obtaining from him proper certificate of the mental condition of the decased, recorded Ex. P-8 declaration which would be highly irregular on the part of the Magistrate to record such statement; the deceased was under agony with 80 per cent of burn injuries. Therefore, the story set up by the prosecution is not genuine and is shrouded with doubts. The prosecution, therefore, has not proved the case beyond reasonable doubt. Accordingly, the Division Bench acquitted the respondent giving him the benefit of doubt.

6. It is contended for the State that the view taken by the High Court is unjustified on the facts of this case. P. W. 1, the Judicial Magistrate waited for the doctor for 40 minutes near the deceased before recording the statement of the deceased, which has now turned out to be dying declaration, but no one had turned up. Therefore, he though it expedient to proceed with recording the dying declaration. He put questions and elicited answers from the deceased. The answers given by her clearly indicate her mental condition. Therefore, the absence of certificate from the doctor does not cast any cloud on the correctness of the declaration by the deceased. They get corroboration from the F. I. R., Ex. P-16 and Section 161 statement, Ex. P-19 which consistently spoke of the offence committed by the respondent. The omission on the part of the investigation officer to have the seized clothes sent for chemical examination is a lapse on the part of the investigation officer but that does not cast doubt on the prosecution case. In view of the evidence on record that after the

deceased was burnt, her clothes were changed and the burnt clothes were found under the Panchanama showed that evidence of offence was destroyed. In view of the doctor's evidence that he died due to 80 per cent burn injuries, the collusion would be that the cause of the death was burns. The omission to find kerosent oil smell on the hair sent for chemical examination also does not cast any doubt on the prosecution case. The statement of the deceased, Ex. P-8 is clear and unequivocal that the respondent had poured kerosene on her and set to fire and consequently she sustained 80 per cent burn injuries and died due to shock. The offence, therefore, of murder, has been made out. Though Pushpa, mother-in-law of the deceased was wrongly acquitted, the acquittal does not cast any doubt on the veracity of the declaration, Ex. P-8.

7. Shri Pasi, learned counsel with his thorough preparation has contended that the High Court was right in its conclusion that the prosecution has not proved the case beyond doubt. There is inconsistency in the timings mentioned in Ex. P-16, F. I. R. and Ex. P-8, dying declaration. Therefore, whereas under Ex. P-8, according to the deceased the occurrence had taken place at 2 p. m., as per Ex. P-16, the occurrence had taken place at about 5 p. m. and death must be only subsequent to 2 p. m. which might necessarily be due to accident or suicide. It was evident from these statements that the deceased made an attempt to rope in Pushpa, her mother-in-law attributing her unsuccessfully attempting to set the declaration on fire in the morning. It would be unlikely that the deceased might not have complained to the neighbours or escaped from the house. Therefore, the possibility of the deceased setting herself to fire by pouring kerosene oil to commit suicide and falsely implicating the respondent and his mother cannot be ruled out. Obviously for that reason the seized clothes were not sent for chemical examination. The wintness who came to the scene and spoke under Section 161 that the respondent prevented them to get into the room, had not supported the prosecution case which obviously is false. The Magistrate, before recording the statement, had not secured the presence of the duty doctor who would always be available in the hosptial, to testify the mental condition of the deceased who had admittedly suffered 80 per cent burn injuries. No certificate even thereafter was appended by the doctor. It is, therefore, unlikely that the deceased would have given such a lenghty statement in the form of answers to 8 questions put to her in that agony. The High Court, therefore, was not prepared to accept the dying declarations. If the dying declarations are excluded there is no other evidence to establish the culpability of the respondent beyond reasonable doubt.

8. Shri S. K. Jain contended that in all the three dying declarations, the deceased attributed major role to her mother-in-law which was found by the Division Bench to be false and accordingly it acquitted the mother-in-law. In other words, part of the dying declarations was disbelieved by the Courts. Consequently, it is difficult to place implicit reliance on the dying declarations of the deceased without any corroboration from independent evidence. S. M. S. Hospital at Jaipur is a big hospital where hundreds of doctors including the doctor on medical jurisprudence would always be available but none were brought at the time P. W. 1 recorded the dying declaration, Ex. P-8. P. W. 1 admitted that he did not read the dying declaration after he had recorded the same. In none of the three dying declarations any motive was attributed to the respondent. P. W. 1 without any identification of the deceased had recorded the declaration in the hospital where several other persons similarly injured were admitted. There was no identification of the deceased when P. W. 1 had recorded the statement. The case sheet of the deceased from the hospital was not produced either to identify the deceased or to know the nature of the treatment given before P. W. 1 recorded the statement, Ex. P-8. The deceased was married to the respondent about 8-9 years ago and three was no previous ill-feelings or estrangement between the respondent and the deceased. The name of the respondent was not specifically mentioned in the first part of Ex. P-8, the statement. There is a considerable time lapse as mentioned by the deceased herself, of different timings in her successive

statements. The hair of the deceased sent for chemical examination did not smell of kerosene oil. The clothes belonging to the deceased seized by the police were not sent for chemical examination. These circumstances clearly indicate that there are strong suspicious features to disbelieve the prosecution case. It being a case of pure appreciation of evidence and the High Court having had gone into that question and recorded the findings, it would not be safe to reverse those findings.

9. From the evidence on record, the prosecution has established that the deceased died of 80 per cent burn injuries on June 22, 1984 and she sustained the same in the afternoon of June 21, 1984. The question, therefore, is : whether she died of suicide or homicide ? There is no clinching evidence regarding the previous mental condition of the deceased to show any tendency to commit suicide. In view of the finding by the doctor under Ex. P-21, post-mortem certificate that she died due to shock of 80 per cent burn injuries, if it is proved to have been committed by any one, indisputably it would be a murder punishable under Section 302, I. P. C.

10. The primary question, therefore, is : whether the prosecution has established the case against the respondent beyond reasonable doubt? The evidence in this case consists of three successive dying declarations of the deceased Guddi. She principally attributed the acts to the respondent, her husband, and abetment by her mother-in-law. Pushpa who stood acquitted. The question, therefore, is : whether the dying declarations are reliable pieces of evidence ? Section 32 (1) of the Evidence Act brings an exception to the rule of hearsay evidence when the statement is made by a person as to the cause of his death or as to any of the circumstances of the transaction which result in the death, in cases in which the cause of the person's death comes into question. Therefore, under Section 32 (1) of the Evidence Act, if the statement of Guddi as to the cause of her death is believable as a reliable peace of evidence, it would form basis to convict the accused-respondent. In Khushall Rao v. State of Bombay, 1958 SCR 552 : (AIR 1958 SC 22), this Court had held that it is not an absolute rule nor even a rule of prudence that has ripened to a rule of law that dying declaration to sustain the order of conviction, must be corroborated by other independent evidence. The rule of corroboration requires that the dying declaration be subjected to close scrutiny since the evidence is untested by cross-examination. The declaration must be accepted, unless such declaration can be shown not to have been made in expectation of death or to be otherwise unreliable. Any evidence adduced for this purpose can only detract from its value but does not affect its admissibility. The dying declaration, therefore, may be tested as any other piece of evidence. Once the Court reaches the conclusion that the dying declaration is true, no question of corroboration arises. The dying declaration cannot be placed in the same category as evidence of an accomplice or a confession.

11. It is settled law by series of judgment of this Court that the dying declaration, if after careful scrutiny the Court is satisfied that it is true and free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, is no legal impediment to form such dying declaration the basis of conviction, even if there is no corroboration vide Tarachand Damu Sutar v. State of Maharashtra, (1962) 2 SCR 775 : (AIR 1962 SC 130); Kusa v. State of Orissa, (1980) 2 SCC 207 : (AIR 1980 SC 559); Meesala Ramakrishnan v. State of A. P. (1994) 4 SCC 181 : (1994 AIR SCW 1978); Goverdhan Raoji Ghyare v. State of Maharashtra, 1993 (Supp) 4 SCC 316 and Gangotri Singh v. State of U. P., 1993 (Supp) 1 SCC 327.

12. We have scanned the dying declaration recorded by the Magistrate, P. W. 1 under Ex. P-8. Therein the first question put was to ascertain the time of occurrence; the second question put was as to the place of occurrence and the person present and the third question was as to who was responsible for causing the burns to her; the fourth question related to the participation of her sisters-in-law; the fifth question related to the persons who extinguished the fire; the sixth question

was regarding her burnt clothes; seventh question related to the identification of the persons who brought her to the hospital; and the eighth question related to the previous hostility between herself, mother-in-law and her husband, i. e., the motive. The learned Judicial Magistrate put these questions and elicited answers given by her were written in her own language and translated English version is placed on record. These questions are not only germane but also absolutely relevant and pertinent to the cause of the occurrence and circumstances leading to the occurrence. The deceased had suffered 80 per cent burn injuries; yet her answers are coherent, clear and unequivocal. In his evidence P. W. 1 has stated that he reached the hospital at 10.10 p. m. went to the victim Guddi, sent the nurse to call the doctor and he waited till 10.50 p. m. for the doctor to turn up but no doctor had come. There is nothing intrinsic for the Magistrate to speak falsity against the inaction on the part of doctor. It is also not uncommon that the deceased being a poor lady, no one was there to care to attend to her all the while. It is not uncommon that in the general hospital such a shabby treatment is meted out to the poor patients. Under these circumstances, having waited for 40 minutes and finding that no doctor had turned up, he discharged the duty of recording the statement of the deceased. He did not record verbatim of what she has stated. He put questions and answers given by her were recorded in her own language.

13. A persual of the answers clearly indicates and inspires us to believe that she was conscious and had given cogent, coherent and direct answers to the questions put by the Magistrate from which it could easily be inferred that she was in a mentally fit condition at that time to give the statement. Nothing has been elicited from the post-mortem conducted by the doctor P. W. 7 and no contra evidence was brought on record that the deceased was not in a mentally fit condition to give the statement either prior to P. W. 1's going to the hospital or thereafter. As a fact no one had attended on her. She was alone left in the bed. There was no occasion for any body to induce her to make a false statement against her husband and mother-in-law. Admittedly, she had 80 per cent burn injuries and it is obvious that she was in expectation of her death due to burns. She would not have willingly excluded the real culprits and implicated falsely the innocent. As a fact, she did not make any attempt to implicate her sister-in-law or father-in-law though their presence at that time of occurrence was spoken by her in the declaration. That would clearly indicate that she was not interested to falsely implicate anyone except the real culprits., viz., her husband and mother-in-law. P. W. 1 obtained her thumb impression on Ex. P-8. It is neither in evidence nor elicited from P. W. 7, the doctor or P. W. 1 that her fingers were burnt and she was not in a position to put her thumb impression. Therefore, no doubt can be cast on her capacity to give the statement or on her putting thumb impression on the statement under Ex. P-8. The declaration reflects the true state of affairs at the time of occurrence and her statement is a truthful version and is reliable one.

14. The tenor of reasoning by the High Court was solely directed to criticise the Magistrate, P. W. 1 which is uncalled for in the circumstances. Therefore, the High Court was not right in doubting Ex. P-8, dying declaration recorded by a Judical Magistrate. It is seen that Ex. P-16 is the F. I. R. which reached the Court at the earliest. It contained an elaborate statement given by Guddi, the deceased to P. W. 6, the S. H. P. The only variation between Ex. P-8 and Ex. P-16 is as regards the timings. It must be remembere that the deceased was an innocent, illiterate poor lady and was not so much conscious of the time factor. It would be only approximate and could not be accurately described. The difference of the timings in this case is not of material consequence since, admittedly, she had the burn injuries. At what point of time the injuries were sustained would not be of material consequence. Even the witness P. W. 4 who turned hostile mentioned the presence of the respondent at the time of occurrence. Ex. P-29, Section 161 statement recorded by P. W. 8, the investigating officer is very simple and specific. It is not as elaborate as the F. I. R. It is P. W. 8 that sent the requisition Ex. P-7 to the Chief Judicial Magistrate to record the statement of the deceased pursuant

to which P. W. 1 had come and recorded the statement Ex. P-8. One important factor which cannot be lost right of is that no one was present with the deceased at the time of recording Ex. P-8 to tutor her to give any false statement or to implicate falsely anyone. As a fact, all the three declarations are spontaneous. That would lend reliability to her declaration coupled with the bruatally frank statement given by the deceased Guddi to P. W. 1 accusing only the respondent and her mother-in-law which inspires us to belive that Ex. P-8 contains all grains of truth and is a reliable statement made by Guddi, the deceased in expectation of her death due to extensive 80 per cent burn injuries. Therefore, it would by itself form basis for conviction. If, at all, any corroboration is needed, Ex. P-16, FIR and Ex. P-19 would corroborate her evidence.

15. It is true as contended by Shri S. K. Jain that S. M. S. Hospital is a big institue but it is not uncommon that to a poor and lonely patient like the deceased, the doctor after attending on her and giving treatment had not turned up, in spite of P. W. 1's sending the nurse to bring the doctor. It is equally true that P. W. 1 admitted that he did not read out the statement again after recording the declaration of the deceased but the tenor of the question put and answers given and recorded in her own language appear to have persuaded P. W. 1 to feel that there was no necessity to read once over the statement to the deceased. It is equally true that the bed case sheet in the hospital of the deceased was not produced. The nature of the treatment given to the deceased before P. W. 1 recorded the statement is not available on record but that lapse does not create any doubt on the capacity of the deceased or on her mental condition at the time of giving the statement. It is already seen that the statement of the deceased is clear, coherent and specific. There is no inkling of any vacillation or doubt when the deceased had given answers to the questions put by P.W. 1. It is seen that to question No. 1 though the deceased had mentioned the presence of the mother-in-law and sisters-in-law of the deceased, she did not mention the name of the husband, the respondent but to the third question she had clearly put the nail of blame on the husband and mother-in-law. The omission to mention his name in question No. 2 does not create any doubt since a major role was attributed only to the respondents. The omission to attribute motive to the respondent is not a material consequence since it was done at the investigation of his mother.

16. In the Meesala Ramakrishna's case (1994 AIR SCW 1978 (supra), this Court had accepted the dying declaration on the basis of gestures now only as admissible but also possessing evidentiary value. The statement was recorded by the Magistrate and a certificate of mental condition was appended by the doctor who had stated that the nods given by the deceased were effective and meaningful. So the dying declaration formed sole basis for conviction. In Ganpat Mahadeo Mane v. State of Maharashtra, (1993) Supp 2 SCC 242 : (1992 AIR SCW 3442), there were three dying declarations regarding burning by the accused in bride burning case, viz., one recorded by the doctor, another by police constable and the third by the Executive Magistrate and they were held sufficient to prove the offence and result in conviction. Though answers were not elicited by way of questions and answers and the declaration was recorded verbatim, the dying declarations were accepted to be truthful and as such they formed basis for conviction. In Govardhan Raoji Ghyare's case (1993 (Suppl) 4 SCC 316) (supra), the minor discrepancy in two dying declarations by the deceased-bride was held to be not of material conse-quence. Both the declarations were similar in material particulars. The minor discrepancies were held to be inconsequential. The two dying declarations were accepted to be admissible to form the basis for conviction. In Jose v. State of Kerala, 1994 (Supp) 3. SCC 1, the dying declaration recorded by the doctor in the form of questions and answers was accepted by this Court. Similarly the declaration recorded by the police officer in his own by way of statement under Section 161, Cr. P. C. was held to corroborate the other statement. It also corroborated evidence of direct witnesses. It was held that dying declaration recorded by the doctor could not be discarded on the ground that there two dying declarations with

variations. In Gangotri Singh's case (1993 (Suppl) 1 SCC 327) (supra), the dying declaration recorded by the Magistrage shortly after the occurrence was accepted in spite of bitter enmity between the accused and the deceased. In Kundula Bala Subrahmanyam v. State of Andhra Pradesh ((1993) 2 SCC 684 : (1993 AIR SCW 1321), the dying declaration relating to the circumstances leading to the death was accepted being consistent with other evidence. In State of Maharashtra v. Rajendra Garbad Patil, 1992 (Supp) 3 SCC 55 : (1993 AIR SCW 3893), the dying declaration recorded within an hour of the occurrence and made by the injured without being influenced by others was held reliable and conviction could be ordered on that basis alone.

17. It is true that Pushpa, mother of the accused-respondent was acquitted by the Sessions Court of the offence under Section 302 read with Sections 109 and 34, I. P. C. and the State did not file any appeal against the acquittal. The acquittal may be wrong but it does not cast any doubt on the veracity of the statement under Ex. P-8. The law does not make any distinction between the dying declaration in which one person is named and a dying declaration in which several persons are named as culprits. The dying declaration may well be false when it implicated only one person while dying declaration implicating several persons may be true. If just one of the many persons is mentioned as culprit by a person claiming to be the witness in the evidence adduced before the Court, the Court has to take care to scruitnise the evidence and decide whether he has spoken falsely or has made a mistake about any of them. Therefore, when dying declaration mentions number of culprits that by itself is not suspect. As stated earlier, it requires careful scrutiny of the declaration in the light of the facts and circumstances of each case, in particular if the accused did not have the opportunity to cross-examine the declarant. It is added duty of the Court to subject the statement to careful scrutiny and if it is found to be credible and believable, mere fact that number of persons were named as culprit but were not at all charged or were acquitted, does not render the declaration suspect or untrustworthy. In Kusa's case (AIR 1980 SC 559) (supra), in the dying declaration, apart from the accused, others also had been named as culprits but no charge-sheet was laid against them. This Court had held that merely because some other persons, though named in the dying declaration, were not charge-sheeted, would not by itself prove falsity of the declaration. It is, therefore, clear that though co-accused Pushpa was wrongly acquitted of the charge of murder, it does not cast any doubt on the veracity of the statement of the deceased under Ex. P-8 nor can it be suspect to act upon the self-same evidence against the respondent. Every suspicion is not a doubt. Only reasonable doubt gives benefit to the accused and not the doubt of a vacillating Judge.

18. It is equally true that the investigating officer P. W. 8 committed grave irregularity in omitting to send the burnt clothes and other incriminating material for chemical examination to lend corroboration to the evidence. Mere fact that the investigating officer committed irregularity or illegality during the course of the investigation would not and does not cast doubt on the prosecution case nor trustworthy and reliable evidence can be cast aside to record acquittal on that account. It is seen from the Panchanama recovery of the incriminating material from the scene of offence that there was an attempt to screen the offence by destroying the evidence. Others were prevented from entering the room. That by itself indicates an attempt on the part of the accused to destroy the incriminating evidence and to prevent others from saving the life of the deceased. Therefore, the absence of smell of kerosene oil on the hair sent for chemical examination does not render the dying declaration of the deceased suspect nor would it become unbelievable. The High Court, therefore, has not considered the evidence in the proper and legal perspective but felt it doubtful like Doubting Thomas with vacillating mind to accept the prosecution case for invalid reasons and wrongly gave to the respondent the benefit of doubt.

19. The reasons, therefore, are clearly erroneous and unsustainable to a close and careful scrutiny

and meticulous examination of the evidence and circumstances in the case. The evidence proves the prosecution case beyond reasonable doubt that the respondent had poured kerosene oil on the deceased, lit the fire with match-stick causing 80 per cent burn injuries to the deceased which resulted in her death. Thereby, the offence of murder punishable under Section 302, I. P. C., has been established beyond reasonable doubt. The Sessions Court, therefore, rightly recorded the conviction under Section 302, I. P. C. and sentenced him to undergo imprisonment for life.

20. The appeal is allowed. The order of acquittal of the High Court is set aside and that of conviction and sentence by the Sessions Court is restored. The respondent who is presently consigned in Central Jail, Jaipur, as per our order dated February 2, 1996, should undergo rigorous imprisonment for life.

21. The appeal is accordingly allowed. Appeal allowed.