

Kishan Lal

Vs

State of Rajasthan

Criminal Appeal No. 156 of 1998

(K. T. Thomas, A. P. Misra JJ)

17.08.1999

JUDGMENT

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A.P. Misra, J. –

1. The appellant, Kishan Lal, husband of deceased Smt. Sulochana has filed this appeal against his conviction under Section 302 read with Section 34 of the Indian Penal Code (hereinafter referred to as "I.P.C.").
2. The High Court convicted the appellant on an appeal filed by the State against an order of acquittal passed by the Additional Sessions Judge. The brief facts are that Smt. Sulochana, according to the prosecution case, was sleeping on the intervening night between 11th and 12th September, 1976 with the mother of the appellant on a separate cot when she was burnt by sprinkling kerosene oil on her chest. She was shifted to the hospital at Pilibanga at 2.00 a.m. Doctor of the hospital sent information to SHO Police Station Lekhuwali on which investigation stated. At 4.30 a.m. police recorded the statement of the deceased. The statement recorded by the police was not brought on the record by the prosecution. She was initially treated at Pilibanga hospital and was later shifted to Bikaner Hospital. While in the hospital on the 17th September, 1976, Smt. Soluchana gave birth to a lacerated male child. On 28th October, 1976 skin grafting was done on her.
3. The case of the complainant is that deceased Smt. Sulochana has given an oral dying declaration to her father, grandmother and uncle that she was burnt by the appellant, his mother, father and brother. On 11th November, 1976 complaint was made by the father of the deceased Smt. Sulochana that his daughter was burnt and on his said complaint a dying declaration was recorded by the Magistrate.
4. On the 15th of November, 1976 all of a sudden the condition of Smt. Sulochana deteriorated and she died in the evening. On the basis of the above complaint dated 11th November, 1976 a case was registered against the accused and investigation was started. The police after investigation could not find any sustainable evidence against the appellant and other family members mentioned in the complaint, hence submitted final report.
5. Thereafter, a complaint was filed by Chandu Lal, father of the deceased before the Court of Judicial Magistrate First Class in which he referred to one dying declaration dated 6th November, 1976 made to him, his wife, grand-mother and other relatives apart from one dated 11.11.1976 before a Magistrate. It also mentions oral extra-judicial confession alleged to have been made by the

appellant in a Panchayat. Though complaint was made against four persons, namely, the appellant, his mother Poora, his father Banwari Lal and his brother Om Prakash, but the Magistrate took cognizance only against the appellant and his mother Smt. Poora under Section 302 read with Section 34, I.P.C.

6. During trial, complainant produced 11 witnesses which included PW.10 Murarilal, Munsif and Judicial Magistrate (who recorded the statement of Smt Sulochana on 11th November, 1976) and PW.11 Dr. Sharad Chand Kalla (who conducted the post-mortem examination on 16th November, 1976). It is significant to note that the complainant did not examine either the Investigating Officer or called for police record which contained the earliest version of the deceased, which is said to have been recorded at 4.30 a.m. on the 12th September, 1976 itself in which police finally submitted final report.

7. The complainant relied strongly on two dying declarations, one oral declaration as aforesaid, dated 6th November, 1976 and the other 11th November, 1976 recorded by a Judicial Magistrate and extra judicial confessions made by the appellant before Panchayat on two different occasions.

8. To a question raised for the appellant, when Smt. Sulochana was admitted in the hospital on the 12th September, 1976 why it is only on 6th November, 1976 for the first time oral dying declaration is alleged to have been made by her to her father, grandmother and uncle etc. The answer given is that she remained unconscious during this period. The trial Court disbelieved this fact on the basis of the hospital bed head ticket Ex. D.11 It held, it reveals that she was not unconscious for all this period rather she was conscious from time to time and had regained consciousness.

9. Dealing with the oral dying declaration, the trial Court held that the three witnesses had stated differently. This creates doubt. To one she stated that she saw one lady and three gents before she became unconscious. To the second, she stated that she became unconscious on seeing herself on fire and before the third witness she stated that she was sleeping and when she woke up all the four accused set fire to her clothes. For all these reasons the trial Court disbelieved this story and consequently the case that appellant Kishan Lal poured kerosene oil on her and set her on fire. The trial Court also rejected the extra-judicial confession as alleged by the complainant by disbelieving the statement of witnesses in its support and held them not trustworthy. Thus trial Court acquitted both, the appellant and his mother Smt. Poora. After acquittal, though earlier the police filed final report referring the case and the trial proceeded only on a private complaint the State filed an appeal against this acquittal both against the present appellant and his mother Smt. Poora. The complainant did not file any appeal. Before dealing with how the High Court dealt with this case it is necessary to refer to some basic facts.

10. The marriage of deceased Smt. Sulochana with the appellant was held on 17th July, 1975. There arose some dispute between her father Chanda Lal and father of the appellant Banswari Lal regarding the amount paid in the marriage. The prosecution case is that the appellant (Kishan Lal), her mother-in-law (Smt. Poora), her father in-law (Shri Banwari Lal) and brother- in-law (Om Prakash) continuously pressurised Smt. Sulochana to bring Rs. 5,100/- from her father. On the 12th of September, 1976 she was given beating by her husband. He took all her ornaments and threatened her that she would be killed. After midnight, at about 1 a.m. when Smt. Sulochana was sleeping with her mother-in-law-Poora the accused persons poured kerosene oil on her and set her on fire.

11. The High Court with reference to the dying declaration dated 11th November, 1976 before a Magistrate held :

"though in the said statement she did not name the appellant or any accused persons but the tenor of her statement clearly reveals that she indirectly named her husband and mother-in-law as the persons who took part in her burning."

12. With reference to the alleged earlier dying declaration dated 6.11.1976 made before her father, grand-mother, uncle and other relatives, the High Court believed the statement of Chandu Lal PW.1, Shri Ram PW.3 and Mst. Sajna PW.6 viz., the father, uncle and grandmother of the deceased. The High Court further accepted the extra-judicial confession by believing the statements of Chandu Lal PW.1, Ganesh Dutt PW.2, Shri Ram PW.3, Khubi Ram PW.4 and Hans Raj PW.5. The High Court recorded that these witnesses have stated before the Panchayat that in the one held in Rai Singh Nagar School, the appellant, Smt. Poora - the mother, Banwari Lal - the father, admitted their guilt and sought for forgiveness. The findings of the trial court thus were set aside with reference to this extra-judicial confession. Though the High Court recorded that P.W.1, P.W.3, P.W.4 and P.W.5 were brothers learned judges believed this extra-judicial confession on the basis of deposition of Ganesh Dutt PW.2 who was Pujari of the family of the deceased father. The High Court further recorded even if the extra-judicial confession was ignored the evidence of dying declaration leads to the irresistible conclusion that appellant was the person who burnt Smt. Sulochana.

13. It is necessary to point out that during the pendency of the said appeal before the High Court, accused Smt. Poora, the mother of the appellant died. Hence the case against her abated. Aggrieved by this judgment of the High Court which set aside the judgment of acquittal, the present appeal has been filed by the appellant. The judgment of the High Court reveals that conviction by it is based on two dying declarations and the alleged extra-judicial confession.

14. We have heard learned Counsel for the parties. With reference to the dying declaration dated 11th November, 1976 made before the Magistrate, it is not in dispute that the deceased did not name any accused including the appellant. It is also not in dispute that at this point of time she was fully conscious and gave statement before the Magistrate. The relevant portion recorded therein is reproduced hereunder :-

"Then I felt falling of the drops. I got up and started running and at that time I got fire. At the time of getting fire I saw one lady and two/three gents standing there. This incident took place in the house of my in-laws at Pilibanga."

15. On specific questions being put by the Magistrate as to who were those persons, she could not name any. This part of her statement is also reproduced hereunder :-

"Who were the persons :

Due to the darkness came in my eyes, I became unconscious and fell down and I could not recognise the lady and the gents standing there."

16. This dying declaration does not in any way help the prosecution. When admittedly at this point of time she was fully conscious, still she could not name any of the accused. She stated she could not recognise any because of fire darkness coming in her eyes. This dying declaration could in no way be said to implicate the appellant. If at all, it runs counter to the alleged earlier dying declaration. The other oral dying declaration is dated 6th November, 1976, which is said to have been deposed by her to her father PW.1, her uncle PW.3 and grandmother PW.5. The High Court seems to have taken great strain to believe the deposition of these witnesses. We have examined the

testimony of these witnesses. There are serious discrepancies in their testimony with reference to this dying declaration, apart from the fact that they are closely related to the deceased being father, grandmother and uncle. They made different statements with respect to the same declaration made by her to them. The trial Court has in detail rightly recorded such discrepancies and did not believe the story of this other oral dying declaration. Further it is significant that the oral dying declaration is said to have been made five days before the dying declaration made to the Magistrate. It is incredible to note that according to the complaint she regained consciousness on the 6th of November, 1976 and when she gave the first oral dying declaration, she named accused therein. But in the second dying declaration dated 11th of November, 1976 made before a Magistrate she did not name any of the accused even on specific question being asked by the Magistrate.

17. Examining these two dying declaration, we find not only that they gave two conflicting versions but there are *inter se* discrepancies in the depositions of the witnesses given in support of the other dying declaration dated 6.11.1976. Finally, in the dying declaration before a Magistrate on which possibly more reliance could have been placed the deceased did not name any of the accused. Thus, we have no hesitation to hold that these two dying declarations do not bring home the guilt of the appellant. High Court, therefore, erred in placing reliance on it by erroneously evaluating them.

18. Now we proceed to examine the principle of evaluation of any dying declaration. There is distinction between the evaluation of dying declaration under the England Law and that under the Indian Law. Under the England Law, credence and the relevancy of a dying declaration is only when person making such statement is in hopeless condition and expecting an imminent death. So under the English Law for its admissibility, the declarant should have been in actual danger of death at the time when they are made, and that he should have had a full apprehension of his danger and the death should have ensued. Under the Indian Law the dying declaration is relevant whether the person who makes it was or was not under expectation of death at the time of declaration. Dying declaration is admissible not only in the case of homicide but also in civil suits. Under the English Law, the admissibility rests on the principle that a sense of impending death produces in a man's mind the same feeling as that of a conscientious and virtuous man under oath. The general principle on which this species of evidence are admitted is that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone, when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak only the truth. If evidence in a case reveals that declarant has reached this state while making declaration then within the sphere of the Indian Law, while testing the credibility of such dying declaration weightage can be given. Of course depending on other relevant facts and circumstances of case.

19. The incident is said to have taken place on the night of 11th and 12th September, 1976. She died on the 15th of November, 1976 and post-mortem was conducted on 16th November, 1976. In other words the date of post-mortem is more than two months after the alleged incidence of burning. In this light we proceed to examine the post-mortem report and the deposition of doctor Mr. Sharad Chand Kala P.W.11.

20. In the post-mortem report we find the doctor recorded that all her organs to be healthy, namely, skull, brain, the spinal cord, ribs, larynx, trachea, lungs, heart, lever spleen and kidney, etc. The cause of the death according to the doctor is syncope which is attributable to heart. This report does not record even deep burns on the body of the deceased. Thus on its basis no inference could be drawn that she died on account of the alleged burn injuries. In his deposition this doctor, Kala P.W.11, deposed :

"The superficial burns of the patient had been cured. There were wounds of deep burn which I have not recorded in the post-mortem."

21. This is the state of medical evidence, which only records the superficial burns which has been cured and does not record any deep burn. On the basis of this medical evidence how could any inference be drawn that cause of death after more than two months of the incidence was because of the burn injuries. This coupled with the evidence during this period, she gave birth to a dead child and on her person a skin grafting was done. For this additional reason also no reliance can be placed on the said two dying declarations.

22. In the present case, as aforesaid the dying declaration was after two months of the alleged incident. It was not at a time when the deceased was expecting imminent death. Neither the post-mortem nor deposition of doctor carry any definite inference that the cause of death was on account of burning. There is a conflict between two dying declarations, in one there is *inter se* inconsistency as revealed in the depositions of witnesses, in the other no naming of any accused, when made before a Magistrate. On such an evidence trial Court rightly declined to base a conviction. The High Court committed manifest error in placing reliance on it.

23. So far as the extra-judicial confession is concerned, it is said that the same was made by the accused at Panchayat on two occasions. First Panchayat is alleged to have taken place at Chak 22 P.S. and the other in the school at Raisinghnagar. The father's testimony in cross-examination when confronted with his statement in Ex. D.2 (made by him during the enquiry made under Section 202 of the Code of Criminal Procedure) wherein he did not name any of the accused persons, he made the usual answer that the name might not have been recorded by mistake. But in the alleged second Panchayat, the names of large number of persons were referred to as to have confessed their guilt, including the appellant. It includes even the names of those who are not even accused. It is alleged that they sought for the pardon of the local leaders for this guilt. We find even in this alleged confession, there is no mention that the accused had burnt the deceased Smt. Sulochana. The alleged confession by large number of persons is more in a general and vague term. Before a confession is relied on it must be clear and unequivocal, whether it is in a judicial or in an extra judicial confession.

24. On the facts discussed above we have no hesitation to hold that reliance should not have been placed on the so called confessions. The trial Court rightly rejected it but unfortunately the High Court very casually accepted it which cannot be sustained.

25. Further the present case is a complaint case. The complainant has not attempted to bring on record the earliest version of the deceased which is said to have been recorded by police at 4.30 a.m. on the date of incident itself. The prosecution has not examined the Investigating Officer. Prosecution has not thus proved the guilt of the appellant by any cogent evidence.

26. In this background, we hold that the High Court has committed an error by setting aside the acquittal of the appellant and convicting him under Section 302 I.P.C. The findings recorded by the trial Court were based on proper evaluation and proper appreciation of evidence on record.

27. Accordingly, the present appeal of the appellant is allowed. His conviction and sentence under Section 302 read with Section 34 IPC are set aside. We restore the order of acquittal. If the accused is in jail he shall be set at liberty unless required in connection with some other case.

Appeal allowed.