A.F.R.

Court No. - 83

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 23624 of 2020

Applicant :- Anees
Opposite Party :- State of U.P.
Counsel for Applicant :- Syed Ali Imam,Laxmi Shankar
Counsel for Opposite Party :- G.A.

Hon'ble Krishan Pahal,J.

1. List has been revised.

2. Heard Sri Mohd. Umar Iqbal Khan, learned counsel for the applicant and Sri Vibhav Anand Singh, learned A.G.A. for the State as well as perused the material available on record.

3. The present bail application has been filed by the applicant in Case Crime No.2815 of 2018, under Sections 498-A, 323, 302 I.P.C. and Section 3/4 of Dowry Prohibition Act, Police Station Loni, District Ghaziabad, with the prayer to enlarge him on bail.

PROSECUTION STORY:

4. As per prosecution story, the informant lodged an FIR at Police Station Loni, District Ghaziabad on 12.12.2018 alleging that he is a resident of town Kandhala, District Shamli, UP and he had married his sister to the applicant Anees as per Muslim customs about seven years before her death. After the marriage, the applicant Anees and co-accused persons, namely, Naseem, Nafees and Smt. Asgari are stated to have subjected the deceased to cruelty for demand of dowry and used to beat her up every now and then. It was learnt that applicant had an affair with some another girl as the sister of the informant and other family members of Anees had seen him in a compromising condition with the said girl. The said fact was brought to the knowledge of family members of the informant about two months before the date of incident. The applicant is

stated to have confessed and had promised that said act shall not be repeated as such the sister of the informant had gone with the applicant. The deceased person was taken by the applicant to Loni and both were residing in Aksha Masjid, Prem Nagar, Loni. On 10.12.2018 at about 10:40 p.m., a phone call was received by the informant stating that his sister has been set to fire by sprinkling kerosene oil on her by her in-laws. The informant and his family members reached at G.T.B. Hospital, Delhi on 11.12.2018 at about 03:00 a.m. from Punjab. The deceased person had stated to all the family members that the applicant and his family members had been beating her for several days and kerosene oil was sprinkled on her by all the accused persons and she was set afire. It is also stated in the FIR that there is a video recording of the statement of his sister at Police Chowki Loni.

RIVAL CONTENTIONS:

For Applicant:

5. Learned counsel for the applicant has stated that the applicant has been falsely implicated in the present case. The trial is going on and in all four witnesses of fact have been examined. Learned counsel has stated that PW-1 Nadeem is the informant and has not supported the prosecution story and he has been declared hostile by the public prosecutor and has been cross-examined by him as such. Learned counsel has stated that it has come up in the statement of PW-1 that when he reached the hospital he found his sister unconscious and she had not made any statement before them. Learned counsel has further stated that PW-2 Ishrar has also followed the suit and has not supported the prosecution story. Learned counsel has also stated that PW-3 Haqiqat is the brother-in-law of the informant and he has also not supported the prosecution story and has even denied of any videographic recording of statement of the deceased person. PW-4 Smt. Fahmida is the mother of the deceased person and she has also not supported the prosecution story. Learned counsel has stated that all these witnesses have resiled from their earlier statements recorded

by the Investigating Officer. Learned counsel has stated that signature of the witnesses has also been taken by the person conducting inquest proceedings on their statements. The said statements are not admissible in the law as they are hit by Section 162 Cr.P.C. Learned counsel has stated that there is dying declaration of the deceased person which was recorded by ASI at G.T.B Hospital. Learned counsel has stated that the said statement indicates that the applicant had sprinkled some liquid on the deceased person and set her afire. Learned counsel has stated that the said dying declaration is not admissible under the Indian Evidence Act as it has not been recorded as per law. Learned counsel has further stated that there is overwriting in the date of recording of the said dying declaration and it cannot be said that it was recorded on 10.12.2018 itself.

6. Learned counsel has further stated that no presumption under Section 113-B of Indian Evidence Act can be drawn in the present case as the marriage of the applicant with the deceased person was solemnized in the year, 2010 as such a period of more than seven years has passed till the date of offence. Even the charge-sheet has been filed under Sections 498-A, 323, 302 I.P.C. and 3/4 of Dowry Prohibition Act. Learned counsel has stated that the trial is moving at a snail's pace and there is no likelihood of early conclusion of trial. The Assistant Sub-Inspector who has recorded the said dying declaration has not been examined by the Investigating Officer and has not even been produced in the court.

7. Learned counsel has stated that the Apex Court in the case of ***Uttam vs. The State of Maharashtra***[1] has opined as follows:-

> *7. It was canvassed by the learned counsel for the appellant that once the High Court had rejected the written dying declarations of the deceased on the ground that there were several conspicuous loopholes in recording of the said statements, there was no good reason for the High Court to have relied on the oral statements allegedly made by the deceased to PW-2 and PW-12, which were equally unreliable and therefore, ought to have met the same fate as the written dying declarations of the deceased. To buttress his submission that where there are multiple dying declarations and each one is inconsistent with the other, then all the said dying*

1 (2022) 8 SCC 576

declarations ought to be discarded without any hesitation, learned counsel has cited ***Nallapati Sivaiah v. SDO [Nallapati Sivaiah v. SDO, (2007) 15 SCC 465 : (2010) 3 SCC (Cri) 560]****. The unreliability of an oral dying declaration made to a family member in the absence of the doctor was sought to be questioned by citing* ***Arvind Singh v. State of Bihar [Arvind Singh v. State of Bihar, (2001) 6 SCC 407 : 2001 SCC (Cri) 1148], Arun Bhanudas Pawar v. State of Maharashtra [Arun Bhanudas Pawar v. State of Maharashtra, (2008) 11 SCC 232 : (2009) 1 SCC (Cri) 112] and Poonam Bai v. State of Chhattisgarh [Poonam Bai v. State of Chhattisgarh, (2019) 6 SCC 145 : (2019) 2 SCC (Cri) 754]****.*

8. On the other hand, Mr Sachin Patil, learned counsel appearing for the respondent State of Maharashtra has with his usual vehemence, disputed the arguments advanced by the other side and stated that both the written dying declarations, the first one recorded by the IO at 3.20 p.m. and the second one recorded by the SEM (PW-9) at 4.30 p.m., on the very same day, were consistent and the deceased had clearly stated that it was the appellant who had set her on fire. He also alluded to the two fitness certificates issued by the attending doctor (PW-10) in respect of the deceased before her statements were recorded and contended that the said certificates showed that she was in a sound state of mind and competent to depose. Similarly, the oral dying declarations subsequently made by the deceased in the presence of her father (PW-2) and the mediator (PW-12) were also stated to be consistent with the version of the victim and worthy of credence. The narration as to the manner in which the deceased was set on fire was stated to be consistent and it was contended that the cross-examination of the said prosecution witnesses did not elicit anything favourable to the appellant on the above aspect. The learned State Counsel referred to the Chemical Analyser Report in respect of the clothes of the deceased and the appellant that were seized from the spot to urge that it lent credence to the version of the prosecution that the appellant had poured kerosene on the deceased and had set her on fire.

9. In support of his submission that where there are conflicting dying declarations, the Court can accept one and discard the other as long as it is satisfied that the basic statement of the deceased had remained consistent, the learned State Counsel cited ***State of U.P. v. Veerpal [State of U.P. v. Veerpal, (2022) 4 SCC 741 : (2022) 2 SCC (Cri) 224], Rizan v. State of Chhattisgarh [Rizan v. State of Chhattisgarh, (2003) 2 SCC 661 : 2003 SCC (Cri) 664] and Bhagwan Tukaram Dange v. State of Maharashtra [Bhagwan Tukaram Dange v. State of Maharashtra, (2014) 4 SCC 270 : (2014) 2 SCC (Cri) 302] .*** *The decision in* ***Trimukh Maroti Kirkan v. State of Maharashtra [Trimukh Maroti Kirkan v. State of Maharashtra, (2006) 10 SCC 681 : (2007) 1 SCC (Cri) 80]*** *was cited to state that the onus remains on the accused to explain how the death had taken place within the privacy of the home, away from public gaze.*

10. We have given our thoughtful consideration to the arguments advanced by the learned counsel for the parties and carefully perused the record. The entire issue in the present case hinges on the admissibility and

evidentiary value of the dying declarations made by the deceased, two of which were in writing and recorded by PW-9 and PW-14 and the other two were oral and communicated by the deceased to PW-2 and PW-12.

11. Dying declaration is the last statement that is made by a person as to the cause of his imminent death or the circumstances that had resulted in that situation, at a stage when the declarant is conscious of the fact that there are virtually nil chances of his survival. On an assumption that at such a critical stage, a person would be expected to speak the truth, courts have attached great value to the veracity of such a statement. Section 32 of the Evidence Act, 1872 (for short "the Evidence Act") states that when a statement is made by a person as to the cause of death, or as to any of the circumstances which resulted in his death, in cases in which the cause of that person's death comes into question, such a statement, oral or in writing made by the deceased victim to the witness, is a relevant fact and is admissible in evidence. It is noteworthy that the said provision is an exception to the general rule contained in Section 60 of the Evidence Act that "hearsay evidence is inadmissible" and only when such an evidence is direct and is validated through cross-examination, is it considered to be trustworthy.

12. In ***Kundula Bala Subrahmanyam v. State of A.P. [Kundula Bala Subrahmanyam v. State of A.P., (1993) 2 SCC 684 : 1993 SCC (Cri) 655]****, this Court had highlighted the significance of a dying declaration in the following words : (SCC p. 697, para 18)*

> *"18. Section 32(1) of the Evidence Act is an exception to the general rule that hearsay evidence is not admissible evidence and unless evidence is tested by cross-examination, it is not creditworthy. Under Section 32, when a statement is made by a person, as to the cause of death or as to any of the circumstances which result in his death, in cases in which the cause of that person's death comes into question, such a statement, oral or in writing, made by the deceased to the witness is a relevant fact and is admissible in evidence. The statement made by the deceased, called the dying declaration, falls in that category provided it has been made by the deceased while in a fit mental condition. A dying declaration made by person on the verge of his death has a special sanctity as at that solemn moment, a person is most unlikely to make any untrue statement. The shadow of impending death is by itself the guarantee of the truth of the statement made by the deceased regarding the causes or circumstances leading to his death. A dying declaration, therefore, enjoys almost a sacrosanct status, as a piece of evidence, coming as it does from the mouth of the deceased victim. Once the statement of the dying person and the evidence of the witnesses testifying to the same passes the test of careful scrutiny of the courts, it becomes a very important and a reliable piece of evidence and if the court is satisfied that the dying declaration is true and free from any embellishment such a dying*

> *declaration, by itself, can be sufficient for recording conviction even without looking for any corroboration……"*

8. Learned counsel has further stated that the so called dying declaration which is annexed as Annexure No.4 to the affidavit filed with the bail application is not supported by any medical certificate of treating doctor. Learned counsel has stated that the deceased was almost burnt more than 90% as such was not in a position to talk. The said statement made by the deceased to any person is not admissible at all.

9. Learned counsel has stated that the period of incarceration of applicant is also to be considered as he is languishing in jail since 14.12.2018, i.e., more than four years. Thus learned counsel has placed much reliance on the judgment of the Apex Court in the case of ***Union of India vs. K.A. Najeeb***[2] wherein the Apex Court has observed that *"We are conscious of the fact that the charges levelled against the respondent are grave and a serious threat to societal harmony. Had it been a case at the threshold, we would have outrightly turned down the respondent's prayer. However, keeping in mind the length of the period spent by him in custody and the unlikelihood of the trial being completed anytime soon, the High Court appears to have been left with no other option except to grant bail."*

10. Learned counsel has also placed reliance on the judgment of the Apex Court passed in the case of ***Kaka Singh vs. State of Madhya Pradesh***[3] whereby it has been held by the Apex Court that *"Where the deceased was unconscious and could never make any dying declaration, the evidence with regard to it is to be rejected"*.

11. Several other submissions have been made on behalf of the applicant to demonstrate the falsity of the allegations made against him. The circumstances which, as per counsel, led to the false implication of the applicant have also been touched upon at length. It is also argued that there is no criminal history of the applicant. In case, the applicant is released on bail, he will not misuse the liberty of bail.

---

2 AIR (2021) SC 712
3 AIR (1982) SC 1021

For State:

12. Per contra, learned A.G.A. has vehemently opposed the bail application on the ground that there is a memo attached with the case diary and has been proved by the PW-2 whereby it has been stated that there was a videographic recording of the statement of the deceased person. The said memo is proved as Ext-Ka-5. Learned A.G.A. has stated that it has nowhere been stated by the prosecution that the statement record by the ASI is dying declaration but has stated that said statement before ASI and even before treating doctors, namely, Dr. Shahbaz Mansoori and Dr. Alfaraz Mohd tantamount to dying declaration as they have been duly recorded by them during the course of their official duty. Learned A.G.A. has further stated that both the dying declarations although are in different language contain more or less the similar allegations against the applicant. The truthfulness of the said statement that tantamount to dying declaration can be taken from the fact that only the applicant has been implicated and not his other family members, although the FIR is lodged against four accused persons. Learned A.G.A. has stated that the said statements recorded by ASI at Guru Teg Bahadur Hospital had been taken in Hindi and that by doctor had been recorded in English. Learned A.G.A. has stated that there are no material inconsistencies in the said dying declarations. It is settled law of the Apex Court that conviction can be recorded solely on the basis of dying declaration. Learned A.G.A. has relied on the judgment of the Apex Court in the case of ***Smt. Paniben vs. State of Gujarat***[4] wherein all the relevant case law has been taken into account and it has been opined that there is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. Learned A.G.A. has stated that merely because the dying declaration is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth.

---

4 AIR (1992) SC 1817

CONCLUSION:

13. The only bone of contention is as to whether the statement of deceased to the ASI and the treating doctors pass the test of dying declaration or not.

14. The victim was a young lady who has succumbed to burn injuries sustained at the time alleged in the First Information Report. This factum stands proved by the statements of the hostile witnesses and the Autopsy report.

15. The statement of the deceased is stated to have been recorded by the ASI which has been filed by the counsel for the applicant and has been disputed on the ground that there is overwriting in the date transcribed by its author.

16. Learned AGA has placed reliance on another statement of the deceased which have been recorded by the two treating doctors and duly signed by the two family members of the deceased. Both the statements are to the point and brief.

17. The dying declaration is hearsay evidence. It is settled law that though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross-examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the Court also insists that the dying declaration should be of such nature as to inspire full confidence of the Court in its correctness. The Court has to be on guard that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination.

Case Law:

18. The Apex Court in the landmark judgement of ***VARIKUPPAL SRINIVAS v. STATE OF A.P.***[5] has categorically opined as follows:

> *"7. This is a case where the basis of conviction of the accused by the trial Court was the dying declarations. The situation in which a person is on his deathbed, being exceedingly solemn, serene and grave, is the reason in law*

5 (2009) 2 SCC (Cri) 136

> *to accept the veracity of his statement. It is for this reason that the requirements of oath and cross-examination are dispensed with. Besides should the dying declaration be excluded it will result in miscarriage of justice because the victim being generally the only eye-witness in a serious crime, the exclusion of the statement would leave the Court without a scrap of evidence.*
>
> *8. Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross-examination.*
>
> *Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the Court also insists that the dying declaration should be of such nature as to inspire full confidence of the Court in its correctness. The Court has to be on guard that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. The Court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailant.* ***Once the Court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence****."*

19. The Supreme Court in ***Munnu Raja & Anr. Vs. The State of Madhya Pradesh***[6] has opined *"There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration."*

20. In ***K. Ramachandra Reddy and Anr. v. The Public Prosecutor***[7] the Apex Court has held *"The Court has to scrutinize the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had an opportunity to observe and identify the assailants and was in a fit state to make the declaration."*

21. The Supreme Court in ***Surajdeo Oza and Ors. v. State of Bihar***[8] has categorically opined as *"Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth."*

22. Another important judgement of the Apex Court in ***State of Uttar Pradesh Vs. Madan Mohan and Ors.***[9] elucidates *"Where the prosecution*

---

6 (1976) 2 SCR 764
7 AIR (1976) SC 1994
8 AIR (1979) SC 1505
9 AIR (1989) SC 1519

version differs from the version as given in the dying declaration, the said declaration cannot be acted upon."

23. In the case of ***BETAL SINGH V/S STATE OF MP***[10] the Apex Court has categorically held that in a case of Bride burning, the Dying declaration recorded by a police officer, can be acted upon if the same is found to be true, coherent, consistent, and free from any effort to prompt the deceased to make such a statement. The same view was expressed in ***PARAS YADAV AND OTHERS V/S STATE OF BIHAR***[11] and ***STATE OF UTTAR PRADESH V/S CHET RAM AND OTHERS***[12].

24. Another point raised by learned counsel for applicant is that the said dying declaration if considered so is not in the form of question and answers. The said contention do not find force as the Apex Court in its judgement ***STATE OF KARNATAKA V/S SHARIFF***[13] has held that a Dying declaration if not recorded in question-answer form cannot be discarded on that ground alone. The statement recorded in narrative form is more natural and gives version of incident as it has been perceived by victim.

25. From the perusal of both the statements aka "dying declarations" it transpires that the contents are almost the same although the ASI has recorded it in vernacular Hindi and the treating doctors have done so in English. There is nothing on record to suggest that the police or the treating doctors had any animosity with the applicant. The investigating officer has fairly exonerated the accused who were although named in FIR, but their names were not mentioned in the statements of the deceased person that tantamount to dying declaration. A presumption of fair action at the part of police and the treating doctors must arise here.

26. At the stage of adjudicating a bail application this court is not inclined to delve into the quality or quantity of evidence but to see

---

10 (1996 SCC (Cri) 624
11 (1999) SCC (Cri) 104
12 (1989) SCC (Cri) 388
13 2003 CrLJ 1254 (SC)

whether the delinquent appears to have committed the crime and he is entitled for bail or not.

27. After hearing learned counsel for the parties, going through the evidence on record and also taking into consideration the aforesaid judgments and the fact that a young lady has been set to fire by the applicant within the precincts of the place they both used to live, I do not find it a fit case for grant of bail to the applicant.

28. The bail application is found devoid of merits and is, accordingly, ***rejected***.

29. However, looking to the period of detention of the applicant, it is directed that the aforesaid case pending before the trial court be decided expeditiously, preferably within a period of one year from the date of production of a certified copy of this order or as early as possible in view of the principle as has been laid down in the recent judgements of the Apex Court in the cases of ***Vinod Kumar Vs. State of Punjab***[14] and ***Hussain and Another vs. Union of India***[15], if there is no legal impediment.

30. It is clarified that the observations made herein are limited to the facts brought in by the parties pertaining to the disposal of bail application and the said observations shall have no bearing on the merits of the case during trial.

Order Date :- 15.2.2023
Vikas

[Krishan Pahal,J.]

14 2015 (2) SCC 220
15 (2017) 5 SCC 702