

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU**

CRAA No. 221/2014

State of Jammu and Kashmir Through Senior Superintendent of Police, KathuaAppellant

Through :- Mr. Dewakar Sharma, Dy.AG

V/s

1. Bhagwan Dass S/o Ram Ditta, R/o Village Dulian Jattan, Tehsil Hiranagar, District KathuaRespondents
2. Reeta Devi W/o Raj Kumar, R/o Ghagwal, Tehsil Hirnagar, District Kathua

Through :- Mr. Jagpaul Singh, Advocate

**Coram: HON'BLE MR. JUSTICE ATUL SREEDHARAN, JUDGE
HON'BLE MR. JUSTICE MOHAN LAL, JUDGE**

JUDGMENT(ORAL)

23.08.2023

ATUL SREEDHARAN, J

1. The present appeal has been preferred by the State against the respondents who were tried by the court of learned Sessions Judge, Kathua in File No. 29/Sessions in case FIR No. 151/2005 registered with Police Station, Rajbagh for offences under Section 302 read with 34 RPC.

2. The case of the prosecution briefly is that on 08.11.2005, an information was received in Police Post, Mahreen at 7:45 pm that a woman Sunita Devi had caught fire. The Police reached the scene of occurrence and they found that the deceased had caught fire in the house of the accused No. 2, from where she was shifted to District Hospital, Kathua in a critical condition. At the said hospital her statement was recorded wherein she disclosed that she was married to the accused No. 1 for the past 7 to 8 years and through the wedlock a daughter was born to them. She further stated that the accused No. 2 is the sister

of the accused No. 1 and was married to her brother Raj Kumar. She further stated that the accused No. 2 was acting as a wedge between her (deceased) and her husband (accused No. 1) and created hostility in their matrimonial relationship. On the date of occurrence, the deceased had gone to the tenanted house of the accused No. 2 at about 7:30 pm, where, according to the deceased, both the respondents doused her with kerosene and set her on fire. She further states that she raised an alarm and several people from neighborhood had arrived at the place of occurrence and put out the fire. Upon the statement of the deceased, the aforementioned FIR was originally registered for offence under Section 307 read with 34 RPC, which was later on converted into 302 read with 34 RPC upon the death of the deceased four days after the incident.

3. During the course of investigation some half burnt pieces of clothes, a plastic container, a kerosene table lamp, a match box, a folding bed etc. were seized from place of occurrence and sent for FSL examination. In the meanwhile, the deceased was shifted to GMC, Jammu, where she succumbed to her injuries. The post-mortem report reflects that the death was on account of septicemia resulting from 98% burns suffered by the deceased. The burns have been extensive and they also include the right upper and left upper limb of the deceased. The relevance of this shall be discussed later on in this order.

4. Post investigation, the accused was charged for the offence under Section 302 read with 34 RPC. They pleaded not guilty and entered their defence. The Prosecution has examined several witnesses. Some of the natural witnesses who were there on the scene of occurrence have turned hostile. The entire crux of the prosecution's case is hinged on the dying declaration of the deceased. The same is exhibit P27 to exhibit P27/1 and exhibit P-23-MU.

5. Before recording the statement of the deceased, the certification of the Doctor at the Hospital in Kathua was taken. The reference to the said Doctor is in paragraph 11 of the trial court judgment. He is PW-Mukul Ubbott. He was posted at Kathua Hospital and gave the initial treatment to the deceased and referred her to Jammu for further treatment. He states that he issued the fitness certificate, which is exhibit 23M, at 8.40 pm. He further states in his testimony that the statement of the deceased was not recorded in his presence and that the deceased, though in distress, was talking. He also states that he has not recorded the particulars regarding the fitness. We have examined the exhibit 23M and have found that no particulars regarding the fitness of the deceased to give a statement, is recorded in the said exhibit.

6. The next witness of importance has been referred to by the trial Court in paragraph 12. He is PW Ranbir Singh, who states that statement of the deceased was recorded in his presence. He further states that the deceased has stated that she was put on fire by the accused persons. In cross-examination, this witness states that the SHO did not ask any question to the deceased and that the deceased has given the dying declaration on her own.

7. In paragraph 14, Dr. Sewa Singh's testimony is recorded. He is the Doctor who carried out the post-mortem and has recorded that the deceased suffered 98% burns. The cause of death is shown as shock due to septicemia resulting from the burn injuries.

8. In paragraph 15, PW Pawan Kumar states that he along with the Incharge of Police Post, Constable Ranbir Singh, Avtar Singh, SPO Kali Dass and SPO Ram Paul went to Village Gadyal at 8 pm and the statement was

recorded by Incharge of the Police Post in presence of the police party and the Doctor.

9. PW Jaswant Singh, who is the investigating officer of this case has been dealt with by the learned trial court in paragraph 17. The learned trial Court has translated his statement which reads as follows.

“Jaswant Singh says that on 8.11.2005, he was posted as the incharge of Police Post, Marheen. When he received information that a woman has caught fire in Village Gadyal. He went there and found the deceased in a burnt condition in the house of the accused No.2. He says that he shifted her to Kathua hospital where her statement was recorded after getting clearance from Medical Officer and registered a case under section 307 read with 34 RPC on the basis of the said dying declaration. He further states that he investigated the case, seized the soil from the scene of crime, trouser of the accused No. 1 and sent them to the FSL. He further recorded the statement of the deceased in the presence of Doctor. Exhibit P27 to P27/1 and exhibit P23-MU, he says are correct. In cross examination the witness states that he received the information at 6.45 pm and reached the scene of crime in five minutes. He states that 50 to 60 people had gathered at the scene of occurrence and the information received on the spot did not disclose whether the fire was accidental or whether it was an attempt to commit the suicide. He says that the deceased was unconscious at the scene of crime. Subsequently, he reiterates that he obtained the fitness certificate of the deceased from doctor, but he admits that the Doctor did not check any parameters of deceased before issuing the fitness certificate. He states that the statement was recorded in presence of doctor.”

This is, however, in contradiction to the statement given by the Doctor who says that he was not present at the scene where the statement of the deceased was recorded and that he came later on to give his certification after the statement was recorded. The I.O. also submits that five children of the accused No. 2 who were there at the scene of the occurrence were not examined as witnesses and has also gone to the extent of saying that not examining them as witnesses has rendered the investigation unfair.

10. In paragraph 22 of the trial Court order the learned trial court has referred to the statement of PW Bishan Dass who is the brother of the deceased. He states that there were strained relations between the deceased and the accused No. 1, who wanted to divorce the deceased and remarry and that the accused No. 2 was arranging a second marriage for accused No. 1 and had also prepared the divorce papers.

11. In para 23, the trial court order has reproduced statement of the PW Rakesh Kumar, who was an alleged witness to the dying declaration given to the IO by the deceased in the hospital. He states that the deceased informed the IO that the accused No. 1 poured kerosene oil over her and the accused No. 2 lit the match.

12. Learned counsel for the Union Territory has argued with great vehemence that the learned trial Court has gone overboard in assessing the dying declaration and holding the same as unreliable. He further states that the corroborated statements of Rakesh Kumar and Bishan Dass should have been taken into account by the learned trial court. According to the learned counsel for the UT, Bishan Dass's statement gave a motive for the alleged murder which was the attempt of the accused No. 1 to divorce the deceased and the assistance

in that direction being given by the accused No. 2 who was searching out for another bride for accused No. 1 and also preparing the divorce papers so that the accused No. 1 could divorce the deceased. Learned counsel for the UT also states that Jaswant Singh was also a witness to the dying declaration which was being given by the deceased to the investigating officer and who has clearly stated that the deceased in the dying declaration has stated that the accused No. 1 poured kerosene oil over her and the accused No. 2 lit the match.

13. As regards the non examination of the children of the accused No. 2 who were natural witnesses being present at the scene of occurrence, learned counsel for the UT has submitted that the same did not go to weaken the case of the prosecution. He submits that those five children of the accused No. 2 would have been turned hostile at the time of the trial being children of the accused No. 2, who would not want to see their mother convicted and sent to prison. He has further stated that the omission by the Doctor in his certification of fitness with regard to the parameters of the deceased is again not fatal to the case of the prosecution. In this regard, learned counsel for the UT has argued that ultimately the trial court had to see was whether the statement of the deceased inspired confidence of the Court and whether the same was probable and true. He further submits that it was not necessary for the Court to apply the standard of proof beyond a shadow of doubt and all that was required for the learned trial court was to see is if on the basis of the dying declaration, it could be said that the prosecution was able to prove its case beyond reasonable doubt.

14. In the course of discussion of the evidence, the learned trial court has also mentioned that the defence in the course of cross-examining the investigating officer confronted him with a carbon copy of the dying declaration

which did not bear signature of the deceased in English which is present on the original dying declaration. On the basis of that, the learned trial court has held the dying declaration to be doubtful as the carbon copy, which is placed under the original, should have borne the signature of the deceased. As regards the same, the learned counsel for the UT has argued that the same is not fatal to the case of the prosecution as the deceased was in a state where she could not have written her name with adequate pressure, that the impressions of the same could have been transferred on to the first and second carbon copies. We shall deal with this contention shortly.

15. The learned counsel for the respondents on the other hand has argued that the impugned order does not require any interference by this Court as the assessment of evidence and the inferences arrived at by the learned trial court are probable and they cannot be said to be perverse and not based on the record of the case. He has also submitted that it is trite law that this Court may interfere only in those limited circumstances where the order of the trial court is perverse or it has not taken into account such incriminating material that would disclose during the course of the trial and that the view taken by the trial court or its appreciation is so improbable that no reasonable person could have arrived at that finding.

16. We have heard learned counsel for the respective parties and perused the record of the learned trial court. As stated by the learned trial court, the crux of the prosecution's case to prove the guilt of the respondents is based on the dying declaration. Some of the natural witnesses, who were neighbors in the area, have all been declared hostile by the prosecution and their evidentiary value is nil. The dying declaration in this particular case, as stated earlier herein

above, is the pivotal evidence against the respondents, if at all the same is reliable. The statement is recorded at the hospital at Kathua, where the deceased was taken immediately for treatment. Doctor Ubbott, who examined the deceased and gave initial first aid, has given the certification for recording the dying declaration. The certification is just in one line that the patient is fit for statement. The same is grossly perfunctory and inadequate. It was necessary for the Doctor to have asked certain preliminary questions to the deceased and thereafter record the fact that the patient was in a fit disposition of mind and body to give the statement. In such a situation, the mental condition of the declarant is extremely important to ensure that embellishment in the form of hallucinated statements on account of an improper frame of mind is discounted. The Doctor does not give any declaration or any observation with regard to the mental condition of the deceased for giving a statement. This assumes great significance in the backdrop of the fact that the post-mortem reveals that the deceased has received 98% burns, which is extremely extensive and the condition of the deceased was precarious at the time when she was brought to the hospital itself. It is another fact that the deceased died after four days of the incident. The trial court has also observed and very rightly so, that the Executive Magistrate who was only 1 km away from the hospital could have been called for by the investigating officer and the same could have been recorded by the Executive Magistrate, but that was never done.

17. The other aspect of which the learned trial court has relied upon is that the carbon copy given to the accused along with the documents annexed with the charge sheet under Section 173 CrPC does not bear the signature of the deceased. The learned trial court has observed that the entire dying declaration

with the signatures of everyone else and all of the endorsements are identical in the carbon copy, but for the signature of the deceased which is conspicuous by its absence in the carbon copy. In this backdrop we considered the submissions made by learned counsel for the UT that the deceased may not have had the strength to apply adequate pressure on the original copy so that impression of the same could be transferred on to the carbon copy. We reject this contention for the simple reason that even if a clear impression did not come on the carbon copy, an illegible copy of the signature would have appeared on the carbon copy at the same place where the deceased is said to have signed in the original. Here, it is also necessary to observe that the signature of the deceased is below the signature of the investigating officer rather than above it. Also, it is apparent to the naked eye that the colour of the ink with which the remaining endorsements and signatures have been made are the same but for the signature of the deceased Sunita Devi.

18. While assessing the reliability of the signature, we looked into the post-mortem report which is exhibit SS, in which the Doctor has recorded 98% burns on the body. As regards the spread of the burns, the Doctor has recorded that the burns were present on the right and left upper limb which is the hands of the deceased. Though, the extent of burns was shown as 9%, it raises a sufficient doubt whether in such a condition, the hand of the deceased was in a position to write her name on the dying declaration. There are photographs which are also present in the charge sheet, which shows a dead woman lying on the post-mortem table with her entire body bandaged including her hands. It does not appear that the said photographs have been exhibited and neither are there any details given with regard to the case. Under the circumstances, we are unable to

assess whether the photographs of the dead woman on the postmortem table is that of the deceased or not. This is the result of a perfunctory investigation by the investigating officer who has not given even the details of the case on the back side of the photographs and neither has it been exhibited.

19. Having gone through the record of the lower court, we found that the accused No. 1 has also suffered extensive burn injuries on his hands, face and chest, which could have been as a result of trying to put out the fire. The same has been referred to and interpreted by the learned trial court at page 34 of the judgment, wherein the learned trial court has observed that “There is an injury form of accused No.1 on record, the perusal of which reveals that he had sustained four burn injuries on his hands, foot, face and knee. In the opinion of the doctor, all these injuries had been allegedly sustained on 8.11.2005, which is the date of the alleged occurrence. If accused No. 1 would have put the deceased on fire, he would not sustain such injuries. Such injuries are possible only when a person tries to put out the fire or is put on fire”.

20. We are in complete agreement with the finding of the learned trial court with regard to the injuries suffered by the accused No. 1. It was the duty of the prosecution to explain how these injuries were suffered by the accused No. 1. These are not simple injuries, but are relatively substantial and therefore, the prosecution has failed to explain these injuries on the accused No. 1. Under the circumstances, we find that it is impossible for any Court to arrive at a finding whether the burn injuries suffered by the deceased were accidental or homicidal or suicidal. We also find that the dying declaration given by the deceased, unfortunately, is not reliable for the reasons we have already stated herein above. It is true that the general principle of law is that man will not meet his maker

with a lie on his lips, however, the rule of the prudence also dictates that where a person is sought to be convicted only on the basis of the dying declaration, the same must be scrutinized with extra diligence by the Court. In this case, the fact that the accused No. 1 was on the verge of divorcing the deceased, the same may have given rise to an element of animosity in the mind of the deceased and therefore, it cannot be said that she did not bear a grudge to falsely implicate the accused No. 1 and the accused No. 2, who are the respondents herein above. Therefore, we hold that the finding of the learned trial court that the evidence against the accused were not of such nature, including the dying declaration that a conviction could be safely arrived at by the trial court.

21. Therefore, we find no reason to interfere with the well reasoned judgment of the learned trial court. The appeal is dismissed.

(Mohan Lal)
Judge

(Atul Sreedharan)
Judge

Jammu:
23.08.2023
Pawan Angotra

Whether order is speaking? : Yes/No

Whether order is reportable? : Yes/No