

Surinder Kumar vs State Of Haryana on 21 October, 2011

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Bench: P. Sathasivam, B.S. Chauhan

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 328 OF 2004

Surinder Kumar

.... Appellant(s)

Versus

State of Haryana

.... Respondent(s)

J U D G M E N T

P. Sathasivam, J.

1) This appeal is directed against the final judgment and order dated 19.12.2003 passed by the High Court of Punjab and Haryana at Chandigarh in Criminal Appeal No. 241-DBA of 1993 whereby the High Court while reversing the judgment dated 17.12.1992 passed by the Sessions Judge, Ambala allowed the appeal filed by the State and convicted the appellant herein under Section 302 of the Indian Penal Code, 1860 (in short 'IPC') and sentenced him to undergo rigorous imprisonment for life and to pay a fine of Rs.25,000/- and in default of payment of fine, to further undergo rigorous imprisonment for one year.

2) Brief facts:

(a) According to the prosecution, the accusation against the appellant-accused was that he was on visiting terms to the house of Inder Pal (PW-7), husband of Kamlesh Rani (since deceased), who was working at Mullana and keeping his family at Naraingarh, Dist. Ambala, Haryana. The appellant-accused had been visiting Inder Pal's house and developed illicit relationship with his wife-Kamlesh Rani. Inder Pal (PW-7) suspected the same between them and stopped his wife from meeting the appellant-accused. When the appellant-accused was stopped to visit their house, he had started threatening and harassing Kamlesh Rani for which she made a complaint to her husband. Inder Pal (PW-7) also visited the shop of the appellant-accused and told him not to visit his house and harass his wife.

(b) On the intervening night of 25/26.06.1991, when Inder Pal (PW-7) was away from his house, the appellant-accused went to his house and taunted his wife that she had become a woman of immoral character and called upon her to burn herself to death if she had any sense of shame. Thereafter, the appellant-accused picked up a kerosene can lying in the one room apartment and after pouring the same on the deceased, set her on fire. When the fire developed, the appellant-

accused ran away from the room after placing a quilt on the deceased. The neighbours of the deceased took her to the Civil Hospital, Naraingarh where she was examined by Dr. Ashwani Kumar Kashyap, Medical Officer (PW-1). He immediately sent intimation to In-charge Police Station, Naraingarh to the effect that the deceased had been brought to the hospital with 100% burns, and as the condition of the patient was critical she had been referred to P.G.I., Chandigarh. At P.G.I. Chandigarh, she was admitted in the Emergency Ward and Dr. Vipul Sood (PW-

9) examined her and reported a case of 95% burn injuries.

(c) On receiving the information, Dalip Rattan (PW-3), Sub-

Inspector, P.S. West, Chandigarh applied to the Sub-Divisional Magistrate, Chandigarh for appointment of an Executive Magistrate to record the statement of Kamlesh Rani.

Consequently, Shri P.K. Sharma, Tehsildar-cum-Executive Magistrate (PW-2) was deputed to record her statement. On 26.06.1991, PW-2 recorded her statement and a First Information Report was registered being No. 86/1991 at P.S. Naraingarh at 5.30 p.m. under Section 307 IPC. On the intervening night of 28/29.06.1991, Kamlesh Rani succumbed to the injuries and the case was converted into Section 302 IPC. Thereafter, Ram Niwas (PW-13), Sub Inspector, P.S. Ambala, arrived at P.G.I., Chandigarh and prepared the inquest report. Post mortem was conducted at General Hospital, Sector 16, Chandigarh by Dr. V.K. Chopra and Dr. Ajay Verma (PW-12) on 29.06.1991 at 4.45 p.m. On the same day, the accused was arrested and the case was committed to the Court of Sessions.

(d) The Sessions Judge, Ambala, after analyzing the evidence and after giving the benefit of doubt, vide judgment dated 17.12.1992 acquitted the appellant-accused.

(e) Challenging the said judgment, the State of Haryana filed an appeal bearing Criminal Appeal No. 241-DBA of 1993 before the Division Bench of the High Court. The High Court, vide judgment dated 19.12.2003, reversed the judgment of the Sessions Judge, Ambala and sentenced the appellant-accused to rigorous imprisonment for life and imposed a fine of Rs.25,000/- and in default of payment of fine, to further undergo rigorous imprisonment for one year.

(f) Aggrieved by the said judgment, the appellant-accused has filed this appeal before this Court.

3) Heard Mr. Sushil Kumar, learned senior counsel for the appellant-accused and Mr. Manjit Singh, learned Additional Advocate General for the respondent-State.

4) The trial Court based on the dying declaration Ex. PD alleged to have been made by the deceased-Kamlesh Rani before Shri P.K. Sharma (PW-2), Executive Magistrate, Chandigarh and after finding that it does not inspire confidence in the mind of the Court and being the only evidence appearing against the accused, after giving the benefit of doubt in his favour, acquitted from the charges levelled against him. On the other hand, the High Court relying on the dying declaration holding that it is extremely difficult to reject the dying declaration altogether and finding that in the said dying declaration the deceased had positively stated that she had been immolated by the accused/appellant, set aside the order of acquittal passed by the trial Court and found him guilty under Section 302 IPC and sentenced to undergo rigorous imprisonment for life. In view of the same, the only question for consideration in this appeal is whether the dying declaration Ex. PD of Kamlesh Rani is reliable, acceptable and based on which conviction is sustainable.

5) We have already referred to the accusation against the accused that he was on visiting terms to the house of Inder Pal-husband of the deceased who was keeping his family at Naraingarh, however, working at Mullana. The accused Surinder Kumar had been visiting the house of the deceased-

Kamlesh Rani during the absence of her husband Inder Pal.

Inder Pal suspected illicit relationship between Surinder Kumar and his wife Kamlesh Rani. It is further seen that on the date of occurrence, that is, on 26.06.1991, Kamlesh Rani went to the cinema in the company of four other ladies. On the same evening, Surinder Kumar confronted her of having loose character and called upon her to immolate herself to death if she had any sense of shame. Thereafter, Surinder Kumar picked up a kerosene can lying in the one-room apartment and after pouring the same on Kamlesh Rani set her on fire. When the fire developed, he ran away from the room after placing a quilt on her person. On hearing her cries, neighbours reached at the spot and carried her to the Civil Hospital, Naraingarh and then she had been shifted to PGI Hospital, Chandigarh where she made a dying declaration statement before P.K. Sharma, (PW-2), Executive Magistrate and thereafter on 28/29.06.1991, she succumbed to her injuries.

6) Before considering the acceptability of dying declaration (Ex.PD), it would be useful to refer the legal position.

(i) In Sham Shankar Kankaria vs. State of Maharashtra, (2006) 13 SCC 165, this Court held as under:

"10. This is a case where the basis of conviction of the accused is the dying declaration. The situation in which a person is on deathbed is so solemn and serene when he is dying that the grave position in which he is placed, is the reason in law to accept veracity of his statement. It is for this reason 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 eyewitness in a serious crime, the exclusion of the statement would leave the court without a scrap of evidence.

11. 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 a nature as to inspire full confidence of the court in its correctness. The court has to be on guard that the statement of 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. This Court has laid down in several judgments the principles governing dying declaration, which could be summed up as under as indicated in Pa niben v.

S tate of Gujarat (1992) 2 SCC 474 (SCC pp.480 -8 1, para 18) (Emphasis supplied)

(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. (See Munnu Raja v. State of M.P.,(1976) 3 SCC

104)

(ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. (See State of U.P. v. Ram Sagar Yadav, (1985) 1 SCC 552 and Ramawati Devi v. State of Bihar,(1983) 1 SCC

211)

(iii) The Court has to scrutinise 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. (See K. Ramachandra Reddy v. Public Prosecutor,(1976) 3 SCC 618)

(iv) Where dying declaration is suspicious, it should not be acted upon without corroborative evidence. (See Rasheed Beg v. State of M.P.,(1974) 4 SCC 264)

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. (See Kake Singh v. State of M.P., 1981 Supp SCC 25)

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. (See Ram Manorath v.

State of U.P.,(1981) 2 SCC 654)

(vii) Merely because a dying declaration does contain the details as to the occurrence, it is not to be rejected. (See State of Maharashtra v. Krishnamurti Laxmipati Naidu,1980 Supp SCC 455)

(viii) 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. (See Surajdeo Ojha v.

State of Bihar,1980 Supp SCC 769.)

(ix) Normally the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eyewitness has said that the deceased was in a fit and conscious state to make the dying declaration, the medical opinion cannot prevail. (See Nanhau Ram v. State of M.P.,1988 Supp SCC 152)

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. (See State of U.P. v.

Madan Mohan, (1989) 3 SCC 390)

(xi) Where there are more than one statement in the nature of dying declaration, one first in point of time must be preferred. Of course, if the plurality of dying declaration could be held to be trustworthy and reliable, it has to be accepted. (See Mohanlal Gangaram Gehani v. State of Maharashtra, (1982) 1 SCC 700)"

(ii) In *Puran Chand vs. State of Haryana*, (2010) 6 SCC 566, this Court once again reiterated the abovementioned principles.

(iii) In *Panneerselvam vs. State of Tamil Nadu*, (2008) 17 SCC 190, a Bench of three Judges of this Court reiterating various principles mentioned above held that it cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of the conviction unless it is corroborated and the rule requiring corroboration is merely a rule of prudence.

7) In the light of the above principles, the acceptability of the alleged dying declaration in the instant case has to be considered. If, after careful scrutiny, the Court is satisfied that it is free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal impediment to make a basis of conviction, even if there is no corroboration. With these principles, let us consider the statement of Kamlesh Rani and its acceptability.

8) Kamlesh Rani was initially taken to the Civil Hospital, Naraingarh at 2.20 a.m. on 26.06.1991 where she was initially examined by Dr. Ashwani Kumar Kashyap (PW-1). The said Medical Officer immediately sent intimation to In-charge P.S. Naraingarh to the effect that Kamlesh Rani had been brought to the hospital with 100% burns, the patient was critical and had been referred to PGI, Chandigarh. Thereafter, at P.G.I., she was admitted in the Emergency ward and Dr. Vipul Sood (PW-9) examined her at 04:35 a.m. and reported a case of 95% burns. It is further seen that on receiving information, Sub-

inspector Dalip Rattan (PW-3) applied to the Sub-Divisional Magistrate, Chandigarh for appointment of Executive Magistrate to record Kamlesh Rani's statement. Based on the same, Shri P.K. Sharma, Tahsildar-cum-Executive Magistrate (PW-2) was deputed to record her statement. The Magistrate who reached PGI applied to the Doctor In-charge to certify if Kamlesh Rani was mentally and physically fit to make a statement or not. The doctor certified at 07.25 a.m. that she was fit to make a statement. Thereafter, Kamlesh Rani's statement was recorded which is marked as Ex. PD. It was marked with thumb impression of Kamlesh Rani and signed by the Magistrate at 7.45 a.m. It is relevant to note the said dying declaration which reads thus:

"Yesterday, at about 10:00 o'clock four ladies came to my house and asked me to accompany them to see a movie and we all had gone to see the movie. One boy Subhash was also seeing movie. He was sitting there on the back seat. After seeing

the movie, I came back to my house. Surinder Kumar Garg who is a so-called brother (dharma Bhai) of my husband came in the evening and asked me that I had gone to see picture and stated that I had become a bad character. My husband is doing service at Mullana and lives there. At that time, he was at Mullana. Then Surinder said if I had any sense of shame, I should die by burning myself. Then, he took kerosene from a container (small peepi) and sprinkled it over me and set me on fire with a match stick. When I was in flame, he put a quilt upon me and ran away. My neighbour removed me to Naraingarh hospital and from there I was referred to P.G.I., Chandigarh. I have made my statement in full senses and without any pressure."

As observed earlier, initially, the trial Court acquitted the accused and the High Court convicted him solely on the basis of the above declaration. In the light of the same, we have to find out whether the dying declaration made and recorded is acceptable and whether it satisfied the required norms/procedure as held by this Court. In other words, we have to see whether the dying declaration inspire the confidence of the court. It is not in dispute that if the dying declaration is by a person who is conscious and the same was made and recorded after due certification by the doctor, it cannot be ignored. In the first sentence of Ex. PD, it has been mentioned that on the date of occurrence, she had gone for a movie at 10.00 O' clock with four other ladies. According to her, these ladies came to her house and on their request she also went to see the movie and returned back to her home.

Though I.O. has examined some persons, there is no information about the "four ladies" who accompanied the deceased to the cinema house. The I.O. did not care to verify those four ladies who accompanied the deceased to the cinema house. In the same declaration, she also stated that apart from the four ladies one boy Subhash was also seeing the movie along with them. According to her, he was sitting there on the back seat. The said Subhash was also not examined by the I.O. Non-examination of four ladies, who accompanied the deceased to the cinema house and no information about Subhash gave an impression that the I.O. had not properly conducted the investigation. If at least one of the ladies or Subhash was examined, it would strengthen the prosecution case. However, the I.O. purposely omitted to examine the ladies who went for cinema and in the same manner no effort was made to trace Subhash whom the deceased saw at the movie. None of the so-called neighbours were produced at the trial. The landlord of the deceased-Ram Rattan was not examined at the trial. It was Ram Rattan who had driven the van to take Kamlesh Rani from Civil Hospital, Naraingarh to PGI, Chandigarh. It is to be noted that Kamlesh Rani's sister's husband Surinder Pal informed Inder Pal-husband of the deceased about the incident. Inder Pal and Surinder Pal had together gone to Chandigarh and later met Kamlesh Rani. For the reasons best known to the I.O., the said Surinder Pal was not examined on the side of the prosecution. In other words, non-examination of any one of the ladies who accompanied the deceased to cinema in the morning, presence of Subhash and the landlord of the deceased, namely, Ram Rattan, another tenant Jeet Singh were all vital to the prosecution. All these were important omissions on the part of the I.O. When Hira Lal (PW-11), Assistant Sub-Inspector was examined, he fairly admitted that he had not obtained opinion of the Doctor at that time about her fitness to make a statement. Another doctor-PW-12, who conducted post mortem, had opined that the cause of death is septicemia due to

extensive burns (approx. 97%) which is sufficient to cause death in ordinary course of nature.

9) Ram Niwas (PW-13), Sub-inspector also admitted that he did not make any effort to ascertain the women who had accompanied Kamlesh Rani to see the movie. He also admitted that he had not associated Subhash referred to in the dying declaration during investigation. He fairly admitted that he had no knowledge about any person by name Surinder Pal who happened to be sister's husband of Kamlesh Rani who was employed in Civil Hospital, Naraingarh. All the above infirmities/defects have not been properly explained by the prosecution.

10) Now coming to her state of mind, all the doctors have mentioned that she was admitted with burn injuries to the extent of 100% and after sometime she succumbed to the injuries. It is true that P.K. Sharma (PW-2), Tahsildar-cum-

Executive Magistrate recorded her statement. In his evidence, PW-2 has stated that on the orders of Shri Jagjit Puri, SDM, Union Territory of Chandigarh, by his order Ex. PB/1 deputed him to record the statement of Kamlesh Rani. Pursuant to the said direction, he went to the PGI and moved an application to seek the opinion of the doctor whether Kamlesh Rani was fit to make a statement or not. He further deposed that when he had contacted Kamlesh Rani she was present in the general ward and some persons were also standing there, they left the room on his direction. About the absence of the doctor certifying at the time and date when she made a statement, he clarified that the doctor issuing such certificate was busy with his professional work. Kamlesh Rani had made a statement in local dialect of mixed Hindi/Punjabi and PW-2 had recorded her statement in Hindi script. Here again, it was pointed out that these were not factually correct. In view of the doubt, we verified the original which is in Hindi script only and not local dialect in mixed Hindi/Punjabi. Though, according to PW-2, she put her thumb impression, in view of the evidence of the doctors that she was brought to hospital with 100% burns and at the time of recording her statement, she suffered 95-97% burn injuries, it is highly doubtful whether it would be possible for her to have her thumb impression below her statement. It is also not clear that when the whole body is burnt and bandaged how the thumb impression of the deceased was obtained.

11) We have already noted that admittedly at the time of recording the statement of the deceased by PW-2, no endorsement of the doctor was made about her position to make such statement. On the other hand, an application was filed by Hira Lal, (PW-11) to Doctor In-charge PGI, Chandigarh seeking clarification "whether she is fit to make the statement or not" and for the said query an endorsement was made by the doctor mentioning that "patient conscious answering the questions, patient fit to give statement". We compared the dying declaration Ex. PD recorded by PW-2 as well as the endorsement made in the requisition of Hira Lal, ASI (PW-11).

The verification of both the documents show different doctors have certified and made such a statement. Dr. Vipul Sood, PW-9, PGI Chandigarh in his evidence has stated Kamlesh Rani was admitted in the Emergency ward of PGI Hospital on 26.06.1991 at about 4.30 a.m. with 95% burns. He also deposed that when Ex. C/1 was submitted by P.K. Sharma, PW-2 on which he gave his opinion that the patient is fit to make a statement on 26.06.1991 at about 7.25 a.m. It is clear that at the time when PW-2 recorded the statement of the deceased Dr. Vipul Sood (PW-9) was not present

and subsequently on the request of the police officer, he offered his opinion to the effect that the patient was fit to make a statement. The procedure adopted by PW-2 while recording the statement of dying declaration is not acceptable.

12) As per the prosecution, the incident took place at 2 a.m. on 26.06.1991 and as per her statement, the occurrence of burning was in the evening of 25.06.1991, that is, the previous day. The dying declaration did not carry a certificate by the Executive Magistrate to the effect that it was a voluntary statement made by the deceased and that he had read over the statement to her. The dying declaration was not even attested by the doctor. As stated earlier, though the Magistrate had stated that the statement had been made in mixed dialect of Hindi and Punjabi and the statement was recorded only in Hindi. Another important aspect is that there was evidence that Kamlesh Rani was under the influence of Fortwin and Pethidine injections and was not supposed to be having normal alertness. In our view, the trial Court rightly rejected the dying declaration altogether shrouded by suspicious circumstances and contrary to the story of prosecution and acquitted the appellant.

13) It is settled that a valid and well reasoned judgment of the trial Court is seldom set aside unless there was some perversity or not based on correct law. From the materials available, absolutely there was no case to presume that the death of the deceased occurred at the hands of the appellant especially, when her statement was shrouded by suspicious circumstances and contrary to the claim of the prosecution.

Particularly, when she was alleged to have 97% burns and being under constant sedatives first at Civil Hospital, Naraingarh and then at PGI, Chandigarh, in such a situation she could not be expected to make a statement at a stretch without asking any questions. Admittedly, the Executive Magistrate, PW-2 did not put any question and recorded her answers.

14) Another important aspect relating to failure on the part of prosecution is that on the date of the incident, the deceased had two children aged about six and four years respectively and both of them were present there, admittedly, the I.O. has not enquired them about the genuineness of the incident.

Though, there are number of immediate neighbours/co-

tenants in the same premises, their statements were not recorded which means that nobody supported the version of the prosecution. Though there is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration but the court must be satisfied that the dying declaration is true and voluntary and in that event, there is no impediment in basing conviction on it, without corroboration.

It is the duty of the court to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. Where a dying declaration is suspicious, it should not be acted upon without corroborative evidence. Likewise, where the deceased was unconscious and could never make any declaration the evidence with regard to it is rejected. The dying declaration which suffers from infirmity cannot form the basis of conviction. All

these principles have been fully adhered to by the trial Court and rightly acquitted the accused and on wrong assumption the High Court interfered with the order of acquittal.

15) It is the consistent stand of the defence from the beginning that the appellant had been falsely implicated, more particularly, at the instance of I.O. Hira Lal (PW-11) who had a previous enmity with him for asking some bribe for running his business of ghee. As rightly pointed out, other witnesses who accompanied the injured Kamlesh Rani did not make any statement involving the appellant in the burning of Kamlesh Rani till 29.06.1991.

16) We are satisfied that the dying declaration was totally in conflict with the version of the prosecution as to the time of her burning, relation of the appellant with the deceased, except for the implication part, which was clarified in favour of the appellant by PW-10 Surinder Singh in his cross-

examination. In such circumstances, the dying declaration was totally unacceptable, could not be believed as trustworthy, which was rightly not believed so by the trial Court.

17) Inasmuch as the acquittal by the trial Court and conviction by the High Court is solely based on the dying declaration, in view of our above discussion, there is no need to traverse the evidence and other factual details. In view of the infirmities pointed above, and contradictions as to the occurrence, failure on the part of the Executive Magistrate in obtaining certificate as to whether Kamlesh Rani had made a voluntary statement and not attested by any doctor and also his statement which is contradictory to that of the deceased Kamlesh Rani and of the fact that at the relevant time she was under the influence of Fortwin and Pethidine injections and was not supposed to be having normal alertness, as rightly observed by the trial Court, we hold that the dying declaration Ex.PD does not inspire confidence in the mind of the Court.

Inasmuch as the dying declaration is the only piece of evidence put forward against the accused in the light of our discussion and reasoning, the accused - Surinder Kumar is entitled to the benefit of doubt.

18) Consequently, the conviction and sentence ordered by the High Court is set aside and the order of acquittal passed by the trial Court is restored. Since the appellant is on bail, his bail bonds shall stand discharged. The appeal is allowed.

.....J. (P. SATHASIVAM)J. (DR. B.S. CHAUHAN)
NEW DELHI;

OCTOBER 21, 2011