HIGH COURT OF JAMMU AND KASHMIR AT JAMMU

Cr. Appeal No. 04/2002 & Cr.M.P. No. 33/2006; 14-A/2002 c/w Confirm. No. 02/2002

Date of decision : 2nd August, 2007

Kikar Singh S/o Balwant Singh
R/o Sainik Colony, Jammu,
Age 32 years. **Vs.** **State of J&K**

State of J&K **Vs.** **Kikar Singh**

Coram:

Hon'ble Mr. Justice Virender Singh
Hon'ble Mr. Justice Mansoor Ahmad Mir

For the appellant : Mr. B. S. Manhas, Amicus Curiae.
For the respondent: Mr. B. S. Salathia, Addl. Advocate General.

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i) Whether approved for reporting in Press/Journal/Media Yes
ii) Whether to be reported in Digest/Journal: Yes

Per: Mansoor Ahmad Mir-J.

This criminal appeal is directed against judgment dated 09.07.2002, whereunder the appellant/accused came to be convicted under Section 302 Ranbir Penal Code (for short hereinafter 'RPC') and order dated 11.07.2002, whereby accused came to be sentenced to undergo imprisonment for life and a fine of Rs.5 lacs.

The prosecution case was as under:-

Deceased, Surjeet Kour, was the wife of the accused. She was taken to hospital on 26.10.1998 in a critical condition having 100% burn injuries. Police official namely Bhagwan Singh presented a memo before the doctor that whether deceased,

Surjeet Kour, was in a fit condition to make statement. Doctor opined that she was not fit to make a statement at 11 p.m. during intervening night 26/27.10.1998. Thereafter Incharge, Police Post, Sainik Colony, made another request for making her statement. Again doctor opined that she was not fit to make a statement at 11.40 p.m. On 27.10.1998, again a request for recording her statement was made by the police official and doctor opined that she was fit to make statement. Accordingly, her statement was recorded.

Deceased, Surjeet Kour, stated that she had contracted marriage with Kikar Singh and out of said wedlock she had given birth to two children, son and daughter. That on 26.10.1998 at 8 p.m., her husband, Kikar Singh, came back to home while he was drunk and started quarreling/scuffling with her and also tried to break down the Television and asked her to leave the home. She told him that you are drunk and asked him to leave. Thereafter, he picked up a gallon of kerosene oil and poured on her and set her on fire with a match stick. She came out crying, but no one came to her rescue. Till neighbourhood /mohallawale assembled, she had received maximum 100% burn injuries and they brought her to hospital and was under treatment. Her husband always used to come in drunken state and, beat and abuse her. And had stated that justice be done to her children and be not handed over to him. This statement was recorded by the PW-12 Incharge, Police Post, Sainik Colony, and attested by PW-3 Dr. Anil Gupta in presence of PW-1 Mahinder Singh & PW-2 Avtar Singh. Thereafter, this statement was sent to Police Post, Bahu Fort, by the Incharge, Police Post, Sainik Colony, and, accordingly, FIR was lodged and set the police in motion. Investigation came to be conducted and during investigation, statements of two important witnesses, children of deceased and accused namely Bikram Singh and Ritu

Devi, were recorded and after completing the investigation charge-sheet came to be presented against the accused for the commission of offence punishable under Section 302 RPC. Accused pleaded not guilty and claimed to be tried. The prosecution examined Bhajan Lal, Bikram Singh, Ritu Devi, Mahinder Singh, Avtar Singh, Nihal Singh, Baldev Singh, Dr. Anil Gupta, Dr. S. D. Thakur and Lazar Khandaray.

The evidence of the prosecution came to be closed and statement of the accused under Section 342 Cr.P.C. has been recorded. He was asked to lead evidence in defence, but he has not led any evidence in defence. After hearing the learned counsel for the parties, the Trial Court convicted the accused for the commission of offence punishable under Section 302 RPC vide impugned judgment and sentenced him to undergo/ suffer imprisonment for life and a fine of Rs.5 lacs.

The Trial Court also made a reference to this Court for confirmation of sentence, which came to be registered as Confirmation No.02/2002.

The accused, feeling aggrieved, has preferred this criminal appeal against impugned judgment and order, which came to be registered as criminal appeal No.04/2002.

This case hinges around the statements of two children of the deceased and accused, and the statement made by the deceased in hospital- EXPW-MS- Dying Declaration.

The argument of learned counsel for the appellant is that the children are living with maternal uncle and were tutored by him. Thus, their statements cannot be relied upon. Second argument advanced by learned counsel for the appellant is that 'Dying Declaration' EXPW-MS cannot be acted upon for the reasons that Dr. Anil Gupta had not issued certificate at the time of recording her statement that she was fit to make a statement. In support of

his argument, he relied on **AIR 2006 SC 1319; 2004 Cr.L.J. 4167; 2002 Cr.L.J. 3981; 1997 SC 3569; 1992 Cr.L.J. 2192; & 2003 Cr.L.J. 1262.**

Mr. B. S. Salathia, while rebutting the arguments advanced by Mr. Manhas, argued that the Dying Declaration is admissible in evidence and can be safely acted upon and relied upon. Statements of children are natural and they are the only persons who would have been present even otherwise at the time of occurrence in their home.

It is profitable to give brief resume of the statements of Bikram Singh, Ritu Devi, Avtar Singh and Mahinder Singh.

PW-5 Bikram Singh, son of deceased and accused, appeared before the Trial Court on 09.09.1999 as a witness of the prosecution. Trial Court after putting questions to him, recorded a finding that he is an intelligent child and is capable to understand the things and make a reply, and thereafter statement came to be recorded. He deposed that accused murdered his mother, Surjeet Kour. He was unemployed, but always came to home in drunken state and used to beat his mother usually in the evening. On 26.10.1998, accused came in a drunken state and slapped him. On questioning by mother, he started beating her and dragged her inside the room and started burning her. He requested him "Pappa do not burn the mother", but he threatened that he will also burn him and the accused picked up the gallon of kerosene oil, poured it over his mother and set her on fire with a match stick. There was hue and cry, neighbours reached and tried to extinguish the fire and took her to hospital. While making a statement, the child was weeping and Trial Court has made a note in the statement.

PW-6 Ritu Devi was also questioned by the Court and after satisfying that she is an intelligent and capable to understand and reply question, recorded a certificate to that extent and thereafter

her statement was recorded and she had deposed that the accused used to come to home in the evening in drunken state and was unemployed. He was beating her mother oftenly. On 26.10.1998 at night, the accused came in a drunken state, started beating her mother, picked a gallon of kerosene oil, poured on her and set her on fire with a match stick. They made hue and cry. Neighbours assembled and tried to extinguish the fire and took her to the hospital.

Dr. Anil Gupta has deposed that the deceased made a statement in his presence and he attested the statement. He proved the certificate issued by him and signatures on EXPW-MS. PW-12, Incharge, Police Post, Sainik Colony, also deposed that he has recorded the statement of the deceased and proved the contents of EXPW-MS. PW- Dr. S. D. Thakur has deposed that he had conducted the post-mortem and proved the contents of the post mortem report and findings recorded.

PWs- Mahinder Singh & Avtar Singh have deposed that the deceased made a statement 'Dying Declaration EXPW-MS' in their presence and in presence of Dr. Anil Gupta in the hospital on 27.10.1992.

Children, Bikram Singh and Ritu Devi, who are the son and daughter of the accused, have given the minute details, how the accused caused the death of their mother-deceased. They have stated that accused poured kerosene oil on her and with a match stick put her on fire. She sustained burn injuries and died because of the burn injuries. There is not even a minor contradiction in both the statements. Virtually, the statement of Bikram Singh received corroboration from the statement of Ritu Devi and vice versa. Their statements get corroborated by the evidence of PW-3 Dr. Anil Gupta, PW-12 Incharge, Police Post, Sainik Colony and PW-1 Mahinder Singh. There is no reason to disbelieve them.

Section 118 of the Evidence Act lays down that all persons are competent to testify unless the Court considers that because of tender years, disease of any kind or any cause of the same kind or because of the old age they are prevented from understanding the questions put to them or from giving rational answers. Competency of the witness is the rule and incompetency is an exception. Only incompetency that Section 118 mandates is incompetency from pre-mature or defective, intellect. The sole test is whether witness has sufficient intelligence to depose or whether he has capability to understand and appreciate the duty of speaking truth.

Hon'ble Apex Court in case, titled **"Baby Kandayanathil Vs. State of Kerala" AIR 1993 SC 2275,** held that statement of a child can be made the basis for conviction if the child is capable to make a statement. The Apex Court also held in case entitled **"Ratansinh Dalsukhbhai Nayak Vs. State of Gujarat" AIR 2004 SC 23** that the conviction can be based on statement of a child. It is profitable to reproduce paras 8 & 9 of that judgment herein:-

> "8. The learned trial Judge has elaborately analysed the evidence of eye-witnesses. There is no reason as to whey she would falsely implicate the accused. Nothing has been brought on record to show that she or her father had any animosity so far as the accused is concerned. The prosecution has been able to bring home its accusations beyond shadow of doubt. Further, the trial Court on careful examination was satisfied about child's capacity to understand and to give rational answers. That being the position, it cannot be said that the witness (PW-11) had no maturity to understand the import of the questions put or to give rational answers. This witness was cross-examined at length and in spite thereof she had described in detail the scenario implicating the accused to be author of the

> crime. The answers given by the child witness would go to show that it was only repeating what somebody else asked her to say. The mere fact that the child was asked to say about the occurrence and as to what she saw, is no reason to jump to a conclusion that it amounted to tutoring and that she was deposing only as per tutoring what was not otherwise what she actually saw. The learned Counsel for the accused-appellant has taken pains to point out certain discrepancies which are of very minor and trifle nature and in no way affect the credibility of the prosecution version.
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> 9. Evidence of PW-11, the child witness has credibility which reveals a truthful approach and her evidence to put it milady has ring of truthing. There are no exaggerations and she has stuck to her statement made during investigation in all material particulars. That being so, the trial Court and the High Court were justified in placing implicit reliance on her testimony. In addition, the evidence of recovery and the report of the Forensic Science Laboratory provide additional support to the prosecution version."

Again the Hon'ble Apex Court, in a case titled **"Bhagwan Singh and others Vs. State of M.P." AIR 2003 SC 1088,** has taken the same view and laid down the same test.

The test laid down is that the child must be capable of making a statement and the Court while recording the statement must record a certificate that the child was a competent witness.

Applying the test in the instant case, the Trial Court has satisfied itself that both the children were capable, intelligent and were in a position to understand the things.

The defence has failed to bring any admissible material on the file suggesting the fact that they were not competent. They have also failed to prove that at the time of recording statement

under Section 161 Cr.P.C. or while recording statement before the Court, they were under the hands of maternal uncle and were tutored.

The question of tutoring looses its significance because of the fact that Dying Declaration EXPW-MS lends support to their statements, rather Dying Declaration corroborates their statements and Dying Declaration gets corroboration from their statements.

Learned counsel for the appellant has cited the judgments referred hereinabove, which are not applicable to the instant case in the given circumstances of the case.

Now coming to Dying Declaration, the main argument of learned counsel for the appellant is that it does not bear certificate of the doctor that the deceased was fit to make a statement and has relied in support of his argument, a judgment of the Hon'ble Apex Court rendered in case entitled **"Jai Prakash and others Vs. State of Haryana" AIR 1999 Supreme Court 3361** and other judgments referred hereinabove. The judgment reported in **AIR 1999 Supreme Court 3361** stands overruled by the Hon'ble Apex Court by a judgment delivered in case entitled **"Laxman Vs. State of Maharashtra" AIR 2002 SC 2973.** It is profitable to reproduce para 3 of said judgment herein:-

> "3. The juristic theory regarding acceptability of a dying declaration is that such declaration is 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 man is induced by the most powerful consideration to speak only the truth. Notwithstanding the same, great caution must be exercised in considering the weight to be given to this species of evidence on account of the existence of many circumstances which may affect their truth. The situation in which a man is on death bed is so solemn and serene, is the reason in law to accept the veracity of his statement. It is

for this reason the requirements of oath and cross-examination are dispensed with. Since the accused has no power of cross-examination, the court insist that the dying declaration should be of such a nature as to inspire full confidence of the Court in its truthfulness and correctness. The court, however, has to always be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. The court also must further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Normally, therefore, 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 eye-witnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and in any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a magistrate or a doctor or a police officer. When it is recorded, no oath is necessary nor is the presence of a magistrate is absolutely necessary, although to assure authenticity it is usual to call a magistrate, if available for recording the statement of a man about to die. There is no requirement of law that a dying declaration must necessarily be made to a magistrate and when such statement is recorded by a magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular

> case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise."

It is enough if a doctor attests the statement-Dying Declaration. In the case in hand, Dr. Anil Gupta has categorically deposed that she made a statement in his presence and in presence of two witnesses and he attested the same. He has identified the signatures and certificate also. Contents of Dying Declaration having been proved and came to be exhibited as EXPW-MS. The two witnesses, Mahinder Singh and Avtar Singh, also have proved while recording their statements the contents of the Dying Declaration. So the question of Dying Declaration was not made by the deceased or she was not capable and fit to make a statement, is of no weight. Hon'ble Apex Court in a case entitled **"Jai Prakash and others Vs. State of Haryana"** reported in **AIR 1999 SC 3361,** held that when witness deposes that the declarant was fit to make a statement, her declaration can not be faulted on the ground that she was not able to speak and genuineness of Dying Declaration cannot be doubted when it is corroborated by other evidence. It is profitable to reproduce para 6 of said judgment herein:-

> "6. It was next contended by the learned counsel that the statement was not recorded in question and answer form and therefore no weight should be attached to it. It also deserves to be rejected as misconceived

> because a complaint is required to be recorded in question and answer form even though there is a possibility that later on it might be treated as a dying declaration. This dying declaration receives corroboration from the site inspection report and also by the application Ex.PL referring to the compromise arrived at on the previous day."

Hon'ble Apex Court in a case entitled **"Mange Ram and another Vs. The State Delhi Administration"** reported as **1998 Cr.L.J. 2269**, held that Dying Declaration before investigating officer and doctor, is sufficient to record conviction when found to be reliable and consistent and more so, when there was nothing to disprove the same. Applying the test in the instant case, the statements of doctor, police officer, two witnesses read with the statements of children and Dying Declaration are reliable and consistent. Defence has not led any evidence and has failed to disprove the same.

Hon'ble Apex Court in the cases entitled **'Narain Singh and another Vs. State of Haryana'** reported in **AIR 2004 Supreme Court 1616;** and **'State of Haryana Vs. Mange Ram and others'** reported in **2003 Cr.L.J. 830,** has laid down the test, which is also laid down in case entitled **'Paras Yadav and others Vs. State of Bihar'** reported in **AIR 1999 Supreme Court 644,** paras 8 & 9 of the judgment read as under:-

> "8. It has been contended by the learned Counsel for the appellants that the Investigating Officer has not bothered to record the dying declaration of the deceased nor the dying declaration is recorded by the Doctor. The Doctor is also not examined to establish that the deceased was conscious and in a fit condition to make the statement. It is true that there is negligence on the part of Investigating Officer. On occasions, such negligence or omission may give rise to reasonable doubt which would obviously go

in favour of the accused. But, in the present case, the evidence of prosecution witnesses clearly establishes beyond reasonable doubt that the deceased was conscious and he was removed to the hospital by us. All the witnesses deposed that the deceased was in a fit state of health to make the statements on the date of incident. He expired only after more than 24 hours. No justifiable reason is pointed out to disbelieve the evidence of number of witnesses who rushed to the scene of offence at Ghogha Chowk. Their evidence does not suffer from any infirmity which would render the dying declarations as doubtful or unworthy of the evidence (credence). In such a situation, the lapse on the part of the Investigating Officer should not be taken in favour of the accused, may be that such lapse is committed designedly or because of negligence. Hence, the prosecution evidence is required to be examined dehors such omissions to find out whether the said evidence is reliable or not. For this purpose, it would be worthwhile to quote the following observations of this Court from the case of Ram Bihari Yadav v. State of Bihar, (1998) 3 JT (SC) 290: (1998 AIR SCW 1647, at P. 1653):

> "In such cases, the story of the prosecution will have to be examined dehors such omissions and contaminated conduct of the officials otherwise the mischief which was deliberately done would be perpetuated and justice would be denied to the complainant party and this would obviously shake the confidence of the people not merely in the law enforcing agency but also in the administration of justice."

9. In this view of the matter with regard to Paras Yadav, in our view, there is no reason to disbelieve the oral dying declaration as deposed by number of witnesses and as recorded in fardbeyan of deceased Sambhu Yadav. The fardbeyan was recorded by the

> Police Sub-Inspector on the scene of occurrence itself, within few minutes of the occurrence of the incident. Witnesses also rushed to the scene of offence after hearing hulla gulla. The medical evidence as deposed by PW-11 also corroborates the prosecution version. Hence, the Courts below have rightly convicted Paras Yadav for the offence punishable under Section 302, I.P.C."

Applying the test, Dying Declaration in the given circumstances is admissible in evidence and can be acted upon and relied upon. It is worthwhile to mention herein that the accused has made a statement under Section 342 Cr.P.C., that the deceased was preparing meals on Stove. That Stove burst and she got burn injuries. I am conscious that statement under Section 342 Cr.P.C., cannot be made the basis for conviction, but its effect is to be taken note of. Virtually, the accused admitted his presence in the house and has taken the defence that she had sustained burn injuries due to the bursting of the Stove. The medical report and post mortem report do not support that version. He has made a U-turn while filing appeal. In memo of appeal, he has averred that he was working as a Conductor of a matador and was earning a meager income. On 26.10.2000 at about 8 p.m., he was still with the matador, he got the information that his wife had caught fire due to bursting of Stove and he immediately reached to the hospital. Thus, the statement made by him under Section 342 Cr.P.C. and the stand taken in the appeal are contradictory. It is profitable to reproduce para 2(c) & (d) of the appeal herein:-

> "2(c) That the appellant was working as a conductor of a Matador and out of the meager income, was trying to fulfil all his matrimonial duties and obligations.
>
> (d) That on 26.10.2000 at about 8 P.M. when the appellant was still with the Matador, he got the information that his

> wife Surjeet Kour had caught fire due to bursting of stove and he immediately rushed to the hospital."

Having glance of the above discussion, we are of the considered view that prosecution has brought guilt home to the accused and Trial Court has rightly convicted the accused. The sentence of imprisonment for life is also legal one, but fine imposed is too excessive. Instead of imposing Rs.5 lacs as fine, it is, in the interest of justice, to impose a fine of Rs.10,000/- only.

We would, thus, uphold the orders of conviction and sentence. The accused to undergo imprisonment for life, but order imposing fine is modified in the terms indicated above.

The instant appeal alongwith connected miscellaneous petitions stands disposed of.

The Confirmation petition is also answered accordingly.

(Mansoor Ahmad Mir) (Virender Singh)
Judge Judge

Jammu
August 02, 2007.
T. Arora, PS