

HIGH COURT OF HIMACHAL PRADESH AT SHIMLA

Cr.A. No. : 34 of 2006
Reserved on: 25.2.2009.
Decided on: 28.2.2009.

Dalip Masih Appellant.

Versus

State of Himachal PradeshRespondent.

Coram:

The Hon'ble Mr.Justice Deepak Gupta, Judge.

The Hon'ble Mr.Justice V.K. Ahuja, Judge.

Whether approved for reporting? Yes.

For the Appellant: Mr.N.K. Thakur, Advocate.

For the respondent: Mr.Rajesh Mandhotra,
Deputy Advocate General.

Per V.K. Ahuja, J.:

This is an appeal filed by the appellant under Section 374 of the IPC against the judgment, dated 29.11.2005, of the court of learned Additional Sessions Judge (Fast Track Court), Kangra at Dharamshala, vide which the appellant was held guilty and sentenced under Section 302 of the IPC to suffer imprisonment for life and to pay a fine of Rs.20,000/-. In default of payment of fine, the appellant was to undergo rigorous imprisonment for a further period of one year.

The prosecution story in brief is that Smt.Suman Kanta and her husband Sukhdev Masih were admitted in the Zonal Hospital, Dharamshala on 15.6.2003,

Whether reporters of local newspapers may be allowed to see the judgment?

as a burn case. Both these persons were undergoing treatment in the Zonal Hospital for burn injuries. On 22.6.2003, a telephonic message was received from Medical Officer, Zonal Hospital, Dharamshala, at Police Station, Dharamshala that one lady, who is admitted in the surgical ward, wants to get her statement recorded. On receipt of this information on telephone, a Police Officer from Police Station, Dharamshala visited the Zonal Hospital, Dharamshala, filed an application before the Medical Officer as to whether the said lady is fit to make her statement and on taking the opinion from the Medical Officer that the lady was fit to make statement, the statement was recorded by the Police Officer at Zonal Hospital, Dharamshala on 22.6.2003, at 7.00 a.m. In the said statement, Smt.Suman Kanta alleged that on 15.6.2003, at about 8/9 p.m., she was taking meals and her father-in-law Dalip Masih (appellant) told her that he will keep his son Sukhdev Masih only and will not keep her in the house. Her husband was sitting in the courtyard on a cot and the appellant threw kerosene oil on her person and her husband cried that daddy she will be burnt in fire and prevented his father but the appellant threw burning lamp on her person. Smt.Suman Kanta was having her nine month old daughter in her lap and her daughter and she caught fire and she threw her daughter in the plants outside. Her husband threw water on her clothes and tried to extinguish the fire and she does not know who extinguished the fire on the person of her daughter. Some boys from the village gathered there and her husband also tried to set himself on fire proclaiming that when his wife and child have got burnt, he will not live. It was alleged in the statement that her husband threw kerosene oil on his person and the boys from the village gave water to them and tried to extinguish fire by putting a blanket and bed sheet on them. Those village boys also arranged a van, her daughter and her husband alongwith her father-in-law were brought to the Hospital for treatment. They were kept in the Shahpur Hospital for 1/1-1/2 hour and they were given first aid and then they were sent

to Zonal Hospital, Dharamshala where they reached at 2/2.30 a.m. This statement was sent to the Police Station, Dharamshala on the basis of which the case was registered and the investigation was carried out. The said Suman Kanta died on 25.6.2003 while her husband died on 24.6.2003 and after investigation, the challan was filed as against the appellant before the learned Judicial Magistrate, who committed the case to the learned Sessions Judge and the case was assigned to the learned trial Court, who tried the appellant under Section 302 IPC for the murder of Smt.Suman Kanta and her husband, which resulted in conviction and sentence of the appellant, as detailed above.

We have heard the learned counsel for the parties and have gone through the record of the case.

The submissions made by the learned counsel for the appellant were that the prosecution had miserably failed to prove their case that the first version given at the time of admission in the hospital by Smt.Suman Kanta and her husband was that it was an accidental case of fire and they had never alleged earlier at any point of time that they were set on fire by the appellant. It was further submitted that the brother of the deceased Suman Kanta got the facts twisted and the alleged statement was got recorded though the injured never made any such statement and there are various factors which prove that the said statement made by the injured cannot be relied upon which shows that the prosecution had failed to prove their case and as such the findings to the contrary are liable to be set aside. The infirmities pointed out in the prosecution case by the learned counsel for the appellant shall be referred below while discussing the evidence led by the prosecution.

On the other hand, the learned Deputy Advocate General for the State had supported the impugned judgment for the reasons recorded by the learned trial Court.

We shall firstly refer to the evidence which has been relied upon by the learned trial Court in coming to its findings that the guilt of the appellant stands established beyond any reasonable doubt. Thereafter, we shall refer to the infirmities in the prosecution case leading to the conclusion that the prosecution story cannot be relied upon.

Coming to the evidence relied upon by the learned trial court, a perusal of the impugned judgment shows that the learned trial Court had relied upon the statement Ext.PW-1/B recorded by a Police Officer at 7.00 a.m. at Zonal Hospital, Dharamshala. A perusal of this statement shows that the complainant had alleged about throwing of kerosene oil and setting her on fire by the appellant, as has been mentioned above in detail. This statement was recorded by the Police Officer at Zonal Hospital on the basis of the information received by him on telephone, as is clear from Ext.PW-1/A, an application submitted in writing by Police Officer to the Medical Officer, Zonal Hospital, Dharamshala. In this application, he had alleged regarding the receipt of telephonic information from the Medical Officer, Dharamshala that a lady admitted in the surgical ward wants to make statement and, therefore, police officer proceeded to the Hospital, submitted an application to the Medical Officer, who opined on this application Ext.PW-1/A that the patient was fit for giving the statement. The said *rapat* received at the Police Station has been proved in evidence as Ext.PW-5/C. A perusal of the same shows that a telephonic message was received on 22.6.2003 at 5.30 a.m. and thereafter a Police Officer was deputed who went to the Hospital and submitted application Ext.PW-1/A and after taking the opinion of the Medical Officer, he recorded the statement at 7.00 a.m. on the same day, on the basis of which an FIR was registered.

Coming to the statement of PW-9 Bobby Masih, brother of the deceased Smt.Suman Kanta, that he reached Dharamshala Hospital on 21.6.2003 from Sri Nagar and after some time, his sister told him that she wanted to make

statement to the police and then the police came and her statement was recorded and he was sent out at that time.

Coming to the question as to whether PW-9 Bobby Masih reached the Hospital for the first time on 21.6.2003 only, PW-6 Majid Masih, father of deceased Suman Kanta, has stated that they reached Chhattri and were informed that his daughter and son-in-law have been taken to Dharamshala for treatment and then they came to Dharamshala. On their enquiry from their daughter Suman Kanta, she did not tell anything to them but before her death, she gave her statement to the doctor that her father-in-law had poured kerosene oil upon her and set her on fire. He admitted that he and his wife visited the hospital on 16.6.2003 i.e. on the next day of the occurrence and they remained attending the deceased in the Hospital till her death. He admitted that his daughter has told them that she had been brought to the Hospital alongwith her husband and child by the appellant. He also stated that Suman Kanta had told them that after giving first aid and recording her statement by the doctor at Shahpur, she was referred to Dharamshala. This clearly shows that her statement was recorded by a Medical Officer at Shahpur also before she was shifted to Zonal Hospital, Dharamshala. He also admitted that his daughter did not ask the doctor that she wanted to make statement, however, he stated that their son Bobby Masih went to the doctor and told that his sister's statement be recorded, which was recorded on the same day meaning thereby that it was recorded on 21st itself, while the statement in question has been proved to have been recorded on 22nd. He further admitted the suggestion as correct that his daughter never wanted to make any statement to the doctor nor she had shown her willingness to give her statement. He further stated that the statement of Suman Kanta was recorded by the police at Police Station, Shahpur. This part of the statement appears to be incorrect since she was never taken to Shahpur Police Station during the time she was admitted in the hospital and it may be that the statement was recorded

by the police of Police Station Shahpur. He further stated that when the police came, the doctor left the place and the statement was recorded in presence of the police, him, his wife and his son. He denied the suggestion that they had tutored their daughter to make such a statement.

Coming to the testimony of PW-7 Smt.Vinus Masih, mother of the deceased, she stated that they remained in the hospital for 10 days and before death, Smt.Suman Kanta had made a statement that her father-in-law had poured kerosene oil on her and put her on fire. She further stated that from 16.6.2003, she alongwith her husband and son remained in the hospital till the death of their daughter and the doctors were attending the patient 4-5 times a day, as was stated by PW-6 Majid Masih, her husband, also. She also admitted the suggestion that her son had asked the doctor to record the statement of Suman Kanta, who was never willing to make statement. She also stated that the doctor was not present when the statement was recorded by the police. She also admitted that her daughter had told her that she had made statement before the Doctor at Shahpur. She also admitted the suggestion that she alongwith her husband and son were only attending Suman Kanta and denied the suggestion of tutoring.

Two main things appear from the statements of these two witnesses i.e. that according to PW-7 Vinus Masih, her son was with them in the hospital right from 16.6.2003 till Suman Kanta died which belies the statement of PW-9 Bobby Masih that he came only on 21.6.2003. The statements of both these witnesses establishes that when the statement was recorded by the police, which has been relied upon as Ext.PW-1/B, the Medical Officer was not present there, though the statement of the Medical Officer, as shall be referred below, shows that he was present there and he had attested the said statement also. In case, the Medical Officer was present throughout the time when the statement was recorded by

the police, there was no occasion for the mother and father of the deceased to depose falsely.

PW-1 Dr.Gopal Singh has stated that the brother of the deceased came to him and stated that his sister wanted to give statement. He went to the patient Suman Kanta and enquired from her, who replied in affirmative that she wanted to give statement and then he called the police. Further, the police came on the next day on 22.6.2003, moved an application Ext.PW-1/A and he opined that the patient was fit and in his presence the statement was recorded by the Police Officer and the contents of the statement were read over to her and then she put her thumb impression and then he also attested the statement and put his signatures on Ext.PW-1/C. He admitted in cross examination that before she was brought to Zonal Hospital, the deceased was given treatment at Shahpur and had given statement before Dr. Sushil Sharma at Shahpur. He also further stated that mother, father and other relations including the brothers were attending upon the deceased right from 16.6.2003 to 23.6.2003. He also admitted the suggestion that he attended the deceased from 16.6.2003 to 22.6.2003 and talked with her but she never told him that she wanted to make any type of statement. He admitted that he did not inform the District Magistrate or any Magistrate that the patient wanted to make a statement, though the District Courts are situated at 100 metres distance from the hospital complex and there are number of Magistrates posted at Dharamshala. He did not deny the suggestion that he himself was competent to record the statement of the deceased on that day i.e. on 21.6.2003 since the police had not come on that day.

It has come up in the above evidence of the Medical Officer PW-1 Gopal Singh as well as in the statement of PW-7 Vinus Masih that her daughter made a statement at Shahpur before a Medical Officer and the said statement has been proved in evidence as Ext.D-1. This statement has been proved in the evidence

in the statement of PW-8 Dr.Sushil Sharma, who stated that this statement Ext.D-1 was recorded separately in his presence and also bears his signatures. A perusal of this statement Ext.D-1 shows that in this statement, Smt.Suman has stated that when she was preparing meals outside her *Tapri*, kerosene oil fell on her while filling it in the lamp from a bottle and her clothes caught fire instantly. Her husband tried to put off the fire and he also caught fire and her 10 month old daughter also came under the impact of the fire flames. She further stated that her father-in-law took them to hospital in a taxi and none is responsible for this accident. She further stated that at the relevant time, her father-in-law had gone to the shop nearby and when fire broke out, he rushed to her. The fact that her father-in-law i.e. the appellant was not present at the relevant time in the house was sought to be proved from the statement of PW-15 Chain Singh, Home Guard personnel, who stated that on 15.6.2003, he was going to his house from the shop of Roshan Lal at 8.00 p.m. and appellant was sitting in the shop of Roshan Lal having purchased vegetables etc. He further stated that when he went near the house of accused, he heard a noise and found that son and daughter-in-law of the accused were burning and they were taken in a jeep by some boys to the hospital. He further stated that when the accused met him in the vegetable shop, he was all right, meaning thereby that he was not under the influence of liquor, as was sought to be proved by the prosecution.

PW-10 Munish Mehra has also given some corroboration to this statement when he stated that he was going on a bike and he saw that people had assembled near the house of the accused, who was present there and was asking for help for his son and daughter-in-law and one small child had suffered burn injuries. He stated that there was no fire around them and they managed a vehicle and the injured were sent to Shahpur Hospital. By these statements, a suspicion has been tried to be created that the appellant was not present at the spot at the relevant time.

It follows from above discussion that the deceased was admitted in the hospital on 15.6.2003 and remained admitted in the Hospital till she died on 25.6.2003. She made a statement to the police Ext.D-1 proved in evidence in which she had alleged that the fire took place accidentally. A perusal of her MLC and that of her husband Ext.PW-8/B and Ext.PW-8/C shows that the Medical Officer has written the alleged history as accidental fire and there was no mention of the fact that they had been set on fire by the appellant. Apart from the MLC and the statement Ext.D-1 in which it was alleged that the fire had taken place accidentally, all along in the statements of PW-6 Majid Masih, PW-7 Vinus Masih, the parents of the deceased and even in the statement of PW-9 Bobby Masih, brother of the deceased, they have never stated that the deceased ever told them that she had been set on fire by her father-in-law, rather the cause of death was never revealed to them, as has been clearly stated by the witnesses including her brother PW-9, who later on called the Medical Officer and the police for recording her statement. It looks surprising that the parents and brother of the deceased will not enquire about the cause of burning, though they were present with the deceased right from the next day of her admission in the Hospital i.e. from 16.6.2003 till she died on 25.6.2003. Her brother had tried to prove that he came to the Hospital on 21.6.2003 though the parents of the deceased stated that he had come earlier. There is nothing in the prosecution case to show that after she made a statement on 22.6.2003 Ext.PW-1/B, the statement of her husband was also recorded by the police to verify the statement of Suman Kanta, though he was alive till 24.6.2003. It was required of the police to have made efforts to get the statement of Smt.Suman recorded from a Magistrate when there was no difficulty in getting a Magistrate as the patient was admitted in the Zonal Hospital, Dharamshala itself where all the Magistrates are posted and were available, but the Police Officer himself thought it fit to record the statement. The statements of the relatives of the deceased

suggest that the Medical Officer throughout was not present who attested this statement though the Medical Officer has stated that he was present and had attested the statement. In such circumstances, when the patient was already admitted in the Hospital on 15.6.2003 and remained alive for about 7 days prior to her statement being recorded on 22.6.2003 and had never expressed anything about the fire having been lit by the appellant, it is difficult to believe that suddenly on 22.6.2003 she thought it fit to make a statement to the police officer, which was never got verified from her husband by the police and no efforts were made to call the Magistrate when she was alive till 25.6.2003. In such circumstances, when the injured had not made any complaint even to her relatives who were all along with her that she had been set on fire by her father-in-law i.e. the appellant and in the MLC and her earlier statement to the Medical Officer she had given the statement that it was an accidental fire, her subsequent statement Ext.PW-1/B cannot be relied upon solely to hold the appellant guilty in the facts and circumstances of the case ignoring the earlier statement made by her Ext.D-1, which was made to the police and attested by the Medical Officer.

We are constrained to remark that the learned trial court had not discussed the above evidence in detail though before relying upon the subsequent statement made by the deceased, all these facts should have been considered by the learned trial Judge. The learned trial Judge had made a brief reference to the facts and had placed implicit reliance upon Ext.PW-1/B without discussing all the points as have been discussed above and, therefore, the learned trial Judge came to a wrong conclusion in holding that the prosecution case has been proved beyond any reasonable doubt. The facts of the case clearly show that the manner in which the statement was allegedly made does not prove that it can be relied upon to hold the appellant guilty when all along

there was nothing on record to show that it was a case of setting on fire by the appellant.

We accordingly hold that the findings of the learned trial Court holding the appellant guilty are not sustainable and as such we hold that the prosecution had failed to prove their case beyond a reasonable doubt and the appellant is, therefore, entitled to be acquitted of the charge framed against him. Consequently, the appeal is accepted and the appellant is acquitted of the charge framed against him. The appellant shall be released forthwith, if not required in any other case. The jail warrant be issued accordingly.

(Deepak Gupta), J.

February 28, 2009.
(TILAK)

(V.K. Ahuja), J.