

Reserved on : 22.2.2023

Delivered on : 28.2.2023

Court No. - 44

Case :- CRIMINAL APPEAL No. - 6602 of 2018

Appellant :- Aslam

Respondent :- State of U.P.

Counsel for Appellant :- Noor Mohammad, Abhishek Mayank

Counsel for Respondent :- G.A.

Hon'ble Dr. Kaushal Jayendra Thaker, J.

Hon'ble Ajit Singh, J.

1. This appeal has been filed against the judgment and order dated 9.10.2018 passed by First Addl. District & Sessions Judge, Aligarh in Session Trial No. 55 of 2016 (State vs. Aslam and others), arising out of Case Crime No. 680 of 2015, under section 302/34 I.P.C., P.S. Qwarsi, district-Aligarh, whereby convicting the appellant under Section 302/34 I.P.C. and awarded the sentence for life imprisonment and a fine of Rs.10,000/- and in default of payment of fine the accused shall further undergo six months additional simple imprisonment.

2. The prosecution story in brief is that the informant Kallu Khan had solemnized marriage of his daughter Shabana with accused Aslam seven years ago according to Muslim rights as per his status and given adequate dowry but her husband and his other family members were not satisfied with the given dowry. They used to keep the daughter of the complainant hungry and does not give meals for several days and when she asked for food she was subjected to cruelty by her husband and his other family members in her matrimonial home. The daughter of the complainant used to make complaint to her parents time to time. Three daughters and one son were born out from the wedlock of the daughter of the complainant and Aslam. Younger daughter of the complainant namely, Sony was also married with brother of Aslam namely, Ishrat. On 21.8.2015 at about 9:00 O'clock in the morning Aslam, Firoz, Kallu Khan and Farzana with intention to kill after pouring kerosene oil on her set her ablaze. Upon hearing the noise raised by Shabana her younger sister Sony reached there and seen Farzana, sister-in-law (nanad) setting her fire. Upon hearing the alarm raised by Sony, her husband

Ishrat and others reached there, who somehow dosed the fire and admitted the injured at Medical College, Aligarh for treatment where she succumbed to the injuries on 30.8.2015.

3. During investigation, the Investigating Officer prepared the site plan and collected evidence of witnesses and after completion of investigation submitted chargesheet against Aslam, Firoz and Farzana under sections 498A and 302 I.P.C. and the cognizance was taken by the Magistrate and considering that the case was triable by the Session Judge and it was committed to the court of session and the Session Court charged the accused under Sections 498-A and 302/34 I.P.C. On being summoned, the accused-appellant pleaded not guilty and claimed to be tried.

4. The Trial started and the prosecution examined 10 witnesses who are as follows:

1	Kallu	PW1
2	Smt. Sony	PW2
3	Najma	PW3
4	Imran	PW4
5	Dr. Mohd. Aslam	PW5
6	Tehsildar Rajesh Kumar	PW6
7	S.I. Vinod Kumar, I.O.	PW7
8	Constable Raghuvir Singh	PW8
9	Nayab Tehsildar	PW9
10	Dr. Gufran Ahmad	PW10

5. In support of ocular version following documents were filed and proved:

1	Complaint	Ex.Ka-1
2	Postmortem report	Ex.Ka-2
3	Panchayatnama	Ex.Ka-3
4	Site plan	Ex.Ka-4
5	Chargesheet	Ex.Ka-5
6	Chik FIR	Ex. Ka-6
7	Copy of G.D.	Ex.Ka-7
8	Dying Declaration	Ex.Ka-8
9	Medical Examination Report	Ex. Ka-13

6. Heard Sri Abhishek Mayank, learned counsel for the appellant, learned A.G.A. for the State and perused the record.

7. At the end of the trial and after recording the statement of the accused under section 313 of Cr.P.C., and hearing arguments on behalf of prosecution and the defence, the learned Sessions Judge convicted the accused-appellant as mentioned above.

8. The trial court recorded statement of the witnesses and after hearing the argument of both the sides, convicted the appellant as aforesaid.

9. Learned counsel for the accused has submitted that the accused-appellant is the husband of the deceased. He is absolutely innocent and has been falsely implicated in the present case. The accused-appellant was living with his younger brother Ishrat and his wife Sony who is younger sister of deceased Shabana. He also submits that at the time of incident he was not present at the spot. He had gone 5 k.m. away from his house for some work. He lastly submits that he is in jail since 29.9.2015.

10. The present appeal is opposed by the learned counsel appearing on behalf of State.

11. It is vehemently submitted that in the present case the deceased died while taking treatment in the hospital and after nine days of occurring the incident. It is submitted that as per the medical evidence the deceased died due to septicemia caused by injuries in small intestine. It is submitted that the deposition of the doctor who initially treated the deceased and thereafter the deposition of the doctor who conducted the postmortem are required to be considered as a whole.

12. While going through the factual scenario we are of the opinion that even if we go by the factual date that the dying declaration was not a tutored one and could have been voluntarily made and that it satisfies the quantoes of dying declaration, we would concur with the learned trial court rather the Sessions Judge. The learned Judge has relied on several judgments. The learned Judge has categorically

mentioned that when the dying declaration would be acted upon and when the same cannot be he has traced the judicial history beginning from 1962 and has traced it right upto 1992 and has summed up the same. The dying declaration can be acted upon without collaboration if it inspires confidence and truth. Thus having summarize the law we are of the considered opinion that no other view than that taken by the learned Judge can be taken for upholding the conviction of the accused on the basis of dying declaration. We are fortified in view of the decision of the Apex Court in **“Krishan vs. State of Haryana, reported in (2013) 3SCC 280”** wherein the same decision was considered by one of us in Criminal Appeal No. 245 of 2004 of the Gujrat High Court decided on 13.9.2013.

13. We can safely rely upon the decision of the Gujarat High court in Criminal Appeal No.83 of 2008 (**Gautam Manubhai Makwana Vs. State of Gujarat**) decided on 11.9.2013 wherein the Court held as under:

"12. In fact, in the case of Krishan vs. State of Haryana reported in (2013) 3 SCC 280, the Apex Court has held that it is not an absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused. Where the dying declaration is true and correct, the attendant circumstances show it to be reliable and it has been recorded in accordance with law, the deceased made the dying declaration of her own accord and upon due certification by the doctor with regard to the state of mind and body, then it may not be necessary for the court to look for corroboration. In such cases, the dying declaration alone can form the basis for the conviction of the accused. But where the dying declaration itself is attended by suspicious circumstances, has not been recorded in accordance with law and settled procedures and practices, then, it may be necessary for the court to look for corroboration of the same.

13. However, the complaint given by the deceased and the dying declaration recorded by the Executive Magistrate and the history before the doctor is consistent and seems to be trustworthy. The same is also duly corroborated with the evidence of witnesses and the medical reports as well as panchnama and it is clear that the deceased died a homicidal death due to the act of the appellants in pouring kerosene and setting him ablaze. We do find that the dying declaration is trust worthy.

14. However, we have also not lost sight of the fact that the deceased had died after a month of treatment. From the medical reports, it is clear that the deceased suffered from Septicemia which happened due to extensive burns.

15. In the case of the B.N. Kavatakar and another (supra), the Apex Court in a similar case of septicemia where the deceased therein had died in the hospital after five days of the occurrence of the incident in question, converted the conviction under section 302 to under section 326 and modified the sentence accordingly.

15.1 Similarly, in the case of Maniben (supra), the Apex Court has observed as under:

"18. The deceased was admitted in the hospital with about 60% burn injuries and during the course of treatment developed septicemia, which was the main cause of death of the deceased. It is, therefore, established that during the aforesaid period of 8 days the injuries aggravated and

worsened to the extent that it led to ripening of the injuries and the deceased died due to poisonous effect of the injuries.

19. It is established from the dying declaration of the deceased that she was living separately from her mother-in-law, the appellant herein, for many years and that on the day in question she had a quarrel with the appellant at her house. It is also clear from the evidence on record that immediately after the quarrel she along with her daughter came to fetch water and when she was returning, the appellant came and threw a burning tonsil on the clothes of the deceased. Since the deceased was wearing a terylene cloth at that relevant point of time, it aggravated the fire which caused the burn injuries.

20. There is also evidence on record to prove and establish that the action of the appellant to throw the burning tonsil was preceded by a quarrel between the deceased and the appellant. From the aforesaid evidence on record it cannot be said that the appellant had the intention that such action on her part would cause the death or such bodily injury to the deceased, which was sufficient in the ordinary course of nature to cause the death of the deceased. Therefore, in our considered opinion, the case cannot be said to be covered under clause (4) of Section 300 of IPC. We are, however, of the considered opinion that the case of the appellant is covered under Section 304 Part II of IPC."

16. In the present case, we have come to the irresistible conclusion that the role of the appellants is clear from the dying declaration and other records. However, the point which has also weighed with this court are that the deceased had survived for around 30 days in the hospital and that his condition worsened after around 5 days and ultimately died of septicemia. In fact he had sustained about 35% burns. In that view of the matter, we are of the opinion that the conviction of the appellants under section 302 of Indian Penal Code is required to be converted to that under section 304(I) of Indian Penal Code and in view of the same appeal is partly allowed.

17. The conviction of the appellants - original accused under Section 302 of Indian Penal Code vide judgment and order dated 19.12.2007 arising from Sessions Case No. 149 of 2007 passed by the Additional Sessions Judge, Fast Track Court No. 6, Ahmedabad is converted to conviction under Section 304 (Part I) of Indian Penal Code. However, the conviction of the appellants - original accused under section 452 of Indian Penal Code is upheld. The appellants - original accused are ordered to undergo rigorous imprisonment for a period of ten years and fine of Rs. 5000/- each in default rigorous imprisonment for six months under section 304 (Part I) of Indian Penal Code instead of life imprisonment and sentence in default of fine as awarded by the trial court under section 302 IPC. The sentence imposed in default of fine under section 452 IPC is also reduced to two months. Accordingly, the appellants are ordered to undergo rigorous imprisonment for a period of ten years and fine of Rs. 5000/-, in default, rigorous imprisonment for six months for offence punishable under section 304(I) of Indian Penal Code and rigorous imprisonment for a period of five years and fine of Rs. 2,000/-, in default, rigorous imprisonment for two months for offence punishable under section 452 of Indian Penal Code. Both sentences shall run concurrently. The judgement and order dated 19.12.2007 is modified accordingly. The period of sentence already undergone shall be considered for remission of sentence qua appellants - original accused. R & P to be sent back to the trial court forthwith."

14. The death was because of after effect of the treatment as she had developed other diseases also and the deceased developed what is known as septicemia.

15. No doubt suspicion, however grave it may be, it can not take place of proof but here we are clear that it is not only suspicion but based on truth and we concur with the learned Judge. This takes us to

the issue of whether the case would fall within under Section 304 or Section 302 I.P.C. We are convinced that from the basis of the postmortem report which was conducted on 3.8.2015, the death was due to ante thermal burns and due to septicemia. The law as far as it concerned septicemia is well settled the death occurred after few days.

16. We come to the definite conclusion that the death was due to septicemia. The judgments cited by the learned counsel for the appellant would permit us to uphold our finding which we conclusively hold that the offence will not be punished under Section 302 of I.P.C. but under section 304 I.P.C.

17. The accused is in jail since 29.9.2015. The decision of this Court and and of the Gujarat High Court in **Gautam Manubhai (Supra)** wherein the undersigned (Dr.K.J. Thaker,J.) was a also a signatory and the decision in **Maniben (Supra)** wherein the Apex Court has converted the conviction under Section 302 of I.P.C. to Section 304 Part II of I.P.C. which will come to the aid of the accused. We are fortified in our view by the decisions in case of **The State of Uttar Pradesh vs. Subhas @ Pappu**, passed in Criminal Appeal No. 436 of 2022 decided on 1.4.2022 and in the case of **Khokan @ Khokhan Vishwas vs. State of Chhattisgarh**, passed in Criminal Appeal No. 121 of 2021.

18. In view of the aforementioned discussion, we are of the view that the appeal has to be partly allowed, hence, it is partly allowed.

19. Appellant-accused is in jail since 29.9.2015, we impose 8 years of incarceration for all the offences and the default sentence is maintained would start after the period of eight years is over, the accused would be entitled to all remissions. The judgment and order impugned in this appeal shall stand modified accordingly.

20. Let a copy of this judgment along with the trial court record be sent to the Court and Jail Authorities concerned for compliance.

21. We are thankful to Sri Abhishek Mayank, learned counsel has ably assisted the Court.

Order Date : 28.2.2023/Faridul.