NON-REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 35 OF 2013

Naresh Kumar .....APPELLANT(S)

Vs.

Kalawati and others .....RESPONDENT(S)

J U D G M E N T

NAVIN SINHA, J.

The appellant, brother of the deceased, is in appeal challenging the acquittal of respondents nos. 1 and 2, the sister-in-law and husband of the deceased, of the charge under Sections 498A and 302/34 I.P.C., affirmed by the High Court.

2. The deceased suffered 95% burn injuries on 17.09.1991 at about 4:30 pm and succumbed in the hospital the next day. There is no eye-witness account. The case of the prosecution is based on circumstantial evidence consisting of the dying declaration of the deceased.

3. The respondents were acquitted as the dying declaration was held not to have been proved in accordance with law and it did not inspire confidence. It vacillated between blaming the husband and the sister-in-law, coupled with the absence of any certificate by the Doctor that the deceased was in a fit state of mind when she made the dying declaration.

4. Shri Rajendra Singhvi, learned counsel for the appellant, submitted that the deceased suffered a homicidal death by burns in the matrimonial home within seventeen months of her marriage. P.W. 13, the Sub-Inspector in the police control room had deposed that P.W. 20, the constable posted in the hospital had informed that the deceased had stated that she had been put on fire by her husband, respondent no.2. The M.L.C. of the deceased recorded at 6:00 pm by Dr. Anant Sinha contained an endorsement that she was conscious. The deceased had stated to the Doctor that she was set ablaze by the wife of his elder brother by pouring kerosene oil upon her while she was making tea. Soon thereafter she made another statement to P.W. 25, the Assistant Sub-Inspector, in presence of the said Dr. Anant Sinha, and who also signed the statement, that her elder sister-in-law, had poured kerosene over

her and set her on fire. The deceased was therefore not only fully conscious, but also in a fit state of mind. Her right toe impression was taken on her statement as her fingers had suffered burn injuries. The mere absence of any endorsement in the dying declaration by the Doctor with regard to fitness of the deceased to make the statement cannot vitiate its evidentiary value. The fitness to make the statement was certified by the Junior Resident Doctor. None of the relatives of the deceased were present at that time. The mere failure of the prosecution to examine Dr. Anant Sinha cannot be fatal to disbelieve the dying declaration and acquit the respondents. The signature of Dr. Anant Sinha has been proved by P.W. 19, the record clerk of the hospital. The appellant had made all efforts to have the Doctor summoned. P.Ws. Nos. 3, 4 and 5, the mother, the sister and the appellant, have also stated that the deceased had told them in the hospital that she was set on fire by her sister-in-law. Respondent Nos. 1 and 2 were having an illicit affair and they considered the deceased as an obstruction because she was objecting to the same. The respondents have wrongly been given the benefit of doubt that the deceased had committed suicide. The respondents have also wrongly been acquitted of the charge under Section 498A. Reliance was placed upon ***State of***

Rajasthan vs. Parthu (2007) 12 SCC 754, ***Sukanti Moharana vs. State of Orissa*** (2009) 9 SCC 163 and ***Heeralal vs. State of Madhya Pradesh*** (2009) 12 SCC 671 in support of the dying declaration.

5. Shri Ramesh Gupta, learned Senior Counsel appearing for respondent nos.1 and 2 submitted that according to the M.L.C., the deceased was only stated to be conscious. There is no evidence that she was fully oriented with a fit state of mind to make a dying declaration. There is no endorsement by the said Dr. Anant Sinha that the deceased was in a fit state of mind to make the declaration and that he was present during recording of the same. The deceased initially named her husband alone as the person who set her on fire. There was no reference to the sister-in-law or any demand for dowry. Subsequently she stated that she had been brought to the hospital by her husband and that she had been set on fire by her sister-in-law. Initially the deceased did not name respondent no.1 to the Doctor at the time of M.L.C., but only stated that she was set on fire by her sister-in-law. The husband lived along with his three brothers and their wives. Subsequently she named respondent no.1 in her statement to P.W. 25. The respondents had taken the defence that the deceased suspected

promiscuous relationship between them and was also frustrated by her inability to conceive and therefore committed suicide by setting herself on fire. The view taken by two courts being a reasonably possible view does not call for interference by this Court. No one has appeared on behalf of the State-respondent no.3.

6. We have considered the submissions on behalf of the parties and have also perused the evidence available on the record. Though the discretionary jurisdiction of this Court under Article 136 of the Constitution is very wide, it has been a rule of practice and prudence not to interfere with concurrent finding of facts arrived at by two courts, by a reappreciation of evidence, to arrive at its own conclusion, unless there has been complete misappreciation of evidence, or there is gross perversity in arriving at the findings, causing serious miscarriage of justice. If the view taken by two courts is a reasonably possible view, this Court would be reluctant to interfere with a concurrent order of acquittal. In ***State of Goa vs. Sanjay Thakran & Ors.***, (2007) 3 SCC 755, it was observed:

> "16. From the aforesaid decisions, it is apparent that while exercising the powers in appeal against the order of acquittal the court of appeal would not ordinarily interfere with the order of acquittal unless the approach of the lower court is vitiated by some manifest illegality and the conclusion arrived at would not be arrived at by any reasonable person and, therefore,

> the decision is to be characterised as perverse. Merely because two views are possible, the court of appeal would not take the view which would upset the judgment delivered by the court below. However, the appellate court has a power to review the evidence if it is of the view that the view arrived at by the court below is perverse and the court has committed a manifest error of law and ignored the material evidence on record. A duty is cast upon the appellate court, in such circumstances, to reappreciate the evidence to arrive at a just decision on the basis of material placed on record to find out whether any of the accused is connected with commission of the crime he is charged with."

7. We shall now consider the facts of the present case in the background of the aforesaid enunciation of the law, to examine if the impugned orders call for interference by us, or not. The deceased was married to respondent no. 2 about 1½ years ago. She suspected a promiscuous relationship between the respondents. The deceased even after 1½ of marriage was unable to conceive. A probable defence has been taken that she committed suicide out of frustration.

8. The deceased had suffered 95% burn injuries at home on 17.09.1991 at about 4:30 pm while making tea. She was brought to Safdarjung Hospital at 6:00 pm. She is said to have initially told the police at the hospital that she had been set on fire by her

husband. The deceased was examined by the said Dr. Anant Sinha at about 6:00 pm and prepared her MLC. She is stated to have told him that she had been set on fire by the wife of her husband's elder brother while making tea. The MLC records her as being fully conscious. It is signed only by the Doctor who has not been examined. The deceased is then stated to have made a dying declaration before P.W. 25 that she was set on fire by respondent no.1 by pouring kerosene oil while she was making tea and that her husband had brought her to the hospital. It bears her right toe impression as her hands were burnt. The statement bears the signature of Dr. Anant Sinha. His signature has been proved by P.W. 19. But it does not bear any endorsement by the Doctor with regard to his presence during the recording of the same and the fit state of mind by the deceased to make the statement. P.W. nos. 3 and 4 have stated that the deceased told them that she was set on fire by respondent no.1. P.W. 5 has stated that both the respondents have killed his sister. He then states that the deceased had told him she was set on fire by respondent no.1.

9. A dying declaration is admissible in evidence under Section 32 of the Indian Evidence Act, 1872. It alone can also form the basis for conviction if it has been made voluntarily and inspires

confidence. If there are contradictions, variations, creating doubts about its truthfulness, affecting its veracity and credibility or if the dying declaration is suspect, or the accused is able to create a doubt not only with regard to the dying declaration but also with regard to the nature and manner of death, the benefit of doubt shall have to be given to the accused. Therefore much shall depend on the facts of a case. There can be no rigid standard or yardstick for acceptance or rejection of a dying declaration.

10. The first statement of the deceased made to P.W. 13 is based on hearsay as deposed by P.W. 20 that she was set on fire by respondent no.2. There is no reference to respondent no.1 in this statement and neither has she said anything about dowry demand. The next statement of the deceased, blaming respondent no.1 alone does not name respondent no1. It is not signed by anybody and the Doctor who recorded the statement has not been examined. Merely because his signature has been identified by P.W. 19 cannot establish the correctness of its contents. The next statement of the deceased has been recorded by P.W. 25, blaming respondent no.1 alone without any allegation against respondent no.2, and on the contrary states that she was brought to the hospital by respondent no.2. It again does not disclose any dowry demand.

11. P.W. 25 who recorded the dying declaration does not state that the deceased was in a fit state of mind to make the statement. He states that the Doctor had certified fitness of mind of the deceased, when the dying declaration itself contains no such statement. In cross examination he acknowledges that the fitness of the deceased was certified by a resident junior doctor separately but whose signature and endorsement is not available on the dying declaration. At this stage it is relevant to notice the statement of P.W. 19 who acknowledges that Dr. Anant Sinha has not signed in his presence and that at times doctors would come and put their signatures in the record room.

12. In ***Paparambaka Rosamma and others vs. State of Andhra Pradesh***, (1999) 7 SCC 695, distinguishing between consciousness and fitness of state of mind to make a statement, it was observed:

> "9. It is true that the medical officer Dr K. Vishnupriya Devi (P.W. 10) at the end of the dying declaration had certified "patient is conscious while recording the statement". It has come on record that the injured Smt Venkata Ramana had sustained extensive burn injuries on her person. Dr P. Koteswara Rao (P.W. 9) who performed the post-mortem stated that the injured had sustained 90% burn injuries. In this case as stated earlier, the prosecution case solely rested on the dying declaration. It was, therefore, necessary for the prosecution to prove the dying declaration as being genuine,

> true and free from all doubts and it was recorded when the injured was in a fit state of mind. In our opinion, the certificate appended to the dying declaration at the end by Dr Smt K. Vishnupriya Devi (P.W.10) did not comply with the requirement inasmuch as she has failed to certify that the injured was in a fit state of mind at the time of recording the dying declaration. The certificate of the said expert at the end only says that "patient is conscious while recording the statement". In view of these material omissions, it would not be safe to accept the dying declaration (Ex. P-14) as true and genuine and as made when the injured was in a fit state of mind. In medical science two stages namely conscious and a fit state of mind are distinct and are not synonymous. One may be conscious but not necessarily in a fit state of mind. This distinction was overlooked by the courts below."

13. In the facts and circumstances of the present case, considering that the statements of the deceased have vacillated, there is no evidence about the fitness of mind of the deceased to make the dying declaration including the presence of the Doctor, the veracity and truthfulness of the dying declaration remains suspect. It would not be safe to simply reject the probable defence of suicide, to reverse the acquittal and convict the respondents.

14. ***Parthu*** (Supra) is distinguishable on its facts. Despite the absence of a certificate of fitness of state of mind on the dying declaration, the Doctor was examined as a witness and proved the fitness of the state of mind.

15. ***Sukanti*** (supra) is again distinguishable on its own facts as follows:

> "25. Further, though no specific endorsement has been made on the dying declaration but there is contemporaneous evidence in the form of Ext. 9/1 which makes it clear that the Doctor recording the dying declaration had recorded that the patient was oriented to time and place and mentally clear at the time of recording of the dying declaration.
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> 35. The Doctor who recorded the dying declaration was examined as a witness and he had in his deposition categorically stated that the deceased while making the aforesaid statement was conscious and in a fit mental condition to make such a statement. The aforesaid position makes it therefore clear that the aforesaid dying declaration could be relied upon as the same was truthfully recorded and the said statement gave a vivid account of the manner in which the incident had taken place."

16. In ***Heeralal*** (supra), noticing the discrepancies in the two dying declarations, it was held that the conviction could not be founded upon the dying declaration.

17. The appeal is, therefore, dismissed.

.....J.
(NAVIN SINHA)

.....J.
(KRISHNA MURARI)

NEW DELHI,
MARCH 25, 2021