GHULAM HUSSAIN AND ANR. A

v.

STATE OF DELHI

AUGUST 4, 2000

[K.T. THOMAS AND R.P. SETHI, JJ.] B

Evidence Act, 1872—Section 32—Dying declaration—Admissibility of—Held, on facts, dying declaration is corroborated by material facts and therefore valid—Penal Code, 1860—Section 302.

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Deceased died on account of burn injuries. The statement of the deceased was recorded by Assistant Sub-Inspector of Police (ASI) at the hospital. Magistrate also recorded the statement of the deceased separately. The deceased stated that he had strained marital relations with his wife; his wife went to her father's house; he went there to take his wife back; on refusal by his father-in-law, the deceased slept in a tea shop situated in a corner of the house for three days; next day very early in the morning he was woken up from sleep; his co-brother held both his hands from behind; his father-in-law asked the wife of the deceased to bring kerosene; she brought kerosene in a container and gave it to her father; he poured the kerosene on his son-in-law forcibly; and was set ablaze by the brother-in-law of the deceased. The statements of the deceased were treated as dying declarations after his death. The Additional Sessions Judge convicted the wife, father-in-law, brother-in-law and co-brother of the deceased under Section 302 IPC and sentenced them to imprisonment for life with a fine of Rs. 500 each. The High Court dismissed the appeals of all the accused. It, however, rejected the dying declaration recorded by the Magistrate on the ground that the prosecution has failed to fully establish the recording of it.

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In appeal to this Court, the accused-appellants contended that the dying declaration of the deceased was not corroborated by any other evidence; that the dying declaration was recorded in suspicious circumstances which cannot be held to have been proved; that the statement of the deceased was recorded by investigating officer which was subsequently treated as First Information Report (FIR) and, therefore, the same could not be treated as dying declaration admissible in evidence.

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A The prosecution contended that the dying declarations have been duly recorded and the material facts are corroborated by other evidence.

Disposing of the appeals, the Court

HELD 1.1. Section 32 of the Evidence Act, 1872 is an exception to the
B general rule of exclusion of hearsay evidence and the statement made by a person written or verbal of relevant facts, after the death of the person, is admissible in evidence if it refers to the cause of the death or any circumstances of the transactions which resulted in death. It cannot, however, be said that the statement recorded by the investigating officer which was treated as FIR later could not be treated as dying declaration and
C inadmissible in evidence, because at the time of recording the statement the ASI did not possess the capacity of an investigating officer as the investigation had not commenced by then. Such a statement can be treated as a dying declaration which is admissible in evidence under Section 32(1) of the Act. The statement was voluntarily made by the deceased which was reduced to
D writing and have rightly been treated as dying declaration after the death of the maker. The deceased has referred to the circumstances which ultimately proved to be the cause of his death. Nothing has been pointed out by the appellants which could create any doubt regarding the making or admissibility in evidence of the statement. [146-C; 145-H; 146-A-B; D-E]

E 1.2. The High Court is right in rejecting the dying declaration recorded by the Magistrate on the ground that the prosecution has failed to fully establish the recording of the statement. [147-C]

1.3. On close scrutiny it is seen that the dying declaration of the ASI is the truthful version of the occurrence which narrates the circumstances
F leading to the death of its maker. As the said statement was made immediately after the occurrence, there is no reason doubt its veracity and correctness. The circumstances surrounding the dying declaration are clear and convincing which is found to be corroborated in material particulars. [148-H; 149-A]

G *Khushan Rao* v. *State of Bombay,* [1958] SCR 552; *Munna Raja* v. *State of Madhya Pradesh,* [1976] 2 SCC 764, relied on.

2. The wife of the deceased could not have held a common intention with the other accused persons in committing the crime of murdering her husband. When her father had asked her to bring kerosene she did so without
H knowing for the purpose. It cannot be denied that kerosene might have been

obtained to put the deceased in fear or force him to go away from the house of his in-laws. No other overt act is attributed to the wife who is the unfortunate widow of the deceased. Similarly the prosecution has not proved its case beyond doubt so for as the co-brother of the deceased is concerned. He is stated to have caught hold of both the hands of the deceased. If the deceased was intended to be killed by setting him on fire, it could have been done while he was asleep. There was no reason to wake him up which could have necessitated catching hold of his hands by the co-brother apparently to over-power him. The mere presence of the co-brother would have prompted the deceased to mention his name in the statement but the said co-brother cannot be said to have shared the alleged common intention of causing the death of the deceased. It is true that the intention to commit murder could emerge at any time but such intention has to be gathered from the circumstances of each case. It might be that the co-brother had accompanied his in-laws to see that the deceased did not create problem by remaining as an unwanted guest in their house. Thus the prosecution has failed to prove its case against the wife and the co-brother beyond all reasonable doubts. Therefore, the two appellants are entitled to the benefit of doubt. Their conviction and sentence are set aside. [149-C-H]

3. So far as father-in-law and the brother-in-law are concerned, the prosecution has proved its case beyond all reasonable doubts that they had shared the common intention to kill the deceased in furtherance of which one poured the kerosene oil on deceased and the other lit him on fire. Hence their conviction and sentence are confirmed. [150-A]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 781 of 1998.

From the Judgment and Order dated 19.11.96 of the Delhi High Court in Crl.A. No. 132 of 1994.

WITH

Criminal Appeal No. 782 of 1998.

From the Judgment and Order dated 19.11.96 of the Delhi High Court in Crl.A. No. 192 of 1993.

WITH

Criminal Appeal No. 783 of 1998.

A From the Judgment and Order dated 19.11.96 of the Delhi High Court in Crl.A. No. 230 of 1994.

K.N. Shukla, Jagdev Singh Manhas (A.C.), A.S. Rawat, Ms. Sushma Suri and C. Ravichandran Iyer Adv. (A.C.) for the appearing parties.

B The Judgment of the Court was delivered by

SETHI, J. The appellant Ms.Shabnam is the wife, appellant Gulam Hussain, is the father-in-law, appellant Roshan is the brother-in-law and appellant Shakil Ahmad is the co-brother of the deceased Islamuddin who died C on 13.10.1989 of the burn injuries caused on his person by the appellants. Upon conclusion of the trial, the court of Additional Sessions Judge, Delhi convicted the appellants under Section 302 IPC and sentenced them to undergo imprisonment for life and to pay a fine of Rs.500 each. The appeals filed against the conviction and sentence were dismissed by the High Court of Delhi D vide the judgments impugned in these appeals which have been preferred by the appellants from the jail.

We have heard Shri Jagdev Singh Manhas, *amicus curaie* appointed and Shri K.N. Shukla, Senior counsel who appeared for the respondents.

E According to the prosecution FIR was registered on the basis of statement of the deceased which was recorded after he was admitted in LNJP Hospital. In the statement Islamuddin had stated that he was married to appellant Shabnam, daughter of Gulam Hussain about 5-6 months before the date of occurrence. When he came to Jhuggi No.215, near Public Latrine, F Sanjay Amar Colony, Boat Bridge, Yamuna Pushta about 7-8 days before the occurrence to take back Ms.Shabnam, a quarrel ensued between him and Shabnam because of her having brought with her gold and silver ornaments worth Rs.5,000. As Shabnam was not sent along with him he slept for three nights in a tea shop which was situated on the corner of the house of his father-in-law and he was not allowed to live in Jhuggi with other members of Gulam G Hussain. On 13.10.1989 at about 3.30 a.m. all the three male accused came on the spot where he was sleeping and woke him up. Shakil Ahmad caught hold of his both hands from behind. His father-in-law asked Shabnam to bring kerosene oil which she brought in a small container and handed over the same to her father who poured kerosene oil on Islamuddin forcibly and Roshan H thereafter set him ablaze. The neighbourers came there and tried to extinguish

the fire while crying "Bachao-Bachao" (save-save), he reached near the iron bridge where a policeman got him seated in a three wheeler scooter for being taken to the hospital. PW22 Balwan Singh is stated to have recorded his statement which was later on treated as his dying declaration.

To prove the case against the appellants, the prosecution examined PW1 Constable Rajbir Singh, PW2 Constable Naubat Singh, PW3 Constable Jit Singh, PW4 lady constable Tara, PW5 Constable Krishan Pal, PW6 Inspector Davinder Singh, PW7 ASI Budhi Singh, PW8 Shashi Dharan, PW9 Nannay Khan, PW10 Inspector Niranjan Singh, PW11 Constable Balbir Singh, PW12 Mohd. Satter, PW13 Laloo, PW14 Dr.B.N. Acharya, PW15 Constable Krishan Kumar, PW16 Dr.George Paul, PW17 Constable Krishan Kumar, PW18 Aslam, PW19 S.N. Shai, PW20 Constable Surinder Singh, PW21 Head Constable Prem Pal Singh, and PW22 ASI Balwan Singh. Besides oral testimony of the witnesses, the prosecution relied upon two written dying declarations i.e. Exhibit PW19/A and Exhibit PW22/B.

Despite various opportunities granted, the accused did not lead any evidence.

Learned counsel appearing for the appellants has vehemently argued that as there was no direct evidence in the case it was not proper for the courts below to convict and sentence the appellants merely relying upon the dying declaration which, according to him, was not corroborated by any other witness in its material particulars. He has further contended that the dying declarations having been recorded in suspicious circumstances cannot be held to have been proved. Per contra, the learned Senior Advocate appearing for the respondent submitted that the dying declarations have been duly recorded and the material facts corroborated by other evidence produced in the case.

Exhibit PW22/B was recorded by PW22 ASI Balwan Singh in the hospital on 14.10.1989 at about 6.30 a.m. after getting an opinion from the Doctor that the injured was fit for statement. The endorsement of the doctor is recorded as Exhibit PW22/A. Learned counsel appearing for the appellants submitted that as the statement was recorded by the investigating officer which was treated as FIR, the same could not be treated as dying declaration and was inadmissible in evidence. The submission has no substance because at the time of recording the statement PW22 Balwan Singh did not possess the capacity

A of an investigating officer as the investigation had not commenced by then. Such a statement can be treated as a dying declaration which is admissible in evidence under Section 32(1) of the Evidence Act. After critically scanning the statement of PW22 ASI Balwan Singh and details of Exhibit PW22/B, we have no hesitation to hold that the aforesaid statement was voluntarily made
B by the deceased which was reduced to writing and have rightly been treated as dying declaration after the death of the maker.

Section 32 of the Evidence Act is an exception to the general rule of exclusion of hearsay evidence and the statement made by a person written or verbal of relevant facts after his death is admissible in evidence if it refers to
C the cause of his death or any circumstances of the transactions which resulted in his death. To attract the provisions of Section 32, the prosecution is required to prove that the statement was made by a person who is dead or who cannot be found or whose attendance cannot be procured without any amount of delay or expense or he is incapable of giving evidence and that such statement had
D been made under any of the circumstances specified in sub-sections (1) to (8) of Section 32 of the Evidence Act. It cannot be disputed that Islamuddin who made a statement PW22/B has died and in his deposition he has referred to the circumstances which ultimately proved to be the cause of his death. Nothing has been pointed out by the defence side which could create any doubt in our mind regarding the making or admissibility in evidence of the statement
E Exhibit PW22/B.

Assailing dying declaration PW19/A, the learned counsel has submitted that as the witnesses to it, namely, PW12 Mohd.Satter and PW18 Aslam who are real brothers of the deceased have not supported the prosecution
F version and there existed other circumstances which created suspicion, it was not safe to hold the said dying declaration to have been proved. It is submitted that the SDM has not assigned any reason in Exhibit PW19/A for not recording the statement himself. However, during the trial he has submitted that as one of his finger was injured, he dictated the dying declaration to PW22 Balwan Singh. PW22 Balwan Singh in turn has stated that
G he had not recorded PW19/A. Learned counsel also drew our attention to the two aforesaid statements and urged that as on the face of it PW22/B and PW19/A do not appear to have been written by one and the same person, reliance upon PW19/A and by treating it a dying declaration would be unsafe. Accepting such a contention of the accused persons, the High Court in this
H regard had concluded:

"Thus, the statements of both PWs 12 & 18 coupled with the observation made by the above fully support the submission referred to above advanced on behalf of the accused in regard to Ex.PW19/A not having been made by the deceased before PW19. Trial Court had acted erroneously in relying upon Ex.PW19/A. It has to be excluded from consideration for recording the finding of guilt against the accused."

We also agree with the findings of the High Court and feel that the prosecution has failed to fully establish the recording of Exhibit PW19/A. However, in view of our finding that Exhibit PW22/B has been proved to be a dying declaration of the deceased we do not find any inherent weakness in the case of the prosecution which would *per se* entitle the appellants to acquittal.

It is well settled that dying declaration must be dealt with caution for the reason that the maker of the statement had not been subjected to cross-examination. There is no rule of law or rule of prudence that dying declaration cannot be accepted unless it is corroborated. [*Khushan Rao* v. *State of Bombay*, [1958] SCR 552; *Munna Raja* v. *State of Madhya Pradesh*, [1976] 2 SCC 764.

However, as prosecution is left with only one dying declaration, namely, PW22/B, we feel that in the instant case it would not be safe to convict the appellants only on the basis of the aforesaid dying declaration unless corroborated in other material particulars. We have found sufficient corroboration in this case. The contents of the dying declaration are to the effect that the deceased was married to Ms.Shabnam, daughter of Gulam Hussain, resident of Jhuggi No.215, near Public Latrine, Sanjay Amar Colony, Boat Bridge, Yamuna Pushta about 5- 6 months before the occurrence. 7-8 days before the date of making the statement he had come at the residence of Gulam Hussain to take his wife back. After 2-3 days of his coming he had a quarrel with his wife because she had brought gold and silver ornaments worth Rs.5,000 with her from his house without his consent. He spent three nights at a tea shop in front of the house of his father-in-law as he was not allowed to stay in the house with other members of Gulam Hussain. On that day he went to sleep in the house of his father-in-law who had called him there. He slept on a "Rehari" (moving-cart) outside the house of his father-in-law. At about 3.30 a.m. his co-brother Shakil Ahmad, his father-in-law Gulam Hussain and brother-in-law

A Roshan came there and woke him up. Shakil Ahmad, appellant caught hold of his both the hands from behind. His father-in-law asked Shabnam to bring kerosene which she brought in a small container and handed over to her father who poured it upon with the intention to burn him and Roshan set him ablaze. He raised alarm upon which neighbourers B came there and tried to extinguish the fire. He ran in flames crying "Bachao-Bachao" (save-save) near iron bridge. He met with one policeman whom he stated that his in-laws have burnt him. The policeman made him seat in a three wheeler scooter and brought him to the hospital. The material facts of the case as disclosed in the dying declaration that (i) the deceased was married to Ms. Shabnam with whom the relations had been strained; (ii) the C in-laws of the deceased were not permitting his wife to go back with him; (iii) he had come from his village in Bijnor, District of U.P.; (iv) he was set ablaze by his in-laws in consequence of which he ultimately died; stand proved by the prosecution. PW2 has corroborated the version of the dying declaration by stating that he had seen the deceased in burnt D conditions with cries 'Jala diya, jala diya, bachao-bachao' (burnt-burnt, save-save). Upon enquiry he had told him that he had been burnt by his in-laws. PW5 Krishan Pal Singh has stated that from the place of incident ASI Balwan Singh had seized one small container of kerosene, one match-box containing match sticks, one purse, two sheets of paper and one shirt in burnt E conditions. PW9 Nanhe Khan though declared hostile has admitted that at about 2.30 a.m. when he was going to fetch water for his child, he had seen the deceased running with his clothes on flames. PW13 Laloo who was also declared hostile has admitted that he had heard noise and saw Islamuddin in flames. Later he informed the accused persons that the man in flames was running from their side of Jhuggi. PW16 Dr. George Paul has stated that in F his opinion the deceased had died due to septicaemia and toxaemia and that his body had burn injuries. PW19 S.N. Shai, the then SDM has referred to the recording of statement Exhibit PW19/A, the narration of which is almost idential as detailed in Exhibit PW22/B. It is worthwhile to mention that all the four accused were arrested immediately after recording of the statement of the G deceased and registration of the case against them. It is, therefore, evident that the material facts stated in the Exhibit PW22/B have been corroborated by various witnesses and the attending circumstances of the case.

Upon close scrutiny we have no hesitation to hold that the dying declaration Exhibit PW22/B is the truthful version of the occurrence H which narrates the circumstances leading to the death of its maker. As

the said statement was made immediately after the occurrence, there is no reason to doubt about its veracity and correctness. The circumstances surrounding the dying declaration are clear and convincing which we have found to be corroborated in material particulars. The general criticism of the defence cannot, in any way, be made a basis for discarding the aforesaid statement which was later on rightly treated as dying declaration of the deceased.

On proof of a valid dying declaration it has to be determined as to all or any of the accused are guilty of offence for which they have been charged, convicted and sentenced. It appears to us that role of Ms.Shabnam is not such which could be made a basis of her holding a common intention with the other accused persons in committing the crime of murdering Islamuddin. Without declaring as to what was to be done with the kerosene, her father had asked her to bring it which she did apparently without knowing for what purpose the kerosene had been obtained by her father. It cannot be denied that kerosene might have been obtained to put the deceased in fear or force him to go away from the house of his in-laws where he was stated to have been staying for about 7-8 days before the date of occurrence. No other overt act is attributed to Ms.Shabnam who is the unfortunate widow of the deceased. Similarly we find that the prosecution has not proved its case beyond doubt so far as Shakil Ahmad is concerned. He is the co-brother of the deceased and is stated to have caught hold of both the hands of the deceased. If the deceased was intended to be killed by setting him on fire, it could have been done while he was asleep. There was no reason of waking him up which could have necessitated catching hold of his hands by Shakil Ahmad apparently to over-power him. The mere presence of Shakil Ahmad would have prompted the deceased to mention his name in the statement but the said appellant cannot be held to have been proved to be sharing the alleged common intention of causing the death of Islamuddin. It is true that the intention to commit murder could emerge at any time but such intention has to be gathered from the circumstances of each case. It cannot be excluded that Shakil Ahmad might have accompanied his in-laws to see that his co-brother does not create any problem by remaining as an unwanted guest in and around their house for 7-8 days. There is no evidence on record to suggest that any of the accused had indicated their intention to kill the deceased. We feel that the prosecution has failed to prove its case against appellants Ms.Shabnam and Shakil Ahmad beyond all reasonable doubts. In our opinion these two appellants are entitled to the

A benefit of doubt.

So far as Gulam Hussain and his son Roshan are concerned, the prosecution has proved its case beyond all reaosnable doubts that they had shared the common intention to kill the deceased in furtherance of which one poured the kerosene oil on deceased's body and the other lit him on fire.

B

Under the circumstances Appeal No.782/98 filed by Shabnam is allowed and Appeal No.781/98 is partly allowed, so far as accused Shakil Ahmad is concerned by setting aside the judgment of conviction and sentence passed against them. They are acquitted and directed to be set at liberty immediately unless required in some other case. There is no merit in Appeal No.783/98 filed by Roshan and Appeal No.781/98 so far as appellant Gulam Hussain is concerned, and the same are dismissed.

C

B.S. Crl. A. No. 781/98 partly allowed.
Crl. A. No. 782/98 allowed.
Crl. A. No. 783/98 dismissed.