REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 2153 OF 2011

Vijay Pal ... Appellant

Versus

State (GNCT) of Delhi ... Respondent

J U D G M E N T

Dipak Misra, J.

In this appeal, the assail is to the judgment and order dated 31.8.2009 passed by the High Court of Delhi in Criminal Appeal No. 417 of 2001 whereby the Division Bench has dismissed the appeal while affirming the judgment and order dated 17.01.2001 of the learned Additional Sessions Judge, Delhi in Sessions Case No. 27 of 1998 whereunder the trial Court had convicted the appellant under Section 302 of the Indian Penal Code (for

short “the I.P.C.”) and sentenced him to suffer rigorous imprisonment for life.

2. Filtering the unnecessary details the case of the prosecution is that the deceased, Savitri, had entered into wedlock with the appellant herein prior to almost eleven years of the date of occurrence i.e. 2.11.1997. The parental home of the deceased was situated at a distance of half a kilometer. On the fateful day i.e. 2.11.1997 about 11:00 p.m., Seema, PW-3, daughter of the deceased, aged about ten years, came running to the house of her grandfather Shivcharan, PW-8, and informed him as well as Satish, brother of the deceased, PW-1, that her father was threatening to burn her mother. The information compelled PWs 1 and 8 to rush to the house of the deceased and, as the factual matrix would show, PW-1, being young in age, reached the house of his sister earlier than his father and found his sister was burning and she told him that it was the accused-appellant who had put her ablaze by pouring kerosene. The brother poured water on the deceased in order to extinguish the fire and thereafter took her to Deen Dayal Upadhyay

Hospital where she could not be admitted due to lack of facility and thereafter they brought her to Safdarjung Hospital where she was admitted. Despite availing treatment, she breathed her last on 3.11.1997 about noon. It is necessary to mention here that after the deceased was taken by her father and brother to the hospital, two neighbours, namely, Shanker Lal and Surender, PW-2 and PW-4 respectively went to the Police Station at Mangol Puri and gave the information about the incident by DD-73 dated 2.11.1997 on the basis of which, the S.I. Vijender Singh, PW-21, went to the place of the occurrence where he met PW-3, the daughter of the deceased, and came to learn that her parents had quarreled and her mother had suffered burn injuries and was taken to the hospital.

3. In the meantime, information was received at the police station from Safdarjung Hospital that the deceased had been admitted there and on the basis of the said information, the police rushed to the hospital where they met PWs 1 and 8. As the prosecution case would further unfurl after the death took place they proceeded with the

investigation, seized the burnt clothes, a quilt, one plastic cane, one match-box and match stick and sent the dead body for post mortem. The investigating agency in course of investigation arrested the husband on 03.11.1997 and after recording the statements of number of witnesses laid the chargesheet for the offence punishable under Section 302 IPC before the competent Court, which in turn committed the matter to the Court of Session and eventually it was tried by the learned Additional Sessions Judge.

4. The accused abjured his guilt and pleaded that he was not at home as he had gone to his sister's place, Shyamwati, DW-1 at MJ-1/61, Vikas Puri, Delhi and claimed to be tried.

5. The prosecution in order to substantiate the charges leveled against the accused person, examined as many as 21 witnesses and got number of documents exhibited. On the basis of the ocular and the documentary evidence, the learned trial Judge came to hold that the prosecution had established the charge levelled against the accused to the hilt and accordingly convicted him under Section

302, I.P.C and imposed the sentence as has been stated hereinbefore.

6. On an appeal being preferred, the High Court reappreciating the evidence and placing reliance on the oral dying declaration and the testimony of the brother and further accepting the post mortem report found that the learned trial Judge had really not faulted in recording the conviction. Being of this view, it dismissed the appeal.

7. We have heard Ms. Nupur Choudhary, Advocate (Amicus Curiae) for the appellant and Mr. W.A. Quadri, counsel for the State.

8. It is submitted by Ms. Nupur Choudhary, learned Amicus Curiae that the learned trial Judge as well as the High Court has erroneously recorded the conviction against the appellant though PW-3, the daughter of the deceased, had not supported the case of the prosecution and she being the principal witness, the accused deserved to be acquitted. It has been urged by her that High Court has flawed by placing reliance on the oral dying declaration of the deceased when she had suffered

serious burn injuries, and in such a situation it could not be possible on her part to tell anything to her brother. She has seriously criticized the judgment of the High Court in not accepting the plea of alibi advanced by the accused which had a solid foundation, for the fateful day was “Bhaiya Dooj” and, therefore, the accused had gone to his sister’s place as per the tradition.

9. Mr. Quadri, learned counsel for the State, per contra, would contend that though the daughter of the deceased, PW-3, has turned hostile yet her evidence cannot totally be brushed aside as both the prosecution and the defence can rely on such parts of the testimony which are favourable to them. It is his further submission that the oral dying declaration which has been stated by the brother of the deceased in his testimony has been proven beyond any trace of doubt and despite the roving cross-examination, he has remained absolutely firm and nothing has been elicited to discard his version and, therefore, neither the learned trial Judge nor the High Court has faulted in placing reliance on it. Pertaining to the plea of alibi, learned counsel would submit that the

said plea has not been established by the accused as required under the law and the material brought on record by the prosecution do clearly demonstrate that at the relevant time he was at home. In essence, it is urged by him that when these aspects are appreciated in a seemly manner, the cumulative effect would go a long way to show that the appellant has been appositely convicted by the learned trial Judge and the High Court has absolutely correctly concurred with the same.

10. To appreciate the rivalised submissions raised at the bar, we have perused the judgments of the trial Court and the High Court with concerned anxiety and cautiously scrutinized the evidence on record. As we find, there are basically seven witnesses whose evidence are important, they are Satish, brother of the deceased, PW-1, Shivcharan, father of the deceased, PW-8, Dr. G.K. Chaubey, who conducted the post mortem, PW-5, Seema, daughter of the deceased, PW-3, Shanker Lal, PW-2 and Surender, PW-4 who informed the police at the first instance and Vijender Singh, PW-21, the sub-Inspector who recorded the statement. At this juncture, it is

necessary to mention that apart from PW-3, PWs 2, 4 and 8, were also declared hostile by the prosecution and were cross-examined by the state. In this backdrop, it is to be seen whether the material brought on record is sufficient enough to sustain the conviction on a scrutiny of the Exbts. PW-1/A, PW-1/B, PW-1/D, PW-1/E, PW-1/F and Exbt. P-2 that were seized.

11. From the oral evidence and the seized items from the place of occurrence, it is quite vivid that the deceased had suffered burn injuries which lead to her death. It was PW-3, the daughter of the deceased, who witnessed the quarrel and rushed to the home of her grandparents. The learned trial Judge has put the relevant question to her to find out whether she was in a position to understand the questions and depose in Court. In her evidence, she had stated that on the fateful day about 11.00 p.m. her mother was preparing food for the children and for the said purpose she was pouring kerosene oil in the stove as it was empty and thereafter when she tried to light the stove, the kerosene oil was not coming from the nozzle of the stove, then the deceased inserted a pin in the nozzle

and the oil sprinkled on her and in the process she caught fire. On being declared hostile, she was cross-examined. It is relevant to note here that she has first deposed that she was not aware who had removed her mother to the hospital and thereafter changed her stand stating that her uncle had removed her mother. As her testimony would show she has not mentioned whereabouts of her father at the time of the incident. Her ignorance about how the mother was shifted to the hospital shows that as the High Court has correctly analysed, she has not spoken anything about her father in order to protect him. Keeping in abeyance whether the plea of alibi taken by the accused is proven or not to be dealt with at a later stage, we think it apposite to scan the evidence of other witnesses. PW-1, the brother of the accused, has unequivocally deposed that after getting the information from Seema, PW-3, his father and he rushed to the house of the deceased. As is evincible from the testimony, he reached the house of the sister first and found she was burning and she told him that his brother-in-law had poured kerosene and put her ablaze. She has also stated

that the children should not be given to the accused. He has, in detail, spoken about going to the hospital and how the site plan was prepared and the items were seized in presence of the witnesses. In the cross-examination, no suggestion has been given about the absence of husband in the house, contrivance of the dying declaration by him or anything which would create a dent in his testimony. What has been sought to be brought in the cross-examination is that no one was present in the room of the deceased and certain other questions which have nothing to do with the incident. It has been suggested to him that his sister and the accused had kept Rs.90,000/- with his father, PW-8, for purchasing a house and as they refused to return the money, they had, getting an opportunity, falsely implicated the accused. It has also come out in the cross-examination that the accused was a habitual drinker and gambler and his family was supported by the in-laws.

12. At this stage it would be appropriate to state that the trial court and the High Court have placed reliance on the post-mortem report. Dr. G.K. Choubey, PW5, who had

conducted the post-mortem on the dead body of the deceased had found the following injuries:-

> "Superficial to deep burn injury over all the body surface area including scalp, skin peeled off at various places, margins red underneath tissues bright red and there was blackening of skin over various area. Skin was peeled off at soles, but not at palms. Venisection at left leg above medial malleolus was present."
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> It was 100 per cent antemortem deep burns. Internal examination revealed that Larynx contained soot particles and rest of the organs were found to be congested."

13. In the cross-examination he has categorically denied the suggestion that the injuries received by the deceased could have been sustained because of kerosene oil from the stove fell on her body due to the pinning of the stove and also by fall of a tin of kerosene oil on the floor. He has deposed without any equivocation that the burn injuries sustained by the deceased were not possible due to accidental burns. The High Court has taken note of the FSL Report, Ext. PW 20/B, from which it is evident that the analysis by gas liquid chromatography showed, kerosene oil residues were found on the scalp hair of the deceased. It is apt to note that the presence of kerosene on the scalp hair of the deceased and presence of dust particles

in the larynx of the deceased clearly evince that kerosene oil was poured on the skull of the deceased which could not have happened by accident. The testimony of the daughter, Seema, PW-3, a young girl of ten years that the kerosene oil accidentally spilled on the body of her mother is thus absolutely unbelievable. We are disposed to think so when we weigh the medical testimony vis-a vis the ocular testimony. There is no dispute that the value of medical evidence is only corroborative. It proves that the injuries could have been caused in the manner as alleged and nothing more. The use which the defence can make of the medical evidence is to prove that the injuries could not possibly have been caused in the manner alleged and thereby discredit the eye-witnesses. Unless, however the medical evidence in its turn goes so far that it completely rules out all possibilities whatsoever of injuries taking place in the manner alleged by eyewitnesses, the testimony of the eye-witnesses cannot be thrown out on the ground of alleged inconsistency between it and the medical evidence. It is also true that the post-mortem report by itself is not a substantive

piece of evidence, but the evidence of the doctor conducting the post-mortem can by no means be ascribed to be insignificant. The significance of the evidence of the doctor lies vis-à-vis the injuries appearing on the body of the deceased person and likely use of the weapon and it would then be the prosecutor's duty and obligation to have the corroborative evidence available on record from the other prosecution witnesses. It is also an accepted principle that sufficient weightage should be given to the evidence of the doctor who has conducted the post-mortem, as compared to the statements found in the textbooks, but giving weightage does not ipso facto mean that each and every statement made by a medical witness should be accepted on its face value even when it is self-contradictory. It is also a settled principle that the opinion given by a medical witness need not be the last word on the subject. Such an opinion shall be tested by the Court. If the opinion is bereft of logic or objectivity, the court is not obliged to go by that opinion. That apart, it would be erroneous to accord undue primacy to the hypothetical answers of medical witnesses

to exclude the eyewitnesses' account which are to be tested independently and not treated as the 'variable' keeping the medical evidence as the 'constant'. Where the eyewitnesses' account is found credible and trustworthy, a medical opinion pointing to the alternative possibilities cannot be accepted as conclusive. [***See: Solanki Chimanbhai Ukabhai v. State of Gujrat***[1]***, State of Haryana v. Ram Singh***[2]***, Mohd. Zahid v. State of T.N.***[3]***, State of Haryna v. Bhagirath***[4] ***and Abdul Sayeed v. State of M.P.***[5]]

14. Having stated about the medical evidence that has been brought on record and how such an evidence is to be valued, we think it apt to dwell upon the oral dying declaration which has been placed reliance upon by the trial Court as well as the High Court. As per the evidence of the brother, Satish, PW-1, he after reaching the place of occurrence found his sister ablaze and she had stated that her husband has poured kerosene on her and put her ablaze. There is material to show that the father,

[1] (1983) 2 SCC 174
[2] (2002) 2 SCC 426
[3] (1999) 6 SCC 120
[4] (1999) 5 SCC 96
[5] (2010) 10 SCC 259

Shivcharan, PW-8, arrived after his son. The prosecution has explained about the delayed arrival of the father.

15. The submission of the learned counsel for the appellant is that the oral dying declaration lacks intrinsic truth and it does not deserve acceptance. At this juncture we think it appropriate to refer to certain authorities how an oral dying declaration is to be scrutinized.

16. In the case of ***Laxman v. State of Maharashtra***[6], the Constitution Bench has held thus:

> "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 the deathbed 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 courts insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and

[6] (2002) 6 SCC 710

> correctness. The court, however, has always to 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 looks up to the medical opinion. But where the eyewitnesses 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 any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite."

17. The aforesaid judgment makes it absolutely clear that the dying declaration can be oral or in writing and any adequate method of communication whether by words or by signs or otherwise will suffice, provided the communication is positive and definite. There cannot be any cavil over the proposition that a dying declaration cannot be mechanically relied upon. In fact, it is the duty of the Court to examine a dying declaration with studied scrutiny to find out whether the same is voluntary,

truthful and made in a conscious state of mind and further it is without any influence.

18. At this juncture, we may quote a passage from ***Babulal v. State of M.P.***[7] wherein the value of dying declaration in evidence has been stated:-

> "7. ... A person who is facing imminent death, with even a shadow of continuing in this world practically non-existent, every motive of falsehood is obliterated. The mind gets altered by most powerful ethical reasons to speak only the truth. Great solemnity and sanctity is attached to the words of a dying person because a person on the verge of death is not likely to tell lies or to concoct a case so as to implicate an innocent person. The maxim is "a man will not meet his Maker with a lie in his mouth" (*nemo moriturus praesumitur mentiri*). Mathew Arnold said, "truth sits on the lips of a dying man". The general principle on which the species of evidence is admitted is that they are declarations 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 mind induced by the most powerful consideration to speak the truth; situation so solemn that law considers the same as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice."

19. Dealing with the oral dying declaration, a two-Judge Bench in ***Prakash V. State of M.P.***[8] has stated thus:

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[7] (2003) 12 SCC 490
[8] (1992) 4 SCC 225

> "*11.* ... In the ordinary course, the members of the family including the father were expected to ask the victim the names of the assailants at the first opportunity and if the victim was in a position to communicate, it is reasonably expected that he would give the names of the assailants if he had recognised the assailants. In the instant case there is no occasion to hold that the deceased was not in a position to identify the assailants because it is nobody's case that the deceased did not know the accused persons. It is therefore quite likely that on being asked the deceased would name the assailants. In the facts and circumstances of the case the High Court has accepted the dying declaration and we do not think that such a finding is perverse and requires to be interfered with."

20. Thus, the law is quite clear that if the dying declaration is absolutely credible and nothing is brought on record that the deceased was in such a condition, he or she could not have made a dying declaration to a witness, there is no justification to discard the same. In the instant case, PW-1 had immediately rushed to the house of the deceased and she had told him that her husband had poured kerosene on her. The plea taken by the appellant that he has been falsely implicated because his money was deposited with the in-laws and they were not inclined to return, does not also really breathe the truth, for there is even no suggestion to that effect.

21. It is contended by the learned counsel for the appellant when the deceased sustained 100% burn injuries, she could not have made any statement to her brother. In this regard, we may profitably refer to the decision in ***Mafabhai Nagarbhai Raval v. State of Gujarat***[9] wherein it has been held a person suffering 99% burn injuries could be deemed capable enough for the purpose of making a dying declaration. The Court in the said case opined that unless there existed some inherent and apparent defect, the trial Court should not have substituted its opinion for that of the doctor. In the light of the facts of the case, the dying declaration was found to be worthy of reliance.

22. In ***State of Madhya Pradesh v. Dal Singh and Others***[10], a two-Judge Bench placed reliance on the dying declaration of the deceased who had suffered 100% burn injuries on the ground that the dying declaration was found to be credible.

23. At this juncture, we think it apt to deal with the plea of alibi that has been put forth by the appellant. As is demonstrable, the trial court has discarded the plea of

[9] (1992) 4 SCC 69
[10] (2013) 14 SCC 159

alibi. When a plea of alibi is taken by an accused, burden is upon him to establish the same by positive evidence, after onus as regards presence on the spot is established by the prosecution. In this context, we may profitably reproduce a few paragraphs from ***Binay Kumar Singh V. State of Bihar***[11]:

> "22. We must bear in mind that an alibi is not an exception (special or general) envisaged in the Indian Penal Code or any other law. It is only a rule of evidence recognised in Section 11 of the Evidence Act that facts which are inconsistent with the fact in issue are relevant. Illustration (*a*) given under the provision is worth reproducing in this context:
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> > "The question is whether *A* committed a crime at Calcutta on a certain date; the fact that on that date, *A* was at Lahore is relevant."
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> 23. The Latin word alibi means "elsewhere" and that word is used for convenience when an accused takes recourse to a defence line that when the occurrence took place he was so far away from the place of occurrence that it is extremely improbable that he would have participated in the crime. It is a basic law that in a criminal case, in which the accused is alleged to have inflicted physical injury to another person, the burden is on the prosecution to prove that the accused was present at the scene and has participated in the crime. The burden would not be lessened by the mere fact that the accused has adopted the defence of alibi. The plea of the accused in such cases

[11] (1997) 1 SCC 283

> need be considered only when the burden has been discharged by the prosecution satisfactorily. But once the prosecution succeeds in discharging the burden it is incumbent on the accused, who adopts the plea of alibi, to prove it with absolute certainty so as to exclude the possibility of his presence at the place of occurrence. When the presence of the accused at the scene of occurrence has been established satisfactorily by the prosecution through reliable evidence, normally the court would be slow to believe any counter-evidence to the effect that he was elsewhere when the occurrence happened. But if the evidence adduced by the accused is of such a quality and of such a standard that the court may entertain some reasonable doubt regarding his presence at the scene when the occurrence took place, the accused would, no doubt, be entitled to the benefit of that reasonable doubt. For that purpose, it would be a sound proposition to be laid down that, in such circumstances, the burden on the accused is rather heavy. It follows, therefore, that strict proof is required for establishing the plea of alibi.
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> [Emphasis supplied]

The said principle has been reiterated in ***Gurpreet Singh v. State of Haryana***[12]***, S.K. Sattar v. State of Maharashtra***[13] and ***Jitender Kumar v. State of Haryana***[14].

24. Applying the aforesaid test, we have to x-ray the evidence on record. The father of the deceased, PW-8, has stated in categorical terms that the appellant-

[12] (2002) 8 SCC 18
[13] (2010) 8 SCC 430
[14] (2012) 6 SCC 204

accused was there at home. Nothing has been elicited in the cross-examination. The prosecution has been able to establish that the occurrence took place at 11.00 p.m. There is conclusive medical evidence that the deceased did not suffer the injuries because of accidental fire. There is no reason to disbelieve the testimony of the father of the deceased or to discard the medical evidence. On the contrary, the evidence is beyond reproach.

25. In our considered opinion, when the trial court as well as the High Court have disbelieved the plea of alibi which is a concurrent finding of fact, there is no warrant to dislodge the same. The evidence that has been adduced by the accused to prove the plea of alibi is sketchy and in fact does not stand to reason. It is not a case where the accused has proven with absolute certainty so as to exclude the possibility of his presence at the place of occurrence. The evidence adduced by the accused is not of such a quality that the Court would entertain a reasonable doubt. The burden on the accused is rather heavy and he is required to establish

the plea of alibi with certitude. In the instant case, nothing has been brought on record that it was a physical impossibility of the presence of the accused to be at the scene of the offence by reason of his presence at another place. The plea can succeed only if it is shown that the accused was so far away at the relevant time that he could not be present at the place where the crime was committed. [See ***Dudh Nath Pandey v. State of U.P.***[15]]. The evidence of the sister, DW-1, does not inspire any confidence. The cumulative effect of the evidence as regards the presence of the accused at the scene of occurrence cannot be disbelieved on the basis of bald utterance of the sister which is not only sketchy but also defies reason. Hence, we are obliged to concur with the findings recorded on this score by the learned trial Judge that has been given the stamp of approval by the High Court.

26. Consequently, the appeal, being devoid of merit, stands dismissed.

[15] (1981) 1 SCC 166

.....J.
[DIPAK MISRA]

.....J.
[N.V. RAMANA]

NEW DELHI
MARCH 10, 2015.