

Court No. - 46

Criminal Misc. Ind Bail Application No. 284720 of 2011

And

Criminal Misc. Short Term Bail Application No. 109677 of 2012

In

Case :- CRIMINAL APPEAL U/S 374 CR.P.C. No. - 1783 of 2010

Petitioner :- Upendra Singh @ Alalan

Respondent :- State Of U.P.

Petitioner Counsel :- Vijay Singh Sengar, J.S.P. Singh

Respondent Counsel :- Govt. Advocate

Hon'ble Amar Saran, J.

Hon'ble Anurag Kumar, J.

Heard Sri Vijay Singh Gour, learned counsel for the appellant (whose name has been wrongly printed on the list and it should be rightly printed on the next date), and the learned A.G.A. for the State.

This is the second bail application on behalf of the appellant Upendra Singh @ Allan in this criminal appeal which arises out of the judgement of the Additional District and Sessions Judge, Court No. 2, Kanpur Dehat dated 17.3.2010 in S.T. No. 241 of 2008, Crime No. 89 of 2006, P.S. Roora, Kanpur Dehat, convicting and sentencing the appellant to imprisonment for life under section 304 B IPC, and Rs. 8000 fine, in default, 1 year additional imprisonment, to 2 years R.I. and Rs. 1000 fine under section 498 A IPC, in default of payment of fine to 1 month additional imprisonment, and to 1 year R.I. and a fine of Rs. 1000 under section 34 Dowry Prohibition Act, in default one month additional imprisonment.

The first bail application was rejected by an earlier Bench by an order dated 10.11.2010 observing that the "appellant was the husband of the deceased and according to the post mortem report, cause of death is burning and throttling. There were allegations of demand of dowry demand and torture on account of non-fulfillment of demand of dowry."

After its release by the earlier bench the second bail

prayer has come up for consideration before us. As the learned counsel for the appellant sought to raise points on merits as well in this second bail application, we have proceeded to hear him also on merit.

The learned counsel contended that the observation in the post mortem report that the cause of death was burns and asphyxia due to throttling, were not correct, in view of the fact that there was a dying declaration (Ext. Kha-1) of the deceased Kalpana, wherein the deceased stated that she received burns when her *saree* caught fire whilst cooking food and that her husband and other family members were innocent. This dying declaration had been recorded by SI Radhey Shyam Yadav, and has been proved by a defence witness, DW 1, Dr. Surendra Singh, who was posted as a medical officer at the Primary Health Centre, Roora Kanpur Dehat, (Ramabai Nagar). He also urged that as the appellant had received burn injuries on his hands, the same could have only been caused when the appellant was trying to save the life of the deceased, hence no case of dowry death was disclosed.

The said dying declaration reads as follows:-

श्रीमती कल्पना पत्नी उपेन्द्र सिंह निवासी काशीपुर थाना रूरा कानपुर देहात ने आज दिनांक 22.4.06 को अस्पताल में जली हालत में बयान किया कि घर में खाना बनाते समय धोती में आग लग जाने के कारण मेरे शरीर जल गया है मेरे पति आग बुझाने में वह भी जल गये हैं। होश हवास में बिना किसी दबाव के स्वेच्छा से यह बयान दे रही हूँ कि मेरे परिवार वालों का इसमें किसी प्रकार दोषी नहीं है यह बयान डाक्टर साहब व पुलिस के समक्ष दे रही हूँ।

ह0 श्रीमती कल्पना

According to the post mortem report, however, the deceased had burns all over her body and her skin had peeled off. Blood was coming out from the nose, smell of kerosene oil was present. In the neck muscles clotted blood was present. There was a fracture of the hyoid bone on the left side of the neck. Soot particles were present in the trachea. Both lungs, gall bladder, spleen and kidneys were congested. Cause of death was burns and asphyxia due to throttling.

As the version contained in the dying declaration

appears to be irreconcilable with the condition found in the autopsy, in view of the gravity of the injuries, the presence of burns over the entire body of the deceased and the fracture of the hyoid bone noted by the two doctors who conducted post mortem on the body of the deceased, it becomes important to determine whether the version as set out in the alleged dying declaration was correct, or whether the autopsy was honestly conducted which would have ruled out the deceased making such a dying declaration.

Prima facie the dying declaration recorded by the SI Radhey Shyam Yadv and certified to be recorded by him by DW 1 Dr. Surendra Singh appears to be fabricated.

If the deceased had got burnt only because her *sari* caught fire whilst cooking as alleged in the dying declaration no smell of kerosene on the body would have been noticed during autopsy. With a fracture of the hyoid bone and the burns and other injuries on the corpse and the cause of death being burns and asphyxia due to throttling there was no likelihood of the deceased being alive for giving the dying declaration at the health centre between 10.20 a.m. and 10.35 a.m., after which she was referred to the Ursula Hospital, Kanpur. The contention of the appellant's counsel that the hyoid bone fracture and internal injuries could have been caused by the burns received by the deceased also does not appear acceptable to us at all.

There are tell tale lines in the dying declaration to the following effect: होश हवास में बिना किसी दबाव के स्वेच्छा से यह बयान दे रही हूं कि मेरे परिवार वालों का इसमें किसी प्रकार दोषी नहीं है यह बयान डाक्टर साहब व पुलिस के समक्ष दे रही हूं। These lines to the effect that the deceased was in a fully conscious condition and had given the dying declaration with her own volition, free of any pressure, that her family members were innocent and that she was making the dying declaration in the presence of the doctor and the police officer appear to be extrinsic to the dying declaration and do not appear to be the natural words of a person on the

verge of dying. Rather *prima facie* they appear to have been put into her mouth by a dishonest police official who claims to have recorded the dying declaration, in collusion with the doctor, who certified that she had made the alleged dying declaration in his presence.

Likewise the lines in the dying declaration that her husband got burnt in trying to save her could also be interpolated in the alleged dying declaration.

It could also not be ruled out that the appellant, husband of the deceased could have received the minor burn injuries in his hands etc. when he may have tried to throttle the deceased to ensure that she died, as she appears to be breathing after being burnt as there were soot particles in the trachea.

Significantly, D.W. 1 Dr. Surendra Singh did not even note the condition of the injuries on the body of the deceased, nor did he note the condition of fitness of the deceased to make the dying declaration at the beginning and conclusion of the dying declaration, (though he has mentioned administration of some medicines etc. to the deceased in a bed head ticket). But Dr. Singh has enthusiastically appeared as a witness for the defence. Neither the doctor nor the police official, Radhey Shyam Yadav (who was not examined by the prosecution or defence) made any effort to call a Magistrate to record the dying declaration, if indeed the deceased was alive at that stage.

Furthermore, it appears that conveniently, the said doctor DW 1 Surendra Singh has referred the matter to Ursula Hospital, Kanpur as that could have facilitated a dishonest police officer taking the plea that the deceased had died on the way to Kanpur. In our view, the Trial Judge has rightly observed that the conduct of this doctor and the recording of the dying declaration by the police officer appears to be highly suspicious.

This is not the first case when suspicion has arisen in the minds of the Courts that doctors and police officials at local levels may have colluded with the

accused, and engaged in such a grave fraud by fabricating a false dying declaration to save the accused in a case of bride burning for dowry or other similar case. What hope does society or the victim have, if such dishonest frauds to try and save guilty offenders by avaricious doctors or police officials are allowed to go unpunished? It is indeed a matter of regret that Courts, after observing, at the most, that the conduct of such doctors or police officials appear to be not above board, leave the matters at that, and fail to pro-actively get such matters probed further and action initiated against culpable government personnel, and it is important that steps are taken to get down to the bottom of such matters and to punish the parties which are found engaged in fabricating such false documents or giving a dishonest opinion for showing a fabricated document to be genuine.

In this state of affairs we think that the Principal Secretary, Medical Health should get a thorough probe made as to whether this particular doctor DW 1 Surendra Singh, who was then posted at PHC Rura, Ramabai Nagar has genuinely found the deceased alive at the time of recording of the alleged dying declaration exonerating the accused, or has colluded with the accused persons for showing the deceased alive when she was either dead or incapable of having made the dying declaration.

The Director General of Police, U.P. should also get an inquiry conducted regarding the conduct of S.I. Radhey Shyam Yadav, as to whether, in the light of the DGP's probe and in view of the circumstances suggested above this police official may have fabricated the dying declaration, which was not made by the alleged declarant at all. In case the Principal Secretary Medical Health or the DGP, U.P., reach the conclusion after inquiry (after giving an opportunity of hearing to the charged doctor and police official to present their versions), that the dying declaration was fabricated and the claim of the doctor and the S.I. that the deceased had made the same to them was false and dishonest, they are to initiate stringent disciplinary and penal proceedings against the said persons, so that an exemplary message goes out that

Courts and society will no more tolerate officials in key places indulging in such criminal acts to save accused of such grave crimes ostensibly for extraneous considerations. The Principal Secretary and the DGP are directed to submit their reports to this Court and also inform this Court about the action taken against the guilty parties within three months by 23.7.2012.

The second bail application has no force and it is rejected.

Learned counsel for the appellant also made a prayer for short term bail on the ground that his sister is to be married on 24.4.2012. As the father of the appellant who was also a co-accused, has been granted bail and is out of jail, there is no reason for granting short term bail, or even allowing the appellant to go to the venue of the marriage in custody. We do not see any merit in the short term bail application also and it is accordingly rejected.

Let a copy of this order be given to the learned A.G.A. by 23.4.2012 for compliance. The Registry is also directed to communicate this order to the Principal Secretary (Medical Health) and the DGP, U.P. within a week. Let copies of this order be also forwarded within a week to the Secretaries, Judicial Training and Research Institute and UP State Legal Services Authority, Lucknow and the National Judicial Academy, Bhopal, M.P., for communication to members of the lower judiciary, so that they may get inquiries initiated and actions taken at the stage of the trial itself against culpable police officers or doctors, or other government personnel or others when in similar circumstances they appear to be involved in fraudulent conduct or in giving false opinions.

List again on 23.7.2012

Order Date :- 20.4.2012

HSM