

NON-REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 1133 OF 2022
(SLP (Cr1.) No. 6882/2021)

SULTAN

APPELLANT

VERSUS

THE STATE OF U.P.

RESPONDENT

WITH

CRIMINAL APPEAL NO. 1134 OF 2022
(@SLP(Cr1) No. 6004/2022)

J U D G M E N T

SANJIV KHANNA, J.

Leave granted.

2. Appellants, Noori - sister-in-law of the deceased Khushboo, and Sultan Akhtar - husband of Noori, have been convicted under Section 302 read with Section 34 of the Indian Penal Code, 1860¹ and sentenced to undergo imprisonment for life, pay fine of Rs 30,000/- and in default to undergo additional imprisonment for one year.
3. The impugned judgment dated 11.01.2021 passed by the High Court of Judicature at Allahabad, dismissed the appeal and upheld their conviction by relying on the

¹ For Short, "IPC".

dying declaration marked as Exhibit Ka-3, statedly recorded on 28.05.2011 at 6.20 P.M. by Satish Kumar Kushwaha, the Naib Tehsildar, who had deposed as PW-5. As per the dying declaration, the incident had occurred at about 1.00-1.30 p.m., when Ashraf, husband of Khushboo, had gone to the city to procure articles for their children. Noori, Sultan and Rukhsana (mother-in-law) had poured kerosene oil on Khushboo and had set her on fire. Noori and Rukhsana believed that Khushboo was characterless, and they would often tell Khushboo to leave the house. For this reason, Noori and Rukhsana would daily quarrel with her. Khushboo had got married to Ashraf 7 years back, and her husband was not involved in setting her on fire. On being set to fire, Khushboo had shouted and the neighbours came to save her.

4. Rukhsana has not filed any appeal before this court. We are informed that she has been released due to her old age.
5. Section 32 of the Evidence Act, 1872, which makes dying declaration admissible, is an exception to the general rule of hearsay evidence. While in terms of Section 32, dying declarations are admissible, but the weight and evidentiary value to be attached to the dying declarations would depend upon facts of each case. In cases where dying declaration is reliable and inspires

confidence as to its correctness, being a substantive piece of evidence, the dying declaration can form basis of conviction. These are cases where there are reasons and grounds to accept veracity of the statement, coupled with the factor that a person who is on deathbed is not likely to falsely implicate an innocent person. However, the court, when in doubt as to the veracity or correctness, can and should seek corroboration, keeping in mind the fact that the accused have no chance of cross-examination. Further, it is necessary to guard and ensure that the statement made by the deceased is not a result of tutoring, prompting or imagination. In the facts of the present case, we find that there are several gaps and contradictions in the present case which makes us doubt the veracity and the correctness of the dying declaration insofar as it implicates the two appellants before us.

6. As noted above, it is the case of the prosecution that the dying declaration, Exhibit Ka-3, was recorded at about 6:20 p.m. on 28.05.2011 by Satish Kumar Kushwaha (PW-5), *albeit* the First Information Report (FIR) No. 261/2011, Exhibit Ka-8, registered at Police Station Kotwali Dehat, District Saharanpur, recorded at about 10:35 p.m. on the same date, does not refer to the dying

declaration, Exhibit Ka-3. No reasons are forthcoming why and how the investigating officer Suresh Babu Itoria (PW-11) was unaware of the dying declaration, Exhibit Ka-3, recorded in the hospital earlier in day.

7. The investigating officer Suresh Babu Itoria (PW-11), had learnt about Exhibit Ka-3, recorded by Satish Kumar Kushwaha (PW-5) only on 30.05.2011. Suresh Babu Itoria (PW-11) has affirmed that he had not received any information regarding the dying declaration from the S.D.M., City Magistrate or any order of the District Magistrate. On 30.05.2011 it was brought to Suresh Babu Itoria's (PW-11) notice that Satish Kumar Kushwaha (PW-5) had filed the dying declaration, Exhibit Ka-3, before the City Magistrate. Till then Satish Kumar Kushwaha (PW-5) also had not bothered to get in touch with the investigating officer Suresh Babu Itoria(PW-11). Thereupon, Suresh Babu Itoria (PW-11) had moved an application for furnishing of a copy of the dying declaration.

8. Suresh Babu Itoria (PW-11), in his deposition, has accepted that Noori and Sultan Akhtar were residing separately at Saint Zahria Academy School, Idgah Road, Nadeem Colony, Saharanpur. Khushboo used to reside with her husband Ashraf, mother-in-law Rukhsana and her three children at Rasulpur. In his cross-examination, Suresh

Babu Itoria(PW-11) has accepted as correct that Noori and Sultan Akhtar were not found at the place of occurrence and it was also true that time of arrival of Noori and Sultan Akhtar at the place of occurrence was not noted or stated by the witnesses.

9. Rashid Naeem, a resident of Noor Basti, who used to do the work of cleaning and maintaining 25 steps away from the house of Rukhsana, and had deposed as PW-10, in his examination-in chief, had testified that on hearing noise coming from the house of Rukhsana at about 3:00-4:00 P.M. on 28.05.2011, he had seen Khushboo outside the house, in a burnt condition. He and others had then tried to quell the fire. At that time, Rukhsana was inside the room. Rukhsana subsequently came out of the house and left on a motorcycle. Rashid Naeem (PW-10) has not deposed that he had seen the appellants. Rashid Naeem (PW-10) was not declared hostile and was not cross examined. Thus, Rashid Naeem (PW-10) had not seen Noori and Sultan Akhtar at the spot.

10. Noori and Sultan Akhtar, in their statements under Section 313 of the Code of Criminal Procedure, 1973² have claimed that they had not visited the residence of Khushboo on the date of occurrence. At that time, they were present at the Saint Zahria Academy School located

² For short, "Cr.P.C."

at Nadeem Colony. The fact that Noori and Sultan Akhtar were running the Saint Zahria Academy School and residing at Nadeem Colony was accepted by the Investigating Officer Suresh Babu Itoria (PW-11).

11. Suresh Babu Itoria (PW-11), in his deposition did not state that he had informed or asked the Naib Tehsildar to record the dying declaration of Khushboo. On the other hand, Satish Kumar Kushwaha (PW-5) in his cross examination has testified that on 28.05.2011 he was deputed to record the dying declaration but they do not make any entry in the office or register for the said purpose in the office of the city magistrate. On 28.05.2011, there was a written order of the city magistrate that Satish Kumar Kushwaha (PW-5) should record the dying declaration, but the direction/order was not brought on record. On the other hand Suresh Babu Eloria (PW-11) in his cross-examination has testified that the order of dying declaration was received/furnished through 'Charlie', which implies from the police control room. No such order was received from the office of the city magistrate or District Magistrate. Satish Kumar Kushwaha (PW-5) could not tell whether the police personnel who had taken the cognizance of offence was on duty or not at the time when he visited the hospital. The doctor on duty at the

emergency ward, who had purportedly signed on the dying declaration Exhibit Ka-3, was not produced as a witness.

12. Satish Kumar Kushwaha (PW-5) deposed that he had reached the hospital at 6.15 P.M. and contacted the doctor on duty in the emergency ward and had thereupon recorded the dying declaration of Khushboo, Exhibit Ka-3. The doctor has not been examined.
13. Yousuf Ali (PW-1), the informant and the father of Khushboo, who was declared hostile, has stated that he came to know from the local people that his daughter Khusboo had died due to burning from the stove. He however accepted that he had given the written report marked as Exhibit Ka-1 to the police station, on which he had put his thumb impression. He claimed that he did not know what was written in it.
14. Mirza Hussain (PW-2), nephew of Yousuf Ali (PW-1), has deposed that on learning about the incident he and Liyakat Ali (PW-4), another nephew of Yousuf Ali (PW-1) had visited the burns ward in the district hospital at Saharanpur, where Khushboo was admitted. Khushboo had then told them that Noori and Sultan Akhtar had set her on fire after pouring kerosene oil on her. In his cross-examination, Mirza Hussain (PW-2), had accepted that in his statement under Section 161 of the Cr.P.C., he had

also mentioned the name of the Khushboo's husband Ashraf and one other person named Haider. Liyakat Ali (PW-4), in his examination-in-chief testified that he, along with his uncle Yousuf Ali (PW-2,) had met Khushboo in the hospital. Khushboo had informed them that she had been burnt to death by the appellants because of dowry. They had then proceeded to the police station and given the report. Thereafter they had returned to the District Hospital, Saharanpur. Khushboo had three children, the eldest being a girl aged about 8-9 years. Suresh Babu Itoria (PW-11) has also accepted that the deceased had three children and the eldest daughter was about 7 years of age at the time of the incident. The daughter and children of Khushboo have not been examined. The dying declaration, Exhibit Ka-3, does not state that dowry was the cause of death. In fact, dying declaration, Exhibit Ka-3, completely exonerates and states that Ashraf is completely innocent. Ashraf was not charge-sheeted and prosecuted. We do not know who is Haider, who again was not charge-sheeted and prosecuted.

15. As per the FIR recorded on the statement made by Yousuf Ali(PW-1), he (Yousuf Ali) had come to know that the in-laws of Khushboo had burnt her alive and the neighbours had admitted her to the hospital and thereupon he had requested Mirza Hussain (PW-2) and

Liyakat Ali (PW-4) to immediately visit the district hospital at Saharanpur.(It appears that Ashraf had taken Kushboo and had got her admitted in the hospital). Kushboo, it is stated in the FIR, at that time was conscious and had told Mirza Hussain (PW-2) and Liyakat Ali (PW-4) that her husband-Ashraf, her mother-in-law-Rukhsana, her sister-in-law-Noori and her husband-Sultan Akhtar and one Haider had poured kerosene oil on her and set her ablaze. Khushboo had died at about 7 P.M.. The time of death is corroborated from the post-mortem report marked as Exhibit Ka-10.

16. For the aforesaid dichotomies and contradictions, we are of the opinion that Noori and Sultan Akhtar are entitled to the benefit of doubt and hence, we set aside their conviction under Section 302 read with Section 34 of the IPC.
17. We however, clarify that we have not examined the conviction of Rukhsana, the mother-in-law who has not preferred any appeal against the impugned judgment upholding her conviction. As noted above, we have been informed that Rukhsana, on account of her old age, has already been released.
18. The appellants-Noori and Sultan Akhtar would be released immediately unless they are required to be detained in

any other case. The impugned judgment(s) and conviction are set aside and accordingly, the appeals are allowed.

19. Pending application(s), if any, shall stand disposed of.

..... .J.
[SANJIV KHANNA]

..... .J.
[BELA M. TRIVEDI]

NEW DELHI;
AUGUST 03, 2022.