
Before Jawahar Lal Gupta and M.S. Gill, JJ.

RAJ KUMAR AND ANOTHER,—*Appellants*

versus

STATE OF PUNJAB,—*Respondent*

Crl. A. No. 418/DB of 1995

8th February, 2000

Indian Penal Code, 1860—Ss. 302/34—High Court Rules and Orders, Vol. III, Chapter 13-A—Rl. 2—Punjab Police Rules, 1934, Vol. 3—Rl. 25.21—Death of wife from serious burn injuries—Before death statement made before the Executive Magistrate—Rl. 2 of High Court Rules and Orders requires the recording of the dying declaration by a Judicial Magistrate. “if possible”—Whether such statement recorded by the Executive Magistrate be excluded from consideration—Held, no.

Held, that a perusal of rule 2 of Chapter 13-A of the High Court Rules and Orders, Volume 3 shows that the rule requires that the statement should be recorded by a Judicial Magistrate “if possible”. Still further, Clause 2 authorises the Judicial Magistrate to depute “some other stipendiary Judicial Magistrate to record the dying declaration”. The plain language militates against a mandatory requirement under the provision. It does not lay down an absolute rule which may be totally inviolable. It requires the recording of the dying declaration by a Judicial Magistrate, “if possible”.

(Para 22)

Further held, that there was substantial compliance with the provisions of Rule 2 of Chapter 13-A of the High Court Rules and Orders, Volume 3 as also Rule 25.21 of the Punjab Police Rules. The statement at Ex. PC cannot be excluded from consideration merely because it had not been recorded by a Judicial Magistrate. Still further, on facts, it is clear that the doctor as also the Executive Magistrate had taken all precautions to ensure that Smt. Pushpa was in a fit state of mind to make the statement. That being so, we are not able to hold that the dying declaration has to be excluded from consideration.

(Para 25)

R.S. Cheema, Sr. Advocate with J.S. Waraich and Prithvi Raj,
Advocates, *for the appellants.*

Dr. A.R. Sidhu, DAG Punjab, *for the respondent.*

JUDGEMENT

Jawahar Lal Gupta, J.

(1) On the fateful night intervening January 25/26, 1994, Pushpa Rani suffered 95% burns on her body. In the early hours of the morning of January 28, 1994, she succumbed to her injuries. Raj Kumar—the husband and Rakesh Kumar—the brother-in-law (husband's younger brother) were tried for the offence punishable under Section 302/34 IPC. They were found guilty and sentenced to undergo rigorous imprisonment for life. A fine of Rs. 200 each was also imposed. In case of default in payment of fine, they were sentenced to undergo further rigorous imprisonment of one year. Aggrieved by the order of conviction and sentence, the two accused have filed this appeal.

(2) The prosecution story was initially narrated by the deceased—Smt. Pushpa herself. She had made a statement before Mr. P.K. Sharma, Executive Magistrate, Chandigarh on 26th January, 1994 at 11.05 A.M. It reads as under :—

“My marriage was solemnised about 12 years back. I have two children. My husband Raj Kumar has illicit relations with some other woman. He used to threaten (sic) me that he would divorce me and would contract second marriage with her. I do not know her name and address. My ‘Dewar’ Rakesh Kumar (the younger brother of my husband) also harassed me and he gave beatings to me many a time. Yesterday on 25th January, 1994 at about i.e. 12.00 midnight my husband Raj Kumar and Rakesh Kumar came to the house in a drunken condition. I altercated with them as to why they had come so late and why they had consumed liquor. Upon this they started beating me. Then my husband Raj Kumar caught hold of my arms and Rakesh Kumar took out the kerosene lying underneath the cooler and sprinkled it on me. I do not know as to who had lit the match-stick. I cried and ran out side and got seated under the Hand pump. On hearing my cries my father-in-law woke up and came there. He asked to bring a Vehicle (Gadi). Then Rakesh Kumar himself brought the vehicle (Gadi). Then they all put me into the car and took me to the house of my Jeth (eldest brother-in-law) at Panchkula. I asked them to take me to the Hospital. They asked me not to

give statement against them. Then they brought me here at PGI. I have made this statement while enjoying my right senses and without any coercion.

Pushpa Rani w/o Raj Kumar

RO and AC

(Sd.) . . . ,

Pushpa Rani (in English)

Certified that I remained present throughout the recording of the statement and the patient was fully mentally physically conscious throughout the statement.

(Sd.) . . . ,

PK Sharma,
Executive Magistrate,
Chandigarh.
26.1.94 at 11.40 AM

(Sd.) . . . ,

Dr. Uttam, SMO,
26.1.94 at 11.40 AM.

(3) This statement was delivered to the Incharge, Police Post, PGI, Chandigarh. It was sent to the Police Station, Banur, District Patiala for recording the First Information Report. On receipt of the statement, the case was initially registered under Section 307/34 IPC. The statement is Ex .PC. The FIR is Ex.PC/2. The special report had reached the Judicial Magistrate, Ist Class, Rajpura at 11.15 AM on 27th January, 1994. Smt. Pushpa having passed away in the early hours of 28th January, 1994, the information was sent to the Police Station. Necessary change was, consequently made in the FIR. The offence was changed from Section 307/34 to Section 302/34 IPC. ASI Ranjit Singh (PW9) had reached the "dead house" PGI, Chandigarh. He had prepared the inquest report. It is Ex. PG. The body of the deceased was identified by her brother—Sudhir Kumar (PW1) and Krishan Chand Sood.

(4) The prosecution produced medical, oral and documentary evidence to prove its case. First the medical evidence.

(5) Dr. Ravi Charan Singh (PW4) was the Medical Officer, General Hospital, Sector 16, Chandigarh. He alongwith Dr. Rajinder Sharma had conducted the *post mortem* examination on the body of Smt. Pushpa. She was found to have "2nd to 3rd degree burns over whole of the body except lower part of the anterior abdominal wall". According to the witness, the death had occurred on account of "extensive burns leading to shock and cardiac respiratory arrest....."

During cross-examination, he stated that "whole of the face from the front and back was completely burnt. Every portion of the dead body was found burnt except.....lower part of the anterior abdominal wall.....Septicaemia gives rise to pus formation in the lungs. Congestion in the dead body was due to the inhaling of the smoke". He further stated that "the burns on the body of Pushpa Rani could be suicidal also but the history suggests that it was a case of homicide as per police information."

(6) Dr. Anant Sinha (PW5) stated that Smt. Pushpa had been admitted in the Hospital under Central Registration No. 183261. She had died on 28th January, 1994. Ex. PJ is the carbon copy of the death summary signed by Dr. Anil Aggarwal. The witness identified the signatures of Dr. Aggarwal. In cross-examination, he clarified that he had not examined the patient. According to the Admission Card, the deceased had been brought to the hospital by Raj Kumar and Saroj Sood at 7.45 AM. He also admitted that "the writing Ex. DB in the bed head ticket of Pushpa Rani is in the hands of Dr. Avnish Kumar who was also my colleague....."

(7) Dr. Hemant Hardikar, (PW6) was the Junior Resident, General Surgery, at the PGI. He had sent "intimation Ex. PK to the Officer Incharge, Police Post, PGI, Chandigarh". In cross-examination, he stated that the death summary had not been prepared by him. He had not examined the patient or treated her at any point of time.

(8) Dr. Uttam Kumar (PW7) stated that application Ex.PA was endorsed to him by the Executive Magistrate. He was asked "to certify if the patient was mentally and physically fit to make the statement". *Vide* endorsement Ex. PB/1, he had declared that the "patient was fit to make a statement". He identified the signatures underneath the endorsement. He also stated that the statement of Smt. Pushpa "was recorded by the Executive Magistrate" in his presence and that the "patient also signed underneath that statement. It was read over and explained to the patient". After the recording of the statement, he had against certified,—*vide* Ex. PD that he had remained present throughout and that the patient was fully mentally physically conscious throughout...." During cross-examination, he stated that the patient had been brought to the emergency at 5.30 AM. After her arrival, intravenous fluids were given. Injection TT (Tetanus Toxoid) was also given. He asserted that "no sedative was ever given to the patient as per record of the Hospital." He also claimed to have put "certain general questions to the patient before certifying her fitness...." He denied the suggestion that the patient was not in a position to speak or give her statement keeping in view the extent and nature of burns. He also

denied the suggestion that the certificate Ex. PD had been obtained by the Executive Magistrate under duress at a subsequent stage.

(9) This is the entire medical evidence.

(10) The oral testimony primarily consists of the statements of Sudhir Kumar (PW1), the Executive Magistrate Mr. P.K. Sharma (PW2), the Senior Assistant from the Central Registration Department, PGI, Chandigarh—Amarjit Singh (PW3). The Investigating Officers were ASI Harbhajan Singh (PW8), Incharge Police Post, PGI, Chandigarh and ASI Ranjit Singh (PW9), Police Station, Civil Lines, Patiala.

(11) Sudhir Kumar is the real brother of the deceased. According to him, Smt. Pushpa was married to Raj Kumar about 12 years prior to her death. A son and a daughter were born out of the wedlock. He resides in Village Kansal and runs a Karyana shop. On 26th January, 1994, the accused—Rakesh Kumar alongwith his younger brother Manoj Kumar and nephew—Abhey Sood (the son of the deceased) had reached his house at about 4 A.M. Manoj Kumar had told him that Pushpa Rani had suffered burn injuries. Mr. Krishan Chand, the father of the deceased was also apprised of the position. Thereupon, Krishan Chand alongwith Rakesh Kumar and Manoj Kumar Sood and gone to the house of Babu Sood—the elder brother of the accused. Sudhir Kumar alongwith his brother—Randhir Kumar and a friend Jaspal had gone to the PGI and reached the Emergency counter. On reaching there, he had seen that Pushpa Rani was lying on a stretcher. Both the accused alongwith their elder brother—Babu Sood and certain other persons were present. Pushpa Rani had told him about the incident. He stated that she had informed him that Rakesh Kumar had caught hold of her arms. Her husband Raj Kumar had put the kerosene oil and then set her ablaze. Thereafter, she had sat underneath the tap to extinguish the fire. On hearing her cries, the other members of the family had gathered. Her father-in-law had told his sons to arrange a conveyance and to shift her to the PGI. She was initially taken to the house of Babu Sood—her husband's elder brother. She was given first aid. He also stated that domestic disputes had arisen between the parties after six months of the marriage. The accused used to maltreat the deceased. In cross-examination, he *inter alia* stated that he 'cannot say if Raj Kumar stood surety in the market for the supply of cloth worth Rs. 2,00,000 to my brother Randhir Kumar.' He denied the suggestion that the accused had protested before him, his father and sister that Randhir Kumar was not "returning the amount to his

creditors.....It is incorrect to suggest that Pushpa Rani was sore about the alleged demand made by Raj Kumar from my brother-Randhir Kumar.....”

(12) Mr. P.K. Sharma (PW2) is the Executive Magistrate. He had recorded the dying declaration on the request of the police. Amarjit Singh (PW3) was examined without oath. He had produced the hospital record. ASI Harbhajan Singh (PW8) had partly investigated this case. ASI Ranjit Singh (PW9) had done the remaining investigation.

(13) The accused in their statements under Section 313 had denied the allegations. Raj Kumar had further stated that he along with his brother had stood surety to the extent of Rs. 2 lacs for Randhir Kumar. In pursuance to this, he had purchased cloth from the market on credit. Randhir Kumar had refused to make payment. As a result, the creditors had started demanding the payment. The matter was brought to the notice of the deceased, her brother and father. She had felt offended and asked them not to demand the payment. This had led to the straining of relations. Pushpa Rani had started giving threats that in case, the demand was repeated, she would commit suicide. It was in this situation that she had committed suicide. This statement of Raj Kumar was also adopted by his brother.

(14) This is the sum and substance of the evidence.

(15) Mr. R.S. Cheema, learned counsel for the appellants contended that the statement made by the deceased before Mr. P.K. Sharma (PW2) does not conform to the provisions of Rule 2 of Chapter 13-A of the High Court Rules and Orders, Volume 3 and Rule 25.21 of the Punjab Police Rules, Volume 3. Thus, it cannot form the basis of conviction of the appellants. The counsel further submitted that the prosecution story was highly improbable. It could not be accepted.

(16) On the other hand, Dr. Anmol Rattan Sidhu, learned Deputy Advocate General contended that the provisions of the High Court Rules and Orders were not mandatory. In the circumstances of the case, the dying declaration made by the deceased before the Executive Magistrate was clearly admissible. The prosecution story was natural. It had been rightly accepted by the trial court.

(17) The two questions that arise for consideration are :—

- (i) Is the statement Ex. PC liable to be ignored merely because it had been recorded by the Executive Magistrate and not the Judicial Magistrate ?
- (ii) Is the prosecution story improbable and unnatural ?

Reg : (i) :

Is the statement Ex. PC liable to be ignored merely because it had been recorded by the Executive Magistrate and not the Judicial Magistrate ?

(18) A dying declaration is a statement made by a person in the face of death. It is the statement of a person who is dying. It can be used against the accused despite the fact that he has no opportunity to cross-examine the person making the statement against him. It can even form the basis of conviction. Thus, it is important that the dying declaration be truthful. It should be honest. It should have been made freely and voluntarily without any extraneous influence or pressure. Above all, the person making the statement should be in a fit state of mind so as to be able to recall the events and give the correct information.

(19) It is in view of the importance of a dying declaration in a criminal trial that provisions of Chapter 13-A were added to the High Court Rules and Orders, Volume 3 in May 1966. It is ordained that the "dying declaration should be recorded in the manner hereinafter prescribed". However, the preambulatory note as well as the subsequent provisions indicate that the prescribed manner has to be followed "as far as possible". This provision is broadly indicative of the fact that the Chapter does not embody mandatory provisions or inviolable rules. It only lays down broad guidelines which must be followed to the extent it is possible in a case. Subject to the facts of a case, a substantial compliance should be enough.

(20) Mr. Cheema contended that Rule 2 contains a mandatory provision. The dying declaration can be recorded only by a Judicial Magistrate. Similar is the requirement of Rule 25.21 of the Punjab Police Rules, Volume 3. The statement having not been recorded by a Judicial Magistrate, it would not be legal to place reliance on the statement made by the deceased before the Executive Magistrate.

(21) Before proceeding to consider this argument, it would be appropriate to notice the rule. It provides as under :—

"2. *Dying declarations to be recorded by Judicial Magistrates.*—

(1) Where a person whose evidence is essential to the prosecution of a criminal charge or to the proper investigation of an alleged crime, is in danger of dying before the enquiry proceedings or the trial of the case commences, his statement, if possible, be got recorded by a Judicial Magistrate. When the police officer concerned with the investigation of the case or the medical officer attending upon such person apprehends

that such person is in the danger of dying before the case is put in court, he may apply to the Chief Judicial Magistrate, and, in his absence, to the seniormost Judicial Magistrate present at the headquarters, for recording the dying declaration.

- (2) On receiving such applicaion, the Judicial Magistrate shall at once either himself proceed, or depute some other stipendiary Judicial Magistrate to record the dying declaration.”

(22) A perusal of the above provision shows that the rule requires that the statement should be recorded by a Judicial Magistrate “if possible”. Still further, Clause 2 authorises the Judicial Magistrate to depute “some other stipendiary Judicial Magistrate to record the dying declaration”. The plain language militates against a mandatory requirement under the provision. It does not lay down an absolute rule which may be totally inviolable. It requires the recording of the dying declaration by a Judicial Magistrate, ‘if possible’.

(23) The purpose of the rule is that as far as possible, the dying declaration should be recorded by a Judicial Magistrate. The obvious intention is that a judicially trained person would be in a better position to elicit the truth through his questions and the statement as finally recorded would represent the factual position. The provision should be complied with in all its essential features. However, in case there is difficulty, the dying declaration cannot be excluded from consideration merely because it has not been recorded by a Judicial Magistrate. In other words, it is incumbent on the agency concerned to make a serious attempt and to ensure that the statement is recorded by a Judicial Magistrate. It is only when it appears difficult for a Judicial Officer to record the statement that an exception should be permitted. The investigating agency should be instructed to comply with the provisions of Chapter 13-A as also those of Rule 25.21. Suitable instructions should be issued in this behalf. This would, however, be a rule for future application.

(24) What is the position in the present case ? January 26, 1994 was the Republic Day. It is a National Holiday. There is no concrete evidence with regard to the availability or otherwise of the Judicial Magistrates. In this situation, we cannot hold that the Investigating Officer had erred totally in approaching the Executive Magistrate, Equally, we cannot say that the statement recorded by the Executive Magistrate shall be excluded merely because it had not been recorded by the Judicial Magistrate. Still further, it appears to us that despite

the fact that Mr. P.K. Sharma, Executive Magistrate is not a Judicial Magistrate, he had taken reasonable precautions to ensure that Smt. Pushpa was in a position to make a rational Judgement. During the course of his examination, he had stated categorically that he had satisfied himself about the mental condition and the capacity to make a rational judgement before recording the statement. Still further, it is also on record that he had asked the doctor to check up and certify that Smt. Pushpa was physically and mentally fit to make a statement. It also deserves notice that Dr. Uttam Kumar (PW7) in his statement categorically stated that he had asked questions and ensured that she was physically and mentally fit to make a statement.

(25) Keeping in view the fact that 26th January, 1994 was a holiday and also the other circumstances, we hold that there was substantial compliance with the provisions of Rule 2 as also Rule 25.21. The statement at Ex. PC cannot be excluded from consideration merely because it had not been recorded by a Judicial Magistrate. Still further, on facts, it is clear that the doctor as also the Executive Magistrate had taken all precautions to ensure that Smt. Pushpa was in a fit state of mind to make the statement. That being so, we are not able to hold that the dying declaration has to be excluded from consideration.

(26) Coming to the facts of the case, we find that Smt. Pushpa had given facts which were within her knowledge. She had given a complete sequence of events which could not have been known to either Dr. Uttam Kumar (PW7) or Mr. P.K. Sharma (PW2). More than that, there is an intrinsic element of integrity in the statement. While giving the details of events, she had very fairly stated that one of the two accused had lit the match-stick. She confessed that she did "not know as to who had lit the match-stick". This part of her statement indicates that the declaration was honest, truthful and straight-forward.

(27) Mr. Cheema submitted that the deceased had revealed the story initially to the doctor and then to her brother. In the hospital record at Ex. DB, there is a reference to the 'stove'. Later, she told her brother Sudhir Kumar (PW1) that Rakesh Kumar had caught hold of her and that Raj Kumar had set her ablaze. He contended that these versions were at variance with the dying declaration. Thus, it should be rejected.

(28) We cannot accept this contention. The hospital record indicates that the appellant Raj Kumar and his sister-in-law Saroj Sood had accompanied the deceased to the hospital. Thus, they must have given the cause of burns to the doctor. The deceased did not refer to the stove at any stage. As for the statement of Sudhir Kumar, we find no

contradiction with the dying declaration Ex. PC. The mere fact that the deceased could not name the person who had set her ablaze does not militate against its truthfulness. Still further, the fact as to whether Raj or Rakesh caught hold of her is insignificant as it is clear that both had combined to bring about her end.

(29) In view of the above, we answer the first question against the appellants. It is held that the dying declaration cannot be excluded from consideration.

Reg : (ii)

Is the prosecution story improbable and unnatural ?

(30) Mr. Cheema contended that the prosecution story was inherently improbable. There was no evidence of any earlier conflict. The appellants had informed the family of the deceased immediately. The father and the mother of the deceased were present in the hospital. The allegation that the husband had some extra-marital relations was vague and not proved. Thus, it cannot be believed. Is it so ?

(31) Admittedly, the deceased and the appellant—Raj Kumar were married about 12 years prior to the date of occurrence. They had two children. In the normal circumstances, there would be no reason for the husband to kill and for the wife to commit suicide. Yet the event has occurred. Why ?

(32) According to the deceased, the two appellants had come to the house at about midnight. They were drunk. She had expressed her anger. They had reacted. One of the two had poured the kerosene oil and thereafter she was burnt. This sequence has been disclosed by her to an impartial outsider. Wherever she was in doubt, she has admitted the factual position. There appears to be no reason to doubt the correctness of the statement.

(33) Mr. Cheema contended that Smt. Pushpa had in fact committed suicide. She had done so because the appellants had asked her brother to repay the debt. He also submitted that Sudhir Kumar (PW1) was evasive in his answer to the question in this behalf.

(34) Admittedly Raj Kumar—the husband and Smt. Saroj Sood had taken Smt. Pushpa to the Hospital. The record of the Hospital clearly establishes this fact. It is also the admitted position that Smt. Saroj Sood is the wife of the elder brother of the appellants. Still further, on a perusal of the Out Patient Ticket Exhibit. DB, it appears that Smt. Pushpa had allegedly caught fire while working with the kerosene stove. Could it be so ?

(35) Normally, in villages, no lady shall be cooking food in the kitchen at or after midnight. The likelihood of Smt. Pushpa working on the stove at that late hour in the night is not there. Still further, if she had attempted to commit suicide, the appellants would have given an indication in that behalf to all concerned. Admittedly, Rakesh Kumar and Manoj Kumar had gone to the house of Sudhir Kumar (PW1) in village Kansal. There was no suggestion that they had told him in the morning of 26th January, 1994 that Smt. Pushpa had attempted to commit suicide. Besides this, there is no evidence to indicate that the brother of the deceased was actually dealing in cloth and that he had purchased material worth Rs. 2 lacs from any one. Still further, there is no indication with regard to any shop or premises where he may be doing cloth business. In this situation, the plea taken on behalf of the appellants appears to be a totally made-up story. It is rejected.

(36) Mr. Cheema submitted that there was no evidence of any earlier conflict. The appellants had informed the family of the deceased soon after the occurrence. It is undoubtedly so. Yet, the fact remains that the death has occurred. The deceased had suffered serious burn injuries. How did she suffer these burns? In her moments of distress, she has disclosed the sequence of events. It appeals to us. We are inclined to accept it. It is true that the deceased has not given the name of the woman with whom her husband may have been having an affair. However, her statement cannot be rejected on that ground alone. The dying declaration appears to be truthful and we accept it.

(37) Mr. Cheema contended that the father as also the mother of the deceased were present. However, they were not produced.

(38) We cannot reject the dying declaration merely because the Public Prosecutor did not consider it proper or necessary to produce the father and mother of the deceased. He may have considered the other evidence as being sufficient.

(39) Mr. Cheema submitted that the conduct of the appellants is symbolic of their innocence. They had informed the family of the deceased soon after the event.

(40) There is no quarrel with the factual position. It is true that immediate information of the event had been given to the family. However, the appellants had no choice. The family could not have been kept in the dark. It would have known the factual position in any event.

(41) In view of the above, even the second question is answered against the appellants.

(42) No other point has been raised.

(43) In view of the above, we find no merit in this appeal. It is, consequently, dismissed.

J.S.T.

Before V.S. Aggarwal, J.

ISHWAR SWAROOP SHARMA,—*Petitioner*

versus

JAGMOHAN LAL,—*Respondent*

C.R. No. 5261 of 1998

26th November, 1999

Haryana Urban (Control of Rent & Eviction) Act, 1973—S. 4—‘Rent’—Defination—Rent is recompense—Payment for the right to occupy demised premises—Agreed rent—Would be rent agreed upon by contract unless varied.

Held that, rent is recompense. The primary meaning of ‘Rent’ is the sum certain, in gross, which a tenant pays to his landlord for the right of occupying the demised premises. It is an acknowledgement made by a tenant to the landlord of his tenure.

(Para 11)

Further held, that the agreed rent would be the one that was agreed upon by contract and it would continue to be so unless the contract is varied. Even if the period for which the lease has been created has come to an end, the tenant would continue to be liable to pay the rent as had been agreed. It cannot be termed that the tenant would be liable to pay any other amount unless so directed by law or there is change in the terms of the contract.

(Para 12)

Ashok Aggarwal, Senior Advocate with Anil Khetarpal, Advocate,
for the petitioner.

Ravi Kant Sharma, Advocate, *for the respondent.*

JUDGMENT

V.S. Aggarwal, J.

(1) The present revision petition has been filed by Ishwar Swaroop Sharma (hereinafter described as “the petitioner”) directed against the