AFR.
Reserved on. 19.11.2020
Delivered on 09.12.2020
Court No. - 75

CRIMINAL MISC BAIL APPLICATION NO. 01 OF 2020

IN RE.

Case :- *CRIMINAL APPEAL No. - 1397 of 2020*
Appellant :- *Smt. Babli And 2 Others*
Respondent :- *State of U.P.*
Counsel for Appellant :- *Vinod Singh,Ayank Mishra*
Counsel for Respondent :- *G.A.*

AND

CRIMINAL MISC BAIL APPLICATION NO. 01 OF 2020

IN RE.

Case :- *CRIMINAL APPEAL No. - 388 of 2020*
Appellant :- *Kamal*
Respondent :- *State of U.P.*
Counsel for Appellant :- *Sunil Kumar*
Counsel for Respondent :- *G.A.*

Hon'ble B. Amit Sthalekar,J.
Hon'ble Shekhar Kumar Yadav,J.

(Per. Justice Shekhar Kumar Yadav.)

1. Mr Ayank Mishra, Sri Sunil Kumar, learned counsel for the appellants/applicants, and learned AGA for the State respondent are present. We have also perused the material available on record.

2. The criminal appeal No. 1397 of 2020 has been filed by the appellants/applicants, namely **Smt Babli, Smt Vimla and Jaiprakash** and the Criminal Appeal No. 388 of 2020 has been filed by appellant, namely, **Kamal** against the order dated 10.1.2020, passed by Addl. Sessions Judge, FTC Court No. 2, Bulandshahr in Sessions Trial No. 849 of 2014 (State Vs Raju and others) and Sessions Trial No. 100 of 2015 (State

Vs. Jaiprakash) arising out of Case Crime No. 153 of 2014, P.S. Pahasu, District Bulandshahr, whereby all the appellants/ applicants, namely, Smt Vimla, Babli, Kamal and Jaiprakash have been convicted under Section 302/34 IPC and sentenced to life imprisonment along with fine with default stipulation. All the appellants except appellant Kamal have further been convicted under Section 498-A IPC and sentenced to three years rigorous imprisonment along with fine with default stipulation. Further all the appellants/applicants except appellant Kamal have been convicted under Section 3 of the Dowry Prohibition Act and sentenced to three years rigorous imprisonment along with fine with default stipulation. All the appellants except appellant Kamal have further been convicted under Section 4 of the Dowry Prohibition Act and sentenced to two years imprisonment along with fine with default stipulation.

3. The appellants/applicants have prayed for their release on bail by filing separate bail applications in the aforesaid two separate criminal appeals arising out of the same impugned judgement, during pendency of their appeals before this Court, hence their bail applications are being disposed of by this common order.

4. In brief, the prosecution case, which has been lodged on 2.7.2014 on the basis of the written report submitted by first informant namely, Munesh (P.W.1) alleging therein that marriage of his niece was solemnised with accused appellant Raju (Husband) son of Jaiprakash about five years ago. It is alleged that Raju (husband), his mother (Smt Vimla) and father (Jaiprakash), sister (Smt Babli) and his friend (Kamal) were continuously torturing and harassing the niece of informant for

bringing less dowry and for not giving vehicle in the marriage, and this torturous acts of appellants/applicants were regularly complained to the informant's side by his niece and for which a case of dowry was also registered and pending between the parties. It is further alleged that on 23.06.2014, the appellants/ applicants took the niece of the informant to her matrimonial home, thereafter, she has been continuously harassed and maltreated again for bringing less dowry, which was also complained by her to the informant and the family members. It is furtehr alleged that the informants' side were, thereafter, in arrangement of the vehicle to pacify their demands but on 2.7.2014 at about 10 a.m., the appellants/applicants are said to have set her ablaze by pouring kerosene oil with intention to kill her and when the informant and his family members got the information that his niece has been burnt, they rushed to the District Hospital, Bulandhshahr, where she was hospitalized and on enquiry by the informant, she narrated that all the appellants/applicants have set her at ablaze with an intention to kill her. It is further alleged that niece of the informant was thereafter referred to Guru Teg Bahadur Hospital, Shahdara, Delhi. During treatment, deceased is said to have expired on 8.7.2014. Inquest on her dead body was conducted on 9.7.2014, vide Ex.Ka.6, and the body was sent for postmortem, report of which, is available on record as Ex.Ka- 3. As per postmortem report, deceased suffered about 95 % burn injury and she died because of septicaemic shock as a result of flame burns.

5. On the basis of the said report, FIR was lodged on 2.7.2014 vide Case Crime No. 153 of 2014, under Sections 498-A, 307 IPC and Section ¾ of D. P. Act and after the death of the victim, the case was converted to Section 498-A, 304-B

IPC and Section ¾ of D. P. Act on 21.07.2014 and lateron additional charge u/s 302/34 IPC was framed by Magistrate.

6. Learned counsel for the appellants/applicants submits that the applicants are husband and in-laws of the deceased and appellant Kamal is friend of appellant Raju. The applicants are in custody since 10.01.2020 and have undergone imprisonment for a period of almost one year, therefore, this court may exercise discretion in favour of the appellants/applicants. The applicants have been falsely implicated in this case.

7. It is further submitted that the dying declaration (Exhibit Ka 2) is not trustworthy because in the dying declaration, it has not been recorded that deceased was in a fit state of mind to make the said dying declaration. Learned counsel submits that before recording the dying declaration, even if the Doctor has certified that victim is in conscious state of mind, the Executive Magistrate was under an obligation to record as to whether the deceased was in a fit state of mind to make the dying declaration. Learned counsel for the applicants has further contended that the prosecution witnesses have not fully supported the case of the prosecution.

8. The prayer of bail is opposed by learned AGA for the State. He placed reliance on the dying declaration (Exhibit Ka-2) recorded by P.W.-4 Ved Prakash Meena (Executive Magistrate) to contend that there is no contradiction or inconsistency in the dying declaration so as to disbelieve the same. It is further submitted that P.W.-4 (Executive Magistrate) in his deposition has stated that before recording the dying declaration, he enquired about the mental status of the victim from the Doctor and on being satisfied regarding fit mental

status of the deceased, he proceeded to record the dying declaration and it is not the requirement of law that the Executive Magistrate was under an obligation to record his satisfaction that the deceased was in a fit state of mind to make the dying declaration. In support of his argument, learned AGA has placed reliance on the Constitution Bench Judgement of Apex Court in the case of **Laxman Vs State of Maharashtra, AIR 2002 SC 2973,** wherein it is succinctly explained that medical certification is not a sine qua non for accepting the Dying Declaration**.**

9. In the case of **Laxman (supra)**, the Court while dealing with the argument that the dying declaration must be recorded by a Magistrate and the certificate of fitness was an essential feature, made the following observations. The court answered both these questions as follows:

> *"3. 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 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. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a Magistrate or a doctor or a police officer. When it is recorded, no oath is necessary nor is the presence of a Magistrate absolutely necessary, although to assure authenticity it is usual to call a Magistrate, if available for recording the statement of a man about to die. There is no requirement of law that a dying declaration must necessarily be made to a Magistrate and when such statement is recorded by a Magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the Magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise."

10. We have heard the parties at length.

11. Prima facie, reading of the dying declaration (Exhibit Ka. 2) shows that the deceased gave the dying declaration before the Executive Magistrate, who after having been satisfied that she was in a fit state of mind in giving the statement, recorded her dying declaration. In her dying declaration, the deceased has categorically stated as to the manner in which she was burnt by the appellants/applicants. It is trite law that the court

should not be too technical when it feels convinced about the trustworthiness of the dying declaration, which inspires confidence, can be acted upon, without any corroboration.

12. Considering the facts and circumstances of the case as also the submissions advanced by learned counsel for the parties, but without expressing any opinion on the merits of the case, and also looking to depositions of prosecution witnesses as have come on record coupled with dying declaration, prima-facie, there is a case against the appellants/applicants, and therefore, taking into consideration the gravity of offence, quantum of punishment, more particularly, considering the age of the deceased, who was around 22 years old at the time of the incident and the manner in which the appellants/applicants are involved in the offence, as alleged by the prosecution, we are not inclined to exercise discretion in favour of the appellants/applicants. Their prayer for bail is **rejected.** It is, however, made clear that any observation made herein will not affect merits of the case at the time of final arguments.

13. The Lower Court Record is available. Office is directed to prepare the paper book within two months.

14. Learned counsel for the parties may collect the paper book thereafter from the office within three days.

15. List thereafter for hearing the appeal.

Order Date :- 09.12.2020
RavindraKSingh