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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of Decision: 17th August, 2009

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CRL.A. 30/2001

SHIVANI & ANR. Appellants
Through: Ms.Neelam Grover, Advocate

versus

STATE Respondent
Through: Mr. Pawan Sharma, Advocate

CRL.A. 133/2001

SATISH KUMAR & ANR. Appellants
Through: Ms.Neelam Grover, Advocate

versus

STATE Respondent
Through: Mr. Pawan Sharma, Advocate

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE INDERMEET KAUR

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

PRADEEP NANDRAJOG, J. (ORAL)

1. Vide impugned judgment and order dated 23.12.2000, the learned Additional Sessions Judge has acquitted co-accused Nahar Singh and Vinod Kumar i.e. the father-in-law and the husband of the deceased Ms.Vimlesh of

the charges under Section 302/34 IPC and Section 498-A/34 IPC. Appellants Shivani, the sister-in-law of deceased, Premwati, the mother-in-law of the deceased, Satish Kumar and Ashok Kumar, the two brothers-in-law of the deceased have been convicted for the offence punishable under Section 302/34 IPC. They have been acquitted of the charge for the offence punishable under Section 498-A/34 IPC.

2. The reason for acquitting the husband and the father-in-law of the deceased and convicting the appellants for the offence of murder is that the two dying declarations made by the deceased did not implicate Nahar Singh, the father-in-law of the deceased for the offence punishable under Section 302/34 IPC. Qua Vinod, the husband of the deceased, in one dying declaration he was accused of being a by-stander and in the other dying declaration he was assigned the role of a saviour. While acquitting all the accused of the offence punishable under Section 498-A/34 IPC, the learned Trial Judge has noted material improvements by the relatives of the deceased on the issue of dowry demands. The learned Additional Sessions Judge has held that the testimony of Nepal Singh PW-2, the brother of the deceased and Chinranji Devi PW-4, the mother of the deceased do not inspire confidence and hence has acquitted all the accused persons i.e. Nepal Singh, Vinod, Premwati, Shivani, Ashok and Satish of the

charge framed under section 498-A/34 IPC. Relying upon the two dying declarations Ex.PW-21/A and Ex.PW-10/A made by the deceased to Inspector Nirranjan Singh PW-21 and Mr.S.N. Sahai PW-10, the then SDM, respectively, the learned Trial Judge has convicted Premwati, the mother-in-law of the deceased, Satish Kumar and Ashok Kumar, brothers-in-law of the deceased and Shivani, the sister-in-law of the deceased for the offences punishable under section 302/34.

3. We note that during the pendency of the appeals Premwati died as recorded in the order dated 20.5.2002. Hence, Crl.Appeal No.30/2001, insofar it relates to the challenge by Premwati stands abated.

4. Since the appellants have been convicted on the strength of the dying declarations made by the deceased, we may briefly note the facts relevant for our decision. Since the State has not filed any appeal pertaining to the acquittal of all the accused for the offence punishable under Section 498-A/34 IPC or the acquittal of the father-in-law and the husband of the deceased for the offence punishable under Section 302/34 IPC, we need not note the evidence pertaining to the alleged dowry demand.

5. As recorded in the MLC Ex.PW-14/A of Vimlesh, she was admitted in a burnt condition at JPN Hospital at 7:00 PM on 2.8.1989. As recorded in the MLC, Vimlesh was brought to

the hospital by her husband i.e. Vinod. Vimlesh was semi conscious and was not responding to the verbal commands, a fact recorded in the MLC Ex.PW-14/A. Her husband i.e. Vinod told the doctor on duty, as recorded in the MLC, that Vimlesh had poured kerosene oil on herself and set herself on fire.

6. On receipt of information that a lady had been burnt at House No.53-B/8 Chhoti Mor Sarai, i.e. the matrimonial house of deceased Vimlesh, Inspector Jagdish Prasad PW-15, reached the house and proceeded to JPN Hospital as he was informed that the lady who was burnt was removed to the said hospital. Vimlesh was not fit for making a statement. Prem Chand, the brother of Vimlesh, who had reached the hospital on receiving information that his sister was burnt, met the investigating officer and made a statement Ex.PW-15/A informing that his sister was harassed for dowry and he suspected that her in-laws had burnt her. Making an endorsement Ex.PW-15/B on the statement Ex.PW-15/A, Inspector Jagdish Prasad forwarded the same for FIR to be registered. Const. Pradeep Kumar PW-3 who had accompanied Inspector Jagdish Prasad from the police station took the statement and the endorsement to the police station where the FIR in question was registered.

7. Proceeding back to the house of the deceased, which was a flat on the first floor, Inspector Jagdish Prasad

prepared the site plan Ex.PW-15/C and penned the marginal notes thereon. A plastic can, a match box, some burnt match-sticks, pieces of burnt clothes were lifted from the spot as recorded in the seizure memo Ex.PW-2/A. A letter Ex.P-A and a note-book (un-exhibited at the trial) was recovered from under a pillow of the bed stated to be that of Vimlesh. The two were seized as recorded in the seizure memo Ex.PW-2/B.

8. The letter Ex.P-A is claimed by the appellants to be in the handwriting of the deceased and it is the claim of the appellants that the same shows that the deceased had decided to commit suicide and falsely implicate her mother-in-law and her sister-in-law as the perpetrators of the crime.

9. The letter Ex.P-A records that Vimlesh was troubled by her mother-in-law and her sister-in-law. It also records that the two had poured kerosene oil on Vimlesh and set her on fire.

10. The MLC Ex.PW-14/A of Vimlesh shows that she was extensively burnt. 90% of her body was burnt. Even the two dying declarations Ex.PW-21/A and Ex.PW-10/A bear the left toe impression of the foot of the deceased and as disclosed by the SDM Shri S.N.Sahai PW-10, he did so because both hands of the deceased were burnt. It is thus obvious that Vimlesh could not have written Ex.P-A after she was burnt.

11. It is possible that she wrote Ex.P-A before she died. But to hold so would require proof that Ex.P-A is in the handwriting of the deceased.

12. The relevance of said exercise would be this: If Vimlesh has written the document which contains a statement that her mother-in-law and sister-in-law have set her on fire, it is obvious that Vimlesh has written said fact before she was set on fire. How could she ever think of that her mother-in-law and sister-in-law would set her on fire? The inference would be that thinking that said letter would implicate her mother-in-law and sister-in-law, Vimlesh wrote the letter and thereafter set herself on fire.

13. The learned Trial Judge has held that Ex.P-A is not in the hand of the deceased for the reason the prosecution has led no evidence pertaining to the handwriting of the deceased and there was no evidence that the writing on the notebook recovered along with Ex.P-A was in the hand of the deceased i.e. there was no sample/admitted writing of the deceased before the Court.

14. Learned counsel for the appellants and the State concede that nothing turns on Ex.P-A and therefore it may be ignored.

15. As recorded in the MLC Ex.PW-14/A, Vimlesh was declared fit for statement vide endorsement Ex.PW-14/D at

10:30 AM on 3.8.1989. Immediately, Inspector Niranajan Singh PW-21 recorded her statement Ex.PW-21/A on 3.8.1989 at around 10:40 AM. The statement is recorded in Devnagri script. Translated, it reads as under:-

“My name is Vimlesh. The name of my husband is Vinod. I got married 3 years prior to February 1990. I have two children named (illegible) and Meenakshi. Since the time of my marriage my mother-in-law Shriveni @ Premwati, my husband Vinod, my sister-in-law Shivani and Ashok and Satish my brothers-in-law kept harassing me. One day my husband had given me beatings and when my family came to visit me he pushed them out of the house saying that he would deal with the police and the court. My husband kept asking me to get money from my parents and to arrange for a separate house for us. Time and again I informed my parents about the demands of my husband and his family. Yesterday morning my father-in-law Nahar Singh, my mother-in-law, sister-in-law Shivani quarreled with me and after putting on the VCR at a very loud volume so that no one could hear my screams, my mother-in-law, sister-in-law Shivani and brothers-in-law Ashok and Satish dragged me towards the balcony where my mother-in-law poured kerosene oil on my head and set me on fire. My husband was also present there but he did not try to save me despite my crying for help. What will happen to my children? I was not even given food for the last two days. I am feeling very thirsty and hungry. After burning me, they said that the police could do nothing.”

16. In view of the fact that Vimlesh implicated four family members directly and her husband of being a passive by-stander, Inspector Niranjan Singh PW-21 informed the area Sub Divisional Magistrate Shri S.N.Sahai PW-10, who

immediately reached the hospital and recorded the statement Ex.PW-10/A at about 1:10 PM the same day. The statement is in Devnagri script. Translated, it reads as under:-

“Q. What is your name?

A. Vimlesh.

Q. What is the name of your husband and where do you reside?

A. My husband is named Vinod Kumar and I reside in House No.53-B/8, Chotti More Sarai, Near Kodia Pul, Delhi.

Q. How did you catch fire?

A. Yesterday evening at around 5 or 6 PM my mother-in-law, my sister-in-law Shivani and my brothers-in-law Ashok and Satish caught hold of me and set me on fire. While my brothers-in-law Ashok and Satish and my sister-in-law Shivani were holding me, my mother-in-law poured kerosene oil on me and by lighting a match stick, set me on fire. I was crying for help but no one could hear me outside as at that time a VCR (taken on rent) was being played at a very loud volume. On catching fire, I ran out from my room towards the kitchen where my husband poured water on me to douse the fire and then took me to the hospital.

Q. Why were you burnt?

A. Since the time of my marriage the members of my husband's family were demanding Rs.1,00,000/- for dowry which demand could not be fulfilled by my brothers and for this reason my mother-in-law, sister-in-law, brothers-in-law and my husband used to beat me. On 5.6.1989, tired of the tortures inflicted on me, I went to my brother, who, however refused to keep me in the house and so I returned back. For this reason my in-laws were agitated and started beating me even more. For the past one week the quarrels had considerably increased and since day before yesterday I was not given food and water. Yesterday evening they attempted to kill me.

Q. When did you get married?

A. I got married according to the Hindu Rites and Rituals on 20.2.1987.

Q. Where were your husband and children when you were being set ablaze?

A. They were outside in the lawn.”

17. As held in the decision reported as 2007 (3) JCC 2355 Mehiboobsaab Abbasabi Nadaf vs. State of Karnataka, where there are more than one dying declarations made by the deceased, extra care has to be taken to see as to which dying declaration inspires confidence. The one which inspires confidence has to be accepted. If none inspires confidence, each has to be discarded.

18. In a decision dated 12.5.2009 disposing of Crl.Appeal No.228/2001 Gokul vs. State, a Division Bench of this Court, of which one of us, namely, Pradeep Nandrajog, J. was a member of, rules of caution for acceptance of dying declarations were enumerated as under:-

“32. The admissibility of a dying declaration as a piece of evidence is an exception to the general rule of exclusion of hearsay evidence. 'A person will not meet his Maker with a lie in his mouth' is the philosophy underlying admissibility of dying declaration as a piece of evidence. Apart from an implicit faith in the intrinsic truthfulness of human character at the dying moments of one's life, admissibility of dying declaration is also based on the doctrine of necessity. In many cases victim is the only eye witness to a crime on him/her and in such situations exclusion of the dying declaration, on hearsay principle, would tend to defeat the ends of justice. The judicially evolved rules of

caution for acceptance of dying declaration are being enumerated herein under:-

(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration.

(ii) The dying declaration is only a piece of untested evidence and must, like any other evidence, satisfy the court that what is stated therein is the unalloyed truth and that it is absolutely safe to act upon it. If after careful scrutiny, the court is satisfied that it is true and free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal impediment to make it the basis of conviction, even if there is no corroboration.

(iii) The court has to scrutinize the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had an opportunity to observe and identify the assailants and was in a fit state to make the declaration.

(iv) Where a dying declaration is suspicious, it should not be acted upon without corroborative evidence.

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected.

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction.

(vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected.

(viii) Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth.

(ix) Normally, 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 eyewitness said that the deceased was in a fit and conscious state to make the dying declaration, the medical opinion cannot prevail.

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon.

(xi) Where there are more than one statements in the nature of dying declaration, the one first in point of time must be preferred. Of course, if the plurality of the dying declaration could be held to be trustworthy and reliable, it has to be accepted.

(xii) The law does not provide that a dying declaration should be made in any prescribed manner or should be in the form of questions and answers. Only because a dying declaration was not recorded by a Magistrate, is no ground to disbelieve a dying declaration."

19. As held in the decision reported as 2008 (1) SCALE 653 Shaikh Rafiq & Anr. vs. State of Maharashtra, where any doubt is cast on a dying declaration, it is unsafe to sustain a conviction on the dying declaration of the maker thereof.

20. A perusal of the two statements Ex.PW-10/A and Ex.PW-21/A, which were recorded with a time interval of about two hours, show substantial discrepancies inter-se the two statements. In Ex.PW-21/A which was recorded first at around 10:40 AM Vimlesh has stated that it all started when her father-in-law Nahar Singh, her mother-in-law Premwati and sister-in-law Shivani quarreled with her. Followed by her

mother-in-law, sister-in-law and the two brothers-in-law dragging her towards the balcony where her mother-in-law poured kerosene oil on her and set her on fire. She alleges the role of a passive by-stander to her husband, who, according to the statement, remained unmoved in spite of her crying as to what would happen to her children. In the second dying declaration, Vimlesh does not speak about any quarrel involving her father-in-law, mother-in-law or sister-in-law. She commences the narrative by saying that in the evening, her sister-in-law and brothers-in-law caught her and her mother-in-law poured kerosene oil on her and set her on fire. She states that on catching fire, she ran out from the room towards the kitchen where her husband poured water on her to douse the fire. To the last question put to her by PW-10 as to where were her husband and children when she was set ablaze, she replied that they were in the lawn.

21. So different are the two versions narrated by Vimlesh that it is just not possible to reconcile the two. From inculcating her husband as a by-stander, she changes her version of ascribing a role of a saviour to her husband. From partly inculcating her father-in-law of being a part of the troika who quarreled with her immediately preceding the act of setting her on fire, she omits to speak anything about a

quarrel preceding the act of setting her on fire. The place where she was burnt, as per the first statement, is the balcony of the house to which she claimed being dragged towards by her sister-in-law and her brothers-in-law. The second statement speaks nothing of anyone dragging her towards the balcony. As per the first statement, she was burnt in the balcony. Her statement that on catching fire she ran out from her room towards the kitchen, which is a part of her second statement i.e. Ex.PW-21/A, shows the place where she was burnt was her room. Thus, even the place where she was burnt has been changed by Vimlesh. In her second statement, Vimlesh has categorically stated that when she was set on fire, her husband was in the lawn.

22. The learned Trial Judge has acquitted the father-in-law and the husband of Vimlesh on account of the afore-noted inconsistencies. We may note a clarification here. Qua the father-in-law of the deceased, the learned Trial Judge has held that no role whatsoever has been attributed to him in both the statements.

23. It appears that the learned Trial Judge has been swayed by the fact that in both the statements the deceased implicated her two brothers-in-law, her sister-in-law and her mother-in-law. The learned Trial Judge has ignored the fact

that Vimlesh had completely changed the version as to where and under what circumstances she was set on fire. The learned Trial Judge has ignored the changed versions as noted by us in the preceding paras.

24. The two mutually contradictory narratives i.e. irreconcilable versions narrated by Vimlesh compels us to hold that neither dying declaration inspires confidence and there are traces of Vimlesh having a grudge against the appellants and hence being motivated not to speak the truth. The grudge against the appellants is evidenced by the fact that in the two completely different narratives of the same event, the only commonality is to implicate the appellants. Thus, the appellants are entitled to a benefit of doubt.

25. It being wholly irrelevant for our decision, we have not included a fact while considering the evidence, but note the same, as insisted to by learned counsel for the appellants. The said fact is that the widowed elder sister of Vimlesh subsequently has got married to Vinod i.e. the husband of Vimlesh. Learned counsel for the appellants has wanted to urge that this shows the confidence of the parents of Vimlesh in the family of Vinod. Counsel wanted us to draw an inference that Vimlesh set herself on fire due to some cause

which has died with her. We feel that said subsequent event is wholly irrelevant.

26. The appeals are allowed. The conviction of the appellants of the offence punishable under Section 302/34 IPC is set aside. The appellants are acquitted of the charge framed against them of murdering Vimlesh.

27. Since the appellants are on bail, their bail bonds and surety bonds are discharged.

PRADEEP NANDRAJOG, J.

INDERMEET KAUR, J.

AUGUST 17, 2009
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