

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Decision : September 14, 2009*

+ **CRL.A. 631/2001**

BRIJ KISHAN Appellant
Through : Mr.P.R.Thakur, Advocate.

Versus

STATE Respondent
Through : Mr.M.N.Dudeja, A.P.P.

CRL.A. 647/2001

VIJAY LAXMI & ANR. Appellants
Through : Mr.P.R.Thakur, Advocate.

Versus

STATE Respondent
Through : Mr.M.N.Dudeja, A.P.P.

CRL.A. 665/2001

RAJ KISHAN Appellant
Through : Mr.P.R.Thakur, Advocate.

Versus

STATE Respondent
Through : Mr.M.N.Dudeja, A.P.P.

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. 5 persons; namely, Raj Kishan husband of the deceased Suman, Suman's mother-in-law Smt.Pushpa, Suman's brother-in-law (jeth) Brij Kishan, Suman's sister-in-law Vijay Laxmi and Jagat Narayan the husband of Vijay Laxmi were charged with the offence punishable under Section 302/34 IPC and for the offence punishable under Section 498A/34 IPC.

2. During trial, Smt.Pushpa, the mother-in-law of the deceased expired on 16.8.2000; a fact noted in the impugned judgment and order dated 22.8.2001. Thus, proceedings abated against Smt.Pushpa.

3. The remaining four accused have been convicted for the offence they were charged and for the offence punishable under Section 302/34 IPC have been sentenced to undergo imprisonment for life and for the offence punishable under Section 498A/34 IPC they have been sentenced to undergo rigorous imprisonment for a period of three years. Fine has also been imposed upon the accused who have been

convicted and in default of payment of fine it has been directed that they would undergo further imprisonment for a period of 6 months.

4. During the pendency of the afore-noted appeals whereunder the husband, the sister-in-law and the two brothers-in-law of the deceased have challenged their conviction, Vijay Laxmi, the sister-in-law of the deceased expired on 14.1.2006; in respect whereof a certificate issued by the Registrar of Births and Deaths has been produced in Court for our perusal. Photocopy thereof has been handed over to learned counsel for the State.

5. It hardly matters whether qua Vijay Laxmi Crl.Appeal No.647/2001 is disposed of as having abated, for the reason after hearing arguments in the three appeals we are of the opinion that the impugned decision of conviction cannot be sustained; entitling the accused to be acquitted.

6. In returning a finding of guilt against the accused, the learned Trial Judge has held that the testimony of Brij Mohan Sharma PW-1 established an oral dying declaration made by the deceased to Brij Mohan who claims to have been present in the taxi in which the deceased was removed to the hospital. The learned Trial Judge has also held that two other dying declarations; namely Ex.PW-29/C, recorded by the

investigation officer SI Hoshiar Singh PW-29; followed by another dying declaration Ex.PW-19/B recorded by Shri G.C.Pillai PW-19, then functioning as the Executive Magistrate of the area concerned, inspired confidence. The learned Trial Judge has held that the said dying declarations clearly inculpated all the five accused. Since the mother-in-law of the deceased had expired, the remaining four accused have been convicted for the offence of murder.

7. Pertaining to the conviction of the appellants for the offence punishable under Section 498A/34 IPC, the learned Trial Judge has held that the testimony of Brij Mohan PW-1, Bhola Shankar PW-2 and Bhu Dev PW-3 who resided in the neighbourhood of the matrimonial house of the deceased as also the testimony of Mahesh Chand Nagar PW-11, the brother of the deceased and Ms.Kamla Nagar PW-10, the mother of the deceased, inspires confidence and establishes that on account of inadequacy of dowry brought by the deceased she was subjected to mental and physical cruelty.

8. It is not in dispute that Suman received burn injuries in her matrimonial house at around 1:00 AM on the intervening night of 8th and 9th August 1985. It is also not in dispute that Suman was immediately rushed to Lok Nayak Jai Prakash Hospital. There is some dispute whether Suman was

removed to the hospital by her father and PW-1 or that they reached the hospital a little late and Suman was removed to the hospital by her husband and Brij Kishan, the brother-in-law of Suman.

9. Whereas the MLC Ex.PW-27/A of Suman records that her father Shri Kanti Chand Nagar had got her admitted at hospital at 1:50 AM; the authorization at the rear of admission form bears the signatures of Brij Kishan.

10. According to the accused when Suman was admitted at the hospital necessary formalities pertaining to the treatment to be given to her were being completed requiring an authorization, permitting the medicines which had to be given to the deceased, to be given. At that time, the father of the deceased reached the hospital and simultaneously when the MLC was being drawn up got recorded in the MLC that it was he who had brought Suman to the hospital.

11. The controversy aforesaid would be relevant for the conduct of the in-laws of Suman. Indeed, if the in-laws of Suman were indifferent towards her, it would show, if not substantially at least to some extent the acrimonious relationship and the indifference of the in-laws in rescuing Suman.

12. But, we need not resolve the aforesaid controversy for the reason we find considerable doubt being cast on the two written dying declarations and even if the two were truthfully recorded, a serious doubt is cast whether at all Suman voluntarily made the statements or was influenced by her father, who, admittedly had reached the hospital before the statements were recorded. Corroboration to said fact i.e. of Suman's father being in the hospital is to be found in the MLC of the deceased, which, as noted above, record that Suman was brought to the hospital by her father.

13. It is settled law that where there are inconsistencies in a dying declaration or where there are traces of the maker of the dying declaration being influenced, unless corroborated by independent evidence, it would be unsafe to sustain a conviction on such dying declarations.

14. Before we note the contents of the two written dying declarations, we may note that while putting the incriminating circumstances to the accused when they were examined under Section 313 Cr.P.C., the incriminating circumstance of the deceased having made any oral dying declaration to Brij Mohan PW-1 has not been put to the accused. Thus, while considering the incriminating circumstances against the accused, said evidence has to be

excluded while considering the evidence led against the accused.

15. We shall also be noting hereinafter the possibility of Brij Mohan falsely deposing on account of local politics in the colony.

16. The statement Ex.PW-29/C, as noted therein, has been recorded somewhere around 11:00 AM on 9.8.1985. The scribe of the statement is SI Hoshiar Singh PW-29. The statement is in Devnagri script. It is not in question-answer form. It is a narrative in one paragraph.

17. The statement reads as under:-

“Statement of Smt.Suman W/o Shri Raj Kishan R/o 1766 Kucha Lattu Shah, Dariba Kalan, aged 27 years.

I reside at the address above noted and about 1¼ years ago got married to Raj Kishan and since marriage I am residing in my matrimonial house where my mother-in-law, my jeth and jethani as also my nand and nandoi reside. No child has been born to me. After marriage my mother-in-law and sister-in-law used to directly and indirectly harass me on account of dowry. On 8.8.1985 Sudhir whom I treat as a brother came to my house and counseled me and my husband. He left in the night at around 12:30. After seeing him off my husband returned and started speaking very harshly with me and even slapped me. After switching off the light in our room we went to sleep. The three doors in the room were latched. After sometime I got up and went towards the toilet. At that time somebody poured kerosene oil on me from the back and lit a matchstick and set me on fire. I could not see who that person was. But saw Jagat Prasad, my Nandoi, leaving the place. In the night whenever my husband used to cohabit

with me he used to leave the room after beating me. My mother-in-law used to sleep in a room downstairs. My bedroom was upstairs. In the night my mother-in-law used to tell me to call my husband to the room and sleep with him and when I used to refuse she used to beat me. This had been happening for quite some time and on account thereof I used to be beaten. The reason was dowry. I have heard the statement. It is correct."

18. The second dying declaration Ex.PW-19/B is in English. It reads as under:-

"On the night of 9.8.1985 after 12 am (midnight) on the night while I was came out from the room to the bathroom, then two or three persons came after me. Sister and brother-in-law came before and after their arrival I was gone to the bathroom. My mother-in-law beat me and my husband Raj Kishan told me that Vijay the sister-in-law and Jagat Prakash brother-in-law told him all the facts and Vijay and Jagat also beat me in between. Then someone poured K.oil on me. I could only see a man with Pyajama & Pyajama was worn by Raj Kishan and some other peson lighted the matches over my body. Mr.Gopal Krishan, brother of Raj Kishan, Vijay laxmi and Jagat Prakash, Annu Bhai of Moradabad were present there and was asking for dowry. All other girls used to bring more dowry by neighbours and they were asking why you did not bring dowry. I was wearing a synthetic saree and the fire was spread all over my body. I was married in 10.5.1984 and no children. I was brought to the hospital by Shri Brij Mohan Sharma resident of the same street and Shri Mool Chand Gupta, Municipal Councillor and admitted. I was sleeping and mother-in-law and wife of Brij Kishan alias Gopal Kishan used put Sindoor on body. Mrs.Vijay used to talk everything to her mother and she used to tell to my husband with this my husband used to beat me. I was used compel to sleep with Jagat brother-in-law. I can't talk anymore."

19. The second dying declaration has been recorded, as

noted thereon at 1:20 PM i.e. after a gap of about two hours and twenty minutes of Ex.PW-29/C being recorded. Suffice would it be to state that a bare reading of the two dying declarations shows great deal of inconsistencies therein.

20. There is no mention of anybody beating Suman at the time when she was set on fire in the dying declaration Ex.PW-29/C. In the dying declaration Ex.PW-19/B it stands recorded that the mother-in-law, Raj Kishan the husband of the deceased, Vijay the sister-in-law of the deceased and Jagat Prasad the husband of Vijay Laxmi gave her beating. Nobody is named being present, whom she had seen, in the first dying declaration Ex.PW-29/C. In the second dying declaration persons who are named being present are Gopal Kishan, Raj Kishan, Vijay Laxmi, Jagat Prasad and one Annu Bhai of Moradabad.

21. The only commonality in the two statements is when Suman states that she saw somebody in a pyjama leave the spot where she was burnt. But, even in respect thereof, we find a changed version. In Ex.PW-29/C she says that the pyjama was the one which she had been seeing worn by Jagat Prasad. In the statement Ex.PW-19/B she says that the pyjama was the one which was worn by Raj Kishan.

22. So different and discrepant are the two dying

declarations that rule of prudence compels us to discard both.

23. We eschew reference to certain features pointed out by learned counsel for the appellant wherefrom counsel doubted the capacity of Suman to make the statements. Suffice would it be for our purposes to note that the presence of Suman's father in the hospital is suspicious enough to doubt whether Suman spoke for herself or was made to speak at the behest of her father.

24. While commencing our decision we had noted a reference to some local politics being played and the same influencing the witnesses to depose falsely.

25. Brij Mohan Sharma PW-1 a resident of Kuch Lattoo Shah is admittedly a neighbour of the deceased. As per him when he removed Suman to the hospital in the taxi along with Kanti Chand, father of Suman, on the way Suman told him that Raj Kishan i.e. her husband had poured kerosene oil on her and Pushpa, her mother-in-law set her on fire, when she tried to save herself Brij Kishan, Jagat Narayan and Vijay closed the door.

26. Though said evidence has to be ignored by us for the reason while examining the appellants under Section 313 Cr.P.C. said incriminating evidence has not been put to the accused, but we would be failing to note that PW-1 has given a

third version of who participated and in what manner as disclosed to him by Suman.

27. We note that on being cross-examined, PW-1 admitted that he was a worker affiliated with the Indian National Congress. He admitted that there was a Consumer Cooperative Society formed by the residents of the area and that he had been a Secretary of the society. He denied that he had embezzled the funds of the society but admitted that the Inspector of Food and Supply Department had checked the working of the society. He stated during cross-examination that he could neither affirm nor deny whether this was done pursuant to the complaint made by appellant Brij Kishan. He admitted that the consumer store was challaned a number of times and fine was imposed by the Court. He admitted that a case was pending against him under the Essential Commodities Act. He denied the suggestion that Suman's brother had stood surety for him, but failed to give the name of his surety.

28. Suffice would it be to state that it is apparent that Brij Mohan had a past enmity with the appellants and Suman receiving burn injuries in her matrimonial house was a golden opportunity for Brij Mohan to ensnare the appellants in the clutches of law.

29. Bhola Shanker PW-2 claimed to be an eye-witness. He deposed that the cries of bachao-bachao broke his slumber when he heard the noise at around 1:00 – 1:15. He switched on the light and saw through the '*jangla*' that Suman was trying to open a window. The accused were pulling her towards the bathroom. He ran down in the street and informed Suman's parents who resided nearby and that in the company of Mahesh, brother of Suman and Kanti Chand, father of Suman, he reached Suman's matrimonial house who had been brought down by then.

30. In cross-examination, Bhola Shanker admitted that he had been convicted and fined by a Criminal Court and that appellant Brij Kishan had filed a suit seeking compensation on the allegation that Brij Kishan had been defamed by him. But, he clarified that the suit was dismissed. He admitted that Brij Kishan had filed a suit against him to injunct him from parting possession with the portion of the property under his tenancy.

31. It is apparent that Bhola Shanker is a tenant under the appellants. Thus, it is apparent that even Bhola Shanker had an axe to grind against the appellants.

32. Bhu Dev PW-3, a resident of house No.1771, Kucha Lattoo Shah, Dariba had deposed in a very blurred language. His testimony hardly inculpates anybody and is of not much

relevance. We may note that as per him when he heard noise in the street at around 1:00 AM he got up and on making enquiry was told that the daughter-in-law in an adjoining house had been burnt. He stated that he saw Brij Mohan bring down Suman whose body was covered with a cloth.

33. We may note that the testimony of Bhu Dev lends credence to the defence version that Brij Mohan, the brother-in-law of the deceased and her husband, were the ones who removed the deceased to the hospital.

34. Mahender Singh PW-8, a resident of House No.1757 Kucha Lattoo Shah, Dariba deposed that at around 1:00 AM in the night of 8th and 9th August 1985 noise of 'bachao-bachao maar- diya maar-diya' awoke him from his slumber. He heard one Bhola shouting that a daughter-in-law had been killed. He saw the accused on the first floor of their house. We note that Mahender Singh was cross-examined with reference to the distance of his house and the house where the incident took place as also whether the two houses were in a straight line of vision.

35. In the absence of a site plan showing the location of the two houses it would not be possible for anyone to draw any conclusion on said issue. But, what is worthy of being noted is that in his statement Ex.PW-8/DA recorded under Section 161

Cr.P.C. it has not been recorded that Mahender Singh saw all the accused on the first floor of their house. It is also worthwhile to note that in the said statement it has not been recorded that Mahender stated to the police that he heard Bhola Shanker shouting that a bahu (daughter-in-law) had been killed.

36. Only two witness of the prosecution i.e. PW-1 and PW-2 have deposed facts which are inculpatory of the accused but since both of them have an axe to grind, being interested witnesses, it would be unsafe to rely on their testimony.

37. Thus, as regards the offence punishable under Section 302/34 IPC the only fact we have on record is that the deceased suffered burn injuries in her matrimonial house. The manner in which she received burn injuries as disclosed by the deceased in her two dying declarations are full of contradictions, rendering both liable to be rejected. As per the defence, the deceased committed suicide by pouring kerosene oil on her.

38. The appellants would thus be entitled to a benefit of doubt entitling them to be acquitted of the charge of murder.

39. Pertaining to the offence punishable under Section 498A/34 IPC, PW-1 and PW-2 have deposed of the deceased being troubled for dowry. The other witnesses pertaining to

the dowry demand are PW-10 and PW-11, the mother and brother of the deceased.

40. Before discussing their evidence we may note that this issue has become academic insofar as appellants Raj Kishan and Brij Kishan are concerned for the reason they have already suffered incarceration for a period in excess of three years. They have been sentenced to undergo imprisonment for three years for the offence punishable under Section 498A IPC.

41. Appellant Jagat Narayan is the only accused who would be affected by our decision for the reason as against a sentence of three years simple imprisonment he had undergone imprisonment only for a period of one year seven months and fifteen days.

42. In her testimony PW-10, the mother of the deceased, with reference to the demand of dowry deposed as under:-

“The accused persons did not make any demand from me except Raj Kishan who once came and demanded Rs.7,000/- and had also given me abuses. I did not tell my husband or son of the said demand of Rs.7,000/-. Raj Kishan had made demand of Rs.7,000/- in the presence of my daughter Suman.”

43. Mahesh Chand Nagar PW-11, the brother of the deceased has deposed that his parents never told him that his sister was being harassed nor did his sister ever told him about

said fact. He deposed that he used to often come to the house of his sister but was not allowed to meet her.

44. Though Kamla Nagar, PW-10, the mother of the deceased has stated that the dowry demand in sum of Rs.7,000/- was made on 24.6.1985, we note that the defence was that Shobha, the sister of the deceased had purchased a television set and a mosquito net from the accused and in respect thereof Rs.7,000/- was the outstanding payment and this amount was demanded from the parents of the deceased for the reason, Shobha had written a letter Ex.DX-1 that the balance payment (sum not mentioned) may be collected from her brother Mahesh Chand Nagar. We note that Mahesh Chand Nagar PW-11 was questioned with reference to the said letter and gave an answer as under:-

“I have seen this letter and it may be in the hand of my sister Shobha.”

45. Thus, the appellants are entitled to a benefit of doubt even with respect to the commission of the offence punishable under Section 498A/34 IPC.

46. The appeals are allowed.

47. The impugned judgment and order dated 22.8.2001 is set aside. The appellants are acquitted of the charges framed against them.

48. The appellants are on bail. The bail bond and

surety bonds furnished by the appellants are discharged.

PRADEEP NANDRAJOG, J.

INDERMEET KAUR, J.

SEPTEMBER 14, 2009
Dharmender