

IN THE HIGH COURT OF DELHI, AT NEW DELHI

Crl.A.No.282/2004

Date of Pronouncement: 16th January, 2009

Smt.Angoori Devi Petitioner
Through : Mr.M.P. Raju and Ms.Mary Scaria
and Mr.P.George Giri, Advocates

Versus

\$ The State Respondent
^ Through : Ms.Fizani Husain, APP.

AND

Crl.A.No.316/2004

Shri Parbhakar Gupta Petitioner
Through : Mr.M.P. Raju and Ms.Mary Scaria
and Mr.P.George Giri, Advocates

Versus

\$ The State Respondent
Ms.Fizani Husain, APP.

CORAM:

**HON'BLE MR. JUSTICE B.N. CHATURVEDI
HON'BLE MR. JUSTICE G.S.SISTANI**

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

G.S. SISTANI, J.

- 1** These two appeals have been filed against the Judgment dated 22.03.2004 and the Order of Sentence dated 23.03.2004, passed by the learned Additional Sessions Judge, Delhi in the

Session's case No. 146/2001, FIR No. 155/2001, sections 498-A/304-B/302/34 of the Indian Penal Code, 1860 (hereinafter, IPC) of Police Station Kalyanpuri. These two appeals were heard together and are accordingly, being disposed of by this common judgment.

- 2** The above said two appellants Angoori Devi w/o Sh. Shiv Sahai and Parbhakar s/o Sh. Shiv Sahai, both r/o 44, Gali No. 5, East Vinod Nagar, Delhi and also E-407, East Vinod Nagar, Delhi, have been held guilty by the Trial Court of the offence under section 302 read with section 34 of the IPC and sentenced to Rigorous Imprisonment (hereinafter, RI) for Life. Further the two appellants were directed to pay a fine of Rs. 1000/- each and in default where of, they were to undergo RI for a period of three (3) months each.
- 3** The facts of the case as noted by the learned Trial Court, briefly stated are. On 06.05.2001 Rajendra Pal, SI received DD No. 36-B to the effect that Mamta w/o Parbhakar Gupta, r/o A-46, Gali no. 6, East Vinod Nagar, Delhi has been admitted to a Hospital with ninety five percent (95%) burns. The SI received MLC of Mamta from the hospital and was informed that Mamta had been declared unfit for statement. On inquiry when it was found that Mamta was married for about three years back, the SDM was informed about the incident. Thereafter, the learned SDM and ACP, Kalyanpuri reached the place of the incident,

took photographs and also seized a bottle containing kerosene oil, one kundi of the door and some burnt clothes. On 07.05.2001 the learned SDM recorded the statement of Mamta after she had been declared fit to give a statement. In her statement, Mamta stated that she was married to Parbhakar about three years back as per the Hindu Rites and that she has two children. Mamta further stated that her husband deals in supply of polythene bags. Mamta then stated that her husband used to harass her from the very beginning of their marriage and also used to raise suspicion on her for having illicit relations with another person. Mamta further stated that four days prior to the day of the incident, her mother in law, Smt. Angoori Devi and father-in-law Sh. Shiv Sahai had also come to their house and that on 06.05.2001 at about 1:15 p.m., her husband quarreled with her and asked her regarding her illicit relations with anyone and that she should call that person. Mamta stated that her husband also asked her to bring Rs. 5,000/- from her parents house and when she told her husband that she cannot do the same then her husband and her mother-in-law, Angoori Devi poured kerosene oil upon her, put the palla of her saree on the gas stove and then she was set on fire by her husband and mother-in-law and thereafter she was brought to the hospital.

4 Mamta died in the hospital on 13.05.2001 and thereafter post-

mortem examination was conducted on the dead body of Mamta and after the post-mortem examination, her dead body was given to her relatives and exhibits of the case were sent for FSL for expert opinion and the report was obtained and post completion of the investigation challan was filed against Parbhakar.

- 5** In support of its case, the prosecution examined twenty one (21) witnesses in all. It would be worthwhile to analyse the evidence of some of the material witnesses in detail.
- 6** PW-2, Kamal Dev Dogra, SDM, PS Preet Vihar, Delhi has stated that on 06.05.2001, he received information from SI, RP Kaushik of PS Kalyan Puri that one lady with burns was admitted to LRS hospital and was being shifted to GTB hospital. Thereafter the said SI, RP Kaushik went to House No. A-44, Gali No. 6, East Vinod Nagar and met the landlord, Nathu Ram, and the statement of Nathu Ram was recorded by SI RP Kaushik at the dictation of PW 2. Thereafter PW 2 directed the SI to seize the exhibits from the spot. PW 2, the learned SDM further deposed that thereafter he went to GTB hospital, but Mamta had been declared unfit for statement by the doctor vide an endorsement on the MLC of Mamta at point A. On 07.05.2001, he had again gone to GTB hospital, when at about 7.00 pm the doctor vide his endorsement on the MLC declared Mamta to be fit for statement, then PW 2 introduced himself to

her as the SDM and recorded the statement of Mamta in his own hand. The statement recorded by PW 2 is Ex. PW-2B and which bears his signatures at point B1 and B2. Mamta put her left thumb mark at point B3 on the statement in his presence. The learned SDM also stated to have met Sh. Mahivir Narain Gupta and to have recorded his statement at Ex. PW2/C and which bears his signatures at point C-1. On the basis of statement of Smt. Mamta he made his endorsement Ex.PW 2/D and forwarded the same to the SHO concerned for taking appropriate action as per the law. During cross-examination the learned SDM deposed that no relative or the attendant of the deceased was present by her side in the burn ward when he reached there.

- 7** PW 4, Dr. Gaurav Aggarwal deposed that on 14.05.2001 he was posted at GTB hospital. On that day, dead body of Mamta along with inquest papers was received in the mortuary at 2:30 pm. The said doctor opined that the death of Mamta was due to septiceamia due to ninety six percent (96%) ante mortem deep to superficial infected burn wounds produced by flame. The doctor deposed that his report Ex PW4/A bears his signatures at point A1.
- 8** PW 7, Mehat Ram s/o late Sh. Ho Ram, r/o Milka Dairy Farm. A-42, East Vinod Nagar, Delhi, deposed that he has been residing at the above address with his family members for the

past twenty three (23) years. He deposed that Nathu Ram was his neighbour and that two months back, the latter had given one of the rooms of his house on rent to Parbhakar Gupta. However he knew Parbhakar and his family members for the past three years, as they had been residing as a tenant in the same Gali in the house of one Ramesh. He further deposed that on 06.05.2001 he was present in his house and at about 2.00 pm *"Parbhakar told in the gali that his wife Mamta had closed the door from inside and she was not opening the same and this was told to landlord Nathu Ram and his wife"*. On this landlord Nathu Ram pushed the door open forcibly as a result of which latch of the door broke open and then he saw that Mamta was burning. Parbhakar extinguished the fire from her person by pouring water on her. Parbhakar put a cloth on Mamta and took her to hospital. PW7 further deposed that at that time Angoori Devi, mother of Parbhakar was not present there. Since the time Parbhakar had taken this room rent on rent, his parents were not residing there and they were residing in village. PW 7 further deposed that due to some reason Mamta had burnt herself.

- 9** PW 8, Smt. Shanti Devi w/o Nathu Ram, deposed that she had been residing at A-44, Gali No. 6, East Vinod Nagar, Delhi for the past twenty years (20) and that she had given one room of her house on rent to Parbhakar. PW 8 deposed that one month

prior to the incident Parbhakar had brought his wife Mamta and they both were residing in the same room. PW 8 deposed that she did not see any quarrel between them. They had two daughters, one and a half years old and the other was seven – eighth months old. PW 8 deposed that they used to keep both the doors closed from inside and used to exit from the outer door.

10 PW 8 further deposed that on 06.05.2001 at about 2'o clock Parbhakar came to them and told her and Nathu Ram that his wife had closed the door of the room from inside and was not opening the same. On this, she and her husband went there and found that the latch of the door was bolted from inside. PW 8 thereafter deposed that she and her husband, both knocked at the door, but it was not opened. At this she opened the outer window of the room, peeped inside and saw smoke coming out from the room. Thereafter she and her husband along with Parbhakar and other neighbours went and forcibly pushed opened the door and where after they saw that Mamta was burning. Then all of them extinguished the fire from her person by pouring water on her. Parbhakar took her to LBS hospital. PW 8 also deposed that at that time she could not talk to Mamta. However at that time the gas stove was on and was put off by some neighbourer.

11 PW 9, Jawahar Singh Rawat, s/o Inder Singh Rawat, deposed

that he had been residing at A-44, Gali No. 6, East Vinod Nagar, Delhi for the past three years as a tenant. The said witness deposed that parents of Parbhakar were not residing there. They were residing in some village because they were never seen by him. PW 9 further deposed that Parbhakar had called his mother by giving a telephone call and that she came there on 07.05.2001.

12 PW 10, Smt. Chanderwati w/o Sh. Ramesh Chander r/o of A-81, Gali No. 6, Vinod Nagar, Delhi deposed that on 06.05.2001, at about 1:30 or 2:00 pm, she was present in the lane outside her house when Parbhakar came crying and told her that his wife had closed the door from inside and that she was not opening it. PW 10 deposed that thereafter, she went to A-44, where Sh. Nathu Ram, Smt. Shanti Devi (w/o Nathu Ram) Parbhakar, one Assu and other public persons forcibly opened the door. There she saw that deceased Mamta was burning, and then Parbhakar poured water and extinguished the fire and took her to hospital and that at that time mother and father of Parbhakar were not present there. This witness, PW 10 deposed that she could not say as to how the deceased was burnt.

13 PW 11, Constable Javed Hassan, deposed that on 06.05.2001, on receipt of DD No. 368, regarding a burning case, he alongwith the IO went to LBS hospital and the MLC of Mamta,

who was admitted there in burnt condition, was collected. As per the MLC the doctor had opined 95 % burns, however, at that point of time Mamta was not in a position to speak properly. Mamta was referred to GTB hospital. PW 11 further deposed that regarding this case, the concerned SDM and the SHO were informed and thereafter as per the directions of the SDM, the scene of occurrence was photographed. PW 11 deposed that from the scene of the occurrence one latch (kundi, chitkani) of the door which was broken, burnt pieces of cloth, one glass bottle containing some kerosene oil were lifted and were converted into a sealed parcel and accordingly seized. During cross-examination by the learned defence counsel, PW 11 deposed that in his presence, the IO had himself asked Mamta as to how did she caught fire and got burnt, and on inquiry, Mamta told that she caught fire when she was cooking food. PW 11 stated that he had stated so in his statement recorded by the IO. This witness further deposed that by that time, none of the family members of the appellant had arrived at the hospital. PW 11 further deposed that there was a gas stove inside the room in question and that the IO did not record the statement of Mamta to the effect that she was burnt when she was cooking food.

- 14** PW 14, Deen Dayal, s/o late Sh. Munshi Ram, r/o E-400, East Vinod Nagar, Delhi, deposed that he knew Nathu Ram, who

was residing in his neighbourhood at house no. A-44 and that Nathu Ram had given his one room on rent to Parbhakar. Parbhakar was residing there with his wife and children and that he did not see any quarrel between them. This witness further deposed that the parents of Parbhakar were not residing with him and that they were residing in their village. PW 14 further deposed that on 06.05.2001, he was present at the chowk, when at about 1:45 pm, Parbhakar told the mohalla people that his wife was not opening the door from inside and suspected that someone had entered therein. Thereafter the said witness deposed that after hearing Parbhakar, he went to A-44. Parbhakar, Nathu Ram, the wife of Nathu Ram and others pushed the door forcibly and the door got opened. He further deposed that he saw the wife of Parbhakar was burning. Parbhakar extinguished the fire by pouring water on her. Parbhakar took Mamta to hospital. At that time parents of Parbhakar were not present there and Mamta was alone in that room.

- 15** PW 15, Sudhir Kumar, s/o Sh. Mahavir Narayan Gupta, deposed that Mamta was his younger sister. He further deposed that on 06.05.2001, his elder sister, Manju had informed him that his younger sister, Mamta had got burnt. On 08.05.2001 he came to GTB hospital where he met his sister Mamta and who told PW 15 that her husband, Parbhakar and her mother-in-law set

her ablaze after pouring kerosene oil on her person.

16 PW 17, Mahavir Narain Gupta, deposed that Mamta was his daughter and had been married to Parbhakar, three years prior to the occurrence of the incident. PW 17 deposed that post five to six months of the marriage Mamta complained that she was being harassed by her husband and mother-in-law for dowry and that she was beaten by them. After about six months of the marriage, her husband Parbhakar and his mother, Smt. Angoori Devi, demanded Rs. 5,000/- from his daughter and which were given by PW 17 to them. Thereafter, Parbhakar and his mother once again demanded Rs. 5,000/-, but PW 17 expressed his inability to give the said amount to them. This witness further deposed that on 06.05.2001, at about 4:00 pm, one person was sent by his wife to the factory where he was working and there he was informed that Mamta was serious and thus he arrived at his office. Thereafter, he made inquiry from his wife and who told him that she came to know about the incident from their daughter, Manju and who in turn was informed by Sh. Sudhakar, father of Parbhakar.

17 PW 17 further deposed that Parbhakar used to suspect the character of his daughter Mamta and did not allow her to go anywhere and used to give threats that he would kill her. PW 17 also stated that two-three times his daughter was also brought home by them, but was later sent to her inlaws house,

when Parbhakar's brother and sister-in-law (bhabhi) came to them and assured that they will not harass Mamta any more for dowry. On being cross-examined by the learned counsel for the appellant accused, PW 17 deposed that he cannot tell the exact date and month when his daughter, Mamta complained about harassment for dowry. And further that he did not tell the police that on one occasion he had given Rs. 5,000/- and which were demanded by the appellant, Parbhakar.

18 PW 18, DR. IP Singh, Specialist Surgery, LBS Hospital, deposed that on 06.05.2001, he was posted at LBS hospital. One patient Mamta was brought by Parbhakar with alleged history of accidental burn by gas stove. This witness deposed that on examination, smell of kerosene was present in the body of the patient. On being cross-examined by the learned defence counsel this witness, PW 17 did not deny the suggestion that that the injuries mentioned in the M[L]C are possible in case of accidental burns by gas stove.

19 PW 20, SI Rajendra Pal (retired), deposed that on 06.05.2001 he was posted at PS Kalyanpuri. The said witness has deposed that from the scene of occurrence burnt pieces of cloth, one kundi, which was whipped out and was lying on the floor and one glass bottle having cover with smell of kerosene oil was lifted and same were converted into sealed parcel and were taken into possession.

- 20** Learned counsel for the appellant, Angoori Devi has impugned the Judgment of the Trial Court on the ground that the said judgment is bad in law and based on surmises and conjectures. It is submitted that the Trial Court failed to appreciate the fact that the deceased, Mamta gave a statement before Constable Javed Hassan and the Investigating Officer that on 06.05.2001 she had burnt herself while cooking food. The said dying declaration of the deceased being prior in time to the one made on 07.05.2001 should have been relied upon as per the settled law.
- 21** It is next submitted that the unexplained delay and time gap between the alleged recording of the dying declaration by SDM on 07.05.2001 at 7:30 PM and the recording of the FIR on 08.05.2001 at 9:10 PM, goes to the root of the matter and destroys the credibility of the dying declaration.
- 22** It is also argued that the Trial Court failed to consider the fact that the deceased was in the company of her parents and relatives before the alleged dying declaration is stated to have been made and that the husband was not at all allowed to have any access to his wife (deceased). Thus the counsel argues that the said dying declaration cannot be relied upon as the same was completely tutored by the parents of the deceased. The learned counsel has further submitted before us that the dying declaration is too general to be true and

lacks material details and that there is no mention or narration of the role of the appellant, Angoori Devi prior to the alleged incident. Mere general mentioning of her name together with the first accused cannot in any manner make the dying declaration reliable. Also that according to the dying declaration, the mother-in-law and the father-in-law had come to the house about four (4) days prior to the day of incident, but it is not stated that they had continued to stay in the house from that day onwards. The counsel submits that the said dying declaration does not disclose the whereabouts of the children and is not in question answer form and thus the dying declaration is liable to be rejected.

- 23** It is submitted by learned counsel that PW 2, SDM has written that the thumb impression of Mamta on the dying declaration was LTI. However, the learned Trial Court has wrongly found that the SDM obtained the RTI of the deceased. The counsel argues that it is for the prosecution to prove that the thumb impression was LTI or the RTI, and in case it was LTI then there would be a possibility of manipulation especially when the burns were 100%. The learned counsel submitted that there was clinching evidence to show that there were hundred percent (100%) burns and it was impossible for the deceased to have been fit for giving statement and further impossible for the thumb impression to have been taken. The counsel argued

that even if the burns are taken to be 95% then also the remaining five percent were not of the hands but of the genetalia and soles of the feet and that the same has been proved by PW 4 in his deposition.

- 24** The learned counsel for the appellant further argues that the Trial Court has neither disbelieved any of the witnesses, PWs-7 to 10, nor have they been declared hostile. The counsel argued that the Trial Court has failed to consider the evidence of PW 7, 8, 9 and 10.
- 25** The learned counsel for the appellant submits that the prosecution has failed to prove its case beyond reasonable doubt.
- 26** The learned counsel for appellant, Parbhakar while relying upon all the grounds of appeal argued for the appellant, Angoori Devi, submits that no case is made out against Parbhakar as well.
- 27** Per contra, it is submitted by learned counsel for the State that the prosecution has proved its case beyond any shadow of doubt.
- 28** We have heard learned counsel for the parties and have gone through the material on record as well as the impugned judgment.
- 29** The first submission of learned counsel for the appellants is

that the Trial Court has failed to take into account the statement made by the deceased before Constable Javed Hasan that she had burnt herself while cooking food. We have carefully scrutinized the statement of PW-11 (Constable Javed Hasan). PW-11 (Constable Javed Hasan) in his statement at the very first instance has stated that Mamta (deceased) was not in a position to speak properly. In the same statement this witness goes on to state that he along with SDM and I.O. had gone to G.T.B. Hospital and Mamta was declared unfit by the Doctor for making any statement. In his cross-examination PW-11 states that I.O. himself asked Mamta as to how she caught fire, to which she replied that she caught fire while she was cooking food. Further during cross-examination he has stated that I.O. did not record the statement to the effect that Mamta was burnt while cooking. We cannot place reliance to this portion of the statement made by PW-11 as at the very first instance this witness had stated that Mamta was not in a position to speak property and thereafter he has again stated that Mamta was declared unfit for making a statement by the doctor. At this point of time the SDM and the I.O. were with PW-11. On reading of the statement of the I.O., we find no such mention of the fact that she had stated that she burnt herself while cooking, thus, we are unable to place any reliance on the statement made by the PW-11 during his cross-

examination.

- 30** It was next argued by counsel for the appellants that there is an unexplained delay and time gap between the recording of the dying declaration on 7.5.2001 and the recording of the FIR on 8.5.2001. It is well settled that the delay in recording FIR by itself cannot be a ground to doubt the case of the prosecution.
- 31** It has been strongly urged before us that the dying declaration relied upon was tutored and the deceased was in the company of her relatives before she made the statement. It has also been argued before us that the dying declaration is general and should not be relied upon by the Court and it was not in question-answer form. Learned counsel for the appellants has in fact questioned the authenticity of the dying declaration.
- 32** The law with regard to the dying declaration is well settled. We can consider it appropriate to refer to a judgment ***Shakuntala v. State of Haryana***, AIR 2007 SC 2709, wherein the Apex Court has culled out the principles governing dying declarations. It would be useful to reproduce para 9 of the judgment:
9. Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross-examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the Court also insists that the dying declaration should be of such a nature as to inspire full confidence of the Court in its correctness. The Court has

to be on guard that the statement of deceased was not as a result of either tutoring, or prompting or a product of imagination. The Court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailant. Once the Court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence. This Court has laid down in several judgments the principles governing dying declaration, which could be summed up as under as indicated in **Smt. Paniben V. State of Gujarat** (AIR 1992 SC 1817):

- i There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. [See **Munnu Raja & Anr. V. The State of Madhya Pradesh** (1976) 2 SCR 764)]
- ii If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. [See **State of Uttar Pradesh V. Ram Sagar Yadav & Ors.** (AIR 1985 SC 416) and **Ramavati Devi V. State of Bihar** (AIR 1983 SC 1640)]
- 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. [See **K. Ramachandra Reddy and Anr. V. The Public Prosecutor** (AIR 1976 SC 1994)].
- iv Where dying declaration is suspicious, it should not be acted upon without corroborative evidence. [See **Rasheed Beg V. State of Madhya Pradesh** (1974 (4) SCC 264)].
- v Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. [See **Kaka Singh V. State of M.P.** (AIR 1982 SC 1021)]

- vi A dying declaration which suffers from infirmity cannot form the basis of conviction. [See **Ram Manorath and Ors. V. State of U.P.** (1981 (2) SCC 654)].
- vii Merely because a dying declaration does contain the details as to the occurrence. It is not to be rejected. [See **State of Maharashtra V. Krishnamurthi Laxmipati Naidu** (AIR 1981 SC 617)]
- 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. [See **Surajdeo Oza and Ors. V. State of Bihar** (AIR 1979 SC 1505)]
- ix Normally the Court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eye witness said that the deceased was in a fit and conscious state to make the dying declaration, the medical opinion cannot prevail. [See **Nanahau Ram and Anr. V. State of Madhya Pradesh** (AIR 1988 SC 912)].
- x Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. {See **State of U.P. V. Madan Mohan and Ors.** (AIR 1989 SC 1519)]
- xi Where there are more than one statement in the nature of dying declaration, one first in point of time must be preferred. Of course, if the plurality of dying declaration could be held to be trustworthy and reliable, it has to be accepted. {See **Mohanlal Gangaram Gehani V. State of Maharashtra** (AIR 1982 SC 839)].”

33 Further, in the case of **State of Punjab rep. through Secretary v. Raj Kumar and Others** reported as **Crl.A. No. 537/2003**, decided on **11.08.2008**, the Apex Court held:

“[t]his is the reason the Court also insists that the dying

declaration should be of such nature as to inspire full confidence of the Court in its correctness. The Court has to be on guard that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination..... Once the Court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration.

This Court in the case of **Keshav Kumar v. State**, in **Crl.A.**

No. 816/2005 observed:

“[w]e are conscious of the fact that the Courts should be cautious in accepting the dying declaration as a trustworthy piece of evidence and only if such dying declaration inspires full credibility in its truthfulness and after testing the same on the basis of consistency and probability, it should be relied upon.”

- 34** Applying the aforesaid principles to the facts of the case, we find no force in the submission of the counsel for the appellants that the dying declaration cannot be relied upon. PW-2, Sh. Kamal Dev Dogra (SDM) has stated that on 6.5.2001 he received an information that one lady in a burnt condition has been admitted in Lal Bahadur Shastri Hospital and further that she has been shifted to G.T.B. Hospital. He visited the hospital but Mamta was declared unfit for making statement. He is stated to have visited the Hospital again on 7.5.2001 when Mamta was declared fit for making statement by the doctor vide his endorsement on the MLC, such endorsement was also made on the paper on which the SDM recorded the statement of Mamta as Ex.PW-2/3. The SDM has identified his

signatures at point (B1) and (B2) of the statement and has further stated that Mamta has put her left thumb mark at point (B3) on the statement in his presence. In the cross-examination this witness has stated that no relative or attendant of the deceased was present by her side in the burn ward when he reached there. He had met the father of Mamta after recording her statement and has stated that in fact father of the deceased had come to the hospital after him. He has categorically stated that no other relative of the deceased met him in the Hospital. This witness had also denied the suggestion that Mamta had told the I.O. that she had caught fire accidentally while working in the kitchen. He also denied the suggestion that Mamta made the statement before him under the influence and pressure of her parents.

- 35** Having regard to the statement made by the SDM, it is clear that when the SDM arrived at the hospital on 7.5.2001, the parents of Mamta were not present at the Hospital and nobody was by her bed side. The doctor declared the patient fit to make statement and has also made an endorsement on the MLC as well as on the dying declaration that Mamta was fit to make the statement. Thereafter the SDM had recorded the statement in his own hand writing. Since no relative was present by the side of Mamta, it cannot be said that the statement is tutored. We thus find no reason to disbelieve the

dying declaration made by the deceased (Mamta) as far as appellant – Parbhakar is concerned, in view of corroboration from other evidence on record. As per the statement made by Mamta, her husband used to harass her and used to suspect her of having illicit relations with someone. As per her statement, they (husband and wife) had a quarrel on 6.5.2001 at about 1:15 p.m. The cause of quarrel was that her husband had asked her as to with whom she had illicit relations and she should call that person. The father of the deceased, PW-17 has also stated that Parbhakar used to suspect the character of his daughter and he never allowed her to go anywhere and even to talk to anyone and had also threatened to kill her. This witness has been cross-examined by the counsel for the defence, with respect to the demand of dowry alone. The evidence of PW-17 lends support to the dying declaration made by deceased – Mamta and that the portion of the evidence with respect to Parbhakar suspecting the character of the deceased – Mamta has remained unchallenged and unrebutted. In view of this, the dying declaration inspires confidence.

- 36** PW-8 (Shanti Devi) who is the neighbour of the deceased, in her evidence has mentioned that there was a gas stove which was put off by some neighbor when she entered the room. PW-11 (Constable Javed Hasan) in his cross-examination has

also mentioned that there was a gas stove inside the room. However, PW-18 (Dr.I.P. Singh), who is a specialist at Lal Bahadur Shastri Hospital has deposed that on 6.5.2001 he was posted at Lal Bahadur Shastri Hospital and one patient named Mamta wife of Parbhakar was brought by her husband with alleged history of accidental burns by gas stove. He has categorically stated that on examination smell of kerosene was found present on the body of the patient. This evidence remains unrebutted. PW-20 (S.I. Rajinder Pal) in his evidence has stated that from the spot he took into possession various articles including one glass bottle with smell of kerosene oil. In the absence of any kerosene oil run stove, we find that the presence of a bottle with kerosene oil points a finger at the appellant.

- 37** Learned counsel for the appellants have strongly urged before us that the trial court has failed to consider the evidence of PW-7 to PW-10, who are the neighbours / landlord of the deceased. These witnesses have deposed that the door of the room was pushed open forcibly as a result of which the latch of the door was broken and Mamta was found burning. What has been argued before us is that there is ample evidence to show that the appellant – Parbhakar was not inside the house while Mamta was cooking and Mamta had accidentally caught fire and as she was not opening the door, Parbhakar had told the

neighbours that his wife has closed the door from inside and was not opening the same. With respect to this aspect, the metallic door hook as well as bolt along with four screws were seized from the room and were sent to FSL, Malviya Nagar, New Delhi. A report Ex.PW-20/ J was obtained. As per this report bending or scratch marks were not observed on the bolt lever and the bent pattern and marks under the bolt frame indicate that the bolt frame had been tampered with. It was also mentioned in the report that no signs were observed on the metallic bolt hook or metallic bolt lever to indicate that the door was forcibly broken open when the above bolt was in closed condition.

38 In view of the fact that as per the FSL report Ex.PW-20/ J there are no signs on the said bolt hook and on the bolt lever to indicate that the door was forcibly broken open and having regard to the report which shows that the door of the bolt frame was tampered with, we are unable to agree with the submissions of learned counsel for the appellants that since the appellant was not found in the room and the door was locked from inside the judgment and order of conviction is bad. We consider it appropriate to reproduce the observations made by the Trial Court as the original bolt lever and its frame were produced before the Trial Court at the time of the argument:

“45. It is relevant to mention here that both the bolt hook as well as the bolt lever and its frame were produced at the time of arguments and it was found that bolt hook was in absolutely in safe condition and it was only bolt frame which was largely tampered with. In case the door would have been forcibly broken open from outside then much impact would have come on the bolt hook which was affixed on the chaukhat (door frame) and its impact would have been very minute on the bolt frame which is there on the door itself. The defence version of the accused that when deceased Mamta did not open the door then the accused alongwith his neighbours have pushed open the door forcibly as a result of which bolt inside the door was broken open and they found deceased Mamta in burning condition near the gas stove, thus stands belied by the report of FSL Ex.PW-20/J.”

39 Having regard to the dying declaration made by the deceased which we find credible and trustworthy qua the appellant – Parbhakar and the same is also corroborated by the evidence of the father of the deceased that appellant – Parbhakar would suspect the character of his wife (deceased – Mamta), which evidence remains unrebutted; and also the fact that despite cooking being done on a gas stove, a bottle containing kerosene oil was recovered from the spot by PW 11, Constable Javed Hassan. The doctor, who attended upon the deceased also stated that when she was brought to the hospital, smell of kerosene oil was found in the body of the patient. Taking into consideration the report of the FSL that the door of the bolt frame was tampered with and there was nothing to show that the door was forcibly opened in the

absence of bending or scratch marks, we have no hesitation in coming to the conclusion that there is no infirmity in the judgment and order of the learned Additional Sessions Judge as far as the appellant – Parbhakar is concerned.

- 40** As far as appellant – Angoori Devi is concerned, we find that the portion of the dying declaration wherein it has been stated that Angoori Devi had also poured kerosene oil on the deceased is not corroborated by the evidence of any other witness. In fact the presence of Angoori Devi is not only in doubt, but there is no evidence on record to show that Angoori Devi was either present at the time when kerosene oil was poured on the deceased or even present in the house at the time of the incident. PW-7 (Mehat Ram), who is one of the neighbours of the deceased, has categorically stated in his evidence that at the time of the incident mother of the appellant – Parbhakar (Angoori Devi) was not present. It has further been stated that parents of Parbhakar were residing in some village. PW-8, Shanti Devi, who is the land lady, has also stated that she had given one room of the house to Parbhakar and he was residing there with his wife and children. PW-9, who is also a neighbor, has deposed that parents of Parbhakar were not residing with him and they were residing in some village and he had never seen them and in fact Parbhakar had called his mother by giving her a telephone call and she came

only on 7.5.2001. Similar evidence has been given by PW-10 that mother and father of Parbhakar were not present at the spot and they were residing at the village. PW-14, Deen Dayal, who is also a neighbor has deposed on the same line and has stated that parents of Parbhakar were not residing with him. PW-17, the father of the deceased in his evidence has stated that Mamta used to complain that her husband and her mother-in-law used to harass her for dowry. This complaint was made by Mamta to her father 5 – 6 months after their marriage. It has nowhere been stated that in-laws of Mamta were residing along with Mamta or that her mother-in-law was present at the spot on the date of the incident. Furthermore, it would be relevant to note the deposition of PW 20 in his cross-examination by the learned defence counsel:

“It is correct that during investigation I found that stt. of deceased was tutored and it has also been mentioned in the charge sheet. It is correct that during investigation I found that Smt. Angoori Devi mother of accused Prabhakar was not involved in the offence. It is correct that during investigation I had come to know that Angoori Devi was not present in her house on the day of occurrence as she had gone to Shiv Vihar in order to attend a marriage party.

Thus the deposition of police personnel also points out towards the absence of the appellant, Angoori Devi from the place of the incident of the burning of the deceased. In the absence of any corroboration, we find the dying declaration not trustworthy and reliable as far as it relates to the appellant –

Angoori Devi. We are fortified in our view by a decision of the Apex Court in **Godhu and Anr. Vs. State of Rajasthan** AIR 1974 SC 2188. Relevant portion of the same reads as under:

“16. We are also unable to subscribe to the view that if a part of the dying declaration has not been proved to be correct. It must necessarily result in the rejection of the whole of the dying declaration. The rejection of a part of the dying declaration would put the court on the guard and induce it to apply a rule of caution. There may be cases wherein the part of the dying declaration which is not found to be correct is so indissolubly linked with the other part of the dying declaration that it is not possible to sever the two parts. In such an event the court would well be justified in rejecting the whole of the dying declaration. There may, however, be other cases wherein the two parts of a dying declaration may be severable and the correctness of one part does not depend upon the correctness of the other part. In the last mentioned cases the court would not normally act upon a part of the dying declaration the other part of which has not been found to be true, unless the part relied upon is corroborated in material particulars by the other evidence on record. If such other evidence shows that part of the dying declaration relied upon is correct and trustworthy, the court can act upon that part of the dying declaration despite the fact that another part of the dying declaration has not been proved to be correct.”

41 This Court in the case of **Satish Kumar v. State (NCT of Delhi)**, Crl.A No.162/2007 and **Geeta v. State (NCT OF Delhi)**, Crl.A No.257/2007 has held that:

“[a]s a final court of facts, the High Court is entitled to re-appraise the evidence and arrive at its own independent conclusion as to the guilt or innocence of the accused. This Court must thus be satisfied that the case of the prosecution is substantially true and that the guilt of the appellant has been established beyond reasonable doubt. It is only when the prosecution has proved its case beyond reasonable doubt that conviction cannot be disturbed in appeal. It will be

useful to reproduce the observations of the Hon'ble Supreme Court in the case of **Kali Ram Vs. State of Himachal Pradesh, AIR 1973 SC 2773** which are as follows :-

"Another Golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. This principle has a special relevance in cases wherein the guilt of the accused is sought to be established by circumstantial evidence. Rule has accordingly been laid down that unless the evidence adduced in the case is consistent only with the hypothesis of the guilt of the accused and is inconsistent with that of his innocence, the court should refrain from recording a finding of guilt of the accused. It is also an accepted rule that in case the court entertains reasonable doubt regarding the guilt of the accused, the accused must have the benefit of that doubt. The rule regarding the benefit of doubt also does not warrant acquittal of the accused by resort to surmises, conjectures or fanciful considerations.

Although the benefit of every reasonable doubt should be given to the accused, the courts should not at the same time reject evidence which is ex facie trustworthy on grounds which are fanciful or in the nature of conjectures.

The guilt of the accused has to be adjudged not by the fact that a vast number of people believe him to be guilty but whether his guilt has been established by the evidence brought on record. Indeed, the courts have hardly

any other yardstick or material to adjudge the guilt of the person arraigned as accused. Reference is sometimes made to the clash of public interest and that of the individual accused. The conflict in this respect, however is more apparent than real.

It is no doubt true that wrongful acquittals are undesirable and shake the confidence of the people in the judicial system, much worse, however, is the wrongful conviction of an innocent person. The consequences of the conviction of an innocent person are far more serious and its reverberations cannot but be felt in a civilised society. All this highlights the importance of ensuring, as far as possible, that there should be no wrongful conviction of an innocent person. Some risk of the conviction of the innocent, of course, is always there in any system of the administration of criminal justice. Such a risk can be minimised but not ruled out altogether."

- 42** However, since in the present case the dying declaration is severable in two parts, we find no justification in rejecting the whole statement. In the above circumstances we find that the dying declaration is not wholly reliable and a portion of which relates to the appellant - Angoori Devi, is untrue and in the absence of any other evidence corroborating the dying declaration with respect to Angoori Devi, we find it difficult to uphold the judgment and order of conviction of the Additional Sessions Judge with regard to the Angoori Devi. Having regard to the evidence on record of PW-7 to PW-10, we set aside the

impugned judgment and order of sentence with respect to the appellant – Angoori Devi. Accordingly the appeal [Crl.A.No.282/2004] with respect to the appellant – Angoori Devi, is allowed and the appeal [Crl.A.No.316/2004] with respect to the appellant – Prabhakar, is dismissed.

43 Appellant – Angoori Devi, be released forthwith, if not wanted in any other case.

**G.S. SISTANI
(JUDGE)**

**B.N. CHATURVEDI
(JUDGE)**

January 16, 2009
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