

* **HIGH COURT OF DELHI AT NEW DELHI**

+ **Crl. Appeal No. 120/2006**

% Date of Order : January 06, 2009

JITENDER KUMAR Appellant
Through : Mr. Sumeet Verma, Advocate

VERSUS

STATE NCT OF DELHI Respondent
through : Mr. M.N. Dudeja, APP

CORAM :-

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE ARUNA SURESH

- (1) Whether reporters of local paper 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. Poonam (the deceased) was married to Bhupender on 14.2.2000. She suffered burn injuries in the kitchen of her matrimonial home at around 8:00 P.M. on 10.4.2002. She was rushed to Rao Tula Ram Memorial Hospital by her husband and a neighbor Ms.Devi. She was attended to at the hospital by Dr.A.S.Yadav who recorded her physical condition

in the MLC Ex.PW-6/2 to the effect that Poonam had burn injuries on 70% of the body. No burn injuries were noted on the legs. The burn injuries were on the torso. It was recorded in the MLC that Poonam was conscious and oriented. Bhupender, husband of Poonam had also suffered burn injuries. He too was attended to by Dr.A.S.Yadav who noted on the MLC of Bhupender, Ex.PW-6/1 that Bhupender had suffered burn wounds on 6% of the body and that the burn wounds were on his hands and arms.

2. Safdarjung hospital in Delhi specializes in the treatment of burn wounds. Dr.A.S.Yadav referred Poonam to Safdarjung hospital. Poonam remain admitted at said hospital till she died on 12.5.2002.

3. When Poonam was brought to Rao Tula Ram Hospital, the duty constable at the hospital, Const. Surender, telephonically informed the duty officer at the police station that Poonam wife of Bhupender was admitted at the hospital having suffered burn injuries, which information was noted vide DD No.26-A Ex.PW-12/A. FIR Ex.PW-1/A was recorded under Section 307/498-A/34 IPC at 10:30 P.M. since Poonam told the investigating officer S.I.Amrit Lal that her brother-in-law, Jatinder, her mother-in-law and her minor sister-in-law

had set her on fire.

4. Since it was a case of a bride getting burned within 7 years of her marriage on the next day i.e. 11.4.2002, at around 10.00AM, the Sub Divisional Magistrate of the area Sh.Indu Shekhar Mishra, PW-13 recorded the statement of Poonam, Ex. PW13/A.

5. As per Ex.PW-13/A i.e. the statement made to the learned Sub Divisional Magistrate by Poonam she stated that she had no complaint against her husband and that her brother-in-law, Jitender Kumar, as also her mother-in-law and her minor sister-in-law used to harass her for bringing insufficient dowry. She stated that last night i.e. on 10.4.2002 at around 8.30 P.M. she wore the slippers of her sister-in-law which resulted in a verbal duel. That her brother-in-law, Jitender Kumar, and her mother-in-law joined issues with her and taunted her for bringing less dowry. She stated that all of a sudden her mother-in-law picked up a can containing kerosene oil and poured the same over her body. She stated that it was followed by her brother-in-law, Jitender Kumar, picking up a match box; lighting the match-stick and setting her on fire. She further stated that when the said act was committed, her husband reached home from office and

attempted to extinguish the fire and that with the help of neighbours rushed her to the hospital.

6. S.I.Amrit Lal also purportedly recorded a statement of Poonam Ex. PW14/F in which she inculpated her mother-in-law, her brother-in-law, Jitender Kumar and her minor sister-in-law.

7. The clothes which were worn by Poonam at the time of the unfortunate incident were taken possession of by the doctor concerned and were seized by the Investigating Officer who proceeded thereafter to the matrimonial home of Poonam and seized one empty plastic can with two used brushes, one matchbox with unused sticks from the kitchen of the house.

8. The plastic can, the matchbox with unused sticks, the used i.e. partially burnt match-sticks lifted from the kitchen of the house as also the partially burnt clothes were sent for forensic examination. Report of the forensic examination of the said objects, Ex. PW14/A, reports that the partially burnt clothes and the used match-sticks as also the unused match-sticks and the match-box did not have any trace of residual kerosene. The can was reported to be having residue of kerosene.

9. The mother-in-law of Poonam could not be apprehended. She was declared a proclaimed offender. Bhupender absconded from the house and was arrested after a few days. The sister-in-law being minor, was, as per the law applicable, referred to the Juvenile Justice Board for trial. Jitender, the brother-in-law, of Poonam was sent for trial.

10. Needless to state the charge framed against him was of having committed murder of Poonam i.e. 302 IPC; he was also charged under Section 304-B IPC as also under Section 498-A IPC.

11. At the trial, the police officers who had received various seized items as also the ones who had forwarded the same to the forensic laboratory and the ones who were concerned with the registration of the FIR were examined. Unfortunately, the Investigating Officer S.I. Amrit Lal had died; obviously he could not be examined. Pertaining to the record of investigation recorded by him, PW-14, Inspector Heera Lal, who claimed to be familiar with the handwriting and the signatures of the Investigating Officer, was examined to prove the same.

12. Father and the brother of Poonam namely, Jai Swaroop and Sunil were examined as PW-3 and PW-4

respectively. Dr.Rajeev Kumar, who had recorded the death summary of Poonam having left the hospital where she died, namely Sufderjung Hospital, Dr. Prateek Arora, PW-5 was examined who proved the death summary.

13. PW-7, Dr.Alexendar who conducted the postmortem of Poonam proved the postmortem report Ex.PW-7/A which recorded the cause of death of Poonam to be the result of septicemia.

14. The case of the prosecution hinged upon Ex. PW-13/A and PW-14/F, the statements made by Poonam, soon after the incident, the first being before the Sub Divisional Magistrate followed soon thereafter by her statement before the Investigating Officer.

15. Vide impugned judgment dated 3.8.2005, learned trial judge has held that the charge of murder and subjecting Poonam to cruelty stood established. It was held that the charge under Section 304-B was not established. The result is Jitender being convicted for the offence under Section 302 IPC i.e. having murdered Poonam. He has also been convicted under Section 498-A IPC. The reasoning of the learned trial judge for the findings returned is the acceptance to the truthfulness of the dying declaration of Poonam recorded by

the learned SDM i.e. Ex.PW-13/A. Pertaining to the second dying declaration, Ex. PW-14/F, we note that the learned trial judge had certain doubts about proof thereof, for the reasons, Inspector Amrit Lal who recorded the same was not examined. (as noted above he died). Be that as it may, the first dying declaration, Ex.PW-13/A recorded by the Sub Divisional Magistrate has been opined to be worthy of credence and acceptance.

16. The learned trial judge has found corroboration to the dying declaration, with reference to the CFSL report Ex.PW14-/A, which records that the empty plastic can lifted from the place of occurrence had traces of kerosene.

17. At the hearing of the appeal today, learned counsel for the appellant, *inter alia*, urges the following:-

A. Ex. PW-14/F, the statement allegedly made by Poonam to the Investigating Officer cannot be looked into for the reason neither in his examination under Section 313 Cr.P.C. statement was put to Jitender; nor the scribe of the statement was examined.

B. The dying declaration Ex.PW-13/A, purportedly recorded by the Sub Divisional Magistrate had to be ignored for the reason the doctor who purportedly certified Poonam

being fit for statement had not been examined. Counsel urges that from a perusal of the document it does not even surface as to who the doctor is i.e. even the identity of the doctor is not forthcoming on record.

C. Conceding that a conviction can be sustained on a dying declaration, counsel urges that the same is subject to there being no evidence to discredit or cast a doubt on the truthfulness of the dying declaration. Counsel urges that where evidence on record casts a doubt on the truthfulness of the dying declaration, it would be unsafe to sustain a conviction on such dying declaration. Elaborating further, learned counsel urges that the report Ex.PW-14/A by the forensic science laboratory is categorical in its opinion that no residue of kerosene was detected in the partially burnt clothes which were worn by Poonam when the unfortunate incident took place, this, coupled with the fact that no kerosene was detected in the used and unused match-sticks as also the matchbox negates any kerosene being thrown on the person of Poonam or lying split on the floor. Counsel further urges that the MLC of the deceased as also the testimony of PW-5 and PW-6 suggest that the deceased suffered burn injuries only on the torso region; counsel urges

that lack of any burn wounds on the part of the body below the torso i.e. the thighs and the legs rule out the possibility of somebody throwing or pouring kerosene on Poonam and thereafter setting her on fire.

D. With reference to the MLC of the husband of the deceased, counsel points out that as recorded therein, the deceased and her husband had been accompanied by Devi to the hospital; a fact stated by Poonam to the Sub-Divisional Magistrate in her statement to the effect that neighbours had brought her and her husband to the hospital. With reference to the testimony of Devi, who was examined as PW-11, counsel points out that the witness stated that she was present in her house when she heard cries of Poonam and her husband; that she reached their house and took both of them to the hospital. She stated that before embarking on their journey to the hospital she requested Poonam and her husband that Poonam's mother-in-law should also be taken along to which Poonam responded by saying that they could not take her mother-in-law to the hospital as she had not come back from duty. Counsel urges that this shows that Poonam's mother-in-law was not present in the house when Poonam suffered burn injuries.

E. With reference to the testimony of the father and the brother of the deceased, namely PW-3 and PW-4, counsel points out that the two had deposed about the appellant, Jitender, harassing Poonam for bringing less dowry without giving any particulars of the date of the harassment or the nature thereof. Counsel urges that as per statement of Poonam, Ex.PW-13/A, she had never disclosed the alleged harassment caused to her to her parents. Pertaining to the events of 14.2.2000, learned counsel points out that both have stated that Poonam gave a telephonic call to her parents intimating that she was being beaten and she was threatened that she would be killed. Learned counsel points out that nowhere in her statement, either to the Sub Divisional Magistrate or the Investigating Officer did Poonam speak of having rung up her parents. Counsel further points out that the testimony of the brother and the father of the deceased is ex-facie tutored and in any case does not inspire any confidence for the reason it would be difficult to presume that a person who was in the process of being beaten would be simultaneously ringing up for rescue. Counsel points out that PW-4 has categorically stated that when his sister contacted him over the telephone she stated that she was being given a

beating.

18. Learned counsel for the State urges that there is no reason to disbelieve the two dying declarations of Poonam which counsel urges were recorded with promptitude. Counsel further points out that the dying declaration recorded by the Sub Divisional Magistrate at 10.00 A.M. the next day was within 13 hours of the incident and that there is no evidence that in the interregnum the parents or any family member of Poonam had access to her; counsel urges that the possibility of Poonam being tutored is ruled out. With reference to Poonam's mother-in-law absconding and ever Jitender absconding for a few days, counsel points out that this conduct indicates the guilt of the two.

19. At the outset, it may be noted that while being examined under Section 313 Cr.P.C, Jitender was not questioned with reference to Ex.PW-14/F and for said reason alone we are of the opinion that the purported statement made by Poonam to the Investigating Officer i.e. Ex.PW-14/F has to be ignored.

20. In any case, we note that the learned trial court has not much relied upon Ex.PW-14/F; although there are traces of a half-hearted use of the statement in the impugned

judgment.

21. It is apparent that the only incriminating evidence which is surfacing against the appellant is Ex.PW-13/A, the purported dying declaration recorded by the learned Sub Divisional Magistrate at around 10.00 A.M. on 11.4.2002 as also the conduct of the appellant absconding for a few days.

22. The act of absconding by itself is not a very weighty circumstance to hold against the accused for the reason many a times innocent persons run away fearing false arrest. At best the circumstance of absconding would reinforce, if otherwise established, the guilt of the accused.

23. It is true that no corroboration is required to a dying declaration, but, to sustain a conviction on a dying declaration, the Court has to record a satisfaction that the same contains the nugget of truth.

24. Way back in the year 1958 in the decision reported as AIR 1958 SC 22 Khushal Rao v. State of Bombay, the Supreme Court spoke as under; pertaining to dying declaration:-

“17. Hence, in order to pass the test of reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused who had no opportunity of testing the veracity of the statement by cross-examination.

But once, the Court has come to the conclusion that the dying declaration was the truthful version as to the circumstances of the death and the assailants of the victim, there is no question of further corroboration.

If, on the other hand, the Court, after examining the dying declaration in all its aspects, and testing its veracity, has come to the conclusion that it is not reliable by itself, and that it suffers from an infirmity, then, without corroboration it cannot form the basis of a conviction. Thus, the necessity for corroboration arises not from any inherent weakness of a dying declaration as a piece of evidence, as held in some of the reported cases, but from the fact the Court, in a given case, has come to the conclusion that that particular dying declaration was not free from the infirmities, referred to above or from such other infirmities as may be disclosed in evidence in that case."

25. Suffice would it be to state that a dying declaration is a piece of evidence and has to be considered along with other relevant and admissible evidence which is brought on record.

26. Where evidence on record casts a doubt on a factual aspects disclosed in a dying declaration, unless explained satisfactorily to the Court, the same would be fatal to a dying declaration.

27. In the instant case it is relevant to note that the brother and father of the deceased as also the deceased herself had made grievances against the mother-in-law, the brother-in-law and minor sister-in-law of the deceased. The

possibility of the deceased falsely implicating the three is in the realm of a probability. With regard to dying declarations as held in the decision reported as 2006(2) SCALE 482 P. Mani v. State of Tamil Nadu, while considering dying declarations Courts have to be careful in weighing the fact whether the deceased had been nurturing a grudge against the persons accused by the maker of the dying declaration.

28. Now, Poonam is categorical in her statement that her mother-in-law poured kerosene over her. The clothes which she was wearing at the time when she sustained the burn injuries (in partially burnt conditions) were taken possession of by the Doctor at the hospital where Poonam was admitted and duly handed over to the Investigating Officer who seized the same vide seizure memo Ex.PW-2/1. Lack of kerosene residues being detected in the clothes as evidenced by Ex.PW-14/A casts a doubt whether any kerosene was at all used. The used match-sticks, the unused match-sticks and the match box which were lifted from the place of occurrence i.e. the kitchen of the matrimonial house of Poonam also showed no traces of kerosene residues. The same is suggestive of no kerosene dropping on the floor. This casts a serious doubt whether at all kerosene was used to

burn Poonam.

29. We also note that even in the MLC, Ex.PW-6/2, the doctor has not recorded that he noted smell of kerosene from the person of Poonam.

30. We also note that in the MLC it has not been recorded, at the place where case history is recorded, that Poonam told the Doctor that she was set on fire by her mother-in-law, her brother-in-law and her sister-in-law.

31. We also note that PW-11, Devi, took Poonam and her husband to the hospital for which independent corroborative evidence is to be found in the MLC of Bhupender, Ex.PW-6/1 which records that Devi had accompanied Bhupender to the hospital. Thus, Devi's presence at the site is not in doubt.

32. Devi has categorically stated that when she responded to the cries of Poonam and her husband; finding the two in a burnt condition, she arranged for a transport to take them to a hospital and at that stage requested that it would be better if Poonam's mother-in-law would accompany them to the hospital to which Poonam responded that her mother-in-law had not come back from duty. It thus becomes doubtful whether Poonam's mother-in-law was at all in the

house. It is also of relevance to note that the independent person to reach the site of the occurrence was Devi. It assumes significance that Devi never stated that when she reached the site, Poonam told her that her mother-in-law, her brother-in-law and her sister-in-law had set her on fire.

33. Poonam's husband was examined as DW-1. He has deposed in his testimony that on the day of the incident his wife desired an immediate visit to her sister's house. He told her that since his mother, his brother and his younger sister were away from house being in Village Devar Khana, Haryana, he would take her to her sister's house on 11.4.2002 more so said day being the birthday of the son of Poonam's sister. That Poonam got very angry. He tried to reason it out with her. At that point of time he went to the bathroom for taking a bath and Poonam went to the kitchen. While he was taking bath he heard cries of Poonam. She was crying "Bachao Bachao". He responded to her calls and attempted to extinguish the fire and as a result sustained burn injuries on his hands. He stated that people from the neighbourhood collected outside their house and a neighbor, Rajveer brought a hired Van and that accompanied by PW-11 Devi, they went to the hospital.

34. Though Bhupender may be labeled as an interested witness but we note that the version given by Bhupender has also to be kept in mind and if consistent with the evidence on record, certainly would be a piece of evidence worthy of consideration.

35. We have noted hereinabove that Poonam did not suffer any burn injuries on her legs. The entire burn injuries were on the torso. Absence of kerosene on her partially burnt clothes which she was wearing at the time of the incident as also absence of kerosene in the used and the unused matchsticks as also the match box has been noted by us. We have opined there from that use of kerosene to burn Poonam stands ruled out and hence discredits the dying declaration of Poonam's version as to how she got burnt. The nature of burn injuries on Poonam are in harmony with the testimony of her husband which shows that when Poonam went to the kitchen she was in an agitated state of mind. The possibility of Poonam, in a state of agitation, entering the kitchen and proceeding to cook food and in the process suffering accidental burn injuries cannot be ruled out.

36. It is unfortunate that the learned trial judge, though has noted the report of the Forensic Science

Laboratory Ex.PW-14/A and has also noted the opinion recorded therein pertaining to no trace of residual kerosene being found on the clothes of Poonam as also the used and unused match-sticks and the matchbox has totally ignored the same while evaluating the evidence. A selective use of Ex.PW-14/A, as noticed above, has been made with reference to the can containing traces of kerosene oil.

37. We are of the opinion that considered in light of the totality of the circumstances and in particular Ex.PW-14/A, as also the version of the husband of the deceased and the testimony of PW-11, it cannot be said that the prosecution has established its case beyond doubt as required by law.

38. The charge under Section 302 IPC cannot stand.

39. Pertaining to the charge under Section 498-A IPC, we note that except for blogged statements made by PW-3 and PW-4 without the date or the nature of dowry demand; merely stating that there were dowry demands, no other evidence being on record, charged under Section 498-A IPC must also fail as the other evidence being the dying declaration of Poonam has been doubted by us.

40. The appellant has been acquitted of the charge under Section 304-B IPC. Even otherwise, for the reasons

noted hereinabove absolving the appellant of the charge under Section 302 IPC as also Section 498-A IPC, the said charge cannot sustain itself on the given evidence.

41. The appeal succeeds.

42. Impugned judgment dated 3.8.2005 is set aside. The sentence imposed upon the appellant, vide order dated 8.8.2005 is set aside. Appellant, who is in custody, is directed to be released forthwith, if not required in any other cases.

(PRADEEP NANDRAJOG)
JUDGE

(ARUNA SURESH)
JUDGE

January 06, 2009
JK