

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

+ CRL. L.P. 247/2008

% Decided on: 16th September, 2010

STATE (GOVT. OF NCT of Delhi) Appellant

Through: Mr. Manoj Ohri, APP for the
State along with Adv. ASI
Rajinder Singh, P.S. Welcome.

Versus

SMT. KAMLA & ANOTHER Respondents

Through: Nemo.

CORAM:
HON'BLE MR. JUSTICE A.K. PATHAK

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| 1. | Whether the Reporters of local papers
may be allowed to see the judgment? | No |
| 2. | To be referred to Reporter or not? | No |
| 3. | Whether the judgment should be reported
in the Digest? | Yes |

A.K. PATHAK, J. (ORAL)

Petitioner seeks leave to appeal against the judgment dated 9th July, 2008 passed by Additional Sessions Judge, Delhi (Trial Court) whereby respondents have been acquitted of the charges under Section 498-A/306/34 of the Indian Penal Code.

2. Prosecution case as unfolded is that the deceased was married with one Suresh (PW6) according to Hindu rites and ceremonies sometime in the year 1991 i.e. about fifteen years prior to the incident. Five children were born from their wedlock. Deceased was living with her husband in a rented accommodation which was adjoining to the house of her mother. Respondent nos. 1 and 2 are the mother-in-law and sister-in-law of the deceased. During the initial years after marriage, deceased had been living with her

mother-in-law and sister-in-law, however, about six years prior to the incident she along with her husband shifted to a rented accommodation. On 19th August, 2005 at about 9:55 pm deceased was brought to Gurutegh Bahadur Hospital, Shahdara with burn injuries covering 98% of the body surface. Dr. V.K. Jain, Chief Medical Officer, examined the deceased and prepared MLC. Deceased informed the doctor that she attempted suicide by burning herself after some altercations with her mother-in-law and sister-in-law.

3. Information regarding hospitalization of the deceased was sent to Police Station Welcome, pursuant whereof, DD No. 22 A was recorded and handed over to ASI Ishwar Singh, who along with Constable Rajiv reached at the hospital and obtained MLC of the deceased. After doctor declared the deceased fit for making statement, ASI Ishwar Singh recorded her statement wherein she stated that after the marriage her mother-in-law and sister-in-law used to harass and beat her on the point of dowry. She had told this fact to her mother also, who had advised her to have patience and had sent her back to her in-laws' house. About five/six years ago she left her in-laws' house and started living separately with her husband in a house adjoining to her mother's house. On the date of incident, her mother-in-law and sister-in-law had come to her house at about 9:30 pm and quarreled with her. Out of anguish, she set herself on fire after pouring kerosene oil. On the basis of this statement, FIR No. 419/2005 under Section 498-A/34 IPC was registered at Police Station Welcome.

4. On 24th August, 2005 at about 5:30 am deceased succumbed to her burn injuries. After her death Section 306 IPC was added in the FIR. Post-mortem was conducted by Dr. K.K. Banerjee who opined that death was due to septicemia as a result of ante mortem infected burn injuries covering 98% of body surface.

5. During the investigation statement of mother of the deceased was recorded wherein she stated that respondents used to beat her daughter on the point of demand of dowry inasmuch as, they also used to taunt her for bringing insufficient dowry. She further stated that on the day of incident respondents visited the deceased and abused her.

6. After completion of investigation, charge-sheet was filed in the court and charges under Sections 498-A/306 IPC were framed against the respondents by the Trial Court to which they pleaded not guilty and claimed trial. Prosecution examined thirteen witnesses in all to support its story. Mother of the deceased was examined as PW4. Maternal uncle of the deceased was examined as PW5. Husband of the deceased was examined as PW6. ASI Ishwar Singh, Investigating Officer, was examined as PW13. Dr. V.K. Jain, who had prepared the MLC, was examined as PW12. Dr. K.K. Banerjee, who had conducted the post-mortem of the deceased, was examined as PW3. All other witnesses are formal in nature having participated in the investigation at one stage or the other. After prosecution closed its evidence, statements of the respondents under Section 313 Cr.P.C. were recorded wherein entire incriminating material, which had come on record, was put to them. The case of the respondents was that of simple denial. They stated that they were falsely

implicated in the case. However, they did not lead any evidence in their defence.

7. Trial Court meticulously scrutinized the evidence on record and came to the conclusion that prosecution had failed to prove its case beyond the shadow of reasonable doubt. PW4 mother of the deceased had not supported the prosecution case. She stated that deceased was not harassed and maltreated by the respondents on the point of dowry or otherwise at any stage. According to her, deceased was kept nicely in the matrimonial home. In spite of her cross-examination by APP for the State, nothing could be elicited from her to show that the respondents had treated the deceased with cruelty to such an extent that deceased was not left with any other choice but to commit suicide. Trial Court held that in absence of any corroboration, dying declaration of the deceased, which otherwise was shrouded by suspicion, alone was not sufficient to base the conviction. It was observed that deceased had suffered 98% burn injuries. Considering the nature of the injuries it could be assumed that she was not in a condition to speak. Deceased remained hospitalized from 19th August, 2005 till 24th August, 2005 before her death. In spite of there being sufficient time available with the Investigating Officer, he did not make any effort to call the Magistrate to record the statement of the deceased. Even the statement of deceased was not recorded by the Investigating Officer in the presence of doctor inasmuch as, signatures of the doctor were not obtained on the statement of the deceased on the basis whereof, FIR was recorded which had, after the death of deceased, taken shape of a dying declaration. Mother of the deceased had not supported the prosecution case and in such an eventuality, it was otherwise not

safe to base the conviction on the statement of deceased recorded by the Investigating Officer. Consequently, respondents have been acquitted by giving benefit of doubt.

8. I am of the view that leave to appeal against acquittal order cannot be granted in a mechanical manner. Petitioner has to disclose a prima facie case in his favour by raising arguable points. In ***State of Maharashtra vs. Sujay Mangesh Poyarekar 2008 (12) SCALE 779***, Supreme Court held that in deciding the question whether requisite leave should or should not be granted, the High court must apply its mind, consider whether prima facie case has been made out or arguable points have been raised and not whether the order of acquittal would or would not be set aside.

9. It is well settled that an order of acquittal cannot be interfered with lightly and cannot be reversed merely because Appellate Court can arrive at a different finding than what had been rendered by the Trial Court on re-appreciating the evidence. Appellate Court will not reverse a decision of the Trial Court merely because different view may also be possible. After an order of acquittal has been made, the presumption of innocence of the accused is further strengthened by that order and that being so, the Trial Court's decision can be reversed not on the ground that accused had failed to explain the circumstances appearing against him, but only for very substantial and compelling reasons. Appellate Court will be slow in interfering an order of acquittal and substitute its view as against the possible view taken by the Trial Court. If two reasonable views are possible then the view taken by the Trial Court cannot be disturbed, if it is a possible view.

10. In ***Chandrappa and Ors. vs. State of Karnataka (2007) 4 SCC 415***, the Supreme Court has culled out following general principles regarding powers of the Appellate Court while dealing appeal against acquittal :-

“(1) An appellate Court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded;

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law;

(3) Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasize the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

(4) An appellate Court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. *Secondly*, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.”

11. In ***Ghurey Lal vs. State of U.P. (2008) 10 SCC 450***, it has been held that the Appellate Court is given wide powers to review the evidence to come to its own conclusions. But this power must be

exercised with great care and caution. In order to ensure that the innocents are not punished, the Appellate Court should attach due weight to the lower court's acquittal because the presumption of innocence is further strengthened by the acquittal. The Appellate Court should, therefore, reverse an acquittal only when it has "very substantial and compelling reasons." The "very substantial and compelling reasons" as enumerated in the judgment are that (i) The trial court's conclusion with regard to the facts is palpably wrong; (ii) The trial court's decision was based on an erroneous view of law; (iii) The trial court's judgment is likely to result in "grave miscarriage of justice"; (iv) The entire approach of the trial court in dealing with the evidence was patently illegal; (v) The trial court's judgment was manifestly unjust and unreasonable; (vi) The trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declarations/ report of the Ballistic expert, etc. It was further observed that the above list was very illustrative and not exhaustive. It was further held that, in case two views were possible, one that leads to acquittal and the other to conviction, the Appellate Court must rule in favour of the accused.

12. If the findings of the Trial Court are examined in the backdrop of above legal position, this Court is of the view that the view taken by the Trial Court cannot be said to be not a possible view. In other words, the view taken by the Trial Court is a possible view in the facts of this case. Deceased was married with Suresh about fifteen years prior to the incident. Initially she had lived with the respondents for few years. However, about five to six years prior to the incident, she had shifted with her husband to a rented

accommodation adjoining to the house of her mother. Respondents were not residing with the deceased all this while. In these circumstances, harassment of the deceased by the respondents on the point of dowry during this period is not a probable version as has been mentioned in the dying declaration. Deceased was having full support of her husband. She has not whispered even a word against her husband regarding ill treatment. If at all there was any harassment of the deceased, the same would have been long prior to the incident, as admittedly, deceased had been living with her husband and away from the respondents since at least six years prior to the incident. Mother of the deceased has categorically deposed that no dowry was demanded nor the deceased was maltreated by the respondents on the point of dowry. In view of this statement of the mother, coupled with the fact that deceased had been living with her husband away from the respondents, Trial Court has rightly chosen not to base the conviction solely on the alleged dying declaration which otherwise had not been properly recorded in spite of sufficient time available at the command of Investigating Officer. Even, the manner in which it has been recorded creates a suspicion on its veracity. No doubt, it is true that in certain circumstances, statement of the deceased recorded in the FIR, after the death, can be accepted as a dying declaration to base the conviction but only if it inspires confidence. Deceased had suffered 98% burn injuries and in such circumstances there would have been a probability that she was unable to speak. It otherwise appears that statement of the deceased was not recorded by the Investigating Officer immediately after Dr. V.K. Jain had declared her fit for making statement. Perusal of MLC shows that doctor had made an endorsement "fit for making

statement” at 11.30 pm. Rukka was sent by the Investigating Officer at about 12:45 am; meaning thereby that dying declaration was recorded by the Investigating Officer during this period of one hour and fifteen minutes. Dying declaration is of about fourteen to fifteen lines and would not have taken much time to record the same. Endorsement made by the Investigating Officer is hardly of ten lines. The recording of dying declaration and making endorsement, thus, would not have taken such a long time of one hour and fifteen minutes. This creates a doubt on dying declaration having been recorded immediately after the doctor endorsing the deceased fit for statement. Deceased had suffered burn injuries covering about 98% of her body and must be in intense pain and had been injected sedative and pain killers making her drowsy and incoherent. In these circumstances, Investigating Officer ought to have taken endorsement of the doctor on the dying declaration itself before proceeding to record the same regarding the fitness of the mental condition of the deceased to make a statement but unfortunately, this was not done. Endorsement was taken on the MLC and not on the dying declaration. This creates serious suspicion on the statement having been recorded immediately after the doctor declared the deceased fit for statement. That apart, deceased had remained alive for about six days. No explanation has been offered as to why no efforts were made to get the dying declaration recorded by a Magistrate more so, when in a place like Delhi, the Magistrate would be available at a short notice. No evidence has been made to show that efforts were made to get the dying declaration recorded by availing the services of a Magistrate. In ***Balak Ram vs. State of UP 1974 SCC (Crl.) 837***, it has been observed that a dying declaration

made before the Investigating Officer cannot be doubted as for its veracity, however, it would not be prudent to solely base the conviction on a dying declaration made to an Investigating Officer as he would be keenly interested in the fruition of his efforts. In ***Mannu Raja Vs State of M.P, (1976) 3 SCC 104*** in para 11 at page 108, the Supreme Court had held that the Investigating Officers are interested in the success of investigation and the Investigation Officer himself recording a dying declaration during the course of investigation ought not to be encouraged. The prosecution has failed to divulge any details as to why the Magistrate could not record the alleged dying declaration. In ***Dalip Singh and others vs. State of Punjab, (1979) 4 SCC 332***, Supreme Court has held that although a dying declaration recorded by a police officer during course of the investigation is admissible under Section 32 of the Indian Evidence Act in view of the exception provided in Sub Section (2) of Section 162 of the Code of Criminal Procedure, 1973, it is better to leave such dying declaration out of consideration until and unless the prosecution satisfies the Court as to why it was not recorded by a Magistrate. In the present case, deceased was admitted in the hospital on 19th August, 2005 and succumbed to her burn injuries on 24th August, 2005 i.e. after about six days. Ample time was available with the Investigating Officer to call a Magistrate for recording the dying declaration. However, no explanation has been given as to why it has not been done. Thus, it would not be safe to base the conviction solely on such a dying declaration.

13. In ***Laxmi vs. Om Prakash, (2001) 6 SCC 118***, Supreme Court has held that a dying declaration made to a police officer is

admissible in evidence, however, the practice of dying declaration being recorded by an investigating officer has been discouraged and this Court has urged the investigating officers to avail the services of a Magistrate for recording dying declaration if it was possible to do so and the only exception is when the deceased was in such a precarious condition that there was no other alternative left except the statement being recorded by the investigating officer or the police officer, later on relied on as dying declaration. In this case prosecution has not led any evidence before the Trial Court to show that deceased was in such a precarious condition that there was no other alternative left with the Investigating Officer but to record the statement of the deceased, inasmuch as deceased remained alive almost for six days. Even no explanation has been offered as to why no efforts were made to record the dying declaration of the deceased in the presence of a Magistrate. In his statement before the Court, Investigating Officer has not even whispered that he had requisitioned the Magistrate for recording the statement of the deceased. In these circumstances, Trial Court has rightly held that it would not be sufficient to base the conviction solely on the dying declaration of the deceased.

14. That apart, it cannot be said that merely because some quarrel took place between the deceased and the respondents prior to the incident would be sufficient to hold that the respondents had instigated the deceased to commit suicide making them guilty for the offence punishable under Section 306 IPC. Section 107 IPC provides that a person, abets the doing of a thing when (1) he instigates any person to do that thing; or (2) engages with one or more other

persons in any conspiracy for the doing of that thing; or (3) intentionally aids, by act or illegal omission, the doing of that thing. These things are essential to complete abetment as a crime. The word "instigate" literally means to provoke, incite, urge on or bring about by persuasion to do anything. The abetment may be by instigation, conspiracy or intentional aid, as provided in the three clauses of Section 107. Section 109 provides that if the act abetted is committed in consequence of abetment and there is no provision for the punishment of such abetment, then the offender is to be punished with the punishment provided for the original offence. 'Abetted' in Section 109 means the specific offence abetted. Therefore, the offence for the abetment of which a person is charged with the abetment is normally linked with the proved offence. In ***Kishori Lal vs. State of M.P. (2007) 10 SCC 797***, it was held that in case of alleged abetment of suicide there must be proof of direct or indirect acts of incitement to the commission of suicide. The mere fact that the husband treated the deceased wife with cruelty is not enough. Merely on the allegation of harassment, conviction in terms of Section 306 IPC is not sustainable.

15. In ***S.S. Chheena vs. Vijay Kumar Mahajan and Anr. MANU/SC/0585/2010***, the Supreme Court has held that abetment involves a mental process of instigating a person or intentionally aiding a person in doing of a thing. Without a positive act on the part of the accused to instigate or aid in committing suicide, conviction cannot be sustained. In ***Mahendra Singh and Anr., Gayatribai vs. State of M.P. 1995 Suppl. (3) SCC 731***, the allegations leveled were "..... My mother-in-law and husband and sister-in-law

(husband's elder brother's wife) harassed me. They beat me and abused me. My husband Mahendra wants to marry second time. He has illicit connections with my sister-in-law. Because of these reasons and being harassed I want to die by burning." The Supreme Court on the aforementioned allegations came to a definite conclusion that by no stretch the ingredients of abetment were attracted on the statement of the deceased.

16. For the foregoing reasons, I am of the opinion that the view taken by the Trial Court is a possible view and does not suffer from any perversity or manifest error resulting in miscarriage of justice. Petitioner, in my view, has failed to make out a prima facie case in its favour. Accordingly, I do not find any reason to grant leave to appeal to the petitioner.

17. Petition is dismissed.

A.K. PATHAK, J.

September 16, 2010

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