

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

+ **CRL.A. 145/2001**

% Reserved on: 11th November, 2010

Decided on: 4th January, 2011

SMT. MISRI DEVI & ORS. Appellants

Through: Mr.K.B.Andley, Sr. Adv. with
Mr. M.Shamikh, Advocate.

versus

STATE Respondent

Through: Mr. Pawan Bahl, APP.

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

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

MUKTA GUPTA, J.

1. On 25th August, 1987, an information was received at P.S. Lahori Gate that a woman namely Nirmala Devi has set herself on fire by pouring kerosene oil at House No. 164, Chatta Bhawani Shankar. The woman was removed to JPN Hospital in PCR van and on the way Nirmala Devi told H.C. Dalley Ram that her father-in-law, mother-in-law and brother-in-law (Dewar)

used to harass her for bringing television and fridge in dowry and so she put herself on fire. In the hospital as Smt. Nirmala Devi was conscious her MLC was prepared wherein she gave the history herself as “She poured kerosene oil over herself and she lit fire”. She also stated that she was being forced upon by her in-laws to commit suicide. On 26th August, 1987 at 4.00 P.M. the Executive Magistrate Shri U.C. Sarangi PW6 recorded the statement of Nirmala, Ex. PW6/A which reads:

“That I was married to Satya Narain in the year 1983 (Oct./Nov). That I do not have any issue. I live with my husband, in-laws (Hari Parshad Khandelwal & Smt. Misri Devi), brother-in-laws Raj Kumar & Rajesh Kumar. On 25.8.87 at 8.00 P.M. I was scolded by my in-laws. Since my marriage, I have been harassed by my in-laws, for want of bearing issue and in veiled manner about dowry. My husband used to make me write dirty letters. I was not allowed any freedom in the house and my every act was criticized. Even my expenditure led to criticism and scolding. In sheer disgust I told my in-laws that I will commit suicide-you give me kerosene. They gave me kerosene and I poured it over my body. My father-in-law set fire to me. I lost my consciousness and found myself in hospital. I hold my in-laws responsible for burning me. Even yesterday i.e. 25.8.87 in the morning I went to Police Station Lahori Gate and reported the fact about harassment being meted to me by my in-laws. The matter was patched up and I came back home. Once again I repeat that my in-laws were harassing and illtreating me.”

2. On the statement of Smt. Nirmala Devi, PW6 directed the registration of the case under Section 307/498A IPC against father-in-law, mother-in-law, husband and both the brothers-in-law. On 29th August, 1987

Smt. Nirmala Devi died in the hospital. The postmortem Doctor opined the cause of death to be “Septicaemia consequent upon infected burn”. After investigation a charge sheet was filed under Section 302/498A IPC against all the accused persons, that is, Hari Prasad (father-in-law), Misri Devi (Mother-in-law), Satya Narain (Husband), Raj Kumar and Rajesh Kumar (Brothers-in-law, Dewar). The learned ASJ framed charges under Section 498A/304B IPC against all the accused persons and also a separate charge under Section 302 IPC against Hari Prasad. During the pendency of the trial accused Hari Prasad died. After recording the prosecution evidence, the statements of the accused under Sec. 313 CrPC and the defence evidence, the trial court acquitted Satya Narain, husband of the deceased and convicted Misri Devi, the mother-in-law, Raj Kumar and Rajesh Kumar, the two brothers-in-law for offences punishable under Section 498A/304B IPC.

3. The present appeal was filed by Misri Devi, Rajesh Kumar and Raj Kumar challenging their conviction under Section 498A/304B IPC and sentence of Rigorous Imprisonment for 7 years under Section 304B IPC and RI for 3 years and a fine of ₹3,000/- each under Section 498A IPC. The sentence of the Appellants was suspended during the pendency of the present appeal. Before the appeal could be finally heard the Appellant No. 1 Smt.

Misri Devi expired on 29th July, 2010. Thus, the two Appellants before this Court now are the two brothers-in-law of the deceased.

4. Learned counsel for the Appellants contends that the present case rests on the three dying declarations of the deceased which are inconsistent and unreliable and hence no conviction can be based on these dying declarations. Controverting the dying declaration made before the Executive Magistrate Ex. PW6/A, it is stated that this dying declaration has not been recorded in the language of the deceased. The alleged statement of the deceased has been translated by the SDM in English and is thus, not the original dying declaration. Neither was the doctor present during the recording of the dying declaration nor has any endorsement been taken that the deceased was fit for making the statement. In a case of 100% burns it was not possible that the deceased could have given such a long dying declaration after more than 20 hours of having received burn injuries. As per this dying declaration there is no demand of dowry soon before the death and the allegation, if at all, is against the father- in-law. As per this dying declaration the harassment, if any, was for want of bearing an issue. Since she was not allowed freedom, criticized and scolded for expenditure, she in sheer disgust told her in-laws that she will commit suicide and asked them to give kerosene. On their giving kerosene oil she poured it on her body and her father-in-law set fire on her.

Moreover, as per this dying declaration the in-laws have been specified as the father-in-law and the mother-in-law and not the brothers-in-law. Thus, there is no allegation against the Appellants.

5. Challenging the oral dying declaration recorded before PW9 H.C. Dalley Ram it is stated that as per the testimony of PW9, he was sitting in front whereas another constable and the mother-in-law of the deceased were sitting by her side in the PCR van on the back side and it was not possible for him to have heard her statement in such a noisy and overcrowded part of Delhi at that hour. Moreover, if PW9 had heard the version of the deceased the driver sitting next to him and surely the Constable sitting by the side of deceased would have also heard it. Neither the driver nor the constable sitting with the deceased, have been examined who would have been the best witnesses. Moreover, the deceased could not have made such a dying declaration when the mother-in-law was present and thus, this dying declaration has been falsely introduced by the prosecution.

6. It is further contended that once the father-in-law was charged for offence under Section 302 IPC, the others could not be convicted for offence punishable under Section 304B IPC. Reliance is placed on *Surender Kumar and others vs. State of Haryana, 2004 (4) SCC 109* to contend that if the evidence shows some harassment about two and a half years prior to the death

such an allegation being not proximate to the death of the deceased, the accused are entitled to be acquitted of the offences. Reliance is also placed on *Dinesh Seth vs. State, 2004 (1) JCC 143* to contend that there should be convincing evidence of cruelty soon before the death and in connection with demand of dowry.

7. Learned APP for the State on the other hand contends that the dying declaration made to the SDM is fully reliable and prior to the dying declaration the Doctor had opined her to be fit for statement. Since the marriage took place in October/November, 1983 and the deceased died on 29th August, 1987 thus, the death occurred within seven years of marriage. There are clear allegations of demand of dowry soon before the death and the death being unnatural, all the ingredients of Section 304B IPC are made out. Reliance is also placed on letters written by the deceased to her father Exhibit PW13/B to G.

8. I have heard learned counsels for the parties and perused the record. The Appellants before this Court now are the two brothers-in-law of the deceased and the evidence qua them has to be analyzed; whether the same fulfils the requirement of offences punishable under Section 498A/304B IPC or not. The main incriminating evidence in the present case as per the prosecution is the three dying declarations of the deceased. As per the dying

declaration recorded by the SDM Ex. PW6/A, it is apparent that the deceased has clarified that the term 'in laws' is being used for father in law and the mother-in-law. If that is the purport of word 'in-laws', then in the entire dying declaration, there is no allegation against the Appellants. This view also finds support from the letters of the deceased Ex. PW13/B to G where the allegations are either against the husband or the mother-in-law. Learned APP fairly states that in these letters there is no allegation qua the two brothers-in-law. Moreover, the deceased has stated that the main reason for the harassment was want of bearing an issue and in a veiled manner about the dowry. Further grievance is lack of freedom, criticism even for expenditure and scolding. The grievance in the letters also appears to be paucity of funds and food with the deceased. In the dying declaration made before PW9 it is stated by the deceased that her mother in-law, father-in-law and brother-in-law (Dewar) used to harass her for bringing television and fridge in dowry so she had put herself on fire. In this dying declaration the deceased speaks of only one brother-in-law. The name of the brother-in-law is not mentioned. In the absence of the name of the brother it cannot be proved as to which of the two Appellants harassed the deceased for bringing television or fridge. Thus the Appellants are entitled to the benefit of doubt on this count as well. Moreover, the dying declaration before the SDM runs counter to the dying

declaration before PW9 HC Dalley Ram and the one made in the MLC. As per the statement of PW9 and the history recorded in the MLC Ex. PW11/A, the deceased stated that she poured kerosene oil over herself and lit herself on fire whereas, as per the dying declaration before the SDM she told her in-laws that she will commit suicide and asked them for kerosene which they gave and she poured it upon her body and the father-in-law set fire to her. The law in relation to reliance on dying declarations is well settled in a catena of decisions of the Hon'ble Supreme Court. Since the dying declaration is a piece of untested evidence and must, like any other evidence, satisfy the court that what is stated therein is the unalloyed truth and that it is absolutely safe to act upon it and if after careful scrutiny the court is satisfied that it is true and free from any effort to induce the deceased to make a false statement and is coherent and consistent, there is no legal impediment to make it the basis of conviction even if there is no corroboration. However, where the dying declaration is suspicious it cannot be acted without corroborative evidence and where the dying declaration suffers from infirmity the same cannot be the basis of conviction. When there are more than one dying declarations and there is inconsistency between them, then conviction cannot be based solely on the dying declaration. The Hon'ble Supreme Court in *Mehiboobsab Abbasabi Nadaf v. State of Karnataka* 2007 (13) SCC 112 held:

“Conviction can indisputably be based on a dying declaration. But, before it can be acted upon, the same must be held to have been rendered voluntarily and truthfully. Consistency in the dying declaration is the relevant factor for placing full reliance thereupon. In this case, the deceased herself had taken contradictory and inconsistent stand in different dying declarations. They, therefore, should not be accepted on their face value. Caution, in this behalf, is required to be applied.”

This court in *Shivani and Anr v. State* 2010 CrLJ 676, held that the two mutually contradictory narratives i.e. irreconcilable versions narrated by the deceased compels it to hold that neither dying declaration inspires confidence and there are traces of deceased having a grudge against the Appellants and hence being motivated not to speak the truth. The grudge against the Appellants is evidenced by the fact that in the two completely different narratives of the same event, the only commonality is to implicate the Appellants. Thus, the Appellants were entitled to the benefit of doubt.

9. There is yet another infirmity in the dying declaration Ex. PW6/A that though PW6 UC Sarangi has stated that he recorded the statement at 19.20 hours at LNJP on the request of the Investigating Officer, in his examination-in-chief he has nowhere stated that he had taken the opinion of the Doctor as to whether she was fit for making statement at the time when he recorded the statement, nor has this witness satisfied himself about the fitness of the deceased to make the statement. The doctor who certified the deceased fit for statement was not present when the statement was recorded nor did the

doctor sign the dying declaration. In his cross examination, PW6 states that when he reached first time at about 5.00 P.M. on 25th August, 1987 the patient was not fit for statement and hence he left for his home. Police informed him on telephone about patient being fit to make the statement but he could not give the name of the officer who rang him. He also did not remember if he met the I.O. when he again went to the hospital. The time when the doctor certified her to be fit for statements has not been proved by the prosecution. Since there are a number of endorsements on the Ex. PW11/A about the condition of the deceased, but none mentioning the time, it has not been proved that at the time when PW6 recorded the dying declaration the deceased was fit for making the statement. The Hon'ble Supreme Court in *Smt. Laxmi vs. Om Prakash and others*, 2001 Crl. L.J. 3302 held:

“....One of the important tests of the reliability of the dying declaration is a finding arrived at by the Court as to the satisfaction that the deceased was in a fit state of mind and capable of making a statement at the point of time when the dying declaration purports to have been made....

10. Since there is no evidence to show that the dying declaration was recorded when the deceased was in a fit state of mind, therefore, this dying declaration cannot be relied upon.

11. I have also analyzed the statement of PW13 Damodar Prasad Gupta father of the deceased who had stated that Hari Prasad, father-in-law,

Misri Devi, mother-in-law, Satya Narain, husband, brothers-in-law Raj Kumar and Rajesh Kumar started harassing his daughter and used to ask her to bring ₹50,000/-, TV, Fridge and a scooter. They used to beat her, lock her in a room and also not serve meals. This happened in March/April, 1985 whereafter Nirmala Devi and Satya Narain shifted to Jaipur and started residing separately in a house taken on rent by deceased Nirmala Devi. All these accused persons again started harassing Nirmala Devi and again demanded ₹50,000/- and the articles as stated above. It may be noted that in his cross-examination he has admitted that in none of the letters Nirmala Devi had written regarding demand of money or any article. He also admits that he had visited the matrimonial home of the deceased twice in the year 1984 and once in the year 1985. In his further cross examination he has stated that while Nirmala used to do work of stitching at the house, her husband Satya Narain used to assist his son Krishan Kumar on his shop, however he was not paying any salary to Satya Narain. From the perusal of the letters it is evident that the grievance of the deceased was the impotency of accused Satya Narain and the fact that he was a drug addict and was under treatment and not employed resulting into frustration in day-to-day matrimonial life which resulted in the end of her life.

12. The appellants have been convicted for an offence punishable under Section 498A/304B. Neither in any of the dying declarations nor in the letters, there is demand in relation to dowry soon before the death attributable to the Appellants. This essential ingredient of Section 304B is also missing in the present case.

13. In view of the fact that there is no clear and cogent evidence proved beyond reasonable doubt against the Appellant Nos. 2 and 3 for having demanded dowry soon before the death resulting in the unnatural death of the deceased the Appellants are entitled to the benefit of doubt. The Appellant Nos. 2 and 3 are acquitted of the charges under Section 304B/498A IPC framed against them.

14. The appeal is accordingly allowed. The bail bonds and the surety bonds are discharged.

(MUKTA GUPTA)
JUDGE

JANUARY 04, 2011
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