

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

Date of Hearing : 3rd February, 2011
Date of Decision : 23rd February, 2011

+ **CRL. L.P. No. 27/2010**

SMT. SUDESH SHARMA

... PETITIONER

Through: Mr. Krishan Kumar Advocate with
Mr. Deepak Vohra Advocate.

Versus

THE STATE & ANR.

...RESPONDENTS

Through: Mr. Lovkesh Sawhany, APP for the State.
Mr. S.C. Buttan, Advocate for Respondent
No.2.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE G.P.MITTAL

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

J U D G M E N T

G.P. MITTAL, J.

1. **Crl.M.A.No.1134/2010 (under Section 5 of the Limitation Act.)**

Delay condoned for the reasons as stated in the application.

Crl. L.P. No. 27/2010

2. This is a petition preferred by Smt. Sudesh Sharma, Petitioner, mother of deceased Sunita seeking leave of this Court under Section 378(3) of the Code of Criminal Procedure (Code) to file an Appeal against the judgment dated 6th November, 2009 passed by the learned Additional Sessions Judge whereby Respondent Navdeep was acquitted of the charges for the

offence punishable under Section 498-A and 304-B of the Indian Penal Code (IPC) framed against him.

3. The law with regard to the grant of leave is well settled by catena of judgments. Leave to Appeal can be granted where it is shown that the conclusions arrived at by the Trial Court are perverse or there is mis-application of law or any legal principle. The High Court cannot entertain petition merely because another view is possible or that another view is more plausible. In *Arulvelu and Anr. vs. State represented by the Public Prosecutor and Anr.*, 2009 (10) SCC 2006, while referring with approval the earlier judgment in *Ghurey Lal vs. State of Uttar Pradesh*, (2008) 10 SCC 450, the Supreme Court reiterated the principles which must be kept in mind by the High Court while entertaining an Appeal against acquittal. The principles are:-

1. The accused is presumed to be innocent until proven guilty. The accused possessed this presumption when he was before the trial court. The trial court's acquittal bolsters the presumption that he is innocent.

2. The power of reviewing evidence is wide and the appellate court can re-appreciate the entire evidence on record. It can review the trial court's conclusion with respect to both facts and law, but the Appellate Court must give due weight and consideration to the decision of the trial court.

3. The appellate court should always keep in mind that the trial court had the distinct advantage of watching the demeanour of the witnesses. The trial court is in a better position to evaluate the credibility of the witnesses.

4. The appellate court may only overrule or otherwise disturb the trial court's acquittal if it has "very substantial and compelling reasons" for doing so.

5. If two reasonable or possible views can be reached - one that leads to acquittal, the other to conviction - the High Courts/appellate courts must rule in favour of the accused.

6. Careful scrutiny of all these judgments lead to the definite conclusion that the appellant court should be very slow in setting aside a judgment of acquittal particularly in a case where two views are possible. The trial court judgment cannot be set aside because the appellate court's view is more probable. The appellate court would not be justified in setting aside the trial court judgment unless it arrives at a clear finding on marshalling the entire evidence on record that the judgment of the trial court is either 'perverse' or wholly unsustainable in law."

4. With this background, it is necessary to consider the facts of this case.
5. The deceased, Sunita was married to Respondent Navdeep on 13th April, 2001 according to Hindu rites and customs. On 3rd August, 2001 Sunita was removed to Walia Nursing Home with extensive burns and was then referred to Lok Nayak Jai Prakash Narayan Hospital (JPN Hospital) where Dr. Suneet Marwah (PW-2) attended to her. Dr. Suneet Marwah prepared MLC Ex.PW-2/A and recorded that the patient (Sunita) had stated, in her own words, that while she was cooking food, her clothes caught fire with kerosene oil which was lying in the kitchen. The doctor found Sunita to be conscious and oriented, in time and space. At the time of her admission her pulse was 86 per minute and BP 120/80 mmHg. Sunita was referred to the burns Department of the hospital for plastic surgery and further management.
6. In pursuance of the information received from wireless operator E-59 of PCR DD No.34-A recorded in the Police Station Mandawali on 3.08.2001 at about 11:00 P.M. that a lady had set herself on fire in a corner house situated in Gali No.2, Mandawali. The DD was assigned to SI Kishan Kumar for necessary action in the matter. SI Kishan Kumar reaches JPN hospital. SDM Kamal Dev Dogra (PW-10) was informed about admission of Sunita in the hospital with burn injuries.
7. SDM Kamal Dev Dogra reaches JPN hospital and obtains the fitness certificate from Dr. Nagendra regarding fitness of Sunita to make statement and proceeded to record her statement. Sunita informed the

SDM that she and her husband had returned home from her parent's house at about 8:30 P.M., she had wiped the floor of the kitchen with a wiper, soaked in kerosene oil. While she threw the matchstick on the floor after lighting the gas, she caught fire. She told the SDM that she raised a noise on which her husband, who was also in the house too raised noise. Her husband and the neighbours extinguished fire by throwing water on her. She further informed the SDM that she had good relations with her husband and that she had never been harassed for dowry. The incident was result of an accident and nobody was to be blamed for it.

8. Sunita succumbed to burn injuries on 5.08.2001 at about 9:30 P.M. in JPN hospital and autopsy was performed on her dead body on 6.08.2001 at 12:30 P.M. The cause of death was found to be shock as a result of ante mortem burn injuries (about 95% of the total body surface area).
9. After Sunita's cremation on 6.08.2001 Smt. Sudesh Sharma (PW-1), her mother, Anisha Chauhan (PW-8) her friend (Sunita's), Sunil Sharma (PW-4) Sunita's brother and Brij Mohan Bhatt (PW-11), landlord of the house where Sunita and Navdeep were residing on the day of incident, appeared before the SDM Preet Vihar and recorded statements. Smt. Sudesh Sharma informed the SDM that Sunita had disclosed to her just before her death on 5.08.2001 that while returning to her matrimonial house along with Navdeep, the latter had quarreled with her. Her husband made her fall from the scooter. Thereafter her husband Navdeep begged her to return to the matrimonial home. While Sunita went to the kitchen to cook, her husband poured kerosene oil on her and set her ablaze.
10. The Respondent pleaded not guilty to charge under Section 498-A and 304-B IPC. The prosecution in order to establish its case examined 18 witnesses out of which PW-1 Smt. Sudesh Sharma, mother of Sunita, PW-2 Dr. Suneet Marwah, the then Medical Officer JPN hospital, PW-4 Sunil Sharma, brother of Sunita, PW-7 Vijay Kumar, father of Sunita, PW-8 Anisha Chauhan, friend of Sunita, PW-10 SDM Kamal Dev Dogra, PW-

14 SI Badruddin, Investigating Officer and PW-15 SI Kishan Kumar who carried out the initial investigation are important and relevant witnesses.

11. In his statement under Section 313 of the Code, the Respondent gave the cause of burn to be accidental fire, as stated by Sunita in her statement to the SDM in the early hours on 4.08.2001.
12. One defence witness was also examined.
13. The learned Additional Sessions Judge by the impugned order concluded that general and vague allegations about the demand of dowry were made. The family members of Sunita were not consistent on this aspect of the case; Smt. Sudesh Sharma is silent about any alleged demand of dowry. There was no evidence of cruelty caused to Sunita. He further held that the dying declaration made to PW-2 Dr. Suneet Marwah Ex. PW-2/A and Ex.PW-10/A made to SDM PW-10 Kamal Dev Dogra had to be preferred to any other dying declaration. The oral dying declaration made to Smt. Sudesh Sharma, mother of Sunita was suspect and therefore could not be believed. He accordingly acquitted the Respondent giving him benefit of doubt.
14. The questions for consideration before us are (i) whether the Respondent had treated Sunita with cruelty as envisaged under Section 498-A IPC; and (ii) which of the dying declarations allegedly made by the deceased is believable. The Explanation to Section 498-A defines cruelty; it states that:-

"Explanation - For the purpose of this section, "cruelty" means-

(a) Any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health whether mental or physical) of the woman; or

(b) Harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable

security or is on account of failure by her or any person related to her meet such demand.”

15. To establish allegations of harassment and cruelty meted out to Sunita, the prosecution relies on testimony of PW-1 Smt. Sudesh Sharma, PW-4 Sunil Sharma, PW-7 Vijay Kumar and PW-8 Anisha Chauhan.
16. Smt. Sudesh Sharma had an opportunity to make the first statement to the person in authority concerned with this case on 6.8.2001. In the statement made to the SDM Smt. Sudesh Sharma was completely silent about any demand of dowry or any cruelty as contemplated under Section 498-A IPC. Even in her statement before the Court (as PW-1) she has not stated a word about any dowry demand or the ill treatment which may be considered to be cruelty within the meaning of Section 498-A IPC. She merely deposed that Sunita had informed her that Navdeep had quarreled with her on the way and had made her fall from the scooter. It is highly improbable that Sunita would be in a position to reach home and start cooking food after she was so treated and made to fall from a running two wheeler scooter. (We shall advert to later on whether any such statement could have been made by Sunita to PW-1 Smt. Sudesh Sharma). Smt. Sudesh Sharma has not given any cause why the Respondent had made Sunita fall from the scooter. Under these circumstances, it is difficult for us to believe that such an incident had occurred.
17. PW-1 Smt. Sudesh Sharma was silent about any demand of dowry purported to have been made by the Respondent. But, when we examine the testimony of PW-4 Sunil Sharma: he mentions of “2/3 demands including installation of telephone” in his house. Admittedly, in his statement Ex.PW-4/A recorded by the SDM on 6.08.2001 he had not stated that Navdeep had raised 2/3 demands.
18. When we examine the testimony of PW-7 Vijay Kumar Sharma, father of Sunita, he tells a different tale about dowry demand. We find that there is no mention of demand of installation of any telephone by Navdeep. On the

other hand, the witness comes out with the plea that after one month of the marriage Sunita during her visit to their house informed him that Navdeep had demanded household articles like Fridge and TV. During his cross examination PW-7 Vijay Kumar Sharma was confronted with the statement Ex.PW-7/DA recorded by the police during investigation where no such fact had been stated by this witness.

19. Similarly, PW-8 Anisha Chauhan, Sunita's friend and with whom she (Sunita) would confide, in as much as she was the only person present on 16.12.1999 at the time of marriage of Sunita with Navdeep at Arya Samaj Mandir, Vivek Vihar, has not stated any word about any dowry demand by Navdeep or that Sunita was harassed in connection with such demand. In her examination in chief (as PW-8) she deposed that Sunita had visited her along with Navdeep 2/3 times. There was a verbal fight between them, which generally takes place between husband and wife. She was permitted to be cross examined on behalf of the State. She admitted that Sunita was not happy with the behavior of her husband. She also admitted that Sunita had informed her that she could not complain about her husband's behavior since she had a love marriage with Navdeep. The witness clarified that the behavior referring to Navdeep not being employed at that time.
20. Thus, these are general and vague allegations made by the father and brother of Sunita. The Trial Court correctly concluded that these are not sufficient grounds to come to hold that Sunita was tortured mentally or physically or any dowry was demanded from her or her family.
21. It has been urged by Mr. Krishan Kumar, learned counsel for the Petitioner that it is not probable that a small amount of kerosene oil used in wiping the floor could result in such a big fire. This fact, it is submitted, is sufficient to belie the dying declaration Ex.PW-10/A purported to have been recorded by the SDM as also recorded by the Dr. Suneet Marwah on the MLC Ex.PW-2/A. He has argued that if the fire

starts from the floor, there would be burns only on the lower part of the body and a person can escape, whereas in the instant case as much as 95% of the surface on the body of Sunita got burnt. This, accordingly to the learned counsel, supports the prosecution version and the dying declaration purported to have been made by Sunita to PW-1 Smt. Sudesh Sharma that Navdeep had poured kerosene oil on her and set her on fire.

22. The two dying declarations i.e. (i) forming part of the MLC Ex.PW-2/A in the form of observations and inquiry made by Dr. Suneet Marwah and (ii) the dying declaration Ex.PW-10/A recorded by the SDM are the written dying declarations, whereas dying declaration claimed to have been made by Sunita to her mother PW-1 Smt. Sudesh Sharma is an oral one.
23. A dying declaration is admitted evidence by way of an exception to the general rule against the admissibility of hearsay evidence on the principle of necessity. It is believed before relying upon a dying declaration, the Court must be satisfied that the deceased was in a fit state of mind to make the statement. The dying declaration has been truthfully and voluntarily made by the maker thereof. Importantly the Court must be satisfied about the veracity of the testimony of the person who claims the victim had made a statement to him before his/her death. Once the Court is satisfied that the dying declaration is true, voluntarily and not influenced by any extrinsic consideration, it can base conviction of accused without any further corroboration. The rule requiring corroboration is not a rule of law but only a rule of prudence.
24. Normally, a first dying declaration made either to a Magistrate or to a doctor is preferred to any subsequent statement made by the deceased. As in case of any other evidence, the prosecution is always at liberty to prove and satisfy the Court that a particular dying declaration is truthful, convincing and should be relied upon. Whenever the Court finds a dying declaration to be suspicious, the same cannot be taken into consideration to base conviction of an accused.

25. Without going into the question that the first two dying declarations are consistent, recorded by public servants without any motive to falsely record the same, let us examine the third dying declaration purported to have been made to Smt. Sudesh on which the prosecution relied. In this regard PW-1 Smt. Sudesh Sharma deposed that on 5.8.2001 about half an hour before her death she (Smt. Sudesh) asked her (Sunita) about the burn injuries sustained by her and she informed *“that after reaching at her inlaws house she went inside the kitchen and accused also came in the kitchen and raised a quarrel with her in kitchen. My daughter also told me that thereafter accused poured kerosene oil on her and set her ablaze. She further told me that after that accused came in the room and did not try to extinguish the fire”*.
26. The witness was cross examined on this aspect. She stated that no nurse was present in the hospital when Sunita made the statement to her. She did not go anywhere else for tracing the doctor or the nurse. She went on to add that the doctors and nurse might have been present in the hospital at that time but they did not come when she called. She stated that she did not inform the police downstairs. She deposed that she got nervous and straightway went to the family members standing downstairs in the verandah. She added that when she went downstairs to inform her family members, her daughter had expired by that time. Though, in her examination in chief this witness had stated that this statement was made to her by Sunita half an hour before her death, but this period was reduced to 15 minutes during cross examination. It is quite strange that Smt. Sudesh would not immediately try to inform the police about a crucial statement made by her daughter. Obviously, Smt. Sudesh could not know at that time that Sunita would die in another 15 minutes or half an hour. Rather, it is quite strange that in her cross examination that when she came down stairs to inform her family members, her daughter expired by that time. It is neither the case of the prosecution nor the statement of PW-1 Smt. Sudesh Sharma that family members or anybody else wanted to

listen/satisfy themselves about the cause of burn injuries from Sunita herself on the information given by Smt. Sudesh Sharma. If any such information had been given by Smt. Sudesh, the relatives would have immediately rushed to her to confirm it. Moreover, it is not explained by Smt. Sudesh as to why did she asked Sunita about the cause of burn after two days of her admission in JPN Hospital. The only explanation is that Smt. Sudesh could not have possibly claimed dying declaration made by Sunita earlier as that would have been totally disbelieved being made to an interested person when there was opportunity to get it recorded by a Competent govt. officer.

27. Sunita was admitted to JPN hospital on the late night of 3.08.2001. She was alive throughout on 4.08.2001 and till late evening of 5.08.2001. Even if, it is assumed for a moment that the first two dying declarations recorded by the two different public servants were not true or that Sunita was under some kind of mental pressure etc. at the time of her admission in the hospital and immediately thereafter, may be that she had high hopes of survival and would not speak his heart to the doctor at the time of her admission in the hospital or immediately thereafter yet it is unbelievable that she would not make any such statement whole day during day time on 4.08.2001 as also on 5.08.2001. We are convinced that the story of the dying declaration allegedly made by Sunita just half an hour or 15 minutes before her death has been introduced by Smt. Sudesh Sharma to put up a case that there was no possibility of verification of this dying declaration by any doctor, police officer or a Magistrate.
28. The marriage between Sunita with Navdeep was a love marriage. They performed this marriage at Arya Samaj Mandir, Vivek Vihar on 16.12.1999, perhaps against the wishes of their parents. When the parents were reconciled, a marriage as per the Hindu rites was performed on 13.04.2001 (after about a year and five months of the marriage performed in Arya Samaj Mandir). Sunita and Navdeep must have known each other much prior to 16.12.1999. Till the formal marriage as per the Hindu rites

on 13.04.2001 there was no grievance. PW-11 Brij Mohan Bhatt, the landlord of the house where Sunita and Navdeep were putting up at the time of the occurrence on 03.08.2001 (who is an independent witness) has also corroborated the version of Dr. Suneet Marwah and SDM Kamal Dev Dogra about the burn injuries sustained by Sunita. This witness was categorical that he did not notice any quarrel between Sunita and Navdeep and went on to add that Navdeep was living happily with his wife in his house. In her statement Ex.PW-1/B made to SI Kishan Kumar, Smt. Sudesh had informed that after setting Sunita on fire Navdeep simply sat in the room and did not try to extinguish fire. In the statement Ex.PW-1/A which was made to SDM on 6.8.2001 (after death of Sunita) the important portion that “*Navdeep sat in the room and did not try to extinguish the fire*’ is not mentioned.

29. In *Laxman vs. State of Maharashtra*, 2002 (6) SCC 710, a Constitution Bench of the Supreme Court quoted with approval the observation made in *Koli Chunilal Savji & Anr. Vs. State of Gujarat*, 1999 (9) SCC 562, where it was held that the ultimate test is whether the dying declaration is truthful one and voluntarily given.
30. The dying declaration recorded by Dr. Suneet Marwah on the MLC Ex.PW-2/A is consistent with the dying declaration Ex.PW-10/A recorded by the SDM after obtaining fitness certificate from Dr. Nagendra. We have no doubt that these statements were voluntarily made by Sunita and truly recorded by the two public servants. Still, it is highly improbable that such a big fire could have occurred simply by falling of a burnt matchstick on the floor which had been wiped with a cloth soaked in kerosene oil. Thus, the circumstances would show that the dying declarations though made voluntarily to the doctor and the SDM were not truthful.
31. In *Smt. Kamla vs. State of Punjab*, 1993 (1) SCC 1, it was held by the Supreme Court that if a dying declaration is found to be voluntary, reliable

and made in fit mental condition, it could be relied upon without any corroboration. If there are more than one dying declarations, they should be consistent. However, if some inconsistencies are noticed between one dying declaration and the other, the Court has to examine nature of the inconsistencies whether the same are material or not. We have already observed earlier that the first two dying declarations, though made voluntarily and correctly recorded by the doctor and the SDM, but the same were not truthful. The third dying declaration claimed to have been made by Sunita to her mother Smt. Sudesh just before the death of Sunita is suspicious because of the circumstances narrated earlier. Otherwise also, in view of the two earlier dying declarations, it would be highly unsafe to rely upon the third dying declaration purported to have been made by Sunita to her mother PW-1 Smt. Sudesh Sharma. The same, therefore, cannot be taken into consideration without any corroboration.

32. There is absolutely no evidence which could suggest that Sunita was treated with cruelty as defined under Section 498-A IPC. We can only speculate the cause of burn injuries. May be Sunita set herself on fire on account of her sensitive nature and not finding her expectations to be fulfilled from the marriage as could be gathered from the testimony of PW-8 Anisha Chauhan (that Sunita was not happy with the behaviour of her husband as he was not having any employment in those days) and she could not make any complaint to her parents as it was a love marriage.
33. We would here recall the decision in ***State of Punjab v. Gurdip Singh, (1996) 7 SCC 163***, where a young bride Jyoti Bala had died an unnatural death within seven years of her marriage and the allegations of maltreatment and cruelty with regard to the demand of dowry had not been substantiated by the prosecution; the Court held that:-

“7..... It appears to us that Jyoti Bala, quite young and yet to be seasoned with discord and unpleasantness in social intercourse and not yet gaining the practical wisdom and capability of adjustment against petulance and disharmony, became very sensitive and lost

the normal frame of mind which might have induced her to end her life before it could fully blossom.”

34. In any case, no fault can be found with the conclusion reached by the learned Additional Sessions Judge that neither Sunita was treated with cruelty nor she was set on fire by Navdeep. The view taken by the Learned Additional Sessions Judge was plausible and also reasonable.
35. Under these circumstances, there is no ground to grant leave to file an appeal; the petition is accordingly dismissed.

(G.P. MITTAL)
JUDGE

(S. RAVINDRA BHAT)
JUDGE

FEBRUARY 23, 2011
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