

* **HIGH COURT OF DELHI : NEW DELHI**

Judgment delivered on: 17.02.2011

+ **CRL.A. 1374/2010**

RASHID & ORS.

.....Appellants

Versus

STATE GOVT OF NCT OF DELHI

.....Respondent

Advocates who appeared in this case :-

For The Appellant:
For The Respondent:

Mr Avadh Bihari Kaushik.
Ms Richa Kapoor, Addl. Standing Counsel.

Coram:

HON'BLE MR. JUSTICE BADAR DURREZ AHMED
HON'BLE MR. JUSTICE MANMOHAN SINGH

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

BADAR DURREZ AHMED, J. (ORAL)

1. This appeal is directed against the judgment dated 16th November, 2010 in Sessions Case No. 08/2008 arising out of an FIR No. 615/2005 registered at Police Station Samaipur Badli under Section 302/316/34 IPC. Initially, the said FIR was registered U/s 307 and thereafter Section 316 was added on the death of quick unborn foetus (unborn child) which the deceased Smt. Rashida was carrying at the time of the incident. Subsequently, on the death of Smt. Rashida on 03.09.2005, Section 302 IPC replaced Section 307 IPC. This appeal is

also directed against the order on the point of sentence which was passed on 26.11.2010. The learned Additional Sessions Judge after convicting all the three appellants, namely, Rashid, Mohd. Kamil and Smt. Mehtab sentenced them to imprisonment for life along with fine of Rs.1,000/- each, and in default whereof, 60 days simple imprisonment each, in respect of the offence under section 302/34 IPC. All the three convicts were also awarded sentences of imprisonment of five years with a fine of Rs.500/- each, and in default whereof, imprisonment of 30 days each for the offence under section 316/34 IPC. The sentences were to run concurrently and the benefit of Section 428 Cr.P.C. was also directed to be given to all the three convicts/appellants herein.

2. The prosecution case as noted in the judgment of the learned Additional Sessions Judge is that, on 18th August, 2005 at about 2.30 p.m. in a house in Gali No.3, Rajiv Nagar, Bhalaswa Dairy, Delhi which fell within the jurisdiction of Police Station Samaipur Badli, all the three appellants in furtherance of their common intention had sprinkled kerosene oil on Smt. Rashida, who was the wife of the appellant Rashid, and ignited her with a matchstick, as a result of which she received 80% grade 'I' and 'II' burn injuries to which she ultimately succumbed at LNJP Hospital on 3rd September, 2005 at about 8:15 a.m. It is further the case of the prosecution that at the time of the incident, Smt. Rashida was about six months pregnant and was carrying a male foetus and that because of the said incident, death of the quick unborn child was caused and thus the appellants had not only committed an offence under section

302/34 IPC in so far as the deceased Smt. Rashida was concerned, but also committed an offence U/s 316/34 IPC with regard to the death of the quick unborn child.

3. In order to substantiate its case, the prosecution had examined as many as 18 witnesses. The defence also led its evidence and examined six witnesses. Even the accused/appellant Rashid came to the witness box as DW 6. Of all the prosecution witnesses, the most material witnesses in respect of the prosecution case were PW 3 Naushad Ahmad, who was the deceased Smt. Rashida's brother, PW 4 Syed Ahmad, who was the deceased Rashida's cousin, PW 7 Mohd. Kamil, who was a neighbour of PW 3 Naushad Ahmad and PW 13 ASI Hari Ram Sharma, who was the initial Investigating Officer and who allegedly recorded the purported dying declaration of the deceased Smt. Rashida which was exhibited as Ex. PW 7/A.

4. We may point out that the appellant Rashid, as stated above, was the husband of the deceased Smt. Rashida. The appellant Mohd. Kamil is Rashid's brother and the appellant Smt. Mehtab is Mohd. Kamil's wife. It was also the prosecution's case that Smt. Rashida was set ablaze by the three appellants because Rashid had alleged illicit relations with his sister-in-law Smt. Mehtab. This, according to the prosecution, was the motive behind the killing of Smt. Rashida at the hands of the three appellants.

5. The defence set up an alternative case of an accidental death. This is apparent from the suggestions which were given by the learned

counsel for the accused at the time of cross-examination of some of the witnesses as also from the direct evidence which the defence sought to lead through DW 6 Rashid (who is the appellant herein).

6. The learned trial court disbelieved and brushed aside all the defence witnesses and found the prosecution witnesses, particularly, PWs 3,4,7 and 13 to be trustworthy, coherent and truthful, and on the basis of their testimonies as well as on the basis of the purported dying declaration Ex. PW 7/A, convicted the appellants for the offences they were charged with. The learned trial court was also of the view that the motive stood established as per the testimony of PW 3 Naushad Ahmad.

7. The learned counsel for the appellants submitted that the prosecution has not been able to prove its case beyond reasonable doubt. In fact, he submitted that the prosecution has not been able to establish any part of its case. On the other hand, he submitted, the defence has been able to show that the burns caused to the deceased Smt. Rashida could have been accidental burns as suggested by the defence. It was also contended by the learned counsel for the appellants that the learned trial court had committed a grave error in concluding that the motive stood established when, according to the learned counsel, the motive as alleged by the prosecution was absurd. The learned counsel for the appellant further submitted that the entire case of the prosecution rests and hinges upon the dying declaration i.e., Ex. PW 7/A. He submitted that the said dying declaration, before it could be used against the accused for purposes of conviction, had to be established as authentic, correct and

truthful. In so far as the authenticity of the dying declaration is concerned, the learned counsel for the appellants submitted that the three prosecution witnesses, namely, PW 3, PW 4 and PW 7 have stated that the said dying declaration Ex. PW 7/A was recorded in their presence at LNJP Hospital on 19th August, 2005 between 10-10:30 a.m. The learned counsel for the appellant immediately drew our attention to the MLC, Ex. PW 14/A, where the fitness certificate given by one Dr. Sumit, to the effect that the patient is “*fit for statement*”, was given at 2:45 p.m. on 19th August, 2005. This, according to the learned counsel for the appellants, completely belied the statements of the said three PWs, namely, PW 3 Naushad Ahmad, PW 4 Syed Ahmad and PW 7 Mohd. Kamil. With regard to PW 13 ASI Hari Ram Sharma, who is said to have recorded the statement of the deceased Smt. Rashida, the learned counsel for the appellants submitted that his testimony cannot also be believed. He took us through the entire deposition of this witness made before the learned trial court in an attempt to point out the several instances where this witness has not spoken the truth. Thus, according to the learned counsel for the appellants, none of the four witnesses on the basis of whose testimony the authenticity of the dying declaration PW 7/A was sought to be established, cannot be relied upon. That being the case, the so-called dying declaration Ex. PW 7/A cannot be considered to be the correct and authentic statement of the deceased Smt. Rashida.

8. The learned counsel for the appellant also pointed out that the learned trial court failed to appreciate that Ex. PW 7/A was not the only

purported dying declaration but there were four other alleged dying declarations which ought to have been taken note of by the learned Additional Sessions Judge. Three of those dying declarations were the alleged history recorded by three separate doctors on the MLC Ex. PW 14/A at Babu Jagjeevan Ram Memorial Hospital (BJRM Hospital) at Jahangir Puri. The fourth dying declaration, according to the learned counsel for the appellants, was actually destroyed by PW 13 ASI Hari Ram Sharma but the substance of that dying declaration was recorded in Ex. DW 1/A which is a copy of page No. 76 of book No. 3513 of Register No.2 i.e. the Station Daily Diary dated 18th August, 2005 of Police Station Samaipur Badli.

9. The learned counsel for the appellants submitted that all these four dying declarations indicate that the death of Smt. Rashida was accidental and the theory of homicidal death propagated by the prosecution is completely belied by these declarations which the learned trial court ought to have considered.

10. Coupled with these other dying declarations, the learned counsel for the appellants also submitted that the endorsement on the MLC Ex. PW 14/A to the effect that the patient was “*fit for statement*”, which has been found on the said MLC, has not been proved by the prosecution.

11. Consequently, the learned counsel for the appellants submitted that the impugned order and order on sentence ought to be set aside in as much as the prosecution has failed to establish its case.

12. Ms. Richa Kapoor appearing on behalf of the State supported the decision of the learned trial court. Her main argument was that the death of Smt. Rashida was not accidental but homicidal. She submitted that the alleged history which has been recorded in the MLC Ex. PW 14/A and which the learned counsel for the appellants has styled as dying declarations was all at the instance of Smt. Rashida's husband, namely, the appellant Rashid. She submitted that this is so because Smt. Rashida was "*unfit for statement*" at that point of time. Secondly, she submits that in one of the alleged dying declarations recorded by Dr. Shilpi Shrivastava, it is mentioned that Smt. Rashid's *saari* got burnt, whereas she was not wearing a *saari* at the time of the incident but she was wearing a *salwar kameez*. It was also contended by Ms. Richa Kapoor that there was no evidence that food was being cooked as was sought to be suggested by the defence in support of its plea that the death was accidental. For all these reasons she contended that death of Smt. Rashida was clearly homicidal and not accidental.

13. She also contended that from the above submissions, it is clear that the appellant Rashid tried to mislead the investigation by suggesting that it was an accidental death when it was homicidal and this in itself is an incriminating circumstance which can certainly be looked into by the learned trial court. She also suggested that the appellant Rashid has not been able to explain why it took him one hour and forty five minutes from the time of the accident, which according to her took place at 2:30 p.m., to arrive at the BJRM Hospital at 4.15 p.m. along with the injured Smt.

Rashida. She submitted that this is all the more startling because the distance between the residence of the deceased and the appellant Rashid and the said BJRM Hospital is only about 3-1/2 kilometres.

14. She also submitted that the learned trial court was correct in believing PW 3, PW 4, PW 7 and PW 13 and also in regarding Ex. PW 7/A as the authentic, correct and truthful dying declaration of Smt. Rashida. She also submitted that when the clothes of Smt. Rashida were examined by the Central Forensic Science Laboratory, they found that the same contained residue of kerosene, therefore, it was clearly a case, according to her, of Smt. Rashida being set ablaze after kerosene was sprinkled on her. Consequently, she submitted that the appeal ought to be dismissed and the order of conviction and sentence ought to be confirmed by this court.

15. Let us, first of all, consider the alleged motive that has been set up by the prosecution. According to the prosecution, the appellant Rashid had illicit relations with the co-appellant Smt. Mehtab, who was the wife of his elder brother (Mohd. Kamil), and it is because of this that the three of them got angered and killed Smt. Rashida. It has only to be stated, to realise how absurd this alleged motive is! The appellant Rashid was married to Smt. Rashida. It is the appellant Rashid who is alleged to have illicit relations with his sister-in-law Smt. Mehtab. Such a relationship could have infuriated either Smt. Rashida or Mohd. Kamil (Smt. Mehtab's husband), or both. In fact, while Smt. Rashida would be upset with her husband Rashid for having illicit relations with another

lady, the appellant Mohd. Kamil would have a double grievance, that is against his wife Smt. Mehtab for having illicit relations with his brother and also against his brother Rashid for having an illicit relationship with his wife. It is unimaginable as to how these three, that is Rashid, Mohd. Kamil and Smt. Mehtab could join hands and direct their so-called ire against Smt. Rashida who was not to blame for anything. Apart from the absurdity of the alleged motive, there is no evidence whatsoever which would even suggest that there were illicit relations between Rashid and Smt. Mehtab. The entire story of the motive has been concocted by the prosecution without any evidence to back it. It is unfortunate and strange that this, otherwise unbelievable, story of motive has been believed by the learned trial court.

16. We now come upon the so-called dying declaration, PW 7/A.

The English translation of the same is as under:-

STATEMENT OF SMT. RASHIDA W/O
RASHID R/O GALI NO.3, RAJIV NAGAR,
BHALSWA DAIRY, DELHI AGED ABOUT
25 YEARS

I state that I reside at the above address along with my husband and children. My husband is having illicit relations with my sister-in-law mehtab and when I objected on the same he used to beat me. On 08.08.2005 my elder brother naushad Ahmed came to my house at Rajiv nagar in this connection and my brother conciliated the matter between me and my husband. My brother went to his village. After my brother had gone my husband threatened to kill me. On 18.08.2005 at about 2.30 in the day my husband came at home and asked me to warm the food. I lit the stove. In the meantime my brother-in-law kamil and sister-in-law mehtab also came there and my sister-in-law and my husband caught hold of me from

both sides and my brother-in-law lifted the kerosene oil can and poured kerosene upon me and ignited a match stick and threw it upon me due to which my clothes caught fire and when I started burning, they all went out and closed the door from outside. After some time my husband came inside the house and poured a bucket of water upon me and took me to the hospital in a vehicle. My husband, my brother-in-law and my sister-in-law tried to kill me. The statement has been heard and found correct.

RTI (Rashida)
Attested Sd/- ASI Hari Ram
P.S. SP badli dt. 19.08.05

The transliterated version of the said statement is as under:-

“Byan ajaane shrimati Rashida w/o Rashida r/o Gali no.3, Rajiv nagar, bhalaswa dairy, Delhi ba umra 25 saal.

Byan kiya ki mein pata uprokt par apne pati va bachcho ke sath rehti hoon. Mera pati Rashid va meri jethani mehtab ke aapas mein nazayaj sambandh hai. Jo mein apne pati ko iss baat ke liye mana karti thi toh voh mujhe maarta peet-ta tha. Dinak 8.8.2005 ko mera bada bhai Naushad Ahmed bhi issi silsile mein mere ghar Rajiv nagar aaya tha aur mere bhai ne mere pati va mera faisla karva diya tha. Mera bhai apne gaon chala gaya. Bhai ke jane ke paschaat bhi mujhe mere pati ne mujhe dhamkaya va kaha jaan se maarunga jo dinank 18.8.05 ko samay karib 2.30 baje din, mera pati ghar par aaya va mujhe kaha khana garam kar lo. Maine stove ko jalaya aur issi asna mein mera jeth Kamil va jethani mehtab bhi wahan aa gaye aur ate hi meri jethani va mere aadmi ne mujhe dono taraf se pakad liya aur mere jeth ne mitti ke tel ki can utha mere upar daal di aur machis ki tilli jala kar mere upar daal di jis se mere kapdo me aag lag gayi. Jab main jalne lagi to voh teeno bahar nikal gaye aur bahar se darvaza band kar diya. Kuchh der ke baad mera pati dubara andar ghar mein aaya aur pani ki balti mere upar daal di aur mujhe mera pati gaadi mein daalkar hospital le gaye. Mere pati

va mere jeth va jethani ne milkar mujhe maarne
ki koshish ki hai. Byan sun liya theek hai.”

17. We have purposely set out the transliterated version to show the clear falsity of the deposition of PW 13 ASI Hari Ram Sharma. According to this witness, the said statement was given by Smt. Rashida in her own words once and then again when he wrote the statement “*line by line and word by word*”. A simple reading of the so-called dying declaration would indicate that it is not the language of an ordinary person but of the police officer himself. The expressions “*pata uprokt*” and “*jo*” and other similar expressions are commonly used by police officials in Delhi, particularly in recording Section 161 statements, as well as FIRs etc. We have serious doubts as to whether these were the words used by Smt. Rashida herself, if at all.

18. We have already pointed out that the learned counsel for the appellants had submitted that there was one dying declaration which had been recorded by this very witness i.e., PW 13 Hari Ram Sharma at BJRM Hospital which has been suppressed by the prosecution. The learned counsel for the appellants, through the deposition of DW 1 ASI Ilam Singh has established that as per Ex. DW 1/A the statement was recorded by PW 13 Hari Ram Sharma at BJRM Hospital itself. The document Ex. DW 1/A translated into English reads as under:-

*“DD No. 40B:
On receiving DD No. 40B I along with
constable reached at BJRM Hospital where
MLC No. 11105/05 in respect of Smt. Rashida
w/o Mohd. Rashid r/o Gali No.3, Rajiv nagar,
bhalaswa was received on which doctor*

mentioned as alleged history of accidental burn and patient fit for statement and thus, statement was recorded. Injured Smt. Rashida told that at about 2.45 p.m. I was warming food on stove. Stove was burning but fuel was not sufficient in it and hence, I started putting kerosene in the stove by uncapping it while it was burning and thus, flames erupted and caught my clothes due to which I received burn injuries on my body. There was never any quarrel at our home nor there was any tension. There is no fault of any body in it. I have three children. I got married in 1997. All circumstances have been explained to the SHO...”.

19. From the above document, it is clear that the statement of Smt. Rashida was recorded at BJRM Hospital where she stated that at about 2:45 p.m. she was warming the food on the stove, and as it had insufficient fuel, she started pouring kerosene into the stove and while doing so, the stove caught fire as a result of which her clothes caught fire and she received burn injuries all over her body. She also stated that there was no quarrel at home nor was there even any tension or fault on the part of anybody. This document Ex. DW 1/A has been proved to be in the writing of PW 13 Hari Ram Sharma by the defence witness DW 1 ASI Ilam Singh who has stated that “Ex. DW 1/A was recorded on 18.08.2005 itself”.

20. This is a very strong circumstance for us to disbelieve PW 13. We may say that this witness has thoroughly discredited himself and his testimony does not inspire any confidence whatsoever. We are unable to comprehend as to how the learned Additional Sessions Judge considered the testimony of this witness (PW 13) to be credible and trustworthy.

21. Ex. DW1/A brings out a case of accidental burns. This is also corroborated by the alleged history of occurrence recorded by three separate doctors on the MLC Ex. PW14/A. The first doctor - Dr. Gaurav Chaudhary - noted, inter alia, as under:-

“Alleged H/o Accidental Burns”.

This was followed by the noting of Dr. Ridip (S/R Surgery) to the following effect:-

“Alleged H/o accidental flame burn Grade I and Grade II superficial burns 80% all over the body except lower abdomen and lower back.”

The third doctor – Dr. Shilpi Srivastava (Gynae S/R) wrote:-

“H/o accidental burn (her saree caught fire while cooking on stove).”

All these notings also suggest a case of accidental burns and cast serious doubts on the prosecution version.

22. We now turn to the other three witnesses, namely, PW 3 Naushad, PW 4 Syed Ahmad and PW 7 Mohd. Kamil who have been brought to the witness box by the prosecution in an attempt to establish the authenticity of the so-called dying declaration Ex. PW 7/A. According to PW 3 Naushad Ahmad, when he reached LNJP Hospital on 19th August, 2005 the statement of Smt. Rashida was being recorded at about 10-10:15 a.m. PW 4 Syed Ahmad also stated that at about 10.00 a.m. on that date he found PW 13 Hari Ram Sharma recording the statement of Smt. Rashida at the said hospital. PW 7 Mohd. Kamil in his cross-examination stated that they had reached the hospital at 10-10.15

a.m. and that the recording of the statement of Smt. Rashida in the hand of PW 13 Hari Ram Sharma started at about 10.30 a.m. and continued for 10-15 minutes. Thus, according to these three witnesses, the statement of Smt. Rashida which has been exhibited as Ex. PW 7/A was allegedly recorded between 10-10.30 a.m. on 19th August, 2005. But, from the fitness certificate at Mark-X of Ex. PW 14/A which is the MLC we find that the same was granted at 2.25 p.m. on 19th August, 2005. According to PW 13 ASI Hari Ram Sharma the statement of Smt. Rashida was recorded after obtaining the fitness certificate. In other words, according to PW 13 the statement was recorded after 2:45 p.m., whereas according to these three witnesses, namely, PW 3 , PW 4 and PW 7 the statement was recorded at about 10-10:30 a.m. prior to the fitness certificate given by Dr. Sumit at 2.45 a.m. on 19th August, 2005. This clearly shows that the statement was not recorded at all in the presence of these three witnesses. Thus their testimonies as regards the recording of the so-called dying declaration Ex. PW 7/A cannot be believed at all.

23. Apart from this, PW 13 in his testimony has categorically stated again and again and particularly in his cross-examination that at the time when he was recording the statement of Smt. Rashida there was nobody else present whereas the PWs 3, 4 and 7 have all stated that they were present. Thus, as per the prosecution case itself, there are serious contradictions and the testimonies of PWs 3, 4 & 7 as also PW 13 cannot at all be believed with regard to the recording of the statement of Smt. Rashida.

24. Although there is evidence of doctor DW 5 Dr. Arun Goel, that he had asked the duty constable at the hospital to call an SDM for recording of the dying declaration, no Magistrate was requested to record the dying declaration. In fact, in Chapter 13-A of the Delhi High Court Rules which pertains to dying declarations, it is specifically mentioned in Rule 2 thereof that wherever possible, a dying declaration should be recorded by a Judicial Magistrate. When PW 13 Hari Ram Sharma was questioned as to why the SDM was not called for recording Rashida's statement, he gave the following answer:-

“Since Rashida was brunt more than 80% and that is why as per my observation, it was hard for her survival. I did not make any request to the SDM to get the statement recorded of Rashida.”

This answer is preposterous inasmuch as Rashida died 15 days later on 03.09.2005. To be specific, Smt. Rashida was admitted to BJRM Hospital on 18th August, 2005 and subsequently shifted to LNJP Hospital on the same day. As mentioned above, she remained in hospital till 3rd September, 2005 when she passed away. There was enough time for requesting a Judicial Magistrate to come and record her statement. The fact that this was not done also lends credence to the submission advanced by the learned counsel for the appellants that the prosecution did not want to do so because that would harm their case.

25. Apart from this, Rule 7 of Chapter 13- A also prescribes that where a dying declaration is recorded by a police officer or a medical officer, the same should be attested by one or more of the persons who

happen to be present at that time. Ex. PW 7/A is not attested by any witness. The Investigating Officer could have easily asked any doctor to have attested the dying declaration. In fact when this question was put to him in cross-examination he gave a most startling answer to the following effect:-

“After recording the statement of Rashida, I shown (sic) it to the doctor on duty and requested him to give his signatures but he said that the person about to die shall not tell a lie and that is why my signatures are not required.”

PW 13 has not disclosed the name of the doctor. And, in any event, it cannot, by any stretch of imagination, be believed that any doctor could make such an irresponsible statement. The manner in which and the preposterous answers given by PW 13 Hari Ram Sharma display his callous and insensitive attitude, in the least, and is even reflective of his complicity in a frame-up.

26. PW 13 Hari Ram Sharma has also not been able to state clearly as to whether Smt. Rashida's hand was burnt or not. He was not even able to tell as to whether he had taken her right thumb impression or as to whether it was burnt or not. In the backdrop of these statements and the absurd answers given by PW 13 Hari Ram Sharma, his testimony, as already mentioned above, does not deserve any credence. In view of the foregoing, the authenticity of Ex. PW 7/A is clearly not established by the prosecution.

27. We also note that PW 14 Dr. Neeraj Chaudhary in his cross-examination had categorically stated that the thumb impression of the

patient Smt. Rashida is not available on the MLC (Ex. PW 14/A) because it was a case of 80% burn all over the body except the lower abdomen and lower back. An important aspect also is that this very witness stated that it is nowhere written in the MLC that any kind of smell was emanating from the body of the patient Smt. Rashida. It is also for this reason that the purported thumb impression appearing in Ex. PW 7/A cannot be considered as the thumb impression of the deceased Smt. Rashida. The law with regard to dying declarations is well settled as observed in the case of **Geeta & Another Vs. State: 163 (2009) DLT 268**

D.B. Paragraph 24 of the said decision reads as under:-

“24. The law with regard to dying declarations is quite well settled. It is an established principle that a conviction can be based solely upon a dying declaration. But, before this can be done, the dying declaration must be established to be authentic and correct as well as truthful. Insofar as the authenticity and correctness of the dying declaration is concerned, the prosecution has to establish that the dying declaration in question was, in fact, made by the person who lost his life. Even where it can be established that the statement, which purports to be the dying declaration of the deceased, was in fact made by the deceased, the prosecution has also to establish that the statement was truthful. Of course, it is normally presumed that a dying person in his last moments does not utter any falsehood. But that does not rule out the possibility that in some cases this may not be the position. There may be instances where out of hate or spite a person may falsely implicate his enemy, even in his dying moments. It is also quite possible that the person making the dying declaration is

under the influence or control of someone else and out of fear or other reasons, he may make a false statement prior to his death. There is also a possibility that a person, in order to save his honour and the honour of his family, who would survive him, may make statements which are not entirely correct or truthful. There is also a possibility that the person making the dying declaration is under some medication or because of his precarious condition is suffering from hallucinations and, therefore, the statements he makes at that point of time may be far removed from the truth. It is only when all these circumstances are ruled out and the court is of the belief and opinion that what the dying declaration states is truthful, can a conviction be based upon it without seeking corroboration. A dying declaration must always pass the scrutiny by the Court because, after all, it is merely hearsay evidence and it is admissible and relevant only because the person who made the declaration is no longer alive and cannot be produced before Court for testifying. At the same time, the courts need to exercise caution in relying upon dying declarations because the maker of the statement is not before it and nor does the defence have an opportunity to cross-examine him. Thus, while there is no rule of law which suggests that a conviction cannot be based solely upon a dying declaration, the courts, as a rule of prudence, look for other corroborative material. If the dying declaration is of such a stellar and unimpeachable quality that it fully inspires confidence of the Court, there is nothing to prevent the Court from relying solely on such a dying declaration and on basing a conviction thereupon. But, the emphasis must be on the quality of the dying declaration. If the dying declaration is suspicious or suffers from some infirmity, then it should not be acted upon without any corroborative evidence.”

28. Keeping the position in law in mind, as also the facts surrounding the so-called dying declaration Ex. PW 7/A, we are clearly of the opinion that the same cannot be relied upon. It is doubtful to say the least and it is eons away from being of stellar or unimpeachable quality. Apart from the so-called dying declaration Ex. PW 7/A there is no other evidence. Consequently, we are of the clear view that the trial court was in error in convicting the appellants solely on the basis of the purported dying declaration Ex. PW 7/A and that too after brushing aside the defence evidence which had been led. The trial court had also erred in not laying any emphasis on the fact that PW 13 Hari Ram Sharma had actually recorded a dying declaration at BJRM Hospital itself which has not been produced but which, fortunately for the defence, found mention in Ex. DW 1/A. Apart from this, the trial court also brushed aside the alleged history as recorded by three separate doctors at BJRM Hospital itself which indicated that the death of Smt. Rashida was accidental and not homicidal.

29. This case has demonstrated as to how innocent people are made to suffer because of a faulty and tainted investigation. Here, the investigating officer PW 13 Hari Ram Sharma has thoroughly discredited himself and has played a vital and key role in setting up, what we feel, a fabricated case against the appellants. To compound the misery of the appellants, we are informed by their learned counsel that during this period two of the three minor children of the appellant Rashid passed away due to want of care as their father, uncle and aunt were all locked

up in jail! It is directed that a copy of this judgment be sent to the Commissioner of Police so that he may take further steps in accordance with law in respect of PW 13 ASI Hari Ram Sharma and also ensure that investigations are never conducted in this manner.

30. In view of the foregoing discussion, there is no doubt in our minds that the prosecution has not been able to establish its case. Consequently, the impugned judgment and the impugned sentences are set aside. The appellants are acquitted of the charges levelled against them. The appellants are in custody, therefore, they are directed to be released forthwith. The appeal stands allowed.

BADAR DURREZ AHMED, J

MANMOHAN SINGH, J

FEBRUARY 17, 2011

pkv