

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
% **CRL. REV. P. 643 OF 2009**
+ **Date of Decision: 24th January ,2011**

PHOOL CHAND & ANR. ...Petitioners
! Through: Mr. R. K. Kapur & Mr. Harish Pant,
 Advocates

Versus

\$ **STATE OF DELHI & ORS.** ...Respondents
^ Through: Mr. Rakesh Tikku & Mr. Haneef
 Mohd., Advocates

CORAM:
* **HON'BLE MR. JUSTICE P.K.BHASIN**

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

JUDGMENT

P.K.BHASIN, J:

The petitioner no.1 is the unfortunate father of a daughter named Sushma and grand-father of a tiny girl Tanu while the petitioner no.2 is the brother of Sushma and uncle of Tanu, both of whom had got burnt on 2nd December, 2004, which happened to be the day of fifth wedding anniversary of Sushma who was married to respondent no.2 herein. The incident in which the mother and daughter had got burnt and which incident had taken the lives of both of them had taken place inside the

matrimonial home of Sushma in village Tauru in District Gurgaon. Since the petitioners had felt that the deceased Sushma had been killed by her in-laws to satisfy their greed for dowry they had complained to the police and a criminal case was registered for murder and dowry death and due course the respondents 2-4 herein were initially tried for these offences by a Sessions Court in Gurgaon but subsequently the Hon'ble Supreme Court transferred the trial to Delhi on being approached by the petitioners.

2. The petitioners feel deeply hurt, firstly, because they have lost two very dear ones because of their inability to fulfill the dowry demands of respondents 2-4 and their other family members who have not even been arrested by the police, secondly, by the denial of justice to them by the Sessions Court in Delhi which has refused to examine them as prosecution witnesses and, thirdly, by the trial Court hastily acquitting all the accused-respondents 2-4 during the pendency of this revision petition which was filed by them to challenge that order of the trial Court by which their request for affording them the opportunity to have their statements recorded was rejected.

3. In order to find out whether any injustice has really been done to the petitioners as is their grievance, by the trial Court in this case, the

background facts of the case, which initially was being tried in Gurgaon Court and then transferred to Delhi, need to be noticed in some detail.

4. The deceased Sushma was married to respondent no.2 herein on 2nd December,1999 and after their marriage they were living in village Tauru, District Gurgaon. Respondent no.2 was a practicing advocate in Gurgaon Courts. On 2nd December,2004 the deceased Sushma and her tiny daughter Tanu got burnt around 8 p.m. in their own house. Both the injured were taken by respondent no.2 to some Public Health Centre in his village where he informed the doctor that his wife had got burnt due to falling of kerosene oil and her catching fire and his daughter had also got burnt in that incident. That incident was thus projected to be an accident only. Sushma died around 10 p.m. same night while baby Tanu was referred to Safdarjung Hospital in Delhi but she also succumbed to the burn injuries on 5th December,2004 in the hospital. The petitioners had, however, suspected that Sushma had died an unnatural death and since before her death she was being harassed by her in-laws the petitioner no.1 lodged a complaint with the Sub-Divisional Magistrate, Gurgaon and complained that his daughter's husband, respondent no.2, her father-in-law, respondent no.3, mother-in-law, respondent no.4 and their other family members named in the FIR had been harassing his daughter for her having brought insufficient

dowry and for not fulfilling their demands of more dowry and on the day of the wedding anniversary of his daughter on 2nd December, 2004 also his son-in-law Pawan Kumar had demanded money from him. The petitioner no.1 claimed in his complaint that his daughter had been killed by her husband and other family members of his family. The Haryana police then registered a case under Section 304-B/34 of the Indian Penal Code on 3rd December, 2004. During the investigation stage respondent no.2 appears to have taken the stand that his wife had committed suicide in his presence when he had shown his reluctance that day to go out for celebrating their wedding anniversary. However, it appears, that the police could not digest that story of suicide and considered it to be a case of murder Section 302 IPC also was invoked., Respondents 2-4 were arrested after many days of the incident while their other family members named in the FIR could not be arrested. On the completion of investigation against these three accused persons a charge-sheet was submitted by the police in the Court of Sub-Divisional Judicial Magistrate on 12th March, 2005 and vide order dated 22nd April, 2005 the case was committed to Sessions Court in Gurgaon and the date of 6th May, 2005 was fixed for the appearance of the accused in the Sessions Court.

5. The case was then entrusted to an Additional Sessions Judge(Fast Track Court) in Gurgaon where the Additional Sessions Judge vide his order dated 19th July,2005 framed charges against all the three accused for the offences punishable under Sections 302/304-B/498-A/34 IPC and since the accused persons had pleaded not guilty the case was fixed for prosecution evidence. However, before any witness could be examined the complainant, petitioner no.1 herein, informed the trial Court that he intended moving some petition for the transfer of the trial from Gurgaon Sessions Division since the public prosecutor had colluded with accused Pawan Kumar who was an advocate practising there. It was also being claimed by the petitioners that the doctor who had initially medically examined the deceased Sushma when she was brought to Primes Health Centre in burnt condition on the day of the incident had also colluded with the accused which was evident from the fact that he had produced after twenty days of his examining Sushma a document purporting to be her statement recorded by him on 2nd December,2004 showing that she had claimed that she had committed suicide since her husband had declined to go out on the night of their wedding anniversary.

6. The petitioner no.1 filed a transfer petition before the Hon'ble Supreme Court (being transfer petition (Crl.) no. 156/2006) and the

Supreme Court initially stayed the on-going trial and subsequently vide order dated 26th March, 2007 the trial of accused-respondents 2-4 was transferred to Patiala House Courts in New Delhi.

7. After the transfer the trial to Delhi the case was taken up for the first time on 17th April, 2007 by the Additional Sessions Judge, New Delhi when none of the accused had appeared and the case was then adjourned for appearance of the accused persons to 23rd May, 2007. However, the accused persons appeared in Court on 25th April, 2007, which was the date of their appearance in Delhi Court given to them by the Sessions Court in Gurgaon. On that date the learned Additional Sessions Judge issued a notice to the Director of Prosecution, Gurgaon to appoint public prosecutor for the case, instead of giving the notice to the Director of Prosecution, Government of NCT of Delhi. On 12th July, 2007 one Mr. N.S. Malik appeared in the matter as special public prosecutor from the State of Haryana. On 5th February, 2008 the counsel for the complainant had requested the trial Court for adjourning the case as the complainant had moved an application for change of the public prosecutor. The case was accordingly adjourned to 7th February, 2008. On 7th February, 2008, it was stated before the trial Court by the counsel for the complainant that no material witness should be examined till the complainant's request for appointment of

another public prosecutor was decided. The learned Additional Sessions Judge after observing that since the complainant had no trust upon the special public prosecutor appearing in the case and had moved an application for change of the public prosecutor adjourned the case for further proceedings to 15th March, 2008. On the adjourned date complainant, who was present in Court, informed the Court that his application for change of the public prosecutor was still pending and accordingly the Court adjourned the case to 25th and 26th April, 2008. The complainant and his son Rajesh Kumar were bound down for 25th April, 2008. On 25th April, 2008 the complainant's son Rajesh Kumar once again informed the Court that their application for change of the public prosecutor was still pending with the appropriate Government and so the case was adjourned to 21st and 22nd May, 2008. PW Rajesh Kumar was bound down for the next date. On 21st May, 2008 when PW Rajesh Kumar appeared in the Court he was asked to give his statement but he refused stating that he would not give his statement so long as the special public prosecutor Mr. N.S.Malik from Gurgaon was appearing in the case. The request for adjournment made by Rajesh Kumar was opposed on behalf of the accused persons and the trial Court after observing that the Hon'ble Supreme Court while transferring the case to Delhi had directed expeditious disposal of the case closed the prosecution evidence qua Rajesh Kumar and

discharged him as a prosecution witness. Thereafter the case was being adjourned from time to time and some witnesses were examined by the special public prosecutor from Haryana. Quite strangely that special public prosecutor on 19th November, 2008 told the trial Court that, in fact, the trial was to be conducted by some prosecutor to be appointed by Delhi Government. Then, the case was adjourned.

8. It appears that finally the Lt. Governor of Delhi appointed one Mr. Shiv Kumar as the special public prosecutor for the present case on 22nd April, 2009 and that prosecutor appeared in the case on 4th May, 2009 and at his request the case was adjourned as he had been newly appointed. On 1st August, 2009 the complainant appeared in Court but he expressed his inability to depose that day. Final opportunity was then given to the complainant for giving his evidence and the case was adjourned to 4th September, 2009. On that date three police witnesses were present and were examined. On behalf of the complainant Phool Chand an application for adjournment and exemption from his appearance accompanied by a doctor's certificate advising him complete bed rest because of stiffness of the knee joints and immobility of the lower limbs was moved by his advocate. The learned trial Court expressed doubts regarding the authenticity of the medical certificate and so the complainant's exemption-cum-adjournment

application was dismissed and it was ordered that the prosecution evidence qua PW Phool Chand was also closed(as was done earlier in case of PW Rajesh Kumar).

9. Thereafter an application was prepared on behalf of the complainant under Section 311 Cr.P.C. praying for an opportunity to examine the complainant Phool Chand and his son Rajesh Kumar and the same was filed in the trial Court through the special public prosecutor on 7th November,2009. That application was, however, dismissed by the trial Court on the same day. The case was then adjourned to 2nd and 8th December,2009 for remaining prosecution evidence after recording statements of some witnesses who were present on that date.

10. The complainant and his son Rajesh Kumar then approached this Court by filing the present revision petition under Section 397 Cr.P.C. on 27th November,2009 and prayed for setting aside of the trial Court's order dated 7th November,2009. The petition was listed for preliminary consideration on 1st December, 2009 when notice of the petition was issued to the respondents for 16th December,2009 and trial Court's record was sent for. On 16th December, 2009 accused - respondents 2-4 entered appearance through their counsel who sought time for filing

of reply to this petition. The matter was then adjourned to 25th January, 2010 and the trial Court's record, which had been requisitioned for 16th December was ordered to be sent back to the trial Court and to be obtained again two days before 25th January, 2010. On 25th January the counsel for the respondents 2 to 4 informed this Court that the trial Court had acquitted respondents 2 to 4 and so this revision petition had become infructuous. However, counsel for the petitioners was not aware of that development and since the trial Court's record had also not been received the same was directed to be obtained.

11. On receipt of the trial Court's record it was confirmed that accused – respondents 2 to 4 had already been acquitted by the trial Court vide judgment passed on 19th December, 2009. It appears that the trial Court had taken up the case for evidence on 2nd December, 2009 and it was informed by the complainant's counsel about the pendency of the present petition but since there was no stay of the trial one witness who was present in the Court was examined. Then while adjourning the case for 8th December, 2009 for remaining evidence final opportunity was given to the prosecution for concluding its evidence in view of the fact that the Supreme Court had already directed expeditious conclusion of the trial while transferring the case to Delhi. On 8th December, 2009 three witnesses were present and

they were examined and since final opportunity had been granted for prosecution evidence and no other witnesses were present the trial Court closed the prosecution evidence and adjourned the case to 19th December, 2009 for recording of the statement of the accused under Section 313 Cr.P.C. On 19th December, however, the trial Court observed that since there was no incriminating evidence against the accused there was no need of recording the statements of the accused persons and after observing so it proceeded to pass the final judgment same day and acquitted all the three accused.

12. Shri R.K. Kapur, learned counsel appearing for the petitioners, had submitted that the rejection of their application under Section 311 Cr.P.C. by the trial Court was not justified and consequently the acquittal of the three accused persons was also unjustified and unmerited. Mr. Kapur submitted that the Hon'ble Supreme Court had reposed faith in the Delhi Courts while transferring this case from Gurgaon to Delhi but the trial Court has not honoured that trust by declining to examine the petitioners as prosecution witnesses by erroneously taking shelter under the directions of the Hon'ble Supreme Court for an expeditious disposal of the trial. It was further contended that the Hon'ble Supreme Court had no doubt while transferring the case from Gurgaon to Delhi directed that the trial should be concluded

as expeditiously as possible but that did not mean that the trial Court should have proceeded to close the prosecution case in a haste without even realizing that after the transfer of the case to Delhi the Delhi Government had not even appointed any prosecutor for prosecuting this case for sufficiently long period and without appointment of the prosecutor by the Delhi government the trial Court had been going ahead with the trial and recording evidence of the witnesses by entertaining the public prosecutor who had been appointed by the State of Haryana. Mr. Kapur pointed out that the Delhi government had appointed special public prosecutor for this case only on 22nd April, 2009 and that prosecutor had appeared in the matter for the first time only on 4th May, 2009 and, therefore, the trial Court was not at all justified in observing that the complainant and his son had been prolonging the trial. Counsel also submitted that in the absence of public prosecutor appointed by the Delhi government the order of the trial Court passed earlier for closing the prosecution evidence qua complainant's son Rajesh Kumar was also totally illegal. Mr. Kapur further contended that the haste shown by the trial Court in wrapping up the trial before 25th January, 2010, the date fixed in the present matter, was also not justified and this Court is not prohibited from undoing the grave injustice caused to the petitioners by exercising the revisional jurisdiction not only in respect of the orders passed by the

trial Court during the pendency of the trial closing the prosecution evidence qua the petitioners but also in respect of the final judgment of acquittal of the accused persons which in the afore-stated background deserves to be set aside and the matter should be sent back to the trial Court for a fresh decision after recording the statements of the petitioners and other left out witnesses. It was also contended that this Court in order to undue gross miscarriage of justice committed by the trial Court can very well do that in the present proceedings itself instead of waiting for some appeal to be filed against the acquittal of the accused.

13. On the other hand, it was contended by Shri Rakesh Tikku, learned counsel for the respondents 2 to 4 that this revision petition had become infructuous with the acquittal of the accused persons and as far as the challenge to the trial Court's order dated 27th November, 2009 rejecting the petitioners' application under Section 311 Cr.P.CV. is concerned and as far as the acquittal of the accused persons is concerned it was for the State to challenge their acquittal by filing an appeal which it had not done and even the petitioners could now file the appeal against the trial Court's final verdict in their appeal they could challenge the acquittal of the accused on all possible grounds including

the closure of prosecution evidence qua both of them which they claim to be illegal and unjustified.

14. It is now well settled that the revisional powers of the High Court are very wide and in the exercise of the same even an order of acquittal can be set aside at the instance of a private party if it is found that there had been a gross miscarriage of justice. In the facts and circumstances of the present case which have been narrated in great detail by me in the preceding paras I have no manner of doubt that this case falls in that category of cases where it can be said that there has been a gross miscarriage of justice. As noticed already, the trial of this case was transferred to Delhi by the Hon'ble Supreme Court vide order dated 26th March, 2007 on a transfer petition moved by the petitioner no. 1 herein and before the passing of that final order by the Hon'ble Supreme Court the trial before the Sessions Court at Gurgaon had been stayed vide order dated 5th May, 2006. After the transfer of the present case to Delhi the Delhi Government was expected to appoint a prosecutor for conducting the trial and, as also noticed already, it appointed a special public prosecutor for the present case only on 22nd April, 2009. It is significant to note that the learned trial Court had on some occasions adjourned the proceedings at the request of the counsel for the complainant when he had stated to the Court that the

appropriate Government had been approached for appointing of another public prosecutor and, therefore, the trial Court was certainly not justified in going ahead with the trial in the absence of any public prosecutor appointed by the Delhi Government and the complainant and his son Rajesh Kumar were fully justified in not coming forward to give their evidence without the appointment of a public prosecutor by the Delhi Government. After the appearance of the public prosecutor appointed by the Delhi Government on 4th May, 2009 the case was taken up by the trial Court on 1st August, 2009 and on that date the complainant Phool Chand had appeared but had expressed his inability to depose on that day which inability, counsel for the petitioners had submitted, was due to his sickness. The trial Court had accepted that request of the complainant and adjourned the case to 4th September, 2009 on which date an application was moved on behalf of the complainant accompanied by a medical certificate of his sickness and a prayer was made for exempting the appearance of the complainant. The learned trial Court, however, rejected that medical certificate doubting the genuineness of the medical certificate and rejected that application. In my view, there was no cogent reason given by the learned trial Court for doubting the genuineness of the medical certificate and in any case if it had any doubt the same could have been got verified instead of closing the prosecution evidence qua the

complainant or arrest warrant could have been issued to ensure the presence of the complainant. In any event, since the earlier delay in the proceedings which had occurred after the transfer of the case to Delhi was attributable to only the Delhi Government's inaction in appointing a public prosecutor for this case it could not be said that the complainant and his son were interested in prolonging the trial as was observed by the learned trial Court and, therefore, the refusal of the trial Court in this case, in which the accused were being tried for the heinous offences of murder and dowry death, to examine the complainant and his son has resulted in totally unmerited acquittal of the accused – respondents 2 to 4. If at all after examining the complainant and his son it had been found that no case was made out against any of the three accused persons their acquittal could have been justified but not without allowing the prosecution to adduce evidence of two of its most material witnesses whose statements were to provide the motive for the murder and to establish the the offence of dowry death.

15. I am, therefore, of the view that this is a fit case where this court should in exercise of its revisional jurisdiction set aside the acquittal of accused – respondents 2 to 4 and send back the case to the trial Court for a fresh decision after recording the statements of the two petitioners and also of the other prosecution witnesses who had

remained to be examined when the trial Court had closed prosecution evidence on 8th December, 2009 as well those who had been examined by the earlier prosecutor Mr. N.S. Malik who was not competent to represent the State of Delhi.

16. Accordingly, the judgment dated 19th December, 2009 passed by the learned Additional Sessions Judge, New Delhi acquitting the accused – respondents 2 to 4 herein is set aside and the trial Court is directed to decide the case afresh in the manner noted above. It is, however, made clear that since this Court has not gone into the merits of the prosecution case at all it will be for the trial Court to come to any conclusion after the remand on appreciation of the prosecution evidence.

The accused shall appear in the Court of the concerned Additional Sessions Judge at Patiala House Courts on 5th February, 2011 at 2 p.m. and shall present fresh bail bonds and in case they fail to do that the trial Court shall be at liberty to ensure their presence in whatever way it would deem appropriate.

January 24, 2011
nk/sh

P.K. BHASIN,J