

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

DECIDED ON: 08.07.2011

+ CRL.L.P. No.4/2011

STATE Petitioner

Through: Mr. Jaideep Malik, APP for the State.

versus

SANJAY & ORS. Respondents

Through: Mr. Sumeet Verma, Amicus Curiae.

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

MR. JUSTICE G.P. MITTAL

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| 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 |

MR. JUSTICE S.RAVINDRA BHAT (OPEN COURT)

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1. The State by this Criminal Leave Petition No. 4/2011, under Section 378(1) of the Code of Criminal Procedure, seeks leave to appeal against the judgment and order of the learned Additional Sessions Judge (hereafter called "Trial Court") dated 18.03.2010 in SC No.39/2008 thereby acquitting the Respondents under Sections 302/498-A/120-B/304-B/34 IPC.

2. The brief facts of the case, as alleged by the Prosecution are that, one Ms. Sonia was married to Praveen Kumar on 11.05.2005 after marriage the respondents (in-laws of the deceased) in furtherance of their common intention had subjected her to cruelty and harassed her

for not bringing sufficient dowry. It is the case of the prosecution that on 15.04.2007, all the respondents in furtherance of their common intention had murdered Ms. Sonia by pouring kerosene oil on her after which they had set her on fire, at about 12:00 noon at her matrimonial house, which resulted in her death on 21/04/2007.

3. The matter was reported to police officials by the Constable on duty in the hospital after Ms. Sonia was admitted in a burnt condition whereupon investigation commenced, during which the sub-divisional magistrate had also recorded the statement of Ms. Sonia on 16.04.2007 and the case was registered against the accused persons. The Trial Court acquitted the accused of the charges leveled against them under Sections 302/498A/120B/304B/34 IPC concluding that the prosecution failed to bring home their guilt regarding the alleged harassment; and the causing of the death of the deceased.

4. It is contended by Mr. Jaideep Malik, the Learned Additional Public Prosecutor, that leave has to be granted to appeal against the impugned judgment on the following grounds:

(a). That the Trial Court failed to appreciate the evidence deposited by PW1, PW 13 and PW19, who had specifically pointed out that the deceased had suffered 90-95% burns at the time she was hospitalized and her death was caused due to the said burns.

(b) The impugned judgment over looked the deposition of PW6- the sub-divisional magistrate. He deposed having recorded the deceased's statement at about 3.05 PM prior to which the doctor had declared her fit to make the statement, and that he himself had satisfied himself that the deceased was capable of making the statement.

(c) The Trial Court misinterpreted the judgments of the Supreme Court in the cases of *Smt. Laxmi vs. Om Prakash and Ors.* (AIR 2001 SC 2383); *Paparambika Rosamma and Others vs. State of Andhra Pradesh* (1999 (7) SCC 695); and *Uka Ram vs. State of Rajasthan* (AIR 2001 SC 1814). Since these judgments have been misinterpreted the findings that the deceased was not in a fit state of mind though she was burnt to 90% is contrary to the facts of the case.

(d) The Court erred in not relying upon the dying declaration since the Supreme Court has ruled that a person can be convicted on the dying declaration as long as it is trustworthy, even if the other witnesses turn hostile.

(e) The finding in the impugned judgment that there was no certificate of the doctor regarding the state/ condition of the mind of the declarant when the SDM recorded the statement of Ms. Sonia is contrary to the law and the facts of the case.

5. This court has considered the Trial Court's record, which was requisitioned for purposes of this proceeding, and carefully analysed the learned APP's submissions. With regard to the petitioner's contention that the Trial Court failed to appreciate the evidence of witnesses who testified that her death was due to the 90-95% burns, the Trial Court noticed and nowhere denied this fact. The Court acquitted the accused for the reason that there was insufficient evidence showing that the accused persons were responsible for her burns.

6. As regards PW6's testimony (he was the Sub Divisional Magistrate) the Trial court did not rely upon it. The reason was that the dying declaration was not accompanied by a certification of the deceased's fitness to make such a statement, and that despite the fact that she had 90% burns that SDM had not made any efforts to enquire from doctors about her fitness to make such a statement. While we notice that the approach of the Trial Court as to the appreciation of law, particularly the larger Bench decision of the Supreme Court, in *Laxman* was incorrect, that does not affect its conclusion, having regard to the circumstances in the present case. The Supreme Court had stated that there is no obligation that the dying declaration must necessarily contain a doctor's endorsement to the effect that the patient or injured person is fit and in an oriented state of mind to make a statement; as long as the person recording it, is able to depose about it, and is credible and trustworthy, the dying declaration can be said to have been recorded in the circumstances, in a given case.

7. In this case, significantly, the Trial Court concluded that the deceased had been declared fit to make the statement at 11.30 AM in the morning, whereas the declaration was recorded only at 03.00 PM and given the severity of her burns, while she might have been fit to make the statement at 11.30 AM, there was no reassurance that she was fit to make it at 03.00 PM. The

SDM, it was held, therefore, should have obtained certification as to her fitness right before he sought to record her statement, at 3.00 PM. We find no infirmity or misapplication of law in this approach. While a person, with extensive burn injuries might be in a position to make a statement or declaration, at the time, when she is brought to the hospital, as long as she is conscious, the longer the time taken in recording any statement, the likelihood of the injured's mental condition deteriorating is strong, given that in most cases, they are administered sedatives to ease the pain and trauma. In such circumstances, it would be reasonably expected that before a dying declaration is recorded, the SDM or responsible officer, assures that the patient indeed is in a position to make a statement, and is conscious to do so. The prosecution's failure to lend assurance was a serious infirmity which cast a doubt on its version.

8. As far as the Appellant's contention that the Trial Court's judgment is contrary to the Supreme Court ruling that the dying declaration, if trustworthy can be the sole basis of conviction goes, we notice that the Trial Court did not reject the dying declaration because it would be the only evidence in favour of conviction, but because it was unreliable and *not trustworthy*, given the irregularities that took place in recording it, which are dealt with in the previous paragraph.

9. It has also been ruled often that in order to secure a conviction for the charge under Section 304-B, IPC, the prosecution has to prove that the woman had been treated with cruelty in connection with dowry demand soon before her death. Section 113-B of the Evidence Act also mandates that the court should presume unnatural death, in case it occurs within seven years of marriage. However, the prosecution's primary duty to prove the foundational elements of cruelty, in connection with dowry harassment, and soon before death (an expression not confined or limited in point of time, but always taking colour from the context of a given case) never ceases. Having gone through the record and the materials before the Trial Court, we are of opinion that the conclusion reached by it, on this aspect cannot be termed unreasonable, or erroneous in any material detail.

10. The High Court's jurisdiction, whilst considering a petition for leave to appeal, by the prosecution, against an order of acquittal is well defined. The court does not examine the impugned judgment as an appellate court; it has to be alive to any exceptional features in the

Trial court's judgment, which compel the exercise of its discretion to grant leave, and hear the appeal. Mere errors, in the Trial Court's reasoning are insufficient; the legislature has advisedly not permitted appeals, a factor which has led the courts to say that a judgment of acquittal amounts to affirmation of the accused's innocence, which should not be lightly interfered with by the High Court, except for substantial and compelling reasons. As to what constitute such reasons, has been spelt out in *Chandrappa & Others v. State of Karnataka* (2007) 4 SCC 415 as follows:

"In light of the above, the High Court and other appellate courts should follow the well settled principles crystallized by number of judgments if it is going to overrule or otherwise disturb the trial court's acquittal :

1. 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.

A number of instances arise in which the appellate court would have "very substantial and compelling reasons" to discard the trial court's decision. "Very substantial and compelling reasons" exist when :

(i) The trial court's conclusion with regard to the facts is palpably wrong;

(ii) The trial court's decision was based on an erroneous view of law;

(iii) The trial court's judgment is likely to result in "grave miscarriage of justice";

(iv) The entire approach of the trial court in dealing with the evidence was patently illegal;

(v) The trial court's judgment was manifestly unjust and unreasonable;

(vi) The trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declarations/report of the Ballistic expert, etc.

(vii) This list is intended to be illustrative, not exhaustive.

2. The Appellate Court must always give proper weight and consideration to the findings of the trial court.

3. If two reasonable 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.

Had the well settled principles been followed by the High Court, the accused would have been set free long ago. Though the appellate court's power is wide and extensive, it must be used with great care and caution."

11. Upon a careful consideration of the evidence led before the Trial court, and the other materials placed before it, and after considering the submissions made by counsel, we are of opinion that no substantial or compelling reasons exist warranting a second look into the case, as an appellate court. For these reasons, the petition, being unmerited, requires rejection. It is, therefore, dismissed.

S. RAVINDRA BHAT
(JUDGE)

G.P.MITTAL
(JUDGE)

JULY 08, 2011