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

+ **CRL. L.P. NO.47 OF 2011**

% Date of decision : 13th March, 2013

STATE

..... APPELLANT

Through : Ms. Richa Kapoor, APP
SI Jagdeep Malik, P.S.
Geeta Colony.

versus

DILBAGH RAI BHOLA AND ORS. RESPONDENTS

Through : Mr. Dinesh Garg, Adv. for
R-1 to R-4 and R-6.

CORAM:

HON'BLE MS. JUSTICE GITA MITTAL

HON'BLE MR. JUSTICE J.R. MIDHA

GITA MITTAL, J. (Oral)

1. The record of the lower court has been received. We have heard learned counsel for the parties. The instant petition has been filed under Section 378(1) of the Code of Criminal Procedure by the State seeking leave to appeal against the judgment dated 25th May, 2010 passed by the Ld. Additional Sessions Judge (East) FTC, E-Court Karkardooma Court, Delhi in Sessions Case No.81/09.

2. The case arose from FIR No.167/2002 registered by the police under Sections 304/498A/406/120B/34 of IPC which was registered by the police station Geeta Colony. One Sh. Roshan

Lal, resident of Jind, Haryana had two sons, namely, Dilbagh Rai Bhola and Rajender Kumar @ Nitu and two daughters Suman Rani and Chancal.

3. Sh. Prithviraj Bhola, a resident of Geeta Colony, Delhi has one son Jagmohan Bhola and a daughter Rashmi.

4. We are informed that an exchange marriage was performed on 26th November, 1993 between Rashmi daughter of Prithviraj Bhola and Dilbagh Rai Bhola, son of Sh. Roshan Lal. While Jagmohan Bhola was married to Chanchal a daughter of Sh. Roshan Lal, resident of Jind, Haryana.

5. It is the case of the prosecution that on receipt of a PCR call (recorded as DD No.3A at the police station on 25th July, 2002 regarding a quarrel at the House No.13/315 Geeta Colony), PW-14 Inspector Harpal Singh, IO of the case reached at the spot and there he found a lady namely Rashmi lying on a stretcher. One ambulance with a Haryana registration number and its driver, PW-9 - Ashok Batra was present. Dilbagh Rai, husband of Rashmi as well as his cousin brother Sanjay were also present at the spot. Rashmi was in serious condition and PW-14 Inspector Harpal Singh took Rashmi in the same ambulance to SDN Hospital, Shahdara. The doctor declared Rashmi unfit for statement. She was also shifted to Safdarjung Hospital.

6. It is pointed out that Rashmi was conscious when she was brought to Delhi. However, she made no statement to PW-14 who has conducted the investigation in the case.

7. It has also come in evidence that Rashmi's father Prithviraj Bhola as well as brother Jagmohan Bhola gave statements on 25th July, 2002 in the evening to the effect that they did not want any action regarding the incident. It is also in evidence that the husband of Rashmi, namely Dilbagh Rai Bhola, her other in-laws were looking after her during treatment and were available till the registration of the FIR against them. Dilbagh Rai Bhola had remained at the Safdarjung Hospital.

8. So far as the treatment which was administered to Rashmi is concerned, our attention has been brought to the record of the Safdarjung Hospital available before the Trial Court. The record would show that on 26th July, 2002, a tracheostomy was conducted on the person of Rashmi. We also find on record that the authorization to undertake this procedure on Rashmi was given by not only her husband Dilbagh Rai Bhola but also her father Prithviraj Bhola.

9. It appears that thereafter, on 27th July, 2002, Prithviraj Bhola made a complaint Ex.PW-1/A mentioning that from the beginning of marriage of Rashmi the accused persons started harassing her for bringing insufficient dowry; that they also used to abuse and beat Rashmi. Due to the behaviour of the accused

persons, Rashmi used to remain mentally disturbed and the matter was discussed with the accused persons. The in-laws expressed regret and assured that such behaviour would not repeat in future but the accused again started harassing Rashmi. The complainant has stated that on 20th July, 2002 he had received a telephonic information to the effect that his daughter has fallen from the roof. He had rushed to the Sood Hospital, Jind, Haryana where Rashmi was admitted by the in-laws. He has further stated that on the 25th of July, 2002 at about 2.30 am Dilbagh Rai Bhola and his cousin Sanjay brought Rashmi in Maruti van and left Rashmi outside the house. The complainant doubted the correctness of the reason for Rashmi's injuries and immediately made a call to the police.

10. Based on this complaint, the police registered the FIR No.167/02 under Sections 304/498A/406/120B/34 of the IPC against Rashmi's husband and in-laws including Dilbagh Rai Bhola (husband), Rajender Kumar @ Nitu (brother in law), Chander Mohini (mother in law), Suman Rani (sister in law), Roshan Lal (father in law) and Sanjay.

11. The police conducted investigation into this matter and thereafter filed a chargesheet against the accused persons under Sections 304/406/498A/120B/34 of the IPC. The Trial Court framed charges under Sections 498A/34 IPC against all the six accused persons while a charge under Section 304 of the IPC was framed against Chander Mohini. The accused pleaded not guilty to all the charges and claimed trial.

12. During the trial, the prosecution examined 15 witnesses and the trial court recorded statements of the accused persons under Section 313 of the Cr.P.C. The defence claimed trial and led the testimony of evidence of 4 witnesses in support of their defence.

13. On a close reading of the entire evidence led on record by all sides, the trial court passed a judgment dated 25th May, 2010 and found that the statements of the prosecution witnesses No.1, 2 and 3 were not credible and trustworthy. It was further held that the prosecution had failed to prove its case beyond the reasonable doubt against the accused persons and they were acquitted from the charges for which they stood trial. Aggrieved thereby the prosecution has filed the present petition seeking leave to appeal against the judgment dated 25th May, 2010.

14. We are informed that Roshan Lal expired during the pendency of the trial as such the proceedings against him abated.

15. The entire case hinges on a statement attributed to injured Rashmi alleged to have been recorded by PW14 the investigating officer. PW-14 has claimed that he made efforts to record the statement of Rashmi on 27th July, 2002, 28th July, 2002, 1st August, 2002 and 2nd August, 2002 but she was declared unfit for statement by the doctors at the Safdarjung Hospital.

16. It is on record that at 2.15 pm on 7th August, 2002 an information of the fitness of the deceased Rashmi to make a statement was conveyed to the Duty Constable at the Safdarjung

Hospital. The Duty Constable informed the police station Geeta Colony about such certification only at 4 pm and 7th August, 2002 DD No.19A at 6.35 pm was recorded at police station Geeta Colony on in this regard.

17. PW14 has claimed that he recorded a statement of Rashmi (Ex.PW1/B) on 7th of August, 2002 at 5.00 pm to which she implicated her husband and in-laws for her injuries. Unfortunately, the injured Rashmi succumbed to her injuries on the 24th of August, 2002. The police added commission of an offence under Section 304B of the IPC in the FIR.

18. Mr. Dinesh Garg, learned counsel for the respondents has pointed out that as per the evidence brought on record, Rashmi was unfit to give a statement after 3rd August, 2002. Our attention has also been drawn to an opinion recorded by Dr. Marut Nandan who was her treating doctor in the Safdarjung Hospital to the effect that as Rashmi was known to be taking anti-psychotic drug, the confirmation of her fitness and ability to give a statement was required to be done after taking opinion from a Senior ENT as well as psychiatric experts. As noted above, having undergone a tracheostomy, obviously to facilitate, breathing, Rashmi's ability to breathe would have been strongly impaired. No evidence of any such opinion having been obtained by PW-14 or presence of such experts when PW-14 claims to have recorded a dying declaration of Rashmi is forthcoming on the record.

19. We also find that as per the medical record proved before the trial Judge, on 6th August, 2002, it was recorded that Rashmi was suffering from illusions and hallucinations she even complained of administration of poisons by the doctors who were treating her at the Safdarjung Hospital.

20. PW-14, Inspector Harpal Singh has claimed that he proceeded to record a statement of Rashmi at about 5 pm on 7th August, 2002. The prosecution places reliance on an endorsement purportedly made by Dr. Marut Nandan that her statement had been recorded. Mr. Dinesh Garg, learned counsel for the respondents has drawn our attention to the interpolation and corrections effected so far as recording of the date of such submissions by Dr. Marut Nandan. It is submitted that these interpolations have not been explained by the prosecution and cast substantial doubt on their authenticity.

21. We also find from the record that Dr. Marut Nandan would have been a material witness to support the correctness and authenticity of the statement made by the IO with regard to the fact that he had actually recorded a statement of the deceased. Dr. Marut Nandan was not even cited as a witness let alone examined by the prosecution before the Trial Court.

22. Above narration would show that there is no evidence at all about the mental and physical condition of Rashmi at the time when her claimed statement was recorded. The material on record

with regard to the treatment manifests that she had undergone tracheostomy. The medication, including the anti-psychotic drugs, which was being administered to her would clearly suggest that there is a strong possibility that the deceased was not in a fit and able state of mind to make a statement. Therefore it was essential for the prosecution to establish Rashmi's fitness before a statement attributed to Rashmi can be relied upon to base a conviction.

23. So far as the fitness on which strong reliance placed by the prosecution, was allegedly obtained in the morning of the 7th August, 2002. It is pointed out that the same is in the handwriting of one Dr. Afzal. It is in evidence that Dr. Afzal was posted in unit 3.

24. It is also in evidence that Dr. Afzal was a mere junior resident in the orthopedic unit. A challenge has been laid to his very presence in the unit where Rashmi was admitted. We also find from the medical record placed before us that the patient was admitted to unit 1 and not in unit 3. Certainly Dr. Afzal would have no custody over this patient. There is no evidence at all to show that Dr. Afzal was at all present or at all examined Rashmi or given the opinion which has been endorsed on Ex.PW-15/A.

25. The senior resident of psychiatric even on 5th August, 2002 has recorded notes to the effect that Rashmi was suffering from delusions and hearing religious voices as well as voices of the Goddess.

26. There is no evidence at all to support the claim of the prosecution that Rashmi was in a fit state of mind to make a statement. We also find that on 6th August, 2002 again a recommendation was made for requires a referral to the senior resident psychiatric. This was never undertaken. It is also on record that the deceased received psychiatric treatment even on 13th December 2000 from one Dr. A.K. Sharma at Delhi. None of the doctors who were treating the deceased have been examined.

27. Given the specific recommendations of the senior consultants, an orthopaedician would not have the capacity to comment on the mental fitness of patient Rashmi given the opinion dated 6th August, 2002 as noticed by us. Therefore even if it is accepted that Dr. Afzal actually made the endorsement attributed to him, we are unable to hold that he was competent to make the evaluation of Rashmi's fitness. In any case, we find the same completely unreliable, even if actually given.

28. It is in evidence that the incident occurred on 22nd July, 2002 at Jind, Haryana. Rashmi was treated between the 20th and 25th July, 2002 at the Sood Hospital in Jind, Haryana. She was treated at the instance of her husband and in-laws. The complainant as well as his relatives (Rashmi's maternal side) had full access to the patient while she was being treated in this hospital. Based on medical advice, Rashmi was shifted to the General Hospital, Jind between 21st July to 24th July, 2002. These facts have been proved

in the testimony of PW-14 who has also proved as Ex.PW-11/A relating to the treatment administered to Rashmi.

29. There is no evidence that Rashmi was unconscious when her relatives met her in the Jind hospital. It is the case of the prosecution that Rashmi was conscious even when she was brought to Delhi. The above narration would show that Rashmi had adequate opportunity to disclose the circumstances, in which the incident resulting in her injuries occurred, to her relatives; doctors at Sood Hospital as well as the General Hospital, Jind between 20th July, 2002 till 25th July, 2002 when she was brought at Delhi. It is evident that neither Rashmi nor her other relatives had any grievance against the respondents for the reason that no complaint against Rashmi's husband and in-laws was made. This is manifested from their statement to the police that they want no action even on the 26th of July, 2002. It appears that a change of heart occurred when the complaint was lodged by them on 27th July, 2002.

30. Even though there is strictly no prohibition recording of a dying declaration by IO, however in the instant case, we find not a whit of an explanation as to why the Sub-Divisional Magistrate was not called in accordance with the applicable rules, despite Rashmi being admitted in hospital from 27th July, 2002 till 7th August, 2002. Even on the fateful day on 7th August, 2002, the IO had more than sufficient time inasmuch as it is claimed that fitness of the deceased was obtained early in the morning, the police

station informed at 2 pm (as per the DD entry) and the statement came to be recorded only at 5 pm. The time span would show the necessity of the fitness requirement even at 5 pm and the reliance on fitness obtained allegedly in the morning is misconceived.

31. The prosecution has led evidence to show that the patient was tracheostomised and that she was not able to utter words clearly. The doctor had advised PW14 to seek opinion of the ENT psychiatric experts. PW-14 has confirmed that he did not seek the opinion about fitness of Rashmi as advised. We are not informed as to when, if at all, the tracheostomy was removed. There is no evidence that in view of her several injuries, no pain killers or sedatives had been administered to the deceased.

32. At this stage we may also briefly comment on the contents of Ex.PW-1/B the dying declaration. The appearance thereof clearly suggests that the language is not of a housewife (which deceased Rashmi was) but that of the police authorities. The bare reading of the same thereof creates doubt on the authenticity of the document as a statement having been given by the deceased.

33. We are informed that Rashmi was educated and was a graduate. We see no reason as to why her left thumb impressions were obtained or why her signatures appear in Hindi. There is also no allegation that Rashmi was ever tortured or that any dowry demand was made upon her by husband or any of the in-laws or any other person. In Ex.PW-1/B Rashmi alleged to have stated that

her mother in law wanted to get her husband remarried. General allegations have been made in the belated complaint (Ex.PW-1/A) on 27th July, 2002 to the effect that Rashmi was troubled for dowry without any specifics. There is therefore no evidence to support the bald allegation made by Rashmi's father in his complaint under Section 498A of the IPC.

34. The sole evidence relied upon by the prosecution to implicate Chander Mohini the mother in-law is Ex.PW-1/B where it is stated that she had pushed Rashmi from the roof of the house. We have disbelieved the authenticity of Ex.PW1/B. We also find that PW-14 Inspector Harpal Singh has stated in his testimony that as per the physical built of Chander Mohini (respondent no. 3 herein), she could not have thrown Rashmi from the roof.

35. PW-14 has noted in Ex.PW-1/B that Rashmi was having difficulty in speaking because of the pain.

36. We may briefly advert to the reference made by the complainant to the conduct of the accused. In this regard, the testimony of PW-9 Ashok Batra as well as PW-14 Inspector Harpal Singh would show that the respondents did not run from the spot when the police reached. There is positive evidence that in-laws of the deceased were regularly visiting the hospital and her husband was available at the hospital where from he was arrested. The statement by the complainant to the contrary are therefore clearly false.

37. Learned counsel for the respondents has placed reliance on the pronouncement reported at **2010 (4) Crl. Court Cases 234 SC, *Amar Singh v. State of Rajasthan*** and **2011 (30 Crl. Court Cases 432 Delhi, *State v. Suraj Mehto*** in support of his submissions. He states that there is no evidence of harassing for dowry which would support a finding of guilt against respondents for commission of offence under Section 498A having been made out. We also find that there is no complaint of a dowry demand or torture at all at any point of time by Rashmi or any prosecution witness or any of other relatives.

38. In **2010 STPL(Web) 935 SC, *Dr. Sunil Kumar Sambhudayal Gupta & Ors. v. State of Maharashtra*** it is urged that there are material contradictions in the testimony of the witnesses which therefore deserve to be disbelieved. It is urged that the statements of the material witnesses suffer from improvements and contradictions in material particulars with previous statements. PW-1, 2, 3, and 5 are close relatives of the deceased in the instant case and the improvements and contradictions in all material particulars in the testimony would render the same liable to be rejected.

39. It is pointed out that as in the present case, in ***Sunil Kumar Sambhudayal Gupta*** (supra), the deceased was suffering from maniac depression and certainly had some mental/epileptic/psychotic problem. In these circumstances, taking a comprehensive view on the conduct of the close witnesses as well

as illness of the deceased, the dying declaration was disbelieved by the court.

40. So far as the instant petition is concerned, we may refer to the scope of consideration by this Court while considering the petition under Section 378(1) of the Cr.P.C. In para 22 of ***Sunil Kumar Sambhudayal Gupta*** (supra) the Supreme Court has laid down the following principles:

“22. It is a well-established principle of law, consistently reiterated and followed by this Court is that while dealing with a judgment of acquittal, an appellate court must consider the entire evidence on record, so as to arrive at a finding as to whether the views of the trial Court were perverse or otherwise unsustainable. Even though the appellate court is entitled to consider, whether in arriving at a finding of fact, the trial Court had placed the burden of proof incorrectly or failed to take into consideration any admissible evidence and/or had taken into consideration evidence brought on record contrary to law; the appellate court should not ordinarily set aside a judgment of acquittal in a case where two views are possible, though the view of the appellate court may be the more probable one. The trial court which has the benefit of watching the demeanor of the witness is the best judge of the credibility of the witnesses.”

41. In view of the above discussion and in the light of the principles laid down by the Supreme Court, we are unable to find any material to support the challenge led by the prosecution in the instant case. The trial court has carefully considered the entire material and evidence led before it and has rightly disbelieved the

prosecution witnesses as well as the statement attributed to the deceased.

42. We may notice one more material factor which has intervened in the instant case. The judgment dated 25th May, 2010 was also assailed by Jagmohan Bhola, brother of the deceased Rashmi, by way of Criminal Appeal No.793/2010. Unfortunately, not only did Rashmi lose her life, but it appears that matrimonial relations of Jagmohan Bhola and his wife Chanchal also turned sour resulting in Jagmohan Bhola filing a petition under Section 13 of the Hindu Marriage and Divorce Act, 1956 which culminated a decree of divorce dated 31st October, 2009. The same was assailed by Smt. Chanchal before this Court by way of MATA 21/10. During the pendency of this appeal, Jagmohan Bhola entered into a compromise not only with the respondents before us but also with his wife Chanchal and they have drawn up a compromise deed dated 31st March, 2013 which has been placed before us in Criminal Appeal No.793/2010. We are informed that all matters including the financial settlement between the parties have been completed and Chanchal has withdrawn MATA 21/10 on 12th March, 2013.

43. In terms of the said settlement, Jagmohan Bhola has separately made a statement seeking leave to withdraw Criminal Appeal No.793/2010 which we have accepted and the said appeal has also been dismissed as withdrawn by a separate order.

44. In view of the above, we find no merit in this petition which is hereby dismissed.

GITA MITTAL, J

J.R. MIDHA, J

MARCH 13, 2013
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