

Crl. Appeal No. 253-DB of 2001

-1-

**IN THE HIGH COURT OF PUNJAB & HARYANA,
CHANDIGARH**

Crl. Appeal No. 253-DB of 2001

Date of decision. 07.01.2009

- 1. Ram Kumar son of Hira**
- 2. Subhash son of Ram Kumar and**
- 3. Smt. Sujani wife of Ram Kumar,**

All residents of village Mokhra, District Rohtak.

..... Appellants

Versus

The State of Haryana

..... Respondent

**CORAM: HON'BLE MR. JUSTICE K.S. GAREWAL
HON'BLE MR. JUSTICE SHAM SUNDER**

Present: Mrs. Baljit Mann, Advocate
for the appellants.

Mr. H.S. Sran, Additional Advocate General, Haryana
for the respondent.

Sham Sunder, J.

This appeal is directed against the judgment of conviction dated 28.04.2001, and the order of sentence dated 30.04.2001, rendered by the Court of Additional Sessions Judge, Jhajjar, vide which it convicted and sentenced the accused (now appellants), as under:

Crl. Appeal No. 253-DB of 2001

-2-

Name of the accused (now appellant)	Offence, for which conviction was recorded.	Sentence awarded
Ram Kumar	U/S. 302- IPC	Life imprisonment. Fine of Rs. 1000/-. In default of payment of fine to undergo rigorous imprisonment for three months.
Subhash	U/S. 302- IPC U/s 498-A	Life imprisonment. Fine of Rs. 1000/-. In default of payment of fine rigorous imprisonment for three months. Rigorous imprisonment for three years. Fine of Rs. 1000/-. In default of payment of fine to undergo rigorous imprisonment for three months.
Sujani	U/S. 302- IPC	Life imprisonment. Fine of Rs. 1000/-. In default of payment of fine to undergo rigorous imprisonment for three months.

The substantive sentences of Subhash, accused, were ordered to run concurrently.

2. The facts, in brief, are that Nirmala (now deceased), was married to Subhash, accused, about five years, earlier to 18.11.1997. Subhash, accused, her husband, used to maltreat her in connection with the demand of dowry. He also used to give her beatings. On 18.11.1997 Subhash was consuming

Crl. Appeal No. 253-DB of 2001

-3-

liquor. When she asked him not to do so, he started beating her. Thereafter, Ram Kumar, her-father-in-law and Smt. Sujani, her mother-in-law also gave her beatings. The accused then poured kerosene upon her, and set her ablaze. When she tried to run away, Subhash, accused, caught hold of her as a result whereof her silken clothes caught fire. On hearing alarm, raised by her, some people from the neighbourhood, arrived and took her to the hospital. On getting information that Nirmala wife of Subhash had been admitted, in the Post Graduate Institute, Rohtak with burn injuries, the police went there. The Medical Officer, however, declared Nirmala not fit to make statement on that day, as well as on 19.11.1997. She was declared fit to make statement on 20.11.1997. Thereafter, Nirmala made statement to Mrs. Anita Dahiya, Judicial Magistrate Ist Class, Rohtak, in the manner, referred to above. On the basis of the dying declaration, made by Nirmala, FIR Ex.PE/1 was registered. The statements of the witnesses were recorded. On 30.11.1997, Nirmala died and, thereafter, the offence under Section 302 of the Indian Penal Code was added in the FIR. The post-mortem examination, on the dead body of Nirmala, was conducted by Dr. P.P. Lamoria. According to him, the cause of death of the deceased, was due to extensive burns and their complications. All the burns were ante-mortem, in nature, and were sufficient to cause death in

Crl. Appeal No. 253-DB of 2001

-4-

ordinary course of time. The accused were arrested. After the completion of investigation, the accused were challaned.

3. On their appearance, in the Committing Court, the accused were supplied the copies of all the documents, relied upon by the prosecution.

4. After the case was received by commitment, charge under Sections 498-A and 302 of the Indian Penal Code, and in the alternative, charge under Section 304-B of the Indian Penal Code, was framed against the accused, to which they pleaded not guilty and claimed judicial trial.

5. The prosecution, in support of its case, examined Madan Lal, brother of Nirmala, (PW-1), Kartari wife of Pillu, mother of Nirmala, (PW- 2), Mange Ram son of Phul Singh, who was living in the same chaupal, (PW-10) and Pillu son of Fateh Singh, father of Nirmala, (PW- 14), who did not support the case of the prosecution, Dr. Amarjit Singh, (PW-3), who medicolegally examined Nirmala wife of Subhash, 20 years, on 18.11.1997 and deposed that there were deep to superficial burns all over the body, except right hand and posterior aspect of left upper limb at buttocks and both legs below ankle. He further deposed that he sent ruqa

Crl. Appeal No. 253-DB of 2001

-5-

Ex.PB, to the Police Post. Jai Parkash, Sub Inspector, (PW-4), prepared the report under Section 173 Cr.P.C. Kaptan Singh, Head Constable, (PW- 5), recorded the FIR Ex.PE/1 on receipt of ruqa Ex.PE. Harender, Constable (PW-6), delivered the Special Reports to the Illaqa Magistrate, and other higher authorities. Ranbir Singh, Constable, (PW- 7), tendered his affidavit Ex.PG. Dr. P.P. Lamoria, Medical Officer, (PW- 8), conducted the post-mortem examination, on the dead body of Nirmala wife of Subhash , on 01.12.1997, and gave the opinion, regarding her death, as stated above. Sunil Kumar Bhatnagar, Draughtsman, (PW-9) , prepared the scaled site plan Ex.PK, with correct marginal notes. Zile Singh, Head Constable, (PW- 11), is a witness to the recovery of bottle along-with a trouser (Salwar) and a scarf (Chunari), at the instance of Subhash. Ashok Kumar, ASI, (PW- 12), prepared the site plan. Ajmer Singh, Assistant Sub Inspector, (PW- 13), is the Investigating Officer and Mrs. Anita Dahiya, the then Judicial Magistrate Ist Class, Rohtak, (PW- 15), recorded the dying declaration of Nirmala. Thereafter, the Public Prosecutor for the State, tendered into evidence report of Forensic Science Laboratory, Madhuban, Ex.PT, and closed the same.

Crl. Appeal No. 253-DB of 2001

-6-

6. The statements of the accused, under Section 313 of the Code of Criminal Procedure, were recorded. They were put all the incriminating circumstances, appearing against them, in the prosecution evidence. They pleaded false implication. It was stated by Ram Kumar, father-in-law of Nirmala, in his statement, under Section 313 Cr.P.C., that on 18.11.1997, she (Nirmala) was cooking food on the hearth, when a kerosene lamp, placed on an empty drum, fell on her. He further stated that children were playing at that time. The clothes of Nirmala then caught fire because she was already working on the hearth (Chulha). It was further stated by him that he and Subhash, husband of Nirmala were working as Labourers for repair of the road, at a distance of ½ killa, and, on hearing noise, they rushed towards Nirmala and tried to save her. It was further stated by him, that in that process, Subhash suffered burns at his hands. He further stated that he, Subhash, Mange and other persons, brought Nirmala, to the hospital in a tempo. It was further stated by him, that it was an accidental fire. He further stated that neither he nor his co-accused poured kerosene upon Nirmala nor set her ablaze.

Crl. Appeal No. 253-DB of 2001

-7-

6-A. Subhash, husband of Nirmala, also took up the same plea, as was taken up, by Ram Kumar, accused. In addition, it was stated by him, that Sujani, his mother was sitting at the site, where the work was going on.

6-B. Sujani, mother-in-law, of Nirmala, deceased, also took up the same plea, in her statement under Section 313 Cr.P.C., as was taken up by Subhash, her co-accused.

6-C. In defence, the accused examined Sishpal son of Matu, DW-1, Suresh son of Sube Singh, DW-2, Azad Singh, Pharmacist, DW-3, and Vijay Singh son of Fateh Singh, DW-4. Thereafter, they closed their defence evidence.

7. After hearing the Public Prosecutor for the State, the Counsel for the accused, and, on going through the evidence, on record, the trial Court, convicted and sentenced the accused, as stated hereinbefore.

8. Feeling aggrieved, against the judgment of conviction, and the order of sentence, rendered by the trial Court, the instant appeal, was filed.

9. We have heard the Counsel for the parties, and have gone through the evidence and record of the case, carefully.

Crl. Appeal No. 253-DB of 2001

-8-

10. The Counsel for the appellants, submitted that the accused neither poured kerosene upon Nirmala, nor did they set her ablaze. She further submitted that the accused belong to a labour class, and they being Sansis, by caste, there was no custom, in their caste to demand dowry. She further submitted that the dying declaration was made by Nirmala, as she was tutored by her father Pillu Ram, involving all the accused, in the instant case, falsely. She further submitted that Madan Lal (PW1) brother, Kartari Devi, Mother (PW2) and Pillu, father (PW14) of Nirmala deceased, did not support the prosecution case. She further submitted that she (Nirmala) was never tortured, in connection with the demand of dowry or anything else. She further submitted that on 18.11.1997 Nirmala was conscious and fit to make statement, but her statement, was not recorded, intentionally, so as to suppress the actual version of the incident. She further submitted that no reliance, under these circumstances, on the dying declaration, could be placed. She further submitted that the trial Court was, thus, wrong, in recording conviction and awarding sentence to the accused.

11. On the other hand, the Counsel for the respondent, submitted that, as soon as, Nirmala was declared

Crl. Appeal No. 253-DB of 2001

-9-

fit to make statement by the doctor, her statement was recorded by Mrs. Anita Dahiya, Judicial Magistrate Ist Class, Rohtak, wherein, she clearly stated that the accused poured kerosene upon her, and set her ablaze, resulting into her death. He further submitted that the dying declaration made by Nirmala, is not the result of tutoring. He further submitted that it is voluntary and without any coercion and duress. He further submitted that the trial Court was right, in recording conviction, and awarding sentence to the accused.

12. After giving our thoughtful consideration, to the rival contentions, raised by the Counsel for the parties, in our considered opinion, the appeal deserves to be partly accepted, for the reasons, to be recorded, hereinafter. The case of the prosecution hinges on the dying declaration Ex.PP/3, recorded by Mrs. Anita Dahiya, the then Judicial Magistrate Ist Class, Rewari, who appeared as PW-15, after obtaining the certificate Ex.PP/2 from the Medical Officer, that Nirmala was fit to make statement. She stated that she read over and explained the dying declaration to Nirmala, who after admitting the same to be correct, thumb marked the same. She further stated that, during the course of her statement, she (Nirmala) remained fully conscious. A statement, written or oral, made by a person, who is dead, as to the cause of his/her

death, or as to any of the circumstances of the transaction, which resulted in his death, in cases, in which the cause of that person's death comes into question, becomes admissible under Section 32 of the Evidence Act. Such statement, made by the deceased, is commonly termed as dying declaration. There is no requirement of law that such a statement must necessarily be made before a Magistrate. In **Patel Hiralal Joitaram v. State of Gujarat, 2002 (1) Crimes 94 (SC)**, it was held that the statement, made by a person, before his/her death, leading to the cause of his/her death, falls within the purview of Section 32(1) of the Indian Evidence Act, and is exempted from the ban, contained in Section 162, by virtue of Section 162(2) of the Code of Criminal Procedure. Under these circumstances, the dying declaration Ex.PP/3, made by Nirmala, is admissible into evidence. It is also equally well settled, that the dying declaration, made by a dying person, if found to be voluntary, truthful, un-tutored, and in a fit state of mind, can solely be sufficient, to record conviction. In the dying declaration Ex.PP/3, made by Nirmala, she, in clear-cut terms, stated that on 18.11.1997 at about 4.00 AM, her husband Subhash started quarreling with her. She further stated that earlier also he used to quarrel with her. She further stated that he also used to beat and torture her, in connection

Crl. Appeal No. 253-DB of 2001

-11-

with the demand of dowry. She further stated that on 18.11.1997, he (Subhash) was taking liquor and when she asked him not to do so, he started beating her. She further stated that thereafter, Sujani, her mother-in-law and Ram Kumar, her father-in-law started beating her. She further stated that thereafter, all of them, put kerosene upon her and set her ablaze. She also stated that when she was set ablaze, and she made an attempt to run away, but Subhash, her husband, caught hold her, as a result whereof, her clothes (Silkan) caught fire. It was further stated by her that, thereafter, the neighbourers came and took her to the hospital. From the dying declaration, Ex.PP/3, it is evident that the dispute was basically between Nirmala and Subhash. No doubt, vague allegations, with regard to her torture, by Subhash, her husband, in connection with the demand of dowry, were made , but no corroborative evidence, in that regard, was produced. Even the details of the articles of dowry, which were allegedly demanded, by Subhash, and in connection with which, she used to be tortured, by him, were not given, in the dying declaration. It appears that, on the day of occurrence, when Subhash, husband of Nirmala, was taking liquor, and she (Nirmala) asked him, not to take the same, he (Subhash) got infuriated, and sprinkled kerosene upon

her and set her ablaze. It was he only, who caught hold of her, when she made an attempt to run away, after she was set ablaze, as a result whereof, her silken clothes caught fire. The dying declaration Ex.PP/3 made by Nirmala, attributing the role to Subhash, her husband, in the commission of crime, is thus cogent, convincing, reliable, voluntary without any coercion and duress. In **Khushal Rao v. State of Bombay, AIR 1958 SC (22)**, the principle of law, laid down, was to the effect, that it cannot be laid down, as an absolute rule of law, that a dying declaration, cannot form the sole basis of conviction, unless it is corroborated. Each case, must be determined, on its facts, keeping in view the circumstances, in which the dying declaration was made. It cannot be laid down, as a general proposition, that a dying declaration is a weaker kind of evidence, than other pieces of evidence. A dying declaration, stands on the same footing, as another piece of evidence, and has to be judged, in the light of surrounding circumstances, and with reference to the principles, governing the evidence. In **K. Ramachandra Reddy and another v. The Public Prosecutor, (1976) 3 SCC, 618**, the principle of law, laid down, was to the effect, that a great solemnly, and sanctity, is attached to the words of a dying person, because a person, on the verge of death, is not

Crl. Appeal No. 253-DB of 2001

-13-

likely to tell lies, or to concoct a case, so as to implicate, an innocent person, yet the Court has to be, on guard, against the statement of the deceased, being the result of either tutoring , prompting or a product of his imagination. One thing, therefore, is well settled, that a great solemnity and sanctity, is attached to the dying declaration, as it is said , that truth sits on the lips of a dying person, expecting his or her imminent death. The principle of law, laid down, in the aforesaid authorities, is fully applicable to the facts of the instant case, in so far as the dying declaration against Subhash, accused, is concerned. Since the dying declaration made by Nirmala against Subhash, accused, her husband, has been held to be reliable, no further corroboration, to the same was required. However, on the basis of the disclosure statement, Ex.PM, made by Subhash, accused, one plastic bottle, containing kerosene, one trouser (salwar) and one scarf (Chunni), partially burnt clothes, belonging to Nirmala were recovered. Further corroboration to the dying declaration, was provided by PT, report of the Forensic Science Laboratory, which found kerosene oil in the plastic bottle and kerosene residues on the aforesaid partially burnt clothes. The mere fact that Madan Lal, brother of Nirmala, deceased, (PW-1), Kartari wife of Pillu, mother of Nirmala, (PW- 2), Mange Ram son

Crl. Appeal No. 253-DB of 2001

-14-

of Phul Singh, who was living in the same chaupal, (PW-10) and Pillu son of Fateh Singh, father of Nirmala, (PW- 14), did not support the dying declaration, and resiled from their earlier statements, did not mean that Subhash, accused, did not commit any offence. The trial Court was, thus, right in coming to the conclusion that Subhash, accused, committed the offence, punishable under Section 302 of the Indian Penal Code. It was not proved that Nirmala was ever tortured in connection with the demand of dowry by Subhash, accused. The trial Court was wrong in recording his conviction for the offence, punishable under Section 498-A of the Indian Penal Code. To this extent, the submission of the Counsel for the appellants, being correct is accepted.

13. Now coming to the role of Ram Kumar, father-in-law of the deceased and Smt. Sujani, mother-in-law of the deceased, in the alleged commission of crime, it may be stated here, that the same was highly doubtful. No doubt, as stated above, in the dying declaration Ex.PP/3, the names of both these accused, as participants, in the commission of crime were mentioned by Nirmala. It appears that their names were mentioned, in the dying declaration, just with a view to exaggerate the number of the accused, as she might be having some grudge against them, earlier for whatever the reason

Crl. Appeal No. 253-DB of 2001

-15-

may be. However, on the date of occurrence, the immediate cause for pouring kerosene upon Nirmala, deceased, was that Subhash, accused, was taking liquor and she (Nirmala) asked him to desist from doing so, as a result whereof, he poured kerosene upon her, resulting into her ultimate death. Even when Nirmala made an attempt, to run away, to save her after she was set ablaze, it was Subash accused only, who caught, hold of her as a result whereof, her silken clothes caught fire. No role was shown to have been played by Ram Kumar and Sujani at that time. There is a general tendency, in this part of the Country, to rope in innocent persons, with the actual accused. Even the demand of dowry was not proved. Ram Kumar and Sujani, accused, thus, could not be said to have played any role in the alleged commission of crime. Subhash, accused, being a well built young person alone was capable of committing the crime. Since the false implication of Ram Kumar and Sujani, accused, could not be ruled out, out of abundant caution, they are required to be given the benefit of doubt. The judgment of conviction and the order of sentence of the trial Court, qua both these accused, thus, deserves, to be set aside.

14. No doubt , Dr. Amarjeet Singh, PW-3, who in his first instance, medicolegally examined Nirmala on

Crl. Appeal No. 253-DB of 2001

-16-

18.11.1997 when she was got admitted in the hospital, stated during the course of cross-examination, that the patient was conscious and disclosed her name and address, which were mentioned in the MLR. However, when Jagdish Chander, Head Constable, reached the hospital, and moved an application Ex.PO before the doctor, as to whether, she (Nirmala) was fit to make statement, he made his endorsement, on the same, that she was not fit, being under sedation. Again, on the same application on 19.11.1997, at about 1.30 PM, the doctor opined that Nirmala was not fit to make statement, vide Ex.PO/1. It was only that on 20.11.1997, at about 10.30 AM, vide Ex.PO/2 that the doctor declared that she was fit to make statement and the same was recorded by Mrs. Anita Dahiya, Judicial Magistrate Ist Class, Rohtak. The patient must be fit and conscious to make statement. The mere fact that the patient was conscious, did not mean that she was also fit to make statement. Under these circumstances, the submission of the Counsel for the appellant to the effect that her statement, on 18.11.1997, was not intentionally recorded, though she was conscious, and lateron she was tutored to make statement against Subhash, accused, does not appear to be correct and stands rejected.

15. The plea of accidental fire, was also taken,

Crl. Appeal No. 253-DB of 2001

-17-

in his statement, under Section 313 Cr.P.C., by Subhash, accused. Ram Kumar, accused, in his statement stated that he (Subash) suffered burn injuries, when he tried to save Nirmala. However, no burn injury was found on the person of Subhash. There is also no document, on the record, that he got admitted Nirmala, deceased, in the hospital. As per the version set up by the accused Subhash, the kerosene lamp was placed, on empty drum, which fell on the hearth where Nirmala was allegedly cooking the food. 70% burn injuries all over her body would not have been possible had the kerosene lamp fell in the aforesaid manner. The burns all over the body of Nirmala, could only be possible, if the kerosene had been poured on her and she had been set ablaze. No suggestion was put to Dr. Amarjeet Singh, PW-3, who medicolegally examined Nirmala that the burns on her body, could be on account of accidental fire. Even no question was put to Dr. P.P. Lamoria, PW-8, that the burns on the body of Nirmala, could be due to accidental fire. Such story was apparently concocted later on, by accused, Subhash, just with a view to save himself. The plea, taken up by Subhash, accused that Nirmala sustained injuries on account of accidental fire, appears to be an afterthought. The submission of the Counsel for Subhash, appellant, being without merit,

must fail, and the same stands rejected.

16. No other point, was urged, by the Counsel for the parties.

17. In view of the above discussion, it is held that the judgment of conviction and the order of sentence, qua Subhash, accused, for the offence punishable under Section 302 of the Indian Penal Code, rendered by the trial Court, are based on the correct appreciation of evidence, and law, on the point. The same do not warrant any interference, and are liable to be upheld.

18. The judgment of conviction and the order of sentence, rendered by the trial Court, qua Subhash, accused, for the offence under Section 498-A of the Indian Penal Code, are not based on the correct appreciation of evidence, and law, on the point and the same deserve to be set aside.

19. The judgment of conviction and the order of sentence, rendered by the trial Court, qua Ram Kumar and Smt. Sujani, accused, are not based on the correct appreciation of evidence, and law, on the point, and the same deserve to be set aside.

20. For the reasons recorded, hereinbefore, the appeal of Subhash, accused, is partly accepted. The judgment of conviction dated 28.04.2001 and the order of sentence, dated

Crl. Appeal No. 253-DB of 2001

-19-

30.04.2001, for the offence punishable under Section 302 of the Indian Penal Code, are upheld, whereas the judgment of conviction and the order of sentence, for the offence under Section 498-A of the Indian Penal Code are set aside.

21. The appeal filed by Ram Kumar and Smt. Sujani, accused is accepted. The judgment of conviction dated 28.04.2001, and the order of sentence dated 30.04.2001, are set aside. They shall stand acquitted of the charge framed against them.

22. If Subhash, accused, is on bail, his bail bonds, shall stand cancelled. If Ram Kumar and Smt. Sujani, are on bail, they shall stand discharged of their bail bonds. If they are in custody, they shall be set at liberty, at once, if not required in any other case. The Chief Judicial Magistrate, shall take necessary steps, in accordance with the provisions of law, to comply with the judgment, within two months, from the date of receipt of a certified copy of the same.

(K.S. Garewal)
Judge

(Sham Sunder)
Judge

January 07, 2009
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