

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

Crl.Appeal No.S-2817-SB-2010

Date of decision : 29.01.2015

Shamsher

.....Appellant(s)

Versus

State of Haryana

....Respondent(s)

CORAM : HON'BLE MR. JUSTICE DARSHAN SINGH

- 1. Whether reporters of local newspapers may be allowed to see judgment? Yes**
- 2. To be referred to reporters or not? Yes**
- 3. Whether the judgment should be reported in the Digest? Yes**

Present: Mr. R.S. Sihota, learned Senior Advocate with Mr. B.R. Rana, Advocate, counsel for the appellant.

Mr. Mukesh Kaushik, learned DAG, Haryana.

DARSHAN SINGH, J.

1. The present appeal has been preferred against the judgment dated 13.10.2010 vide which appellant-Shamsher was held guilty and convicted for the offences punishable under Sections 498-A and 304-B of the Indian Penal Code (for short the 'IPC') and the order of sentence dated 15.10.2010 vide which the appellant was sentenced to undergo rigorous imprisonment for a period of 10 years for the offence punishable under Section 304-B IPC. He was further

sentenced to undergo rigorous imprisonment for a period of 2 years and to pay a fine of ₹ 1,000/- for the offence punishable under Section 498-A IPC. In default of payment of fine, he was to further undergo rigorous imprisonment for a period of 3 months. Both the sentences were ordered to run concurrently.

2. The sequence of the events giving rise to the prosecution can be summed up as under:-

That on 30.8.2009 on receipt of a telephonic message from Paras Hospital, Gurgaon, PW-8 ASI Jagdish Rai, Police Station Sushant Lok, Gurgaon, reached the Paras Hospital, Gurgaon and moved an application to the Doctor attending deceased Hansira for seeking his opinion for her fitness to make the statement. The doctor declared her fit to make statement. ASI Jagdish Rai telephonically requested for deputing some Magistrate to record her statement. After sometime, PW-1 Bal Raj Singh, Naib Tehsildar cum- Executive Magistrate, Gurgaon reached Paras Hospital, Gurgaon and he recorded the statement of deceased Hansira wherein she stated that she was married with appellant-Shamsher in the year 2005. No child was born from their wedlock. That Shamsher and his family members demanded vehicle in the dowry. They also did not allow her to visit her parental house for the last 3 years. That on 30.8.2009 at about 10 A.M., appellant-Shamsher, the husband of the deceased, her father-in-law Hamid, her mother-in-law Hasina, her brother-in-law (devar) Khalid, the uncle of her husband Rashid jointly raised the demand of vehicle from her. Due to non-fulfillment of said

demand, her husband put her ablaze by pouring kerosene oil. Her mother-in-law and brother-in-law caught hold of her. Her father-in-law and uncle of her husband asked that she should be put on fire. She was confined in the room and was set ablaze by pouring kerosene oil. Before the occurrence, she had intimated her elder sister Warisa about the dispute. Due to this reason, she earlier arrived at the spot. She telephonically called her father and her father got Hansira admitted in the Hospital. She had been set on fire by her in-laws for not meeting out their demand of vehicle. On the statement of deceased Hansira Ex.PA, ASI Jagdish Rai made his endorsement Ex.PW-8/C and the FIR Ex.P22 was registered.

3. Thereafter, investigation of the case was taken over by PW-7 ASI Gulab Singh. He went to the spot on the same day along with Sahab Khan, the father of the deceased and inspected the scene of the crime. He prepared the rough site plan of the place of occurrence PW-7/B. On 31.8.2007, he recovered the kerosene oil container, burnt clothes and ashes. All these articles were kept in sealed parcel and were taken into possession vide memo Ex.PW7/C. He moved application Ex.PW7/D to the doctor for obtaining his opinion regarding the burn injuries of Hansira. The doctor gave the opinion that the burn injuries were 90% and dangerous to life. Thereafter, Section 307 IPC was added.

4. The further investigation was conducted by PW-13 SI Mohinder Singh. Hansira succumbed to the burn injuries on 5.9.2009. SI Mohinder Singh prepared the inquest proceedings and

sent the dead body for the postmortem examination. That on 22.1.2010, PW-11 ASI Khem Raj on the basis of secret information arrested appellant-Shamsher and Rashid and on interrogation, they suffered the disclosure statements. On completion of the investigation, report under Section 173 Cr.P.C was presented against the present appellant and his uncle Rashid. Co-accused Hamid, Khalid and Hasina could not be arrested.

5. The accused appellant along with his co-accused Rashid were chargesheeted for the offences punishable under Sections 498-A and 304-B IPC by the then learned Additional Sessions Judge, Nuh vide order dated 18.5.2010 to which they pleaded not guilty and claimed trial.

6. In order to substantiate its case, the prosecution examined as many as 15 witnesses.

7. When examined under Section 313 Cr.P.C, accused appellants pleaded innocence and their false implication. No evidence was led by the accused in their defence.

8. On appreciating the evidence on record and the contentions raised by the learned counsel for the parties, co-accused Rashid, the uncle of the appellant, was acquitted of the charges whereas appellant-Shamsher was held guilty and convicted for the offences punishable under Sections 498-A and 304-B IPC and was awarded the sentence as mentioned in the upper part of the judgment.

9. Aggrieved with the aforesaid judgment of conviction and

order of sentence, the present appeal has been preferred.

10. I have heard Sh. R.S. Sihota, learned Senior counsel with Mr. B.R. Rana, Advocate, counsel for the appellant, Mr. Mukesh Kaushik, learned DAG for the State of Haryana and have gone through the record carefully.

11. Initiating the arguments, learned counsel for the appellant contended that the entire case of the prosecution is based on the dying declaration of the deceased. He contended that PW-2 Sahab Khan, the father of the deceased, PW-3 Warisa, the sister of the deceased and PW-4 Mor Mal have not supported the prosecution version at all rather they had contradicted the dying declaration.

12. He further contended that the dying declaration Ex.PA is not reliable. The death has occurred after six days of the occurrence. So, it cannot be treated to be dying declaration. From the statements of the prosecution witnesses, it is established that the parents and sister of the deceased were present in the hospital at the time of recording the dying declaration. It shows that the dying declaration has been recorded under the influence of the parents of the deceased and is a result of their tutoring. Such dying declaration cannot be relied upon. To support his contentions, he relied upon case **Mohan Lal and others versus State of Haryana 2007 (2) RCR (Criminal) 88.**

13. He further contended that PW-7 ASI Gulab Singh and PW-8 ASI Jagdish Rai are discrepant about their meeting. There are also the discrepancies about the time of the arrival of the Tehsildar

for recording the dying declaration. PW-1 Bal Raj Singh, Naib Tehsildar, stated that he reached the hospital at about 4/5 P.M whereas ASI Jagdish Rai stated that after receiving his message, Naib Tehsildar reached the Paras Hospital at about 8 P.M. So, even the presence of Naib Tehsildar becomes doubtful. He further contended that PW-15 Dr. Julian Antoni, has stated that he did not remain present during recording of statement of deceased Hansira. So, there is no evidence to show that the deceased remained fit during the recording of her statement.

14. He further contended that the dying declaration Ex.PA has already been disbelieved by the Court as in this very case, Rashid the uncle of the appellant and in the subsequent judgment dated 20.11.2013, Hamid, father-in-law of the deceased, have been acquitted against whom also there were the similar allegations. Such discarded sole dying declaration cannot be made the base for conviction particularly when other prosecution witnesses have turned hostile.

15. He further contended that there is no evidence to establish the demand of dowry and that the deceased was subjected to cruelty in connection with the demand of dowry soon before her death. The father and sister of the deceased have not supported the prosecution version. They were the best witnesses to prove the demand of dowry, if any, but they have not deposed anything about the demand of dowry rather PW-2 Sahab Khan, the father of the deceased, has stated that appellant-Shamsher and his family

members never harassed Hansira for the demand of dowry. They did not demand dowry from her and them. The marriage was simple. They did not give any dowry in the marriage. PW-3 Warisa has also stated that it was a simple marriage and there was no demand of dowry. Thus, he contended that the ingredients of the offence punishable under Sections 304-B IPC are not made out. To support his contentions, he relied upon cases **Panchanand Mandal @ Pachan Mandal and another versus State of Jharkhand 2013 (4) RCR (Criminal) 591** and **Biswajit Halder @ Babu Halder versus State of West Bengal 2007 (2) RCR (Criminal) 395**. Thus, he contended that the presumption under Section 113-B of the Evidence Act cannot be raised in this case and the conviction of the appellant has been wrongly recorded by the learned trial Court.

16. On the other hand, learned DAG, contended that the dying declaration of deceased Hansira has been recorded by the Executive Magistrate. She was declared fit to make the statement by the doctor attending her. She had categorically deposed that the demand of vehicle was raised and due to non-fulfillment of the said demand, she was set ablaze by the present appellant. The main allegations in the dying declaration are against the present appellant. There is nothing to disbelieve the dying declaration of the deceased recorded by the Executive Magistrate. Mere this fact that the other prosecution witnesses have not supported the prosecution case is no ground to discard the dying declaration which has been voluntarily and truly made by the deceased. There is no evidence on

record to establish that she was tutored by her parents for making the dying declaration. Moreover, they have not themselves supported the prosecution case which also negates the plea of the accused that she was tutored by them. He further contended that the death of the deceased Hansira has taken place within 7 years of the marriage. She has died as a result of burn injuries and from her dying declaration, it is also established that she was subjected to cruelty in connection with the demand of dowry soon before her death. Thus, he pleaded that there is no legal infirmity in the conviction of the appellant recorded by the learned trial Court.

17. I have duly considered the aforesaid contentions.

18. The present case has been registered on the basis of the dying declaration of Hansira Ex.PA which has been recorded in the presence of PW-1 Bal Raj Singh, Naib Tehsildar-cum-Executive Magistrate, Gurgaon. No doubt PW-2 Sahab Khan, father of the deceased, PW-3 Warisa, sister of the deceased and PW-4 Mormal, the another material witness of the prosecution, have not supported the prosecution version and the entire case of the prosecution is based on the dying declaration of the deceased. If the dying declaration is true, correct, reliable and has been recorded in accordance with the established practices and principles, moreover, the attending circumstances show it to be reliable, such dying declaration can be acted upon even without corroboration as it is not an absolute principle of law that sole dying declaration cannot form the basis for conviction of an accused. If the deceased had made

the dying declaration of her own accord and upon due certification by the doctor with regard to her state of mind and body then it may not be necessary for the Court to look for the corroboration. In such cases, the dying declaration alone can form the basis for conviction of the accused but where the dying declaration itself is attended by suspicious circumstances and has not been recorded in accordance with law and settled procedure and practice, then it may be necessary for the Court to look for the corroboration. To support this view, reference can be made to case **Krishan Versus State of Haryana 2013 (2) RCR (Criminal) 88 (SC)**.

19. The Hon'ble Apex Court in case **Bhagwan Tukaram Dange Vs. State of Maharashtra 2014 (2) RCR (Crl.) 176** while dealing with the evidentiary value of the dying declaration has laid down as under :-

*“The Court has to carefully scrutinize the evidence while evaluating a dying declaration since it is not a statement made on oath and is not tested on the touchstone of cross-examination. In **Harbans Singh & another v. State of Punjab AIR 1962 SC 439** this Court held that it is neither a rule of law nor of prudence that dying declaration requires to be corroborated by other evidence before a conviction can be based thereon. Reference may also be made to the decision of this Court in **State of Uttar Pradesh Vs. Ram Sagar Yadav and others (1985) 1 SCC 552**. This Court in **State of Uttar Pradesh Vs. Suresh alias Chhavan and others (1981) 3 SCC 635** held that minor incoherence in the statement with regard to the facts and circumstances would not be*

sufficient ground for not relying upon statement, which was otherwise found to be genuine. Hence, as a rule of prudence, there is no requirement as to corroboration of dying declaration before it is acted upon.”

20. In view of the consistent rule of law laid down in the cases referred above, if the sole dying declaration of deceased is found to be true, correct, reliable and voluntarily made by the deceased in fit state of mind and body and has been recorded in accordance with the established procedure, the same can be acted upon to base the conviction even without corroboration. Learned counsel for the appellant has pleaded that from the statements of the prosecution witnesses, it comes out that the parents and sister of the deceased were present in the hospital at the time of recording her dying declaration but mere this fact that the parents and the sister of the deceased had come present in the hospital on receiving the information about the incident is no ground to presume that they had come there to tutor and influence the mind of the deceased. In the judgement titled as **“Dharampal versus State of Haryana” 2014 (4) RCR (Criminal) 99**, the Hon'ble Supreme Court has laid down that mere this fact that the relatives of the deceased were around her to attend her this is not the proof that deceased was tutored. Moreover, in the instant case, Sahab Khan, the father of the deceased and Warisa, the sister of the deceased, have not supported the prosecution version at all. If they would have tutored and influenced the mind of the deceased for making the dying declaration, they would not have resiled from their statements. Their not supporting

the prosecution version negates the plea of learned counsel for the appellant that they had tutored the deceased.

21. PW-15 Dr. Julian Antoni, Chief Medical Officer in casualty at Paras Hospital, Gurgaon, who has Medico Legally Examined deceased Hansira, has deposed that on 30.8.2009, Jagdish Rai, ASI, Police Station Sushant Lok, Gurgaon moved an application Ex.PW-8/A regarding the fitness of the injured. He gave his opinion Ex.PW-8/B. He further deposed that on the same day, Hansira made the statement Ex.PA before him as well as Bal Raj Singh, Naib Tehsildar and she marked thumb impression which was attested by Jagdish Rai, ASI in their presence. In his opinion Ex.PW-8/B, Dr. Julian Antoni has declared deceased Hansira fit to make the statement. So, as per the opinion of Dr. Julian Antoni, deceased Hansira was in fit state of mind at the time of making the dying declaration.

22. Mere this fact that the deceased has survived for about six days after the occurrence is also no ground to treat the statement of deceased Hansira Ex.PA not to be her dying declaration as in the statement Ex.PA she has narrated the circumstances leading to her death. So, the statement Ex.PA made by her will clearly amount to her dying declaration. The contentions raised by the learned counsel for the appellant that PW-7 ASI Gulab Singh and PW-8 ASI Jagdish Rai are discrepant about their meeting with each other and there is also a discrepancy in the time of Bal Raj Singh, Naib Tehsildar reaching the hospital as per the statements of PW-1 Bal Raj Singh,

Naib Tehsildar and PW-8 ASI Jagdish Rai, are with respect to the procedural steps. Learned counsel for the appellant has not been able to point out any inconsistency in the dying declaration Ex.PA. The discrepancies pointed out by the learned counsel for the appellant do not go to the root of the matter and is absolutely no ground to render the dying declaration doubtful.

23. Mere this fact that Hamid, father of the appellant and Rashid, his uncle, have been acquitted by the learned trial Court is also no ground to conclude that the dying declaration Ex.PA has been rendered unreliable even against the present appellant against whom there are categoric and specific allegations.

24. A perusal of the dying declaration Ex.PA shows that the same has been attested by PW-8 ASI Jagdish Rai, the Investigating Officer of the case, PW-1 Bal Raj Singh, Naib Tehsildar and PW-15 Dr. Julian Antoni, the Chief Medical Officer. It shows that the aforesaid dying declaration has been recorded in the presence of the aforesaid three persons. It is not believable that they will collide with each other to fabricate the dying declaration. The attestation of the dying declaration by PW-1 Bal Raj Singh, Naib Tehsildar-cum-Executive Magistrate and ASI Jagdish Rai in the presence of PW-15 Dr. Julian Antoni attaches due authenticity to the veracity of the dying declaration. As already discussed, there is no evidence on record to establish that the deceased was tutored by her family members before making the dying declaration. The deceased had suffered serious burn injuries and was lying admitted in the hospital. In the

dying declaration itself it has been mentioned that she had telephonically gave information to her sister Warisa about the dispute and she had arrived at the spot. Her sister had further telephonically called the father of the deceased. She was taken to the hospital by her father. In these circumstances, the presence of the father and sister of the deceased for attending her in the hospital was natural. Their presence in these circumstances cannot raise any presumption that they had tutored the prosecutrix.

25. Learned counsel for the appellant has not been able to point out any inconsistency in the dying declaration Ex.PA or any suspicious circumstance surrounding the dying declaration. In the dying declaration Ex.PA, the deceased has categorically mentioned that she was married with appellant Shamsheer in the year 2005. She has not delivered any child till date. Her in-laws used to demand the vehicle from her father. She was also not being sent to her parental house for the last three years. That on the date of occurrence at about 10 AM her husband Shamsheer, her father-in-law Hamid, her mother-in-law Hasina, her brother-in-law Khalid and uncle of her husband Rashid, jointly raised the demand of the vehicle. Due to non-fulfilment of the said demand, her husband poured the kerosene oil upon her and set her on fire. She was caught by her mother-in-law and brother-in-law Khalid (devar). Her father-in-law and uncle of her husband asked that she should be set ablaze. She was confined in the room and was set on fire after pouring the kerosene. Before this occurrence, she had telephonically told her elder sister Warisa about

the dispute. Due to this reason she also came at the spot at the time of her burning. She called her father telephonically and he got her admitted in the Paras hospital. She further categorically stated that her in-laws had set her on fire by pouring the kerosene due to non-fulfilment of their demand of vehicle. Thus, in the dying declaration there are specific allegations against present appellant-Shamsher, the husband of the deceased with respect to the demand of dowry i.e the vehicle and setting her ablaze after pouring kerosene due to non-fulfilment of the said demand.

26. No doubt PW-2 Sahab Khan, the father of the deceased and PW-3 Warisa, the sister of the deceased, have not supported the prosecution version rather they have stated that the deceased was never harassed for the demand of dowry by appellant-Shamsher and his family members. The marriage was simple one. They did not demand dowry from her and them but as already mentioned the statements of these witnesses are highly unreliable. In the cross examination by the learned defence counsel, PW-2 Sahab Khan stated that the deceased was unable to speak till her death. She did not make any statement to any person. Bal Raj Singh, Naib Tehsildar, Gurgaon never visited the Paras hospital, Gurgaon and did not record the statement of Hansira. Hansira also did not put her thumb impression on any statement. PW-3 Warisa has also stated in her cross examination by the learned defence counsel that Hansira remained unconscious from the admission in the Paras hospital, Gurgaon till her death. She did not make any statement to Bal Raj

Singh, Naib Tehsildar. She did not thumb mark any statement recorded by Bal Raj Singh, Naib Tehsildar. The police obtained thumb impressions of Hansira on some blank papers. This version of these witnesses shows that they had gone out of way to support the case of the accused. They have even deposed against the record. As per the medical evidence, the deceased was declared fit to make the statement by PW-15 Dr. Julia Antoni , vide his opinion Ex.PW-8/B on the basis of the application Ex.PW-8/A moved by PW-8 ASI Jagdish Rai. The dying declaration Ex.PA is attested by ASI Jagdish Rai and PW-1 Bal Raj Singh, Naib Tehsildar. It is also signed by PW-15 Dr. Julian Antoni. It is not believable that these persons had any animus or ill will against the accused to fabricate the statement Ex.PA just to falsely implicate the appellant and his family members. The version of these witnesses in the cross examination by the learned defence counsel clearly shows that they had completely colluded with the accused. PW-3 Warisa had stated that she is also married at village Rupraka in the family of accused Shamsher. It may be the reason that PW-2 Sahab Khan, PW-3 Warisa and PW-4 Mormal have resiled from their statements and sided with the accused. So, their testimonies that there was no demand of dowry and harassment of the deceased in connection with the dowry carries no substance as they have come out with this version only to save the accused-appellant from the legal punishment.

27. The dying declaration Ex.PA made by the deceased Hansira in the presence of PW-8 ASI Jagdish Rai, PW-1 Bal Raj

Singh, Naib Tehsildar-cum-Executive Magistrate with respect to the role of the present appellant is cogent, reliable, true and correct. Deceased Hansira was in a fit state of mind at the time of making the dying declaration Ex.PA. She had voluntarily made the dying declaration Ex.PA narrating the true circumstances leading to her death. The dying declaration Ex.PA is not surrounded with any suspicious circumstance. The dying declaration Ex.PA has been recorded in accordance with the established practice. Such dying declaration can be acted upon even without any corroboration.

28. It will be appropriate to take note of some other judicial precedents on the dying declaration. In case **P.V. Radhakrishna versus State of Karnataka, 2003(3) RCR (Criminal) 869**, the Hon'ble Apex Court has relied upon the dying declaration recorded by a police officer in the presence of the doctor. In case **Sohan Lal alias Sohan Singh and others versus State of Punjab, 2003 Criminal Law Journal 4569**, the dying declaration recorded by the Naib Tehsildar-cum-Executive Magistrate was relied upon to base the conviction. In case **Kalawati w/o Devaji Dhote versus State of Maharashtra (2009) 4 Supreme Court Cases 37**, the dying declaration was recorded by the Head Constable and the Executive Magistrate which was held to be credible and cogent. Similarly, in case **Izaz versus State of Haryana 2005(2) RCR (Criminal) 256 (DB)**, the dying declaration was recorded by the Head Constable of the police in the presence of the doctor who had given the fitness certificate. The Division Bench of this Court held that the statement

cannot be discarded merely because it was recorded by the Head Constable. In **Kanwal Singh and others versus State of Haryana 2006(3) RCR (Criminal) 783**, the part of the dying declaration which was found to be correct was relied upon. The Division Bench of this Court held that it is not necessary to reject the whole of the dying declaration. Relying upon the part of the dying declaration, the husband was convicted while the conviction of the other four accused was set aside. This authority is squarely applicable to the facts of the present case. In case **Vikas and others versus State of Maharashtra, 2008(1) RCR (Criminal) 805**, the father of the deceased had turned hostile and conviction was based solely on the dying declaration. Similarly, in case **State of Punjab versus Sukhdev Raj and others, 2008(4) RCR (Criminal) 321**, the prosecution witnesses including the real sister of the deceased had turned hostile. The mother-in-law of the deceased was convicted on the basis of the dying declaration alone which inspires confidence.

29. There is no dispute that deceased Hansira was married with the present appellant in the year 2005. The present occurrence has taken place on 30.8.2009 i.e within seven years of the marriage. As per the post-mortem report Ex.PX, the cause of death is due to hypovolumic shock and respiratory failure secondary to the burn. Thus, deceased Hansira has met with the death on account of the burn injuries. As per the opinion Ex.PW-7/E, she has suffered 90% burn injuries. So, she has died otherwise than under normal circumstances. From the dying declaration Ex.PA, it also comes out

that soon before her death she was subjected to cruelty in connection with the demand of vehicle and only due to this reason she was set on fire.

30. This fact is not disputed. Moreover, it is established from the dying declaration Ex.PA and other evidence available on record that the occurrence has taken place in the matrimonial home of deceased Hansira. So, the circumstances leading to the death of Hansira due to burn injuries must be in the special knowledge of the appellant but he has not rendered any explanation in his statement under Section 313 Cr.P.C. So, the presumption under Section 106 of the Indian Evidence Act, 1872 also arises against him.

31. As already mentioned, it is established that deceased Hansira has died within seven years of her marriage otherwise than under normal circumstances and she was subjected to cruelty or harassment in connection with the demand of the vehicle. So, the presumption under Section 113-B of the Indian Evidence Act, 1872 shall also arise and the Court has to presume that the appellant has caused the dowry death punishable under Section 304-B IPC.

32. In the dying declaration Ex.PA, the allegations are that deceased Hansira was put on fire by the appellant after pouring kerosene but during the trial, the appellant was charge-sheeted only for the offences under Section 498-A and 304-B IPC and has also been convicted for these very offences. The respondent-State has not agitated at any stage that the charge or conviction should have been under Section 302 IPC. More than four years have passed

since the date of the impugned judgment but no appeal has been filed by the State of Haryana. The appellant is in custody for the last more than five years so, it will not be in the fitness of the things to remand the case for de novo trial.

33. Thus, all essential ingredients of Section 304-B IPC that deceased Hansira has died otherwise than under normal circumstances within seven years of marriage and that soon before her death she was subjected to cruelty or harassment by appellant-Shamsher, her husband, in connection with the demand of dowry i.e the vehicle, are fully established beyond shadow of reasonable doubt. So, I do not find any infirmity or impropriety in the conviction of the appellant recorded by the learned trial Court for the offences punishable under Section 498-A, 304-B IPC. Thus, the conviction and sentence of the appellant as awarded by the learned trial Court are hereby maintained and stand affirmed.

34. Resultantly, the present appeal has no merits and the same is hereby dismissed.

January 29, 2015
ps

(DARSHAN SINGH)
JUDGE

