

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

**+ CRIMINAL LEAVE PETITION No. 183/2012**

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*Date of decision: 17<sup>th</sup> March 2015*

**STATE**

**..... APPELLANT**

Through : Mr. Sunil Sharma, APP for the  
State

versus

**MOHD ALI HUSSAIN & ORS**

**.....RESPONDENTS**

Through : None.

**CORAM :**

**HON'BLE MR. JUSTICE G. S. SISTANI**

**HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL**

**SANGITA DHINGRA SEHGAL, J.**

**CRL.M.A 4127/2012**

1. This is an application filed by the petitioner seeking condonation of 208 days delay in filing the present petition for leave to appeal. Heard. For the reasons stated in the application, the same is allowed. Delay in filing the present leave to appeal is condoned.
2. Application stands disposed of.

**CRL.L.P 183/2012**

3. The present leave to appeal has been filed by the State under Section 378(3) of the Code of Criminal Procedure against the acquittal of the respondents of all charges under Sections 302/34 of

IPC, vide judgment dated 31.05.2011 passed by the learned trial court in S.C. No. 102/2010 and also acquittal of respondent Mohd Hussain Ali of charge under section 498A of IPC.

4. As per the prosecution version, on 07.01.2005, DD No. 16A was recorded at the PS Bawana with regard to the information that one female got burn injuries at Transformer wali gali, Vijay Colony, Bawana and has been taken to LNJP hospital. ASI Gianvir Singh reached the hospital where he obtained the MLC of victim Nazma who was declared unfit for making a statement. ASI Gianvir again visited the hospital on 08.01.2005 and 09.01.2005 but victim Nazma was still unfit to give her statement. On 10.01.2005, victim Nazma after being declared fit to make a statement, made her statement which was recorded by the SDM and videography of her statement was also done. FIR under Sections 498A/307/34 of IPC was registered at the PS Bawana and investigation was carried out.
5. During the investigation, a rough site plan was prepared, room was searched, plastic bottle containing little oil was seized, statement of witnesses were recorded and on 13.01.2005, DD no. 24B was recorded in the PS on the information with regard to death of the victim in the hospital and section 302 of IPC was added.
6. On 21.01.2005, both the respondents were arrested but one of the respondents Kamal Khan was granted bail by the Hon'ble High Court of Delhi. On 06.04.2005, respondent Kamal Khan who was granted bail earlier was again arrested but vide order dated 15.10.2007 he was discharged from the case. Charge sheet was filed and vide order dated 31.10.2007, a charge under section 302/34 of IPC was framed against both the respondents and an additional charge under section 498A IPC was framed against the

respondent Mohd Ali Hussain. Both the respondents pleaded not guilty and claimed trial.

7. To prove its case, prosecution examined as many as 22 witnesses. The statement of the respondents was recorded under section 313 of CrPC. The respondents pleaded innocence and false implication.
8. Learned trial court while passing the impugned judgment has observed that the present case rests mainly on the dying declarations made by the victim Nazma (deceased). First dying declaration is made by the deceased Nazma to PW4 Sh Anand Prakash, who deposed that he was passing through the premises where the deceased Nazma was in flames and after hearing the cries of the deceased Nazma, he entered the house and put off the fire on her with a jute/gunny bag. PW4 further deposed that deceased Nazma told him that her husband was not present at her house and she burnt herself on her own. Trial court observed that the deposition of PW4 was corroborated by PW7 Ct. Krishan Kant and further corroborated and well established by DD No. 24 (Ex.PW22/DA) recorded by PW15 ASI Gianver Singh.
9. Regarding the second dying declaration trial court observed that it was made to PW18 Sh Suresh Kumar, incharge of CATS Ambulance who deposed that on 07.01.2005, he removed the deceased Nazma to LNJP hospital and got her admitted there. He also deposed that on the way to hospital deceased Nazma told him that she was put on fire by her husband. Trial Court observed that the deposition of PW18 Sh Suresh Kumar has been corroborated by the MLC (Ex.PW16/A) of deceased Nazma but is not trustworthy as his statement under section 161 of CrPC was recorded after more than three months of the incident. The Trial

Court has relied upon ***Paramjeet Singh vs State of Punjab 1996 (4) Crimes 266 (SC)*** wherein it was held that it would be unsafe to accept the evidence of a witness whose statement u/s 161 CrPC was recorded after four and a half months and especially when there was no explanation for the delay.

10. With regard to the third dying declaration made by the deceased Nazma on 10.01.2005 to the SDM and recorded in question answer form (Ex.PW2/A), trial court opined that Ex.PW2/A and its alleged confirmation in the videography cannot be bifurcated as such because claim of PW2 SDM is that whatever he recorded in Ex.PW2/A was again put to the deceased Nazma and videographed but deceased Nazma showed her inability to repeat her statement again through videography and the contents of her statement Ex.PW2/A were read over by the SDM and videographed. Trial Court observed that the statement Ex.PW2/A is running into five pages and considering the length of answers allegedly given by the deceased Nazma it can be safely inferred that Ex.PW2/A must have taken a considerable time in its recording. Trial Court placed reliance on ***Paparambaka Roshamma vs. State of Andhra Pradesh 1999 Crl. Law Journal 4321***, wherein Apex Court held that:

*“....the said dying declaration cannot be treated as true, genuine and was made when the injured was in a fit state of mind and that in medical science two stages namely conscious and a fit state of mind are distinct and are not synonymous as one may be conscious but not necessarily in a fit state of mind. The circumstances of the case are pointer to the fact that the deceased was disappointed and frustrated in her married*

*life and it was in these circumstances the dying declaration wherein all the three accused alleged to have committed the crime cannot be accepted.”*

Trial court further made reference to the decision of the Apex Court in the case of ***State of Maharashtra vs Sanjay 2005 (1) RCR (Crl.)*** wherein it was held that:

*“deceased suffered from 95% burn injuries and her dying declaration was recorded by Executive Magistrate for 45 minutes and it is doubtful that for 45 minutes the patient in that serious condition could go on responding to questions to the extent of minute details.”*

11. Trial court while relying upon ***Panneerselvam vs State of Tamil Nadu*** reported at ***2008 (3) RCR (Crl.) 54*** also observed that when there is more than one statement in the nature of dying declaration, one first in time must be preferred.
12. Learned counsel for the state submits that the trial court has passed the impugned judgment on hypothetical presumptions, conjectures and surmises and the order is perverse and lacks legality. Counsel further submits that the learned trial court failed to appreciate the evidence led by the prosecution witnesses and wrongly applied the law on wrong assumptions.
13. Counsel for the state also submits that trial Court erred in not relying upon the dying declaration. Mr Sunil Sharma, counsel for the state further argued that the learned trial court has wrongly observed that the deceased did not give any history of receiving the burn injury to Dr Arvind Kumar who has prepared the MLC of the deceased Nazma. Counsel contends that non disclosure of the name

of the respondents to the doctors by the deceased Nazma is not a legal ground to reject the dying declaration (Ex.PW2/A) which was recorded by the SDM.

14. Based on the aforesaid submissions, learned counsel for the state strongly urges for setting aside the impugned judgment dated 31.05.2011.
15. We have heard the learned counsel for the State and also carefully perused the trial court record. We have noticed the three dying declarations made by the deceased Nazma and a comparison of the three dying declarations, in our opinion, shows certain glaring contradictions. In the first dying declaration made by the deceased Nazma to PW4 Sh. Anand Prakash she informed him that her husband has gone to his work place and she had put herself on fire. No explanation has been given as to why presence of PW4 Sh. Anand Prakash was not mentioned by PW15 ASI Gianveer in his endorsement Ex.PW15/A when he was getting the FIR registered nor this fact was brought to the notice of the SDM. However the deposition of PW4 Sh Anand Prakash is corroborated and well established by DD No. 24 (Ex.PW22/DA)
16. Regarding the second dying declaration made by the deceased Nazma to PW18 Sh. Suresh Kumar, incharge of CATS ambulance that she has been put to fire by her husband is unreliable as in the alleged history, as told by PW18 with regard to burn injuries of the deceased Nazma, it is nowhere mentioned that the deceased Nazma was put to fire by her husband. The court cannot also lose track of the fact that PW18 was incharge of the CATS ambulance and incase any such statement was made before him he would have mentioned the same. With respect to the third dying declaration

made to PW2 SDM, it can be inferred that this dying declaration is unbelievable because if the deceased Nazma was conscious throughout during the time when her statement was reduced into writing and throughout the time of videography then why SDM did not wait for the videographer so that the entire statement could have been narrated by the deceased Nazma in the videography.

17. Also we are of the opinion that trial court has rightly observed this fact that PW16 Dr Saurabh who declared the deceased Nazma fit for making statement vide his endorsement on the MLC Ex.PW16/A, has specifically deposed in his cross examination that deceased Nazma did not name her husband as the person who had put her to fire while he was examining her. The aforesaid reasons clearly highlight the contradictions in the dying declarations made by the deceased Nazma.
18. In *Mehiboobsab Abbasabi Nadaf v. State of Karnataka* (2007) 13 SCC 112, having noticed multiple dying declarations Apex Court held:

*7. Conviction can indisputably be based on a dying declaration. But before it can be acted upon, the same must be held to have been rendered voluntarily and truthfully. Consistency in the dying declaration is the relevant factor for placing full reliance thereupon. In this case, the deceased herself had taken contradictory and inconsistent stand in different dying declarations. They, therefore, should not be accepted on*

*their face value. Caution, in this behalf, is required to be applied.*

19. In **Anoop Singh v. State of M.P. (SC) 2008 (3) RCR (Crl.) 602**, it was held that:

*13. Law relating to appreciation of evidence in the form of more than one dying declaration is well settled. Accordingly, it is not the plurality of the dying declaration but the reliability thereof that adds weight to the prosecution case. If a dying declaration is found to be voluntary, reliable and made in fit mental condition, it can be relied upon without any corroboration. The statement should be consistent throughout. If the deceased had several opportunities of making such dying declarations, that is to say, if there are more than one dying declaration they should be consistent (See.: Kandula Bala Subramanyam v. State of A.P. (1993) 2 SCC 684). However, if some inconsistencies are noticed between one dying declaration and the other, the court has to examine the nature of the inconsistencies, namely whether they are material or not. While scrutinizing the contents of various dying declaration, in such a situation, the court has to examine the same in the light of the various surrounding facts and circumstances.*

20. In a recent judgment by Delhi High Court titled **Manoj Kumar Verma Vs. State**, it was observed by the court:

*“.....the dying declaration made by the deceased must represent a truthful version*

*of the incident and in a case where there are more than one dying declaration then there should be consistency, particularly on the material facts in all the dying declarations. If there are intrinsic contradictions and inconsistencies in multiple dying declarations and there are suspicious circumstances which surround such multiple dying declarations then it is for the prosecution to clear all such doubts with the help of other corroborative evidence otherwise it may not be safe to act upon such inconsistent and discrepant dying declarations particularly where such discrepancies are on the material aspects.”*

21. Applying the aforesaid principles of law to the facts of the present case we are of the view that there are contradictions in the dying declarations made by the deceased Nazma, however her first dying declaration made to PW4 Sh. Anand Prakash must be believed as her true dying declaration as PW4 has no motive to falsely depose that deceased Nazma disclosed the fact to him to the effect that her husband was not at home and had gone to work place and she had set herself to fire as she wanted to die. Further the presence of PW4 Sh. Anand Prakash at the spot at the relevant time has been established on record. The second and third dying declarations are not consistent with the first one and tutoring, prompting or imagination of the dying declaration cannot be ruled out. Hence benefit of doubt can be extended to the respondents.
22. It is well settled that leave to appeal is to be granted in exceptional cases where the judgment under appeal is found to be perverse.

The High Court cannot entertain a petition merely because another view is possible or that another view is more plausible. In *Arulvelu and Anr. vs. State* 2009 (10) SCC 206, while referring with approval the earlier judgment in *Ghurey Lal vs. State of Uttar Pradesh*, (2008) 10 CRL.L.P.No.764/2013 Page 6 of 7 SCC 450, the Supreme Court reiterated the principles which must be kept in mind by the High Court while entertaining an Appeal against acquittal. The principles are:

*“1. The accused is presumed to be innocent until proven guilty. The accused possessed this presumption when he was before the trial court. The trial court's acquittal bolsters the presumption that he is innocent.*

*2. The power of reviewing evidence is wide and the appellate court can re-appreciate the entire evidence on record. It can review the trial court's conclusion with respect to both facts and law, but the Appellate Court must give due weight and consideration to the decision of the trial court.*

*3. The appellate court should always keep in mind that the trial court had the distinct advantage of watching the demeanour of the witnesses. The trial court is in a better position to evaluate the credibility of the witnesses.*

*4. 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.*

*5. If two reasonable or possible 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.*

23. Further the court must take into account the presumption of innocence of the accused and the acquittal by the trial court adds to the presumption of his innocence. In **Ramanand Yadav v. Prabhunath Jha 2004CriLJ640** , this Court observed;

*"There is no embargo on the appellate Court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the Court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate Court to re-appreciate the evidence in a case where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not".*

24. For the reasons stated above and having regard to the facts of this case and the reasons given by the trial court in support of its findings, we find there to be no material irregularity that may

warrant interference by this court in the judgment passed by the trial court. Consequently, the petition is dismissed.

**SANGITA DHINGRA SEHGAL, J.**

**G. S. SISTANI, J.**

**MARCH 17, 2015**  
**gr**