

Vijay Kumar Arora Vs. State

Vijay Kumar Arora Vs. State

SooperKanoon Citation : sooperkanoon.com/699604

Court : Delhi

Decided On : May-15-2008

Reported in : 150(2008)DLT638; II(2008)DMC58; 2008(103)DRJ661

Judge : Vikramajit Sen and; P.K. Bhasin, JJ.

Acts : Arms Act - Sections 19; Evidence Act - Sections 106 and 114; Indian Penal Code (IPC) - Sections 34, 149 and 302; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 313, 386(1) and 423(1)

Appeal No. : Crl. Appeal 183/1992

Appellant : Vijay Kumar Arora

Respondent : State

Advocate for Def. : Mukta Gupta, APP, ; M.P. Singh, ; Rajat Katyal and ;

Advocate for Pet/Ap. : D.C. Mathur, Sr. Adv. and; Vikram Singh Panwar, Adv

Disposition : Appeal dismissed

Judgement :

Vikramajit Sen, J.

1. This Appeal is against the Judgment dated 29.9.1992 of the learned Additional Sessions Judge, Delhi (ASJ for brevity) in FIR 154/83 P.S. Moti Nagar, whereby

the Appellant/Convict, Shri Vijay Kumar Arora, son of Shri S.P. Arora, was awarded a sentence of life imprisonment with a fine of Rs. 2,000/- (Rupees Two Thousand Only) and in default of its payment further rigorous imprisonment of one year under Section 302 of the Indian Penal Code (IPC for short). On 11.1.1985 the Appellant/Convict as well as his mother, Smt. Beena Arora, wife of Shri S.P. Arora, were charged thus-

That you in the night intervening between 5.4.83 and 6.4.83 at the house No. F-503, Karampura, within the jurisdiction of P.S. Moti Nagar, Delhi, in furtherance of the common intention you both, committed murder by intentionally causing the death of Smt. Shashi Arora w/o Shri Vijay Kumar Arora and thereby committed an offence punishable Under Section 302 read with Section 34 of the IPC and within the cognizance of this Court of Sessions.

And, I hereby direct you that you be tried by this Court on the aforesaid charge.

2. The uncontroverted facts are that the deceased, Smt. Shashi Arora, was brought to and admitted in the Lok Nayak Jai Parkash Narain Hospital (LNJP Hospital), New Delhi at 2:45 A.M. on 6.4.1983 with 90 per cent burns; and that she died at 3:15 P.M. on that same day. She was brought to the Hospital by her husband, the Appellant/Convict herein, accompanied by Dr. Satish K. Bindal. The Report, DD 25-A dated 6.4.1983, Ex. PW 18/G, prepared by ASI Hansraj (PW/18), records the version given by the Appellant/Convict to the effect that his wife woke up to prepare milk for their three month old daughter and while lighting the stove her clothes caught fire. He, accompanied by his friend Dr. Satish, admitted her to LNJP Hospital. In the statement under Section 313 of the Code of Criminal Procedure (Cr.PC) the Appellant/Convict has stated that - 'I was asleep. I was awakened by the shrieks of Smt. Shashi, I came out in the verandah and saw her in flames. I tried to extinguish the fire by my hands and water. My hands were injured in this process. I called a Doctor and rang up the house of my father-in-law. I do not remember the exact time. I told the family of my father-in-law to come.... Shashi herself told me that she caught fire when she had gone to the stove to boil milk. She told me that the stove 'bhabak gaya'. I will file a written statement if so advised'.

3. So far as Smt. Beena Arora is concerned the learned ASJ has concluded that 'Smt. Beena Arora could participate in this ghastly crime while Smt. Shashi Arora was held by her beloved son Appellant/Convict Vijay Kumar Arora and therefore discard and reject the defense of Smt. Beena Arora as well.... It has already been held in the earlier part of the judgment that the circumstances noticed in the judgment do not form an unbreakable chain inconsistent with the hypothesis of the innocence of Smt. Beena Arora, under Section 302 IPC. I have already held that the oral dying declaration of Smt. Shashi Arora in this case cannot be said to be totally acceptable to be sufficient for holding accused persons guilty under Section 302 IPC and that this oral dying declaration can be used only as a corroborative piece of evidence. Hence notwithstanding the false and improbable defense of accused Smt. Beena Arora the evidence against her in the shape of circumstantial evidence and the oral dying declaration is not that weighty and clinching to prove her guilty beyond a shadow of doubt. I, therefore, feel that she deserves benefit of doubt. I accordingly acquit Smt. Beena Arora giving her benefit of doubt'. The State has not preferred any Appeal against the acquittal of Smt. Beena Arora.

4. The immediate question that arises is whether we are bound to accept her acquittal or are we not empowered to consider her complicity along with the Appellant/Convict. Ms. Mukta Gupta, learned APP for the State, has directed our attention towards *Sunder Singh v. State of Punjab* : AIR 1962 SC1211 . *Sunder Singh*, along with three others, was tried for the murder of three persons. The Trial Court extended the benefit of doubt to one of them, and the remaining three were convicted under Section 302 read with Section 34, IPC. The High Court confirmed the conviction of these three who thereupon approached the Supreme Court of India. Their Lordships analysed *King v. Plummer* 1902 2 KB 339, found it not to have any relevance, and observed thus:

8. Cases sometimes arise where persons are charged with being members of an unlawful assembly and other charges are framed against them in respect of offences committed by such unlawful assembly. In such cases, if the names of persons constituting the unlawful assembly are specifically and clearly recited in the charge and it is not suggested that any other persons known or unknown also were members of the unlawful assembly, it may be that if one or more persons

specifically charged are acquitted, that may introduce a serious infirmity in the charge in respect of the others against whom the prosecution case may be proved. It is in this class of cases, for instance, that the principle laid down in the case of Plummer may have some relevance. If out of the six persons charged under Section 149 of the Indian Penal Code along with other offences, two persons are acquitted, the remaining four may not be convicted because the essential requirement of an unlawful assembly might be lacking. In the present case, however, the failure of the prosecution to prove that Rachhpal Singh took part in the commission of the offence does not introduce an infirmity in its case against the appellants at all. Even if Rachhpal Singh is held not to be present at the scene of the offence, that, in law, cannot prevent the prosecution from presenting its case against the three appellants if the evidence adduced by it is otherwise satisfactory and cogent. therefore, we are satisfied that the case of Plummer does not make the conviction of the appellants either unreasonable or illegal.

9. Reverting then to the argument based on the provisions of Section 423(1)(a) of the Criminal Procedure Code, it is obvious that the order of acquittal passed in favor of Rachhpal Singh cannot be set aside unless an appeal had been duly preferred in that behalf against the said order. But do the provisions of Section 423(1)(a) create a bar against the High Court incidentally considering the question about Rachhpal Singh's presence and conduct at the relevant time while it is dealing with the prosecution case against the three appellants before it? When the High Court in appeal considered the case against the three appellants, it had inevitably to examine the comment made by Mr. Sethi against the reliability of the witnesses on the ground that their evidence against Rachhpal Singh had not been accepted by the trial Court and that necessarily meant that the High Court had to apply its mind to that problem as well. If in dealing with the case presented before it on behalf of the appellants it became necessary for the High Court to deal indirectly or incidentally with the case against Rachhpal Singh, there is no legal bar at all. It may be that in considering the evidence as a whole the High Court may have come to the conclusion that the evidence against Rachhpal Singh was unsatisfactory and if it had come to such a conclusion, it would have examined the said evidence in the light of this infirmity. On the other hand, after considering the

evidence, the High Court may well have come to the conclusion, as it has, in fact, done in the present case, that the evidence against Rachhpal Singh is also good and need not have been discarded. In our opinion, there is no doubt that if in appreciating the points made by the appellants before it the High Court had to consider the whole of the evidence, in respect of the accused persons, it was free to come to one conclusion or the other in respect of the said evidence, so far as it related to Rachhpal Singh. That is why we think that the point made by Mr. Sethi that Section 423(1)(a) precluded the High Court from considering the merits of the order of acquittal even incidentally or indirectly cannot be upheld.

10. Mr. Sethi, however, sought to derive assistance from the decision of this Court in the case of *Pritam Singh v. State of Punjab* : 1956 CriLJ805 . In that case, this Court has observed 'that the effect of a verdict of acquittal pronounced by a competent Court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication. The maxim '*res judicata pro veritate accipitur*' is no less applicable to criminal than to civil proceedings.' These observations were made when despite the order of acquittal passed against a person under Section 19(f) of the Arms Act in an earlier proceeding, the same allegation was made against him in a subsequent case where he was charged with murder. In other words, the decision of this Court in the case of *Pritam Singh* merely shows that if a person is acquitted of an offence on a charge framed against him which had been tried in a court of competent jurisdiction, the acquittal is conclusive between the said person and the prosecution and it can be challenged or reopened only by an appeal against the said acquittal, not otherwise. This proposition has no relevance to the present case. When the High Court considered Mr. Sethi's criticism against the prosecution evidence based on the assumption that the said evidence was found to be unreliable in so far as Rachhpal Singh is concerned, it was not appreciating that evidence with a view to reverse the order of acquittal passed in favor of Rachhpal Singh; it was appreciating that evidence only with a view to decide whether the said evidence should be believed against the appellants before it. That is why we think no assistance can be legitimately claimed by Mr. Sethi from the decision in the case

of Pritam Singh in support of his argument that the High Court has acted illegally or improperly in expressing its opinion that the prosecution evidence against Rachhpal Singh was not unsatisfactory. Indeed, as an appellate Court, the High Court has to consider indirectly and incidentally the evidence adduced against an accused person who had been acquitted by a trial Court in several cases where it is dealing with the appeal before it by the co-accused persons who had been convicted at the same trial and in doing so, the High Court and even this Court some times records its indirect conclusion that the evidence against the acquitted persons was not weak or unsatisfactory and that the acquittal may in that sense be regarded as unjustified, vide *Bimbadhar Pradhan v. The State of Orissa* : 1956 CriLJ831 . thereforee, we do not think that there is any substance in the point made by Mr. Sethi that the judgment of the High Court suffers from a serious infirmity in that it examined the evidence against Rachhpal Singh and came to the conclusion that the said evidence was not unsatisfactory. In this connection, we may incidentally point out that even the trial Court which acquitted Rachhpal Singh has expressly observed that it did not say that the eyewitnesses were false in their claim that Rachhpal Singh also took part in the furtherance of the aforesaid common intention, but it thought that the case against him was not proved beyond all reasonable doubt. In other words, even the finding of the trial Court was not that the prosecution evidence against Rachhpal Singh was false; it only was to the effect that it left room for reasonable doubt. That is about all.

5. Our own research discloses that the power of the High Court to so completely reappraise the evidence as to come to a finding that an acquitted person, in respect of whom the State has chosen not to prefer an appeal, had played a culpable role in the commission of the offence, is well entrenched in our criminal jurisprudence for over half a century, see *Marachalil Pakku v. State of Madras* : AIR 1954 SC648 . The Apex Court had remarked that though the acquittal of accused 3 to 7 stands, they could nevertheless sustain the conviction of other convicts on the premise that the said accused had been erroneously acquitted. *Sunder Singh* was duly analysed in *Brathi v. State of Punjab* : 1991 CriLJ402 and *Golla Pullanna v. State of A.P.* : 1996 CriLJ3987 . In *Brathi* the Supreme Court has opined that the '...powers of the appellate court in dealing with an appeal against an order of conviction are defined under Section 386(1)(b) of the Code of Criminal

Procedure, 1973 corresponding to Section 423(1)(b) of the Code of 1898. In the matter of appreciation of the evidence the powers of the appellate court are as wide as that of the trial court. It has full power to review the whole evidence. It is entitled to go into the entire evidence and all relevant circumstances to arrive at its own conclusion about the guilt or innocence of the accused. In Sunder Singh's case (supra), this Court has held that the provisions of Section 423(1)(a) do not create a bar against the appellate court considering indirectly and incidentally a case against the person who was acquitted, if that becomes necessary when dealing with the case in the appeal presented on behalf of the other accused who are convicted. In considering the evidence as a whole, the appellate court may come to the conclusion that the evidence against the person acquitted was also good and need not have been discarded. When several persons are alleged to have committed an offence in furtherance of the common intention and all except one are acquitted, it is open to the appellate court to find out on a reappraisal of the evidence that some of the accused persons have been wrongly acquitted, although it could not interfere with such acquittal in the absence of an appeal by the State Government. The effect of such a finding is not to reverse the order of acquittal into one of conviction or visit the acquitted person with criminal liability. The finding is relevant only in invoking against the convicted person his constructive criminality'. More recently, in *Nallobothu Venkaiah v. State of A.P.* : 2002 CriLJ4081 their Lordships, without alluding to any of the above cited decisions enunciated the law to the extent that the 'wrongful acquittal recorded by the High Court, even if it stood, that circumstances would not impede the conviction of the appellant under Section 302 read with Section 149 IPC'.

6. We are, therefore, somewhat surprised that Mr. D.C. Mathur, learned Senior Counsel appearing for the Appellant/Convict, should submit that Sunder Singh does not lay down the correct law and must be deemed to have been overruled by the larger Bench in *Krishna Govind Patil v. State of Maharashtra* : [1964]1SCR678 . This point could have been substantiated only after dealing with several Judgments mentioned by us above, which reaffirm and reiterate the ratio of Sunder Singh; or independently lay down the same law. The powers of the appellate Court of reviewing the complicity of an accused whose acquittal has become final was not in question at all in *Krishna Govind Patil* 's case. In that

case, the charges framed against four persons were under Section 302 read with Section 34 IPC; all of them were also charged separately for the substantive offence under Section 302 IPC. All four accused were acquitted but the State preferred an Appeal to the High Court against the acquittal under Section 302 read with Section 34 of the IPC. No Appeal was preferred against the acquittal under Section 302 of the IPC. Their Lordships recorded that the High Court had given conflicting findings inasmuch as, whilst it had acquitted accused Nos. 1, 3 and 4 under Section 302 read with Section 34, it nevertheless convicted accused No. 2 under Section 302 read with Section 34 of the IPC. It was in that context that their Lordships observed that the 'effect of acquittal of accused 1, 3 and 4 is that they did not conjointly act with accused 2 in committing the murder. If they did not act conjointly with accused No. 2, accused 2 could not have acted conjointly with them'. Another distinction must be immediately drawn with regard to the germaneness of the rest judicata principle, as decided in *Pritam Singh*. Their Lordships had clarified that this doctrine is 'no less applicable to criminal than to civil proceedings', i.e. subsequent cases cannot reopen a finding arrived at in earlier proceedings; but since an appeal is a continuation of the original proceedings, the rule of rest judicata would not apply thereto. Extrapolating the ratio of *Krishna Govind Patil* to the case before us, the Trial Court having acquitted Smt. Beena Arora could not have convicted the Appellant/Convict, Shri Vijay Kumar Arora, under Section 302 read with Section 34 since no person other than Smt. Beena Arora was charged or was in contemplation. In the event, the learned ASJ has convicted the Appellant/Convict only under Section 302 IPC.

7. Equally well established is the legal proposition that it is the bounden duty of the prosecution to establish its case beyond all reasonable doubt. The law is conveniently encapsulated in the following paragraphs from *Vikramjit Singh v. State of Punjab* (2006) 12 SCC 306 : 2007[1] JCC 64, making it unnecessary to refer to other precedents:

14. Section 106 of the Evidence Act does not relieve the prosecution to prove its case beyond all reasonable doubt. Only when the prosecution case has been proved the burden in regard to such facts which was within the special knowledge of the accused may be shifted to the accused for explaining the same. Of course,

there are certain exceptions to the said rule e.g. where burden of proof may be imposed upon the accused by reason of a statute.

15. It may be that in a situation of this nature where the court legitimately may raise a strong suspicion that in all probabilities the accused was guilty of commission of heinous offence but applying the well-settled principle of law that suspicion, however, grave may be, cannot be a substitute for proof, the same would lead to the only conclusion herein that the prosecution has not been able to prove its case beyond all reasonable doubt.

16. In *Sharad Birdhichand Sarda v. State of Maharashtra* : 1984 CriLJ1738 this Court laid down the law in the following terms:

153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in *Shivaji Sahabrao Bobade v. State of Maharashtra* : 1973 CriLJ1783 where the observations were made:

'Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions'.

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

Without reference to the above, similar observations can be found in *State of Rajasthan v. Parthu* : 2007 CriLJ4722 in these extracted paragraphs:

12. It is now a well settled principles of law that a judgment of conviction can be recorded on the basis of the dying declaration alone subject of course to the satisfaction of the court that the same was true and voluntary. For the purpose of ascertaining truth or voluntariness of the dying declaration, the Court may look to the other circumstances. Apart from the fact, as noticed hereinbefore, that the homicidal nature of death was not disputed by the respondent herein and furthermore as he in his statement under Section 313 had raised a positive defense that she died of an accident, we are of the opinion the High court adopted a wrong approach. It is not disputed that the deceased and the appellant were living separately from their family. It has also not been disputed that at the time when the incident occurred, the respondent was in his house together with the deceased. It is furthermore not in dispute that after the incident took place, the respondent was not to be found. He was arrested only on 20-6-1995. If the deceased and the respondent were together in their house at the time when the incident took place which was at about 10 O'clock in the night, it was for the respondent to show as to how the death of the deceased took place.

13. In the absence of sufficient or cogent Explanations in that behalf the Court would be entitled to consider the same as the circumstances against the accused. (See *Raj Kumar Prasad Tamakar v. State of Bihar* : 2007 CriLJ1174).

14. This Court in a large number of decisions in a case of this nature had also applied the principles of Section 106 of the Indian Evidence Act. (See *State of Rajasthan v. Kashi Ram* : AIR 2007 SC144 and *State of Punjab v. Karnail Singh* : 2003 CriLJ3892 .

15. For the reasons stated above, the impugned judgment cannot be sustained. It is set aside accordingly. The appeal is allowed. The judgment of the learned trial Judge is affirmed. The respondent who is on bail shall surrender to serve out the remaining sentence. His bail bonds are cancelled.

8. The case of the Prosecution rests primarily on the Dying Declaration allegedly made by the deceased Smt. Shashi Arora to her father, Ram Nath (PW-1); her sister Meenu, PW-3; her mother Ravi Kanta, PW-4; B.L. Sharma, PW-6; Kamlesh Sharma, PW-10; and Sudershan Lal, PW-11. Mr. Mathur contends that the alleged Dying Declaration made to the sister Meenu and mother Ravi Kanta are inadmissible since their existence has not been put to the Appellant/Convict under Section 313 Cr. PC. Ms. Gupta has drawn our attention to *Jai Dev v. State of Punjab* : [1963]3SCR489 which, in turn, referred back to *Hate Singh Bhagat v. State of Madhya Bharat* : AIR 1953 SC468 . The Court held that the examination of the accused is intended to give him an opportunity to explain any circumstances appearing in the evidence against him, and that the Court must take care to put all relevant or material questions to the accused. This decision, in our view, is of no assistance to the State. Ms. Gupta has also sought support of *Bakshish Singh v. State of Punjab* : 1967 CriLJ656 wherein it has been opined that it is 'not at all necessary that each separate piece of evidence in support of circumstances should be put to accused'. A Dying Declaration attracts such high probative value as to virtually set it apart from other evidence [see *Mohan Lal v. State of Haryana* : (2007)9SCC151]. It is rightly treated as substantive evidence, sufficient by itself to sustain a sentence or conviction. A Dying Declaration must be put to the accused to elicit his response thereto as a precondition for it to be read against him. It is in sharp contrast to a postmortem. In *Sharad* the Supreme Court had garnered support of *Hate Singh* for concluding that the circumstances or events not put to the accused while recording his evidence under Section 313, Cr. PC 'must be completely excluded from consideration since the appellant did not have any chance to explain them'. In the light of these pronouncements we are restrained from considering the testimony of Meenu and Ravi Kanta to the extent that they pertain to the Dying Declaration allegedly made to them by the deceased. So far as the other witnesses are concerned, in his statement under Section 313, Cr. PC the Appellant/Convict has steadfastly maintained that his deceased wife Shashi,

after her initial admission in the Hospital, was never conscious till her death and that the witnesses had made false statements. It is necessary to clarify that it is not the veracity or truthfulness of the Dying Declarations which is in doubt, but their very existence. In *Kans Raj v. State of Punjab* : 2000 CriLJ2993 it has been established that to make such statement as substantive evidence the person relying on it is obliged to prove the making of such a statement as a fact.

9. Ram Nath, father of the deceased, had been called upon by the Investigating Officer (I.O.) to make a statement at 11:20 A.M., which he declined to make. However, later on on that very day Ex. PW1/A had been submitted by him to the SHO, Mr. Ved Parkash Gupta, P.S. Moti Nagar. Although he had dictated the letter to his son, he had signed it. This is what the Report says:

Sir,

That I Ram Nath S/o Late Shri Labhu Ram R/o A-1/138, Inderpuri, New Delhi-110 012. My daughter Shashi was married to Vijay Kumar Arora s/o S.P. Arora R/o F-503, Shivaji Marg, Karampura, Telephone No. 500742, New Delhi in Jan 82. My daughter has been burnt to death by Mrs. Beena Arora (mother in law) Vijay Kumar Arora (husband) and other members of their family on the night of 5th & 6th April 1983. It was also declared by my daughter Shashi, when she came in senses in the 100% burnt position at about 12:15 P.M. (6th-4-83). As she was admitted in the burn ward in the Irwin Hospital (LokManya Jai Prakash Narayan Hospital) in serious condition by them. I Along with my relatives were waiting outside in the verandah of the ward when she gained senses she sent for me (the undersigned). I immediately rushed in Along with my relatives and asked her, 'Ha bata kya hua'. She said weepingly, 'Daddy jala dita menu'. Maina pucha, 'bata kinnane'. Jwab diya, 'meri saas...vijay...te inha de gharwalayn nay'.

Now I would request your goodself to investigate the brutal murder of my daughter and take stern action.

10. So far as cross-examination on this aspect of the case is concerned learned Counsel for the Appellant/Convict had suggested that FIR Ex. PW1/A was totally false and that the Report was given to the Police on 7.4.1983 and not on 6.4.1983.

Both these suggestions were denied. The SHO has inter alias stated that - 'next morning i.e. on 7.4.83 on receipt of a complaint from Sh. Ram Nath father of deceased Shashi Arora I had registered the case F.I.R. No. 154 of 1983 under Section 302/34 IPC and took up the investigation myself'. In cross-examination he has stated that he 'recorded the statement of PW Ram Nath and Meena on 7.4.1983. Ex. PW-1/DA and Ex. PW-3/DA are correct copies of their statements'. Mr. Mathur, learned Senior Counsel for the Appellant/Convict, has argued that there is again a time discrepancy so far as complaint of Ram Nath is concerned, which, according to him, was received on 7.4.1983 and not on 6.4.1983. The argument is without merit since it is obvious to us, from the syntax of the sentence, that the SHO was speaking of the FIR which was registered on 7.4.83, after (time not indicated) the receipt of the complaint. thereforee, there is no error in the statement of Ram Nath so far as Ex.PW1/A is concerned.

11. Apart from the deceased's sister her sister PW3 and her mother PW4, the other witnesses to whom the Dying Declaration had allegedly been conveyed/addressed, have made the following deposition:

PW1 : Ram Nath Mehra (Father of the deceased). Thereafter I made inquiry on the telephone from my house and I came to know that Shashi had been taken to LNJP Hospital, and from Willingdon Hospital, we went to LNJP Hospital. We reached there at about 5:00 A.M. She was admitted in general ward on the ground floor, and we had visited her. At that time, she was unconscious. Vijay Kumar also met us on the way in the hospital and he took me to the ward where Shashi had been admitted. At that time Dr. Satish his friend was also with Vijay Kumar Arora. Subsequently, she was shifted to some other ward. At about 11:00 A.M. on the same day, that is 6.4.83 Shashi when she was conscious told me that she wanted water. At that time, she was on the same ward on ground floor, and then I also inquired from her as to what had happened to her. In trembling voice (Tutlai Hui) she told me 'Innane Jaladitta Hai Menu'. I inquired 'Kinane'. She said 'Vijay, Uski Ma Te Unade Ghar Walan Ne'. No person from the family of her-in-laws was present at that time. No member of my family was also present at that time. Volunteered thereafter I brought A.C.P., Mr. Khan who was present in that hospital at that time. I requested him to record the statement of Shashi. ACP had visited

my daughter but he did not record his statement as her in patient's certificate. It was written that the patient was unfit to make a statement. Before ACP had reached there, perhaps an ASI had already visited her. I had no talk with that ASI. I did not approach any other person to record statement of Shashi. I met Dr. Tiwari to record statement of Shashi but he did not come as he told me that he had to attend some operation. After 11 Shashi remained conscious till she died. She died at about 3:15 P.M. on the same day. My wife, my daughter (Meena), my son (Vinod) also came to the hospital. My other relations had also come to the hospital. After 11 A.M. till she died my family members and relations had visited Shashi. However, at one time only one person was allowed to meet her.

xxxxx.It is incorrect to suggest that Shashi was never fit to make any statement to me when I met her in the hospital in the ward on the ground floor and even later till her death. It is incorrect to suggest that my statement about what she stated to me on the ward on the ground floor is totally false. It is further incorrect to suggest that my FIR Ex. PW1/A is totally false. It is incorrect to suggest that I gave the report to the police on 7.4.83 and not on 6.4.83.

PW6 : B.L. Sharma (Neighbour of the deceased).On 6.4.83, when I had gone to my office, I came to know that Shashi had been burnt in the last night and had been admitted in the hospital. On receipt of this information, I visited JPN Hospital to see her. I met Shashi in burn ward situated on first floor there. She had extensive burn injuries but she was talking. Mother of Shashi was also present with Shashi. I enquired from Shashi's mother as to what had happened. At this Shashi recognised my voice and gave response and told me, 'Uncle I had been burnt.... Mujhe Jala Diya'. I enquired from her as to who had burnt her. She told me that she had been burnt by Vijay Kumar and his other family members. She had not specified any other member of her-in-laws family but had said 'Gharwalaon Nay'. At that time Vijay Kumar accused was also present.

xxxxx.It is incorrect to suggest that I had not talked with Shashi in JPN Hospital at all or that Shashi had remained unconscious throughout at the Hospital. Volunteered, in my presence, I had heard Vijay accused Whispering in the ears of Shashi saying, 'Shashi save me'. I had not stated this last fact in my statement to

the police.

PW10 : Kamlesh Sharma (Neighbour of the deceased).I had met Shashi in burn ward of the Hospital where she was admitted. I had found her burnt. I questioned her as to who I was and she recognised me by my voice and told me that I was K.L. Sharma aunti. She used to call me by this name earlier. I enquired from her how it had happened to her. She replied 'Vijay caught hold off me from my hands and my mother-in-law had sprinkled K. oil on me. She had not said anything else.

Court question. Had she told you as to who had set her on fire?

Ans. No.

xxxxx.It is incorrect that Shashi was unconscious and had not talked at all with me.

PW11 : Sudershan Lal (Uncle of the deceased).I enquired from Shashi as to what had happened to her, she replied that she had been burnt. I further raised the query as to how, he (sic 'she') had been burnt, to which she first became mum for a minute. When I further enquired from her, she told me that her mother-in-law had poured oil on her while Vijay had caught hold of her from her hand. She further told me that she had not seen the person who had set her on fire. ASI was sitting inside ward. I told him that the girl was speaking and he should record her statement. That ASI told me that he could not record her statement and her statement would be recorded when SDM would arrive.

xxxxx.It is incorrect that Shashi was unconscious throughout.

12. The Medico Legal Certificate (MLC), Ex. PW16/B, of the deceased contains writing of these words -'Alleged stove exploding as stated by the patient'. It thereafter records at 4:30 A.M. (Ex.PW16/C), on 6.4.83, that 'Patient is not fit to make statement'. It further records at 11:00 A.M. that the deceased 'is unfit for statement'. Dr. Tiwari has also made a noting at 3:15 P.M. that the 'Patient is unfit for statement'. However, that document also mentions that at 1:00 P.M. 'Patient semi conscious'.

13. The very recent decision in Mohan Lal v. State of Haryana : (2007)9SCC151 is indeed topical, as is evident from these extracts, which perspicuously summarise the law on the subject:

9. This is a case where the basis of conviction of the accused is the dying declaration. The situation in which a person is on his deathbed, being exceedingly solemn, serene and grave, is the reason in law to accept the veracity of his statement. It is for this reason that the requirements of oath and cross-examination are dispensed with. Besides, should the dying declaration be excluded it will result in miscarriage of justice because the victim being generally the only eyewitness in a serious crime, the exclusion of the statement would leave the court with a scrap of evidence.

10. Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross-examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the court also insists that the dying declaration should be of such nature as to inspire full confidence of the court in its correctness. The court has to be on guard that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. The court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailant. Once the court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence. This Court has laid down in several judgments the principles governing dying declaration, which could be summed up as under as indicated in Paniben v. State of Gujarat : 1992 CriLJ2919 :

(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. [See Munnu Raja v. State of M.P. : 1976 CriLJ1718]

(ii) If the court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. [See State of U.P. v. Ram Sagar

Yadav : 1986 CriLJ836 and Ramawati Devi v. State of Bihar : 1983 CriLJ221].

(iii) This Court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had an opportunity to observe and identify the assailants and was in a fit state to make the declaration. [See K. Ramachandra Reddy v. Public Prosecutor : 1976 CriLJ1548].

(iv) Where the dying declaration is suspicious, it should not be acted upon without corroborative evidence. [See Rasheed Beg v. State of M.P. : 1974 CriLJ361].

(v) Where the deceased was unconscious and could never make any dying declaration, the evidence with regard to it is to be rejected. (See Kake Singh v. State of M.P. : 1982 CriLJ986).

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. [See Ram Manorath v. State of U.P. : [1981]3SCR195].

(vii) Merely because a dying declaration does contain the details as to the occurrence, it is not to be rejected. (See State of Maharashtra v. Krishnamurti Laxmipati Naidu : 1981 CriLJ9).

(viii) Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth. (See Surajdeo Ojha v. State of Bihar : 1979 CriLJ1122).

(ix) Normally the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration looks up to the medical opinion. But where the eyewitness said that the deceased was in a fit and conscious state to make the dying declaration, the medical opinion cannot prevail. (See Nanhau Ram v. State of M.P. : 1988 CriLJ936)

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. [See State of U.P. v. Madan Mohan : 1989 CriLJ1485]

(xi) Where there is more than one statement in the nature of dying declaration, one first in point of time must be preferred. Of course, if the plurality of dying declarations could be held to be trustworthy and reliable, it has to be accepted. [See Mohanlal Gangaram Gehani v. State of Maharashtra : [1982]3SCR277].

14. Mr. Mathur has vehemently stressed upon the fact that in cross-examination, the deceased's father Ram Nath PW1 had admitted that Hans Raj, ASI had asked him to give a statement about the incident and about what Shashi had stated to him, but that he declined to do so at that time. He, however, denied that the time was 11:20 A.M. Ex. PW 18/F records these words of PW1-'I am father Shashi. I am mentally upset at present and cannot make a statement now. I will make statement later'. PW1, however, has recorded the time as 11:20 A.M. Hans Raj has deposed that none of the relatives of the deceased volunteered to make any statement on 6.4.83 despite his asking them repeatedly. PW10, namely, Mrs. Kamlesh Sharma had admitted in her cross-examination that her statement was recorded after about one month. Similarly PW11, namely, Sudershan Lal has also conceded in cross-examination that his statement was recorded after one month of the incident. PW18, Hans Raj, who had retired at the stage of recording of evidence in Court has made three significant statements - (a) that no one other than him was allowed or permitted to enter the room where the deceased was receiving medical attention,(b) that none of the relatives of the deceased was willing to make any statement and (c) that when Shashi was taken from the Ground Floor to the 1st Floor, at about 12 noon, she was unconscious and remained so till 2:30 P.M. Equally significant is the fact that the Public Prosecutor was permitted to cross-examine ASI Hans Raj. Remarkably, even in these circumstances, it was not even suggested to him that despite the medical certification to the effect that the deceased was unfit to make a statement she had actually spoken to various persons, and had implicated the Appellant/Convict, his mother and other members of his family. In fact, the most favorable statements were elicited from ASI Hans Raj in the course of his cross-examination by the learned Counsel for the Appellant/Convict. ASI Hans Raj, it is plain to us, is both an untrustworthy witness and also an incompetent investigator. However, the prosecution should have, at the very least, suggested to him with a view of getting his response (a) that Shashi was conscious at various times and periods; (b) that

she had spoken to several members of her family and her neighbours who had entered the room where Shashi had been hospitalized. If the Court makes any assumptions of this nature, it would run foul of its duty to only assess the veracity and weight of the evidence presented to it, not to don the mantle of the Prosecutor.

15. In analysing the credibility or otherwise of the four Dying Declarations allegedly given by the deceased to various relatives and neighbours, we are at once struck by their brevity and by the fact that the deceased did not indicate who had set her on fire. If the making of the oral Dying Declarations is believed, it speaks so strongly in favor of the truthfulness of the deceased as to make its credibility beyond cavil. If the Dying Declarations are only the machinations of the prosecution, then the witnesses could have been tutored to implicate the Appellant/Convict viz-a-viz the setting aflame of the deceased also. These features have indeed made the decision a difficult one to reach.

16. As has been noted, the statements of PW6, Shri B. L. Sharma, PW10 Ms. Kamlesh Sharma, and PW 11, Shri Sudershan Lal were recorded after the passage of about one month from the date of the death of Shashi. None of these witnesses have stated that they had shared, either with any of the member of the deceased family or each other, the factum of Shashi having made an oral Dying Declaration to them. This runs counter to human nature. We cannot persuade ourselves to believe that these three witnesses would not have informed Shashi's parents of what had been allegedly told to them by Shashi. We cannot also ignore the delay of one month in recording their statements. We reject the testimony of these three witnesses as their versions are beset with doubts. However, we still have for consideration the statements of PW1 Ram Nath in which he has categorically mentioned in his Report Ex. PW1/A filed on 6-4-83 at 5:30 P.M. with the SHO, Moti Nagar, New Delhi that his deceased daughter Shashi had told him at 12:15 P.M. that very day that her mother-in-law, husband and his family had burnt her. True, he makes no mention of similar statement allegedly made to ACP Khan and his wife and daughter, as well as neighbours. In his statement in Court on 13-9-1985 he has repeated these facts with the exception or deviation that the time has been mentioned by him to be 'about 11:00 A.M.' What is indeed

remarkable, however, is that Ram Nath had not made any mention of what was allegedly told to him by Shashi when FIR No. 154/83 was recorded on 7-4-83. Furthermore, when the supplementary Statement Ex PW1/DB was recorded on 3-8-83 by the Anti Dowry Cell Crime Branch, Delhi, PW1 Ram Nath has stated that Shashi's statement (Dying Declaration) implicating her husband and mother-in-law for setting her aflame was made by Shashi even within the hearing of ACP Khan. Again, we find it wholly incredible that if such an incident had occurred, Shri Ved Prakash would have omitted to mention it in his Report PW1/A as well as in the FIR 154/83 recorded on the following day. The situation becomes worse confounded when it is recalled that the Doctor has certified Shashi to be unfit for making any statement up to the time of her death; and the deposition of the Investigating Officer that no one was permitted into the Burn Ward. Significantly, Smt. Ravi Kanta Mehra, PW4, mother of the deceased, Shashi, has also deposed that - 'Shashi was in upper ward when the ward was locked and one was not allowed to enter the ward'. There are too many imponderables and conundrums even in Shri Ram Nath's version of Shashi's oral Dying Declarations allegedly voiced to him also because he makes no reference of similar oral Dying Declarations made to several other persons on that fateful day. We cannot, therefore, accept that Shashi had made any Dying Declaration, even to her father, Shri Ram Nath. We say this fully mindful of the approval of the Supreme Court in *Nanahau Ram v. State of Madhya Pradesh* : 1988 CriLJ936 to advisability of latitude being granted where the actions of the prosecution/IO are riddled with 'lapses'.

17. The enquiry must now proceed to whether sufficient circumstantial evidence exists to establish the guilt of the Appellant/Convict. In *State of U.P. v. Dr. Ravindra Prakash Mittal* : 1992 CriLJ3693 [followed in *Vithal Tukaram More v. State of Maharashtra* : 2002 CriLJ3546] their Lordships reached the conclusion, based on circumstantial evidence alone, that the deceased had been strangled and later burnt to suppress and alter evidence. The extracted paragraph is instructive:

20. As pointed out supra, there is no direct evidence to connect the respondent with this offence of murder and the prosecution entirely rests its case only on

circumstantial evidence. There is a series of decisions of this Court so eloquently and ardently propounding the cardinal principle to be followed in cases in which the evidence is purely of circumstantial nature. We think, it is not necessary to recapitulate all those decisions except stating that the essential ingredients to prove guilt of an accused person by circumstantial evidence are:

- (1) The circumstances from which the conclusion is drawn should be fully proved;
- (2) the circumstances should be conclusive in nature;
- (3) all the facts so established should be consistent only with the hypothesis of guilt and inconsistent with innocence;
- (4) the circumstances should, to a moral certainty, exclude the possibility of guilt of any person other than the accused.

(Vide Rama Nand v. State of H.P. : 1981 CriLJ298 ; Gambhir v. State of Maharashtra : 1982 CriLJ1243 ; Earabhadrapa v. State of Karnataka ; Ram Avtar v. State (Delhi Administration) : 1985 CriLJ1865).

18. In Prabhudayal v. State of Maharashtra : 1993 CriLJ2239 the possibilities oscillated between suicide by burning on the one hand, and homicide by strangulation and postmortem burning to conceal and hide the strangulation on the other. The relevant factors detailed by the Court inter alias were - (a) that there was no outsider in the house, (b) place where the tragic incident occurred was in the occupation of the appellants (c) the occurrence was in the wee hours when nobody else could have had ingress to the place where the incident allegedly occurred and (d) the appellants had admitted their presence etc. This case was decided almost entirely on the dialectic followed in Mittal. The law has been analysed in great detail by their Lordships in Trimukh Maroti Kirkan v. State of Maharashtra : 2007 CriLJ20 and we cannot do better than reproduce the relevant extracts there from:

12. In the case in hand there is no eye-witness of the occurrence and the case of the prosecution rests on circumstantial evidence. The normal principle in a case based on circumstantial evidence is that the circumstances from which an

inference of guilt is sought to be drawn must be cogently and firmly established; that those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; that the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and they should be incapable of Explanationn on any hypothesis other than that of the guilt of the accused and inconsistent with his innocence. .

14. If an offence takes place inside the privacy of a house and in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the Courts. A Judge does not preside over a criminal trial merely to see that no innocent man is punished. A judge also presides to see that a guilty man does not escape. Both are public duties. (See *Stirland v. Director of Public Prosecutions* 1944 AC 315 quoted with approval by Arijit Pasayat, J. in *State of Punjab v. Karnail Singh* : 2003 CriLJ3892 . The law does not enjoin a duty on the prosecution to lead evidence of such character which is almost impossible to be led or at any rate extremely difficult to be led. The duty on the prosecution is to lead such evidence which it is capable of leading, having regard to the facts and circumstances of the case. Here it is necessary to keep in mind Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustration (b) appended to this section throws some light on the content and scope of this provision and it reads:

(b) A is charged with traveling on a railway without ticket. The burden of proving that he had a ticket is on him.

15. Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial

evidence. The burden would be of a comparatively lighter character. In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent Explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no Explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any Explanation. .

21. In a case based on circumstantial evidence where no eye-witness account is available, there is another principle of law which must be kept in mind. The principle is that when an incriminating circumstance is put to the accused and the said accused either offers no Explanation or offers an Explanation which is found to be untrue, then the same becomes an additional link in the chain of circumstances to make it complete. This view has been taken in a catena of decisions of this Court. [See *State of Tamil Nadu v. Rajendran* : 1999 CriLJ4552 , *State of U.P. v. Dr. Ravindra Prakash Mittal* : 1992 CriLJ3693 , *State of Maharashtra v. Suresh* : (2000)1SCC471 , *Ganesh Lal v. State of Rajasthan* : 2002 CriLJ967 and *Gulab Chand v. State of M.P.* : [1995]3SCR27].

22. Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any Explanation how the wife received injuries or offers an Explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime. In *Nika Ram v. State of Himachal Pradesh* : 1972 CriLJ1317 it was observed that the fact that the accused alone was with his wife in the house when she was murdered there with 'khukhri' and the fact that the relations of the accused with her were strained would, in the absence of any cogent Explanation by him, point to his guilt. In *Ganeshlal v. State of Maharashtra* : 1992 CriLJ1545 the appellant was prosecuted for the murder of his wife which took place inside his house. It was observed that when the death had occurred in his custody, the appellant is under an obligation to give a plausible Explanation for the cause of her death in his

statement under Section 313 Cr.P.C. The mere denial of the prosecution case coupled with absence of any Explanation were held to be inconsistent with the innocence of the accused, but consistent with the hypothesis that the appellant is a prime accused in the commission of murder of his wife. In *State of U.P. v. Dr. Ravindra Prakash Mittal* : 1992 CriLJ3693 the medical evidence disclosed that the wife died of strangulation during late night hours or early morning and her body was set on fire after sprinkling kerosene. The defense of the husband was that wife had committed suicide by burning herself and that he was not at home at that time. The letters written by the wife to her relatives showed that the husband ill-treated her and their relations were strained and further the evidence showed that both of them were in one room in the night. It was held that the chain of circumstances was complete and it was the husband who committed the murder of his wife by strangulation and accordingly this Court reversed the judgment of the High Court acquitting the accused and convicted him under Section 302 IPC. In *State of Tamil Nadu v. Rajendran* : 1999 CriLJ4552 the wife was found dead in a hut which had caught fire. The evidence showed that the accused and his wife were seen together in the hut at about 9.00 p.m. and the accused came out in the morning through the roof when the hut had caught fire. His Explanation was that it was a case of accidental fire which resulted in the death of his wife and a daughter. The medical evidence showed that the wife died due to asphyxia as a result of strangulation and not on account of burn injuries. It was held that there cannot be any hesitation to come to the conclusion that it was the accused (husband) who was the perpetrator of the crime.

19. On the issue of the demand of dowry and of physical assault of the deceased by her husband and in-laws the following statements of witnesses are available:

PW 1 Ramnath Mehra. At the time of marriage, I gave dowry items according to the demands of father of the accused Vijay Kumar Arora. The dowry items given at the time of marriage in cash and kind were of the value of Rs. 75,000/-.. My said daughter used to complain about ill-treatment towards her. Her complaints were normally against Vijay Kumar Arora and his mother. In the beginning she was saying that they were ill-treating her on minor things. Later on she also complained that the family members of the accused were making demands of various things.

.Once I myself had seen impressions of the fingers on her cheek..At the time of birth of child, Smt.Beena Arora accused had made a demand of golden set and we gave in its place a golden chain to Vijay Kumar Arora..When demand of fridge had been made earlier, we paid a sum of Rs. 4,000/- to Vijay Kumar Arora on demand through my daughter for a fridge..My daughter had told me that attitude of Shri Satpal towards her newly born daughter was not good.

xxxxx.My daughter had told me that her husband Vijay Kumar accused had made a demand of a Scooter through her and she had declined of this demand.

xxxxx

It is incorrect to suggest that what I have stated about the dowry, further demand and beating to Shashi are totally false. It is further incorrect that she never told me anything at any time about the above things..As far as dowry items are concerned, some were given of our own wishes and some at the instance of the father of accused Vijay.

xxxxx.I had seen finger mark on the face of Shashi.

PW3 MEENA .During her visit she had told us that Vijay Kumar Arora her husband was complaining and demanding stitching charges for his suit and that he was also harassing her saying that your parents had promised to give a fridge in the marriage and the same has not been given..On a wedding she told me that her in laws had given beating to her on her face and back and she showed beating marks (neels) on her face and on her back to me..My Sister Shashi on that day told my mother when I was also present that her husband Mr.Vijay Kumar Arora had made a demand of Scooter from her and that he was harassing her for this demand.

xxxxx

It is wrong to suggest that my sister had not complained to us regarding demand of Scooter by the accused Vijay Kumar. It is incorrect to suggest that there was never demand of stitching charges of the suit piece and the fridge from the side of the accused. It is incorrect to suggest that I did not see any injury marks on the

person of Shashi on 27.2.1983. It is further incorrect that Shashi did not tell me or showed me any such beating marks.

PW 4 Ravi Kanta Mehra.I again enquired from Shashi as to why she had come late. At this, Shashi began weeping. She also told me that she had been beaten by Vijay Kumar Arora and by her mother in law and father in law. She had also complained that she had not that much grievance for being beaten by Vijay Kumar Arora but for her being beaten by her father in law. At that time Shashi also showed me blue marks of beating on her cheek. When she was narrating and showing her injury marks, Vijay Kumar Arora accused was present and he had remained quite (sic)..When we were taking our meals, Shashi had also complained that she was being harassed by her in laws side.

xxxxx

It is incorrect to suggest that Shashi had not

made any complaint whatsoever regarding any alleged treatment to her by her in laws when she had met me at the time of marriage of Ramesh. My husband had also attended the marriage of Ramesh. My husband was also present when Shashi had narrated the facts of ill-treatment and showed marks of injuries on her face.

xxxxx .Shashi had said that she had no grievance of being beaten by her husband and mother in law but of being beaten by her father in law. .Shashi had showed blue marks of beating on her face.

PW 6 B.L.SHARMA.Q. Had Shri Ram Nath told you anything?

Ans. He had been complaining that he had married Shashi but demands were being made from her.

He had also been complaining that her in laws side had been making demands of various items. I have been suggesting to him that since she was his daughter and had been married, he should help adjusting her there as far as possible. Shri Ram Nath had been telling me that financially he could not render much help. He also

asked me to help him financially but I could not render any financial help.

xxxxx.It is incorrect that Ram Nath had never complained me regarding demand of cash or any items from him by the in laws side of Shashi.

20. As per the statement of Appellant/Convict, Vijay Kumar Arora under Section 313 of Cr.P.C., he was put the following questions regarding demand of dowry and physical assault:

Q. It is further in evidence against you that 2-3 months after the marriage deceased Smt.Shashi made complaints to her father Shri Ram Nath about ill-treatment by both of you on account of demand of Refrigerator, Scooter etc. What have you to say?

Ans. It is incorrect.

Q. It is further in evidence against you that you and your parents had given beatings to deceased Shashi on 27.2.1983. What have you to say?

Ans. It is incorrect.

21. We have carefully considered the possibility of Shashi having suffered a homicidal death. The medical opinion is that her death was the result of 100 per cent burns and toxemia. Strangulation or asphyxiation was not detected thereby distinguishing the present case from Mittal, Prabhudayal and Trimukh Maroti Kirkan. In fact, the Appellant/Convict and his two sisters, as well as one neighbour, have testified about the screaming of the deceased on the fateful night. If the Appellant/Convict with or without assistance had sprinkled kerosene oil on Shashi it is only to be expected that she would have struggled to save her life. Apart from 1st to 2nd degree burns on the right wrist and dorsum of the right hand of the Appellant/Convict no other injuries on him or his mother have been noted. So far as the deceased is concerned, in addition to the fatal burns sustained by her, a 'cut open drip wound 2cms over lower inner of left leg' has been recorded. Could this have been caused as a consequence of her resisting the dousing of her clothes with kerosene oil and/or igniting her clothes; or because of her futile efforts to stave off against her assailant/s. Unfortunately, this has escaped the attention of

the prosecution and no Explanation or opinion has been sought for or obtained from any person. The fact that it has been described as a 'drip wound' leads to the inference that it was very fresh. Since the prosecution has not delved into this aspect, we have no alternative but to ignore this significant and remarkable feature.

22. According to the Postmortem Report the other injuries found on the deceased were - '(1) Superficial burns present all over body except patches over scalp; lower front of abdomen; perineum; left buttock and inner part of right buttock. Approximate area of burns about 90%. Cuticle peeled off at places, base reddened. Singeing of tips of scalp hair, eyelashes and eyebrows present. No smell of kerosene at present. (2) Cut open drip wound 2 cm over lower inner of left leg.

Internal Examination:- Abdomen

Stomach contains 50 ml. of liquid material mixed with soot particles walls-NAD

Small and large intestines-NAD

Liver-NAD wt.1080 gm

Spleen congested wt.80 gm

Kidneys both congested wt.80 gm each

Uterus-NAD

Bladder : Empty

Pelvis : NAD

Neck and Chest

Neck structures intact.

Trachea :Soot particles present over wall.

Lungs : Both congested wt. - Rt.340 gm., lft. 250 gm

Heart:NAD wt. 240 gm

Head

No fracture of skull bones

Brain and membranes - slightly congested wt. 1360 gm.

Opinion

Death in this case was due to shock and toxemia due to burns by fire.'

23. The following questions and answers in the course of examination of the accused persons Vijay Kumar Arora and Beena Arora under Section 313 of Cr.P.C. are, in our opinion, of far-reaching consequences -

Vijay Kumar Arora

Q. It is further in evidence against you that on the same night at 2.30 AM or 3.00 AM you asked PW Ramnath to come to your house in Karampura, Moti Nagar. What have you to say?

Ans. I was asleep. I was awoken by the shrieks of Smt. Shashi. I came out in the veranda and saw her in flames. I tried to extinguish the fire by my hands & water. My hands were injured in this process. I called a doctor and rang up the house of my father-in law. I do not remember the exact time. I told the family of my father-in-law to come.

Q. You have heard the entire evidence recorded in your presence. What have you to say?

Ans. Shashi herself told me that She caught fire when she had gone to the stove to boil milk. She told me that the stove 'bhabak gaya'. I will file our written statement if so advised.

Q. It is further in evidence against you that in your house there was a gas stove in working order along with full gas cylinder and half gas cylinder. What have you to say?

Ans. It is correct that the gas stove could be burnt only with the help of a tool.

Beena Arora

Q. It is further in evidence against you that in your house you had a gas stove with one full cylinder and another almost half cylinder with gas stove working order. What have you to say?

Ans. My son has already answered the question.

Q. It is further in evidence against you that you and your son had given beatings to Smt. Shashi on 27.2.1983. What have you to say?

Ans. It is incorrect.

24. The tragic death of Shashi could have been an accident or a suicide or a homicide. We shall examine the possibility of suicide first. Mr. Mathur has read out portions of the Personal Diary maintained by the deceased in a vain attempt to contend that suicide cannot be ruled out. The passages read thus-

Year 1983 has brought drastic changes in my life -

(1) I am mother of a baby girl.

(2) Relation between me and my in laws are not that good as they were previously.

(3) Relation between me and my husband are also not good and under such conditions life has become really monotonous and hell.

Every day when me and my husband meet we really do not have same feelings for each other. I think that he has almost stopped loving me and this very idea has been inflicted in my mind by his behavior only - his way of thinking has almost changed.

Under such circumstances - I only think of (Death) - means that my end is nearby. May be in this year only..

Now all my desires have vanished. I do not know where. We were never together on any of our first functions after marriage. May be due to any circumstances. Now I have no grudges for anything.

I am 25 years old. I got married on 30th Jan' 82, Saturday. Only one year of my married life has crossed and see the changes in my life. I am a woman and I think on this earth every woman wants to be with her husband -at least, on functions. My Viju never cared for my these feelings..After killing my heart again and again now the situation has come to kill myself. It seems that now there is nobody with me - my life has become like a lonely bird. There were so many hopes, all of them have vanished..I thought that the life of a single individual is better, at least he is not a servant of anybody. The situation has come to such an extent to take the divorce..My parents had married us on our (me and Vijay) will and I got married with him because he used to say that you are my first love and I love you very much - his this sentence that I have developed a liking for you has ruined my life. I got nothing except tears. First tears and second wait have become part of my life. When I denied to call my father they started pushing me and my father-in-law gave me a slap.

25. In our view these words do not disclose only suicidal tendencies. On the contrary they articulate the resolve of the deceased to make a life for herself assuming that her marriage has failed. What speaks out loudly is that the relations between Shashi and her husband and members of his family were extremely troubled. 'Mamta' usually has a strength incomparable to any other, and when the recent birth of their daughter is kept in perspective, the theory of suicide pales as a possibility; the extracted passages are indicative of Shashi's resolve to make a life for herself away from her husband and her in-laws. It is in evidence that the Appellant/Convict wanted to leave the infant daughter with Shashi's parents and that the latter refused. Even though the intention of the Appellant/Convict to murder his wife cannot fairly be inferred from this incident, it certainly militates against the suicide theory since Shashi, in the normal course, would have left her

daughter with her own family if she was contemplating to put an end to her life herself. Maternal instincts dictate a course of action which runs counter to Mr. Mathur's submissions. This question has been discussed in *Mulakh Raj v. Satish Kumar* : 1992 CriLJ1529 . Their Lordships have observed that even if the letter in question indicated the bent of the deceased towards committing suicide, she would have changed her mind on reflecting upon her infant son. In any event, the Appellant/Convict has not put forward this possibility since he has spoken only of the accidental death of his wife. This important factor cannot be ignored.

26. There are several features, factors and circumstances pointing towards the guilt of the Appellant/Convict. Firstly, the house, which is only 10 feet in width, is on the corner and open on three sides. Hence shrieks, if any, would perforce have been heard in the neighborhood. Medical opinion is to the effect that in burn cases the pain is so excruciating as to make it impossible for the deceased to suppress screams even if death is suicidal. The Appellant/Convict has answered in the Section 313 Examination that - 'I was asleep. I was awakened by the shrieks of Smt. Shashi....' However, in similar circumstances the sisters-in-law of the deceased, had stated, on 6.4.83 at 2.15 A.M., as there was noise in the home, we saw that our brother, Vijay Arora, was trying to extinguish the fire in the clothes of the deceased; we went outside where neighbours had also gathered on hearing the noise. It is indeed regrettable that the prosecution has not examined any of the neighbours on this vital aspect of the incident, since if no screams had been heard in this densely built-up and populated area, it would have become impossible to accept that death was either accidental or suicidal; the screams would have had to have been muffled by some person/s. On the other hand the neighbour who had allegedly collected or gathered outside the house could have been produced along with the other defense witnesses. Furthermore, no suicide note has been discovered. What would have prompted Shashi to put an end to her life thereby leaving her infant daughter motherless? The Personal Diary speaks of her marriage becoming lovelorn as well as slapping by her father-in-law. Shashi's mother and sister, PW4 and PW3 respectively, have deposed that she had told them of physical assault by the Appellant/Convict; that both of them had been shown the subsequent bruises. In such a situation it is simply unthinkable that the deceased would have proffered a lie as to the cause of her death. Yet the

Appellant/Convict has stated that the deceased had told him that she had caught fire when the stove 'bhabhak gaya', i.e. briefly broke into flames. The CFSL Report is to the effect that the kerosene oil stove was in normal working order. Had the deceased committed suicide she would indubitably have told her husband that his lack of love for her was the reason for her having taken her own life. This leads to the conclusion that the statement of the Appellant/Convict was a falsehood, with repercussions which cannot but be damning for him, especially in view of the discussion of the law in Trimukh Maroti Kirkan. The untenable version of the incident offered by the Appellant/Convict thus constitutes a chain of circumstances strongly indicative of his culpability.

27. Secondly, the injuries sustained by the deceased could not have been the result of an accident (bhabhak jane se); on the contrary it could have resulted from the murderous assault on her. The Postmortem Report pertaining to external injuries reads thus:

External Injuries:

(1) Superficial burns present all over body except patches over scalp; lower front of abdomen; perineum; left buttock and inner part of right buttock. Approximate area of burns about 90%. Cuticle peeled off at places, base reddened. Singeing of tips of scalp hair, eyelashes and eyebrows present. No smell of kerosene at present.

(2) Cut open drip wound 2 cm over lower inner of left leg.

Internal Examination:- Abdomen

Stomach contains 50 ml. of liquid material mixed with soot particles walls-NAD

Small and large intestines-NAD

Liver-NAD wt.1080 gm

Spleen congested wt.80 gm

Kidneys both congested wt.80 gm each

Uterus-NAD

Bladder : Empty

Pelvis : NAD

Neck and Chest

Neck structures intact.

Trachea :Soot particles present over wall.

Lungs : Both congested wt. - Rt.340 gm., lft. 250 gm

Heart:NAD wt. 240 gm

Head

No fracture of skull bones

Brain and membranes- lightly congested wt. 1360 gm.

Opinion

Death in this case was due to shock and toxemia due to burns by fire.

28. The learned ASJ has dwelt in detail on the use of the word 'superficial' and has found its use to be inappropriate. We are in entire agreement with the reasoning of the Trial Court inter alias for the reason that the deceased had suffered third degree burns which cannot be categorised as superficial. The Trial Court has further come to the conclusion that these injuries could have been sustained only in a conflagration and that too in a closed area. The learned ASJ has taken note of the fact that human tendency would have been to run into the open, which in this case was at the end of the passage which is 12x3 feet in width.

29. A scanned copy of the passage showing its dimensions is as follows:

30. The investigation has been woefully and in all likelihood willfully substandard, with a view to help the Appellant/Convict. The learned ASJ has with justification

summed up that the investigation was conducted with 'utter dishonesty'. There was obviously sound reason to transfer the case to the Crime Branch on 16.4.1983. So far as the passage is concerned, where according to the Appellant/Convict the deceased had received extensive burn leading to her death, blackening through smoke and soot particles should have been visibly present. In a fire of this volatility it is most unlikely that the towel hanging in the passage should have been only partially burnt. Furthermore, assuming that the deceased had actually got up, within two hours of going to sleep, for preparation of milk, it is implausible that she would have attempted to light a kerosene stove in this dingy and cramped passage, used for washing of clothes and utensils, rather than in the adjoining kitchen. We are in complete agreement with the learned ASJ that the deceased would have used the kitchen rather than passage for heating milk. The IO has dismally failed to return any finding as to whether he had inspected every other part of the residence, for example the toilet in the rear courtyard which is 6x4 feet for evidence of a fire having erupted. We mention this factor because of the reason that if the deceased was not done to death in this passage, the obvious question that would arise would be where else could this unfortunate incident have taken place. Since the Appellant/Convict has stated that the deceased had caught fire in the passage, and since in our opinion this could not have been the location, the Appellant/Convict has tried to mislead the prosecution. Rather than discharge the burden of offering an Explanation for the events which occurred in the close confines of his own residence, where no outsider had entered, he has proffered a false story which points to his guilt.

31. Thirdly, the unrebutted testimony of the deceased's father, PW1, mother PW4, sister PW3 is that the deceased along with her husband and daughter had left her parental home between 11:00 P.M. and 11:15 P.M. on 5.4.1983. The Trial Court has concluded that they could not have gone to sleep before 11:30 P.M. Presumptions under Section 114 of the Evidence Act have been drawn to conclude firstly that the baby girl would have been fed before going to sleep and would not have required another feed within two hours. The deceased, being a well-educated lady, would have been breast-feeding her child of three months, thus making it unnecessary to prepare artificial feed. We agree with the learned ASJ that these circumstances also go against the Appellant/Convict. We also find

it not just a little extraordinary that no feeding bottle has been found at the place of incident.

32. Fourthly, according to the Appellant/Convict he was told by the deceased that she had sustained her burns because the kerosene oil stove had burst into a vaporised flame which could not have been more than a couple of seconds in duration as the words 'bhabhak jane se' convey. It is inconceivable that the deceased should have been engulfed in 90 per cent burns, that too despite the fact that she was wearing a cotton night gown, without the kerosene oil stove having caught fire and exploding. The CFSL Report is to the effect that the kerosene oil stove was in normal working order.

33. Fifthly, a gas connection was available in the kitchen. One full cylinder as well as a partially used cylinder were found in the kitchen. It is in evidence that the gas stove could be operated with the help of pliers, presumably for the turning of nobs. There was half used cylinder in the kitchen which is indicative of the fact that this apparatus was in regular use. PW5, Shri Kundan, has deposed that he visited the site on 8.4.1983 and found the apparatus to be in working order with no gas leakage. The Witness, however, admitted that he had not mentioned the fact of the faulty regulator and the need of pliers to operate the gas stove to the Police. Even if milk had to be prepared, in our opinion it would have been much easier to operate the gas connection rather than the comparatively painstaking, tedious, smelly and noisy operation of igniting a kerosene oil stove. No satisfactory Explanationn has been offered by the Appellant/Convict or his mother under Section 313 of the Cr. PC. No kerosene oil containers have been located. All these factors overwhelmingly indicate that the kerosene oil stove was planted on the site in a vain attempt to hide the homicidal death.

34. Sixthly, the deceased, Shashi was wearing a cotton night gown, of which only a small patch was found remaining on her arm. A brief burst of flames (bhabhak jana) can, at the most, cause first degree burns and could not be sufficient to totally and completely ignite cotton garments. The MLC Report records that the clothes of deceased were smelling of the kerosene oil. This clearly shows the presence of kerosene oil on the clothes and body of the deceased which could not

be the result of 'bhabhak jana', as per the Explanation proffered by the Appellant/Convict. Anyone who has operated a kerosene oil stove will know that the brief inflammation that is sometimes caused during the initial ignition of the stove is because of excess oil escaping through the feeder hole which excess gathers in a small circular receptacle or section well above the tank.

35. A scanned copy of the stove burner is as follows:

36. Seventhly, the deceased was brought to the Hospital by her husband, Appellant/Convict and Dr. S.K. Bindal. In his statement, Dr. S.K. Bindal has admitted that the Appellant/Convict and he were childhood friends. Their long friendship has been denied by the Appellant/Convict in these words:

Q.13: It is further in evidence against you that you along with your friend Dr. Satish were present there and you took PW Ram Nath and his son Ashok to the Ward and found Smt. Shashi lying unconscious there. What have you to say?

Ans.13: Dr. Satish is a doctor nearby our house. He was called to the house as I have stated above and we went to the hospital. Dr. Satish is not my friend but I am familiar with him. I had taken Shri Ram Nath my father-in-law to Shashi's bed in the Ward where she was unconscious.

This denial is of significance because although several defense Witnesses have been examined, Dr. Satish is conspicuous by his absence even though his testimony would have been of great importance. So far as the prosecution is concerned, it is understandable that they may not have considered it expedient or prudent to produce Dr. Satish since he has made a statement to the effect that the deceased had stated that she got burns while preparing milk. Failure to produce a witness of this nature can only lead to the conclusion that defense were apprehensive of his capacity, capability to sustain examination or to resile from the statements favorable to the Appellant/Convict.

37. Eighthly, reliance by the defense on an alleged statement of the deceased that she sustained her injuries because of 'bhabhak jana' of the stove is not trustworthy for the simple reason that the deceased was in extreme pain and was surrounded

by the very persons who are suspected to have perpetrated the assault on her. The Appellant/Convict has stated that he went to fetch Dr. Satish along with his brother. This travel to and fro would have taken at least fifteen minutes, during which time the deceased was surrounded only by her in-laws. It has not been seriously controverted that relations between the deceased and her in-laws as well as her husband, far from being normal, were severely strained. Thereafter, she was admitted to the LNJP Hospital at 2:45 A.M. which means that almost one hour would have elapsed (if not more) since she suffered her burns. Although the parents of the deceased were informed of this incident, there was confusion both in regard to the time when they were spoken to as also to which hospital she had been admitted. The parents of the deceased had gone on a wild goose chase to Willingdon Hospital because, according to them, they were informed by Appellant/Convict to this effect; thereafter, they even visited the house where the incident took place but the sister could not inform them to which hospital the deceased had been taken; that after dropping the mother of the deceased back home, the father and the brother of the deceased thereafter left for LNJP Hospital at 5:00 A.M. therefore, even if a statement was made by the deceased that her death was caused by an accident, it would have been the result of fear, being alone with her in-laws family for almost three hours. We, therefore, discount any significance in the so-called statement in the MLC attributed to the deceased. The learned ASJ has gone to the extent of opining that the Appellant/Convict had put the parental family of the deceased on a wrong track, and we are in agreement with this opinion.

38. Ninthly, the injuries sustained by the Appellant/Convict are not indicative of his alleged efforts to extinguish the fire on the body of the deceased. He has sustained burns on the dorsum of his right hand only. Keeping in perspective the ninety per cent third degree burns suffered by the deceased, these injuries are so superficial and insignificant as to disclose failure to take any steps to save the deceased. On the contrary these would have been sustained if the palms were on the body of the deceased or the Appellant/Convict, thereby shielding them from getting injured.

39. Tenthly, PW1 has specifically deposed that dowry items given at the time of marriage were of the value of Rupees Seventy Five Thousand and that a demand for a gold set had been raised at the time of the birth of the daughter but a gold chain was given instead. When a demand for a fridge had been made, he had paid a sum of Rupees Four Thousand to Appellant/Convict. In Cross-examination he has stated that a demand for a scooter had also been made. The right of Cross-examination is an integral and inalienable feature of the defense, because it is a tool or method by which the falsity of statements made can be brought to the surface. Mere facile suggestions that these statements are incorrect, without any more, serves no useful purpose. The nature of the Cross-examination of the Father, PW1, Sister PW3 and the Mother, PW4 as in fact all other witnesses routinely only gives these suggestions which have been categorically and forthrightly negated by the witnesses. Their testimony has not been dainted in any manner. Apart from physical beatings given to the deceased not only by the Appellant/Convict but also by her father in-law must be believed as also demands for a scooter and fridge. PW1 has deposed that he had paid a sum of Rupees Four Thousand to the Appellant/Convict in response to the claim for a fridge. There is thus ample evidence on record to provide the reason or motive for the Appellant/Convict and members of his family to conspire to murder the deceased.

40. The answers of Appellant/Convict as well as the co-accused, mother, namely, Smt. Beena Arora, do not shed any light on their possible innocence; on the contrary the answers are evasive. We have extensively quoted from Trimukh Maroti Kirkan to show that in cases, such as the present, the Appellant/Convict as well as members of his family are obliged to offer a reasonable Explanationn of events indicative of their innocence. Rather than doing so, the Appellant/Convict has put forward a story of the deceased having caught fire by accident, which, in our opinion, is totally false.

41. For all these manifold reasons as well as other grounds which have weighed in the mind of the learned ASJ in convicting the Appellant/Convict we affirm the impugned Judgment and Sentence. There is adequate and overwhelming circumstantial evidence indicating that the deceased, Shashi, had met a homicidal death. We have arrived at this conclusion even though we have discounted the

making of dying declarations.

42. As has already been discussed by us in detail it is open to the Appellate Court to assign a culpable role even to a person who has been acquitted by the Trial Court. In our view, the Appellant/Convict may have been assisted by his mother and/or any other member of his family in the commission of the dastardly act of putting the deceased on fire. However, since the State has not preferred any Appeal against the acquittal, we need not go any further into the matter other than holding that the Appellant/Convict had committed the act of burning the deceased with or without the assistance of members of his family.

43. Appeal is dismissed with no order as to costs.

44. During the pendency of this Appeal the Appellant was enlarged on bail. His Bail Bonds are cancelled. He is directed to be taken into custody and sent to jail to serve out his remaining sentence.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com