

Bhim Singh and ors Vs State

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Court : Delhi

Decided On : Aug-18-2010

Judge : Mr. Badar Durrez Ahdmed ; Mr. V.K. Jain. J J

Appeal No. : CRL.A. 997/2009 ; CRL.A. 1042/2009

Appellant : Bhim Singh and ors

Respondent : State

Advocate for Def. : Ms Richa Kapoor, Adv.

Advocate for Pet/Ap. : Mr K.B. Andley, Sr , Mr M.L. Yadav. Adv.

Judgement :

1. Whether Reporters of local papers may be allowed to see the judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in Digest? Yes

ORDER

1. These appeals are directed against the judgment dated 30th November 2009 and Order on Sentence dated 3rd December 2009, whereby the appellant Trilok Chand was convicted under Section 302 and 498-A of IPC and was sentenced to undergo imprisonment for life and to pay fine of Rs 15,000/- or to undergo R.I. for

six months in default under section 302 and was further sentenced to undergo R.I. for three years and to pay fine of Rs 5000/- or to undergo R.I. for six months in default under Section 498-A IPC. The appellants Roshan Lal, Premwati and Bhim were convicted under Section 304-B and 498-A IPC and were sentenced to undergo R.I. for ten years each and to pay fine of Rs 10,000/- each or to undergo R.I. for six months each in default under Section 304-B of IPC and further sentenced to undergo R.I. for two years each and to pay a fine of Rs 5000/- each or to undergo S.I. for six months each in default under Section 498- A thereof. The sentences were directed to run concurrently.

2. The appellant Trilok Chand is the husband of deceased Deepali, whereas the appellants Roshan Lal, Premwati and Bhim are her father-in-law, mother-in-law and brother-in-law (younger brother of the deceased), respectively. On 28th November 2005, deceased Deepali was brought to JPN hospital, at about 10.50 P.M., by the appellant Trilok Chand, with burn injuries. In the dying declaration recorded by the SDM, Deepali alleged that in the evening of 28th November 2005, when her father-in-law, mother-in-law and brother-in-law were also present in the house, her husband held her, poured kerosene on her and ignited fire, using a matchstick. Thereafter, all of them went out. She was then brought to hospital by her husband and her father-in-law. She also alleged that the husband used to beat her and she was under treatment. She was not aware of the specific ailment she was suffering from, but stated that her hands and legs used to bend, on account of that ailment. The father of the deceased was also examined by the SDM on the same day. He alleged that his son-in-law, and the Uncle and Aunt of his son-in-law started beating the deceased immediately after her marriage to Trilok. Her father-in-law also sometimes used to verbally abuse her after taking liquor. He claimed that though Deepali never complained to him about demand of dowry, she used to make such complaints to her mother.

3. The case of the prosecution in a nutshell is that deceased Deepali, who was murdered by the appellant Trilok, was harassed and treated with cruelty, in connection with demand of dowry, by her father-in-law, mother-in-law and brother-in-law, soon before her death. The appellant Trilok Chand was charged under Section 302 of IPC. All the appellants were also charged under Section 304-B and

498-A IPC read with Section 34 thereof.

4. The prosecution examined 24 witnesses in respect of its case. One witness was examined in defence.

5. PW-9 K.K. Sharma is the SDM, who recorded the statement of deceased Deepali on 29th November 2005 at JPN hospital. He stated that on 29th November 2005, while working as SDM, Patel Nagar, he received a call from Police Post Ranjit Nagar, regarding burns received by Deepali, wife of Trilok Chand, who was admitted in JPN hospital. On reaching the hospital, he consulted the concerned Doctor who declared the injured fit for statement. He thereupon recorded the statement Ex. PW9/A, which bears thumb impression of the deceased at point B. During cross-examination, he stated that no other person was present at the time of recording the statement of Deepali, though it was possible that her mother came inside to help in taking her thumb impression on the statement. He also stated that the statement was read over by him to Deepali.

6. PW-3 Prem, mother of the deceased, stated that when she reached the hospital along with her husband, she told her that Trilok Chand, Roshan Lal, Premwati, Bhim Singh and Chhotey Lal had confined her in a room, burnt her, shut the door from outside and left. PW-4 Sh Rajender, father of the deceased stated that when he reached the hospital, she told him that her husband accused Trilok Chand poured kerosene on her in her bedroom and set her on fire and that accused Roshan Lal, Premwati and Bhim were also present in the house at that time.

7. We thus have before us two identical dying declarations. One made by the deceased to the SDM, which was reduced into writing and on which thumb impression of the deceased was obtained by the SDM, and the other made to PW-4 Rajender, who visited her in the hospital. Even PW-3 Smt Prem, mother of the deceased, corroborates their dying declarations, to the extent that the appellant Trilok Chand had burnt her in her room, though she has gone far ahead of the deposition of her husband, by claiming that the deceased had also implicated the appellants Roshan Lal, Premwati and Bhim Singh as well as Chhotey Lal and Roshni, Uncle and Aunt, respectively of her husband, in her burning.

8. The dying declaration recorded by the SDM was challenged by the learned counsel for the appellant on the ground that it does not bear an endorsement from the doctor, certifying that the deceased was fit for making statement. It has also been assailed on the ground that the deceased being a patient of epilepsy, and having burns to the extent of 95- 100%, could not have been fit to make statement either to the SDM or to her parents.

9. We will first examine the contention on the requirement of obtaining a certificate of fitness from the Doctor, before recording a dying declaration. In *Paparambaka 'Rosamma & ORs vs State of Andhra Pradesh* 1997 (7) SCC 695 the dying declaration in question had been recorded by a Judicial Magistrate and the Magistrate had made a note that, on the basis of answers elicited from the declarant to the questions put, he was satisfied that the deceased was in a fit disposing state of mind to make a declaration. The doctor had appended a certificate to the effect that the patient was conscious while recording the statement. Yet the court came to the conclusion that it would not be safe to accept the dying declaration as true and genuine and that it was made when the injured was in a fit state of mind, since the certificate of the doctor was only to the effect that the patient was conscious while recording the statement. However, in a later decision *Koli Chunilal Savji & Another vs. State of Gujarat*: 1999 (9) SCC 562, it was held that the ultimate test is whether the dying declaration can be held to be a truthful one and voluntarily given. It was further held that before recording the declaration the officer concerned must find that the declarant was in a condition to make the statement in question. The court relied upon the earlier decision in *Ravi Chander vs. State of Punjab*': 1998 (9) SCC 303, wherein it had been observed that for not examining the doctor, the dying declaration recorded by the Executive Magistrate and the dying declaration orally made, need not be doubted. The Magistrate being a disinterested witness and a responsible officer and there being no circumstances or material to suspect that the magistrate had any animus against the accused or was in anyway interested for fabricating a dying declaration, question of doubt on the declaration, recorded by the magistrate does not arise.

10. The apparent conflict in the aforesaid two decisions, both of which were three Judges Bench decisions, came to be resolved by a Constitution Bench of the Supreme Court in *Laxman vs State of Maharashtra* 2002 VII AD (SC) 1. The Constitution Bench inter alia held as under:- "The court insists that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The court, however has to always be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. The court also must further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Normally, therefore, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eyewitnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately hold the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise. We have no hesitation in coming to the conclusion that the observations of this court in *Paraprambika Rosamma & ORs vs State of Andhra Pradesh* 1999 (7) SCC 695 to the effect that "in the absence of a medical certification that the injured was in a fit state of mind at the time of making the declaration, it would be very much risky to accept the subjective satisfaction of a magistrate who opined that the injured was in a fit state of mind at the time of making a declaration" has been too broadly stated and is not the correct enunciation of law.

11. In *Sukanti Moharana v. State of Orissa*: JT 2009 (9) SC 697, dying declaration of the deceased was recorded by a lecturer in the Surgery Department of the hospital where she was taken. She also made an oral dying declaration to her relatives. The dying declaration recorded by the doctor was challenged on the

ground that it did not contain any certificate that she was in a stable and fit mental and physical condition to make such a statement. The dying declaration in that case also did not contain the signature or thumb impression of the deceased. However, there was an endorsement on the Bed Head Ticket which indicated that as per the history given by the deceased herself the treating physician had endorsed that it was a case of homicidal burn due to ignition caused by spilling of kerosene. Rejecting the challenge it was held by Supreme Court that the ultimate test was as to whether dying declaration was truthful or voluntary.

12. In *Nallapati Sivaiah v. Sub-Divisional Officer, Guntur, A.P.*: AIR 2008 SC 19, the Supreme Court reiterated that there is no requirement of law that the dying declaration must necessarily contain a certification by the doctor that the patient was in a fit state of mind especially when the dying declaration was recorded by a Magistrate. It was further held that it is the testimony of the Magistrate that the declarant was fit to make statement that gains importance and that reliance can be placed upon such a declaration, even in the absence of the doctor, provided the court ultimately holds the same to be voluntary and truthful.

13. Thus, the settled legal proposition with respect to a dying declaration is that though it is not necessary to obtain a certificate or endorsement from a doctor about fitness of the maker to make a statement nor is it necessary that a doctor should be present at the time the dying declaration is recorded, the Court needs to ensure that the deceased was not tutored or prompted before she made the statement and that the statement made by her was not a product of his/her imagination. The Court further needs to satisfy itself, from the evidence produced before it and other facts and circumstances of the case that the deceased, at the time she made the statement was in a fit state of mind and was making a voluntary statement. If this is so, there is no rule of law which requires any corroboration of the dying declaration and it is legally permissible and open to the Court to base the conviction solely upon such a dying declaration. As observed by Supreme Court in *Nanahau Ram & Anr. vs State of M.P.*: AIR 1988 SC 912 normally the Court in order to satisfy whether the deceased was in a fit medical condition to make the dying declaration looks up to the medical opinion, but where the eyewitnesses state that the deceased was in a fit and conscious state to make the declaration,

the medical opinion cannot prevail over it.

14. Though the dying declaration recorded by a Magistrate by itself is not a proof of its truthfulness, it is indeed entitled to a great weight and normally needs to be accepted, where it is found acceptable after passing the test of scrutiny by the Court. The ultimate test in every case would be as to whether the dying declaration can be said to be trustful and voluntarily made.

15. In the present case, PW-9, Sh. K.K. Sharma SDM has specifically stated that he had consulted the concerned Doctor, who had declared the injured Deepali fit for statement. Though there is no written endorsement to this effect, on the dying declaration recorded by him, we see no reason to disbelieve the testimony of this, otherwise, independent witness, who was acting in performance of his official duties as a public servant in recording the dying declaration made by the deceased Deepali. He also took the precaution of the reading over the statement to Deepali and obtaining her thumb impressions on it. The appellants do not allege any animus on his part to them. It has also come in the deposition of PW-20 ASI Mahender Singh that the doctor was also present when the statement of Deepali was recorded. On a careful scrutiny of the evidence, the trial court was satisfied that the deceased Deepali was in fit state of mind to make the dying declaration recorded by the SDM. We see no reason to take a contrary view in this regard.

16. As regards the possibility of tutoring, it has come in the deposition of PW-20 that the parents and brother of Deepali were not present when her statement was recorded. According to the learned SDM, the mother of the deceased could possibly have come inside to help her in taking thumb impression. This part of his statement also indicates that the mother of the deceased was not present, when her statement was recorded by the SDM, though she was present in the hospital, at that time. We are, therefore, satisfied that the dying declaration made by the deceased was not a product of any tutoring or prompting on part of any of her family members

17. Another circumstance which rules out the possibility of dying declaration being a product of tutoring by the family members of the deceased is that in the dying declaration the deceased did not attribute any overt act to any accused, other than

the appellant Trilok Chand. This circumstance needs to be viewed in the light of the fact that both the parents of the deceased have tried to hold other appellants as well, for the death of their daughter. Had the dying declaration been a product of tutoring, the burning would have been imputed by the deceased not only to her husband Trilok Chand, but also to the other appellants or at least she would have imputed cruelty or harassment to the other appellants.

18. As noted earlier, the dying declaration recorded by the SDM finds corroboration from the oral dying declaration made by the deceased to her father. We, therefore, find no ground or circumstance to reject the dying declarations made by the deceased.

19. Admittedly, the appellant Trilok Chand was present in the house when the incident took place. When he was examined in hospital, no burn injuries were found on his person. It shows that no attempt was made by him to save the deceased, using his hands for the purpose. Had he made such an attempt, which a husband is expected to make on finding his wife burning, some burn injuries would have been sustained by him in the process. This indicates that he himself had poured kerosene on her and that is why he made no attempt to save her.

20. It was pointed out by the learned counsel for the appellants that according to PW-1 Mohd Saleem, a neighbour of the deceased, when he came out of his room and noticed smoke coming out of the adjacent room, he saw the appellant Trilok Chand coming upstairs and the door of the room from which smoke was coming, was bolted from inside at that time. The witness further stated that Trilok Chand pushed the door with force and opened it. However, in his statement to the police under Section 161 of Cr.P.C., this witness did not claim that the door of the room was found bolted from inside. Had the door been bolted from inside, he would definitely have disclosed this fact to the police. We are, therefore, not inclined to believe this part of the deposition of PW-1 Mohd Saleem. Moreover, there is no evidence of the bolt of the door having been found broken or any sign of violence having been found on the door, when the Investigating Officer reached the spot. During cross-examination of PW-20 ASI Mahender Singh, who went to the spot, no suggestion was given to him that the bolt of the room was found broken from

inside or there was any mark of the door having been opened by use of force. No such suggestion was given to PW-9 Sh. K.K. Sharma, SDM, who also had visited the place of occurrence and prepared the inquest proceedings Ex. PW 9/C.

21. Referring to the report of DW 1 Dr. Sameer Sood, to the effect that the deceased was having two small cysts in the brain, with eccentric mural nodules suggestive of neurocystercosis, which means that the patients was having parasitic infection in brain, which gives rise to epilepsy, it was contended by learned counsel for the appellants that the deceased committed suicide on account of her physical suffering. A perusal of the scan Exhibit DW1/A would show that it pertains to 7th March, 2003 when the deceased was not even married. There is no evidence before us that the deceased was so fed up with the epilepsy she was alleged to be suffering from, that she would commit suicide. Admittedly, the deceased was four months pregnant when she died. A woman, who is pregnant, is not likely to commit suicide on account of a sickness, since she would be the last person to destroy the child in her womb by taking such a drastic step. It is extremely difficult for a mother to take such a drastic step, unless she is left with no other option. We find no such compelling reason for the deceased to take such a step.

22. The appellant Trilok Chand, therefore, has rightly been convicted under Section 302 of IPC and his conviction is maintained accordingly.

23. Coming to the charge under section 498-A and 304-B of the Indian Penal Code, in order to succeed in charge under Section 498-A of IPC, the prosecution is required to prove that the accused subjected the deceased to cruelty, which has been defined to mean willful conduct which is of such a nature that it is likely to drive the woman to commit suicide or cause grievous injury or danger to her life or health or harassed her, is with a view to coerce her or any person related to her to meet any unlawful demand for any property or valuable security, or is on account of failure by her or any person related to her, to meet such demand. The expression cruelty takes within its sweep both mental as well as physical agony and torture.

24. As held by the Supreme Court in Shanti vs. State of Haryana: AIR 1991 SC 1226 before a person can be convicted for the offence under section 304-B of the Indian Penal Code, the prosecution must prove the following:

- (i) The death of a woman must have been caused by burn or bodily injury or otherwise than under normal circumstances;
- (ii) Such death must have occurred within seven years of her marriage;
- (iii) Soon before her death, the woman must have been subjected to cruelty or harassment by her husband or by relatives of her husband;
- (iv) Such cruelty or harassment must be for or in connection with demand for dowry;
- (v) Such cruelty or harassment is shown to have been meted out to the woman soon before her death.

25. Cruelty postulates such a treatment as would cause a reasonable apprehension in the mind of the wife that her living with the husband will be harmful and injurious to her life. The word harassment has not been defined in Section 498-A IPC, but dictionary meaning of the word harassment is to subject someone to continuous vexatious attack, questions, demands or other unpleasantness.

26. In the case before us, PW 3 Prem stated that her daughter was given beating by Trilok, Roshan Lal, Prem Wati, Roshni, Chhotey Lal and Bhim, for dowry demands, and they used to demand money from her. She further stated that they used to give Rs 2,000-4,000 according to their capacity, from time to time. She also claimed that her daughter had told her that accused Trilok Chand had demanded Rs3-4 lacs from her for purchasing a house. The witness also stated that in November, 2005 her daughter came to her house, stayed for 2- 3 days and asked her to pay some money, since her husband Trilok Chand wanted to purchase a house and she had given Rs3,000-4,000/- to her and sent her back. She also assured her to make some arrangement for money and pay in future. According to her, though her daughter was not willing to go back to the

matrimonial house without money, she made her understand that she would give her the money in future. She also claimed that after two days her daughter made a telephone call to her complaining that she was not given food by accused persons for two days. However, the witness was confronted with her statement under section 161 of Cr.P.C. (Exhibit PW 3/DA), where she did not state that accused persons used to beat her daughter for demand of dowry. It was also not stated by her to the police that her daughter used to visit her frequently and she used to pay Rs 2,000-4,000/- to her from time to time. She also did not state to the police that Trilok Chand had demanded Rs 3-4 lacs for purchasing a house. She also did not tell the police that her daughter had visited her in the month of November, 2005 and that she had paid Rs 3,000-4,000 to her at that time. She also did not tell the police that Deepali had told her on telephone that she was not given food for two days.

27. The above referred facts were so important and so crucial that the witness could not have omitted them while giving statement to the police. These are not minor omissions on peripheral matters and form the very basis of the conviction of the appellants under Section 498-A and 304-B of the Indian Penal Code. Hence, considering that the witness did not state these material facts to the police and also considering the fact that her statement was not recorded by the Sub-Divisional Magistrate, despite the fact that he was told by the father of the deceased that the deceased used to complain to his wife about demand of money, we are not inclined to believe her deposition that the deceased used to be given beatings by all the appellants, they used to demand money including Rs 3-4 lacs for purchasing a house and that the parents of the deceased used to pay money to her from time to time. We are also not inclined to believe that the deceased had gone to live with her parents in November, 2005 and had complained about demand of money for purchase of a house. In any case the demand alleged to have been made in November, 2005 for purchase of house was attributed by the witness only to the appellant Trilok Chand.

28. PW 4 Rajinder, father of the deceased, stated that after few days of marriage, the accused persons started harassing his daughter for want of dowry. He also stated that his daughter had told him that her husband Trilok Chand and her

father-in-law accused Rohan Lal were asking for an amount of Rs4-5 lakhs from her, in dowry, for purchasing a house. He claims to have arranged a sum of Rs5,000/- and given it to her daughter while expressing his inability to arrange the huge amount demanded by her in laws. During cross-examination by the learned Addl. Public Prosecutor, he admitted the suggestions that the uncle and aunt of Trilok Chand, namely, Chhotey Lal and Roshni, also used to harass and taunt his daughter for want of dowry and that whenever his daughter came to the parental house, they sent her back on the assurance given by the accused persons not to repeat similar acts. He also admitted that on the eve of Bhai Duj she told him that all the four accused persons, present in the court, had demanded money. However, during cross-examination by the appellants, he was confronted by the statement given to the police Exhibit PW 4/E wherein he had specifically stated that deceased Deepali never complained to him regarding dowry demand. Thus, the deposition of this witness in the court regarding demand of money, being totally contradictory to his statement to the police during investigation, is obviously an afterthought and cannot be believed. Had there been any demand of money, he would not have made a positive statement to the police that his daughter had never complained to him regarding dowry demand. In fact, even in his statement to the SDM Exhibit 4/DA this witness specifically stated that his daughter Deepali never complained to him about dowry. Thus, his deposition in the Court alleging demand of dowry is contradictory not only to the statement made by him to the police, but also to the statement made by him to the SDM.

29. According to PW 3 Prem, mother of the deceased, they had a mobile telephone at their house and her daughter used to call them either from the mobile or from the landline CRL number of her husband Trilok Chand. She does not claim that they were also having a landline connection at their residence. No record of the mobile number of the parents of the deceased has been produced to show that the deceased had called up her parents, on the day the witness claims to have received a telephone call from the deceased, complaining that food was not being given to her by the accused persons for two days. This is yet another reason for us to disbelieve the deposition of PW 3 as regards the telephone call alleged to have been made to her by the deceased complaining about denial of food to her.

30. Admittedly, the parents of the deceased come from an economically weaker strata of society they being engaged in ironing clothes of others. It is difficult for us to accept that the appellants were demanding a huge sum of Rs 3-4 lacs from them for purchasing a house. This is the case of the PW 4 himself that he had mortgaged his house for Rs 1.6 lacs in order to incur expenditure on the marriage of the deceased Deepali. Considering the financial constrains of this witness, it is rather unlikely that the appellants would expect him to arrange a sum of Rs3-4 lakhs from a person of his means.

31. The most important reason we are unable to accept the deposition of PW 3 and PW 4 alleging demand of dowry by the appellants is the dying declaration made by the deceased herself to the SDM. In the dying declaration, the deceased did not make even a faint allegation of demand of money from her by any of the appellants, though she specifically alleged that her husband used to beat her. Had there been any demand of dowry, the deceased would not have omitted this material fact in her statement to the SDM particularly when she referred to the beatings given to her by her husband and also to the ailment she was suffering from. There could have been no reason for the deceased to omit demand of dowry while imputing beating to her husband.

32. In these circumstances, we are of considered view that neither the charge under section 498-A nor the charge under section 304-B of the Indian Penal Code stand proved against the appellants Bhim Singh, Premwati and Roshan Lal. Though there is evidence that the appellant Trilok Chand used to give beating to the deceased, there is no evidence that she used to be beaten by him in connection with demand of dowry. Therefore, it cannot said that the deceased was subjected to cruelty for or in connection with demand of dowry. Hence no offence under section 304-B of the Indian Penal Code is made out even against the appellant Trilok Chand.

33. However, we see no reason to disbelieve the evidence that the appellant Trilok Chand used to give beatings to the deceased, as stated by her in the dying declaration recorded by the SDM and also stated by PW 3 Smt. Prem, mother of the deceased.

34. Though there is no credible evidence on record to prove the reasons for the appellant Trilok Chand beating the deceased the dying declaration made by the deceased in this regard cannot be discarded merely because the reason or motive for him to give beatings to his wife could not be established by the prosecution. The statement of the deceased that her husband used to beat her indicates that she used to be beaten frequently and that she was not referring to any solitary instance of the beating. No doubt, the use of the expression willful in the explanation to section 498-A of the Indian Penal Code indicates that the conduct attributed to the accused, in order to be culpable, needs to be deliberate, aimed at causing injury to the health of the woman or bringing misery to her, but, it can hardly be disputed that if a woman is persistently beaten by her husband, such an act on the part of the husband is likely to draw the woman to cause injury to her life, limb or health. Once such an act on the part of the accused is established, it is immaterial whether the woman actually causes any injury to herself or not. Even if the woman subjected to cruelty does not actually cause any harm to herself, but, the act committed by the accused has the potential to drive her to take such a step, the act would constitute cruelty within the meaning of section 498-A of the Indian penal Code. The appellant Trilok Chand has, therefore, rightly been convicted under section 498-A of the IPC.

35. For the reasons given above, the conviction of the appellant Trilok Chand under section 302 and 498-A of the Indian Penal Code as well as the sentences awarded to him by the trial court under these sections are maintained and the appeal filed by him is dismissed. The appeals filed by the appellants Bhim Singh, Premwati and Roshan Lal are allowed and they are acquitted of all the charges against them. The bail bonds of these three appellants stand discharged. The appeals stand disposed of accordingly.

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