CASE NO.:
Appeal (crl.) 957 of 2005

PETITIONER:
Balbir Singh & Anr

RESPONDENT:
State of Punjab

DATE OF JUDGMENT: 26/09/2006

BENCH:
S.B. Sinha & Dalveer Bhandari

JUDGMENT:
J U D G M E N T

S.B. SINHA, J :

Appellant No.1 was married to Amarjit Kaur (deceased). She had been complaining of ill-treatment at the hands of her in laws. The dispute between the deceased on the one hand and Appellants on the other was resolved by Panchayat. As despite the same, ill-treatment continued, an application was filed before the Senior Superintendent of Police by the deceased. Appellant No.1 was working as Sepoy in the Indian Army. He took leave for two months. A settlement was effected whereby Appellants were made responsible for any untoward incident that might happen to the deceased. She in view of the said settlement came to her matrimonial home. On 12.10.1995, she received 90% burn injuries. She was taken to a hospital. Although she was in her senses, having regard to the extent of burn injuries suffered by her, the doctors attending on her opined that her dying declaration should be taken. Her dying declaration was taken down by one Dr. Anoop Kumar in presence of other doctors including Dr. R.S. Kadiyan, Professor of Skin and VD Department, Christian Medical College, Ludhiana. The said dying declaration, marked as Ex. P-1, which was recorded at about 08.30 A.M. on 12.10.1995, reads as under :

"Pt. Amarjit Kaur w/o Balbir Singh, unit No.C-180136 aged 24 years, married for three years as stated by patient herself in presence of Dr. R.S. Kadyan (Addl. Deputy Medical Superintendent), Dr. Tejinder Singh (DCMO, CMCH Ludhiana. Pt. was brought to Casualty Deptt. Of CMCH Ludhiana at 830 a.m. on 12.10.95 by neighbours along with husband who was forced by the neighbours to accompany them as stated by the Pt. According to patient she was conflict with her husband and mother in law for whole night yesterday at 4.00 a.m. in the morning when she went for urination, her husband approached from behind and threw kerosene oil and ignited her and locked the door from outside. She cried and was rescued by neighbours and brought to the hospital. Patient was referred from Civil Hospital, Malerkotla."

Her parents in the meanwhile were also informed. They came to the hospital. The First Information Report was lodged at about 09.30 a.m. on the same day; whereupon a case under Sections 307/498-A of the Indian Penal Code was registered. The Investigating Officer came to the hospital and recorded a second dying declaration which was marked Ex.P-J. In the said dying declaration she not only named her husband but also her mother-in-law, inter alia, stating :

"\005But dispute continued as usual. Today at about 5 A.M., when I got up for urinating (sic for urination) and went inside the bath room constructed in the house. Then with an intention to kill me and as a part of their conspiracy, my husband Fauji Balbir Singh and mother-in-law Nachattar Kaur set me on fire after pouring kerosene, due to which I was badly burnt. I raised an alarm saying 'Bachao Bachao' (Save-Save) and both of them ran away. My father-in-law Joga Singh with an intention to save me, first took me to Malerkotla Hospital in a Taxi from where I was referred to Patiala by the doctor due to extensive burns, but my father-in-law took me to CMC Ludhiana. Where I am lying on death bed. Action may be taken."

The said dying declaration bore her signature. She died on 16.10.1995 at about 01.15 a.m., whereupon a case under Section 302 IPC was registered. During trial the learned Sessions Judge framed charges under Section 302 IPC read with Section 34 thereof or in the alternative under Section 304-B read with Section 304-B read with Section 34 IPC. Appellants were also charged under Section 498-A read with Section 34 IPC. The charges framed by the learned Sessions Judge read as under :

"That on 12.10.1995 at about 5.00 A.M. within the revenue limits of village Bhurthala Mander, in furtherance of the common intention of both of you, you Balbir Singh and Nachhatar Singh intentionally caused the death of Amarjuit Kaur daughter of Ram Kishan Singh and that by you both committed an offence punishable under Section 302 read with Section 34 IPC or in the alternative under Section 304-B read with Section 34 IPC and within the cognizance of this Court.

Secondly during the period from 1993 to 1995 in furtherance of the common intention of you both, you Balbir Singh and Nachhatar Kaur committed cruelty on aforesaid Amarjit Kaur d/o Ram Kishan Singh with a view coercing her to meet the unlawful demand of dowry and thereby you both committed an offence punishable under Section 498-A r.w. 34 of Indian Penal code and within the cognizance of this Court.

And I hereby direct that you both be tried by this Court for the aforesaid offences."

No plea was taken in regard to the alleged defect in framing of the charges by Appellants at any stage. No prejudice was ever pleaded by the accused. The learned Sessions Judge convicted the Appellants both under Section 302 IPC as also under Section 498-A thereof and sentenced them to undergo rigorous imprisonment for life under Section 302 read with Section 34 IPC and to pay a fine of Rs.2,000/- each and in default of fine to undergo rigorous imprisonment for six months. They were also sentenced to undergo rigorous imprisonment for three years and to pay a fine of Rs.1,000/- each and in default of fine to undergo rigorous imprisonment for three months under Section 498-A IPC.

The appeal preferred by Appellants before the High Court has been dismissed by the impugned judgment.

Mr. Prem Malhotra, the learned counsel appearing on behalf of Appellants, in support of the appeal raised the following contentions :

(i) That the charges framed against the Appellants being illegal, the impugned judgment of conviction and sentence cannot be sustained;

(ii) As there are inconsistencies and contradictions between the two purported dying declarations, Ex.P-1 and P-J, no reliance should be placed thereupon;

(iii) The deceased having suffered extensive burn injuries, she could not have been in a fit condition to give the said dying declarations;

(iv) In any event, there is nothing to show that she was in a position to put her signature on the second dying declaration;

(v) There was no reason as to why the Magistrate had not been sent for to record her dying declaration as the deceased expired after four days of sufferance of the burn injuries.

The learned counsel appearing on behalf of the State, on the other hand, urged that :

(i) The prosecution case must be considered keeping in view the disputes of the parties.
(ii) As the occurrence having taken place in the bathroom, it was urged, it is wholly unlikely that the deceased committed suicide.
(iii) Although in the first dying declaration, the name of Appellant No.2 was not disclosed, the same may be ignored in view of the fact that she was named specifically in the second dying declaration.
(iv) There is nothing on record to show that the deceased was not in a position to put her signature on the dying declaration.

Where a death takes place within the four walls of a room, the prosecution ordinarily would not be able to examine any eye-witness. A case of this nature, thus, must be judged having regard to the entirety of the circumstances which have been brought on record by the prosecution.

Dr. S.S. Kokhar, (PW-3), Senior Medical Officer, Civil Hospital Malerkotla, stated that the deceased was brought at the Emergency Ward with 70% burn over the body. Dr. K.C. Goyal sent the information about the incident to the police. He further stated that the patient was referred to a "higher institution".

Dr. R.S. Kadiyan (PW-12) witnessed recording of the statement of Amarjit Kaur by Dr. Anoop Kumar. He found her to be in her senses. He proved the dying declaration. He also stated that Dr. Tejinder Singh and Dr. Ashish Gupta were also present. The witness stated that although they thought of calling for some Magistrate for recording her statement but having regard to serious condition of the patient and as the time therefor was short, it was decided not to wait therefor.

PW-13 is Dr. Anoop Kumar, who had recorded the dying declaration. In his deposition, he categorically stated :

"\005Amarjit Kaur was admitted in the hospital at about 8.30 a.m. on 12.10.95. I suspected that Amarjit Kaur can succumb to the burn injuries when I first saw her. I did not send the information to police about my suspicion that she may die of burn injuries. I did not send for any Magistrate to come and record her statement. I gave the information to my superiors on telephone. The Additional Deputy Superintendent reached in the emergency within about five minutes. It was not suggested to me by Medical Superintendent who came that I should send the request to the police or to the Magistrate for recording statement of Amarjit Kaur\005"

As regards the reason for not taking either thumb impression or

signature of the deceased on the dying declaration, he stated :

"\005Statement of Ex. PP is not thumb marked or signed by the lady but she was having burns on all over the body including palms of the hand. There is no burn injury on the toes of the feet of the deceased. I did not obtain the impressions of toes of the patient because I was not aware that this can be done. I do not remember if the thumb of the finger toes were partly or totally burnt. When patient was brought in the hospital she was given in tera benus fluids. I did not do that the bandage of the wounds. I do not remember if the hands of the lady were having the bandage when I recorded her statement. It took about ten or fifteen in recording the statement of Amarjit Kaur."

We would consider the effect of the said statement a little later.

It may be true, as was contended, that Dr. Ashish Gupta was not examined but it is borne out from the records that he at the material time, had gone abroad.

Keeping in view the statements of Dr. R.S. Kadiyan and Dr. Anoop Kumar, in our opinion, it was also not necessary to examine Dr. Ashish Gupta. The second dying declaration was recorded by Sub Inspector Tejinder Singh (PW-10). When the second dying declaration was being recorded, he had obtained the opinion of the doctor that the deceased was fit to make her statement.

Contention of Mr. Malhotra that the Magistrate was not called to record such statement may have any substance but the same by itself cannot be a ground to reject the whole prosecution case.

It is not in dispute that the deceased suffered extensive burn injuries. She had burn injuries almost on her whole body. This is evident from the post mortem report as was proved by Dr. U.S. Sood.

We have seen the signature of the deceased in the original of Ex.P-Z which shows that the same was put with great difficulties. It is also not the case of the Appellants that she could not write her name in English. No suggestion was also put to the Investigating Officer that the signature appearing on the second dying declaration was not of the deceased.

The law does not provide that a dying declaration should be made in any prescribed manner or in the form of questions and answers. Only because a dying declaration was not recorded by a Magistrate, the same by itself, in our view, may not be a ground to disbelieve the entire prosecution case. When a statement of an injured is recorded, in the event of her death, the same may also be treated to be a First Information Report.

Dying declaration, however, must be voluntary. It should not be tutored. It is admissible in evidence in special circumstances. But it must be borne in mind that its admissibility is statutorily recognized in terms of Section 32 of the Indian Evidence Act.

The effect of the statement being not recorded before a Magistrate would depend upon the facts and circumstances of each case and no hard and fast rule can be laid down therefor.

If, however, wholly inconsistent or contradictory statements are made or if it appears from the records that the dying declaration is not reliable, a question may arise as to why the Magistrate was not called for, but ordinarily the same may not be insisted upon.

Kamla (Smt.) v. State of Punjab [(1993) 1 SCC 1], relied upon by Mr.

Malhotra, falls in the above category. In that case four dying declarations were made, and one could not be reconciled with the other. In the aforesaid fact situation, it was held :

"If we examine all these dying declarations one by one we notice glaring inconsistencies as to who exactly poured kerosene and set fire or whether she caught fire accidentally. Suicide however is ruled out. In Ex. PB/2 recorded by PW 2 the deceased stated that her mother-in-law sprinkled kerosene from behind and burnt her. In the next statement Ex. DA recorded by Dr Jaison Chopra, CW 1, she is alleged to have stated that her clothes got burnt catching fire from the stove, thereby indicating that it was an accident. In the third statement Ex. PJ recorded by CW 2 she was rather vague as to who exactly poured kerosene and set fire on her and she only stated that it could be possible that her mother-in-law and father-in-law might have set the fire after pouring kerosene. On September 30, 1979 Ex. PD was recorded in the presence of three doctors, PW 7, PW 3 and CW 1 wherein she stated that she turned to the store and she heard her mother-in-law and father-in-law talking behind her and suddenly they poured kerosene and they set her on fire\005"

However, in State of Karnataka v. Shariff [(2003) 2 SCC 473], this Court categorically held that there was no requirement of law that a dying declaration must necessarily be made before a Magistrate. This Court therein noted its earlier decision in Ram Bihari Yadav v. State of Biha and Others [(1998) 4 SCC 517], wherein it was also held that the dying declaration need not be in the form of questions and answers. [See also Laxman v. State of Maharashtra (2002) 6 SCC 710]

There is, however, no escape from the fact that in the first dying declaration, Appellant No. 2 was not named. The fact that she was brought in a burnt condition is not in dispute. She had exonerated her father-in-law. According to her, she was brought in the hospital by her father-in-law. The records, however, suggested that she was admitted by her husband. Presumably both were present.

We have earlier noticed that her husband was forced to bring her to the hospital by the neighbours. His culpability has categorically been stated by the deceased in both the dying declarations.

She had categorically stated that her husband had put kerosene oil upon her and upon igniting, locked the door of the bathroom from outside. She was rescued by the neigbours. A case of suicide, therefore, must necessarily be ruled out. She was first taken to the Civil Hospital and then to the Christian Medical College, Ludhiana.

We may place on record our appreciation as to the role played by the doctors and the concern shown by them. In view of the manner in which she made her statement before the doctor, in our opinion, it is difficult to hold that her first statement was not voluntary or was tutored. For arriving at the said finding, the time factor is also significant.

In Jai Karan v. State of Delhi (NCT) [(1999) 8 SCC 161], it was held :

"A dying declaration is admissible in evidence on the principle of necessity and can form the basis for conviction if it is found to be reliable. While it is in the nature of an exception to the general rule forbidding hearsay evidence, it is admitted on the premiss that ordinarily a dying person will not falsely implicate an

innocent person in the commission of a serious crime. It is this premiss which is considered strong enough to set off the need that the maker of the statement should state so on oath and be cross-examined by the person who is sought to be implicated. In order that a dying declaration may form the sole basis for conviction without the need for independent corroboration it must be shown that the person making it had the opportunity of identifying the person implicated and is thoroughly reliable and free from blemish. If, in the facts and circumstances of the case, it is found that the maker of the statement was in a fit state of mind and had voluntarily made the statement on the basis of personal knowledge without being influenced by others and the court on a strict scrutiny finds it to be reliable, there is no rule of law or even of prudence that such a reliable piece of evidence cannot be acted upon unless it is corroborated. A dying declaration is an independent piece of evidence like any other piece of evidence \027 neither extra strong nor weak \027 and can be acted upon without corroboration if it is found to be otherwise true and reliable\005"

In State of Maharashtra v. Sanjay S/o Digambarrao Rajhans [(2004) 13 SCC 314], it was observed :

"\005It is not the plurality of the dying declarations that adds weight to the prosecution case, but their qualitative worth is what matters. It has been repeatedly pointed out that the dying declaration should be of such nature as to inspire full confidence of the court in its truthfulness and correctness (vide the observations of a five-Judge Bench in Laxman v. State of Maharashtra). Inasmuch as the correctness of dying declaration cannot be tested by cross-examination of its maker, "greater caution must be exercised in considering the weight to be given to this dying declaration genuinely recorded, they must be tested on the touchstone of consistency and probabilities. They must also be tested in the light of other evidence on record. Adopting such approach, we are unable to place implicit reliance on the dying declarations, especially when the High Court felt it unsafe to act on them\005"

Yet again in Muthu Kutty and Another v. State by Inspector of Police, T.N. [(2005) 9 SCC 113], while summarizing the law, this Court, inter alia, stated :

"(xi) Where there are 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 declaration could be held to be trustworthy and reliable, it has to be accepted. (See Mohanlal Gangaram Gehani v. State of Maharashtra)"

The backdrop of the events is not much in dispute. The dispute between the deceased and the family of the Appellant is borne out from a DDR (Ex.PO) recorded on 21.08.1995, wherein it was recorded that because of a dispute she had gone to her parents' house and that as a result of the compromise, 'the grievances had been removed and the accused Balbir Singh and his family would be responsible for any loss to the lady'. It is also substantiated by the testimonies of Ram Kishan (PW-6), father of the deceased, Gurdev Kaur (PW-7), mother of the deceased, Ajaib Singh (PW-8), and Sarup Singh (PW-9) relatives of the deceased, who had categorically deposed stating how the deceased received maltreatment at the hands of Appellants on account of non-fulfillment of their demand of dowry. The

deliberations which had taken place in the Panchayat had also been proved by Ajaib Singh (PW-8) and Sarup Singh (PW-9).

Although we have been taken through the depositions of the said witnesses, nothing has been pointed out to discard their testimonies.

We, in view of the order proposed to be passed by us, do not intend to delve into the testimony of Sub Inspector, Tejinder Singh (PW-10) as regards recording of the second dying declaration.

We are of the opinion that whereas the findings of the learned Sessions Judge as also the High Court in regard to guilt of Appellant No.1 must be accepted, keeping in view the inconsistencies between the two dying declarations, benefit of doubt should be given to Appellant No.2. We, however, uphold the conviction and sentence of both the Appellants under Section 498-A IPC.

This leaves us the alternative question as to whether framing of charge was permissible in law. The said question has not been raised even in the special leave petition. No such point was also taken before the learned Trial Judge or the High Court. Appellants have not shown any prejudice even in their statements under Section 313 of the Code of Criminal Procedure.

Strong reliance, in this connection, has been placed by Mr. Malhotra on Soni Devrajbhai Babubhai v. State of Gujarat and Others [(1991) 4 SCC 298]. The question which arose therein was the applicability of Section 304-B IPC, where the death had occurred prior to insertion of the said provision in the statute book. The question, therefore, which arose for consideration therein, was as to whether conviction under Section 304-B of the Indian Penal Code would be violative of clause (1) of Article 20 of the Constitution of India. It was in the aforementioned fact situation, the contention of Respondent therein that Appellant should be punished under Section 304-B IPC was rejected.

In Shamnsaheb M. Multtani v. State of Karnataka [(2001) 2 SCC 577], the question which arose for consideration of this Court was as to whether in a case where the only charge framed against the accused was under Section 302 IPC, he ccould be convicted under Section 304-B thereof. In holding that the same would be impermissible, it was stated :

"Now take the case of an accused who was called upon to defend only a charge under Section 302 IPC. The burden of proof never shifts on to him. It ever remains on the prosecution which has to prove the charge beyond all reasonable doubt. The said traditional legal concept remains unchanged even now. In such a case the accused can wait till the prosecution evidence is over and then to show that the prosecution has failed to make out the said offence against him. No compulsory presumption would go to the assistance of the prosecution in such a situation. If that be so, when an accused has no notice of the offence under Section 304-B IPC, as he was defending a charge under Section 302 IPC alone, would it not lead to a grave miscarriage of justice when he is alternatively convicted under Section 304-B IPC and sentenced to the serious punishment prescribed thereunder, which mandates a minimum sentence of imprisonment for seven years.
The serious consequence which may ensue to the accused in such a situation can be limned through an illustration: If a bride was murdered within seven years of her marriage and there was evidence to show that either on the previous day or a couple of days earlier she was subjected to harassment by her husband with demand for dowry, such husband would be guilty of the

offence on the language of Section 304-B IPC read with Section 113-B of the Evidence Act. But if the murder of his wife was actually committed either by a dacoit or by a militant in a terrorist act the husband can lead evidence to show that he had no hand in her death at all. If he succeeds in discharging the burden of proof he is not liable to be convicted under Section 304-B IPC. But if the husband is charged only under Section 302 IPC he has no burden to prove that his wife was murdered like that as he can have his traditional defence that the prosecution has failed to prove the charge of murder against him and claim an order of acquittal."

The said decision has also no application in the instant case. As the Appellants had the requisite knowledge of the charges against them, it may or may not be justifiable for the learned Trial Judge to frame an alternative charge, but from what we have noticed hereinbefore evidently they were not prejudiced in any manner whatsoever.

Effect of framing of alternative charges vary from case to case. In the peculiar facts of present case, we are of the opinion that Appellants having not raised any grievance at any stage in that behalf, they cannot be allowed to do so at this stage.

For the aforementioned reasons, we are of the opinion that there is no merit in the appeal of Appellant No.1 which is dismissed. The conviction and sentence of Appellant No.2 under Section 302 read with Section 34 IPC, however, is set aside. However, conviction and sentence of the Appellants under Section 498-A is upheld. Appellant No.2 is said to be in custody for four years. She would, therefore, be released forthwith. The appeal is allowed in part and to the extent mentioned hereinbefore.