CASE NO.:
Appeal (crl.) 280 of 2003

PETITIONER:
Sohan Lal @ Sohan Singh & Ors.

RESPONDENT:
State of Punjab

DATE OF JUDGMENT: 14/10/2003

BENCH:
K. G. Balakrishnan & B. N. Srikrishna.
@
JUDGMENT

SRIKRISHNA, J.

This appeal by special leave is directed against the judgment of the Punjab & Haryana High Court dismissing the appeals of the present appellants against convictions, under Section 302 read with Section 109 IPC in respect of appellant No. 1, and under Section 302 IPC in respect of appellant Nos. 2 and 3.

On 1.4.1996 an F.I.R. was lodged at the Sadar Police Station on the basis of information given by one Bansi Ram (Taya i.e. Uncle) at 10.40 p.m. on that night with regard to the unnatural death, in suspicious circumstances, of one Kamlesh Rani. The gist of the F.I.R. was that Kamlesh Rani was being harassed by her husband-Sohan Lal @ Sohan Singh (first appellant), mother-in-law Harbans Kaur (second appellant) and sister-in-law Kanchan (third appellant), who ill treated her to extract dowry from her parents. The said Kamlesh Rani was also thrown out of the house of her in-laws and it was only after intervention of interested parties that she returned to the house of the in-laws on 31.3.1996. On 1.4.1996, Bansi Ram received information that Kamlesh Rani had been admitted in G.N.D. Hospital, New Emergency, Amritsar with extensive burn injuries. He lodged a complaint that Kamlesh Rani had been set on fire by her husband, Sohan Lal, mother-in-law, Harbans Kaur, father-in-law, Sarwan Singh, and sister-in-law, Kanchan after pouring kerosene oil on her, after conniving with one another.

The police started investigation in the matter, seized certain incriminating materials and also recorded statements of witnesses. As a result of the investigation, the police filed a Charge Sheet against the three appellants and Sarwan Singh. It was alleged against Harbans Kaur and Kanchan that at about 4.00 p.m. on 1.4.1996 they murdered Kamlesh Rani and committed an offence punishable under Section 302 of the IPC. In the alternative, since Kamlesh Rani had died on account of burn injuries otherwise than under normal circumstances, within seven years of her marriage with Sohan Lal @ Sohan Singh, Sohan Lal (husband), Sarwan Singh (father-in-law), Harbans Kaur (mother-in-law) and Kanchan (sister-in-law) of Kamlesh Rani were charged with subjecting Kamlesh Rani to cruelty and harassment on account of demand of dowry and causing her dowry death, an offence punishable under Section 304B of the IPC. The accused denied the charges and claimed to be tried. The prosecution examined Dr. Gurmanjit Rai, Lecturer, Forensic Medicines, Medical College, Amritsar (PW 1), Bansi Ram (PW 2), Usha Rani (PW 3), Gopi Ram (PW 4), Rishi Ram (PW 5), Lakhbir Singh, Naib Tehsildar, Ratala (PW 6), Jit Singh (PW 7), Surinder Singh HC (PW 8), A.S.I. Joginder Singh, P.S. Civil Lines, Amritsar (PW 9), Dr. Sat Pal, Surgical Specialist, C.S.C. Saroya, Distt. Nawan Shehar (PW 10) and A.S.I. Satnam Singh (PW 11) and produced certain material objects and documents to prove the charges against the accused. The trial court held that Kamlesh Rani had died as she was

murdered by second appellant Harbans Kaur and third appellant Kanchan abetted by first appellant Sohan Lal @ Sohan Singh. The trial court also recorded a finding that, as far as dowry death was concerned, there was no definite statement of any witness that any of the accused had ever demanded dowry at the time of the marriage or even thereafter. Upon appreciation of the evidence on record, the trial court held that the prosecution had failed to prove its case against accused Sarwan Singh beyond a shadow of doubt. Sarwan Singh was, therefore, acquitted of all charges against him, but Harbans Kaur and Kanchan were held guilty of burning Kamlesh Rani to death and Sohan Lal @ Sohan Singh was held guilty of abetting the same. Harbans Kaur and Kanchan were thus held guilty of an offence punishable under Section 302 of the IPC, while Sohan Lal @ Sohan Singh was held guilty of an offence punishable under section 302 read with Section 109 IPC. All three accused were sentenced to imprisonment for life and fine of Rs. 1,000/- each and, in default, a further imprisonment of two months. Being aggrieved by the convictions, the three appellants, Sohan Lal @ Sohan Singh, Harbans Kaur and Kanchan are in appeal.

The case of the prosecution rests mostly on two declarations made by Kamlesh Rani, one on 2.4.1996 to the Naib Tehsildar-cum-Executive Magistrate, Lakhbir Singh (PW 6) at 3.15 p.m. and the second statement made under Section 161 of the Cr. P.C., recorded by Satnam Singh, A.S.I. (PW 11) at 7.10 p.m. on 7.4.1996. It also rests on the oral testimony of the witnesses for corroboration of the statements made in the said declarations.

Appellant No. 1, accused Sohan Lal husband of Kamlesh Rani, according to the Charge Sheet, had been charged only with the offence of dowry death, punishable under Section 304B of the IPC. There was no charge under Section 302 or for abetment of murder under Section 109 of the IPC. Counsel for the appellants contended that Section 109 of the IPC, which deals with abetment of a substantive offence, is itself a substantive offence for which punishment is prescribed under the section. Learned counsel contended that unless an accused has been charged for an offence under Section 109 IPC and tried, it was not open to the trial court to sustain the charge under Section 302 with the help of Section 109 IPC for which the accused was never tried. Learned counsel relied on the judgments of this Court in Joseph Kurian Philip Jose v. State of Kerala (1994) 6 SCC 535 and Wakil Yadav and Anr. v. State of Bihar (2000) 10 SCC 500 to buttress his contention.

Joseph Kurian (supra) holds thus:
"Section 109 IPC is by itself an offence though punishable in the context of other offences. A-4 suffered a trial for substantive offences under the Indian Penal Code and Abkari Act. When his direct involvement in these crimes could not be established, it is difficult to uphold the view of the High Court that he could lopsidedly be taken to have answered the charge of abetment and convicted on that basis. There would, as is plain, be serious miscarriage of justice to the accused in causing great prejudice to his defence. The roles of the perpetrator and abettor of the crime are distinct, standing apart from each other."

This view was reiterated in the subsequent judgment in Wakil Yadav (supra). In Wakil Yadav (supra) the appellant was originally charged with several other accused under Section 302 with the aid of Section 109 IPC. The Court of Sessions convicted all the 7 accused for the offences charged. The High Court in appeal acquitted 5 persons, convicting one Guru Charan Yadav substantively for the offence under Section 302 IPC and the appellant, Wakil Yadav, for the offence under Section 302 read with Section 109 IPC. There was no dispute that no charge had been framed against the appellant, Wakil Yadav, under Section 109 IPC. This Court reiterated the law laid down in Joseph Kurian (supra) and held that it was not open to the High Court to convict the accused, Wakil Yadav, for an offence under Section 302 with the aid of Section 109 IPC, as no charge had been framed

against him under Section 109 IPC, which is itself a substantive offence.

Section 211 of the Code of Criminal Procedure requires that the charge against the accused be precisely stated. Sub-section(4) of Section 211 of the Code of Criminal Procedure specifically requires that the law and section of the law against which the offence is said to have been committed shall be mentioned in the charge. The learned counsel for the respondent State, relying on Section 464 of the Code of Criminal Procedure, urged that failure to specify Section 109 in Charge Sheet against Sohan Lal was a mere irregularity which would not vitiate the trial without proof of prejudice to the accused. We cannot agree. The learned counsel for the accused is fully justified in his submission that failure to frame a charge with regard to the substantive offence of Section 109 IPC has certainly prejudiced the accused in the trial court. The accused Sohan Lal @ Sohan Singh was called upon to face trial only for the charge under Section 304B IPC. Neither a charge under Section 302 IPC nor under Section 109 IPC, was levelled against him in the Charge Sheet. In the absence of a charge being framed against the accused Sohan Lal under Section 302 or 109 IPC, it would certainly cause prejudice to him, if he is convicted under either for these offences at the end of the trial. In our view, it was not permissible for the trial court to convict the first accused Sohan Lal for the offence under Section 302 read with Section 109 IPC. His conviction under Section 302 read with Section 109 IPC is, therefore, illegal and is liable to be set aside. The High Court erred in upholding the conviction of Sohan Lal @ Sohan Singh under Section 302 read with Section 109 of the IPC and dismissing his appeal.

The learned counsel for the appellants then strongly assailed the convictions of Harbans Kaur (mother-in-law) and Kanchan (sister-in-law) under Section 302 IPC. He contended that the version given in the First Information Report (FIR) lodged at the instance of Bansi Ram (PW 2) and the version given by Bansi Ram in his evidence before the trial court are irreconcilable and suggest that Bansi Ram could never have had the information with which he rushed to the Police. In the FIR, Bansi Ram says: "After making my niece Kamlesh to understand the things, we sent her with her parent’s in-law on 31.3.1996. Today on 1.4.1996, we received information that Kamlesh was admitted to G.N.D. Hospital, New Emergency, Amritsar in burnt condition. I accompanied by Usha Rani W/o Hira Lal (brother’s daughter-in-law) reached G.N.D. Hospital, New Emergency, Amritsar. My niece Kamlesh told us that on that day at about 4.00 p.m. she was present in her house and that her husband Sohan Lal, Banso, mother-in-law, Sarwan Singh, father-in-law and Kanchan her sister-in-law after conniving with one another had set her on fire, after pouring kerosene oil on her." In his testimony before the court, Bansi Ram stated that on 1.4.1996, Gurbux Singh, another son of Sarwan Singh, came to their house at 8.00 p.m. in the night and told that Kamlesh was admitted in G.N.D. Hospital, Amritsar in burnt condition. He then said, " I accompanied by Usha Rani and another person went to the said hospital. Kamlesh was in excessively burnt condition. She told us that her husband’s sister Kanchan had tied her legs and Sohan Singh accused had set her on fire after pouring kerosene oil on her body." A number of improvements, variations and inconsistencies between the FIR statement made by Bansi Ram (PW 2) and his evidence before the court were highlighted by the learned counsel for the accused. He also contended that it was impossible for Kamlesh Rani to have spoken to Bansi Ram and given him information as to what transpired at the time of the incident. Strong reliance was placed by the learned counsel on the bed-head ticket (Ex. PQ) which showed that on 1.4.1996 Kamlesh Rani was admitted to the hospital at 6.30 p.m. with alleged history of burns, that she was prescribed several medicines which included a strong sedative and pain killer like Calmpose and Pathidine injections. There is an endorsement at 8.40 p.m. in the bed-head ticket (Ex. PQ): "seriousness of the Pt. explained to the relatives." There is also an endorsement at 9.10 p.m.: "Pt. declared unfit for statement due to sedation."

The learned counsel urged that according to the evidence of Bansi Ram, he received information about the burn injuries and admission in the

hospital of Kamlesh Rani at about 8.00 p.m.; he immediately went to Usha Rani and accompanied by her and others came to the hospital. By that time, injections Calmpose, Furtulin and Pathidine had already been administered at 7.20 p.m., as seen from the I.O. Chart dated 1.4.1996. It would be improbable that the patient would be in a position to talk to anyone, if these strong sedatives had been administered at 7.20 p.m.. There appears to be substance in this contention. At 9.10 p.m. the doctor had declared the patient unfit for statement due to sedation. The exact time at which Bansi Ram reached the hospital is not available from the evidence on the record. The evidence of Usha Rani (PW 3) suggests that she had received information about Kamlesh Rani receiving burn injuries and her admission to the hospital at 8.30 p.m. on 1.4.1996. According to PW 3, she found that, "she was in a serious condition, she was speechless and was not able to speak." It is true that Usha Rani was declared as a hostile witness and cross-examined. Nonetheless, it is open to the accused to rely on the testimony of Usha Rani for the purpose of improbabilising the evidence of Bansi Ram, in so far as his talk with Kamlesh Rani on the night of 1.4.1996 is concerned. In our view, the contention of the learned counsel for the accused is justified and needs to be upheld. A cumulative assessment of the evidence of Bansi Ram (PW 2), Usha Rani (PW 3) and the medical chart (Ex. PQ) improbabilises that Bansi Ram could have had a talk with Kamlesh Rani in the evening of 1.4.1996, before he went to the Police Station and had the FIR recorded.

The learned counsel thereafter contended that if Bansi Ram's testimony is not believable, then the whole of the FIR becomes doubtful and the case against the accused necessarily collapses. We cannot accept this. It may be probable that Bansi Ram might have given information to the police which was exaggerated and added things which, probably, he did not learn from Kamlesh Rani on 1.4.1996. It is possible that seeing Kamlesh Rani in the hospital, after suffering extensive burns to the extent of 80 per cent, Bansi Ram might have suspected the in-laws of Kamlesh Rani as having murdered her. The First Information Report is only a report about the information as to the commission of an offence; it is not substantive evidence, as the police has yet to investigate the offence. If Bansi Ram's was the only testimony in support of the prosecution, then perhaps the counsel's was right. We find, however, that the prosecution strongly relied on two declarations, one made to Naib Tehsildar, Lakhbir Singh (PW 6) on 2.4.1996 as well as the statement made by Kamlesh Rani under Section 161 of the Cr. P.C. recorded on 7.4.1986 by Satnam Singh, A.S.I., both of which can be treated as dying declarations.

The learned counsel for the accused strongly assailed the two dying declarations and contended that the two dying declarations are mutually contradictory and the evidence of the other witnesses do not probabilise their truth. It was contended that the overall circumstances make it unsafe to convict the accused merely on the said dying declarations. We need to consider these arguments in detail and assess their merit.

The first dying declaration (Ex. PN) was recorded on 2.4.1996, on the basis of a complaint (Ex. PL) made by Bansi Ram to the Deputy Commissioner, Amritsar alleging that the police were not cooperating in recording the statement by Kamlesh Rani, who had been admitted in the Emergency Ward. A request was made that some officer may be deputed for recording her statement and legal action be taken. Lakhbir Singh, Naik Tehsildar-cum-Executive Magistrate addressed a letter dated 2.4.1996 to the Doctor on duty in the hospital requesting the doctor to issue a certificate as to whether Smt. Kamlesh Rani was fit to give a dying declaration. According to the evidence of Lakhbir Singh (PW 6), Bansi Ram made an application addressed to the District Magistrate, Amritsar, on which the District Magistrate made an endorsement at 2.05 p.m. on 2.4.1996 directing the Tehsildar to record her statement as an emergency. The document and the endorsement have been proved by PW 6. PW 6, thereafter, went to the hospital and addressed the letter (Ex. PM) to the Doctor on duty requesting him to certify as to whether Smt. Kamlesh Rani was fit to give dying

declaration. The Doctor on duty (Dr. Vikram Dua, Junior Resident, Surgical Unit-4, GND Hospital, Amritsar) made an endorsement on the application (Ex. PM) to the effect: "Pt. is fit for statement." His endorsement (Ex. PM/1) was made at 3.00 p.m.. Thereafter, PW 6 went to Kamlesh Rani, disclosed his identity to her, asked the attendants to go out and, after ascertaining that she was fit to make the statement voluntarily, recorded her statement. The dying declaration (Ex. PN) was recorded without any omission or addition and as narrated by Kamlesh Rani at 3.15 p.m.. An endorsement on Exhibit PN 1 was made by PW 6 stating, "The above given dying declaration of Smt. Kamlesh Rani wife of Sh. Sohan Lal, was recorded by the undersigned on 2.4.1996 at 3.15 p.m. in the Emergency Ward of Guru Nanak Dev Hospital, Amritsar." He, thereafter, sent the original dying declaration to the District Magistrate, who with his endorsement upon Exhibit PN/1 directed that the same to be sent to the S.S.P., Taran Taran under sealed cover. This dying declaration (Ex. PN) translated in English reads as under:

"I, Kamlesh Rani wife of Sohan Lal resident of 1-a, Jajj Nagar near V.V. Modern School, Amritsar. I was burnt on pouring kerosene oil by my mother-in-law Harbans Kaur and I am conscious although my body was completely burnt but I understand all the things. Before I burnt I took tea mixed something in it. After that my mother-in-law put kerosene oil on me and my sister-in-law named Kanchan lit the fire. My husband harasses me and demanded for bringing money from her parents if she resides with him. Heard and admitting the correct.

RTI of
Sd/- Kamlesh Rani
W/o Sohan Lal
2.4.96"

The learned counsel for the accused criticised the dying declaration (Ex. PN) as not legally sustainable on several grounds. First, it is contended that the certificate of fitness is not endorsed on the dying declaration itself but on a separate paper i.e. on Exhibit PM/1. Secondly, it is contended that the certificate of fitness alleged to have been given by Dr. Vikram Dua, Junior Resident, Surgical Unit-4, G.N.D. Hospital, Amritsar was not proved as the said Dr. Dua was not examined at all. He also criticised the evidence of Dr. Sat Pal, Surgical Specialist, C.H.C. Saroya (PW 10), who produced the bed-head ticket and identified the writing and signature of Dr. Vikram Dua with his endorsement on the application. Though this witness was not even cross examined, the learned counsel contended that the certificate of Dr. Dua was not proved in accordance with law. He also criticised the evidence of PW 6 by contending that no material was produced by PW 6 to show that he was really appointed as Naik Tehsildar-cum-Executive Magistrate. PW 6 also denied having made a statement to the Police during investigation and that he had not brought the Gazette Notification whereby he had empowered to discharge the function of an Executive Magistrate.

Having read the evidence of PW 6, in the light of the law laid down by a Constitution Bench of this Court in Laxman v. State of Maharashtra (2002) 6 SCC 710, and on assessment of the dying declaration, Exhibit PN, we are afraid that none of the contentions can prevail. The Constitution Bench in Laxman (supra), while resolving the conflict of opinion as to the manner of testing the credibility of a 'dying declaration', overruled the view taken in Paparambaka Rosamma v. State of A.P. (1999) 7 SCC 695 and approved the correctness of the view taken in Koli Chunilal Savji and Anr. v. State of Gujarat (1999) 9 SCC 562. According to the Constitution Bench:

"The juristic theory regarding acceptability of a dying declaration is that such declaration is made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the man is induced by the most powerful consideration to speak

only the truth. Notwithstanding the same, great caution must be exercised in considering the weight to be given to this species of evidence on account of the existence of many circumstances which may affect their truth. The situation in which a man is on the deathbed is so solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason the requirements of oath and cross-examination are dispensed with. Since the accused has no power of cross-examination, the courts insist 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 always to 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 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 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. A dying declaration can be oral or in writing and any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a Magistrate or a doctor or a police officer. When it is recorded, no oath is necessary nor is the presence of a Magistrate absolutely necessary, although to assure authenticity it is usual to call a Magistrate, if available for recording the statement of a man about to die. There is no requirement of law that a dying declaration must necessarily be made to a Magistrate and when such statement is recorded by a Magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. 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 holds 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."

The view taken in Paparambaka Rosamma (supra) that in the absence of a medical certification as to the fitness of state of mind, it would be risky to accept a dying declaration on the subjective satisfaction of the Magistrate was overruled as having been too broadly stated and not being the correct enunciation of law. The Constitution Bench said :
"â\200¦It is indeed a hypertechnical view that the certification of the doctor was to the effect that the patient is conscious and there was no certification that the patient was in a fit state of mind especially when the Magistrate categorically stated in his evidence indicating the questions he had put to the patient and from the answers elicited was satisfied that the patient was in a fit state of mind whereafter he recorded the dying declaration. Therefore, the judgment of this Court in Paparambaka Rosamma v. State of A.P. must be held to be not correctly decided and we affirm the law laid down by this Court in Koli

Chunilal Savji v. State of Gujarat."

In Koli Chunilal Savji (supra) a Bench of three learned Judges rejected the contention that in the absence of a doctor while recording the dying declaration, the declaration loses its value and cannot be accepted. The Court observed that, "â\200¦ the aforesaid requirements are a mere rule of prudence and the ultimate test is whether the dying declaration can be held to be a truthful one and voluntarily given."

Ravi Chander and Ors. v. State of Punjab (1998) 9 SCC 303, was approved, in which this Court held 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 Court observed that the Executive Magistrate is a disinterested witness and is a responsible officer as long as there was no material on record to suspect that he had any animus against the accused or was in any way interested in fabricating the dying declaration, no question arises to checking the genuineness of the dying declaration recorded by the Executive Magistrate.

In the face of this clear enunciation of law, we are afraid that none of the above arguments urged by the learned counsel can be accepted. Upon careful assessment of the evidence tendered by PW 6, Lakhbir Singh, Naik Tehsildar, we find no circumstance brought on record to suspect his bonafides; nothing has been elicited to show that he was interested in fabricating a case against the accused or that he had any motive to make out a false case against the accused. Hence, we are unable to accept the contention of the learned counsel for the accused that it is unsafe to convict the accused on the dying declarations.

It was strenuously urged by the learned counsel for the accused that the testimony of the Naib Tehsildar Lakhbir Singh (PW 6) is unbelievable because the District Magistrate appears to have acted with great haste in deputing Lakhbir Singh to record the dying declaration as soon as he was approached by Bansi Ram (PW 2). It was also urged that the entries in the bed-head ticket suggest that the witness was constantly under administration of heavy sedatives which improbabilises the recording of her dying declaration by Lakhbir Singh (PW 6). In our view, these are arguments of desperation. As to how much time the District Magistrate should take in responding to a request for recording a dying declaration, is not a matter of law or rigidity, but one of convenience depending on the circumstances and the urgency with which he views it.

The bed-head ticket shows that the last injection of Pathidine and other sedative drugs were given at 7.20 p.m. on 1.4.1996. On 2.4.1996, no Pathidine injection was given in the morning. On the contrary, there is an endorsement in the treatment sheet stating, "Sedation dose of evening withheld. Pt. declared fit for statement and the same given in the presence of the Magistrate." It is contended that this entry has not been proved by any witness. In our view, this argument is without substance. If the accused wanted to rely on this entry, to impeach the credit worthiness of Exhibit PN, they were free to examine any witness. Whether this entry is held proved or not, it does not detract from the credit worthiness of the evidence of Lakhbir Singh (PW 6). We, therefore, think that there is no substance in this contention.

We are satisfied that the dying declaration (Ex. PN) was made by the deceased Kamlesh Rani and that there is no need to discard the evidence of PW 6; that when she made the dying declaration she was in a fit mental condition to do so and was fully conscious of what she was saying. Irrespective of whether the endorsement of Dr. Dua upon Exhibit PM/1 has been proved in accordance with law or not, we find no reason to discard the dying declaration (Ex. PN).

The learned counsel asserted that this is a peculiar case in which there

are five statements which can be characterised as dying declarations and each one is inconsistent with the others. He, therefore, urged that we should disbelieve all of them, give the benefit of doubt to the accused, and acquit them.

According to the learned counsel for the accused, the circumstances under which the deceased Kamlesh Rani died have been narrated differently on five different occasions. First, there is the version in the FIR lodged by Bansi Ram (PW 2); second, is the version given in the deposition of Bansi Ram (PW 2); third, is the dying declaration recorded by Naib Tehsildar Lakhbir Singh (PW 6) (Ex. PN); fourth, is the version in the statement of Kamlesh Rani recorded under Section 161 of the Cr. P.C. and fifthly, the version given in the deposition of Jit Singh (PW 7) under cross-examination. Learned counsel contended that each one of the versions is inconsistent with the others and, therefore, taking an overall view, as each one the versions conflicts with the dying declaration (Ex. PN), it would be unsafe to rely on the dying declarations to uphold the conviction of the appellants. Although, at the first blush, the contention of the learned counsel for the appellants seems attractive, upon a careful appraisal it has no substance. We have already analysed the deposition of Bansi Ram (PW 2) in the light of the deposition of Usha Rani (PW 3). A cumulative reading of the two, together with the medical endorsements made on the bed-head ticket of G.N.D. Hospital, clearly ruled out Bansi Ram as having received any information from deceased Kamlesh Rani. It is true that both in the FIR as well as in the deposition of Bansi Ram (PW 2) an exaggerated version had been given. Merely, because Bansi Ram takes it upon himself to give an exaggerated and coloured version of the circumstances under which Kamlesh Rani died, we do not think that it would be proper to reject the dying declaration (Ex. PN) which we have tested on the anvil of the law laid down by the Constitution Bench of this Court in Laxman (supra) and found it to have passed. We are, therefore, not inclined to accept the contention that the dying declaration (Ex. PN) needs to be rejected because of the FIR of Bansi Ram and the deposition of Bansi Ram do not tally with it.

Next, we turn to the evidence of Jit Singh (PW 7) on the basis of which the dying declaration (Ex. PN) is impeached. PW 7 was examined only to prove the recovery of certain material objects. He was a Pancha, who had signed the Panchanama which showed the recovery of certain incriminating articles. His examination-in-chief merely consists of the fact that certain articles were recovered in his presence and that he had attested the Panchanama, and that his statement had been recorded by the police. Surprisingly, in his cross-examination, this witness came out with a new story that he was present at the seen of the occurrence, that Kamlesh Rani was lying in the hands of her husband Sohan Lal @ Sohan Singh and she had told all of them including Jit Singh that she had committed suicide, and that she had committed a blunder, before she was moved to the hospital. Rightly, this witness was declared as hostile and suggestions were made to him that the facts deposed by him had not been narrated in his statement to the police, that they had been so narrated at the instance of the accused and that he had deposed falsely under the cross-examination. We have no hesitation in rejecting that part of the testimony of PW 7 which appears to have found its way on the record so convenient for the accused. If at all there was any truth in his statement that he was present at the time of occurrence and that the deceased Kamlesh Rani had made any statement before him, it was the obligation of Jit Singh (PW 7) to have disclosed this to the police. Had he done so, he would have been treated as a material witness and examined by the police with regard to the so called statement made before him. The fact that no such disclosure was ever made by him to the police, and his attempt to come out with crucial material facts pertaining to the occurrence, although he was being examined only as a witness to the Panchanama, do not lend credence to his testimony. It appears to us that Jit Singh (PW 7) must have been won over by the accused and made bold to give convenient evidence under cross-examination. We are not inclined to accept this very convenient testimony of Jit Singh (PW 7) as detracting from the veracity and weight to be attached to the dying declaration (Ex. PN).

That leaves us with the other statement made by Kamlesh Rani to the police under Section 161 of the Cr. P.C. The High Court in its judgment has quoted the statement of Kamlesh Rani under Section 161 of the Cr. P.C. (Ex. PV), which is as under:

"Statement of Kamlesh Rani wife of Sohan Lal resident of Gali No. 1A, Judge Nagar, Amritsar u/s 161 Cr. P.C.

It is stated that I am resident of above said address on 1.4.96. I was burnt by my mother-in-law Harbans Kaur by pouring kerosene oil. Due to that my body was burnt. At this time I am conscious. Before burnt, I took a tea after mixing some poison in the tea. Then my mother-in-law put a kerosene oil on me. My sister-in-law named Kanchan lit the fire by match box. Before the present occurrence my father-in-law Sarwan Singh, Sohan Lal, husband, Harbans Kaur mother-in-law and Kanchan sister-in-law stressing me for bringing dowry from my parents. On 1.4.1996 at the time of occurrence my father-in-law Sarwan Singh and Sohan Lal my husband both were present in the house. My husband usually asked me that I did not like her and he further told me that if she remain with him bring more dowry from his parents house. I have heard my statement which is correct."

A comparison of the dying declaration (Ex. PN) recorded by PW 6, Naib Tehsildar Lakhbir Singh, and the statement of Kamlesh Rani recorded under Section 161 of the Cr. P.C. (Ex. PV) shows that they tally in material particulars. There is no conflict or inconsistency between these two statements. The contention of the learned counsel as to the inconsistency must, therefore, fail.

Upon careful consideration of the facts and circumstances of the case, we are satisfied that we can safely accept the veracity of the dying declaration (Ex. PN) made by Kamlesh Rani deceased which is also fully corroborated by the other circumstances and not contradicted by her statement recorded under Section 161 of the Cr. P.C.. No material has been placed before us to show that the dying declarations were the result of any tutoring or coaching. Hence, we are not satisfied that there exist any circumstances which compel us to suspect the trustworthiness of the dying declaration.

Once we come to the conclusion that the dying declaration is credit worthy, there is no doubt that the accusations against the appellants accused Harbans Kaur and accused Kanchan are fully proved. In the circumstances, we are of the view that both the courts below were justified in relying upon the dying declaration and convicting the two accused, Harbans Kaur and Kanchan. We see no reason to take a different view in the matter.

In the result, we make the following order :

First appellant Sohan Lal @ Sohan Singh is acquitted of all the charges. He shall be released forthwith, if his custody is not required in any other case.

The convictions of second appellant Harbans Kaur and third appellant Kanchan are hereby upheld. The appeal is dismissed as far as these accused are concerned.

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The Government of Tamilnadu & Ors.
Vs.
M. Ananchu Asari & Ors.
@
October 29, 2003
#
S. RAJENDRA BABU & P. VENKATARAMA REDDI

JUDGMENT:
JUDGMENT
With
(arising out S.L.P.(Civil) No. 870 of 2002)

P. Venkatarama Reddi, J.

Leave granted in S.L.P.(Civil) No. 870/2002.

1. Civil Appeal Nos. 1444-1445 of 1999 are preferred against the common judgment of the Division Bench of the Madras High Court in W.A. Nos. 522 of 1992 and 962 of 1993 dismissing the writ appeals filed by the State of Tamil Nadu. The Civil Appeal arising out of S.L.P.(Civil) No.870 of 2002 is against the order of the division bench of the High Court in Writ Petition No. 11985 of 1992 which was allowed following the judgment in Writ Appeal Nos. 522 of 1992 and 962 of 1993 referred to supra. Civil Appeal Nos. 1446-1452 of 1999 are those filed by the State of Tamil Nadu against the common order passed in a batch of writ petitions disposing of the writ petitions filed by the Transport Corporation employees in terms of the judgment in Writ Appeal Nos. 522 of 1992 and 962 of 1993. The State has directly approached this Court against the said order of the learned single Judge. Thus, the lead judgment is the one rendered by the High Court in Writ Appeal Nos. 522 of 1992 and 962 of 1993.

2. Broadly, the issue in these appeals is whether the cutoff date fixed by the Government for the purpose of entitlement to pension of the erstwhile Transport Department employees who were later on absorbed in Transport Corporations, is constitutionally valid? The High Court answered that issue in the negative and directed the fixation of cutoff date afresh in the light of the observations made.

3. The two writ petitioners in W.P. No. 6969 of 1990 with reference to which Writ Appeal No. 522 of 1992 was filed by the State Government, were the employees of Nessmony Transport Corporation which was carved out of Kattabomman Transport Corporation Limited. The latter Corporation came into existence from 1.1.1974. The writ petitioner in W.P. No. 7012 of 1988 out of which writ appeal No. 962 of 1993 arose is the workers union of Pallavan Transport Corporation Limited which was formed with effect from 1.1.1973. The said writ petitioners including the concerned members of the workers union were originally employed in the State Transport Department. Pursuant to the decision taken by the Government to form separate transport corporations to take over the operation and management of public transport in the districts concerned, the two Corporations aforementioned came into existence in 1973 and 1974. The assets and liabilities were transferred on certain terms to the newly formed Government Companies which in effect have the status of Public Sector

Undertakings. The writ petitioners and other similarly situated employees were deputed to work in the said transport Corporations. For instance, in G.O.MS. No. 651 (Transport) dated 18.7.1973, it was stipulated that all employees of the Tamilnadu State Transport Department serving in the Kanyakumari District for the purpose of running, maintenance and upkeep of the transport system in the District will be considered to be employees on deputation with the Kattabomman Corporation with effect from 1.1.1974. It was further enjoined that "they will continue to receive the same emoluments and enjoy the same conditions of service and privileges till such time the Corporation frames its own rules and takes those employees in its pay rolls". The G.O. further provided that the new Corporation shall be responsible for meeting all the establishment charges and making pension and leave salary contributions to Government in respect of such of those deputed employees of the Transport Department who were in pensionable services.

4. It is the stand of the State Government as seen from the only counter-affidavit filed in W.P. No. 6969 of 1990 that all the employees absorbed in Kattabomman Transport Corporation Limited were on deputation upto 30.4.1975 and from 1.5.1975 onwards, the Corporation had framed its own rules and absorbed all of them as Corporation employees duly accepting the options exercised by them. It is to be mentioned at this juncture that options were called for finally only in the year 1982.

5. The writ petitioners and other similarly situated employees who moved the High Court under Article 226 for appropriate reliefs were not eligible to pension while in Government service in view of non-fulfillment of the criterion of ten years of qualifying service. It is not in dispute that the service in the Corporation is non-pensionable.

6. In order to extend the benefit of pension to the Government servants permanently absorbed in the Public Sector Undertakings on the basis of options, the State Government issued certain orders from time to time. In order to appreciate the controversy in proper perspective, a brief reference to these G.Os. is necessary. The first one is G.O.MS.No. 378 (FR II) dated 18.4.1975. The said G.O. made the following provision for pension and gratuity.

"In addition to pay in the public undertaking an optee will be entitled to pension/gratuity earned by him in Government service prior to such absorption. If the qualifying service under Government is less than ten years, gratuity and Death-cum-Retirement Gratuity alone will be payable. They are permitted to draw their pension/gratuity immediately on absorption in the Corporation."

This G.O. was kept in abeyance till further orders were issued in regard to the terminal benefits to be given to the Government servants who opted for service in Public Sector Undertakings. This was done in G.O.MS.No. 1197 dated 22.8.1978. Then, came G.O.MS.No. 284, Finance (CFC) Department, dated 31.3.1980 in supersession of the earlier orders issued on the subject including G.O.MS.No. 378. According to para 2(iii) of the said G.O.â\200\224

"Pension, in respect of industrial and non industrial workers who get themselves absorbed in State owned Corporations/Boards will be calculated at the time of transfer; it is payable by the State Government only on retirement of the

employee from the public sector corporationâ\200¦
*** *** ***
The pension if any will be paid by the Government direct to the absorbed employee after his retirement from the Corporation/Board."

Para 3 of the G.O. is the crucial provision. It saysâ\200\224
"3. The crucial date for calculating the terminal benefits in respect of all the State Public Sector Corporations except the Transport Corporations, will be the date from which the employee is continuously working in Corporation or the date of incorporation of the Corporation, whichever is later. In respect of Transport Corporations, the crucial date will be 1st May, 1975 or the date from which the employee is continuously working in the Corporation, whichever is later." (Emphasis supplied)

7. Thus, as far as the Transport Corporations are concerned, the relevant date for the purpose of judging the entitlement of the employees who were earlier in Government service was fixed as 1st May, 1975. The same G.O. also stipulated that fresh options will be obtained from Government servants working in various Corporations/ Boards "on the basis of this G.O.". The Corporations/Boards were requested to decide absorption of Government servants on the basis of the terminal benefits indicated in the G.O. Pursuant to this G.O. a letter was addressed by the Commissioner and Secretary to Government, Transport Department on 5.1.1982 to all State Transport Undertakings to get fresh options from the employees of the erstwhile Tamilnadu State Transport Department employees absorbed in the Corporation. The pro-forma of option form was enclosed therewith. The last date for exercise of options was fixed as 28.2.1982. As a consequence thereof, the Transport Corporations called for options to be submitted by 28.2.1982. It appears that G.O.MS.No. 284, dated 31.3.1980 was quashed by the High Court by its judgment dated 18.1.1983 insofar as it took away the benefits conferred by G.O.No. 378 dated 18.4.1975. Subsequently, G.O.MS.No. 1028 came to be issued on 23.9.1985. It is this G.O. read with the earlier G.O. 284 that has given rise to the grievance of the writ petitionersâ\200\224respondents. The relevant portion of the G.O. is extracted hereunder:
"â\200¦Eventhough the erstwhile Tamilnadu State Transport Department employees have exercised option for their permanent absorption in the Transport Corporations on different dates and were working continuously in the various Transport Corporations with effect from different dates from 1.1.72, the crucial date for their permanent absorption in the Transport Corporations was fixed as 1.5.75 or the date from which the employees were continuously working in the Corporation whichever was later as per orders issued in the Government order second read above. The crucial date already fixed in the G.O. second read above holds good without any change in this regard."
("The G.O. 2nd read" is G.O. 284 dated 31.3.1980)

8. It was further laid down that the terminal benefits of all the erstwhile Tamilnadu State Transport Department employees working in the various Transport Corporations

should be settled as per the orders issued in G.O.No.378 dated 18.4.1975 subject to certain procedural modifications set out in the G.O. The pension/gratuity earned by an employee while in Government service prior to such absorption was protected as was done by G.O.No.378.

9. If the cutoff date stipulated in G.O.1028 dated 23.9.1985 is applied to the case of the writ petitioners, they will not be eligible to get pensionary benefits. This led to the filing of the writ petitions in the High Court.

10. It may be mentioned that during the pendency of the writ appeals, the Government issued G.O.MS.No. 250 (Transport Department) Dated 18.11.1996 further modifying the cutoff date in order to benefit the erstwhile State Transport Department employees. The Government while fixing the crucial date as 15.9.1975 for the permanent absorption in the respective Transport Corporations, directed that pensionary benefits should be granted to those who have completed ten years of qualifying Government service as on 15.9.1975 subject to the condition that no arrears of pension shall be given to the employees benefited by the revised date for the period prior to 1.1.1986. It does not appear that any of the respondents will be eligible to get pension even if the revised date is taken into account.

11. In writ petition No. 6969 of 1990, the learned single Judge held that the cutoff date fixed by the Government in G.O.MS.No. 1028 was illegal and left it to the Government to fix a fresh cutoff date taking into consideration the services of the writ petitioners. In the second writ petition also another learned single Judge of the High Court declared the fixation of cutoff date as 1.5.1975 / 14.9.1975 as illegal and arbitrary and directed the Government to fix the cutoff date afresh within the stipulated time. At the same time it was indicated in the judgment that the date on which the options were finally called for i.e., 20.6.1982 would be the appropriate date for determining the eligibility to pension. On appeal, the Division Bench of the High Court while affirming the judgments in the two writ petitions, concurred with the view expressed by the learned Judge in the latter case as regards the fixation of cutoff date with reference to the exercise of options in the year 1982. The Division Bench observed thus:

"â\200¦we are of the view that the cut-off date fixed as 1.5.1975 for the purpose of computing the terminal benefits of the erstwhile Government servants, who came to be subsequently permanently absorbed in the various Government Undertakings, particularly State Transport Undertakings, proceeded on an artificial basis. ...

*** *** ***

â\200¦It is only subsequently, in the year 1982, that such employees were asked to finally exercise their option, either way, and various employees exercised their option also. For instance, in respect of Pallavan Transport Corporation, the said date within which such options have to be exercised appears to have been fixed finally by a letter dated 20.6.1982 and in respect of other Corporations, it would depend upon the option called for before they were finally absorbed as employees of the Corporations, which have come into existence. Till the respective employees have exercised their options on their volition, they must be considered to continue in service as Government employees only, in view of the fact that the actual exercise of option by different

employees may be on different dates and to have a uniformity among group or category of workers pertaining to a particular Corporation, the date on which the options were called for finally, or the last date within which the options were to be exercised, once and for all finally, may be taken up as the relevant criteria in fixing the cut-off or crucial date for determination of the terminal benefits. â\200¦"

12. The learned senior counsel for the appellants has urged that for all practical purposes, the process of absorption of deputed employees was completed by 1.5.1975 by which date even the State Transport Department got disbanded. Our attention was drawn to the fact that pursuant to the promulgation of the rules known as 'The Pallavan Transport Corporation Longevity Pay Scheme and Conditions of Service Rules' which came into force on 1st May, 1975, options were called for from the employees on deputation from Government Departments. The option form enclosed to the Memorandum dated 29.5.1975 issued by the Managing Director of PTC Ltd. required the employees to declare that they voluntarily opted to serve in the PTC Ltd. and accordingly relinquished all their rights vis-a-vis Tamilnadu State Transport Department and that they were willing to get absorbed permanently in the said Corporation subject to the service put in the State Transport Department being carried over to PTC Ltd. with pay scales, accumulated rights for gratuity, provident fund, pension etc. Accordingly, the respondents exercised their options in 1975 itself and the process of absorption had thus completed during that year. Having regard to this background, there is nothing arbitrary in the policy decision fixing the cutoff date for eligibility to pension as 1.5.1975. The learned senior counsel then contended that the relevance and the rationality of fixation of the crucial date as 1.5.1975 cannot be faulted merely because one more opportunity was given to exercise options in the year 1982. The premise on which the impugned judgment proceeded, namely, that the respondents continued to be Government employees till final options were exercised in February, 1982, according to the learned counsel for the appellants is based on incorrect appreciation of facts. The financial repercussions have also been stressed by the learned senior counsel.

13. We find it difficult to accept the contentions advanced by the appellants' counsel. The learned counsel has not disputed the proposition that the cutoff date fixed by the Government for the purpose of conferring the pensionary benefits cannot be arbitrary or whimsical. Even according to the appellants, the date of permanent absorption in the service of the Corporation is a material date and it is in the light of that factor that the cutoff date was fixed as 1.5.1975. The stand taken in the counter affidavit filed on behalf of the Government of Tamilnadu in writ petition No. 6969 of 1990 is that the writ petitioners were absorbed in the Kattabomman Transport Corporation with effect from 1.5.1975 on the basis of the options exercised by them and that their deputation ended on 30.4.1975. That is how the choice of the date 1.5.1975 is sought to be justified. In other words, the fixation of cutoff date is sought to be linked up with the completion of the process of absorption. A perusal of G.Os. 1028 and 250 would also make it clear that the Government wanted to fix the date for pensionary entitlement to coincide with the date of permanent absorption. The criterion cannot be said to be

irrational or irrelevant. But, the question is whether this factual premise that the process of absorption took place in the year 1975 is correct. Viewed in the light of G.O.MS.No. 284 dated 30.1.1980 and the subsequent actions taken by the Management of the State Transport Undertakings, it cannot be said with certitude that the process of absorption was completed even in the year 1975. If in fact the process was completed by April, 1975, the pertinent question would be why fresh options were directed to be called for in the year 1980 and actually called for in January, 1982 and thereafter? G.O.MS.No. 284 dated 30.1.1980 clearly stipulates that fresh options shall be obtained from the Government servants working in various Corporations/ Boards. The Corporations/Boards were requested to decide the question of absorption of Government servants "on the basis of the terminal benefits indicated in the G.O." The sanction of pension and other terminal benefits was made dependent upon the acceptance of options. Specific reference has been made in the G.O. to the Transport Department employees. This G.O. gives an unequivocal indication that the Government itself regarded that the process of absorption was not complete and that a final exercise of calling for and accepting the offers should be gone through, may be, in view of the change of criteria in regard to the terminal benefits. As already noticed, G.O.No. 378 was issued on 18.4.1975, it was kept in abeyance on 22.8.1978 and thereafter G.O.No. 284 was issued on 31.3.1980. Thus, the terms and conditions of absorption did not take final shape till then. Moreover, even if the respondents had submitted the option forms in the year 1975 for the purpose of availing the Longevity Pay Scheme or otherwise, there is nothing on record to show that the said options were treated as final for all purposes. No material has been placed either before the High Court or before this Court to establish that the respondents' deputation came to an end by 1.5.1975 and that they were absorbed into Corporations' service from that date. Above all, the more important point is that nothing has been said in the counter-affidavit filed by the State Government before the High Court as to why fresh options were provided for by G.O. No. 284 and called for by the Corporation in the year 1982, if the entire process was concluded in the year 1975 itself. The counter-affidavit merely contains an assertion that State Transport Department employees were absorbed into the Transport Corporation with effect from 1.5.1975 by accepting the options. In the counter, not even a reference has been made to G.O.No. 284 and the options exercised pursuant thereto. The reason for calling for fresh options has not been spelt out even in the S.L.P. The factual assertion in the counter-affidavit therefore remains unsubstantiated.

14. Having regard to these facts and circumstances, we cannot accept the plea of the appellants that the absorption did in fact take place in the year 1975. In this situation, the justification sought to be made out for fixing the cutoff date as 1.5.1975 loses its ground in which case the finding of the High Court that the date was arbitrarily fixed cannot be assailed.

15. There is one more point which needs to be considered. In order to explain away the effect and efficacy of the options called for in the year 1982, a contention has been raised that G.O. No. 284 pursuant to which the options were called for was struck down by the High Court in a writ petition disposed of in the year 1983 and therefore such options must be regarded as non est in the eye of law. We find no merit in this contention. It is true that G.O No. 284

was struck down at the instance of some of the employees who were benefited by the earlier G.O. which it superseded. But, that is besides the point. What is material is the factual inference that is to be drawn from the fact that fresh options were called for by virtue of and pursuant to G.O.No. 284. The inference should be that the process of absorption was not regarded as complete by the Government as well as the Corporation. The invalidation of that G.O. by the High Court does not in any way displace this factual inference. In fact the validity of cutoff date was apparently not adjudicated in the said writ petition. The options exercised pursuant to G.O.No. 284 have for all practical purposes regained their efficacy with the reiteration of the same cutoff date by the subsequent G.O. dated 23.9.1985.

16. For the reasons aforesaid we find no merit in these appeals. The judgment of the High Court is upheld. However, the High Court while indicating that the last date for submitting the options finally should have been taken as the basis for fixation of date, gave a direction to the Government to fix the relevant date in the light of the observations made in the judgment. The High Court proceeded on the basis that it was only on 20.6.1982 and thereafter that the options were called for. We are of the view that in view of the long lapse of time and in order to avoid further delay and the scope for possible controversies, instead of leaving it to the Government to fix a fresh cutoff date as per the directions of the High Court, in exercise of our powers under Article 142 of the Constitution, we direct that the date 1.4.1982 shall be adopted as cutoff date in modification of what was prescribed in G.O.No. 1028 dated 23.9.1985 and G.O. No. 250 dated 18.11.1996. The reason for selecting the said date is that the Commissioner and Secretary to Government, Transport Department by his letter dated 5.1.1982 addressed to the Managing Directors of all State Transport Undertakings requested them to obtain fresh options by 28.2.1982. The memo issued by the Managing Director of KTC Ltd. dated 11.1.1982 makes it clear that the last date for exercise of options was fixed as 28.2.1982 in conformity with the Government's directive. The respective Corporations were supposed to finalise the options sometime thereafter. It is reasonable to presume that PTC Ltd. and other Corporations would have also adhered to the same date. The High Court has referred to the Note dated 20.6.1982 issued by the Managing Director of PTC (Metro) Ltd. But, it does not fix the last date for submitting the options. It purports to give certain instructions as to the follow up action to be taken with reference to the options received. Hence, the fixation of cutoff date as 1.4.1982 would, in our view, be appropriate. Taking into account the aforementioned date for the purpose of assessing the requisite length of service, we direct the appellants to take steps to extend the pensionary benefits to the eligible employees. Having regard to the conduct of the respondents in seeking the remedy long after the options were exercised, we consider it just and proper to direct that the respondent-employees whoever have retired should get the arrears of pension only from 1.1.1988 which date is fixed with reference to the year of filing the first writ petition namely W.P. No. 7012 of 1988. The fixation of pension and payment of arrears should be done accordingly within a period of four months from today. The appellants are entitled to adjust the monetary benefits which the employees would not have received if they were to receive the pension.

17. The civil appeals are disposed of accordingly

without costs.