

HIGH COURT OF JAMMU AND KASHMIR AT JAMMU

**Cr. Appeal No. 09/2006
And
Confirmation No.01/2006**

Date of decision : November 16, 2007

Tilak Raj	vs.	State
State	vs.	Tilak Raj

Coram

*Hon'ble Mr. Justice Nirmal Singh
Hon'ble Mr. Justice Virender Singh*

Appearing counsel:

For appellant(s) : Mr. Rahul Pant, Advocate, for
appellant/accused
For respondent(s) : Mr. B.S. Salathia, Addl. Advocate
General, for State.

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| i) | Whether approved for reporting in Press/Media | : Yes / No |
| ii) | Whether to be reported in Digest/Journal | : Yes / No |
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PER Virender Singh, J.

Appellant, Tilak Raj, (hereinafter to be referred to as 'accused') stands convicted under Section 302 RPC vide impugned judgment of learned Sessions Judge, Kathua, dated 30th of May, 2006 and has been sentenced to undergo life imprisonment and a fine of Rs.10,000/-, in default thereof to further undergo simple imprisonment for six months. Aggrieved of the same, he has filed the instant appeal. The judgment of conviction has been sent to this Court for confirmation under Section 374 Cr. PC, hence Confirmation Reference (Cr.) No.1/2006. Vide this judgment, we dispose of Criminal Appeal as also Confirmation Reference.

Deceased in this case is Bimla Devi. As per the prosecution case, the accused had developed intimacy with her, while working as labourer at Delhi-U.P. Border and she started living with him as his wife. His legally wedded wife, Smt. Shano Devi, (PW-7) was alive. Two sons had also born out of the living relationship between the accused and the deceased.

Bimla Devi was found in an unconscious state at Lakhapur Bus Stand in the early hours of 7th of September, 2003. Some one gave an information to Constable Vijay Kumar (PW-1) in this regard. Vijay Kumar, Constable happened to be on duty at Bus Stand, Lakhapur. Thereafter, Constable Bodh Raj (PW-2) and Head Constable Tilak Raj (PW-3) also rushed to Bus Stand. By that time, nobody knew the name of the woman lying there. However, she was struggling for life. An arrangement for vehicle was made from Police Station and she was shifted to Kathua Hospital. Constable Bodh Raj was asked by Head Constable Tilak Raj to stay in the hospital by the side of the woman and Constable Vijay Kumar and Head Constable Tilak Raj came to the Police Station. ASI Shiv Kumar (PW-4) (SHO of the concerned Police Station) was directed to conduct the investigation. Whereupon, he reached the hospital and approached the concerned doctor (Dr. Varinder Kumar (PW-16), moved an application (EXPW 4-SK) for obtaining the opinion as to whether the patient was fit to make statement. By that time, the doctor had come to know of her name from her and the address. Vide Certificate

EXPW 16-VK, Dr. Varinder Kumar declared her fit to make statement at 11.00 a.m. Thereafter, her statement (EXPW 4-SK/1) was recorded by ASI Shiv Kumar, which was attested by Dr. Varinder Kumar, which is EXPW 16/VK/1. On the basis of the statement, report No.8 was recorded in Daily Diary registered at Police Station, Basohli, on 07-09-2003 upon which a case was initially registered under Section 307 RPC. After some treatment was given to her at Kathua Hospital, Bimla Devi was referred to Government Medical College Hospital, Jammu. She, however, died on the way and was declared as ‘brought dead’ at 3.45 p.m. at Jammu Hospital. The case was then converted under Section 302 RPC. Her post-mortem was conducted by Dr. L.D. Bhagat (PW-17) on 08-09-2003.

During investigation, it revealed that the accused was harassing the deceased. They had left their ordinary abode at Madraki (Tehsil Basohli, District Kathua) and gone ton Delhi-U.P. Border for earning their livelihood. On 06-09-2003, he had mixed some poisonous material in the vegetable cooked for consumption and the deceased had consumed the same. Thereafter, he made her to board a bus and, ultimately, on 07-09-2003 in the early hours, she was found in an unconscious condition at Bus Stand, Laskhanpur by certain police official.

The prosecution recorded the statement of certain witnesses to established identity of deceased and his relationship with the accused. From the statement of Smt. Shano Devi (PW-7), wife of the accused,

recorded during investigation under Section 161 Cr. PC, it revealed that since she did not give birth to a child, her husband (accused) procured a woman (deceased) from his place of work (Delhi-U.P. Border) and she gave birth to two children. She also stated that she was staying separately with her sister Champa Devi. The deceased and the accused had left their ordinary abode (Madraki) 18/19 days before the alleged occurrence and she came to know that one Kartar Chand, Contractor of U.P. Board had employed the accused in his Company. The FSL report EXPW19-S revealed that the viscera of deceased Bimla Devi sent for clinical examination was containing aluminium phosphide. After completion of investigation, the accused was challaned and consequently charged under Section 302 RPC.

Before the trial Court, Smt. Shano Devi (PW-7) did not support the case of the prosecution and was declared hostile. Her sister Champa Devi (PW-9), also deserted the prosecution case and she too was declared hostile. Similarly, Kartar Chand, Contractor of U.P. Border, when examined as PW-10, disowned his statement with regard to the deceased staying with the accused. However, he deposed that the accused had worked in his Company for about 10 (ten) days in 2003. Similarly, another witness, Suresh Kumar, (PW-11), who was running a shop at the U.P. Border also denied the factum of any lady staying with the accused.

Another set of evidence produced by the prosecution was from the family of the accused and they also denied the factum of deceased staying with the accused.

Virtually, the case of the prosecution is hinging upon the statement of Bimla Devi, since deceased, (now treated as dying declaration) recorded by Shiv Kumar ASI (PW-4) in the presence of Dr. Varinder Kumar (PW-16). So far as cause of death is concerned, it cannot be disputed that Bimla Devi died on account of consumption of aluminium phosphide, as is evident from FSL report EXPW19-S. The dying declaration has been considered to be authentic by the learned trial Court for the purposes of recording the conviction of the accused under Section 302 RPC.

We have heard Mr. Rahul Pant, learned counsel for the appellant, and Mr. B.S. Salathia, learned Additional Advocate General representing the State. With their assistance, we have gone through the entire record.

Mr. Pant submits that the learned trial Court has not appreciated the evidence in its right perspective. He contends that, no doubt, conviction can be made solely on the basis of the dying declaration, but before recording it, the Court has to satisfy itself that it is free from all infirmities and unerringly points towards the guilt of the accused. According to him, in the case in hand, the so-called dying declaration suffers from the following infirmities:

- (i) It is not recorded by the Magistrate, whereas the police had ample time to requisition the service of a Magistrate. The statement of Bimla Devi is recorded in Government Hospital, Kathua, which is in the heart of the town and, therefore, any Magistrate could be requested for recording the same without wasting any time. This infirmity by itself creates lot of doubts with regard to the genuineness of the dying declaration.
- (ii) Dr. Varinder Kumar, who is the attesting witness to the statement, was not the treating doctor and, therefore, it is not clear as to what was the basis with him to declare the deceased as fit to make statement.
- (iii) The best witness was Dr. Vijay Bali, who was attending to the patient, as is clear from the statement of Dr. Varinder Kumar or ASI Shiv Kumar and, therefore, he should have been brought in the witness box. He develops his arguments further on this aspect submitting that deceased was found in an unconscious condition at Bus Stand and, therefore, her condition would have deteriorated instead of improving. In this eventuality, Dr. Bali, who was the treating doctor, could make the position very clear with regard to the mental faculty of the

deceased and not Dr. Varinder Kumar examined by the prosecution. According to him, if the poison is ingested about 12 hours prior to the death, the patient would go in coma, blood pressure would fall, pulse rate would also fall, resultantly, the breathing would be slow. To say so, he relies upon the evidence of Dr. L.D. Bhagat (PW-17) where he has stated that if the patient is not in coma, then the speech would be slurred and the brain functioning would be depressed due to lack of oxygen supply to the brain and in that eventuality, thought process would also be impaired. From this, Mr. Pant submits that it is doubtful as to whether the deceased was, in fact, in a position to make a statement at 11.30 a.m. of not. According to Mr. Pant, the case of consumption of aluminium phosphide is either accidental or suicidal. It can not be homicidal, as aluminium phosphide gives very pungent smell and, as such, difficult to be administered to someone, may be by mixing it in food stuff .

- iii) Mr. Pant then submits that if one reads the contents of the dying declaration, it appears that certain words have been added by ASI Shiv Kumar making it a case of 302 RPC. Drawing our attention to the

original statement from the trial Court records, learned counsel states that one important word “Mar Jaun (in Hindi version) is out of the space and does not fit in the sentence. This appears to be interpolation. Therefore, a case of suicidal death has been converted into homicidal death.

- iv) The learned counsel then submits that even otherwise, the dying declaration is not recorded in accordance with the provisions of Rule 609 of the Manual (&K), therefore, this infirmity also can be considered as one of the flaws for rejecting it.
- v) Mr. Pant submits that it is not clear as to at which place, the poison was administered to the deceased at previous night, i.e. on 06-09-2003. It could be village Madraki, Tehsil Basohli or Delhi-U.P. Border. The deceased was not clear as to how she has reached Lakhapur in the wee hours of 07-09-2003. This again indicates that the deceased was not in a fit state of mind and possibly was not in a position to make a statement and possibility of the same being manufactured can not be ruled out.
- vi) Mr. Pant then submits that initially it was taken by the prosecution that the poison was administered to the deceased at Madraki and that is reason that the

Police at Police Station, Basohli had initiated the investigation and the FIR was registered there. It was only during the investigation that the story was changed by the prosecution that the deceased was poisoned by the appellant at Delhi-U.P. Border where she was allegedly residing with the accused.

This creates a lot of doubt about the very case set up against the accused.

On the basis of aforesaid submissions, Mr. Pant submits that the dying declaration is not free from doubt and may not be made the basis of conviction of the accused. He, thus, prays for his acquittal

Mr. Salathia, on the other hand, while supporting the impugned judgment, states that there appears to be no reason to disbelieve the dying declaration of the deceased, as it cannot be said that any of the witness was against the accused in any manner including the police officials. At the same time, it cannot be a case of any tutoring from any outer agency and this fact by itself is enough to believe the dying declaration as it is for maintaining conviction. He then submits that even if it is not strictly in accordance with the provisions of Police Manual, that by itself cannot be a ground to discard it. Mr. Salathia, thus, prays for

maintaining the conviction of the accused as already recorded by the trial Court.

The philosophy underlying admittance in evidence of ‘dying declaration’ is that no one at the time of death is presumed to tell lie. Therefore, dying declaration enjoys a sacrosanct status as a piece of evidence being the last words coming from the mouth of the deceased (victim). On this principle, it is otherwise very well settled now that it is not a rule of law or even the rule of prudence that the ‘dying declaration’ cannot be made the sole foundation of conviction. This basic principle, which holds good till date was observed in case **Khushal Rao Versus State of Bombay, AIR 1958 SC 22**, which view is reiterated in a very latest judgment rendered by Hon’ble Apex Court in **Dayal Singh Versus State of Maharashtra, 2007 (3) All India Criminal Law Reporter (SC) 346**, wherein their Lordships have observed in para 11 as under:

“11. The law regarding the dying declaration and the value which is to be attached to it has been examined in considerable detail in **State of Karnataka v. Shariff, (2003) 2 SCC 473: 2003(2) All India Criminal LR (S.C.) 533**, by a Bench of which one of us was a member and paragraphs 18, 19, 20, 22 and 23 of the decision are being reproduced below:-

18. The earliest case in which the law on the point of dying declaration was

considered in detail by this Court in Khushal Rao v. State of Bombay AIR 1958 SC 22. The Court ruled that it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated; each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made; it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other pieces of evidence; a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence. It has been further held that in order to pass the test of reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused who had no opportunity of testing the veracity of the statement by cross-examination. But once the Court has come to the conclusion that the dying declaration was the truthful version as to the circumstances of the death and the assailants of the victim, there is no question of further corroboration.

19. In State of Uttar Pradesh v. Ram Sagar Yadav, (1985) 1 SCC 552 the Court speaking through Chandrachud, C.J. held as under:

“It is well settled that, as a matter of law, a dying declaration can be acted upon without corroboration. See Khushal Rao v. State of Bombay, AIR 1958 SC 22; Harbans Singh v. State of Punjab, AIR 1962 SC 439, Gopal Singh v. State of M.P., 1972 (3) SCC 268. There is not even a rule of prudence which has hardened into a rule of law that a dying declaration cannot be acted upon unless it is corroborated. The primary effort of the Court has to be to find out whether the dying declaration is true. If it is no question of corroboration arises. It is only if the circumstances surrounding the dying declaration are not clear or convincing that the Court may, for its assurance, look for corroboration to the dying declaration.....”

20. In K. Ramachandra Reddy and Anr. v. The Public Prosecutor, (1976) 3 SCC 618 it was held that a great solemnity and sanctity is attached to the words of a dying man because a person on the verge of death is not likely to tell lies or to concoct a case so as to implicate an innocent person yet the Court has to be on guard against the statement of the deceased being a result of either tutoring, prompting

or a product of his imagination. It was further held that the Court must be satisfied that the deceased was in a fit state of mind to make the statement after the deceased had a clear opportunity to observe and identify his assailants and that he was making the statement without any influence or rancour. Once the Court is satisfied that the dying declaration is true and voluntary it can be sufficient to found the conviction even without any further corroboration. In Pothakamuri Srinivasulu v. State of A.P., (2002) 6 SCC 399 it has been held that if the deceased made statement to the witnesses and their testimony is found to be reliable the same is enough to sustain the conviction of the accused. In Mafatbhai Nagarbhai Raval v. State of Gujarat, (1992) 4 SCC 69 it was held that the Doctor who has examined the victim was the most competent witness to speak about her condition.

22. The other reason given by the High Court is that the dying declaration was not in question-answer form. Very often the deceased is merely asked as to how the incident took place and the statement is recorded in a narrative form. In fact such a statement is more natural and gives the version of the incident as it has been perceived by the victim. The question whether a dying declaration which has not been recorded in question -answer form can be accepted in evidence or not has been considered by this Court on several occasions. In Ram Bihari Yadav v. State

of Bihar and ors., (1998) 4 SCC 517, it was held as follows:

“It cannot be said that unless the dying declaration is in question answer form, it could not be accepted. Having regard to the sanctity attached to a dying declaration as it comes from the mouth of a dying person though, unlike the principle of English law he need not be under apprehension of death, it should be in the actual words of the maker of the declaration . Generally, the dying declaration ought to be recorded in the form of questions and answers but if dying declaration is not elaborate but consists of only a few sentences and is in the actual words of the maker the mere fact that it is not in question-answer form cannot be a ground against its acceptability or reliability. The mental condition of the maker of the declaration, alertness of mind, memory and understanding of what he is saying, are matters which can be observed by any person. But to lend assurance to those factors having regard to the importance of the dying declaration, the certificate of a

medically trained person is insisted upon....”

23. In Padmaben Shamalbhai Patel v. State of Gujarat, (1991) 1 SCC 744 it was held that the failure on the part of the medical men to record the statement of the deceased in question and answer form cannot in any manner affect the probative value to be attached to their evidence. This view was reiterated in State of Rajasthan v. Bhup Ram, (1997) 10 SCC 675 and Jai Prakash and ors. v. State of Haryana, (1998) 7 SCC 284.”

In another very recent judgment rendered by Hon’ble Apex Court in case **Smt. Shakuntala Versus State of Haryana, 2007 (4) All India Criminal Law Reporter 374**, while upholding the conviction of the accused/appellant under Section 302 IPC, which was based on the dying declaration of the victim, their Lordships dealing with Section 32 of the Indian Evidence Act, 1872, observed as under:

“At this juncture, it is relevant to take note of Section 32 of the Indian Evidence Act, 1872 (in short ‘Evidence Act’) which deals with cases in which statement of relevant fact by person who is dead or cannot be found, etc. is relevant. The general rule is that all oral evidence must be direct viz., if it refers to a fact which could be seen it must be the evidence of the witness who says he saw it, if it refers to a fact which could be heard, it must be the evidence of the witness who says he

heard it, if it refers to a fact which could be perceived by any other sense, it must be the evidence of the witness who says he perceived it by that sense. Similar is the case with opinion. These aspects are elaborated in Section 60. The eight clauses of Section 32 are exceptions to the general rule against hearsay just stated. Clause (1) of Section 32 makes relevant what is generally described as dying declaration, though such an exception has not been used in any Statute. It essentially means statements made by a person as to the cause of his death or as to the circumstances of the transaction resulting in his death. The grounds of admission are: firstly, necessity for the victim being generally the only principal eyewitness to the crime, the exclusion of the statement might deflect the ends of justice; and secondly, the sense of impending death, which creates a sanction equal to the obligation of an oath. The general principle on which this species of evidence is admitted is that they are declarations 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 mind is induced by the most powerful considerations to speak the truth; a situation so solemn and so lawful is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of justice. These aspects have been eloquently stated by Lyre LCR in *R . v. Wood Cock (1989) 1 Leach 500*. Shakespeare makes the wounded Melun, finding himself disbelieved while announcing the intended treachery of the Dauphin Lewis explain:

“Have I met hideous death within my view,
Retaining but a quantity of life,

Which bleeds away even as a form of wax,
 Resolveth from his figure against the fire?
 What is the world should make me now deceive,
 Since I must lose the use of all deceit?
 Why should I then be false since it is true
 That I must die here and live hence by truth?"

(See King John, Act 5, Sect.4)

The principle on which dying declare is admitted in evidence is indicated in legal maxim "nemo moriturus proesumitur mentiri" a man will not meet his maker with a lie in his mouth."

What precaution is to be taken by Court while accepting the dying declaration, their Lordships further held as under:

"Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross-examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the Court also insists that the dying declaration should be of such a nature as to inspire full confidence of the Court in its correctness. The Court has to be on guard that the statement of deceased was not as a result of either tutoring, or prompting or a product of imagination. The Court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailant. Once the Court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence. This Court has laid down in several judgments the principles governing dying declaration, which could be summed up as under as indicated in *Smt. Paniben v. State of Gujarat (AIR 1992 SC 1817 : 1992 (3) All India Criminal LR (S.C.) 260)*:

“(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration [See *Munnu Raja & Anr. v. The State of Madhya Pradesh* (1976) 2 SCR 764].

(ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. [See *State of Uttar Pradesh v. Ram Sagar Yadav and Ors.* (AIR 1985 SC 416) and *Ramavati Devi v. State of Bihar* (AIR 1983 SC 164)]

(iii) The Court has to scrutinize the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had an opportunity to observe and identify the assailants and was in a fit state to make the declaration. [See *K. Ramachandra Reddy and Anr. v. The Public Prosecutor* (AIR 1976 SC 1994)]

(iv) Where dying declaration is suspicious, it should not be acted upon without corroborative evidence. [See *Rasheed Beg v. State of Madhya Pradesh* (1974 (4) SCC 264)].

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. [See *Kaka Singh v. State of M.P.* (AIR 1982 SC 1021)]

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. [See *Ram Manorath and Ors. V. State of U.P.* (1981 (2) SCC 654)]

(vii) Merely because a dying declaration does contain the details as to the occurrence, it is not to be rejected. [See *State of Maharashtra v.*

Krishnamurthi Laxmipati Naidu (AIR 1981 SC 617)]

(viii) Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth. [See *Surajdeo Oza and Ors. v. State of Bihar (AIR 1979 SC 1505)*].

(ix) Normally the Court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eye-witness said that the deceased was in a fit and conscious state to make the dying declaration, the medical opinion cannot prevail. [See *Nanahau Ram and Anr. v. State of Madhya Pradesh (AIR 1988 SC 912)*].

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. [See *State of U.P. v. Madan Mohan and Ors. (AIR 1989 SC 1519)*].

(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 (AIR 1982 SC 839)*.”]

We would now appreciate the acceptability of the dying declaration made by Bimla Devi following the aforesaid guidelines and enter into detailed discussion while considering the arguments advanced by Mr. Pant.

One very material aspect which cannot be lost sight of, is that it cannot be a case of tutoring from the outer source at all, as no one was known to the either side. The deceased was a stranger to the policemen or even to the doctor and so was the position of the accused. She was noticed just incidentally lying near the bus stand and then taken to the Hospital at Kathua for treatment. So an attempt was there to save her and during her treatment, she uttered few facts to the police official in presence of a doctor (Dr. Varinder Kumar) of Kathua Hospital. Whatever she could say in few words before being removed to Jammu Hospital now has taken the shape of a dying declaration. She, however, could not reach Jammu Hospital and died on the way. Although this fact by itself can be said to be sufficient to say that the dying declaration of Bimla Devi does not suffer from any infirmity, and can be the sole basis of conviction of the accused, yet we are rescanning it from the angle of certain infirmities pointed out by Mr. Pant.

No doubt, it is not recorded by a Magistrate as stated by Mr. Pant, but it is not essential that a dying declaration should be made only before a Magistrate. Section 32 of the Evidence Act nowhere states that the dying declaration must be recorded in the presence of the Magistrate. In Dayal Singh's case (*supra*), it has been observed that Section 32 of Evidence Act nowhere states that the dying declaration must be recorded in the presence of a Magistrate and the dying declaration recorded by a police officer in

the presence of the doctor, who had given an opinion that the deceased was in a fit state of mind to make the statement, was held to be credible and reliable, sufficient to establish the guilt of the accused. In the present case, the statement is recorded in Government Hospital, Kathua, by Shiv Kumar, ASI, (PW-4) in the presence of Dr. Varinder Kumar, after she was declared fit to make statement. The record reveals that statement of the deceased was recorded within two/three hours after she was noticed at bus stand Lakhanpur. Thereafter, the victim was sent to Jammu Hospital for further treatment. In this short span of time, services of a Magistrate could not be requisitioned. Admitted position is that the deceased did not survive even for a day and rather died while she was being carried to Jammu Hospital. So, it is a case, in which police had possibly no time to call for the Magistrate at all for recording the statement and the moment ASI Shiv Kumar reached the Hospital, he contacted Dr. Varinder Kumar and after taking his opinion, recorded her statement. It was duly attested by Dr. Varinder Kumar also.

Mr. Pant has made an attempt to make the dying declaration doubtful on the ground that Dr. Vijay Bali, who had initially attended to the patient and had prepared the Medico-Legal Report, was the best person to tell us about the fitness of the patient. But, in our view, it is a futile attempt for the reasons that aforesaid Dr. Varinder Kumar is the person, who was present in

the Hospital when ASI Shiv Kumar reached there, as it is clear from his statement or even from the original dying declaration available on the trial Court record. Dr. Varinder Kumar has proved his certificate, which is exhibited as EXPW16-VK. No doubt, in his cross-examination, he stated that he had not recorded in so many words that the statement was given in his presence, but he made this fact very clear saying that he would attest the statement only if it is made in his presence, and would not attest any other statement. From this, it is now crystal clear that the dying declaration of Bimla Devi was recorded in the presence of Dr. Varinder Kumar after she was found to be fit to make a statement. We find no reason to doubt his evidence. Argument of Mr. Pant that when the deceased was found at the bus stand, she was in an unconscious condition and, therefore, her condition would have deteriorated instead of improving and, as such, she could not make the statement, falls on the ground in the light of aforesaid factual position.

Another infirmity as pointed by Mr. Pant is that if the poison is ingested about 12 hours prior to the death, the patient would go in coma, resultantly, the breathing would be slow and because of malfunctioning of brain, it would not be possible to make a statement, would again be of no relevance as each case depends upon its own facts. Here in the case in hand, nobody is sure as to how much was the quantity of poison mixed with the vegetable, which was taken

by the deceased. Mr. Pant made an attempt to take advantage from the evidence of Dr. L.D. Bhagat, who had conducted the autopsy on the dead body of the deceased, where in his cross-examination he has stated that if the poison is ingested since 12 hours then the patient may be in coma, blood pressure will fall, pulse rate will fall, breathing will be slow. If the patient is not in come, the speech will be slurred and the brain functioning will be depressed due to lack of oxygen supply to the brain. Whatever is stated by Dr. Bhagat cannot take us to draw a positive conclusion that at the time of recording of the statement of the deceased in this case, she was not at all in a position to even utter a word. After all, there is evidence before us of a doctor, who was absolutely unconcerned with the success or failure of the prosecution case, and has stated categorically that the patient was fit to make the statement and we are not going to discard it. We are also conscious of the fact that the cases of consumption of aluminium phosphide are generally accidental or suicidal and the cases of homicidal death in such type of situation are very rare, but it cannot be said that there is no possibility of homicidal death in such type of a situation. It depends upon the other attending factors also. In the case in hand, all the attending factors are staring at the appellant and speak volumes of the fact that the few words, in fact, vomited

out by Bimla Devi (since deceased) are true to the core. Therefore, arguments of Mr. Pant on this aspect are also repelled.

Another attempt made by Mr. Pant that some interpolation has been done or that it has not been recorded in accordance with the provisions of Rule 609 of the Police Manual (J&K), while recording the dying declaration by the Investigating Officer, also merits rejection for the reason that simply the dying declaration has not been recorded strictly in accordance with the Police Rules, it cannot be said that it is not the true dying declaration. On the aspect of interpolation, if any, we have very minutely and carefully perused the original dying declaration from the trial Court records and find that there is no interpolation in it. The deceased uttered that after she was given the poison in the vegetable, she was turned out. Then she wanted to express that her husband used to harass her, so that she leaves the house herself of dies. In vernacular (Urdu), it is said "*Taki Muzra Tang Aakar Ghar Se Chali Jaun Ya Mar Jaun*" Thereafter it is written that "*Yeh Ilam Nahi, Yahan Kaise Pahunchi Hoon*". No doubt, the words "*Mar Jaun*" is little bit out of space, but it cannot be said that it was inserted subsequently by the Investigating Officer. This word, in our view, has no effect and from this it cannot be said that the deceased, in fact, had committed suicide, as argued by Mr. Pant. Dying declaration in the present case is in few words, which does not contain all details and if one reads it very carefully, it is not in

sequence and is true reproduction of facts. It is a very brief statement, the shortness of which itself is the guarantee of the truth. We can, therefore, comfortably say that the perusal of the dying declaration reflects that ASI Shiv Kumar had recorded it in the manner it was coming out of the mouth of the deceased without adding even a word from his side. In other words, it is in its purest form and without any tinge of tutoring.

The other infirmities pointed out by Mr. Pant with regard to the place of administering the poison to the deceased on the previous night and his attempt to create doubt to the fact as to how she had reached Lakhanpur in the wee hours on 7th of September, 2003 or even with regard to the start of the investigation at Police Station Basohli are neither here nor there being insignificant aspects, resultantly merit outright rejection on the premise that we are believing the dying declaration of Bimla Devi as it is.

As a sequel to the aforesaid discussion, it can safely be concluded that there is no material to show that the dying declaration was product of imagination, tutoring or prompting. On the contrary, it can be said that it has been made by the deceased voluntarily and is trustworthy to rely upon for the purposes of proving the charge against the accused.

Resultantly, the instant appeal is dismissed and the conviction of the accused under Section 302 RPC, as already recorded by the trial Court, is hereby upheld. The appellant is

stated to be in custody and shall serve the remainder of his substantive sentence.

Confirmation Reference (Reference No.01/2006) sent by the learned trial Court under Section 374 Cr.PC is accepted accordingly.

(Virender Singh) *(Nirmal Singh)*
JAMMU **Judge** **Judge**
November 16, 2007
T.Arora, PS