IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRIMINAL APPEAL NO.1291 SB OF 2003

DATE OF DECISION: OCTOBER 31, 2007

Jai Pal

.....Appellant

VERSUS

State of Haryana

....Respondent

CORAM:- HON'BLE MR.JUSTICE RANJIT SINGH

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

PRESENT: Mrs.Vandana Malhotra, Advocate,
for the appellant.

Mr. Yashwinder Singh, AAG, Haryana,
for the State.

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RANJIT SINGH, J.

On being convicted for an offence under Section 304-B IPC due to death of his wife Reshma, appellant Jai Pal son of Hari Ram, a labourer, has filed this appeal. The appellant alongwith his parents was tried for an offence of dowry death, which happened on 26.3.2000. Though the parents of the appellant stand absolved of the allegations levelled against them, but the appellant was convicted and sentenced to suffer rigorous imprisonment of 10 years. The sentence awarded to the appellant was suspended on 13.8.2007, noticing that he has by then actually undergone more than 7 years RI out of the sentence awarded. The appeal has now come up for hearing.

The facts, in brief, are that the appellant was married to one

Reshma on 28.6.1994. It is urged that the complainant, father of the deceased, gave dowry to the appellant according to his capacity. The appellant and his parents, however, started making demands for dowry and on refusal, gave beating to the deceased, Reshma. The deceased also disclosed to her father that her husband (appellant) was addicted to drinking and gambling and used to make demands for money from her and on refusal, gave her beatings. The complainant is alleged to have counseled the appellant and also expressed his inability to meet the demands so raised, which, rather resulted in increased harassment of the deceased by the appellant. It is further alleged that on 25.3.2000, the appellant alongwith his parents gave beatings to deceased Reshma, who was sick and then gave her poison on the pretext of giving her medicine. Her condition became precarious and she was then admitted in the Government Hospital by the appellant, who also informed the complainant about admission telling that the deceased had consumed poison. When the complainant met his daughter, she allegedly disclosed in the presence of 2/3 persons that her husband (appellant) and parents-in-law had poisoned her. Reshma expired on 26.3.2000, having been hospitalised for a day. The complainant accordingly made an application, Ex.PK, to the police and thereafter the present case was registered on 8.4.2000 under Section 304-B IPC. FIR is on record as Ex.PK/1. The matter was investigated by Sub Inspector Bir Bhan. Statement of one Rano Devi, a cousin sister of the deceased (daughter of complainant's sister and married in same village Mathana, that of the appellant), was also recorded. In her statement, she had disclosed that the appellant gave beatings to

the deceased on 25.3.2000 and hearing the voice of the deceased, she had gone to the house of the appellant where she found the deceased lying on the floor. Rano Devi had further disclosed that deceased Reshma started weeping on seeing her and stated that her husband and parents-in-law gave her beatings and thereafter had administered certain tablets used for wheat preservative instead of medicine. As per Rano Devi, the deceased had also told her to disclose this fact to her parents i.e. the complainant. These facts statedly were disclosed by Rano Devi to her maternal uncle i.e. Sant Lal, complainant. Rano Devi had also made a statement that deceased was harassed by her in-laws for bringing insufficient dowry. She has further testified that Reshma, deceased, was taken to Lok Nayak Jai Parkash Hospital, Kurukshetra, when her condition became serious, where she ultimately died.

Another fact of significance, which has come on record and may need a notice, is that on 26.3.2000 ASI Sudhir Kumar of Police Station Thanesar had gone to the Police Station to record inquest proceedings on the death of deceased Reshma. He sent the dead body for autopsy vide request letter Ex.PA. Dr.C.R.Khatri and Dr.G.D.Mittal had conducted the post mortem examination on the dead body. The post mortem report is exhibited on record as Ex.PD. A sealed parcel containing viscera and vial containing her blood etc. were also sent for examination and opinion in regard to the cause of death was deferred to be given after the report of the Chemical Examiner. The Chemical Examiner report revealed presence of aluminum phosphide in stomach, small and large intestines, liver spleen, kidney etc. whereas blood from heart contained in a vial gave

positive test for phosphide whereas the preservative used contained in separate vial gave positive test for saline only. The medico legal examination gave test for phosphine whereas vomiting of Reshma, deceased, gave positive test for aluminum phosphide. On the basis of these reports, Dr.C.R.Khatri gave his opinion about the cause of death being due to aluminum phosphide and phosphine, which are poisons. The police, after investigation, found Hari Ram, father of the appellant, innocent but arrested the appellant on 11.4.2000 and his mother, Premo Devi, on 29.4.2000. Appellant and his mother accordingly were charge-sheeted under Section 304-B IPC.

After recording the statement of the complainant, prosecution moved an application under Section 319 Cr.P.C. for summoning Hari Ram as well, which was done and he was charged for an offence under Section 304-B IPC alongwith other two accused. Subsequently, another application was moved by the prosecution and the charge was amended and preferred under Section 302 IPC with an alternative charge under Section 304-B IPC against all the three accused.

They all pleaded not guilty and claimed trial. The prosecution case is supported by seven witnesses. Two witnesses, namely, Sukho Devi and Dalip Kumar, were given up as unnecessary. The appellant alongwith his co-accused when confronted with the evidence and the circumstances appearing against them, conceded the factum of marriage but denied the remaining allegations made against them. It is further brought out that Hari Ram and Premo Devi, accused, were living separately from accused Jai Pal. It is pleaded that Reshma had fallen sick and was

taking medicine for 3-4 days prior to her death. She was having high fever on the day of incident and statedly had taken celphos tablets mistakenly from the slab where medicine for fever as well as celphos tablets were kept. Thereafter, she started vomiting, when appellant Jai Pal removed her to the hospital under intimation to her parents. Co-accused parents of the appellant had also reached the hospital on getting information about admission of deceased Reshma. Soon complainant Sant Ram and his other family members also reached the hospital besides some persons from Village Mathana. The police was also informed and ASI Sudhir Kumar recorded the statement of Reshma in the presence of her parents and other relatives. In this statement made before the police officer, Reshma clearly stated that she had taken tablets by mistake while she was under high fever, thinking it to be her medicine. Defence would highlight that after death of Reshma, complainant, Sant Ram, and his brother joined the inquest proceedings and also the cremation, which was done in Village Mathana in their presence. They never raised any accusation against the appellant or his parents.

The appellant and his co-accused have denied the allegation of demand of dowry. The case of the defence further is that complainant, Sant Lal, broke open the house of the appellant in his absence to take away the house hold goods from there, which was protested by the villagers. The Panchayat had even required the appellant to lodge a complaint of theft against Sant Lal. As per the defence, apprehending action against him, he has lodged the false report against the appellant and his parents. In support of its case, the appellant examined three witnesses, one of which was ASI

Sudhir Kumar, who had recorded the statement of the deceased while she was in hospital, which is being referred as a dying declaration. Accordingly, it is pleaded that the appellant and his parents are innocent and were not guilty of offences alleged against them.

The case of the prosecution is mainly supported by the evidence given by the father-complainant and Rano Devi, cousin sister of the deceased. The complainant admittedly is not an eye witness to any of the happenings. Rano Devi ofcourse has given evidence, showing that she had reached the place of occurrence soon after the incident. Both of these witnesses have given derivative evidence, source being the deceased. Thus, their evidence is on the basis of whatever was told to them by the deceased, which may be taken into consideration as dying declaration. Both these so called dying declarations concededly are oral. Against this, the defence would place strong reliance on a statement recorded by ASI Sudhir Kumar, which is also termed as dying declaration. All these three dying declarations have been dis-believed by the trial Court. The version, as introduced by the complainant and Rano Devi, which led to the appellant and his co-accused being charged for an offence under Section 302 IPC, thus, was dis-believed and they all were acquitted of the said charge. Parents of the appellant were also acquitted of the charge under Section 304-B IPC mainly on the ground that they were found living separate from their son (appellant). The State is not aggrieved against the order of acquittal in any manner and hence it has acquired finality. It is now required to be seen if the conviction of the appellant can be sustained on the

basis of evidence and material led on record or it would require any interference as pleaded in the appeal.

Submission mainly is that out of the three dying declarations available on record, one recorded by the police officer alone is in writing and as such, is required to be preferred and believed over the oral dying declarations brought on record through complainant and cousin sister of the deceased, who are otherwise closely related and, thus, interested witnesses. This aspect is further highlighted in the background that the complainant has made a statement during the inquest proceedings where he did not make any allegation and also did not disclose that the deceased had made any statement before him. According to the appellant's counsel, this version introduced after a lapse of nearly 12 days of the incident is an after thought and as such, not worthy of any credence whereas the dying declaration recorded by Sudhir Kumar (DW1) was prompt and in writing, and as such, wrongly ignored by the trial Court. The counsel would also submit that the prosecution failed to prove the demand of dowry and accordingly the death in this case can not be termed as a dowry death, which aspect has again not been properly appreciated by the trial Court. The State counsel, however, would support the findings returned by the trial Court and pleads that no interference is called for.

It is seen that complainant Sant Lal (PW5) and Rano Devi (PW6) have not been believed so far as they had deposed about the statement made by the deceased before them is concerned, which were pressed by prosecution as dying declaration. It is also noticeable that the prosecution or the complainant has not raised any

grievance against this finding. The prosecution has not raised any plea that these witnesses ought to be believed in regard to their statements on the basis of information derived from the deceased. The two dying declarations introduced on record by the prosecution through PW5 and PW6, as such, can be excluded from consideration without any further discussion. The third dying declaration brought on record by the defence, which is in writing, was also dis-believed by the trial Court. Let us see in case this finding of the trial Court can be sustained or not.

The dying declaration reduced into writing by DW-1 has been mainly dis-believed on the ground that the same was not got attested from a doctor, though this was recorded in the hospital. Another fault noted in this by the trial Court is that the police officer did not summon the Magistrate for recording the statement of the deceased. These two aspects would have an easy explanation which is available on record. DW-1 deposed before the Court while under cross-examination that he did not call the Magistrate to record dying declaration as he found the deceased in a normal condition and as such, did not expect her to die. This explanation was not found satisfactory by the trial Court on the ground that it is not supported by evidence of any doctor to show that the deceased was fine and so likely to survive. The trial court appears to have wrongly placed uncalled for burden on the defence to prove this assertion. It is required to be appreciated that DW-1 had conducted the inquest proceedings and was a prosecution witness. He was required to be examined as such but was not examined by the prosecution, which necessitated the defence to examine him as its own witness. In this

background, requiring the defence to establish the assertion of a witness made in cross-examination that the deceased was well and fine, can not be insisted for strict proof keeping in view the law relating to burden of proof on the defence. Sufficient evidence in this regard otherwise is available on record, which apparently was ignored by the trial Court. Before recording the dying declaration, DW-1 had moved an application, Ex.DE, before a doctor, seeking opinion whether Reshma was fit to make a statement or not. The doctor gave his opinion Ex.DE/1 reading "Patient is fit to give her statement." This opinion was given at 3.45 P.M. On 25.3.2000. This would be enough to indicate the stand of DW1 that deceased was well and fit and as such, he can not be faulted for not summoning Magistrate to record her statement. Similarly, DW1 had simply recorded the statement of the deceased, not excepting her to die and in this background, requiring him to get the statement attested from a doctor would be asking for something which is not a requirement under any law. It may be for lending assurance to such statement. Otherwise, the statement is thumb marked by the deceased and is attested by the police officer putting his signatures thereon. Having recorded the statement of the deceased, DW1 made a due endorsement thereon that before recording the statement, opinion of the doctor was obtained regarding her fitness to make statement and thereafter the statement was read over to the deceased when she had put her thumb impression thereon, taking it to be correct statement made by her and recorded by DW-1. In this background, it would not be fair to require from the defence to prove that the deceased was in a fit state to make the statement by examining a

doctor. Rather, grievance would be of the defence to say that the prosecution failed to examine a doctor who had treated the deceased while she was in the hospital to prove her condition. This is more so in the background of the evidence given by complainant, Sant Lal. He has introduced the version of the deceased by saying that she was unconscious and had regained consciousness for sometime again to become unconscious after making statement to the complainant. He seems to be making an effort to show that the deceased was unconscious, realising that the defence was likely to rely upon a statement of the deceased recorded by DW-1 about which he obviously was aware. It is too much to believe that the deceased would regain consciousness to make a statement before her father and then again relapse into unconscious condition. This appears to have been done to introduce the oral dying declaration by the complainant and to cater for the written dying declaration relied upon by the defence. If the deceased could regain consciousness to make a statement before her father, it would give an indication that she perhaps was fit to make a statement. This would be in line with the deposition of DW-1 that she was fit. Rather, this version of DW-1 is supported by a written record i.e. doctor opinion produced through the prosecution witnesses, which has apparently been completely ignored by the trial Court from consideration. This would rather show that the deceased was fit to make a statement. It would also negate the evidence given by complainant Sant Lal that deceased had remained unconscious and has regained consciousness for some time for making statement before him.

No reasons are forth-coming as to why the prosecution did not examine Sudhir Kumar who indeed was a prosecution witness. The prosecution can not also justify its conduct in not examining a doctor who treated the deceased while she was in the hospital to depose about her condition and the treatment that she received. In this background, to find fault with the statement of DW-1 is not be a justifiable approach especially in the background of the law relating to burden of proof on the defence. It may need a notice that the defence succeeds by probablising its pleas whereas the prosecution can succeed only if it is able to establish the case beyond reasonable doubt.

The trial Court has also doubted the written dying declaration recorded by DW-1 on the ground that how deceased Reshma could have known that she had taken these tablets mistakenly, even if it was so. There is evidence on record that Reshma had vomited. This perhaps could be the reason for her to learn that she had taken these tablets by mistake. It also can not be ignored that the appellant had taken the deceased to the hospital and had informed her parents as well. Why would he have done so, if he had intended to kill and poison his wife? It would appear more probable to say that deceased had been taken to hospital immediately when the appellant learnt that his wife had consumed some wrong tablets by mistake. It is also to be viewed in the background that the complainant did not lodge any complaint against the appellant immediately. The case of the prosecution is that the deceased had disclosed the fact of having been administered poison to the complainant on 25.3.2000 while she was in the hospital.

Complainant, thus, can be expected to make a complaint about it immediately, rather then to wait till 8.4.2000. The evidence of the complainant would be found infirm in this regard. So too would be his evidence in regard to demand of dowry. PW5 has testified that after about 4 or 5 months of the marriage, appellant, Jai Pal as well as his father and mother started harassing and mal-treating his daughter for and in connection with demand of dowry. He has further deposed that he could not meet the demand being a poor labourer. PW5 then deposed about convening a panchayat whereafter the appellant and his family had behaved properly with the deceased, again to start raising demand of dowry. It would be relevant to notice the exact version given by PW5 in this regard, which is ".....they behaved properly with Smt.Reshma for 15/20 days but again started raising demand of dowry. On this Reshma told about it to us. She also told us that her husband was a drunkard and indulged in gambling and used to beat her quite often." This all is the deposition of PW5 relating to demand of dowry and harassment. There is no date given as to when any demand was made and what was the nature of demand. He has not deposed specifically that if any dowry was demanded from him. His version rather would show that the deceased complained to her father that the appellant was a drunkard and was indulging in gambling and not that he was demanding any dowry. To be fair to PW5, he did state that he had made available a fan and a sum of Rs.5,000/- in cash to the accused persons through his daughter Reshma. He, however, has not said whether this dowry was demanded by the appellant or his parents. This also is clearly not soon before the death as can be seen from the further evidence

of PW-5. Having deposed about making available this fan and cash, PW5 further stated that after about 15 days of the said payment, he went to the house of his daughter, when he learnt that they were still mal-treating her. PW-5 claims to have requested the appellant not to misbehave with his daughter. It can, thus, be stated that this evidence would not be sufficient to show either a demand or that it was soon before the death to attract the rigors of Section 304-B IPC. It would be of advantage to notice that the dowry death, as defined under Section 304-B IPC, can be alleged only where the death is caused by any burn or bodily injury or which occurs otherwise than under normal circumstances within 7 years of marriage and is shown that soon before the death, the girl was subjected to cruelty or harassment by her husband etc. for or in connection with any demand of dowry. It may not be out of place to notice the observation of the Hon'ble Supreme Court in ***Appasaheb and another Vs. State of Maharashtra***, 2007 (1) RCR (Criminal) 747. In this case, the husband had directed his wife to bring a sum of Rs.1000-1200/- from her parents for expenses as he had no money. Wife had committed suicide by consuming insecticides. The Hon'ble Supreme Court observed that this would not amount to demand of dowry. Noticing that dowry is defined in Section 2 of the Dowry Prohibition Act, the Court held that the demand of this nature, as alleged against the appellant, would not amount to demand of dowry. It is also not sufficiently established that this demand was soon before the date of death. Concededly, the fan and sum of Rs.5,000/- was 15 days prior to the visit of PW5 to her daughter. There is no evidence on record through PW5 that this demand was anywhere close to the

present incident. No date or time is given in the evidence given by PW5. In this background, it can not be safely held that there was any demand of dowry by the appellant or his parents or that this death is on account of cruelty or harassment, which was soon before the death and relating to any demand of dowry. In fact, statement of PW5 would not show if any demand of dowry was addressed to him. Whatever is his version in this regard, it is again through the deceased whereas he has not deposed if any such demand was raised before him.

It would not be safe to rely upon this evidence through PW5 as he did not so state even in his complaint which he ultimately filed. In fact, PW5 has not conducted himself with much credit if his entire evidence is seen. Concededly, he has reached the hospital on being informed by the appellant at about 3.20 P.M. On 25.3.2000. He admits that the appellant had come to his house to give information about the admission of the deceased in the hospital. PW5 has reached the hospital accompanied by his wife, brother, bhabi etc. and had found the deceased unconscious. Time, as per the evidence, was 3.30 P.M. Reference has already been made to the evidence showing that doctor had given his opinion at 3.45 P.M., to say that the deceased was in a fit state to make statement when the same was recorded by DW-1. As already noticed, as per PW-5, the deceased had regained consciousness for some time to make statement and again to become unconscious thereafter. This appears to be rather far-fetched. As per PW5, the deceased had never regained consciousness and had then died at 4 A.M., the following morning. To explain his previous statement made and

recorded at the time of inquest, PW-5 has introduced another story that his signatures were obtained on certain blank papers. No reasons are forth-coming as to why the police would do so. Even if his version is accepted, then he has no explanation to offer as to why he did not go and lodge the complaint with the police immediately after learning the facts from his daughter on 25.3.2000 or soon after her death on the next morning. He rather concedes that he did not go to the police station or to the police post to inform about this incident. He had further to concede while under cross-examination that he had identified the dead body of his daughter and that the inquest proceedings, Ex.PE, contained his signatures. He further conceded that gist of his statement was contained in the inquest proceedings. A fact of significance, which was stated by PW5 in his previous statement is that even, according to him, his daughter was ill for the last 2 or 3 days and her husband (appellant) Jai Pal had arranged medicines for her. The witness (PW5) had also stated that his daughter was running a high fever on 25.3.2000 and the medicines for the same were lying on the slab and that even tablets of celphos were also lying, which his daughter consumed by mistake. When confronted with his previous statement, PW5 stated that he did not so state during the inquest proceedings. In his previous statement, PW5 had also mentioned that his daughter had started vomiting after consuming medicine and she was got admitted in the hospital. He again denied having so stated while appearing before the Court. In his previous statement, PW5 had even mentioned that condition of his daughter became serious during night and she died by chance and none was responsible for the same. Upon denial, he

was confronted with his previous statement where it was found so recorded. It is, however, conceded by the witness that the documents bore his signatures and that of his brother, Dalip Kumar. To explain this, PW5 mentioned that his signatures were obtained on blank papers.

In fact, PW-5 could not deny that body, after post mortem, was handed over to him. To get over the discomfort of not taking action, PW5 stated that he, at that time, was perplexed and dazed. He had also to concede that the dead body was cremated in village Mathana but did not give the names of persons who attended the cremation again to take shelter on the ground that he was perplexed and dazed. Ultimately, he conceded that he became composed in the evening and on enquiry, learnt about the daughter having been cremated at Mathana. It could not be disputed by PW5 that cremation was attended by his father, wife, brother, mother etc. He had also visited village Mathana for collecting the ashes of the deceased. In order to explain delay on his part in lodging the report, PW5 did state that he made statement before the police, which was not recorded. This fact again could not be substantiated from the evidence given by the Investigating Officer. In this background, it would be unsafe to rely upon the version of PW5. Even if sufficient allowance is given to him in this regard, his evidence would not show if the appellant had made any demand or this death is due to cruelty and harassment on account of demand of dowry. Evidence would not be sufficient to base conviction of the appellant under Section 304-B IPC. Evidence of PW6 Rano would also not support the stand of the prosecution much. She had only stated whatever she learnt from

the deceased when she had gone to her house on the day of incident. She had been dis-believed, which is not under any challenge before this Court. In fact, the trial Court itself found serious infirmities in her version wherein she did not disclose this fact to his maternal uncle (complainant) and accordingly she was disbelieved in this regard. It is this aspect of the evidence, which made trial Court to acquit the appellant and his co-accused for an offence under Section 302 IPC. I would not find any reason to interfere or to take a different view in regard to the value and worth to be attached to the testimonies of PW5 and PW6 in this regard. Even if the written dying declaration, which is worthy of reliance, is to be excluded from consideration for the sake of arguments, the case of prosecution, in my considered opinion, would not stand established from the evidence that has been led in this case. As already noticed, there is no evidence indicating demand of dowry, leading to death. The prosecution has not been able to establish that his death was related to any demand of dowry or that it was soon before the death to attract the provisions of Section 304-B IPC. Counsel for the appellant has rightly relied upon the case of ***Nachhatar Singh and others Vs. State of Punjab,*** 2004 (4) R.C.R. (Criminal) 580 where the accused was acquitted of the charge under Section 304-B IPC on the ground that none of the PWs stated about the year, date and month when any cruelty in connection with demand of dowry was committed. No witness had given any specific instance in this regard, as is the case in the present case. No complaint has also been made by the complainant prior to the date of incident. In this case, only the deposition of prosecution witnesses did not reveal that demand of

dowry was soon before death. Accordingly, the deposition of the PWs was not considered reliable, who had made material improvements from their previous statements. Similar is the position here. It is not safe to rely upon the version of PW5, who was seriously contradicted with his previous statement. He had even not given the date of demand of dowry. When the witnesses are contradicted by their previous statements then that part of the statements, which has been put to the witness is to be considered alongwith the evidence to assess the worth of the witness in determining his veracity. See ***Major Som Nath Vs. Union of India,*** AIR 1971 SC 1910. Evaluating the deposition of PW-5 in this background, it can be said that he would not be worthy of much credence and it would be unsafe to place reliance on his version. Rather, the evidence of demand of dowry is lacking. Accordingly, it can be said that the prosecution has failed to prove the charge under Section 304-B IPC against the appellant. In view of these serious infirmities, the statement of the deceased, as recorded by DW-1, can not easily be discounted from consideration. In any case, even otherwise the evidence would be lacking to show any demand of dowry and that too soon before the death to attract the provisions of Section 304-B IPC. The conviction of the appellant, as such, can not be sustained.

The appeal is accordingly allowed. The conviction of the appellant is set-aside and so also the sentence awarded to him. The

bail bonds and surety bonds, if any furnished in the trial Court, shall stand discharged.

October 31, 2007 **(RANJIT SINGH)**
khurmi **JUDGE**