

HIGH COURT OF JAMMU AND KASHMIR AT JAMMU

Cr. Appeal No.26/2009
Cr.M.A. No.25/2009
Confirmation No.7/2009

Date of Decision: 12.07.2012

Vijay Kumar Vs. State of J&K.

Coram:

**Hon'ble Mr. Justice J.P.Singh, Judge.
Hon'ble Mr. Justice Muzaffar Hussain Attar, Judge.**

Appearing Counsel:

For Appellant(s) : Mr. Anil Khajuria, Advocate.
For Respondent(s) : Ms. Z.S.Watali, Dy.AG.

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| i) | Whether approved for reporting
in Press/Media | : | Yes |
| ii) | Whether to be reported
in Digest/Journal | : | Yes |
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JUDGMENT

J.P. Singh-J:

1] The Appellant-Vijay Kumar was convicted and sentenced to *Rigorous Imprisonment for Life* and fine of Rs.5000/- under Section 302 RPC with default sentence of one year, and *two years' Rigorous Imprisonment* and fine of Rs.2000/- with default sentence of six months under Section 498-A RPC by the learned Sessions Judge, Kathua vide his judgment and order dated 16.04.2009, for committing Murder of his wife- Pinki Devi alias Babli, and treating her with Cruelty.

2] He is in Appeal against the sentence.

3] Learned Sessions Judge too has made Reference for confirmation of the sentence of life imprisonment awarded to the appellant.

4] The **Facts**, in brief, necessary for disposal of the Appeal and Confirmation Reference may be stated thus:-

Pinki Devi alias Babli, the appellant's wife, received burn injuries in the kitchen of appellant's house situated at village Seswan Rang Talab, Hiranagar on 01.02.2003. She was shifted initially to the Government Hospital, Kathua and thereafter to the Government Medical College Hospital, Jammu for treatment. The Incharge Police Post Chadwal, who was deputed to record her statement, could not, however, so do, for, the Doctors attending on Pinki Devi certified her "*Not Fit for Statement*". The Doctors continued to declare her unfit for Statement until February 06, 2003. In the meantime, Raj Kumar, Pinki Devi's brother, lodged a Written Report with the Police Post Chadwal accusing the appellant, his brother Kali Dass and brother's wife, Rani Devi of threatening to do away with his sister and pressurizing her to bring money from her parents. The parents of the deceased would satisfy their demands. The trio thereafter entered into a criminal conspiracy and set Pinki Devi to fire pouring kerosene on her. On Raj Kumar's report,

FIR No.34/2003 was registered at Police Station Raj Bagh, Kathua under Sections 307/498-A RPC.

Head Constable Sat Pal, Incharge Police Post Chadwal, recorded Pinki Devi's statement in Government Medical College Hospital, Jammu on February 06, 2003, when she was declared fit for statement by a Doctor.

Pinki Devi succumbed to the injuries in Government Medical College Hospital, Jammu on February 09, 2003.

The appellant was arrested on 10.02.2003 i.e. a day after Pinki Devi's death and his brother, Kali Dass on 17.02.2003.

On the basis of the investigation, the appellant, his brother and brother's wife, were found involved in commission of offences punishable under Sections 302/498-A/120-B RPC.

The Final Police Report laid by the Police before the Judicial Magistrate First Class, Hiranagar was committed to the Sessions Court at Kathua where the accused were charged for the above offences to which they pleaded 'Not Guilty' and claimed to be tried.

To sustain the Charge, the prosecution examined Raj Kumar, the brother, Manohar Lal, the father, Biro Devi, the mother, Madan Lal and Chaman Lal, the uncles, Jyoti Devi, Shashi Paul,

Srishta Devi, Kamlesh Kumari, the neighbours, of the deceased, besides Head Constable Sat Pal, who had recorded the Dying Declaration of Pinki Devi at Government Medical College Hospital, Jammu. In addition, the prosecution examined Ram Chand, Dr. L.D.Bhagat, Harbhajan Singh, Ashok Kumar, Onkar Nath, Romesh Chander, besides Ravinder Singh, the Investigating Police Officer, who concluded the investigation in the case.

The documents placed on records along with the Police Challan include the Directorate of Forensic Science Laboratory, Jammu and Kashmir, Jammu's Reports, which indicate presence of kerosene in the Plastic Jeerican and Plastic Bottle seized from the place of occurrence, besides EXPW18-LD, the Post Mortem Report of the deceased which, *inter alia*, records the cause of death and injuries found on the body of the deceased as follows:-

“ Infected burns present over whole face, neck, front & back of chest, abdomen and back, both the arms including dorsum and palms of both hands, both the thighs anteriorly and posteriorly both the gluteal regions, both legs anteriorily and posteriorily.

Distil $\frac{1}{2}$ portion of both feet, both the soles and perineal region spared.

Approximate burn area is 90%”

The cause of death is stated due to septicaemia and shock as a result of extensive, infected burns.

Entering the defence after being examined under Section 342 Cr.P.C, the accused examined Prem Chand and Ram Chand to prove that Pinki Devi had committed Suicide because of her having gone into depression on termination of her husband's employment from Army, wherefrom she would not come out until she committed Suicide.

On appreciation of the evidence of the parties, the trial Court found Vijay Kumar guilty of Murder in pouring kerosene on Pinki Devi and setting her on fire as a result whereof she succumbed to the burn injuries in the Hospital, besides of Cruelty to her during her life time. No case was, however, found proved by the prosecution against the appellant's brother and brother's wife, who were, accordingly, acquitted.

In coming to the conclusion that the Charge against the appellant was proved, the trial Court heavily relied on the Statement of Head Constable Sat Pal, who had recorded the Dying Declaration of Pinki Devi, besides the Statements of Madan Lal, Onkar Nath and Harbhajan Singh, who had signed the Dying Declaration as witnesses because there was no eye witness to the occurrence.

5] The appellant's learned counsel, Mr. Anil Khajuria, questioned the appellant's conviction urging that in the absence of any acceptable evidence having been produced by the prosecution that Pinki Devi was in a fit state of mind to make statement, the learned Sessions Judge had erred in relying on it and convicting the appellant on the basis thereof. According to him the prosecution had failed to produce any sustainable evidence on the basis whereof any Charge against the appellant could, in law, be said to have been proved. Vital aspects of the case appearing in the evidence are stated to have been ignored consideration by the learned Sessions Judge while appreciating the evidence of the prosecution, which, if considered, in right perspective, would demonstrate appellant's innocence. He submitted that the appellant was entitled to be acquitted as the prosecution had failed to prove any case against him.

6] *Per contra*, Ms. Watali, the learned Deputy Advocate General, appearing for the State submitted that the prosecution had produced enough evidence to justify the appellant's conviction and no such aspect of the case had been refused consideration by the trial Court which, if so considered, would demonstrate appellant's innocence. She submitted that the deceased having received burn injuries in the premises of the appellant; there was a strong presumption of appellant's involvement in causing burn injuries and ultimate death of his wife, And his conviction, which was otherwise supported by the evidence produced by the

prosecution, may not, therefore, warrant interference in Appeal.

7] We have considered the submissions of learned counsel for the parties and perused the evidence and material on records.

8] In view of the submissions made by the learned counsel for the parties, the first question that falls for consideration is as to whether the prosecution had proved that the deceased was in a fit state of mind when her statement was recorded, and if so, whether the Dying Declaration- EXPW-SP/6 was a Reliable Piece of Evidence warranting appellant's conviction?

9] To examine the issue, we would first refer to EXPW-SP/6, the Dying Declaration of Pinki Devi which has been relied upon by the learned Sessions Judge, English rendering whereof is as follows:-

“Statement of Pinki Devi alias Babli wife of Vijay Kumar, Caste Chamaar R/O Rang Talab Hiranagar, Aged 20 years, Occupation housewife, under Section 32 of Evidence Act (the words under Section 32 of the Evidence Act superimposed on the words “under Section 161 Cr.P.C.) dated 6.2.2003.

When questioned by the Police, stated, “I am a housewife and resident of Rang Talab Tehsil Hiranagar. I was married to Vijay Kumar son of Bui Lal caste Chamaar R/o Seswan Rang Talab Tehsil Hiranagar according to Hindu religious rites about three years ago. My parents gave dowry much beyond their means. A son was born to me from my husband, whereafter he started beating me and would trouble me a lot. He would accuse me of bringing less dowry. I would bring money from my parents and give it to my husband. My parents had given rupees twenty thousand to me for the purchase of a scooter and the money is in deposit in the Jammu and Kashmir Bank, Barnoti. My

husband's brother Kali Dass and his wife Rani Devi would also say that my parents had given less dowry and when I would tell them that they had given whatever was within their means, my husband, his brother and brother's wife would unnecessarily taunt and accuse me and my husband would always beat me. I would tolerate all this; but they would always say that they did not want to keep me in their house. I would narrate all this to my mother from time to time. My mother used to console me and send me back to my in-laws' house so that my matrimonial home remained rehabilitated. All the three would always taunt me but I would concentrate on my child playing with him and would not take note of their taunts. My husband would always beat me and threaten me that one day or the other he would kill me. After all one day, pursuant to a conceived plan, I was asked as to what was I doing, to which I responded that I was cooking pulses. My husband told me that for whom was I cooking, because my end had come, and with these words he held me from hair and started beating with his shoes. This happened on Saturday the first of February, 2003 at about 5/5.30 p.m. My husband Vijay Kumar son of Bui Lal Chamaar, r/o Saiswan Rang Talab Tehsil Hiranagar emptied kerosene Jeerican on me and lit it with a matchstick. I raised hue and cry, called for help and came out from the kitchen in the compound and there I fell down. My husband's brother and his wife kept on watching all this. Some Rajput ladies poured water on me and covered me with quilt whereafter I lost consciousness. At this time, I am fully conscious and there is no pressure on me. I am receiving treatment in Government Medical College Hospital, Jammu in Ward No.11, Bed No. 58. This is my Statement which I have read and is correct.”

- 10] At the hearing of the Appeal, it was not disputed by the prosecution, and rightly so, that Dr. Mashooq, who had certified Pinki Devi *Fit for Statement*, was not examined during the trial. Therefore, in the absence of the evidence of Dr. Mashooq, it needs to be examined as to whether the other evidence produced by the prosecution would prove that Pinki Devi was in a fit state of mind when her statement was

recorded by Head Constable Sat Pal. The first witness whose statement, therefore, needs consideration is Head Constable Sat Pal.

11] According to PW-Sat Pal, number of Doctors had, on his request, examined Pinki Devi to certify as to whether or not she was fit to make statement. Whereas all others had certified Pinki Devi unfit for statement; it was only Dr. Mashooq, who found her fit for statement on February 06, 2003. According to him and the investigation carried out in the case, the deceased had spoken for the first time after the occurrence, only on February 06, 2003 and was unable to speak before that. She gained consciousness in the Hospital at Jammu around 12 p.m and thereafter taking the permission of the Doctors he commenced recording her statement at 12.30 p.m. It took him half an hour to complete the statement. Pinki Devi died on February 09, 2003, but he did not approach any Magistrate for recording her statement. He admits that no Medical Officer from the Government Medical College Hospital, Jammu had attested Pinki Devi's statement. According to him the Doctor was not present at the time of the recording of the statement. He showed his ignorance about interpolations appearing in the statement of Pinki Devi recorded by him under Section 161 Cr.P.C where the words 'under Section 32 of the Evidence Act', appear to have been superimposed on the words 'under Section 161 Cr.P.C'. He says that on being asked, Pinki Devi would respond saying "**Yes**" or "**No**". He recorded whatever was stated by the witness, **and at times**, the witness would only

nod her head to indicate “**Yes**” or “**No**”. Pinki Devi spoke in *Dogri* dialect and he would record it in *Urdu*. He requested the Doctor to attest the statement, but the latter plainly refused so to do. He did not reflect in the Case Diaries, the factum of the refusal of the Doctor to attest the statement.

12) From the above excerpts of Sat Pal’s statement, it appears that the deceased would respond to the Head Constable’s questions saying **Yes** or **No** and at times, would only **nod her head to indicate her response to the questions put to her**. The statement appears to have been made by Pinki Devi in Dogri language and Sat Pal had transcribed it in Urdu.

13] Looking to the nature and complexion of the statement appearing in EXPW-SP/6, it becomes difficult to accept its authenticity, *inter alia*, because it is quite lengthy and couched in usual police jargon that one would see in the statements recorded under Section 161 Cr.P.C where the recording officers normally indicate the parentage, caste and residence of the accused/witnesses wherever appearing in the statement. Not only this, the statement which begins with the factum of Pinki Devi’s marriage, religious rites that were performed in the marriage and the brief history about alleged Cruelty and thereafter the actual occurrence. Towards the end of the statement it is recorded that Pinki Devi was fully conscious and there was no pressure on her. She is recorded to have been receiving treatment in the Government Medical College Hospital, Jammu in Ward No.11 Bed No.58.

Such a detailed statement, looking to its form, complexion and length was not expected from a person who had received burn injuries over 90% of her body and had remained unconscious right from the time of receiving injuries and re-gained consciousness only few minutes before her statement was recorded. It, therefore, becomes necessary to refer to the statements of other witnesses to find whether Pinki Devi was in a fit state of mind when her Statement was recorded by Sat Pal.

14] We would, therefore, go to the statements of Madan Lal, Onkar Nath and Harbhajan Singh, who are indicated to have signed the Dying Declaration.

PW- Madan Lal, the uncle of the deceased says that he was present in Government Medical College Hospital, Jammu when Pinki Devi's statement was recorded. According to him, Pinki Devi was in conscious state and would not talk much. Doctor was present when Pinki Devi's statement was recorded. 6/7 Police Personnel besides Bhajan Lal, Romesh Kumar and Biro Devi were present when the statement was being recorded. It took around 2 to 2½ hours to record the statement. The Police Personnel would not put any question to Pinki Devi and Pinki Devi made statement on her own in *Dogri* language. She would, however, make statement with pauses. After recording of the statement, an attempt was made to have the signatures of the Doctor; but he was not available. Thereafter further attempt was made to obtain his signatures but he did not know as to what happened thereafter. He further stated that *the Doctor was*

present but had refused to attest the statement on the plea that only superior Doctor would do that. He read the statement before appending his signatures. The other witnesses too had read it before signing.

PW- Onkar Nath says that when he went to the Hospital, the Police had recorded Pinki Devi's statement where she would say that her husband had poured kerosene and thereafter put her on fire. About 30 to 35 persons had surrounded the deceased at the time of the recording of her statement. The Doctor and the Nurse were also present there. The statement was recorded within 15 to 20 minutes. Pinki Devi was making statement with pauses. 4 to 5 persons had signed the statement and the Doctor must also have signed it.

PW-Harbhajan Singh says that Pinki Devi's face was burnt and swollen and *because of the burn injuries she was unable to take medicine and would speak less and in a feeble voice.* Her hands and feet were also burnt and she signed the statement with great difficulty. Pinki Devi was making statement with pauses and after every two minutes would be *vertiginous* and it was because of this reason that she would make statement with pauses.

15] In view of the divergent statements made by the three witnesses, we independently scrutinized the statements and find that in view of what has been stated by the witnesses, Pinki Devi cannot be said to have been in a fit and proper state of mind to make the statement, with certainty. The statements of the three witnesses, besides being contradictory,

do not support the manner in which the statement is stated to have been recorded by Head Constable Sat Pal.

This apart, in the facts and circumstances of the case when the witnesses themselves admit that at the time of the recording of the statement of Pinki Devi she would feel giddy, speak in a feeble and low voice and that too very less, she cannot be expected to have made such a detailed statement couched in usual phraseology used by the police in recording statements.

16] In the circumstances when it does not come out from the evidence on records as to what were those questions that were put by Head Constable Sat Pal to the witness, to which she would respond in **Yes** or **No** and at times only nod her head to convey answer to the questions, it would be highly unsafe to rely on such statement additionally because neither had the prosecution produced Dr. Mashooq, who had certified Pinki Devi fit for statement nor the Hospital records during the trial, on the basis whereof her medical condition could be examined to form opinion as to whether or not she was able to make statement on February 06, 2003.

17] In view of the above discussion, we find that the evidence produced by the prosecution does not prove Pinki Devi to be in a fit state of mind on February 06, 2003. We further find that Head Constable Sat Pal had not satisfied himself that Pinki Devi was in a fit and proper state of mind to make statement. The Head Constable has not recorded the statement of Pinki Devi in question and answer form in which

it ought to have been so recorded in view of his statement that he would put questions to the witness to which she would respond in Yes or No and at times nod her head to reply the questions. The statement appearing in EXPW-SP/6 does not appear to be that of Pinki Devi, who, because of extensive burn injuries on her body, could not have made such a detailed statement when after every two minutes she would feel giddy.

18] We, therefore, do not find it safe to rely on EXPW-SP/6.

19] We are fortified in taking the above view by the settled legal position as indicated in *Kanti Lal versus State of Rajasthan*, reported as AIR 2009 SC 2703, where while dealing with similar circumstances, it was held as follows:-

“It is well-settled that one of the important tests of the credibility of the dying declaration is that the person, who recorded it, must be satisfied that the deceased was in a fit state of mind. For placing implicit reliance on dying declaration, court must be satisfied that the deceased was in a fit state of mind to narrate the correct facts of occurrence. If the capacity of the maker of the statement to narrate the facts is found to be impaired, such dying declaration should be rejected, as it is highly unsafe to place reliance on it. The dying declaration should be voluntary and should not be prompted and physical as well as mental fitness of the maker is to be proved by the prosecution.”

20] Barring the Dying Declaration, the prosecution has not produced any evidence on the basis whereof it be said that the appellant had poured kerosene on the deceased and set her on fire on 01.02.2003.

21] It appears from the prosecution evidence that the appellant had all along remained with the deceased in the Hospital right from the day she caught fire upto the date of her death. The prosecution has not explained its omission to arrest him till February 10, 2003, when Pinki Devi is alleged to have specifically indicated his involvement in pouring Kerosene and setting her on fire, on 6th February, 2003. The omission indicates and points out the making of the alleged Dying Declaration post Pinki devi's death.

Fard Surathaal prepared by the Police on February 10, 2003 too does not record the factum of Pinki Devi's making statement on February 06, 2003.

22] We would now deal with the learned State counsel's plea that having led no evidence to prove as to how his wife had caught fire in his house, the appellant was presumed responsible for causing her burn injuries.

23] The argument raised by the learned State counsel, is not supported by law, in that, in a Charge of Murder, the accused is presumed to be innocent unless the initial onus was discharged by the prosecution. There is no such presumption, in law, as argued by the learned State counsel that in the event of wife's suffering burn injuries in husband's house, a presumption of husband's involvement in causing injuries to cause her death would arise in all cases. The Evidence Act Svt. 1977 does not contemplate any such presumption and the only presumption contemplated by law, as contained in the provisions of Section 114-C of the Act is regarding

abetment of suicide by a married woman and not that of a Murder of a married woman.

24] We, therefore, do not find merit in the learned State counsel's submission and, accordingly reject it.

25] In view of the above discussion, we find that the appellant's learned counsel is right in contending that Pinki Devi was not proved to be in a fit state of mind on 06.02.2003 and the learned Sessions Judge had erred in relying on her statement treating it as her Dying Declaration and convicting the appellant on the basis thereof.

26] We will now deal with the second Charge for which the appellant has been convicted.

27] The learned Sessions Judge has convicted the appellant of the second *Charge* without dealing with it and merely on the proof of the first *Charge*. Every Charge is required to be dealt with separately on the strength of the evidence produced in support thereof. The omission of the learned Sessions Judge to deal with the evidence produced by the prosecution on the Charge, cannot, therefore, be justified. In any case as we have gone through the whole case, we would like to deal with the second Charge too.

28] According to the case of the prosecution, the relations between the appellant and the deceased were cordial for one year whereafter the appellant had started beating her. He would taunt her for bringing less dowry and had declared that he would not permit her to stay at his place.

It is, however, not the case of the prosecution that the appellant would coerce the deceased to meet any unlawful demand. Although the Charge against the appellant may not strictly speaking fall within the definition of Cruelty appearing in Section 498-A(b) RPC, in the absence of any allegation that the appellant would coerce the deceased to meet any unlawful demand for any property, yet it appears from the case set up by the prosecution that the Charge is otherwise vague, for, neither the date(s), the month, or the year in which the appellant had coerced the deceased to satisfy any unlawful demand of the appellant, are forthcoming either from the prosecution story or from the evidence produced by it.

This apart, the evidence of the parents of the deceased does not support the Charge, in that, they are categoric in saying that the appellant had never made any demand for any property. According to the mother of the deceased, the deceased would remain depressed because of the poor financial condition of the appellant, which is stated to have further worsened about six months prior to the occurrence when the appellant's employment in the Territorial Army had ceased. The neighbours of the deceased, who were produced by the prosecution to support the Charge of Cruelty against the appellant, who were first to reach on spot, have, however, a different story to tell. According to them, the appellant and the deceased were living happily before the occurrence and according to some of them, the deceased had admitted to have committed mistake.

29] In these circumstances, when the persons residing in the immediate vicinity of the appellant and the deceased had not supported the prosecution on the Charge of Cruelty and the evidence of the relations of the deceased, besides being contradictory, is vague, ambiguous and shorn of the circumstances that would prove the ingredients constituting offence under Section 498-A(b) RPC, we do not find the prosecution to have proved the second Charge too.

30] For all what has been said above, we find that the prosecution has failed to prove any Charge against the appellant and the learned Sessions Judge has erred in holding him guilty of the offences punishable under Sections 302/498-A RPC. The Judgment and order passed by the learned Sessions Judge is, therefore, liable to be set aside.

31] This Appeal, accordingly, succeeds and is, therefore, allowed declining the Confirmation Reference. The Judgment and Order dated 16.4.2009 of the learned Sessions Judge, Kathua is set aside and the appellant acquitted of the Charges. He is directed to be set to liberty forthwith.

(Muzzaffar Hussain Attar)
Judge

(J. P. Singh)
Judge

JAMMU:
.07.2012
Pawan Chopra