Ashok Kumar vs State Of Rajasthan on 11 September, 1990

Equivalent citations: 1990 AIR 2134, 1990 SCR SUPL. (1) 401, 1990 (4) JT 149, AIR 1990 SUPREME COURT 2134, 1991 (1) SCC 166, 1991 SCC(CRI) 126, 1991 IJR 48, 1990 CRIAPPR(SC) 355, (1991) 18 ALL LR 38, (1990) 2 ALL WC 1551, (1991) EASTCRIC 70, (1991) MAD LJ(CRI) 179, (1990) MARRILJ 542, (1990) MATLR 345, (1991) 1 PAT LJR 50, (1991) 1 RECCRIR 14, (1991) CRICJ 37, (1991) 1 CRILC 717, (1990) ALLCRIR 682, (1991) 1 ANDHWR 27, (1991) 1 CHANDCRIC 153, (1991) 1 ALLCRILR 102, (1991) 1 CRIMES 116, (1991) SC CR R 62

Author: R.M. Sahai

Bench: R.M. Sahai, M.M. Punchhi

PETITIONER:
ASHOK KUMAR

Vs.

RESPONDENT:
STATE OF RAJASTHAN

DATE OF JUDGMENT11/09/1990

BENCH:
SAHAI, R.M. (J)
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SAHAI, R.M. (J)
PUNCHHI, M.M.

CITATION:
1990 AIR 2134 1990 SCR Supl. (1) 401
1991 SCC (1) 166 JT 1990 (4) 149
1990 SCALE (2)464

ACT:
Code of Criminal Procedure, 1973: Section 378 & 386---Murder --Acquittal by Trial Court--Appeal against acquittal by State--Powers of the Appellate Court--Trial Judge misappreciating the evidence and deciding the case on irrelevant considerations--Held High Court was justified in reversing the order of acquittal and convicting the accused.
Criminal Trial--Defective investigation--Effect of Indian Evidence Act, 1872: Section 32--Dying declaration--Authenticity of.

Indian Penal Code, 1860: Section 302. Murder--In dowry death motive is inherent and is not of the individual but of the family----Duty of Court is to examine who translated it into action.

HEADNOTE:

The appellant was accused of burning his sister-in-law to death. Accordingly, he was prosecuted for the offence of murder. The Trial Judge acquitted him by holding (i) that there was no motive for him to cause the murder; (ii) that there were vital contradictions between the statement of the doctors who examined the deceased and that the conviction could not be based on the testimony of doctor before whom the dying declaration was made by the deceased; and (iii) that the investigation was defective because (a) no one from the locality was produced; (b) the nurse and the compounder who took down the injury report on the dictation of the doctor was not examined; and (c) no incriminating material was found at the site.

The State preferred an appeal before the High Court against the acquittal order, which allowed the appeal, set aside the order of acquittal passed by the Trial Court, and convicted the accused under Section 302 of the Indian Penal Code and sentenced him to life imprisonment.

Hence this appeal by the accused.

Dismissing the appeal, this Court,

HELD: 1. While caution is the watchword, in appeal against 402
acquittal as the Trial Judge has occasion to watch the demeanour of witnesses, and interference should not be made merely because a different conclusion could have been arrived, the provisions contained in Sections 378 and 386 of the Code of Criminal Procedure, 1973 do not Inhibit any restriction or limitation. Prudence demands restraint on mere probability or possibility but in perversity or misreading interference is imperative otherwise existence of power shall be rendered meaningless. [213H; 214A]

2. In the instant case, the approach of the Trial Judge apart from being faulty was contrary to the rule and appreciation of evidence. Appreciation apart the order of the Trial Judge is vitiated as apart from deciding the case on irrelevant considerations, criticising the doctors without any basis, drawing an inference against the doctor only because she was a lady the most serious error of which he was guilty and which rendered the order infirm which was rightly set aside by the High Court was that he mis-read the evidence and indulged in conjectural inference and surmises. Therefore, the High Court did not exceed its powers in setting aside the order of acquittal. It did not commit any error in allowing the appeal and recording the conviction under Section 378 read with Section 386(a) of the Code of

Criminal Procedure. [216F; 217E; 220A]

3. Motive for a murder may or may not be. But in dowry deaths it is inherent. In dowry deaths what is required of courts to examine is as to who translated it into action as motive for it is not individual, but of family. [214H; 215A]

4. Argument as a matter of law that defective investigation should go to discredit prosecution cannot be disputed but on facts of the instant case it is not available. The High Court was right in not discarding the prosecution evidence due to remissness of investigating officers. The finding of the High Court that the investigating officer due to remissness failed to preserve the site is correct but it does not in any manner weaken the prosecution case. Nor any adverse inference could be drawn due to non-production of nurse or compounder when the investigating report was written on dictation of the doctor. [218F-H]

Chander Kant v. State of Maharashtra, A.I.R. 1974 SC 220, referred to.

5. Bride burning is a shame of our society. Poor never resort to it Rich do not need it. Obviously because it is basically an economic problem of a class which suffers both from ego and complex. Unfortu-

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nately, the high price rise and ever increasing cost of living coupled with enormous growth of consumer goods effacing difference between luxury and essential goods appear to be luring even the new generation of youth, of the best service, to be as much part of the dowry menace as their parents and the resultant evils flowing out of it. How to curb and control this evil? Dowry killing is a crime of its own kind where elimination of daughter-in-law becomes immediate necessity if she or her parents are no more able to satiate the greed and avarice of her husband and their family members, to make the boy available, once again in the marriage market. Eliminate it and much may stand resolved automatically. Social reformist and legal jurists may evolve a machinery for debarring such a boy from remarriage irrespective of the member of family who committed the crime and in violation penalise the whole family including those who participate in it. That is social ostracisation is needed to curtail increasing malady of bride burning. [214E-G]

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 453 of 1986.

From the Judgment and Order dated 2.7.1986 of the Rajas- than High Court in D .B. Criminal Appeal No. 289 of 1983. U .R. Lalit and S.K. Jain for the Appellant.

N.H. Hingorani, Ms. Hingorani, Ravi P. Wadhwani and B.D. Sharma for the Respondent.

Aruneshwar Gupta for the State.

The Judgment of the Court was delivered by R.M. SAHAI, J. In this appeal, by grant of special leave under Article 136 of Constitution of India, the short ques- tion that arises for consideration is if the High Court committed any error of law in exercise of its powers under section 378 read with section 3861(a) of the Criminal Proce- dure Code in allowing the appeal against acquittal and convicting the appellant under section 302 of the Indian Penal Code and sentencing him to undergo life imprisonment. Law is well settled. While caution is the watchword, in appeal against acquittal as the Trial Judge has occasion to watch demeanour of witnesses and interference should not be made merely because a different conclusion could have been arrived, the provision does not inhibit any restriction or limitation. Prudence demands restraint on mere probability or possibility but in perver- sity or misreading interference is imperative otherwise existence of power shall be rendered meaningless. Time and place of unnatural death, of Asha Rani, by burning, at her in-laws' small house with at least six inmates, could not and was no disputed. Both the Trial Judge and the High Court held that the prosecution succeeded in proving this. It was further found by them that she did not die of accident nor she committed suicide. Burning by kero- sene stove or gas or even firewood may not be unusual due to synthetic wear which has become very common. But when post mortem report indicates, as was in this case, that smell of kerosene was coming from body and even burnt hairs smelt kerosene then it not only belied the statement of her sis- ter-in-law (Nand) that she was burnt while making tea but it ruled out remotest possibility of accident. That is why the findings were not, seriously, challenged by the appellant. Asha Rani was thus murdered. Why? Sadly for Rs.5,000 or an auto rickshaw which her father, of seven daughters, could not afford even though he suffered the ignominy of her being beaten in his presence by her in-laws at his own house. Bride burning is a shame of our society. Poor never resort to it. Rich do not need it. Obviously because it is basical- ly an economic problem of a class which suffers both from ego and complex. Unfortunately, the high price rise and ever increasing cost of living coupled with enormous growth of consumer goods effacing difference between luxury and essen- tial goods appear to be luring even the new generation of youth, of the best service. to be as much part of the dowry menace as their parents and the resultant evils flowing out of it. How to curb and control this evil? Dowry killing is a crime of its own kind where elimination of daughter-in-law becomes immediate necessity if she or her parents are no more able to satiate the greed and avarice of her husband and their family members, to make the boy available, once again in the marriage market. Eliminate it and much may stand resolved automatically. Social reformist and legal jurists may evolve a machinery for debarring such a boy from remarriage irrespective of the member of family who commit- ted the crime and in violation penalise the whole family including those who participate in it. That is social os- tracisation is needed to curtail increasing malady of bride burning.

Motive for a murder may or may not be. But in dowry deaths it is inherent. Both the courts have concurrently held on evidence of parents of deceased, that her in-laws were regularly and continuously pestering her for bringing cash or an auto rickshaw and on their failure to satisfy their demand she was subjected to torture and maltreatment. But the Judge attempted to dilute it by holding that relations between the deceased and her in-laws were strained. And even if there was any motive it could not be of appellant. There is thus little difference between the finding of the two courts on motive except for immediate cause. But what was overlooked was that in dowry deaths

motive is already there and what is required of courts to examine is as to who translated it into action as motive for it is not individual, but of family.

Motive of dowry, the first link was found proved. Next and most important link was the evidence of doctor or the details of what happened in the hospital. The victim was undisputedly brought in the ward at 10.00 a.m. She was examined by Dr. Saxena PW 6, a student of first year of M.S. course. He prepared the bed head ticket. Since it was a serious case he sent for Dr. Temani and Dr. Patricia the medical jurist. He stated that Dr. Temani examined her first and Dr. Patricia came later. He stated that Asha Rani was conscious from 10.00. a.m. to 11.00 a.m. He further admitted unequivocally that when she was admitted she could give clear cut answer of whatever was asked from her. He thus stated three vital things, one preparation of bed head ticket and entries made on it, second about the sequence in which the doctors examined the patient and third that the victim was conscious who could understand and give answers of whatever questions were asked from her. In the bed head ticket which was deposed to be written by him it was clearly mentioned that Asha Rani complained of misbehaviour of her brother-in-law. He made an unsuccessful attempt to wash off its effect by stating that on his inquiry as to who burnt her she did not disclose name of anyone. Nothing turns on this part of the statement as he could not deny the entry in the bed head ticket. No further need be said firstly because he was a student only and secondly circumstances do not lie. However if the entry in bed head ticket and the statement on three vital aspects are not contradicted by the other two doctors either by taking their depositions individually or with Dr. Saxena then minor contradictions here and there not relevant or material could not shake the prosecution case. Dr. Temani examined the deceased and gave detailed description in the injury report. It is also mentioned that she was burnt by her brother-in-law (Devar). He stated that on his inquiry Asha Rani told him that she was burnt by her brother-in-law (Devar) Ashok. He further stated that the statement was made in presence of Dr. Patricia who on his asking made endorsement on the injury report. In cross examination he admitted that Dr. Patricia came five minutes after him. He stated that the deceased disclosed name of Ashok in her presence. He further stated that she was conscious. Dr Patricia deposed that Asha Rani stated in her presence stated on asking of Dr. Temani that she was burnt by Ashok Kumar. She admitted that the endorsement on the injury report that Asha Rani was burnt by her Devar was made by her on request of Dr. Temani. Thus on all material particulars the statements were consistent. The Judge could not point out any contradiction on these important aspects but discarded the statement of Dr. Temani and Dr. Patricia because there were contradictions as to how many persons were present during examination by these doctors, and if even earlier such dying declaration was recorded in injury report and got endorsed by senior doctors and why the doc- tors did not disclose it to anyone and why the report was written by compounder on dictation of Dr. Temani and why was not he examined. It was held, 'Dr. Temani has said about the statement by Asha Rani prior to examination by him and has deposed about the presence of Dr. Patricia. Dr. Patricia is stated to have recorded the statement of Asha Rani after examining. Dr. Patricia and Dr. Rakesh, whom Dr. Patricia has stated to be with her as a House Surgeon, has falsified the statements of both the witness and it has been clearly said that before him Asha Rani said anything to Dr. Temani nor Dr. Patricia nor Dr. Patricia or Dr. Temani examined Asha Rani before him. In this way there are vital contradic- tions between the statements of Dr. Patricia and Dr. Temani and on account of refutal by the statement of Dr. Rakesh in my opinion, prima facie, it can be said that no reliance can be placed on the statements of Dr. Patricia and Dr.

Temani.' This approach of the Judge apart from being faulty was contrary to the rule and appreciation of evidence. The High Court after going into detail and examining the evidence of each of these witnesses has found that there was no material contradiction either on the question of presence of the two doctors of the sequence in which she was examined by them or in respect of recording of bed head ticket and the injury report. Dr. Patricia in her statement stated that in her presence when Dr. Temani asked Asha Rani as to who burnt her she told that her brother-in-law (Devar) Ashok had burnt her. Dr. Temani stated the same. But the two were disbe- lieved because Dr. Temani in her cross-examination stated that when he got the injury report recorded by compounder Dhirender Jain Dr. Patricia went away and he got the en- dorsement of Dr. Patricia on the desk outside the chamber. The High Court pointed out that there was no material con- tradiction on the two aspects namely the disclosure of name by Asha Rani in her presence on asking of Dr. Temani and the endorsement in the injury report. Even the sequence of examination by Dr. Saxena then by Dr. Temani and thereafter reaching of Dr. Patricia and then disclosure of name of the appellant by Asha Rani have all been deposed without any contradiction. The High Court was further of the opinion that merely because the-injury report reached on 13th August 1982 at the police station it could not reflect adversely on the testimony of either of the doctors. It was also held that the entry of misbehaviour of Ashok Kumar in the bed head ticket by Dr. Saxena and the name of Ashok in the injury report were consistent as Ashok was admittedly present in the hospital when Dr. Saxena had examined the victim. May be that he was present even when Asha Rani was examined by Dr. Temani but that by itself could not render the entry of his name in the injury report suspicious or motivated. The High Court further was right in concluding that the statement made by her was correct and honest as apart from the statement of a dying person which is normally trustworthy there was no reason for her to disclose the name of Ashok to Dr. Temani or of brother-in-law to Dr. Saxena when her relations were strained with her in-laws and the husband. Nor there could be any reason or motive for the doctors to implicate him.

Appreciation apart the order of the Judge is vitiated as apart from deciding the caste on irrelevant considerations, criticising the doctors without any basis, drawing an infer- ence against Dr. Patricia only because she was a lady the most serious error of which he was guilty and which rendered the order infirm which could be set aside by the High Court was that he mis-read the evidence and indulged in conjectur- al inferences and surmises. To quote his own words:

> "From the statement of Dr. Rakesh it is also clear that when Asha Rani was brought to the Ward, she was unconcious. In this situation it seems very strange and unnatural that prior to the alleged statement Asha Rani was senseless and thereafter became unconscious. Then how did she have re- gained consciousness in between only to make a statement, particularly in the situation when every part of the body was cent per cent badly burnt and in this severe pain it cannot be expected that she could have been able to make a statement to the doctor, seeing her trouble, giving her some medicine, would not have tried to pacify her. From Ex. PS, the bed head ticket, itself appears that simultaneously with the admission she was given injections of morphia etc. so that she may be fully quiet and her speech would not be possible and she might not have felt terrible pain. This also appears to be surprising that if she was really able to speak, why did she only say that her brother- in-law Ashok burnt her

> and why also she not say as to why she was burnt and how did he burn her. If for sometime she would not have told this, even then there should have been an anxiety to Dr. Patricia and Dr. Temani and they should have asked her as to how and why she was burnt but nothing like this happened and possibly in a corner of Ex. P 4, where endorsement A to B has been made, over there so much could be written. Therefore it appears that the endorsement A to B has been got written later on when so needed."

Needless to say that each and every word of this is based neither on appreciation of testimony of the witnesses nor on consideration of material on record but on imagination and assumption. For instance the finding that from statement of Dr. Saxena it was clear that when Asha Rani was brought to ward she was unconscious is against testimony of Dr. Saxena and is not supported by any material whatsoever. The other conclusions flowing out of it were equally fallacious. From the bed head ticket it is clear that morphine was injected after eleven yet the judge observed to support his unsup- portable finding that it was administered simultaneously on entry in the ward. The High Court thus did not exceed its powers in setting aside the order of acquittal. Investigation was criticised and it was submitted that no one from locality having been produced nor the nurse or compounder, who took down injury report on dictation of Dr. Temani, having been examined nor any incriminating material having been found at site it created a doubt if everything proceed fairly and in accordance with law. Argument as a matter of law that defective investigation should go to discredit prosecution cannot be disputed but on facts it is not available. The High Court was aware of it and, in our opinion rightly, did not discard prosecution evidence due to remissness of investigating officer on ratio laid down by this Court in Chander Kant v. State of Maharashtra, AIR 1974 SC 220. We are further of the opinion that the finding of the High Court that the investigating officer due to remiss- ness failed to preserve the site is correct but it does not in any manner weaken the prosecution case. Nor any adverse inference could be drawn due to non-production of nurse or compounder when the investigating report was written on dictation of Dr. Temani.

Delay in sending injury report to the Police Station on 13th instead of 9th despite request by Police Inspector was attempted to be highlighted as casting suspicion on its genuineness. The High Court has gone into this aspect in detail and has found that in fact the negligence, if any, was on the part of the investigating officer as despite having received the information he neither took care to preserve the site nor did he record the statement of any of the doctors before 14th August.

Entries in the injury report which have been construed as dying declaration by the two courts below were severely criticised and it was submitted that although dying declara- tion was admissible in evidence and conviction could be recorded on it without corroboration yet the circumstances in which it was recorded created doubt if it was genuine. The High Court for very good reasons rejected similar argu- ments advanced before it. We also do not find any substance in it. When the deceased was examined by Dr. Temani he having found her condition to be serious immediately sent message to the police station and also requested for arrang- ing for recording of the dying declaration. This is corrobo- rated by the entry in the record of the police station. But the inspector of police came after 11.00 when the injection of morphine had already been administered to lessen the agony of the patient who thereafter became unconscious. She was, however, as indicated earlier conscious between 10.00 to 11.00 during which period the bed head ticket was written by Dr. Saxena and the

entries were made on the injury re- port. The judge did not doubt the recording on the bed head ticket that the deceased complained of misbehaviour by her brother-in-law. Even the learned counsel could not point out any infirmity or reason to discard it except that by mere word, brother-in-law it was not established that it was appellant, i.e., the effort was to make out a case of doubt. That could have been possible if that entry could have stood alone. But it stands not only corroborated but clarified by identifying the appellant by entry in injury report as the brother-in-law who was responsible for this crime. We per- sued the injury report and we could not find any reason to doubt its authenticity.

Before parting with this case we consider it necessary to record that the judge was uncharitable in discarding the testimony of Dr. Patricia and doubting her truthfulness principally because she was a woman forgetting that she was a doctor of 14 years standing and there was no reason for her to make the endorsement on the injury report other than stated that it was on request of Dr. Temani. We do not wish to comment further but we express our deep dissatisfaction on the manner in which the judge criticised the two doctors. For the reasons stated above we are of the opinion that the High Court did not commit any error in allowing the appeal and recording the conviction under Section 378 read with Section 386(1)(a) of the Indian Penal Code.

In the result this appeal fails and is dismissed. The appellant is already in jail. He shall serve out his sen- tence.

T.N.A. Appeal dismissed.