

Delhi High Court

Jugesh Kumar vs State on 3 May, 2007

Equivalent citations: 141 (2007) DLT 394

Author: M Mudgal

Bench: M Mudgal, P Bhasin

JUDGMENT Mukul Mudgal, J.

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1. This appeal challenges the order of the learned Additional District Judge dated 4th March, 2004, convicting the appellant under Section 302 IPC, while acquitting him of the charges under Section 498A and 304B.

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2. The facts of the case as per the case set up by the prosecution are as follows:

(a) On the night intervening 19th and 20th May 2002, the deceased Babita was admitted in Safderjung Hospital with burn injuries about which an intimation was received in Police Station OIA vide DD No. 28B. The SI Nirbhay Kumar was assigned the said DD for necessary action who went to Safderjung hospital accompanied by Constable Yogesh. SI Nirbhay Kumar sought permission of the doctor for recording the statement of the injured, and on being permitted, he recorded Babita's statement which was endorsed by the SI Nirbhay Singh and sent to Police Station for the registration of the case. The present FIR was thus recorded for offences under Section 498-A and 307 IPC. The injured Babita (now deceased) stated in that she was married to the appellant Jugesh Kumar and it was a love marriage. Some months after the marriage, the couple started quarreling on petty matters and many a times her husband used to make some dowry demands and also used to tell her to pressurize her parents for giving him a Television, fridge, etc. She also stated that her husband used to tell her to live in his parents' house which also used to be a reason for the quarrel. She further told to SI Nirbhay Kumar in her statement of 19th May 2002 that on 19th May 2002 her husband came at about 11:00 pm and was asked as to why he was so late on which a quarrel started and then her husband taunted her for not bringing dowry and then picked up a kerosene stove from the kitchen and poured kerosene on her and set her afire. She then shouted on which some neighbours came there but her husband, only to put a show, started pretending as if he was trying to extinguish the fire and thereafter he took her to the hospital and got her admitted there. The statement of the deceased was also recorded by the SDM. The appellant/accused was arrested on 20th May 2002. His medical examination was also got conducted. Injured expired in the hospital 7 days later on 27th May 2002. Post mortem was got conducted on her dead body and finally investigations led to the filing of the challan against appellant/accused Jugesh Kumar for offences under Section 498-A and 302 IPC.

3. The appellant was thus charged with the offences under Sections 498-A and 302 IPC with alternative charge under Section 304-B IPC and he pleaded not guilty and claimed trial.

4. The prosecution in support of its case, examined 13 witnesses, principal among them being PWs 1 and 2, i.e., mother and father of the deceased, PW3 landlord of the appellant, PW13 Dr. Sumit Malhotra who first admitted and examined the deceased in the hospital, and PW 11 Sub Inspector Nirbhay Kumar.

5. It is significant to record the stand taken by appellant/accused in his statement under Section 313 Cr.P.C., which is noticed by the trial court :

Accused claimed innocence stating that he never demanded dowry from his wife and that IO asked for some seva pani from him after he had some talks with his in laws, i.e., parents of the deceased and told him that he would otherwise not be spared. The accused further stated that Page 1277 he told the IO that he was not at fault despite which the IO told him that he would come to know it later and asked him to arrange money and was then taken to his house at about 4:30 pm and was then taken to PS and detained in the lock up and was not allowed to meet any family members and was further told that he would have to face consequences personally. He also told that he had his son also suffered injuries.

The appellant also led his defense evidence in support of the above stand taken by him in Section 313 Cr.P.C. proceedings as recorded by the trial court in the following terms:

Accused examined two DWs. DW1 is the younger brother of the accused and DW2 is some employee of a gas agency. DW1 deposed that he and his wife went to hospital on learning about the incident where accused and his landlord Surender Khurana were found present and that he and his wife were not allowed to meet deceased Babita and that IO had some talks with the parents of deceased Babita and then with the accused at about 4:30 pm or 5:00 pm where after he was told by the accused that the IO was demanding some money, and also that, the IO had also asked him (this DW) to arrange 20,000-25,000 telling that it was a dowry case and then he told the IO at about 9:30 pm that they were unable to arrange the money and then the IO became angry and went inside and registered this case against his brother. DW2 testified about his (the deceased) having taken LPG from his shop.

6. The main plea raised by the learned Senior Counsel for the appellant is that the entire conviction recorded by the trial court is founded upon 2 of the 4 dying declarations, recorded before the Inquiry Officer and the SDM and the said 2 dying declarations were contradicted in material terms by the earlier 2 dying declarations recorded contemporaneously before the landlord of the premises where the incident took place at about 10.30 p.m., and more importantly the MLC and the testimony of the Doctor who recorded the declaration at 12.10 a.m. on 20th May 2002 while admitting the deceased Babita. It is submitted in that both these declarations made to the landlord who was the first on the scene of the incident at about 10.30 PM and the Doctor, who admitted the deceased it was clearly and consistently stated that injuries were sustained by the deceased while lighting a LPG stove. It is submitted that the learned Additional District Judge has erroneously discarded the evidence of PW-3 Surender Khurana, the prosecution's own evidence by describing him as planted and procured. It is submitted that the landlord's presence on the scene was natural as the landlord was staying on the ground floor of the premises whereas the deceased was staying on the second

floor. It is further submitted that the presence of PW-3 was acknowledged by the deceased who made a statement that a number of persons came to her residence. This was also the testimony of PW-11 Nirbhay Singh who was the Investigating Officer and had acknowledged the presence of the landlord PW3 Surender Khurana.

7. The second dying declaration was made before Dr. Sumit Malhotra, PW-13, who prepared the MLC on 20th May, 2002 while admitting the deceased Babita to Safdarjung Hospital. The said dying declaration has been discarded Page 1278 by the trial court due to the presence of the husband. This has been criticised by the learned Counsel while submitting that it is the evidence of the Doctor who prepared the MLC that no friend or relatives were present during the recording of the statement of the deceased. He submitted that this crucial testimony of the Doctor that no friend or relative was present when has been totally ignored by the trial court which has surprisingly recorded the finding that the reliability of the dying declaration before the Doctor is suspect because of the presence of the husband. It is submitted that the judgment of the trial court is thus totally vitiated. The dying declaration made before PW-11 Investigating Officer at 11.00 am on 20th May, 2002 has been criticised as being too detailed and containing phrases normally not used by ailing person. It has been submitted that the deceased suffered 90% burns and was not in a position to give the meticulous details recorded before PW-11. It was also submitted that there were inherent contradictions in the said dying declaration making it unworthy of belief as the death is said to be by pouring kerosene oil and there is no smell of kerosene in the MLC while admitting the deceased or in the post mortem report nor is there any satisfactory recovery of any kerosene stove or can from the spot of the incident. The I.O. has in fact admitted that the kerosene stove was not received back from the FSL and the trial court has totally ignored this vital factor.

8. The 4th dying declaration was made before the SDM at 6.15 pm on 20th May, 2002. This is laconic statement and contains absolutely no detail in direct contrast to the detailed dying declaration made to the I.O. barely 7 hours earlier. The dying declaration made to the SDM reads as follows:

Babita, w/o Jugesh, r/o N/57, Gali-12, T.Kd. Extension, New Delhi, age 23 years.

Name : Babita Husband's Name : Jugesh When did you get married : 5 years How Many Children : One Son How incident happened : Husband Jugesh poured kerosene and set me afire.

Nature of relationship with Husband: Kept quarreling with me and beating me.

9. It has been submitted that the two dying declarations which are contemporaneous and made to the landlord and the doctor were made immediately after the incident, disclose the correct state of facts and the later dying declarations cannot be relied upon and appear to be tutored and or inspired. In any event the stark contradiction in the two diametrically divergent accounts would require corroboration. While there is no corroboration of the dying declaration made to the IO and indeed its part falsification qua the dowry demand even as per the finding of the Trial court, the dying declaration to the PW3 landlord and PW13 the Doctor who admitted the deceased to hospital is corroborated by the testimony of PW13 and PW3 whose testimony stood unchallenged and several

other material pieces of evidence such as the MLC. It has also been submitted that there is no motive for the murder because the allegation of dowry demands set up by the Page 1279 prosecution has been disbelieved even by the trial court. It is further submitted that indeed both the parents of the deceased deposed that there was no dowry demand and in fact they had no relationship with the accused and the deceased owing to the fact that a love marriage was performed between the deceased and the accused.

10. Mr. Sharma for the State submitted that the statement and indeed the statement of Dr. Malhotra, PW-13 could not be believed as the said Doctor had recorded in the MLC and in his testimony that the LPG stove was used. He submitted that the defense version that the sari caught fire while cooking a kerosene stove is therefore belied by the fact that there was dying declaration to the contrary. It is thus enough to disregard the testimony of the doctor. He further submitted that the accused had received minor injuries and unless he had fully participated in saving Babita, he ought to have received much more injuries than he had received and therefore this clearly throws doubts on the stand taken by the accused. He has thus submitted that there is no reason to doubt the testimony of I.O. who recorded the 3rd dying declaration and that of the SDM who recorded the 4th one. He further submitted that the Trial Court has rightly relied on these two latter declarations to convict the appellant. The fact that the IO put on record the statement of PW-3 Landlord and the parents even though they were suggestive of negative role of prosecution shows that the investigation was fair. He has relied upon the judgment of the Hon'ble Supreme Court in , Balbir Singh v. State of : .

11. We are of the view that the judgment of the trial court convicting the appellant under Section 302 IPC cannot be sustained for the following reasons:

(i) The case set up by the prosecution of dowry demand by the appellant leading to the burning being the underlying motive for killing of his wife deceased Babita is totally belied by the evidence of the parents of deceased, i.e., PW 1 and PW 2 who clearly stated that their relationship was completely broken with the deceased because of deceased having married the appellant without their consent and the marriage was a love marriage and there was hardly any visits between them and the parents did not know the nature of the relationship of the appellant with the deceased and they were not aware of any dowry demands.

(ii) Indeed, the trial court found that no dowry demand was ever made and the deceased was not tortured by the accused or any other member of his family. The Trial Court recorded the following findings:

Page 1280 The same thing came up in their deposition made in the court on the basis of which, (if statement of the deceased is kept apart) it can be said that really no dowry demands were ever made and deceased was not tortured by the accused or any other member of his family.

Once this finding of the dowry demand not ever being made and the deceased not having been tortured by the accused is recorded by the trial court, we are unable to appreciate how there can be any rationale for accepting the prosecution case that the deceased was burnt by the appellant on

account of failed dowry demands. Since the motive for the appellant to have killed his wife Babita is totally belied even by the above finding of the trial court, the least the trial court ought to have done was to examine the prosecution case and the role of the I.O. Nirbhay Kumar with care, which becomes most significant in light of the statement recorded under Section 313 Cr.P.C. of the appellant where the appellant made an allegation that the Investigating Officer wanted some money from him and on his refusal he recorded the statement of the deceased in total variance with the statement given not only to the landlord who was first on the scene but even the statement given to the doctor when she was admitted to the hospital. This statement under Section 313 Cr.P.C. was corroborated by the defense evidence of DW1, the younger brother of the deceased, who deposed to the above effect and the trial court has regrettably while noticing the above stance and testimony, disregarded it without reason. To both the doctor and the landlord the deceased clearly stated that the deceased caught fire while cooking food on the stove. Both the landlord and Dr. Malhotra PW13 were the prosecution's own witnesses and were not declared hostile and cross-examined on this issue and their testimony has stood unchallenged. Further, PW 2, father of the deceased, in his cross examination stated that the house of Jugesh was at a distance of about 5-7 houses from their house. Thus, had there been any matrimonial dispute between the accused and the deceased, PW 2, father and PW 1 mother would have certainly come to know of it.

(iii) It is not in dispute that there are burn marks on one of the hands of the appellant/accused and the trial court in our view has brushed aside such injuries by suggesting that there were not enough burn injuries so as to sustain the case set up by the deceased. The learned trial Judge has totally lost sight of the fact that the landlord PW3 had deposed that he found that the accused was also trying to save his son who sustained a minor injury as evident from the photograph of child Ex. PW 3/DA along with the medical treatment slip of the child. We are pained to observe that the learned trial Judge has not even adverted to this vital circumstance which would go a substantial way in supporting the stand taken by the accused. Furthermore, the testimony of the doctor Dr. Sumit Malhotra who was the prosecution's own witness and indeed the MLC produced by him which recorded that burns were sustained while cooking food on an LPG stove, clearly ran contrary to the so called Dying Declaration recorded by the Investigating Officer. In the dying Page 1281 declaration it is stated that the kerosene oil was poured from the kerosene stove on the deceased Babita by the accused. It is the prosecution's own case that the kerosene stove recovered from the scene of the incident was not recovered in the presence of any independent witness and the S.I Nirbhay Kumar the I.O has admitted that he had not recorded in the case diary that the smell of kerosene was present in the room though he has improved upon this in oral evidence. There is thus positive evidence of PW3, the prosecution's own witness to the effect that the deceased told him when he reached upstairs on the scene that she sustained the injuries while cooking on the Gas Stove. Since the third Dying Declaration recorded by the Investigating Officer implicated in detail the appellant, the part of the Dying Declaration could not have been relied upon by the trial court without giving reasons why part of the Dying Declaration relating to dowry demand was unworthy of reliance and yet part of the Dying Declaration made to the Investigating Officer relating to burning was correct. The trial court has brushed away the evidence of the Doctor by recording that the husband was present and therefore, the wife did not depose correctly. In doing so, the trial court's judgment totally ignored the clear and unchallenged testimony of doctor Sumit Malhotra PW13 to the following effect:

She had told me that she had sustained burns while cooking food on LPG stove, when her pallu caught fire and then before she could react, her cloths were on fire. She was brought to hospital by her husband. The relative or friend of the patient is not present when the history is recorded by us.

PW13 Dr. Sumit Malhotra deposed as above and even in the cross examination by the accused, PW13 Dr. Malhotra asserted positively as follows:

No relative or friend was present when the history of the deceased was recorded.

(iv) Similarly, the prosecution's own witness PW 3 the landlord, Surender Khurana, who was first present on the scene also deposed in the following terms:

After about 10-15 minutes I heard commotion from the second floor and went upstairs. I found Babita in flames and accused Jugesh trying to douse the fire from his hands. I asked Babita as to what had happened and she told me that her suit had caught fire while cooking. I went down stairs to bring a taxi. Thereafter I and Jugesh took Babita to Safdarjung hospital and got her admitted.

The above testimony clearly establishes PW 3's presence on the scene of occurrence which was confirmed by SI Nirbhay Kumar in his testimony. It also establishes the role of the accused who tried to douse the fire and indeed took the deceased to the hospital immediately. In the cross examination Surender Khurana further stated as follows:

Accused was in my house as a tenant for about 1 1/2 year or more prior to the date of occurrence. He used to have a LPG Gas Page 1282 connection for cooking in his house. I have seen the Gas stove and cylinder at the very day he came to this room and used continuously even till the date of incident. Photographs Ex.PW11/Dx3 at point C show the position of gas stove and cylinder in the room of accused even in the date of incident. there was no kerosene stove in this house ever the period the accused stayed in this room. Immediately hearing the cries, I reached the stove on the date of incident and found Babita having caught burns on her chunni (pallu) and on her cloths. She was pushed outside the room. Her husband was trying to extinguish fire and also saving his small child. Ex.PW3/DA is the photograph of son of the accused (earlier marked A1) x the child has received burns.

Thus, it is also clear that there was only a LPG gas as per the prosecution's own witness i.e. the landlord, who in our view was a natural witness on the spot as he stayed on the ground floor and the appellant stayed on the second floor. Consequently the case set up by the prosecution that kerosene was poured on her and set her afire cannot be accepted. This is also evident from the following statement of the investigating officer in his cross examination:

Court Q. Did you find any smell of kerosene oil when you reached the spot?

Ans. I had found faint smell of kerosene when i reached the spot.

Court Q. Did you smell the stove before you seized it from the spot?

Ans. Yes.

Court Q. Did you find smell of kerosene oil from the stove?

Ans. Yes.

I did not record in case diary that I had found faint smell of kerosene oil on the spot or that I had found smell of kerosene oil from the stove. It is wrong to suggest that I am deposing falsely. As regards smell of kerosene on the spot and from the stove, I did not mention in any document whatsoever that I had found faint smell of kerosene on the spot or that I had found smell of kerosene oil from the stove.

Further relevant portions of the cross-examination of PW11 Nirbhay Kumar read as follows:

It is correct that information in the police station was received at 3:15 a.m on 20.5.02 and that was the first information in this regard.

I did not seize record of her treatment in hospital and only collected the MLC. It is correct that I cannot say what treatment if any had been given to the deceased before I reached the hospital. It is correct that I will not be able to say whether any sedative was given to the deceased or not before I reach the hospital.

I had no talk with the doctor before I met the patient.

Yes I had taken permission of the doctor on duty and then I had entered the ICU.

Page 1283 I had first visited the patient in ICU at about 4:15 or 4:30 A.M. I had visited her at about 11 A.M. along with the SDM. I Had also visited her at about 6:30 P.M in the evening, along with the SDM.

Therefore only stove seized by me from the house of accused and the deceased was sent to FSL. the stove sent to FSL for finding out whether it contained kerosene oil or not has been returned by FSL on the ground that they did not have the facility to give this finding.

The seizure of the medical record would have corroborated the I.O's version that at 11:00 am on 20th May 2002 Babita was not in a position to speak due to heavy sedation. This throws doubt on the Investigating Officer's version that the deceased was not fit to make a statement at 11:00 am when the SDM first came to the deceased. The above statement of the I.O. that the kerosene stove seized from the house of the accused and the deceased was sent to FSL Laboratory to find out whether it contained kerosene oil or not and has not been returned by the FSL Laboratory seems to be a convenient way of hiding the factum of the seizure of the stove from the premises of the accused and the deceased. Further if FSL Laboratory did not have the facility to give this finding about the stove then why did the I.O. not get back the said stove for sending it to any other certified laboratory for testing.

I did not record in case diary that I had found faint smell of kerosene oil on the spot or that I had found smell of kerosene oil from the stove. It is wrong to suggest that I am deposing falsely. As regards smell of kerosene on the spot and from the stove, I did not mention in any document whatsoever that I had found faint smell of kerosene on the spot or that I had found smell of kerosene oil from the stove.

The above statement of the I.O. with respect to the smell of the kerosene oil appears to be an afterthought since even in the post mortem report it has been stated that there was no smell of the kerosene oil.

The doctor who declared the patient fit for statement was present when I recorded the statement of the patient. I had requested the doctor to make endorsement on the statement of the patient. He, however, stated that he could not put his endorsement on the statement without permission from his Medical Superintendent. I had told the doctor that his endorsement was required on the statement of the patient recorded by me as the statement had been recorded in his presence and it as a case of 90% burns.

I cannot give name of the doctor who was present at the time of statement and who refused to make endorsement on the statement. Probably I did not record in my rukka that the doctor was present at the time when statement of patient was recorded by me.

I have not mentioned in case diary regarding refusal of the doctor to put his endorsement on the statement of the deceased.

The above statement of the I.O. that he did not record in his rukka that he did not record the presence of the doctor at the time when the statement of the deceased was recorded by him and he did not endorse this fact makes it clear the callous attitude of the I.O. in conducting the investigation of the present case.

Page 1284 I do not know whether the SHO has mentioned in the Initial Special Report or not that I had told him that the doctor had refused to make his endorsement and the statement of the deceased recorded him. I did not complain to Medical Superintendent, Head of Deptt. or any senior doctor on account of the refusal of the doctor on duty to put his endorsement on the statement of the deceased recorded in his presence. I am not aware of any rule of Delhi High Court comprised in Chapter 13 (a) Part II Para 7 requiring that whenever the statement is recorded by a police officer, he shall as far as possible, get it attested by one or more persons present at that time. No one other than me and doctor was present when the statement of Babita was recorded.

We are surprised by the above statement made by the I.O. that he was not aware of the rule in Delhi High Court Rules Chapter 13 (a) Part II Para 7. It is said that 'Ignorance of law is no excuse' because everyone is presumed to know the law of the land. This is all the more expected from a Police Officer.



I kept on putting questions to the patient and she kept on giving answers. I did not record the questions put by me to the patient. The patient was declared fit for statement by the doctor after about 10-15 minutes of my reaching the hospital.

The above statement of the I.O. that the patient was declared fit for statement by the doctor within 10-15 minutes of his reaching the hospital shows the curious nature of the I.O. in conducting the investigation since as per the statement in the cross-examination he reached the hospital at about 4-4.30 a.m. but the third Dying Declaration was recorded by him at 5.30 p.m. Court Question: What did the patient tell you when you told her about the history recorded at A to A on the MLC expW9/3?

Ans: The patient kept on saying that her husband had poured kerosene oil on her. I did enquire from the parents of the deceased regarding her statement that she had informed her parents a number of times about the pressure of the accused to bring motorcycle, TV, fridge, cash etc. They told me that sometimes, such a complaint was made to them by their daughter. I have seen the statement of father of the deceased recorded by me under Section 161 Cr.P.C. It is correct that in this statement, it is nowhere recorded that deceased had sometimes complained to him that the accused used to say that her parents should have given motorcycle, TV, fridge and cash and that she should pressurize them to bring these articles. It is correct that in the statement of Vinod Kumar, father of the deceased recorded by me on 20/5/2002 there is no mention of any complaint by the deceased to them. I have recorded in the statement of Vinod Kumar Under Section 161 of Cr.P.c. that he did not have any knowledge about the relations of his daughter with her husband and he did not try to find out about their relations. It is not mentioned in this statement that Vinod Kumar had come to know from other persons that those days, there was tension and quarrel between the accused and the deceased.

Page 1285 However, the above statement of the I.O. in the cross-examination that the deceased did complain to her parents about the dowry demands of her husband is contradictory to the Dying Declaration made to the I.O and the S.D.M. It is also totally contradicted by the evidence of the parents of the deceased PW 1 & PW 2 who categorically stated in their statement under Section 161 Cr. P.C. that there were no dowry demands by the accused. In fact the trial court while accepting that there were no dowry demands then could not have taken into account the compromised version of the dying declaration recorded by the I.O.

I had asked the deceased as to who were the persons from the neighborhood who had come to the spot when the incident took place. She told me that the landlord was that person. However, this fact has not been recorded by me in her statement.

The above statement of the I.O. that he did not record the fact that the deceased had told him that the landlord was the person who had come to the spot when the incident took place shows the lax attitude of the I.O. in conducting the investigation. This fact was of utmost importance since the landlord was the natural witness to the incident.

Court Question: Can you give any reason for not recording the above referred part of the statement of the deceased?

Ans: I cannot give any reason for omitting this from the statement.

It is correct that in my statement ExPW11/5, the time of sending report was initially written as 5.30 p.m., but later on p.m. was changed to a.m. at point encircled red.

I have no knowledge that in such (in such) cases SDM records the statement of the relatives of the victim and then issues necessary instructions to the concerned SHO for registration of FIR or otherwise. It is correct that in this case also the SDM gave instructions for necessary action after recording the statement of the deceased by me. I had told the SDM that the FIR had already been registered and statement of the patient had already been recorded by me. I had shown the statement recorded by me to SDM when he came at about 11 a.m. I have not mentioned in case diary that the Doctor was present at the time when statement of the deceased was recorded. It is wrong to suggest that no Doctor was present when I recorded the statement of the deceased. It is wrong to suggest that the deceased did not make the statement in the manner recorded by me and that I have concocted and fabricated her statement.

However, the above statement of the I.O is contradictory to the 3rd Dying Declaration before the recording of which, the I.O had alleged that he had requested the doctor to make out an endorsement on an application for grant of permission to take the statement of the deceased but, the doctor refused to give the permission.

I did not request any Gazetted officer of the police to visit the hospital to record the statement of the deceased. I cannot say whether word P.M. has been changed to A.M. at point X in the FIR Ext PW7/1.

Page 1286 Crime team was not called at the spot. The spot was got photographed from a private photographer. When I went to the photographer to collect the photographs I found that he had shifted from his place.

The above statement of the I.O. that he did not call the crime team at the spot and neither did he place any photographs of the incident on the file of the case further shows the callous attitude of the I.O. in investigating the instant case.

It is wrong to suggest that I did not get the spot photographed and that is why no photographs placed on the file. I did not remember whether the photographer is attached with the crime team. It is correct that under Punjab Police rules crime team is called to inspect the place of occurrence, in case of serious crime such as the crime committed in this case. I did not get the scaled (so called) plan prepared in this case. I have not shown the room where the incident took place in the site plan Ext PW11/9. I did not prepare any list of the articles found in the room of the deceased. I cannot give exact size of the room where the deceased sustained burn injuries but same could be 8-10 feet.

There was no blackish spot on the door or window of the room.

I have seen the photocopy of FIR No. 279/02 of PS OIA. The copy is Ex.PW11/D3. It has been recorded at 10.30 A.M. on 19.5.02. I have also seen photocopy of FIR No. 281 of the above referred PS and the same is Ex.PW11/D4. It has been registered at 4.05 P.M. on 20.5.02 and I am the I.O of this case.

It is wrong to suggest that I had come to know on reaching the hospital that the deceased had died accidentally. It is wrong to suggest that I started negotiations with Sanjay and when he failed to satisfy my requirement, I got this false case registered by fabricating the statement of the deceased. It is wrong to suggest that also tutored the deceased, to depose before the SDM, in the manner the statement has been recorded by the SDM. It is wrong to suggest that I am deposing falsely. No public witness was present when I prepared seizure memo of the articles seized from the spot. I did not call anyone from the neighborhood for this purpose, though the seizure took place at about 1 P.M. It is wrong to suggest that accused has been fabricated in a false case.

The above statement of the I.O. shows that the seizure of the article from the spot was made by him at 1.00 pm. a time of the day where he could have called any respectable member of the neighborhood to sign as a witness on the memo of the seizure, but he failed to do so.

CQ: When you were examined in this Court you stated that kerosene stove was seized from the kitchen of the accused whereas as per the seizure memo prepared by you kerosene stove was seized from the room of the accused. How do you reconcile your statement with the seizure memo?

Page 1287 CQ: Did you see any gas stove in the premises of the accused?

Ans: There was no gas stove in the premises of the accused".

CQ: In his statement Under Section 161 of Cr.P.C., Surinder Khurana stated to you that deceased Babita had told him that when she was cooking on gas stove her suit caught fire. If no gas stove was seen by you in the premises of the accused, why did you not question Surinder Khurana in this regard?

Ans: It did not occur to me to question Surinder Khurana on this aspect".

A mark PW11/XY appears to be carbon copy of a receipt about gas connection and mark PW11/XY.1 appears to be bill of a cylinder purchase.

There was no gas cylinder or gas stove inside that room. It is wrong to suggest that the Koil stove was planted subsequently and that there was no oil stove in that room. PW Surinder Khurana met me on the spot when I had just finished the proceedings that day at the spot. I did not inspect the room once again after the arrival of PW Surinder Khurana. Vol. Khurana did not meet me on the top floor of this house. Rather he had met me in his own G.F. residence and I had recorded his statement at the his residence only.

The above statement of the I.O. that there was no gas cylinder or gas stove on the spot of the incident is contradictory to the photographs Ex. P 11/X3 which clearly shows that a gas stove and a gas cylinder were present on the scene of the incident. Moreover, the landlord PW3 had also testified in his cross-examination that he had seen the gas stove and the gas cylinder the very day the accused and the deceased came to live there and used it continuously even till the date of the incident.

The stove had already been taken into possession by us and it was with police team.

In our view, when there is positive evidence from the prosecution witness PW3 that there was no kerosene stove ever used by the appellant during his entire stay and only a gas stove was used for cooking, the case of the prosecution that the deceased was killed by pouring kerosene on her cannot be sustained at all. Even the Ex.PW 11 DX3, which is the photo of the spot of the alleged incident clearly shows that there is a gas cylinder and a gas stove and yet in cross examination the Investigating Officer has wrongly and persistently stated that there was no gas cylinder. Furthermore the presence of the kerosene stove is also belied by the fact that the stove was alleged to be sent for forensic examination and said not to be returned and no report of the laboratory where the stove was sent nor was it stated as to who took it for forensic examination. Regrettably the trial Court has totally ignored and brushed aside these vital and material inconsistencies totally falsifying the prosecution case. The learned Sessions Judge ought to have noticed that the meticulously detailed declaration to the Investigating Officer the S.I. Nirbhay Singh was totally contrived and the doubts about the alleged recovery of kerosene stove and positive and uncontroverted evidence of the PW3 to Page 1288 the effect that the appellant only used a LPG stove and never used a kerosene stove completely destroyed the edifice of the case set up by the prosecution. The trial court has not even referred to this crucial infirmity in the prosecution case. Furthermore, the doctor who was said to be approached to grant permission for the deceased to give a declaration of fitness has not been examined. The I.O has categorically stated that the Doctor refused to give an endorsement on the application. Significantly, the doctor concerned has not been named nor complained against giving rise the suspicion that no such permission was sought by the I.O. Thus, the declaration to the I.O and indeed his entire investigation is shrouded in suspicious circumstances and the trial court wholly erred in relying upon it.

(v) Ex. PW 11/3 clearly shows that there was an overwriting with respect to the time of submitting the report. The time 5: 30 pm was overwritten as 5:30 am by the Investigating officer. This has not been satisfactorily explained by the prosecution. In fact the original writing was 5:30 pm and it has been overwritten to suggest that it was written at 5:30 am to show its time of recording to be soon after the IO arrived at the hospital at 4/4:30am. A declaration to the I.O. at 5:30 pm would show it to be meaningless when the SDM had recorded such a declaration at about 6:00pm. Further, the following extracts from the cross examination of the PW 6, the SDM also make it evident that the relevant time was 5:30 p.m and not 5:30 a.m:

At about 5.30 p.m. he informed that the patient was fit for statement according I again went to hospital. I did not mention this in the brief facts Ex. PW 6/1.

(vi) The dying declaration made to the IO was not supported by any fitness certificate to be given by the doctor.

(vii) Ex.PW 6 /3 which is the permission to record the statement of the deceased submitted to the CMO, Burn Ward, Safdarjung Hospital, reads as follows:

----It is submitted that Babita w/o Jugesh r/o H.No.9/57, Gali No. 12, TKD Ext. New Delhi has been admitted to this hospital following burn injury.

Please permit me to record the statement of the injured if she is fit for the statement.

The reply to the Ex.PW 6/3 was as follows:

Patient is NO fit for statement.

The word 'NO' appears to have been overwritten which is a vital discrepancy in the document which the learned trial court has brushed aside. However, there is no endorsement about the fitness of the dying declaration itself which is recorded on the loose sheet of paper by the SDM.

12. A perusal of four dying declarations revealed that they are inconsistent in material aspects and the appellant was not only entitled to benefit of doubt but to honourable acquittal. The dying declaration made to the landlord PW-3 was clearly corroborated by the dying declaration made to the Doctor who Page 1289 also recorded a corroborative and contemporaneous MLC. Thus the dying declaration being inconsistent and mutually contradictory could not be the sole basis for conviction particularly when there was overwhelming evidence and indeed a finding by the trial court that no dowry demands were made to the parents of Babita, who did not suspect any foul play.

13. The Trial Court has erred in relying on the dying declaration made to the I.O. inspite of disbelieving the motive of murder in the case set up by the prosecution. While relying on the dying declaration for the purposes of accepting the plea of the prosecution qua the burning of the deceased by the Accused, the Trial Court has not given any reason why a part of the dying declaration which made the allegation of dowry demand under Section 498A was disbelieved by the Trial Court and that qua the burning of the deceased was accepted.

14. Surprisingly, the dying declaration made to the SDM is two line one and it is not explained why the fourth dying declaration made to the SDM is so terse when the third one made to the Investigating Officer which is 8 to 10 hours earlier is so chronicled and detailed so as to be unworthy of belief. Furthermore, there is no corroboration of the assertions made in the dying declaration to the SDM as the recovery of the kerosene stove or can was shrouded in suspicion. That even though four dying declarations were made on the same day i.e. 19/20th May, 2002, the death of the girl Babita occurred 7 days later i.e. on 27th May, 2002. Thus there was no reason why the dying declaration to the SDM ought not to have contained some factual averments. Furthermore, no explanation is forthcoming from the prosecution as to the unexplained delay in recording of the dying declaration by the SDM and the fact that the SDM was not aware of the police action prior to

recording the dying declaration. Besides PW9 who conducted the post mortem has not deposed about there being any smell of kerosene emanating from the deceased.

15. The trial court in Para 30 of the judgment has recorded the plea of the appellant on the applicable case law as follows:

30. It was argued in the last that the dying declarations recorded by the IO or the SDM were not recorded as per required norms, and therefore cannot be made the basis of conviction as these appear to be a game plan of the IO who could not be obliged by the accused by agreeing to meet out his money demand as a price for not getting a case registered against the accused Ld.Cl referred to various cases which are reported as;

I) 33 (1987) DLT-254 of which the decision is based on the observations made in a case cited as II AIR 1986 Supreme Court 250 wherein it was held that under relevant rules applicable to Delhi area, an investigating officer was not to scribe a dying declaration.

II) AIR 1994 SCC 129 In this case a dying declaration was recorded by a Magistrate which was neither signed by the deceased nor it Page 1290 contained a date and time about its recording and no explanation was given that deceased was not in a position to sign the dying declaration, and therefore, an order of acquittal was deemed proper.

III) 2001 (V) AD (SC) 245 In this case five dying declarations were made by the deceased which were found to be infirm, weak and self-contradictory. It was observed that possibility of committing suicide and implicating in-laws cannot be ruled out.

IV) 1993 SCC (Criminal) Page 1 - Here also there were four dying declarations and none was before a judicial officer and there were material inconsistencies in the statements of the deceased and were held to be unworthy of reliance.

V) AIR 1974 Supreme Court 332 it was observed that in case dying declarations have been recorded under suspicious circumstances - cannot be acted upon without corroborative evidence. This dying declaration was recorded when the victim was very serious and was accompanied by a person who bore enmity with the accused.

VI) 1981 (Criminal 638) In this case, dying declaration was recorded by a police officer in the hospital which was very detailed and coherent and was thus not possible when the deceased was in a state of shock being seriously injured. Medical and ocular evidence regarding the nature of weapon was also found to be discrepant. It was also held that it is not safe to rely upon such a dying declaration.

VII) 2002 SCC (Criminal) 1575 In this case it was observed that a doctor's certificate about the mental fitness of the declarant is necessary and further it would not suffice if the doctor's certificate merely states that patient was conscious.

The trial Court has unfortunately failed to deal with or consider the law laid down in any of the judgments cited by the accused thus demonstrating its erroneous approach. Even the judgment relied upon by the trial court in para 31 Sohan Lal v. State of Punjab 2003 JCC 1869 clearly also gives sanctity to a statement made before the doctor which statement of the doctor, we have already found to have been wrongly discarded by the trial court by ignoring the PW13 Doctor Malhotra's evidence that no friend or relative of the deceased was present.

16. In the light of the above we are astonished by the praise showered on the I.O. by the learned trial Court in para 35 of its judgment which reads as follows :

35. Looking to the facts that IO's conduct has remained very fair and he did put on records the statements of PW Surender Khurana and parents of the deceased - despite these being suggestive of a negative role for the prosecution, that the IO or the SDM were not known to either of the two families, that there was absolutely no chances for anyone to tutor the Page 1291 injured deceased and that the making of the statements before the IO and the SDM is quite natural and convincing - I find the dying declaration as wholly true and inspiring full confidence. No factor available where under - the Dying Declaration may be looked with any suspicion.

We fail to see how the I.O. could have known in advance the testimony of PW3, the landlord and the parents PW1 and PW2. This apart the above finding of the trial court seems to give a license to the I.O. to conceal vital evidence.

17. In the case of P. Mani v. State of Tamilnadu , the Hon'ble Supreme Court held that the conviction can be recorded on the basis of dying declaration alone but the same must be wholly reliable as follows:

14. Indisputably conviction can be recorded on the basis of the dying declaration alone but therefore the same must be wholly reliable. In a case where suspicion can be raised as regards the correctness of the dying declaration, the Court before conviction an accused on the basis thereof would look for some corroborative evidence. Suspicion, it is trite, is no substitute for proof. If evidence brought on record suggest that such dying declaration does not reveal the entire truth, it may be considered only as a piece of evidence in which event conviction may not be rested only on the basis thereof. the question as to whether a dying declaration is of impeccable character would depend upon several factors; physical and mental condition of the deceased is one of them.

Thus, in view of the position of law laid down by the Hon'ble Supreme Court in P. Mani's case (supra) and the reasons given by us with respect to the creditworthiness of the two dying declarations made by the deceased Babita to the Investigating Officer and the SDM, the accused in our view was innocent and appears to have been wrongly charged and does not appear to have been involved in the incident at all and is in fact appears to be a victim of the loss of his wife and an unwarranted charge and conviction for murder. Further in the case of State of Punjab v. Praveen Kumar held that the court, while appreciating the credibility of the evidence before it, must view the evidence as a whole so as to come to a conclusion as to its genuineness and truthfulness and that the court must be satisfied that the dying declaration must be truthful. The relevant extract of the said

judgment reads as follows:

While appreciating the credibility of the evidence produced before the Court, the Court must view evidence as a whole and come to a conclusion as to its genuineness and truthfulness. The mere fact that two different versions are given but one name is common in both of them cannot be a ground for convicting the named person. The court must be satisfied that the dying declaration is truthful. If there are two dying declarations Page 1292 giving two different versions, a serious doubt is created about the truthfulness of the dying declaration. It may be that if there was any other reliable evidence on record, this Court could have considered such corroborative evidence to test the truthfulness of the dying declarations. The two dying declarations, however, in the instant case stand by themselves and there is no other reliable evidence on record by reference to which their truthfulness can be tested. It is well settled that one piece of unreliable evidence cannot be used to corroborate another piece of unreliable evidence. The High Court while considering the evidence on record has rightly applied the principles laid down by this Court in *Thurukanni Pompiah and Anr. v. State of Mysore and Khusal Rao v. State of Bombay* 1958 SCR 552.

Thus, in view of the position of law laid down by the Hon'ble Supreme Court in *Praveen Kumar's* case(supra) in order to convict the accused, the court should be satisfied about the truthfulness of the dying declaration. However, in the instant case, the 2 dying declarations to the I.O and the SDM were contradicted in material terms by the earlier 2 dying declarations recorded contemporaneously before the landlord of the premises where the incident took place, and the MLC and the testimony of the Doctor who recorded the declaration while admitting the deceased Babita. Thus, in the instant case, the accused was wrongly convicted by the Trial Court on the basis of the Dying Declaration.

18. Before we deal with the debatable role played by the IO S.I. Nirbhay Kumar, we must also express our unhappiness with the manner in which the trial Judge has dealt with the case resulting in an unjust and uncalled for conviction for murder leading to life imprisonment. The investigation of the case does not appear to have been done objectively and fairly at least by S.I. Nirbhay Kumar. His investigation seemed to have been directed to secure a conviction of the petitioner rather than to find out the truth. The following suspicious circumstances clearly show that investigation by S.I. Nirbhay Kumar to be lopsided if not motivated:

- (a) There were no independent witnesses for the recovery of the kerosene stove and bottle.
- (b) The I.O. has admitted in cross-examination that in the case diary no mention has been made by him that there was any smell of kerosene on the spot though in the testimony before the Court he had improved his version by saying that there was smell of kerosene on the spot.
- (c) He states that the kerosene stove was sent to the FSL. Laboratory but not returned.
- (d) In the so called dying declaration made before the I.O., there is no endorsement of the fitness of the deceased.



(e) Even the dying declaration made to the SDM does not have an endorsement on the declaration about the fitness of the deceased but such declaration is on a separate loose sheet of paper.

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(f) Contrary to the established police procedure, no information was given to the Crime Branch for proceeding to record the scene of incident by the I.O.

(g) There is crucial overwriting about the time on the Report dated 20th May 2002 sent by the Investigating Officer in which 5:30 pm was overwritten as 5:30 am.

(h) There is also overwriting about the fitness certificate given by the CMO, Burn Ward, Safdarjung Hospital, New Delhi, and the original certification which showed that the deceased was fit to make statement at 11.00 AM has been altered by the superimposition of 'NO' so as to support the prosecution case that when the SDM first came on the forenoon of 20th May, 2002 at 11:05AM when the deceased Babita was not fit to make a statement as per medical certification and again visited at 6 P.M.

(i) As compared to meticulously worded and comprehensive and detailed declaration to the I.O. the SDM was given a two line laconic statement by the deceased.

(j) The declarations to the police and the SDM about dowry demand being the motive of the murder of Babita, are falsified by the statements of the parents of Babita who stayed 5-6 houses away from the deceased's house to the effect that there was no dowry demand nor did they think of there was any suspicious circumstance regarding Babita's death.

(k) Even though the photograph of the place of the incident produced by the prosecution clearly shows that there is a gas cylinder and a gas stove, the Investigating Officer SI Nirbhay Kumar has blatantly and persistently stated in his testimony that he did not find either a gas cylinder or a gas stove on the spot. This clearly shows that the Investigating officer was bent upon twisting the truth so as to establish the presence of a kerosene stove and the absence of a gas stove and cylinder.

19. Consequently, in view of the above findings, the appeal is allowed and the conviction of the accused recorded by the impugned judgment of the learned Sessions Judge dated 4th March 2004 in F..R. No. 280/2002, P.S. Okhla Industrial Area is set aside. The accused is thus directed to be set free forthwith. While recording our verdict of acquittal in favor of the appellant, we feel constrained to comment upon the conduct of the investigation. We are also of the view that the conduct of the investigation by the IO Nirbhay Kumar was far from satisfactory and in fact was one sided. Consequently, we direct the Commissioner of Police to get an enquiry conducted by a Senior Officer into the manner of the investigation conducted by the I.O. in the present case in the light of the observations made and deficiencies pointed out in this judgment, and submit such report to this Court not later than 31st August, 2007. List on 7th September, 2007 along with the Report.

20. The appeal stands allowed and is disposed of accordingly.

21. A copy of this judgment be sent to the Commissioner of Police, Delhi by the Registry by a special messenger. It will be open to the Enquiry Officer appointed by the Police Commissioner to seek access to the record of this case by securing permission from the Registrar of this Court.