A STATE OF MADHYA PRADESH

*v.*

VISHWESHWAR KOL

(Criminal Appeal No. 1361 of 2006)

JANUARY 18, 2011

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**[HARJIT SINGH BEDI AND CHANDRAMAULI KR. PRASAD, JJ.]**

*Penal Code, 1860: s.302 – Brutal murder – Accused* C *burnt his wife and daughters – Dying declaration of daughter recorded by police – The declarant stated that accused came home late at night in inebriated state and poured kerosene oil first on her mother and then on her and her sisters and when declarant tried to escape, accused caught hold of her,* D *and in the process he himself received burn injuries – Conviction by trial court based on dying declaration – High Court held that the dying declaration did not inspire confidence and ordered acquittal – Held: The fact that the accused received burn injuries was corroborated by the* E *medical evidence – Dying declaration was recorded after the doctor certified fitness of the declarant to give dying declaration – There was no reason to disbelieve the dying declaration – High Court erred in passing order of acquittal – Order of conviction passed by trial court restored and accused* F *directed to undergo sentence of life imprisonment.*

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1361 of 2006.

From the Judgment & Order dated 06.12.2004 of the High G Court of Madhya Pradesh at Jabalpur in Criminal Reference No. 855 of 2004.

Aishwarya Bhati, Rashid Khan, C.D. Singh for the Appellant.

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Rajesh for the Respondent. A

The following order of the Court was delivered

ORDER

This appeal, at the instance of the State of Madhya Pradesh, arises out of the following facts: B

The first wife of the respondent (hereinafter called "the accused"), had died of tuberculosis and several years prior to the date of occurrence (19th October 2003) he had started living with Leelawati Bai deceased as a second wife. Out of this arrangement, 4 daughters, namely, Sandhya about 6 years, Lovely 3 years, Madhu 1 year and Jyoti 10 or 11 years had been born. As Leelawati Bai had abandoned her previous husband and belonged to a community different from that of the accused, she had not been accepted as a member of his family and even otherwise there was suspicion that she was not of good character. On the evening of 18th October 2003 the accused went to see a dance performance at Chandiya. He, however, returned home at about 1.00 a.m. i.e. in the early morning hours of 19th October 2003 before the performance had ended and after picking up a plastic can which contained kerosene oil, he poured the oil on his wife and four daughters. Jyoti who was the eldest, woke up and tried to escape but the accused got hold of her and in that process, he too sustained burn injuries on his body. As a consequence of the serious burn injuries, Leelawati Bai, Sandhya, Lovely and Madhu died almost instanteously and house was completely burnt down. Jyoti, who had sustained severe injuries, was removed to the Primary Health Centre by her uncle and brother of the accused, Nandi Kol PW-7 where she was examined by Doctor Ashish Pandey, PW-1. The Doctor also informed the police on which Sub-Inspector S.K.Mishra, PW-10 reached the hospital and after ascertaining from Dr. Ashish Pandey as to Jyoti's fitness to make a statement, recorded the same between 1.40 and 2.15 a.m.. In this dying declaration, she gave the story as already C D E F G H

A given above. The accused was accordingly brought to trial for an offence punishable under Section 302 of the IPC on the completion of the investigation. The trial court relying on the dying declaration and partly on the evidence of Nandi Kol PW-7 and Jognibai PW-8, the mother of the accused, held that the B fact that the accused and Leelawati Bai were living as a man and wife had been proved on record. The court, however, held that the story as to the motive for the burning of Leelawati Bai and particularly her daughters could not be entirely accepted as the witnesses aforesaid had resiled from their police C statements in an attempt to help the accused who was a very close relative and accordingly the primary evidence against the accused was the dying declaration made by Jyoti. The court observed that this was the main link in the chain of circumstances against the accused. It was pointed out that the D dying declaration had been recorded by PW-10 after the Doctor had opined that Jyoti was fit to make a statement. Support for the dying declaration was also found from the evidence of PW-4 Balwant, a medical assistant, who too had been present in the Primary Health Centre. PW-10 also deposed that no Executive Magistrate was posted at Chandiya and as Jyoti was E in a very serious condition it had not been feasible to secure the services of an Executive Magistrate from Umariya which was about one hour distant and that in any case the wireless set at the Headquarters had been shut down at midnight and the telephone too was not in working order. PW-10 also F explained that soon after the recording of the dying declaration Jyoti too had died. The trial court observed that a dying declaration to be more reliable and plausible ought to be recorded by a Magistrate but if the circumstances did not make that possible and a dying declaration was recorded by a police G officer and was found to be credible, there was no law or practice that it could not be relied upon. The trial court also noted that in the light of the fact that PWs.7 and 8, the brother and the mother of the accused, had resiled from their statements though admittedly PW-7 had brought Jyoti to the H hospital, no other evidence could be produced as the incident

had happened at 1 a.m., an extremely awkward time. The court then took up the question of the sentence to be awarded and held that the case fell within the rarest of the rare category as four innocent girls between the ages of 1 and 10 and their mother had been murdered by their father only because he had some strained relations with the mother. It was found that the murders had been committed in an excessively brutal manner. An appeal was thereafter taken to the High Court and a reference was also made under Section 366 of the Cr.P.C. The High Court has, by the impugned judgment, allowed the appeal and acquitted the accused, thereby declining the murder reference. The High Court analyzed the law relating to dying declarations and held that such a statement could by itself form the basis for conviction provided it inspired confidence and with this background examined the dying declaration and gave a few rather unusual reasons for discarding it; they being (1) that as per the dying declaration, all victims had been sleeping when the oil had been poured on them and the fire lit but if all (including Jyoti) were asleep, there was no question of Jyoti having seen the incident; (2) that there was no smell of kerosene oil on the dead bodies of the children which belied the story that kerosene oil had first been poured on the victims and they had subsequently been set afire and (3) that it appeared that a bottle containing kerosene oil which was being used as a crude lamp (chimney) appeared to have caused the fire and that the story that the kerosene oil had been poured directly on the victims was a concoction. The High Court also referred to certain passages from Dr. Modi's Medical Jurisprudence and Toxicology to support its views. The State is in appeal before us.

Ms. Aishwarya Bhati, the learned counsel for the State of Madhya Pradesh, has argued that the three reasons given by the High Court for making an order of acquittal were completely unjustified, as they ignored the basic fact that the dying declaration had been recorded within a very short time of the incident and by PW-10 after getting a fitness certificate from

A the Doctor who had given the certificate in the presence of PW-4 Balwant, an employee of the hospital. She has pointed out that realizing the gravity and urgency of the situation and Jyoti's serious condition, it had not been possible to secure the services of a Magistrate from Umariya which was some B distance away and that PW-10 was thus fully justified in recording the dying declaration. These pleas have been controverted by Mr. Rajesh, the learned counsel for the accused who has supported the judgment of the High Court.

C We have gone through the evidence with the help of the learned counsel and also examined the reasons which have weighed with the High Court in rendering its judgment. With great respect, we are unable to accept any of the reasons given by the High Court. It has to be highlighted that a dying declaration cannot be analyzed as if it were a statute and it was D only if the Court was to find that the injured was not in a fit condition to make a statement or the possibility that it was tutored or motivated or the story given was completely unacceptable could be some of the reasons for discarding it. It has come in Jyoti's statement that her father had returned E home completely inebriated and before the dance performance had ended is supported by PW-7 as well. Jyoti also stated that the accused had walked to the kitchen and picked up a can of kerosene oil and had first poured its contents on her mother and thereafter on her and her siblings and then set them ablaze. F She further stated that she being the eldest had managed to get up and had attempted to escape but she had been got hold of by the accused with the result he too had received burn injuries in that process. The fact that the accused received burn injuries is corroborated by the medical evidence.

G We find absolutely no reason as to why the story given in the dying declaration should not be believed. Admittedly, Jyoti had been brought to the hospital by PW-7 and he so admitted in his statement. Dr. Pandey, the attending doctor, had immediately sent for the police which had brought PW-10 to

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the hospital and after ascertaining from the doctor as to Jyoti's fitness, the dying declaration had been recorded in the presence of the doctor as also Balwant PW. The argument that had found favour with the High Court that as the presence of a chimney was conceded by the prosecution, it appeared that the kerosene oil had spilt out after the chimney had been accidentally broken and caused the burn injuries to all the victims. This story is, however, not based on any material but is an inference which does not flow from the evidence.

The question is as to the sentence that is to be awarded in such a matter. The trial court had rightly held that the incident was in the category of the rarest of the rare cases. Nothing can be said in exoneration of the accused on the facts of the case, and we are constrained to hold that the High Court by rendering a judgment which is completely against the evidence makes it difficult for us to re-impose the capital sentence at this stage. As already indicated above, the incident had happened in October 2003. The trial court had convicted the accused under Section 302 of the IPC and sentenced him to death vide judgment dated 30th April 2004. The acquittal judgment was rendered on the 6th December 2004. The accused has been free on acquittal for more than 6 years now. In this view of the matter, notwithstanding the horrendous nature of the crime and that it called for the capital punishment, we find it difficult to re-impose the death sentence on the accused at this stage. We nevertheless give this opinion with regret. We accordingly allow the appeal, set aside the judgment of the High Court dated 6th December 2004 and restore that of the trial court in so far as the conviction under Section 302 of the IPC in concerned, but direct the accused to undergo a sentence of life imprisonment.

D.G. Appeal allowed.