

* **IN THE HIGH COURT OF DELHI : NEW DELHI**

+ **Criminal Appeal No. 823/2005 & 830/2005**

% Judgment reserved on : 04.07.2008
Date of Pronouncement : 15.09.2008

Smt Kalawati & Anr. Appellants

Through: Ms. Neelam Grover, Advocate.

Versus

STATE Respondent

Through: Ms. Richa Kapoor, APP.

CORAM :

Hon'ble Mr. Justice B N Chaturvedi

Hon'ble Mr. Justice Rajiv Shakdher

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

Rajiv Shakdher, J.

1. This is an appeal under Section 374 (2) of the Criminal Procedure Code (hereinafter referred to as the CrPC) preferred against the judgment dated 24.08.2005 and sentence of even date i.e., 24.08.2005 passed by the Additional Sessions Judge; Karkardooma Courts, Delhi.

2. The Trial Court by the impugned judgment has found

only Smt Kalawati (hereinafter referred to as the '1st Appellant' and Shri Tikam Singh (hereinafter referred to as the '2nd Appellant') guilty of the offences they were charged with, out of six persons accused, under Section 302, read with Section 34 of the Indian Penal Code (hereinafter referred to as the IPC) and Section 498A, read with, Section 34 of the IPC. The said Appellants have been sentenced under Section 302, read with, Section 34 IPC to life imprisonment and a fine of Rs.5,000/- each upon default in payment of fine, they have been sentenced to undergo a further simple imprisonment of five months each. For the offence under Section 498A, read with, 34 IPC, the said Appellants have been sentenced to two years rigorous imprisonment, with a fine of, Rs. 2,000/- each, and in the event of default they have been sentenced to undergo further simple imprisonment for a period of two months each. The Trial Court ordered that both the aforesaid sentences shall run concurrently.

3. The Appellants being aggrieved by the aforesaid judgment and sentence rendered against them, have preferred the present Appeal.

4. In order to dispose of the Appeal, it would be pertinent to briefly capture the case of the prosecution before the Trial Court.

5. On 15.06.1997, one Smt. Pushpa, alias Poonam, resident of F 153, Gali No. 10, Khajoori Khas, Delhi got married to the 2nd Appellant. Immediately, thereafter, Smt. Pushpa became pregnant. However, the child died during the course of delivery. Thereafter, Smt. Pushpa once again became pregnant and in the year 2000, delivered a girl child. The 2nd Appellant and his family which included amongst others, his mother i.e., the 1st Appellant, his brothers and their wives, as well as his sisters were evidently not happy with the fact that Smt. Pushpa had delivered a girl child. It is the prosecution's case that on account of lack of dowry brought by Smt. Pushpa at the time of her marriage and the fact that she had delivered a girl child, resulted in her being physically tortured and abused by the 2nd Appellant i.e., the husband and the 1st Appellant, i.e., the mother in law and, other members of the family. Smt. Pushpa would often discuss her travails with her parents on her frequent and at times forced prolonged visits to her parental home. One such visit by Smt Pushpa took place ten days prior to the fateful night i.e. 22.10.2002 when, Smt. Pushpa was done to death by the 2nd Appellant and his family members by pouring kerosene oil on her and setting her ablaze.

6. It is the prosecution's case that Smt. Pushpa was burnt by the Appellants alongwith other accused at around 09.00

pm on 22.10.2002. The husband of Smt. Pushpa i.e., the 2nd Appellant poured kerosene oil on the victim with the help of the 1st Appellant i.e., mother in law, whereupon the victim, Smt. Pushpa, was set ablaze. At about 10.00 pm, father of the victim, Smt. Pushpa, Shri Uddal Singh (PW-7), received the information that there was an emergency at the house of his daughter, whereupon, Shri Uddal Singh (PW-7) rushed to her in-laws' house. On reaching Smt. Pushpa, i.e, his daughter's house; to his horror, the father, Shri Uddal Singh (PW-7) discovered that Smt. Pushpa was burnt. On being asked, his daughter, Smt. Pushpa, informed him that the Appellants alongwith other family members were responsible for setting her ablaze. At about 11.00 pm, the victim, Smt. Pushpa was brought to Guru Teg Bahadur Hospital, Delhi (in short GTB Hospital) with 95 % burns.

6.1. The Police Station at Khajoori Khas, District – North East, Delhi received intimation of the incident on 22.10.2002, at about 11.15 pm. Upon receipt of the intimation, the information was entered in the Daily Diary bearing entry No. 57A. Sub Inspector, Mahender Singh (PW-16) alongwith Constable, Ranjan Singh (PW-6) reached GTB Hospital at about 12.15 am. In the meanwhile, Shri Uddal Singh (PW-7), father of the victim, followed by the mother Smt. Sheela Devi (PW-3) reached the GTB Hospital, PW-3, mother reached the GTB Hospital at about

02.00 am, in the morning of, 23.10.2002. The mother, Smt. Sheela Devi (PW-3) saw the victim at about 07.00 am on 23.10.2002, at which point in time, the victim, Smt. Pushpa was conscious. It is at this meeting that Smt. Pushpa confided in her mother, PW-3 that she had been set ablaze by the Appellants with the help of other accused.

7. The Sub Inspector, Mahender Singh (PW-16) recorded the statements of parents of the victim i.e., Shri Uddal Singh (PW-7) and Smt. Sheela Devi (PW-3). The Sub Inspector also informed the Sub Divisional Magistrate (hereinafter referred to as the SDM) about the incident in view of the fact that it occurred within seven years of the victim's marriage. This information was relayed to the concerned SDM (PW-17) at about 12.30 pm in the afternoon on 23.10.2002.

8. The SDM reached the GTB Hospital at about 01.00 pm, on 23.10.2002. Thereafter, the SDM after receiving the clearance from the Doctor on duty in the burns ward, namely one, Dr. Sujata (PW-19) to the effect that the victim, Smt. Pushpa, was fit to make a statement, proceeded to record the statement of, Smt. Pushpa. The SDM (PW-17) recorded the statement of the victim, Smt. Pushpa in a question-answer form. The said statement of Smt. Pushpa thereafter was endorsed by the SDM (PW-17) with his signatures, as well as by Sub

Inspector, Mahender Singh (PW-16).

9. In the meanwhile, the Police had registered the FIR (Ex.PW4/A) under Section 498A/307 of the IPC, read with, Section 34 IPC. Unfortunately, the victim, Smt. Pushpa succumbed to the extensive burn injuries caused to her person and consequently, breathed her last on 25.10.2002. Upon the Police receiving this information, a fresh entry was made vide a Daily Diary No. 4A (Ex.PW14/A). Consequent, thereto, the police converted the case into one under Section 302 of the IPC.

10. The Police, thereafter, upon completion of the investigation filed a report under Section 173 of the Cr P C. The Court of, Shri S M Gupta, Additional Sessions Judge, Karkardooma Courts, Delhi; by an order dated 21.08.2003 charged the following persons including the Appellants herein, with the offences punishable under Section 498A, read with, Section 34 of the IPC and for the offences under Section 302, read with, Section 34 of the IPC. The six accused persons who were charged were: Shri Tikam Singh s/o Bhola Ram i.e., the 2nd Appellant, Smt. Kalawati w/o Bhola Ram i.e., the 1st Appellant Smt. Maya w/o Ram Avtar, Smt. Rajan w/o Shri Mukesh Singh, Mahesh s/o Shri Bhola Ram, and Smt. Rajwati w/o Shri Mahender Singh.

11. At the trial, the prosecution examined nineteen (19) witnesses. The defence at the first informed the Trial Court that they did not wish to lead any defence, but at a later stage, examined one (1) witness, namely one, Shri Udaiveer (DW-1).

12. The prosecution in order to bring home the guilt of the accused persons, which included the Appellants herein, primarily relied upon the following:-

- i) the dying declaration, being Ex.PW17/A, which was, proved by the SDM, Shri Raj Kumar Chauhan (PW-17);
- ii) the MLC (Ex.PW18/A), which was, proved by Dr. P P Singh (PW-18);
- iii) the testimony of Dr. Sujata (PW-19) who, deposed as regards, the medical fitness of the victim to give the statement, which she did, on 23.10.2002 to the SDM, Shri R K Chauhan (PW-17);
- iv) the death summary, being Ex.PW19/A, which was, proved by Dr. Sujata (PW-19);
- v) the Post Mortem Report (Ex.PW15/A) which was proved by Dr. S Lal (PW15); and
- vi) the testimony of Shri Uddal Singh (PW-7), the father of the deceased victim Smt. Pushpa.

13. Apart from the above, the prosecution also relied upon the formal police witnesses, i.e., Constable Parvesh, (PW-

1) who arrested the accused Mahesh Kumar and Rajwati. PW1 proved the personal search memos Ex.PW1/A and Ex. PW 1/B pertaining to accused, Mahesh Kumar and Rajwati respectively. The arrest memo (Ex.PW1/C) with regard to accused Mahesh Kumar was also proved by the said witness. PW2, Smt. Lata proved the fact that statement (Ex.PW2/A) of father of the victim, Shri Uddal Singh (PW-7) and statement (Ex. PW2/B) that of Smt. Sheela Devi, mother of the victim were recorded by her. Assistant Sub Inspector, Ram Manohar (PW-4) proved the registration of the FIR No. 211/2002 (Ex.PW4/A).

13.1) Lady Constable, Leela Devi (PW-5) proved the search memo (Ex.PW5/A) with regard to the 1st Appellant i.e., the mother in law of the deceased. The said witness also testified that one stove was recovered from the site where the incident took place. The said witness (PW-5) also identified the stove which was marked as Ex.P-1.

13.2) Constable, Ranjan (PW-6) testified that he alongwith Sub Inspector, Mahender Singh (PW-16) were on emergency duty on 22.10.2002 from 08.00 pm till 08.00 am the following day. He also deposed to the effect that information with regard to the incident was received in the Police Station on 22.10.2002, at about, 11.15 pm whereupon, he alongwith Investigating Officer, Sub Inspector Mahender Singh had reached the Guru Teg

Bahadur Hospital, Delhi at about 12.15 night. He further deposed that the SDM was called next day i.e., 23.10.2002 at about noon time to the GTB Hospital by the Investigating Officer, who reached the GTB Hospital upon receiving the intimation. He further deposed that on receiving the information, they had visited the GTB Hospital whereupon, Sub Inspector, Mahender Singh had made inquiries from the victim, Smt. Pushpa and had also collected the MLC from the GTB Hospital, He also deposed to the effect that scene of the occurrence was inspected by the concerned SDM and, photographs were taken. He further testified that concerned documents were handed over to the Station House Officer, who had directed that the case be registered. He also testified that the 1st and the 2nd Appellants were apprehended and their personal search was conducted. The said witness proved the personal search memos of the 1st Appellant, being Ex.PW6/A and that of the 2nd Appellant, being Ex.PW5/A. The said witness also deposed that from the scene of the crime, one stove containing some kerosene oil was recovered and seized vide a seizure memo Ex.PW6/D. He identified his signatures at point D-1 on the said seizure memo. He also deposed to the effect that on 23.10.2002, that the Appellants were arrested from their house. He further deposed that the stove (Ex.P-1) was recovered and seized from the place

of occurrence in his presence.

13.3) PW-9, Shri Gulab Singh, who owned one Studio by the name and style of Aashu Studio deposed to the effect that he had deputed a photographer to take photographs at the place of incident. He proved the photographs Ex.PW9/A to Ex.PW9/D and the negatives thereof, being Ex.PW9/E to Ex.PW9/H. He denied the suggestion that the photographs were not taken by the photographer deputed by him or they were planted at the instance of the police.

13.4) The uncle of the deceased, one, Shri Vijay Kumar (PW-11) identified the body of the deceased and proved his identification statement, being Ex.PW11/A. He also deposed that the deceased, Smt. Pushpa was admitted to the GTB Hospital on 22.10.2002 with burns injuries.

13.5) PW-12, one, Shri Raj Kumar also an uncle of the deceased identified the body of the deceased and proved his statement (Ex.PW12/A) as also his signatures at point A, as recorded by the Investigating Officer. The information with regard to the death of Smt. Pushpa which was received in the Police Station on 25.10.2002 and entered in Daily Diary No. 4A (Ex.PW14/A) was proved by Assistant Sub Inspector (PW-14), who testified that the said DD entry was made in the hand

writing of and, bears the signatures of Assistant Sub Inspector, Sushma, whose writing he recognised as he had seen her writing and signing during the discharge of her official duties.

14. As stated above, the testimony of witnesses which are most crucial to the prosecution case are those of the parents of the deceased (PW3 and PW 7), SDM (PW-17), Dr. S Lal, (PW-15) who, conducted the Post Mortem, Dr. Sujata, (PW-19) who gave the certificate of fitness to, Smt. Pushpa on 23.10.2002 pursuant to which her statement was recorded by PW-17 and the testimony of PW-18, Dr. P P Singh, who proved the MLC.

15. Briefly, the testimony of PW-3 established that the marriage of the deceased, Smt. Pushpa was an unhappy one as the deceased was often tortured. The cause, according to PW3, was the birth of a girl child. She deposed that ten days prior to the death of her daughter, the 2nd Appellant alongwith two other persons had come to their house to accompany the victim, Smt. Pushpa and the daughter to his house, when in point in time, the 2nd Appellant had threatened that his wife, Smt. Pushpa and the daughter would not return to their house and that he would throw her body into a drain after cutting her to pieces and thereafter, would go to jail. In her cross examination, as well as, in chief, she maintained that on receiving information, she had first visited her daughter's in-laws house, at about 10.00 pm,

and thereafter, reached GTB Hospital at about 02.00 am, on 23.10.2002, and also, that she was able to speak to her daughter at 07.00 am, on 23.10.2002. She stated that her daughter had informed her that she was set ablaze by the Appellants alongwith other members of the family. In her cross examination, she clearly deposed that at the time when, she met her daughter i.e., Smt. Pushpa, she was conscious. She further proved the fact that when, the statement of her deceased daughter, Smt. Pushpa was recorded, no one was present with her. In the cross examination, she specifically denied the suggestion that she had tutored her daughter to make the statement which she did, before the SDM.

16. Shri Uddal Singh, (PW-7) father of the deceased Smt. Pushpa deposed that between 09.30 and 10.00 pm, on 22.10.2002, the 2nd Appellant i.e., his son in law, had left a message with one Shri Lakhan Singh, a nearby shopkeeper, to the effect that he should come to their house as someone in their house was seriously ill. He also deposed that upon receiving the said information, he went to the house of the in- laws of his deceased daughter. On reaching his daughter's place, he found that his daughter had sustained burn injuries and that a mattress was lying over her. On making inquiries from his daughter as to what had happened, she had told him that the accused had set

her ablaze. He also deposed to the effect that marriage of his daughter with the 2nd Appellant was a troubled one. He deposed that his daughter was constantly tortured, and that, she lost her first child as her brother-in-law namely one, Mahesh had kicked her while she was in the family way. He also deposed that his daughter had demanded money from him, which he was not able to give her as he did not have the money. He specifically referred to the fact that on one such occasion i.e., on Rakshabandhan, she had come to her parental house when she informed him that she had not been given her meals by the accused persons for last three days and that she had been beaten up. He also proved the statement made by him to the SDM, being Ex.PW2/A and identified his signatures at point A-2. In the cross examination, he deposed that at about 07.30am, on 23.10.2002, his wife had met his daughter Smt. Pushpa, and no one else, was allowed to meet her. He also deposed in the cross examination that his wife had informed him after her meeting with their daughter, Smt. Pushpa, that she was conscious and oriented during the meeting. He specifically also deposed to the effect, that his statement in the office of SDM was recorded by one Smt. Lata, a distant relation of his. He, specifically denied the suggestion that his daughter while in the GTB hospital, was unconscious throughout, having sustained the said burn injuries.

17. The Post Mortem Report being Ex.PW15/A was proved by Dr. S Lal, (PW-15) Sr. Demonstrator, GTB Hospital, Dr. S Lal deposed that he had conducted the Post Mortem on the body of Smt. Pushpa, wife of the 2nd Appellant on 25.10.2002 at about 02.30 pm. He deposed that he had received the dead body of a young female average built wrapped in white cotton sheet and plastic sheet having surgical bandages on the burn area except face, palm and sole. He deposed that eyes were closed and the cornea was clear. He further deposed that a tattoo mark in the shape of 'OM' was on the right dorsum of hand. He testified that the injuries on the body were ante mortem which had, superficial deep infected burn injuries all over the body except in genitalia, right loin and right side of lower back just above the buttock, yellowish plaque was present on the base of the burn at different places. According to him, the extent of burn injuries was 95% accompanied by singeing of scalp hair. He also deposed that there was no smell of kerosene oil detected nor was there any external injury present on the body. In his deposition he confirmed that no abnormality is detected in the internal examination. In his opinion, the cause of the death was due to septicemia due to superficial to deep infected ante mortem flame burn. The time of death was six hours prior to the time of the examination.

18. Dr. P P Singh, (PW-18) proved the MLC being Ex.PW18/A. Dr. Sujata (PW-19) deposed that at the relevant point in time, she was working as Junior Resident, in the Burns Ward, of GTB Hospital. She further deposed that on 22.10.2002, the deceased Smt. Pushpa wife of the 2nd Appellant was admitted in the burns ward vide a MLC No. 5042, dated 22.10.200, at about, 11.00 pm. In her deposition she deposed that on 23.10.2002 at about 12.45 pm she had examined the deceased, Smt. Pushpa and upon being satisfied declared her fit for making a statement before the SDM. She also confirmed that she had made the endorsement on the statement of the deceased i.e., dying declaration (Ex.PW17/A) which is, encircled in red ink and bears her signatures at point X. She deposed that after she had declared the deceased fit to make the statement, the SDM (PW-17) proceeded to record the statement of the deceased, Smt. Pushpa. The said witness (PW-19) also proved the death summary dated 25.10.2002 (Ex.PW19/A) and identified her signatures at point A. In her cross examination she deposed that as far as she could remember, the deceased had suffered burn injuries to the extent of 95%. In the cross examination, she admitted that in the death summary report (Ex.PW19/A), she had maintained that the deceased had suffered 100% burns, which included, the injuries to the finger and

thumb. She, however, denied that suggestion that the thumb impression on the dying declaration was not that of the deceased, because finger and thumb were severely burnt. She categorically denied that fact that relatives of the deceased had met her. The witness further deposed that at the time when the SDM recorded the statement of deceased, she was not present as she had to attend to other patients.

19. The dying declaration Ex.PW17/A was proved by Shri R K Chauhan, SDM (PW-17). The SDM (PW-17) deposed that on 23.10.2002, Sub Inspector Mahender Singh from Police Station Khajoori Khas came to his office, at about 11.30 am and informed him that one, Smt. Pushpa wife of the 2nd Appellant had been admitted to GTB Hospital, with burns on 22.10.2002, at about, 11.00 pm and that she was fit for making the statement. The SDM deposed that he reached the GTB Hospital in the afternoon, at about, 12.45 pm and, only after the patient was declared fit for making the statement and upon his own satisfaction to the same effect, he proceed to record the statement of the deceased; which ran into three pages, in a question-answer form. He specifically identified his signatures on the dying declaration (Ex.PW17/A) at point A, A1 & A2, and also, the right thumb impression of Smt. Pushpa, at point X, X1 & X2, and that, after recording the statement, he forwarded the

same to the Station House Officer, Khajoori Khas, for taking necessary action in accordance with the provisions of law. He also deposed that on the same day i.e. 23.10.2002, he had also recorded the statement (Ex.PW2/A) of Shri Uddal Singh, father of the deceased Smt. Pushpa, and that the statement (Ex.PW2/B) of Smt. Sheela Devi, mother of the deceased, Smt. Pushpa. The said statements of Shri Uddal Singh, Ex.PW2/A and that of mother Ex.PW2/B were recorded in the hand of one Smt. Lata, wife of, Shri Nand Kishore who had accompanied the parents of the victim, on his dictation. In the cross examination, the SDM (PW-17) categorically denied the suggestion that he had not obtained the thumb impression of Smt. Pushpa and that it was the thumb impression of some other person.

20. As against the above, the defence had examined only one witness DW-1 i.e., one Shri Udaiveer Singh, brother of the 2nd Appellant. In his deposition, DW1 has stated that on 22.10.2002, at about, 09.00 pm on his return from his work he was sitting alongwith his father, brothers and sisters, outside the house while the deceased, Smt. Pushpa, wife of the 2nd Appellant was cooking food inside the house. Soon thereafter, daughter of one of his brothers, Shri Mahender Singh, who was cleaning utensils inside the house, raised an alarm that there was a fire inside the house. He further deposed that they immediately

rushed into the house and found that Smt. Pushpa had caught fire. He deposed that they tried to extinguish the fire. After the fire was extinguished, Smt. Pushpa was taken to GTB Hospital, where she was treated and shifted to the burns ward. He also deposed to the effect that at about 12.00 noon, the SDM came to the Hospital alongwith a lady, namely Lata, who recorded the statements. He also deposed to the effect, that the parents of the deceased came to the Hospital between 03.00 – 04.00 am, in the morning, on 23.10.2002 upon his communication to them about the incident. He deposed that the deceased had caught fire accidentally. In his cross examination he denied the suggestion that the deceased was harassed for dowry or that on the day of incident, she was abused by the accused or even that the 2nd Appellant had beaten up the deceased. He denied the fact that his sister Maya had beaten up the deceased or that the 2nd Appellant had poured kerosene oil and set the deceased ablaze. He also denied the suggestion that the 2nd Appellant had quarreled with them when he was trying to extinguish the fire, in which, the deceased was caught.

21. Based on the evidence which is brought on record, Ms. Neelam Grover, Learned counsel for the Appellants submitted that the entire case of the prosecution was based on the dying declaration of the deceased, and that, there was no

direct evidence of the commission of the crime the Appellants have been charged with. It was the contention of the learned counsel for the Appellants that the dying declaration in the instant case cannot be relied upon for the following reasons:-

- i) the testimony of Sub Inspector, Mahender Singh (PW-16) who was the Investigating Officer would clearly show that he had recorded the statement of Smt. Pushpa wherein, she had informed him that she had caught fire accidentally while, she was cooking a meal for the family inside the house. It was the learned counsel's submission, that the prosecution has unfairly and illegally not placed this statement on record;
- ii) a perusal of the contents of the death summary report, dated 25.10.2002, being Ex.PW19/A alongwith deposition of, Dr. Sujata (PW-19) would show that Smt. Pushpa had suffered 100% burn injuries and hence, was incapable of making dying declaration to the SDM. It is her contention that in these circumstances, both the dying declaration stated to be bearing the right thumb impression of the deceased should be viewed with great circumspection.
- iii) a perusal of the testimonies of Prosecution Witnesses

– 8, 10, & 13 would show that they had not supported the case of the prosecution. Furthermore, the testimony of PW8 and that of DW-1 had clearly established that the accused which, included the Appellants herein (i.e., the husband and mother in law) of the deceased, Smt. Pushpa, were at the relevant point in time sitting outside the house and not inside the house as alleged, to give effect to their design of murdering the deceased by pouring kerosene oil and setting her ablaze; and

iv) Last, but not the least, the testimony of PW15 i.e., Dr. S Lal, who conducted the Post Mortem, as well as, his report categorically brought to fore the fact that no smell of kerosene oil was found at the time when, the Post Mortem was conducted on 25.10.2002.

22. Having perused the testimonies of the witnesses and other evidence brought on record, as also the submissions of learned counsel for the Appellant, Ms. Neelam Grover, as well as that of the learned counsel for the State, Ms. Richa Kapoor, we are of the view that the prosecution has been able to prove the guilt of 1st and 2nd Appellant beyond reasonable doubt. Our reasons for coming to this conclusion are based on the following:-

22.1) The fact that the deceased Smt. Pushpa was subjected to physical torture on the account that she had given birth to a girl child is clearly brought out in the testimony of her mother, Smt. Sheela Devi (PW-3), as well as, that of her father, Shri Uddal Singh, (PW-7). As a matter of fact, (PW3) in her testimony has clearly deposed that ten days prior to the fateful day i.e., 22.10.2002, when the 2nd Appellant had visited their house to take his wife Smt. Pushpa to their home, he had at that point in time threatened to kill her and their child.

22.2) No doubt, the case of the prosecution is entirely based on the dying declaration of the deceased Smt. Pushpa, we have no reason to disbelieve her dying declaration as, it not only inspires the confidence, but otherwise, meets all the safeguards which the Courts have provided for in respect of a dying declaration. In the instant case the recordal of the dying declaration by the SDM (PW-17) was preceded by a certificate of fitness being accorded by the Doctor present on the duty i.e. PW-19, after she had examined Smt. Pushpa. The Doctor giving the certificate i.e., PW 19 has proved the said endorsement on the dying declaration in her deposition before the Court. PW-19 has specifically deposed that her endorsement on dying declaration (Ex.PW17/A) is encircled in red ink and bears her signatures at point X. The SDM after receiving the certificate of

fitness of Smt. Pushpa to make statement, from the doctor on duty, once again, personally satisfied himself as regards her mental state and her ability to make a statement before him. The SDM (PW-17) in his deposition has clearly made reference to the same. The SDM in his deposition clearly stated that he had proceeded to record the statement in a question-answer form after he had satisfied himself as to the ability of Smt. Pushpa to record the said statement. The SDM has proved the dying declaration (Ex.PW17/A) by identifying his signatures at point A, A1 & A2. More particularly, the SDM in his deposition has also identified the right thumb impression of the deceased Smt. Pushpa at point X, X1 & X2 on the dying declaration (Ex.PW17/A). The SDM in his cross examination has clearly denied the suggestion that the thumb impression appearing on the dying declaration was not that of the deceased Smt. Pushpa, but that of some other person. A translated version of the dying declaration which was recorded by the SDM (PW-17) is as follows:-

“..... Smt. Pushpa which when translated reads as under:-

Q1. What is your name?

A. Poonam.

Q2. What is the name of your husband?

A. Tikam Singh.

Q3. How old are you?

A. 25 years.

Q4. When did your marriage solemnize?

A. My marriage was solemnized on 15th June, 1977.

Q5. You are also called Pushpa?

A. Yes, at home.

Q6. How did this happen?

A. I was feeding with milk to my daughter. Her father had come from duty. He asked me to give him the daughter as he wanted to play with her. I had given her to my husband. He did not play with her and handed over her to his mother. The girl was suffering from loose motion, her Tai was feeding her with food. I stopped. I asked to bring her back on the pretext of feeding milk. I brought her back to me. Here Tai abused me. I asked Jiji not to abuse. In the meantime, my husband came and had given beatings to me. I was virtually strangled. He had handed over the girl to his bhanji and said not to give her to me. I started searching the girl in the house and did trace out as her grandmother was sitting on the road with her. It is matter of yesterday about 9.30 pm, when I had gone to bring back the girl, my mother-in-law had beaten me. I came back from there. My mother-in-law had not given the girl to me. Elder Nand-Maya had started abusing me. I had gone to sleep in the house. In the meantime, her father came and poured kerosene oil on me and my mother-in-law had started saying to send me back to my parents' house and

not to give the girl to me and my mother-in-law and husband had set me on fire. I shouted. My jeth had taken me outside by dragging me. His name is Mahender Singh. He had poured water on me. Udaiveer- jet had also saved me. My husband had started quarrelling with them. Elder jeth Mahender Singh had started saying that she had come to implicate us and she had done whatever she wanted. Elder jethani (Omwati) and my husband brought me to Hospital in a three wheeler scooter. My husband was saying, "TUIHE LADKI KI KASAM HAI, MAIN TERE HATTH JODTA HOON, MERA NAAM MAT LENA, TUIHE TERE BHAII KI KASAM HAI, JO KAHEGI WOHI KAROONGA.:

Q7. What your husband do?

A. Furniture work.

Q8. Whom do you hold responsible for this incident?

A. My mother-in-law, My husband, my elder Jethani (Omwati) and two nand (Maya and Rajan) and one jeth (Mahesh).

Q9. How are your relations with your family members?

A. Mahesh and my mother-in-law (Kalawati), both nand, Mahendere Singh used to harass me very much. My husband used to beat me and nobody came to save me. All of them used to instigate. I will not stay with that man and will take back my daughter also. My jet Udaiveer is a gentleman. I have no complaint against him.

Q10.Does anybody used to harass you for dowry?

A. No.

Q 11. Do you want to say anything else?

A. No.

Q12. Have you set yourself on fire?

A. No. Why will I put myself on fire.

RTI (Pushpa)

Recorded by me
Sd/- (SDM)"

22.3) A perusal of the dying declaration would show that the deceased on the fateful day was feeding her daughter at which point in time, her husband, i.e., the 2nd Appellant returned from duty. The 2nd Appellant took the child from Smt. Pushpa on the pretext that he wanted to play with her, however, he handed over the child to his mother i.e., the 1st Appellant. Since, the child was suffering from loose motions, the deceased attempted to take back the child from her sister-in-law as she was not happy with the fact that the child was being fed food even though she was suffering from loose motions. This resulted in the sister-in-law abusing Smt. Pushpa. The 2nd Appellant joined in by resorting to physical assault and very nearly strangled Smt. Pushpa in the melee. The child was taken away from Smt. Pushpa. The deceased being not happy with it went out to get back the child. It seems that she looked for child and realized

that the child was with the 1st Appellant, who was sitting outside the house, when she tried to get back the child, she was both beaten and abused by the 1st Appellant. Unsuccessful on getting her child back she came back into the house, to sleep. It is then, that the 2nd Appellant, came into the house and poured kerosene oil on the deceased; while all this happened, the 1st Appellant exhorted that she should be sent back to her parental home. And finally, the Appellants set Smt. Pushpa on fire. While she was ablaze, she was dragged by her brother-in-laws outside the house who poured water on her. She specifically stated that when one of her brother in laws, Udaiveer Singh (DW1) tried to save her, her husband i.e., the 2nd Appellant quarreled with them. The victim was taken to GTB Hospital by the 2nd Appellant and her sister in-law, Omwati. On the way to the Hospital, the 2nd Appellant had pleaded with her not to implicate him in the case.

22.4) It is clear from the manner, in which, the dying declaration reads, as well as the testimony of the doctor on duty (PW-14), the parents of the deceased (i.e. PW3 & PW4), and the SDM (PW-17) clearly establish that dying declaration was voluntary, and made, while the deceased was in control of her mental faculties. A dying declaration is believed, despite the fact that it has not been subjected to cross examination, if it

otherwise inspires confidence, for the reason that, the law recognises that it is rare in human nature for a person to lie when he is making peace with his maker. The dying declaration of the deceased in the instant does not in any manner indicate that it was tutored or that it was made at the behest of her parents and relatives only to implicate the Appellants.

22.5) The fact that it was recorded by the SDM in his presence, who clearly stated in his deposition that, not only he had obtained a medical certificate, with regard to, the fitness of Smt. Pushpa from PW-19, but, in addition, he had himself ascertained her ability to make the statement, inspires confidence that the declaration was made voluntarily and not influenced by the parents or relatives of the deceased, in order to, falsely implicate the Appellants.

23. It is well settled that a dying declaration can be the sole basis of conviction, if it otherwise meets the safeguards provided for in law. The safeguards enunciated are reiterated in the recent judgment of the Supreme Court in **Shaik Nagoor v. State of AP : AIR 2008 SC 1500**. The relevant extract reads as follows :-

“.....6. We see no reason to doubt the veracity of the dying declarations especially since there is consistency between them. We see no reason why the judicial officer should make a false

statement about the dying declaration.

7. As observed by this Court in *Narain Singh v. State of Haryana* AIR vide para 7 : (SCC p. 267, Para 7)

“A dying declaration made by a person on the verge of his death has a special sanctity as at that solemn moment a person is most unlikely to make any untrue statement. The shadow of impending death is by itself guarantee of the truth of the statement of deceased regarding the circumstances leading to his death. But at the same time the dying declaration like any other evidence has to be tested on the touchstone of credibility to be acceptable. It is more so, as the accused does not get an opportunity of questioning veracity of the statement by cross-examination. The dying declaration if found reliable can form the base of conviction.”

8. In *Babulal v. State of M.P.* [MANU/SC/0855/2003](#) this Court observed vide in para 7 of the said decision as under: (SCC p. 494)

“A person who is facing imminent death, with even a shadow of continuing in this world practically non-existent, every motive of falsehood is obliterated. The mind gets altered by most powerful ethical reasons to speak only the truth. Great solemnity and sanctity is attached to the words of a dying person because a person on the verge of death is not likely to tell lies or to concoct a case so as to implicate an innocent person. The maxim is 'a man will not meet his Maker with a lie in his mouth' (*nemo moriturus praesumitur mentiri*). Mathew Arnold said, 'truth sits on the lips of a dying man'. The general principle on which the species of evidence is admitted is that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone, when every motive to falsehood is silenced and mind induced by the most powerful consideration to speak the truth; situation so solemn that law considers the same as creating an obligation equal to that which is imposed by a

positive oath administered in a court of justice."

9. In Ravi v. State of T.N. 2004 (10) SCC 776 this Court observed that: (SCC p. 777, para 3)

"If the truthfulness of the dying declaration cannot be doubted, the same alone can form the basis of conviction of an accused and the same does not require any corroboration, whatsoever, in law".

10. In Muthu Kutty v. State [MANU/SC/ 0979/2004](#) this Court observed as under: (SCC pp. 120-21)

"15. Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross-examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the court also insists that the dying declaration should be of such a nature as to inspire full confidence of the court in its correctness. The court has to be on guard that the statement of the deceased was not as a result of either tutoring, or prompting or a product of imagination. The court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailant. Once the court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence. This Court has laid down in several judgments the principles governing dying declaration, which could be summed up as under as indicated in *Paniben v. State of Gujarat* [MANU/SC/0346/1992](#)

(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon

without corroboration. (See *Munnu Raja v. State of M.P.* 1976 (3) SCC 104)

(ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. (See *State of U.P. v. Ram Sagar Yadav and Ramawati Devi v. State of Bihar* [MANU/SC/0118/1985](#))

(iii) The court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had an opportunity to observe and identify the assailants and was in a fit state to make the declaration. (See *K. Ramachandra Reddy v. Public Prosecutor* [MANU/SC/0127/1976](#))

(iv) Where dying declaration is suspicious, it should not be acted upon without corroborative evidence. (See *Rasheed Beg v. State of M.P.* [MANU/SC/0160/1973](#))

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. (See *Kake Singh v. State of M.P.* 1981 Supp. SCC 25)

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. (See *Ram Manorath v. State of U.P.* [MANU/SC/0207/1981](#))

(vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected. (See *State of Maharashtra v. Krishnamurti Laxmipati Naidu* 1980 Supp. SCC 455)

(viii) Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth. (See *Surajdeo Ojha v. State of Bihar* 1980 Supp. SCC 769)

(ix) Normally the court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eyewitness said that the

deceased was in a fit and conscious state to make the dying declaration, the medical opinion cannot prevail. (See *Nanhau Ram v. State of M.P.* 1988 Supp. SCC 152)

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. (See *State of U.P. v. Madan Mohan* [MANU/SC/ 0565/1989](#))

(xi) Where there are more than one statement in the nature of dying declaration, one first in point of time must be preferred. Of course, if the plurality of dying declaration could be held to be trustworthy and reliable, it has to be accepted. (See *Mohanlal Gangaram Gehani v. State of Maharashtra* [MANU/SC/0090/1982](#))”

11. So far as the practicability of the deceased giving dying declaration is concerned it is significant that the learned Additional Senior Civil Judge who has examined PW 7 and the constable PW 10 have described in detail as to what the deceased has stated to each one of them. There was not even any suggestion to either of the witnesses that the deceased was not in a fit condition to give any statement as claimed. That being so, there is no substance in the plea of learned Counsel for the appellant that the deceased was not in a physical condition to give a statement.

12. The trial Court and the High Court have analysed the evidence of these witnesses and the statements made in the dying declaration referred to above to hold the accused guilty.

13. That being so, no interference is called for. The appeal fails and is dismissed.”

24. In our view, as discussed above, the dying declaration

meets the safeguards enunciated by Courts. Therefore, in our opinion, the submission of the learned counsel for the Appellants that because there is no other direct evidence apart from dying declaration, the conviction of the appellant should fail, according to us, is untenable and hence, is rejected.

25. The submission of the learned counsel for the Appellants, to the effect, that the dying declaration should be viewed with suspicion because the prosecution witness, Sub Inspector, Mahender Singh, Investigating Officer, PW-16 had deposed that he had recorded the statement of Smt. Pushpa before her death in the GTB Hospital wherein, she had informed him that her saree had caught fire while, she was cooking food on the gas, and that, the said statement was not placed on record as the SDM had prevented him to do so, is without merit.

25.1) A perusal of the testimony of PW16 would show that the same does not inspire confidence and is designed to help the accused in their defence. This is evident from the following:-

i) PW-16 made his deposition in the case at point in time when he had retired from the service,

ii) the fact that he had recorded such statement of Smt. Pushpa while she was in Hospital was never disclosed by him to his peers or superiors,

iii) the defence made no suggestion to the SDM (PW-17) who was cross examined after Sub Inspector, Mahender Singh (PW16) as to whether he had prevented the PW-16 from placing on record the statement which he had recorded while Smt. Pushpa was in hospital,

iv) In the normal course, a Sub Inspector would have had no occasion to record the statement of the deceased, Smt. Pushpa unless he was sure that the victim's death was imminent. No such circumstance have been brought to fore by the defence.

v) In the event such a situation arose in the normal course, PW-16, would have recorded such statement in the presence of the Doctor on duty.

26. In sequel to the above contentions made on behalf of the Appellants, the veracity of dying declaration, was sought to be questioned by making a reference to the contents of the summary of death report dated 25.10.2002 (Ex.PW19/A). An attempt was made to demonstrate that the thumb impression on the dying declaration could not have been that of the deceased, Smt. Pushpa, as the summary of death report records, that the, deceased had suffered 100% burns. To support this point, the learned counsel for the appellant also relied upon the testimony of Doctor Sujata (PW-19).

26.1) A close scrutiny of the evidence on this point, would show that the submissions and the conclusion arrived at by the learned counsel for the Appellants is based on the reference to the extent of burns mentioned therein. In our opinion, the reference to the extent of burns, suffered by the deceased in the summary of death report cannot by itself lead to the conclusion that the thumb impression on the dying declaration is not that of deceased, Smt. Pushpa, for the following reasons:-

i) the first document which was generated in the instant case, by the GTB Hospital authorities when the deceased in the instant case was or for that matter any patient in such circumstances, is admitted to the hospital is normally the MLC. In the instant case, the MLC being Ex.PW18/A, clearly records that the deceased, Smt. Pushpa had suffered 95% burns;

ii) the said MLC (Ex. PW 18/A) was proved by Doctor P P Singh (PW-18). In the cross examination it was not suggested to the witness that the extent of burns as recorded in the MLC may not be correct;

iii) Dr. S. Lal (PW-15) who conducted the Post Mortem deposed that when he received the dead body of Smt. Pushpa, "it was wrapped in white cotton sheet and plastic sheet having surgical bandages on the burn areas except face, palm and sole

... ..". He also deposed that the approximate extent of burn was 95%. PW-15 also proved the contents of the Post Mortem Report in Ex.PW15/A. The defence made no suggestion to PW15 in the cross examination that the extent of burns recorded in the Post Mortem Report may not be correct.

iv) In her testimony, PW-19 clearly deposed that as far as she remembered, the deceased, Smt. Pushpa had 95% burns. In her cross examination, she has explained that she had mentioned in the summary of death report Ex.PW19/A that the patient was admitted with 100% burns. While she deposed in the cross examination that the deceased had also received injuries on the finger and thumb, she denied the suggestion that the thumb impression on the dying declaration was not that of Smt. Pushpa. A careful perusal of the testimony of PW19 would show that the 'summary of death report' (Ex.PW19/A) had been filled out by PW19 based on what she thought was the extent of burns with which the patient was admitted. This is clearly evident from a perusal of 'summary of death report' which in abbreviated form records "A=100% burns". Wherein 'A' stands for admitted. It is thus clear that PW19 was relying on her memory even though not accurate that at the time of admission the deceased, Smt. Pushpa had suffered 100% burns. It is undisputed that the MLC clearly records that the extent of burns

suffered by the deceased was 95%. A perusal of the testimony of Dr. S Lal, (PW-15) who conducted the Post Mortem, the MLC Ex.PW18/A and the testimony of PW18 and; more crucially, that of the SDM (PW-17) would clearly establish that the thumb impression appended on the dying declaration Ex.PW17/A was that of Smt. Pushpa. In these circumstances, according to us, nothing would turn based on what is stated in the summary of death report as regard the extent of the burns suffered by the deceased, Smt. Pushpa, so as to, have us, entertain a doubt that the thumb impression on the dying declaration either could have been obtained or, was not that of the deceased.

27. The submission of learned counsel for the Appellants that the testimony of Prosecution Witnesses - 8, 10, & 13 when read alongwith that of the defence witness, DW1 would show that the case of the prosecution deserves to be rejected - for the reason that PW8, 10 & 13 did not support the case of the prosecution and also given the fact that the testimony of PW8 and DW-1 would show that at the relevant point in time accused were sitting outside the house when the alleged incident took place, according to us, is also without merit.

27.1) In this connection, let us first take up the testimony of PW-8, Shri Raghubir Singh. PW-8 has deposed that Smt. Pushpa was an unsocial character who, did not mix around with the

ladies of the neighbourhood. In his cross examination, he has deposed that at the time of incident he alongwith other accused persons which, included the 1st Appellant were sitting in the front side of the house when, they heard the cries of the children from inside the house. It is then, they alongwith the 1st Appellant went inside the house and saw smoke coming out of the window. He also stated that they found the door of the room from which the smoke was emanating was bolted from inside. He further deposed that when they did not receive any response to their calls they broke open the door and that it was then that they found that the deceased, Smt. Pushpa was ablaze and, which is, when she was taken out and the fire on her person extinguished and that, it was thereafter that, she was removed to GTB Hospital.

27.2) We have no doubt that the testimony of PW9 is false. The witness has tried to set up a case of suicide by stating that the door of the room in which the deceased, Smt. Pushpa was found was locked from inside. As a matter of fact, this is not even the case of the defence. The case of the defence all along has been that the saree of Smt. Pushpa caught fire accidentally when she was cooking a meal inside the house. There is no evidence to the effect that door of the room in which Smt. Pushpa was found was locked from inside, and that, it had to be

broken open.

27.3) As regards the testimony of other witnesses being PW10 & 13, it is clear that they had turned hostile. Accordingly, they were cross examined by the learned Additional Public Prosecutor and confronted with the statements made by them under Section 161 Cr P C.

27.4) The case set up by the defence that the Appellants alongwith the other accused were sitting outside the house when, the incident occurred and that the saree of the deceased caught fire accidentally is unbelievable, for the reason, that, if the incident had occurred as claimed by the defence, then in the normal course, either the deceased, Smt. Pushpa, would have come out of the room inside the house or, in any event there would have been an attempt by her to save herself in the first instance as would be the natural human reaction in such a situation – in such circumstances the scene of the incident would have been in utter disarray. We have looked at the photographs of the scene of the crime being, Ex.PW9/A to Ex.PW9/D. The photographs of the scene of the crime show that the place where the incident took place is exceptionally orderly, which would not have been the case, had the incident been an accident as claimed by the defence.

27.5) In view of these circumstances, we do not give much credence to the depositions of PW-8, 10 & 13 and DW-1, all of whom are interested parties and have obviously deposed to favour the Appellants and the other accused persons.

28. The last submission of the learned counsel for the Appellants was that, the Appellants, should have been given the benefit of doubt in view of the fact that both - Ex.PW15/A, as well as, the deposition of Dr. S Lal (PW-15) records the fact that at the time of Post Mortem, no smell of kerosene was found on the body of the deceased.

28.1) To buttress her submission, the learned counsel for the Appellant also relied upon the following extract of the Modi's Book on **Medical Jurisprudence and Toxicology, 27th Edition, Page No. 315:-** *"..... burns caused by kerosene oil are usually very severe and are known from its characteristic odour and sooty blackening of the parts"*.

28.2) We have given much thought to this aspect of the matter and have come to the conclusion that this aspect by itself would not come to the rescue of the defence for the following reasons:-

i) First and foremost, the testimony of PW7 would show that when he reached the house of deceased, Smt. Pushpa at

Khajoori Khas, he found that she was covered with a wet mattress. This testimony when examined in the light of dying declaration wherein, the deceased stated that her brother in-law, Mahender had poured water on her after she had been set ablaze by her husband i.e., the 2nd Appellant and mother in-law, i.e., the 1st Appellant - leaves scope for much debate as to whether smell of kerosene would have remained in such circumstances.

ii) Secondly, the incident in this case happened on 22.10.2002 at between 09.00 pm to 10.00 pm. The Post Mortem was conducted on 25.10.2002 at about 02.30 pm. It is quite possible that the resultant delay and even the treatment given to the deceased, in the GTB Hospital led to a situation that no smell of kerosene could be found when, the dead body of the deceased Smt. Pushpa was received for Post Mortem.

28.3) In view of the aforesaid cumulative factors, we are of the view that this single fact by itself i.e., the absence of the smell of kerosene on the body of the deceased cannot by itself come to the aid of the Appellants.

29. We, however, find that the case under Section 498A is not proved. There is nothing in the dying declaration of Smt Pushpa which would suggest that she was harassed for dowry, or that, there were any demands made on her, or her relatives for

dowry. What comes through essentially in the testimony of the deceased's mother, PW3 and that of her father, PW4 is that the deceased was tortured and abused verbally and physically for having given birth to a girl child, even though, there is a passing reference, in the deposition of the father, PW4, to the demand for money made by the deceased, which he was unable to fulfill because of lack of resources. As a matter of fact Smt Pushpa in her dying declaration, categorically denied having been harassed for dowry, in an answer, to a pointed question by the SDM (PW-17) to that effect. There is thus, to our mind, no evidence on record to establish the charge under Section 498A IPC against the Appellants.

30. In view of the discussion hereinabove and having considered the evidence on record, we are of the view that the prosecution has been able to establish that this was a case of murder. The role of the Appellants has been clearly spelt out in the dying declaration of the deceased, Smt. Pushpa. The Trial Court in the impugned judgment has given the benefit of doubt to the other four accused persons, namely, Smt. Maya w/o Ram Avtar; Smt. Rajan, w/o Shri Mukesh Singh; Mahesh, s/o Shri Bhola Ram; and Smt. Rajwati, w/o Shri Mahender Singh, on the ground that dying declaration does not spell out clearly their role in the death of Smt. Pushpa. In view of the fact that benefit of doubt

has been given by the Trial Court to the other accused persons except the Appellants and given the fact that the State has not come in appeal, we do not propose to disturb that part of the judgment. We, therefore, sustain the findings of the Trial Court as recorded in the impugned judgment against the Appellants, in so far as, they are charged with offence under Section 302 IPC, read with, Section 34 of IPC. The Appellants are acquitted of the charge framed under Section 498A of the IPC read with Section 34 of the IPC. In the result, the appeal is partly allowed.

RAJIV SHAKDHER, J

B N CHATURVEDI, J

September 15, 2008
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