

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

% CRL. APPEAL NO. 631 OF 2002

+ Date of Decision: 16th January, 2009

Mange Lal ...Appellant
! Through: Mr. Sudhanshu Palo,
Advocate

Versus

\$ State (NCT of Delhi) ...Respondent
^ Through: Mr. M.N. Dudeja, APP

WITH

% CRL. APPEAL NO. 639 OF 2002

Missar & Anr. ...Appellants
! Through: Ms. Ritu Gauba,
Advocate

Versus

\$ State (NCT of Delhi) ...Respondent
^ Through: Mr. M.N. Dudeja, APP

CORAM:

*** HON'BLE MR. JUSTICE B.N.CHATURVEDI
HON'BLE MR. JUSTICE P.K.BHASIN**

- 1. Whether Reporters of local papers may be allowed to see the judgment?(No)**
- 2. To be referred to the Reporter or not?(Yes)**
- 3. Whether the judgment should be reported in the digest?(Yes)**

JUDGMENT

P.K.BHASIN, J:

The appellants have filed these appeals assailing the judgment dated 22.7.2002 and order dated 24.7.2002 passed by the Additional Sessions Judge whereby the appellant Mange Lal has been convicted for the offence under Section 498-A of Indian Penal Code ('IPC' for short) and sentenced to three years rigorous imprisonment and fine of Rs. 500/-, while the other two appellants have been convicted for the offences punishable under Sections 302/498-A/34 IPC and sentenced to undergo imprisonment for life under Section 302/34 IPC and also to pay

fine of Rs. 500/-, and to undergo three years imprisonment under Section 498-A/34 IPC and to pay fine of Rs. 500/-. Since both the appeals had arisen out of the same judgment of the trial Court they were heard together and are now being disposed of by a common judgment.

2. At the outset the facts of the case which led to the prosecution of the three appellants-accused need to be noticed. Sushila (the deceased) was married to PW-8 Ram Singh more than ten years before the tragic incident of burning of the deceased which took place on 29/01/01. They were staying together on the first floor of house no. A-369, Transit Camp, Govindpuri. Appellant-accused Missar is the mother-in-law of the deceased, appellant-accused Mange Lal is her brother-in-law(jeth) and appellant-accused Teeja is her jethani(wife of accused Mange Lal). They were also living in house no.A-369. As per the case of the prosecution, these three accused persons used to harass the deceased for her not satisfying their demands of dowry. On 29.01.2001 at about 11.40 a.m. accused Missar and Teeja

allegedly set the deceased Sushila on fire due to which she sustained 85% burn injuries and although she was taken to Safdarjung hospital by the officials of Police Control Room which had been informed of the incident by someone but she could not survive for long and succumbed to the burn injuries sustained by her on the same day in the night at about 9 p.m.

3. The body of the deceased was subjected to post-mortem examination on 01.02.2001. The autopsy surgeon, Dr. Alexander (PW-16), gave his report Ex. PW-16/A wherein he made a mention of the following injuries noticed by him on the dead body:

a) External Injuries:

On external examination epidermal to dermoepidermal burn injuries were present on all over the body except on both the legs and feet. Line of redness blackening and charring were present on all over the involved areas. Approximate percentage of burn injuries was 85. No other injuries were present on the body externally.

b) Internal Injuries:

In the internal examination brain was congested. Nasolaryngopnx showed mucosal congestion. Both lungs were congested trachea and bronchi

showed mucosal congestion. Stomach was empty. Uterus was non-pregnant. Rest of the structures inside the body were normal and intact.

In the post-mortem report the autopsy surgeon also mentioned that the smell of kerosene was present all over the body of the deceased and the cause of death was opined to be shock caused by ante-mortem thermal injuries. The three accused persons were arrested on the date of the incident itself since the deceased had implicated them in her statements made before different persons which subsequently were being relied upon as her dying declarations. After completion of usual investigation formalities the police charge-sheeted them for the commission of offences under Sections 302/498-A/34 IPC. The trial Court framed charges under Sections 302/498-A/34 IPC against accused Missar and Teeja while accused Mange Lal was charged only under Section 498-A IPC.

4. The prosecution had sought the conviction of the three accused persons on the basis of four dying declarations of the

deceased as also the testimonies of some of the family members of the deceased including her husband. The husband of the deceased, however, had turned hostile. The accused persons had abjured their guilt and taken the plea of alibi. They had claimed that on the day of the incident they had gone to Ravidas temple on the occasion of Ravidas Jayanti. Accused Mange Lal stated at the time of recording of his statement under Section 313 Cr.P.C. that in the temple they had got the information that the deceased had got burnt accidentally and then he had gone to hospital and had found the deceased talking to her buas(PWs 2 and 11) . Other two accused had also claimed that they had gone to hospital from the temple on getting the information and in the hospital they had found the two buas of the deceased present with the deceased. Two witnesses were also examined by the accused to prove their plea of alibi. It was also claimed by the accused persons that they were living separately on the ground floor of house no.A-369 while the deceased was staying on the first floor with her husband. The husband of the deceased while turning hostile had supported the plea of alibi taken by the three accused persons and also claimed

that he himself was also with them in the temple while his wife was at home.

5. The learned trial Judge did not accept the plea of alibi taken by the accused persons and the evidence adduced by them in defence to establish this plea and convicted all the three accused relying upon the dying declarations made by the deceased as also the evidence of the father of the deceased(PW-1) and the two buas of the deceased(her father's sisters), who were examined as PWs 2 and 11, regarding the harassment of the deceased by the three accused persons. The three convicted accused felt aggrieved and two of them who were convicted under Sections 302/498-A/34 IPC filed one joint appeal while the third one convicted only under Section 498-A IPC filed his separate appeal but since both the appeals were heard together we are deciding the same by this common judgment.

6. Learned counsel for the appellants did not dispute the fact that the deceased Sushila had got burnt in the morning of 29th

January, 2001. In fact, to that effect is even the evidence of one of the two defence witnesses examined by the accused. She is DW-1 Noorie, who was the next door neighbour of the deceased in Govindpuri. She claimed that she had seen the deceased burning in her house at about 11.30 a.m. on 29/01/01 and also that she had informed the police on phone. Learned counsel also did not dispute the fact that the deceased had died due to burn injuries. That fact is also, in any case, proved from the evidence of the autopsy surgeon(PW-16) who had conducted post-mortem over the dead body of the deceased and in respect of his evidence no arguments were advanced by the learned counsel for the appellants. Learned counsel also did not dispute the proposition that conviction of an accused can be recorded by the Court solely relying upon a dying declaration of the deceased and that too without any corroboration if it is established that the dying declaration was made voluntarily by the deceased while in a fit state of mind. In our view, learned counsel for the appellants rightly did not dispute the proposition regarding the value of a dying declaration in view of the various pronouncements of the

Apex Court one of which was cited on behalf of the appellants by their counsel. That judgment is reported as **AIR 1962 SC 439, “Harbans Singh vs State of Punjab”** in which it was observed as under:

“17. The learned Judge appears to have relied also on what was said by this Court in *Ram Nath v. State of Madhya Pradesh* AIR 1953 SC 42 on the need of corroboration for a dying declaration. Speaking for the Court Mahajan J. (as he then was) observed in that case :-

"It is settled law that it is not safe to convict an accused person merely on the evidence furnished by a dying declaration without further corroboration because such a statement is not made on oath and is not subject to cross-examination and because the maker of it might be mentally and physically in a state of confusion and might well be drawing upon his imagination while he was making the declaration."

The question was however considered again by this Court in *Khushal Rao v. State of Bombay* [[1958] S.C.R. 552, 568]. After pointing out that in *Ram Nath's Case* (Supra) the Court after a careful examination of the facts of that case distinctly came to the conclusion that the dying declaration was not true and could not be relied upon this Court stated in the later case that the observations of the Court in *Ram Nath's case* were in the nature of obiter dicta. The Court then proceeded to review the relevant provisions of the Evidence Act and of the decided cases in the different High Courts in India and in this Court and stated the law in these words :-

"that it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated; (2) that each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made; (3) that it cannot be laid down as a general position that a dying declaration is a weaker kind of evidence than other pieces of evidence; (4) that a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence; (5) that a dying declaration which has been recorded by a competent magistrate in the proper manner, that is to say, in the form of questions and answers, and, as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character, and (6) that in order to test the reliability of a dying declaration, the Court has to keep in view the circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the facts stated had not been impaired at the time he was making the statement by circumstances beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties.

"Hence, in order to pass the test of reliability a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused who had no opportunity of testing the

veracity of the statement by cross-examination. But once the court has come to the conclusion that the dying declaration was the truthful version as to the circumstances of the death and the assailants of the victim, there is no question of further corroboration. If, on the other hand, the Court, after examining the dying declaration in all its aspects and testing its veracity, has come to the conclusion that it is not reliable by itself, and that it suffers from an infirmity, then, without corroboration it cannot form the basis of a conviction. Thus, the necessity for corroboration arises not from any inherent weakness of a dying declaration as a piece of evidence, as held in some of the reported cases, but from the fact that the court, in a given case has come to the conclusion that that particular dying declaration was not free from the infirmities referred to above or from other infirmities as may be disclosed in evidence in that case."

7. We may also make a useful reference to a Constitution Bench decision of the Supreme Court in ***"Laxman vs State of Maharashtra"***, AIR 2002 SC 2973, wherein while dealing with the value of a dying declaration in a criminal trial it was observed by the Apex Court as under:

"The justice theory regarding acceptability of a dying declaration is that such declaration is 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 the man is induced by the most powerful consideration to speak only the truth. Notwithstanding the same, great caution must be

exercised in considering the weight to be given to this species of evidence on account of the existence of many circumstances which may affect their truth. The situation in which a man is on death bed is so solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason the requirements of oath and cross-examination are dispensed with. Since the accused has no power of cross-examination, the court insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The court, however has to always be on guard to see that the statement of the deceased was not as a result of either tutoring or promoting or a product of imagination. The court also must further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Normally, therefore, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eyewitnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and in any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a magistrate or a doctor or a police officer. When it is recorded, no oath is necessary nor is the presence of a magistrate is absolutely necessary, although to assure authenticity it is usual to call a magistrate, if available for recording the statement of a man about to die. There is no requirement of law that a dying declaration must necessarily be made to a magistrate and when such statement is

recorded by a magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind.....”

8. It was, however, seriously disputed by the learned counsel for the appellants that accused Missar and Teeja had set the deceased on fire as had been found by the trial Court relying upon the dying declarations of the deceased. Regarding the dying declarations of the deceased, learned counsel argued that it has not been established beyond doubt that the deceased had actually made any dying declaration and in fact she could not have made any considering the fact that she had sustained 85% burn injuries. It was also submitted that, in any event, all the dying declarations being not consistent with each other could not be relied upon. It was contended that in the first two dying declarations Mange Ram was not named and in the third only he was named and assigned the role of beating the deceased but not with a danda as was allegedly told by the deceased to her bua PW-11. Learned

counsel further pointed out that PW-11 had claimed that the deceased had told her that kerosene oil was poured on her by her sister-in-law Teeja while in the dying declarations made before the SDM and the investigating officer she had claimed that kerosene oil was poured on her by her mother-in-law and so, learned counsel submitted, none of the dying declarations could be relied upon. It was also contended that as far as the evidence of the father and two buas of the deceased regarding the allegations of cruelty to the deceased by the accused is concerned the trial Judge himself has not wholly relied upon the same and has observed that their statements that the deceased used to be harassed for dowry were not reliable at all and so based on their evidence conviction under Section 498-A IPC was also not justified. Learned Additional Public Prosecutor, on the other hand, fully supported the decision of the trial Court and submitted that all the dying declarations relied upon by the prosecution have been proved beyond any shadow of doubt to be of the deceased made while she was in a fit state of mind and there are no circumstances throwing any doubt about their genuineness and

truthfulness and that the inconsistency therein as to which accused had poured kerosene oil on the deceased highlighted by the counsel for the appellants was not material enough so as to attract rejection of all the dying declarations. It was also submitted that the fact that the deceased had made as many as four dying declarations within a short time after the incident about the incident and involvement of the accused persons is also factor which lends assurance to the genuineness of the dying declarations. Regarding the offence under Section 498-A it was contended that the father and the two buas of the deceased had clearly deposed about the acts of cruelty committed by the three accused towards the deceased and so all the three accused have been rightly convicted for this offence also.

9. We shall first take up the case of accused Missar and Teeja who have been convicted for the offence of murder by the learned trial Judge relying upon the dying declarations of the deceased. In this case there are four dying declarations of the deceased being relied upon by the prosecution. Of course, just because four dying

declarations were allegedly made by the deceased that number would not by itself be a factor of any special significance, as was the submission made by the learned prosecutor. It is not the plurality of the dying declarations but their qualitative worth and inter-se consistency which matters. And even if some inconsistencies are found in the dying declarations the Court has to examine the nature of inconsistencies to find out if the same are material or not and prosecution case cannot be thrown out on the basis of some minor discrepancy in the dying declarations. In the present case first dying declaration of the deceased was in the form of history of the burning incident given by her to Dr. Atul Wadhwa (PW- 12) who had initially examined her when she was brought to the Safdarjung Hospital. She had informed this doctor that her mother-in-law Missar and her sister-in-law Teeja (who are the two appellants in CrI. Appeal no. 639/02) had set her on fire. The doctor recorded this narration of the deceased in the MLC Ex. PW-12/A at about 12.40 p.m. The second dying declaration is Ex. PW-15/B which was recorded by PW-15 Sub-Inspector Akhilesh Yadav in the hospital where he had gone on getting the

information that she had been admitted there. The doctor had certified the deceased to be fit for making statement on the investigating officer's application Ex.PW-15/A before he(PW-15) recorded her dying declaration in question-answer form. That was at about 1.45 p.m. In that statement the deceased had claimed that there used to be quarrels on the question of keeping of her daughter. When asked as to how she had got burnt the deceased had claimed that her mother-in-law Missar had poured kerosene oil on her when her jethani Teeja had caught hold of her and when her jethani Teeja had set her on fire by igniting match stick her mother-in-law had caught hold of her. She also told the police officer that at the time of the incident her husband was not at home as he had gone out to his work. PW-15 had informed Sub-Divisional Magistrate also and by the time he reached the hospital PW-15 had already recorded the aforesaid statement of the deceased. However, the SDM(PW-18 Sh. A.K. Singh) himself also recorded the statement(Ex. PW-18/A) of the deceased after the doctor again certified her to be fit for making statement on Ex.PW-15/A. That was at about 2.30 p.m. In the statement made to the

SDM also the deceased had claimed that her jethani had caught hold of her while her mother-in-law had poured oil on her and her jethani had then ignited the match-stick and set her on fire. She also claimed that before that her jeth(accused Mange Lal) had given her severe beating. She further claimed that everyday her in-laws used to beat her. On being asked about her relations with her husband the deceased had stated that her husband used to love her and further that at the time of the incident he was not at home. The SDM had also obtained thumb impression of the deceased on her statement. Fourth dying declaration allegedly made by the deceased was before her bua PW-11 Leela Bai when she had gone to the hospital to see her. The deceased had told her that she was given beatings and her jeth Mange Lal gave a danda blow on her head and her mother-in-law Missar Devi caught hold of her and Teeja poured kerosene oil on her and then had lit the matchstick.

10. We shall now proceed to examine the evidence regarding the dying declarations in the present case and the attack on their

genuineness launched by the learned counsel for the appellants to find out if the same could be relied upon and made the basis of conviction of the accused persons. The first dying declaration was sought to be proved through the evidence of PW-12 Dr.Atul Wadhwa who had initially examined the deceased when she was brought to Safdarjung Hospital. He deposed that:

“On 29.1.01 I medically examined Sushila w/o Ram Singh, age 30 years, female with alleged history of sustaining burns when she was set a fire by her mother in law (Ms.Messer) and sister-in-law Teja. On examination I found that general condition of the Sushila was critical, superficial to deep burns were present over face, neck, chest, abdomen, back, both upper limbs and both thighs. Approx. 85% burns were present on her body. My detailed report in this regard is Ex.PW12/A and bears my signature which is correct. The patient was kept in burn ward.”

Learned counsel for the appellants did not dispute that whatever cause of burning this doctor recorded in the MLC on being informed by the deceased herself could be treated as her dying declaration after her death. However, the evidence of this doctor was assailed on the ground that in the MLC Ex.PW-12/A it

was not noticed that the patient was in a fit state of mind at the time she was brought to the hospital and even the prosecutor while examining him in the Court had not elicited from him whether the deceased was in a fit state of mind to speak about the incident in view of her being in critical state at that time. In our view, this argument does not have any force and for this reason the evidence of the doctor cannot be disbelieved. There is no doubt that in the MLC PW-12 did not mention specifically that the patient was fit for disclosing as to how she got burnt and during his cross-examination he admitted also that he had not recorded so in the MLC but that would not show that the patient at that time could not have disclosed to the doctor the cause of her receiving burn injuries. Since the doctor himself claimed to have questioned the deceased regarding the cause of her burn injuries and her having disclosed to him as to how she received burn injuries, despite her being in a critical state, there was no necessity of making a note in the MLC by the doctor that the deceased was at that time in a fit state of mind to give her statement or not. In this regard we may make a reference to a case decided by the Supreme Court where

also a similar contention was raised in a case of dowry death in which also the conviction of the accused was based on dying declarations of the deceased and, in fact, in that case the doctor had not even recorded in the medical register what the burnt patient had told him about the incident and the culprits but still the challenge against the testimony of the doctor was rejected. It was observed in that judgment, which is reported as **AIR 1988 SC 1785 “Lichhamadevi vs State of Rajasthan”** that:

“9.....He has stated that Pushpa was in a serious condition. He has deposed that upon his questioning, Pushpa told him that her mother-in-law had burnt her. It is true that Dr. Goel has not recorded this in the medical register but that is no ground to disbelieve him. Dr. Goel is a disinterested person. The High Court has accepted his version and we have no reason to reject it. Dr. Goel himself has treated the victim. Therefore, there was no question of finding out from the Doctor whether Pushpa was in a position to give her statement or not. Moreover, the statement before the Doctor was not recorded as a dying declaration. It was a communication between by the patient to the Doctor who treated. He is a Government Doctor on duty in the hospital at that time. Nothing has been elicited from his cross-examination that he was interested in or enemically disposed towards the appellant” (emphasis supplied)

11. PW-12 during his cross-examination admitted that general understanding power of the patient gets affected due to burn injuries but he also clarified that that happens very late and not in the initial stage. He had denied the suggestion that when he had examined the deceased she was not fit to say anything. He also denied that the 'alleged history' was recorded by him in the MLC at the instance of the relatives of the deceased. In our view this doctor cannot be imputed any motive for preparing a false MLC to implicate the accused. At least, no foundation has been laid by the accused persons for drawing such an inference against the doctor who is a totally disinterested person being a government servant in the outcome of the police case against the accused. This witness had withstood the cross-examination on behalf of the accused persons. His evidence clearly establishes that at the time the deceased was brought to hospital and was examined by him she was in a position to state as to how she had got burnt. The deceased was brought to the hospital by police and not by any of her relatives and so there was no possibility of her being tutored also before she was questioned by the doctor

regarding the cause of her injuries and whatever she told the doctor was her voluntary statement. Evidence of the doctor in a government hospital regarding the cause of incident of burning as narrated by the victim-wife was given special weightage even by the Apex Court in one of its decisions reported as **AIR 2003 SC 1074, “State of Karnataka vs Shariff”**. We have thus no hesitation in accepting the evidence of PW-12 Dr. Atul Wadhwa and coming to the conclusion that the deceased was in a fit state of mind to disclose to him as to how she had got burnt and who had burnt her and whatever she told this doctor was absolutely her voluntary disclosure and since she was brought to the hospital by the police there was even otherwise no scope of her being tutored to implicate accused Missa and Teeja. None of her relatives was by her side when the deceased was being examined by PW-12 and neither the police officials who had brought her to the hospital nor Dr. Atul Wadhwa had any axe to grind against these accused and so they could not be expected to get a tutored version of the incident from the mouth of the deceased.

12. We shall now examine the evidence regarding the other three dying declarations of the deceased relied upon by the prosecution. PW-15 Sub-Inspector Akhilesh Yadav had recorded the second dying declaration. The relevant part of his statement before the trial Court is reproduced below:

“On 29.1.2001 I was posted at PS Kalkaji incharge PP Govindpuri. On that day at about 12 noon I received a message that one woman has been burnt in transit camp Govindpuri upon this information I reached at the spot there I met with HC Girvar Singh and Ct. Suresh. Injured was removing to hospital in PCR van. I left HC Girvar at the spot and I alongwith Constable went to S. Hospital then I moved an application before the Dr. for getting the patient recorded vide Ex.PW15/A. I also informed the SDM. I recorded the statement of injured Sushila Ex.PW15/B. Meanwhile SDM came and I again obtained the permission of the Dr. regarding the condition of the patient on Ex.PW15/A she was opined to be fit for giving the statement at 2.30 PM vide endorsement Ex.P1. SDM recorded statement of Sushila mark X. SDM directed the SHO to register the case vide endorsement mark Y, the case was marked to me. On the statement of Sushila I prepared rukka Ex.PW15/C on the basis of rukka FIR Ex.PW14/A was got registered.....”

PW-15 had recorded that statement of the deceased in question-answer form. As has already been noticed by us, the

deceased had told this police officer that she had been burnt with kerosene oil. In answer to separate questions as to who had poured kerosene oil on her and who had ignited the match-stick the deceased had stated that her mother-in-law Missar had poured kerosene oil on her and her jethani Teeja had ignited the match-stick.

13. PW-18 Sh.A.K. Singh is the SDM who had recorded the third dying declaration of the deceased. He deposed that:

“On 29.1.2001 at about 2.30 PM I was called by IO PS Kalkaji upon receiving the information. I went to S.J. Hospital there I recorded the statement of Smt. Sushila Ex.PW18/A. On the same day I gave the directions to SHO PS Kalkaji to register the case. My endorsement is Ex.PW18/8. On 31.1.2001 at about 4 PM I recorded the statement of father deceased Dallu and Smt. Krishna and Leela Bhai the statements are Ex.PW2/B, 2/A and 18/C. I also signed the inquest papers. When I came to know that the deceased was got married with the accused 10 years ago I sent the case to PS alongwith relevant papers my letter is Ex.PW18/D.”

To the SDM also the deceased had in her statement, which was also recorded in question-answer form, claimed that her mother-in-law had poured kerosene oil on her while her jethani had ignited the match-stick.

14. PW-11 Leela Bai, the bua of the deceased who was living in Delhi and had reached the hospital on getting the information about the incident, deposed about what she was told by the deceased as to how she had got burnt. Her deposition regarding the dying declaration is reproduced below:

“.....On 29/1/01 I received information that Sushila had been burnt and admitted in Safdarjung Hospital. I went to Safdarjung Hospital. There Sushila told me that she was given beatings and her jeth Mangelal gave danda blow on her head her mother-in-law Mishra Devi caught hold her and Tija Devi poured kerosene oil on her and lit the matchstick. Then I came out of the room and my statement was recorded”

15. From the testimony of PWs 11, 15 and 18 also it is clear that the deceased had claimed before all of them that accused Missar and Teeja Devi were responsible for the burn injuries

sustained by her. The testimony of these three witnesses was attacked by the learned counsel for these two accused firstly on the ground that the deceased could not be expected to make any statement since she had sustained 85% burn injuries. However, in our view the statements which these three witnesses claim to have been made to them by the deceased cannot be viewed with suspicion for the reason put forth by the learned counsel for the accused. PW-15 had categorically claimed that he had got the written clearance from the doctor on his application Ex.PW-15/A before recording the statement Ex.PW-15/B of the deceased and also when the SDM had come and recorded her statement. The SDM had himself also claimed that before recording the statement of the deceased he had sought the opinion of the doctor and the deceased was declared fit for making her statement. We have no reason to disbelieve these two witnesses. Learned counsel had also contended that merely on the statements of these two witnesses without the prosecution having examined the concerned doctor about the state of mind of the deceased it cannot be said that the prosecution has been able to

establish that the deceased had made her so-called dying declarations while in a fit state of mind. There is no doubt that the prosecution has not examined the doctor from whom PWs 15 and 18 had got confirmed that the deceased was fit for making statement but, in our view, on that score evidence of these two witnesses cannot be rejected or viewed with suspicion. They had no reason to depose falsely that the doctor had declared the deceased fit for making statement and we have also no reason to say that the investigating officer would have himself made the two endorsements on his application Ex.PW-15/A purporting to be the endorsements of the doctor declaring the deceased fit for making statement, one made before the recording of the statement by the police officer and the second before the recording of the statement by the SDM. As noticed already, these two witnesses had recorded the dying declarations in question-answer form. The same were very brief also and from the answers given by the questions put to her including as to how she had got burnt we are fully convinced that she was in a fit state of mind at that time. Thus, non-examination of the doctor cannot

give any benefit to the accused. For this view we are fortified by the similar view taken by the Supreme Court also when a similar objection was raised before it in an appeal against conviction in a bride burning case which was also based on the dying declarations of the deceased. That decision is reported as **AIR 1999 SC 3695, “Koli Chunilal Savji and anr. Vs State of Gujarat”** and the relevant paras of that judgment are reproduced below:

“ 7. Coming to the first question, the answer to the same would depend upon the correctness of the "submission of Mr. Keshwani, that in the absence of doctor while recording the dying declaration, the said declaration loses its value and cannot be accepted..... But the aforesaid requirements are mere a rule of prudence and the ultimate test is whether the dying declaration can be held to be a truthful one and voluntarily given. It is no doubt true that before recording the declaration, the concerned officer must find that the declarant was in a fit condition to make the statement in question. In *Ravi Chander v. State of Punjab* JT 1998(8)SC 211 this Court has held that for not examining the doctor, the dying declaration recorded by the Executive Magistrate and the dying declaration orally made need not be doubted. The Court further observed that the Executive Magistrate is a disinterested witness and is a responsible officer and there is no circumstance or material on record to suspect that the Executive Magistrate had any animus against the accused or in any way interested in fabricating the dying declaration and, therefore, the question of genuineness of the dying declaration recorded by

the Executive Magistrate to be doubted does not arise. In the case of Harjit Kaur v. State of Punjab (1994) 4 Scale 447, this Court has examined the same question and held:

.....As regards the condition of Parminder Kaur, the witness has stated that he had first ascertained from the doctor whether she was in a fit condition to make a statement and obtained an endorsement to that effect. Merely because that endorsement was made not on the Dying Declaration itself but on the application, that would not render the Dying Declaration suspicious in any manner.

8. In view of the aforesaid decisions of this Court, we are unable to accept the submission of Mr. Keshwani that the two dying declarations cannot be relied upon as the doctor has not been examined and the doctor has not made any endorsement on the dying declaration. With regard to the condition of the deceased, the Magistrate who recorded the dying declaration has been examined as a witness. She has categorically stated in her evidence that as soon as she reached the hospital in the Surgical Ward of Dr. Shukla, she told the doctor on duty that she is required to take the statement of Dhanuben and she showed the doctor the Police yadi. The doctor then introduced her to Dhanuben and when she asked the doctor about the condition of Dhanuben, the said doctor categorically stated that Dhanuben was in a conscious condition. It further appears from her evidence that though there has been no endorsement on the dying declaration recorded by the Magistrate with regard to the condition of the patient but there has been an endorsement on Police yadi, indicating that Dhanuben was fully conscious. In view of the aforesaid evidence of the Magistrate and in view of the endorsement of doctor on the Police yadi and no reason having been ascribed as to why the Magistrate would try to help the

prosecution, we see no justification in the comments of Mr. Keshwani that the dying declaration should not be relied upon in the absence of the endorsement of the doctor thereon.”

16. In this regard we may once again make a reference to the Constitution Bench judgment of the Supreme Court in Laxman’s case(supra) wherein also it was held that if the person recording a dying declaration is satisfied about the mental fitness of the person whose dying declaration is to be recorded then the dying declaration will not be rejected on the ground that there was no certification of any doctor regarding the fitness of the declarant to make the dying declaration. Here, we are satisfied from the evidence of PWs 15 and 18 that the deceased was in a fit state of mind at the time when the deceased had spoken to them. In our view, except for putting bald suggestions to PWs 11, 15 and 18 in their cross-examination that the deceased had not made any statements before them(and not that she was actually unfit for making any statement) there is nothing brought on record by the accused to demonstrate that the dying declarations of the

deceased Sushila were products of imagination or tutoring by anyone dear to her or even by the police. It was also not suggested to these witnesses or to any of the two doctors examined by the prosecution that thumb-impression of the deceased could not be taken as the same was burnt making it impossible to take its impression on her declarations and so just because the deceased had sustained 85 % burns it cannot be said that she was not in a position to give her thumb impression on her dying declarations recorded by the investigating officer and the SDM, as was also the argument advanced on behalf of accused Missar and Teeja. None of these witnesses could be discredited in cross-examination and we have no reason to disbelieve them. Keeping in view the sanctity attached to a statement made by a person on death bed we find no reason to come to the conclusion that the deceased had made false statements before PWs 11, 12, 15 and 18, who have deposed about the different dying declarations of the deceased before each one of them separately and whose testimonies we find to be wholly reliable.

17. There are other reasons also for holding that the deceased was fit for making her statements being relied upon by the prosecution as her dying declarations. Accused Missar and Teeja in their statements under section 313 Cr.P.C. had themselves claimed that when they reached the hospital on getting the information that the deceased had been admitted there PWs 2 and 11, buas of the deceased were present with the deceased and accused Mange Lal in his statement under Section 313 Cr.P.C. had also claimed in the hospital he had seen the deceased talking to her buas Leela (PW-11) and Krishna(PW-2). So, even according to the accused persons themselves the deceased was in a position to speak in the hospital around 2-2.30 p.m. Not only that, even DW-1 Noorie, who claimed to have seen the deceased burning in her house around 11.30 a.m. and her having informed the police control room, claimed in her examination-in-chief that when she went to Safdarjung hospital to see the deceased Sushila around 2 p.m. the deceased had talked to her and had asked her to call her husband from Ravidass Mandir where he had gone and then she had gone to Ravidass Mandir. So, even according to this defence

witness also the deceased was in a position to speak and it also becomes clear that her mental faculties were not affected as otherwise she would not have been able to tell DW-1 where her husband would be at that time and that fact further strengthens the prosecution case that she was in a fit state of mind at the time when she had made the dying declarations relied upon by the prosecution.

18. There is no doubt that in the dying declarations recorded by the Investigating Officer(PW-15) and the SDM(PW-18) the deceased had claimed that accused Teeja Devi had poured kerosene oil on her while to PW-11 Leela Bai she had told that kerosene oil was poured on her by her mother-in-law. However, in our view this discrepancy is inconsequential and on this ground the prosecution case cannot be thrown out by giving the benefit of doubt to accused Missar and Teeja Devi, as was the submission made by the learned counsel for the accused.

19. It was also contended on behalf of the appellants that the dying declarations of the deceased should not be accepted also for the reason that the deceased had not named accused Mange Lal either before PW-12 Dr. Atul Wadhwa or before PW-15 SI Akhilesh Yadav and the first time he was named by the deceased in her third dying declaration recorded by the SDM. It was also submitted that even in the third dying declaration before the SDM the deceased had not claimed that she was beaten with a danda by Mange Lal as was claimed by PW-11 Smt. Leelabai to have been told to her by the deceased. Thus, according to the learned counsel these inconsistencies in the dying declarations also create a doubt about their genuineness. There is no doubt that the deceased had not said anything against accused Mange Lal when she was being examined by PW-12 Dr. Atul Wadhwa and also when her statement was being recorded by PW-15 SI Akhilesh Yadav but because of that no benefit can be claimed by accused Missar and Teeja. It appears to us that as far as accused Mange Lal is concerned the learned trial Court itself gave him the benefit at the stage of framing of charge itself by not charging him for the

offence of murder also along with his co-accused Missar and Teeja because of his having not being named in the first two dying declarations of the deceased.

20. Thus, in our view the prosecution has been able to discharge satisfactorily the burden of proving its case against accused Missar and Teeja as far as the charge of murder framed against them is concerned. That necessitates taking up for consideration the plea of alibi taken by the accused persons. However, before we examine the plea of alibi in this case let us notice what the Supreme Court has held about the plea of alibi in one of its judgments. In “ *Jayantibhai Bhenkarbhai v. State of Gujarat*”, (2002) 8 SCC 165, the Hon’ble Supreme Court observed as under in para no. 19:

“19. The plea of alibi flows from Section 11 and is demonstrated by illustration (a). Sarkar on Evidence(Fifteenth Edition, p. 258) states the word 'alibi' is of Latin origin and means "elsewhere". It is a convention term used for the defence taken by an accused that when the occurrence took place he was so far away from the place of occurrence that it is highly improbable that he would have participated in the crime. Alibi is not an exception(special or general) envisaged in the Indian Penal Code or

any other law. It is only a rule of evidence recognized in Section 11 of the Evidence Act that facts which are inconsistent with the fact in issue are relevant. The burden of proving commission of offence by the accused so as to fasten the liability of guilt on him remains on the prosecution and would not be lessened by the mere fact that the accused had adopted the defence of alibi. The plea of alibi taken by the accused needs to be considered only when the burden which lies on the prosecution has been discharged satisfactorily. If the prosecution has failed in discharging its burden of proving the commission of crime by the accused beyond any reasonable doubt, it may not be necessary to go into the question whether the accused has succeeded in proving the defence of alibi. But once the prosecution succeeds in discharging its burden then it is incumbent on the accused taking the plea of alibi to prove it with certainty so as to exclude the possibility of his presence at the place and time of occurrence. An obligation is cast on the Court to weigh in scales the evidence adduced by the prosecution in proving of the guilt of the accused and the evidence adduced by the accused in proving his defence of alibi. If the evidence adduced by the accused is of such a quality and of such a standard that the Court may entertain some reasonable doubt regarding his presence at the place and time of occurrence, the Court would evaluate the prosecution evidence to see if the evidence adduced on behalf of the prosecution leaves any slot available to fit therein the defence of alibi. The burden of the accused is undoubtedly heavy. This flows from Section 103 of the Evidence Act which provides that the burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence. However, while weighing the prosecution case and the defence case, pitted against each other, if the balance tilts in favour of the accused, the prosecution would fail and the accused would be entitled to benefit of that

reasonable doubt which would emerge in the mind of the Court.”(emphasis supplied)

21. Coming now to the plea of the accused in the present case, as noticed already, all the accused at the time of recording of their statements under Section 313 Cr.P.C. had claimed that they had gone to Ravidass Temple on the day of the incident on the occasion of Ravidass Jayanti and there they had received the information(of Sushila getting burnt) and from there they had gone to the hospital and Sushila was found talking to her buas(PWs 2 and 11). That is all they pleaded. This plea, in our view, does not even amount to a plea of alibi. None of the accused gave any time of their leaving their house and reaching the temple. All those facts were within their special knowledge which they should have disclosed. None of the accused has even entered into the witness box in support of the plea of alibi. They do not even claim to have informed the investigating officer(PW-15) about their presence in the temple at the time of the incident, which according to their own witness DW-1 Noorie took place

around 11.30 a.m., nor did they put any such suggestion to him(PW-15) in cross-examination.

22. Even the evidence adduced by the accused persons in support of their plea of alibi as also the evidence of the husband of the deceased, who though was examined by the prosecution as PW-8 but he turned hostile and gave a statement to help the accused persons in proving plea of alibi and whose evidence is also being relied upon by the accused, does not help them at all. The defence witness DW-1 Noorie had deposed that on 29.01.2001 at about 11.30 a.m. she had gone to the house of the deceased, which was on the first floor, on hearing the screams of Sushila(the deceased) and there she found the deceased burning and then she put water on her and gave a telephone call to the police which came and took Sushila to Safdarjung Hospital. After sometime she also went to hospital to see Sushila where she was saying that her husband should be called from Ravidas temple where he had gone. Then at about 2 p.m. she went to Ravidas temple where all the accused were present and she informed

them that Sushila was admitted in hospital in burnt condition and all the accused then came to Safdarjung Hospital. DW-2 Prem, who was also a resident of Transit Camp, Govindpuri, was examined by the accused to establish their plea of alibi. This witness deposed that on 29.1.2001 he was present at Ravidass Mandir at 10.00 a.m. and all the accused persons were also present there in connection with some meeting for collection of donations. He had further deposed that at about 2.00 p.m. one Noorie(DW-1) had come to the temple and had informed them that Sushila had set herself on fire and then they alongwith accused persons and the husband of Sushila, who as stated by him in cross-examination, was also present there, had gone to Safdarjung Hospital where they had found that Sushila had died and they all came back since the doctor told them that dead body would be handed over to them next day.

23. In our view, the evidence of DW-2 does not inspire confidence. According to this defence witness DW-1 Noorie had come to the temple around 2 p.m. and had informed the accused

persons regarding the incident. He has also claimed that when after getting that news he alongwith the accused persons and the husband of Sushila had reached hospital Sushila had already died. The deceased actually had died in the night. That means the accused persons had not rushed to the hospital immediately on getting the information about Sushila having been admitted in hospital because of her having sustained burn injuries. This statement of DW-2 is at variance with the stand of accused persons themselves who have claimed that they had rushed to the hospital on getting the information from Noorie and at that time the deceased was alive. This discrepancy in the evidence of DW-2 and the stand taken by the accused themselves casts serious doubt about the claim of DW-2 that the accused persons were present with him in the temple from 10 a.m. onwards. The husband of the deceased was examined by the prosecution as PW-8 and his evidence is also being pressed into service by the accused in view of his having not supported the prosecution case and having made an attempt to support their plea of alibi. However, his evidence is also of no help for the accused. He

deposed that he was at the temple alongwith accused persons and from there at about 2.30 p.m. they returned back and then he came to know that his wife had committed suicide by setting herself on fire. This witness was cross-examined by the prosecutor since he had tried to help the accused in their plea of alibi and for claiming that his wife had committed suicide and had also not supported the prosecution's allegations against the accused persons that they used to harass the deceased for dowry. According to him the relations between his wife and the accused were quite cordial and the accused persons then sought advantage from his evidence which actually does not help them in any way. PW-8 had not stated in his evidence as to at what time he alongwith the accused persons had left their house for going to the temple. So, just because he alongwith accused persons was present in the temple around 2 or 2.30 p.m., as claimed by him as well as the two defence witnesses, that would not show that the accused persons were not present at their house around 11.30 a.m. He has not even disclosed as to who had informed him that his wife had committed suicide. Even his statement is not in

conformity with the evidence of DW-2 as well as the plea taken by the accused person inasmuch as he has claimed that all of them had come back to their home around 2.30 p.m. and then had come to know that his wife had committed suicide while DW-2 has deposed that all of them had been informed in the temple itself that the deceased had got burnt and then all of them including the PW-8 Ram Singh, husband of the deceased, had gone to hospital where she had already expired. And the accused have taken the stand that from the temple they had gone to the hospital and had found the deceased talking to her buas. Accused persons have not claimed that from the temple they had come back to their house and then had come to know about the deceased having committed suicide. In fact accused Mange Lal had claimed that the information received by him was that the deceased had got burnt accidentally. He has also not disclosed as to who had given such an information. Their witness Noorie has not claimed that she had informed the accused persons or the husband of the deceased as to how the deceased had got burnt. In view of these infirmities in the stand of the accused and the

evidence sought to be relied upon by them, we are of the view that the accused persons have failed to establish their plea of alibi.

24. We are, therefore, of the view that as far as the conviction of accused Missar and Teeja under Section 302/34 IPC is concerned no fault can be found with the decision of the learned trial Court and we affirm the same.

25. We now proceed to examine the conviction of the three accused persons under Section 498-A IPC. The prosecution case was that the deceased used to be harassed by the three accused persons for not fulfilling their demands of dowry. To establish that allegation the prosecution had examined the father of the deceased and his two sisters (buas of the deceased). All of them did claim in their evidence that the deceased used to be harassed for dowry by the three accused persons but the learned trial Court has found that this part of their evidence was an improvement and an exaggerated version because in their statements recorded by the police with which they were duly confronted during the cross-

examination they had not claimed that the deceased used to be harassed on account of dowry demands by the accused persons. So the learned trial Court has rejected the prosecution case of harassment of the deceased by the accused persons on account of non-fulfillment of their demands of dowry. We are in full agreement with this conclusion arrived at by the learned trial Court. However, the three accused persons have been convicted under Section 498-A IPC by the trial Court relying upon the statements made by PWs 1, 2 and 11 to the effect that the deceased used to be given regular beatings by the accused persons which even the deceased also had claimed in her dying declarations made before the investigating officer and the SDM. This is what the learned trial Court held while convicting the accused persons under Section 498-A IPC :

“On the basis of evidence on record, I come to the conclusion that so far as version of PWs 1 Dallu PW-2 Krishna and PW-11 Leelabai that accused persons used to demand dowry is concerned, the same is nothing but an afterthought and exaggeration. However, it stands proved on record that deceased was being subjected to physical beatings and harassment by all the 3 accused persons. The cause of such harassment was squabbling on the question as to who will keep the child of the deceased. It also stands

proved on record that before the incident of burning took place accused Mange Lal had beaten the deceased.....Accordingly, I come to the conclusion that it stands proved on record that accused Mange Lal used to subject the deceased to physical beatings and harassment.....”

26. Section 498-A reads as follows:

“498-A: Husband or relative of husband of a woman subjecting her to cruelty-

Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

Explanation - For the purpose of this section 'cruelty' means -

(a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.”

Section 498-A IPC has two limbs. The first limb of Section 498-A provides that whoever, being the husband or the relative of

the husband of a woman, subjects such woman to cruelty shall be punished. `Cruelty' has been defined in clause (a) of the Explanation to the said Section as any willful conduct which is of such a nature as is likely to drive a woman to commit suicide. When there is demand of dowry, the case comes under clause (b) of the Explanation to Section 498-A. In the present case the prosecution has not established that the accused persons used to harass the deceased on account of non-fulfillment of their demands of dowry. So clause (b) of Section 498-A will not apply. As far as clause(a) is concerned the same is also not applicable in the facts of this case since there is no evidence that the deceased was being meted out with cruelty to such an extent that she could have committed suicide. Consequences of cruelty which are likely to drive a woman to commit suicide or to cause grave injury or danger to life, limb or health, whether mental or physical of the woman are required to be established in order to bring home the charge of cruelty as defined in clause(a). There is only a vague statement of PW-11 Leela Bai, bua of the deceased that in the hospital the deceased had told her that she was given beatings

and accused Mange Lal had hit her with a danda. In our view, on the basis of this vague statement, charge under Section 498-A IPC cannot be held as established against any of the accused persons. And whatever the deceased stated in her dying declarations before the investigating officer and the SDM regarding her harassment by her in-laws also cannot be used against the accused as that statement was not in respect of the cause of her death or circumstances leading to her death and so is inadmissible for establishing the charge under Section 498-A IPC. For this view, we are relying upon the decision of the Supreme Court in “ **Gananath Pattnaik vs State of Orissa**”, (2002) **2 SCC 619**. We are, therefore, of the view that all the three accused persons deserve to be acquitted of the charge under Section 498-A IPC.

27. In the result, Criminal Appeal No. 639/02 is allowed partly. While maintaining the conviction of the accused–appellants Missar and Teeja under Section 302/34 IPC as well as the sentence awarded to them, their conviction under Section 498-

A/34 IPC is set aside. Criminal Appeal No. 631/02 filed by accused–appellant Mange Lal is allowed and his conviction under Section 498-A IPC is set aside and resultantly he stands acquitted and his bail bonds are cancelled.

P.K.BHASIN,J

B.N. CHATURVEDI,J

**January 16, 2009
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