

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of Decision: 5th September, 2014

+ **CRL.A. 79/2000**
RAJWATI Appellant
Through Mr. T.N. Saxena and Mr. H.C.
Kharbanda, Advocates along
with appellants in person

versus
STATE Respondent
Through Mr. Sunil Sharma, APP

+ **CRL.A. 80/2000**
MAHENDER SINGH Appellant
Through Mr. T.N. Saxena and Mr. H.C.
Kharbanda, Advocates along
with appellants in person

versus
STATE Respondent
Through Mr. Sunil Sharma, Additional
Public Prosecutor for the State

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CORAM:

HON'BLE MR. JUSTICE KAILASH GAMBHIR

HON'BLE MS. JUSTICE SUNITA GUPTA

J U D G M E N T

: SUNITA GUPTA, J.

1. The judgment of learned Additional Sessions Judge convicting the appellants Rajwati for offence under Section 302/498A/34 and Mahender for offence under Section 498A/34 Indian Penal Code is under challenge in these appeals.

2. Harbans got married to one Vimlesh on 14.05.1997. According to prosecution, she was harassed for dowry by her mother-in-law Rajwati and father-in-law Mahender and was turned out of her matrimonial home along with her husband Harbans on 16.04.1998. A complaint was made by Vimlesh on 19.04.1998 to SHO Police Station, Gokul Puri who directed her to approach Women Cell. Consequently, on 22.04.1998, another complaint was submitted to Deputy Commissioner of Police, North East District, Crime Branch Cell, Welcome, Delhi. A compromise was entered into inter se parties on 26.05.1998 on the assurance given by the accused persons not to harass Vimlesh and as such Vimlesh prayed for closure of her complaint and returned back to her matrimonial home. On 30.05.1998, she was set on fire at about 12 noon.

3. According to the prosecution, Vimlesh was pushed by her mother-in-law over a burning kerosene stove and her father-in-law had attempted to commit rape on her on the previous night. Information was given to Police Station Karawal Nagar vide DD No.6. Harbans Kumar was also informed and when he reached the house, PCR officials were already present. Vimlesh was taken to GTB Hospital where she breathed her last on 03.06.1998 at 4.15 am. It was found that she had suffered

100% burns, but before that, her dying declaration was recorded by PW13 – Mr. Vinay Bhushan, SDM. According to prosecution, before recording this dying declaration, an opinion was taken about her fitness. Nineteen (19) witnesses were examined at the trial including her relatives, husband, Investigating team, Magistrate and the doctor. The learned Trial Court convicted both the appellants as mentioned hereinbefore, while acquitting Mahender Singh of the charge under Section 376/511 of Indian Penal Code.

4. The defence taken by the appellants was that of denial. The appellant Rajwati took a plea of alibi by stating that she was not at home at the time of incident and had gone to the market to purchase vegetables. It was also stated that the deceased was staying separately with her husband at the first floor of the house. She wanted transfer of the house in her name. Two witnesses were examined in defence.

5. The defence pleaded by the appellants did not prevail and that is how the appellants are before us.

6. The main thrust of arguments of learned counsel for the appellants was against the dying declaration. It was claimed that dying declaration is not voluntary. Learned counsel for the appellants earnestly argued that

there were some intrinsic defects in the dying declaration which militated against its credibility. It was pointed out that Vimlesh had suffered 100% burn injuries and, therefore, it was not possible that she would be in her senses while making dying declaration or would be in a position to thumb mark the same. It was further pointed out that before recording her dying declaration, her fitness to make statement was not ascertained and the dying declaration was not attested by any doctor. Reference was made to the MLC where the word “*multi gravida*” was mentioned to show that Vimlesh had already given birth to a child and was again pregnant. Lastly, it was pointed out that there was no kerosene oil residue detected on the clothes/ articles which were seized. It was also suggested that the evidence of Smt. Chandrawati and Girish Babu who claimed that an oral dying declaration was made to them, was also not reliable because of material improvements.

7. Before we proceed to consider the contentions raised at the Bar and independently scrutinize the relevant evidence brought on record, it is fruitful to recapitulate the law and enunciation of Hon’ble Supreme Court pertaining to dying declaration in ***Bhajju @ Karan Singh v State of M.P.*** 2012 CrI.L.J. 1926 wherein it was held as under:-

“10. The law is very clear that if the dying declaration has been recorded in accordance with law, is reliable and gives a cogent and possible explanation of the occurrence of the events, then the dying declaration can certainly be relied upon by the Court and could form the sole piece of evidence resulting in the conviction of the accused. This Court has clearly stated the principle that Section 32 of the Indian Evidence Act, 1872 (for short ‘the Act’) is an exception to the general rule against the admissibility of hearsay evidence. Clause (1) of Section 32 makes the statement of the deceased admissible, which is generally described as a ‘dying declaration’. The ‘dying declaration’ essentially means the statement made by a person as to the cause of his death or as to the circumstances of the transaction resulting into his death. The admissibility of the dying declaration is based on the principle that the sense of impending death produces in a man’s mind, the same feeling as that the conscientious and virtuous man under oath. The dying declaration is admissible upon the consideration that the declaration was made in extremity, when the maker is at the point of death and when every hope of this world is gone, when every motive to file a false suit is silenced in the mind and the person deposing is induced by the most powerful considerations to speak the truth. Once the Court is satisfied that the declaration was true and voluntary, it undoubtedly can base its conviction on the dying declaration, without requiring 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 by other evidence.

11. There is a clear distinction between the principles governing the evaluation of a dying declaration under the English law and the Indian law. Under the English law, credence and relevancy of a dying declaration is only when the person making such a statement is in hopeless condition and expecting an imminent death. So under the English law, for its admissibility, the declaration should have been made when in the actual danger of death and that the declarant should have had a full apprehension that his death would ensue. However, under the Indian law, the dying declaration is relevant, whether the person who makes it was or was not under expectation of death at the time of such declaration. The dying declaration is admissible not only in the case of homicide but also in civil suits. The admissibility of a dying declaration rests upon the principle of nemo meritorious praesumuntur mentiri (a man will not meet his maker with a lie in his mouth).

12. The law is well-settled that a dying declaration is admissible in evidence and the admissibility is founded on the principle of necessity. A dying declaration, if found reliable, can form the basis of a conviction. A Court of facts is not excluded from acting upon an uncorroborated dying declaration

for finding conviction. The dying declaration, as a piece of evidence, stands on the same footing as any other piece of evidence. It has to be judged and appreciated in light of the surrounding circumstances and its weight determined by reference to the principle governing the weighing of evidence. If in a given case a particular dying declaration suffers from any infirmity, either of its own or as disclosed by the other evidence adduced in the case or the circumstances coming to its notice, the Court may, as a rule of prudence, look for corroboration and if the infirmities are such as would render a dying declaration so infirm that it pricks the conscience of the Court, the same may be refused to be accepted as forming basis of the conviction.

13. Another consideration that may weigh with the Court, of course with reference to the facts of a given case, is whether the dying declaration has been able to bring a confidence thereupon or not, is it trust-worthy or is merely an attempt to cover up the latches of investigation. It must allure the satisfaction of the Court that reliance ought to be placed thereon rather than distrust.

14. In regard to the above stated principles, we may refer to the judgments of this Court in the cases of Ravikumar @ Kutti Ravi v. State of Tamil Nadu (2006) 9 SCC 240, Vikas and Others v. State of Maharashtra (2008) 2 SCC 516, Kishan Lal v. State of Rajasthan (2000) 1 SCC 310, Laxmi (Smt.) v. Om Prakash & Ors. (2001) 6 SCC 118, Panchdeo Singh v. State of Bihar (2002) 1 SCC 577.

15. In the case of Jaishree Anant Khandekar v. State of Maharashtra (2009) 11 SCC 647, discussing the contours of the American Law in relation to the 'dying declaration' and its applicability to the Indian law, this Court held as under: -

"24. Apart from an implicit faith in the intrinsic truthfulness of human character at the dying moments of one's life, admissibility of dying declaration is also based on the doctrine of necessity. In many cases victim is the only eyewitness to a crime on him/her and in such situations exclusion of the dying declaration, on hearsay principle, would tend to defeat the ends of justice.

25. American law on dying declaration also proceeds on the twin postulates of certainty of death leading to an intrinsic faith in truthfulness of human character and the necessity principle. On certainty of death, the same strict test of English law has been applied in American jurisprudence. The test has been variously expressed as "no hope of recovery", "a settled expectation of death". The core concept is that the expectation of death must be absolute

and not susceptible to doubts and there should be no chance of operation of worldly motives."

16. It will also be of some help to refer to the judgment of this Court in the case of Muthu Kutty and Another v. State by Inspector of Police, T.N., (2005) 9 SCC 113 where the Court, in paragraph 15, held as under:-

"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 [(1992) 2 SCC 474 : 1992 SCC (Cri) 403 : AIR 1992 SC 1817] (SCC pp. 480-81, paras 18-19)

(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.)

(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.)

(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)

(iv) Where dying declaration is suspicious, it should not be acted upon without corroborative evidence. (See Rasheed Beg v. State of M.P.)

(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.)

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. (See Ram Manorath v. State of U.P.)

(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.)

(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.)

(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.)

(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.)

(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.)"

8. Coming to the factual matrix of the case, as per the prosecution case on 30.05.1998, Vimlesh was brought to GTB Hospital by her husband Harbans. Sub Inspector Chander Bhan informed PW13 Mr. Vinay Bhushan, SDM, who reached GTB Hospital and recorded statement of Vimlesh Ex.PW13/A which bears her thumb impression.

The statement was recorded in question-answer form and is to the following effect:

“Q. What is your name?

A. Vimlesh.

Q. What is the name of your husband?

A. Harbans Kumar

Q. Where do you reside?

A. Krishna Nagar

Q. When were you married?

A. One year back.

Q. Have you children?

A. No.

Q. Who are in your family?

A. Mother-in-law, father-in-law, Dever and two sisters in law and my husband.

Q. How did you get burnt?

A. I had shown a match stick to the stove at about 12:00 noon today to prepare tea. My mother-in-law poured kerosene oil on me from back and pushed me towards the stove and I got burnt.

Q. What happened thereafter?

A. My mother-in-law thereafter went out, closed the latch (kundi) and firmly held the doors and did not allow me to come out. Thereafter I shouted. Mohallawalas came and saved me.

Q. Who was present at the house at the time of incident?

A. Only my mother-in-law and all others were out.

Q. Why did mother-in-law burn you?

A. My father-in-law had tried to do ‘Galat Kam’ with me yesterday night. I told my mother-in-law about this. She said that I was making the allegations against her husband and she would take revenge.

Q. Who used to harass you?

A. *My mother-in-law and father-in-law harassed me. They beat me. We live in one house. Mess is separate.*

Q. *Why do your mother-in-law and father-in-law harass you?*

A. *They asked me to bring scooter and Rs.20,000/-.*

Q. *Did your husband ever demanded money or harassed you?*

A. *No. He keeps me properly.*

Q. *Did you tell yesterday's incident to your husband?*

A. *Yes. There was a serious quarrel between my husband and my father-in-law.*

Q. *Have you to say anything more?*

A. *Do not spare my mother-in-law and father-in-law. My father-in-law had tried to do 'galat kam' with me several times and my mother-in-law burnt me."*

9. According to SDM, he did not specifically enquire from the patient whether she was mentally fit to give her statement, however, he himself assured that by way of talking she was well-oriented and fit for making statement. Although he did not get the fitness certificate of the doctor on the statement, but according to him, the same was taken on MLC. Even according to PW3 Dr. V.K. Jain, who examined the patient and prepared her MLC Ex.PW3/A, the patient was conscious and well-oriented. She was fit for statement.

10. What impresses us most about the dying declaration is that firstly it has been recorded by an independent witness like PW13 Mr. Vinay Bhushan, who was working as SDM Shahdara and secondly, before it commenced, the Magistrate had satisfied himself about the ability of

Vimlesh to make a dying declaration. The said dying declaration is in question-answer form and we do not see any suggestive question having been put to the witness. Moreover, there was no question of tutoring the witness as it has come in the statement of witnesses that as per practice, at the time of recording statement, no one else is allowed to remain in the room and everybody was directed to go out, so much so, even no doctor or nurse was there.

11. As regards the submission of the learned counsel for the appellant that since the deceased had 100% burn injuries, she would not have been in a position to make a statement, same again is devoid of merit. This precise issue was considered by Hon'ble Supreme Court in *State of MP vs. Dal Singh & Ors.*, (2013) 14 SCC 159 and the question for consideration in that case also was whether a 100% burnt person can make a dying declaration or put a thumb impression. In that case, reliance was placed on *Mafabhai Nagarbhai Raval vs. State of Gujarat*, AIR 1992 SC 2186, where also question arose with respect to whether a person suffering from 99% burn injuries could be deemed capable enough for the purpose of making a dying declaration. The learned Trial Judge thought that the same was not at all possible as the victim had gone into

shock after receiving such high degree burns. The moment the deceased had seen the flame, she was likely to have sustained mental shock. Development of such shock was the ground on which the Trial Court had disbelieved the medical evidence. It was held that the Doctor who had conducted her post-mortem was a competent person and had deposed in this respect. Therefore, unless there existed some inherent and apparent defect, the Court could not have substituted its opinion for that of the doctor's. Hence in the light of the facts of the case, the dying declaration made was found to be worthy of reliance, as the same had been made truthfully and voluntarily. There was no evidence on record to suggest that the victim had provided a tutored version and the argument of the defence stating that condition of deceased was so serious that she could not have made such a statement was not accepted, and dying declarations were relied upon. Similar view was reiterated in ***Rambai vs. State of Chhatisgarh***, (2002) 8 SCC 83.

12. In view of the same, the mere fact that Vimlesh had suffered 100% burn injuries, no inference could be drawn that she was incapable of making a dying declaration. This is more particularly so because MLC Ex.PW3/A of Vimlesh was prepared by PW3 Dr. V.K. Jain. As per the

MLC, the patient was brought by her husband Harbans, son of Mahender Singh. The alleged history was given by the informant himself to the following effect:

“Alleged history of burn by being pushed by mother-in-law over a burning kerosene stove” alleged history of “rape yesterday night by father-in-law.”

13. On examination, doctor found the patient to be conscious and well-oriented. She was fit for making statement. There is no challenge to his testimony that Vimlesh was not in a fit condition to make statement. Vimlesh has been consistent throughout, firstly at the time when doctor asked her as to how she sustained injuries and secondly when she made a dying declaration before the SDM.

14. A vague attempt was made to assassinate the character of Vimlesh by emphasising on the word ‘*multi gravida*’ appearing in the MLC Ex.PW 3/A for submitting that ‘*multi gravida*’, as per Dr. V.K. Jain means ‘a lady who has given birth to more than one child and is again pregnant’. It is a matter of record that the marriage itself has taken place on 14th May, 1997 and the unfortunate incident had taken place on 30th May, 1998, meaning thereby within 12½ months of the marriage, Vimlesh met her untimely death. At that time, she was not pregnant. It

has also come on record that no issue was born out of wedlock of Vimlesh and Harbans. In any case, this fact has no bearing on the case.

15. Lastly, a point was raised by learned counsel for the appellants that prosecution has failed to prove that kerosene oil was poured on Vimlesh as a result of which she died. It is to be seen that seizure of one kerosene stove, one plastic can in burnt condition, one *saree* in burnt condition vide memo Ex.PW19/C was proved by PW19 SI Chander Bhan Singh. PW4 Dr. K.K. Banerjee, who conducted post-mortem on the dead body of deceased Vimlesh had handed over scalp hair and vaginal swab and slides duly preserved and sealed to the Investigating Officer of the case who seized the same vide memo Ex.PW11/A. According to the Investigating Officer, he had sent the seized articles to FSL, Malviya Nagar but the same were not accepted by the laboratory as they were not having the facility of chemical analysis for kerosene. Although, according to him, permission was obtained by him from DCP, Crime for sending the exhibits to CFSL, Hyderabad, but the same were not sent till he came to depose in the Court on 18.12.1999. This reflects the casual and callous attitude of the Investigating Officer in carrying out its most solemn duty of conducting fair, honest, flawless and scientific

investigation into the crime but that cannot furnish a ground for acquittal of accused.

16. In ***Ram Bihari Yadav Vs. State of Bihar***, AIR 1998 SC 1850, it was held by Hon'ble Supreme Court that if primacy is given to the omissions or lapses by perfunctory investigation by the investigating agency, the faith and confidence of people would be shaken not only in law enforcing agency, but also in the administration of justice. It is true if on account of any lapse doubts are created in prosecution case, the accused would be entitled to the benefit of that doubt. But, if the prosecution is able to establish its case beyond reasonable doubt against the accused inspite of lapses, the accused cannot be acquitted because of the lapse on the part of investigating officer. Substantially similar view was taken in ***C. Muniappan and others vs. State of Tamilnadu***, (2010) 9 CC 567 where it was held that the defect in investigation by itself cannot be a ground for acquittal. If primacy is given to such design or negligent investigation or to the omissions or lapses by perfunctory investigation, the faith and confidence of people in criminal justice administration would be eroded. Where there has been negligence on the part of investigating agency or omissions etc which resulted in defective

investigation, there is a legal obligation on the part of the Court to examine the prosecution evidence de hors such lapses carefully to find out whether said evidence is reliable or not or to what extent it is reliable and as to whether such lapses affected the object of finding out the truth. Therefore, the investigation is not the solitary area for judicial scrutiny in a criminal trial. The conclusion of trial in the case cannot be allowed to depend solely on the probity of investigation.

17. A careful reading of the dying declaration made by deceased Vimlesh goes to show that the same is voluntary, truthful, made in conscious state of mind, without being influenced by the relatives and the investigating agency. That being so, it can be acted upon and can be made the basis of conviction. Moreover, her statement finds corroboration from the oral testimony of the witnesses.

18. On receipt of information regarding admission of Vimlesh in hospital, her parents Smt. Chandrawati and Girish Babu reached hospital. According to PW1 Chandrawati, her daughter informed her that her father-in-law tried to commit rape upon her by tearing her blouse. When she disclosed this fact to her husband, there was a quarrel in the house. She also informed her that when her father-in-law attempted to

commit rape on her, she confided to her mother-in-law. As a reaction to that, her mother-in-law threatened her to set her on fire if she complained about it. Next day, when her husband had gone for his work, her mother-in-law poured kerosene oil on her and set her on fire. In cross-examination, however, she tried to improve her version by deposing that Vimlesh told her that her father-in-law poured kerosene oil on her and her mother-in-law set her on fire. Even father of the deceased, Girish Babu has deposed that Vimlesh informed him that both the accused set her on fire by pouring kerosene oil. As such, although in the statements of mother and father of the deceased, complicity of father-in-law in the crime is also tried to be established, but in view of the fact that this fact does not find mention in the initial history given by the deceased to Dr. V.K. Jain and subsequently in her dying declaration made before Shri Vinay Bhushan SDM, only mother-in-law was charge-sheeted for offence under Section 302 of Indian Penal Code and was rightly convicted by learned Trial Court.

19. Further, as per the information given by Dr. K.K. Banerjee, who conducted the post-mortem examination, the cause of death was *septicaemia* as a result of superficial deep ante mortem burn injuries

covering 100% body surface. As per dying declaration, Vimlesh had shown a match stick to the stove in order to prepare tea. Her mother-in-law poured kerosene oil on her from the back and pushed her towards the stove and she got burnt. The unfortunate incident has taken place within the matrimonial home. Harbans, husband of the deceased, had gone for his work, as such, only her in-laws were available in the house at the time of incident. Hence, it was for them to explain as to how Vimlesh sustained burn injuries. Such explanation could have been given by them when all the incriminating evidence was put to them while recording their statements under Section 313 of Code of Criminal Procedure or by way of eliciting answer in cross examination of prosecution witnesses or by examining themselves under Section 315 Cr.PC or by leading defence evidence.

20. As regards eliciting answers by way of cross-examination of prosecution witnesses or suggestions given to them, a perusal of record goes to show that various suggestions were given to the prosecution witnesses, which were denied by them. PW1 Chandrawati denied that her daughter did not tell her about attempt of rape by her father-in-law or that she had made a false story in order to malign him. She also denied

that the deceased was harassing the accused persons and was compelling them to transfer the house in her name or that when they did not oblige her, she committed suicide. She also denied that she being the step-mother had been ill-treating her when she visited her house or that she tried to kill her by administering poison or that she (deceased) was fed up by her conduct and day-to-day interferences in her married life and, therefore, committed suicide. PW6 Girish Babu also denied the suggestion that Chandrawati used to torture Vimlesh or that Vimlesh was fed up with the misbehaviour of his wife or that Chandrawati had administered "*chuhe marne wali dava*" to her and her stepmother had once tried to hang her with the ceiling fan and tried to kill her. PW5 Maya Devi tried to support the defence story by deposing that Vimlesh wanted transfer of house in her name but her father-in-law did not oblige. She also supported the defence of accused persons regarding attempt to murder Vimlesh by Smt. Chandrawati, by administering "*chuhe marne wali dava*" and by hanging of Vimlesh. The suggestion given to the prosecution witnesses were denied by them and the testimony of Maya Devi does not inspire confidence inasmuch as she was only a witness to the arrest of accused Rajwati on 31.05.1998 and

her personal search taken vide memo Ex.PW5/A. However, in her cross examination she tried to favour the accused persons by deposing on the lines as suggested by them. If the relations between Vimlesh and Chandrawati were so much strained that she attempted to take her life by administering poison or by hanging her, there would have been no occasion for Vimlesh and her husband Harbans to go to her parents' house when they were turned out by the accused persons.

21. Coming to the stand of the appellants taken in their statements recorded under Section 313 Cr.PC, appellant Mahender has absolutely not given any explanation as to how Vimlesh sustained injuries. However, appellant Rajwati has taken a plea of alibi by stating that she had gone to the market to purchase vegetables. When an alibi is set up, the burden is on the accused to lend credence to the defence put up by him/her.

22. Explaining the essence of a plea of alibi, it was observed in ***Dudh Nath Pandey v. State of U.P.***, (1981) 2 SCC 166 that:

“The plea of alibi postulates the physical impossibility of the presence of the accused at the scene of offence by reason of his presence at another place. The plea can therefore succeed only if it is shown that the accused was so far away at the relevant time that he could not be present at the place where the crime was committed.”

23. This was more elaborately explained in ***Binay Kumar Singh v.***

State of Bihar, (1997) 1 SCC 283 in the following words:

“22. We must bear in mind that an 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 recognised in Section 11 of the Evidence Act that facts which are inconsistent with the fact in issue are relevant.”

“23. The Latin word alibi means "elsewhere" and that word is used for convenience when an accused takes recourse to a defence line that when the occurrence took place he was so far away from the place of occurrence that it is extremely improbable that he would have participated in the crime. It is a basic law that in a criminal case, in which the accused is alleged to have inflicted physical injury to another person, the burden is on the prosecution to prove that the accused was present at the scene and has participated in the crime. The burden would not be lessened by the mere fact that the accused has adopted the defence of alibi. The plea of the accused in such cases need be considered only when the burden has been discharged by the prosecution satisfactorily. But once the prosecution succeeds in discharging the burden it is incumbent on the accused, who adopts the plea of alibi, to prove it with absolute certainty so as to exclude the possibility of his presence at the place of occurrence. When the presence of the accused at the scene of occurrence has been established satisfactorily by the prosecution through reliable evidence, normally the court would be slow to believe any counter-evidence to the effect that he was elsewhere when the occurrence happened. But 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 scene when the occurrence took place, the accused would, no doubt, be entitled to the benefit of that reasonable doubt. For that purpose, it would be a sound proposition to be laid down that, in such circumstances, the burden on the accused is rather heavy. It follows, therefore, that strict proof is required for establishing the plea of alibi.”

24. In order to substantiate this plea, accused Rajwati examined two defence witnesses, namely, DW1 Gajraj Singh and DW2 Kalyan Singh.

Both these witnesses have deposed that on hearing the noise in the street “aag lag gai” they rushed to the house of Mahender where they found

wife of Harbans lying burnt in the courtyard. At that time, none of the family members of Mahender were present. When PCR officials were putting Vimlesh in police vehicle, Rajwati came from the market after purchasing vegetables. It is pertinent to note here that it is not the case of appellant Mahender, that at the time of incident, he was not present at the house. Testimony of DW1 was rightly not believed by learned Trial Court by observing that he was a neighbour who admitted in cross examination that prior to his statement in the Court on 21.01.2000, he never approached the Investigating Officer or any other senior police officer or any other authority to state that he had seen the occurrence. He had not even accompanied Vimlesh and Harbans Kumar to the hospital. He also could not say as to how Vimlesh sustained burn injuries because, according to him, he came at the scene when she was already burnt. Presence of DW2 Kalyan Singh at the spot was highly doubtful inasmuch as, as per his own version, he was working in a factory at Sita Ram Bazar. His duty hours were from 10 am to 6.30/7.00 pm. The incident took place on 30th May, 1998 at around 12 noon. It was a Saturday, as such, there was no occasion for him to be present at the

house. Under the circumstances, the plea of alibi setup by the appellant Rajwati is not established.

25. In view of the foregoing, the prosecution had succeeded in establishing beyond reasonable doubt that it was accused Rajwati who pushed Vimlesh on a burning stove and poured kerosene oil, as a result of which she sustained 100% burn injuries and later succumbed to her injuries. That being so, she was rightly convicted by learned Additional Sessions Judge for offence under Section 302 IPC.

26. Coming to Section 498A Indian Penal Code, it was amended by Criminal Law Amendment Act, 1983 with a view to deal with menace of dowry deaths. Explanation appended to the Section defines cruelty. As per Explanation (b) “cruelty” means *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.*

27. Adverting to the case in hand, the dying declaration made by the deceased reflects the treatment which was meted out to her by the accused persons. She has specifically stated before the SDM that she was

harassed by her mother-in-law and father-in-law as they used to ask her to bring scooter and Rs.20,000/-.

28. This dying declaration finds substantial corroboration from the oral testimony of the witnesses and documentary evidence.

29. PW1 Chandrawati, mother of the deceased, has deposed that after a week of her marriage, when Vimlesh came to her house, she informed her that her mother-in-law and father-in-law were demanding a colour TV and Rs.20,000/- cash. She further informed her that she was being tortured and beaten for this reason. Her husband along with some of the relatives had gone to the house of accused persons in order to take Vimlesh with them on the eve of *Raksha Bandhan*, but accused persons refused to send her till their demands are met, as such, her husband and relatives returned back without taking her. After few days, she was again beaten by both the accused persons. Her daughter and her husband were forced to leave the house by the accused persons till their demands were fulfilled. As such, a complaint was made at PS Gokal Puri and thereafter at CAW Cell. Initially, the accused did not attend the hearing at CAW cell, but thereafter they attended the proceedings and promised not to demand any dowry from Vimlesh and her husband. As such, the

matter was compromised. She was taken to her matrimonial home by the accused persons and after 2-3 days, this incident had taken place.

30. Her testimony in this regard finds substantial corroboration from PW6 Girish Babu who has also deposed that at the time of marriage there was no demand of dowry but thereafter accused Mahender and Rajwati started demanding colour TV, Rs.20,000/- and scooter first from Vimlesh and thereafter from him. He had gone to the house of accused persons before *Raksha bandhan* in the year 1997. However, both the accused persons refused to send her. Accused Mahender also demanded the aforesaid articles and cash of Rs.20,000/- from him on that date. Rajwati also told him that they would send Vimlesh to her parents' house only if they meet their demands. Thereafter, he returned from there. Later on, he went to the house of accused along with some of his relatives in order to pacify them and also told them that he was not in a position to meet such high demands, but the accused persons were not ready to listen to him. He further deposed that on 16.04.1998, Vimlesh was turned out of her house by the accused persons. Harbans along with Vimlesh came to his house and informed him that they have been turned out of the house and would be allowed to stay only if they would bring

the aforesaid articles. He advised Harbans to contact his relatives as his own parents were harassing them. Thereafter, Harbans contacted his grandfather and uncle, but they refused to interfere by stating that accused Mahender would not listen to anyone. Thereafter, a complaint was made by Harbans and Vimlesh on 19.04.1998 at Police Station Gokul Puri and then to CAW Cell. Initially, the accused persons did not attend the proceedings, but later on they attended the proceedings and gave in writing that they would not further harass or beat Vimlesh nor would demand any dowry. The matter was got compromised and after a week or so i.e. on 30.05.1998, Vimlesh was burnt.

31. The ocular testimony of both these witnesses finds corroboration from documentary evidence. PW17 – SI Dushyant Singh was posted at CAW Cell, Seelam Pur on 23.04.1998. This witness has deposed that on 23.04.1998, he received a complaint Ex.PW17/A and Ex.PW17/B given by Vimlesh alleging torture and harassment and demand of dowry, particularly scooter by her in-laws i.e. Rajwati and Mahender. During the course of enquiry and proceedings in CAW Cell, on persistence of accused persons, Vimlesh, although reluctant to go back to her matrimonial home but at last agreed and thereafter the accused persons

took her to their house after giving an assurance in writing that she would live with her husband separately and the accused persons will have no interference. In view of the compromise, Vimlesh requested to close her complaint. On 30.05.1998, father of the deceased informed CAW Cell regarding death of Vimlesh.

32. Learned counsel for the appellants, however, relied upon the testimony of PW5 Maya Devi. Maya Devi was a neighbour, whose house was situated in front of the house of the accused persons. In cross examination, she deposed that she was informed by Vimlesh that there was no demand of dowry by her in-laws or husband. He also referred to the statement of her husband PW7 Harbans who deposed that after two months of marriage, he started living separately at House No.359, Nand Nagri as Vimlesh was asking him to stay at her parents' house and she also insisted for transfer of the house in her name. After staying for 2-4 days at Nand Nagri, he returned back to his parents' house and started living there. He went to the house of parents of deceased to take her back, but she refused to come till the house is transferred in her name. He further went on to depose that even parents of deceased had asked him to transfer the house in her name. He talked to his father who told

him that he cannot transfer the house in his name till the time his other brothers would become major. He went to the extent of deposing that he went to her parents' house and informed his mother-in-law that house could not be transferred in her name. Thereupon he was given beatings by her. The witness as such did not support the case of the prosecution and turned hostile. In cross examination by learned Additional Public Prosecutor for the State, he denied the suggestion that after marriage his mother and father used to demand Rs.20,000/-, TV, VCR from Vimlesh and started harassing her and also denied that on 16.04.1998, they were turned out of the house by the accused persons for non-fulfilment of dowry demands. He also denied that any complaint was made to CAW Cell against his parents for demand of dowry and harassment. However, when the attention of the witness was drawn to the copy of the complaint mark PX, then he admitted that the same bears his signatures at point 'X' and that of Vimlesh at point 'Y'. He also admitted that accused persons had given in writing in CAW Cell that they would not harass Vimlesh any further nor would demand any dowry from her and would keep her safe with them. He also admitted that due to their complaint at CAW Cell, this assurance was given by the accused persons in writing.

33. The law regarding hostile witnesses is well settled that the evidence of a prosecution witness who has been declared hostile by the prosecution cannot be rejected *in toto* merely because the prosecution chose to treat him hostile and cross-examine him. The evidence of such witness cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent their version is found to be dependable on a careful scrutiny thereof vide ***Bhagwan Singh vs. State of Harayana***, (1976) 1 SCC 389; ***Robinder Kumar Dey vs. State of Orissa***, (1976) 4 SCC 233; ***Khujji vs. State of M.P.***, (1991) 3 SCC 627; ***Rameshbhai Mohanbhai vs. State of Gujarat***, (2011) 3 SCC.

34. This being the legal position, the mere fact that PW Harbans has been declared hostile is not sufficient to discard his testimony altogether and that much part of the testimony which supports the prosecution can be read in evidence. Harbans Kumar, who initially had lodged a complaint against his parents regarding harassment being meted out to his wife Vimlesh by them on account of non-fulfilment of dowry has now turned hostile because the accused persons are none else but his own parents and he is now living with them and, therefore, he deposed that Vimlesh was never harassed by any of the accused nor any dowry

was demanded, but as the saying goes- “a man may tell a lie but not the circumstances”. He admitted filing of a complaint jointly by him and Vimlesh against the accused persons before the police and CAW Cell, which ultimately was compromised on the assurance given by the accused persons. The same amply proves that Vimlesh was harassed by the accused persons on account of non-fulfilment of their demand of dowry.

35. Furthermore, accused Mahender in his statement under Section 313 Cr.PC although denied that any dowry item was demanded from Vimlesh or she was harassed, but it was admitted by him that a joint complaint Ex.PW17/A was made by the deceased Vimlesh and her husband Harbans to SHO Gokul Puri regarding harassing Vimlesh to bring Rs.20,000/-, TV, etc. He also admitted that a similar complaint dated 22.04.1998 Ex.PW17/B was made by Vimlesh to DCP, North East District, Crime Branch Women Cell, Welcome on the direction of police. He also admitted that a compromise was entered into between him and his wife on the one hand and Girish Babu, Harbans and Vimlesh on the other hand wherein it was mentioned that he will not interfere in the life of Vimlesh and Harbans Kumar.

36. In view of the above discussion and our appraisal and analysis of the evidence on record, we have no hesitation to hold that prosecution had successfully established its case by cogent, clear and reliable evidence. That being so, the learned Trial Court rightly convicted the appellant Rajwati for offences under Section 302/498A/34 IPC and appellant Mahender for offences under Section 498A/34 IPC. The finding does not suffer from any infirmity which calls for any interference.

37. The appeals, being devoid of merit, are hereby dismissed.

38. Sentence of appellant Mahender was suspended vide order dated 24.05.2000 and sentence of appellant Rajwati was suspended vide order dated 20.04.2005. As such, they are directed to surrender within three days in order to serve the sentence imposed upon them, failing which the learned Trial Court to get them arrested to serve the sentence.

Trial Court record be sent back along with the copy of this judgment. Intimation be sent to the Superintendent Jail.

(SUNITA GUPTA)
JUDGE

(KAILASH GAMBHIR)
JUDGE

SEPTEMBER 05, 2014/rd