

GAHC010198682023



THE GAUHATI HIGH COURT AT GUWAHATI
(The High Court of Assam, Nagaland, Mizoram and Arunachal Pradesh)

PRINCIPAL SEAT AT GUWAHATI

CRIMINAL APPEAL (JAIL) NO. 101/2023

- 1) Dipjyoti Malakar, Age 40 years,
S/o Nakul Malakar,
- 2) Labanya Malakar, Age 60 years,
W/o Nakul Malakar.
Both are residents of Village-Satdola,
P.S.-Hajo, District- Kamrup, Assam

.....Appellants.

-Versus-

- 1) The State of Assam,
Represented by Public Prosecutor, Assam.
- 2) Smt Mina Das,
W/o Sri Sushil Das,
R/o Bamundi, Hirapara, P.S.- Sualkuchi,
District- Kamrup, Assam

.....Respondents.

Advocates for the appellant : Ms T Som,
Ms B Das.

Advocate for the respondent : Mr B B Gogoi, APP, Assam
Ms B Sarma, LAC, R-2.

BEFORE
HON'BLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

Date of hearing : 20.08.2024

Date of judgment : 20.08.2024

JUDGEMENT AND ORDER (ORAL)

1. Heard Ms T Som, learned counsel for the appellants, Ms B Sarma, learned Legal Aid Counsel for the respondent No. 2 and Mr B B Gogoi, learned Additional Public Prosecutor for the State of Assam.
2. This appeal is directed against the Judgment and Order dated 03.07.2023, passed by the learned Sessions Judge, Kamrup, Amingaon, in Sessions Case No. 26/2014, convicting the appellants under Section 304-B of the Indian Penal Code, 1860 (IPC, for short) and sentencing them to undergo Rigorous Imprisonment for 10 years and to pay a fine of Rs. 20,000/- each, with default stipulation.
3. Dipjyoti Malakar and Labanya Malakar will hereinafter be referred to as the appellants or 'A-1' and 'A-2', respectively.
4. The FIR was lodged on 01.01.2008, by Smt Mina Das (hereafter also referred to as the informant), contending *inter alia*, that A-1 married her daughter Rubi Das vide registered marriage dated 04.07.2007 and her daughter started her matrimonial life with the appellant, A-1, in his house. At the behest of A-2, the appellant A-1 used to subject her daughter to

cruelty to meet their illegal demand of dowry in the form of cash and furniture etc. Both A-1 and A-2 subjected Ruby Das (hereinafter also referred to as 'the victim' or 'the deceased') to cruelty as the victim failed to meet their illegal demand of dowry. They also threatened to eliminate her. On 27.07.2012, at about 04:00 pm, the appellants physically assaulted the victim and set her ablaze by dousing her with kerosene. The victim sustained grave burn injuries over her body. During her treatment at the GMCH, the FIR was lodged. As the informant was busy with the treatment of her daughter, there was a delay in lodgement of the FIR.

5. Hajo PS Case No. 1 of 2008, under Section 498(A)/307/34 of IPC was registered and the Investigating Officer (IO, for short) SI M Rahman was entrusted with the investigation. The IO embarked upon the investigation. Meanwhile, the victim succumbed to her injuries on 08.02.2008 and she passed away and on the prayer of the IO, Section 304-B IPC was added. A-1 was arrested and forwarded to custody. Meanwhile, the statements of the witnesses were recorded and on completion of investigation, charge sheet was laid against the appellants and A-2 was shown as an absconder in the charge sheet. This case was committed for trial. At the commencement of trial, a formal charge under Section 302/304-B/34 IPC was framed and read over and explained to the appellants, who abjured their guilt and claimed innocence. To substantiate its stance, the prosecution adduced the evidence of 5 (five) witnesses, including the Medical Officer (MO, for short) and the IO. On the incriminating materials, projected through the evidence by the witnesses, several questions were asked to the appellants under Section 313 of the Code of Criminal Procedure, 1973 (CrPC, for short) and the appellants pleaded not guilty to each and every question asked to them in a mechanical and evasive manner. The learned trial Court delineated the following points to decide this case:-

“POINTS FOR DETERMINATION

- (i) *Whether the accused persons in furtherance of their common intention have committed murder of the victim Rubi Das by setting her on fire on 27.12.2007 to which she succumbed on 08.02.2008 and thereby committed an offence punishable under Section 302/34 of IPC?*
- (ii) *In alternative- Whether the accused persons in furtherance of their common intention has caused dowry death of victim Rubi Das due to non-fulfilment of dowry demand by setting her on fire by pouring kerosene oil on 27.12.2007 to which she succumbed on 08.02.2008 and thereby committed an offence punishable under Section 304(B)/34 IPC.*

6. The learned counsel for the appellant, Ms T Som laid stress in her argument that all the witnesses examined by the prosecution are interested witnesses and family members. It is submitted that there is not a single eye-witness in this case. Circumstantial evidence does not form a complete chain. The evidence reflects that the victim was alive for one month after the incident, but no dying declaration was recorded by the doctor or any Magistrate. However, much reliance has been placed on the oral dying declaration before PW-1 and PW-3. It is stressed that PW-3 is the uncle (Moha) of the victim. The incident allegedly occurred on 27/12/2007, whereas the FIR was lodged on 01.01.2008, leaving enough scope for fabrication of the FIR. After more than a month, the victim succumbed to her injuries, but this case is *sans* any dying declaration recorded by the IO or by the MO. On mere conjectures and surmises, without any substantial evidence cases of dowry death cannot be proved. It has to be contemplated whether two innocent persons can be put behind bars merely on conjectures and surmises. The 60-year-old lady, i.e., the A-2 is behind bars for more than 500

days and she has been erroneously incarcerated by an erroneous judgment of the trial Court. It was also not asserted whether the burn injuries were accidental or suicidal or whether the injuries were homicidal in nature. There is nothing on record to bring home the charges under Section 304-B of the IPC. The allegation of torture meted out to the victim has not been substantiated. Not a single FIR was lodged against the appellants relating to domestic violence as alleged by PW-1. The PW-2's allegation is very vague as he has relied on the dying declaration of the victim before his wife (PW-1).

7. PW-2 is the informant's father and his evidence clearly reveals that the victim was in a position to speak. Thus, the question lies, why the victim's dying declaration was not formally recorded and reduced to writing or even why her statement under Section 161 CrPC has not been recorded. This could have been used as a dying declaration. The MO's evidence clearly reveals that the victim has sustained 40% burn injuries, which goes to show that the victim would have been in a position to speak. It is submitted that sometimes people survive 60% burn injuries. There is nothing to substantiate or fortify the prosecution case as no seizure has been made in connection with this case.

8. The learned Legal Aid Counsel, Ms B Sarma, has raised objection stating that this is nothing but a case of dowry death. The incident occurred within one year of her marriage. The delay in lodgement of the FIR is not crucial to this case as the FIR was lodged after 4 days, as the informant was busy with her daughter's treatment. It is stressed by the learned Legal Aid Counsel that PW-3 is an independent witness and not the victim's uncle.

9. The learned Legal Aid Counsel and the learned Additional Public Prosecutor has stated that in cases of this nature, one cannot expect eye-witnesses. The incident occurred within

the four walls of the house and the victim was tortured within the four corners of her house, leading up to the incident. It is further submitted that at this stage, it cannot be contemplated whether the incident was accidental or suicidal incident. The appellants have not stated through their statements under Section 313 CrPC that the incident was a case of suicidal death. They have denied every query in a mechanical manner.

10. It is also submitted by the learned Additional Public Prosecutor and the learned Legal Aid Counsel that there are two corroborating oral dying declarations and the allegation of cruelty by all the witnesses, leads us to believe that both the appellants are complicit.

11. In reply to the argument placed by the respondents' side, the learned counsel for the appellants has submitted that the appellants could give their answers under Section 313 CrPC, only to the questions framed by the trial Court and when the appellants were not asked about the nature of death, they could not answer, whether death was suicidal or homicidal in nature.

12. It is also emphasized by the learned counsel for the appellants that the allegations by the deceased victim before her parents and her uncle that the appellants have subjected her to cruelty and set her ablaze, cannot be considered to be dying declarations as these are mere allegations.

13. It has been held by the learned trial Court that the defence had ample of opportunities to cross-examine the witnesses, but the defence failed to dislodge the evidence adduced by the prosecution witnesses. The evidence of all the witnesses could not be contradicted and controverted by the defence through the cross-examination of the witnesses. A careful

analysis of the evidence reflects that the witnesses have not tried to improve their case. Even if death was suicidal in nature, death had occurred within 7 years of marriage and it has been proved by the prosecution that the victim was subjected to cruelty due to non-fulfilment of dowry demand. Section 113-B of the Indian Evidence Act, 1872 (Evidence Act, for short), deals with presumption as to dowry death. A Court is bound to presume that the person has committed dowry death if it is shown that soon before her death the victim was subjected to cruelty. This presumption is always rebuttable, but the appellants failed to rebut the evidence. No contradiction could be elicited through the cross-examination of the witnesses. There is overwhelming evidence that the appellants have subjected the victim to cruelty to the meet their illegal demand of dowry and her death is nothing but dowry death. All the necessary ingredients of Section 304-B of the IPC have been proved beyond a reasonable doubt.

14. The remaining part of the arguments by the learned counsel for both the sides and the Judgment of the trial Court will be discussed at an appropriate stage.

15. Now, the question that falls for consideration is that whether the trial Court has erred in convicting the appellants under Section 304-B IPC.

16. To decide this case in its proper perspective, the evidence is re-appreciated.

17. The informant Mina Das deposed as PW-1 that her daughter had a love affair with the appellant, A-1 and they got their marriage registered. After her marriage, her daughter, Rubi Das was subjected to cruelty by her husband and her in-laws. They used to threaten her that they would set her ablaze if she could not meet their demand of dowry. The victim once came back to her parental home as she was subjected to cruelty by the appellants and the other

family members. Once, A-1 assaulted her daughter in her parental home.

18. PW-1 further deposed that she arranged a rented house for her daughter and son-in-law, but the appellant, A-1 took her daughter to his house. This time, her daughter was assaulted till she passed out and A-1 also set her daughter on fire. Her daughter was kept in a goat pen and she was not allowed proper food. Her daughter's neighbours also used to inform her that her daughter was being assaulted in the appellants' house as her daughter's matrimonial home was on the roadside and neighbours used to hear her daughter being tortured. When the informant heard about her daughter's plight, she went to meet her daughter in her matrimonial home and she noticed that her daughter was kept on a raised platform constructed by three betel nut trees in a goat pen.

19. PW-1 further deposed that her mother's family who resides near the appellants' house was informed that her daughter was assaulted by the appellants and was thereafter set ablaze. Her mother took her daughter to the hospital. When she received this information, PW-1 immediately went to the GMCH and found her daughter in a serious condition. PW-1 further deposed that her daughter underwent treatment for one month and she finally died in the GMCH. She lodged the FIR while her daughter was undergoing treatment at the GMCH, after asking her daughter about the incident. Her daughter informed her that her husband had assaulted her and poured kerosene on her body. PW-1 has proved the FIR as Exhibit-1 and Exhibit 1(1) as her signature.

20. In her cross-examination, PW-1 has deposed that her son-in-law's house is near her mother Smt Nirubala Das's house, which is about 2 kilometres apart. Her daughter was 18 years old at the time she got married to A-1 and she was a student of Class-IX at that time.

She has further admitted in her cross-examination that she did not witness the incident and she could not remember the exact date when her daughter was assaulted and set ablaze by the appellants. But she could recall that, it was in the Assamese month of Puh (which corresponds to December-January, according to the Gregorian calendar). She has admitted in her cross-examination that the people from her daughter's village did not inform her about the incident initially, but her mother had informed her about the incident at about 04:00 or 05:00 pm. She could not recall the name of the person who had informed her over phone about her daughter's condition, but that person is no more and has passed away, about two years back. She has also stated in her cross-examination that her daughter's statement was taken by a doctor, but she did not know whether any Magistrate has recorded her daughter's statement. She has admitted in her cross-examination that her daughter was subjected to cruelty, she did not lodge any FIR with the Police and she has not informed the Police that her daughter was kept in a goat pen, but she has deposed that while she was contemplating to inform the Police about the cruelty meted to her daughter, the incident took place. She did not know who informed her mother about the incident, but the people who were passing by the appellant's house, informed her mother about the incident. Her mother passed away after three years of the incident. Her brother-in-law, Moti Das (PW-3), her elder sister Lakhi Das and some other people took her daughter to the GMCH. Her brother-in-law's house is situated about one mile away from her mother's house.

21. PW-1 has further deposed in her cross-examination that she did not know who used whitener on the FIR. It is apt to mention at this juncture that on the date, i.e., 01.01.2008, in the middle of the FIR, it is evident that whitener was used. She has further testified that her daughter could speak after 3/4 days of the incident. The remaining part of her cross-

examination are mere denials of the suggestions by the defence counsel, which does not appear to be noteworthy.

22. The poignant point in this case is that the victim was able to talk to her mother and according to PW-1, the victim gave her statement before the doctor, but no statement could be found on record. There is no dying declaration recorded by the doctor or by the Magistrate. The IO took no pains to record the statement of the victim under Section 161 CrPC. When the victim was undergoing treatment or rather if some statement has been recorded the prosecution has not brought such statement on record or exhibited any such statement as dying declaration. This argument of the learned counsel for the appellants can be safely brushed aside. It has to be borne in mind that the victim sustained 40% burn injuries all over her body. She was able to speak, but with 40% burn injuries over her body would it be possible to get her dying declaration recorded?

23. The first person, i.e. the uncle of the victim, Moti Ram Das, who found the victim lying in an injured condition, deposed as PW-3 that the incident occurred on 27.12.2007. At about 04:00 pm, he was proceeding towards Bagta Xatdola. He noticed a crowd in front of the appellant's house and stopped there and went inside the campus of the house. He noticed Rubi Das lying on the ground in a burnt condition and she was unconscious. He immediately informed the 108 ambulance and he took the victim to the Hajo CHC and on the advice of the doctor, he took the victim to GMCH. Subsequently, on 01.01.2008, the informant lodged the FIR with the Police. The victim had sustained 40% burn injuries and he noticed that her face, neck, chest and abdomen were completely burnt. During the course of treatment for about 42/43 days, the victim succumbed to her injuries and she passed away. When he met the

victim in the hospital, the victim informed him that the appellants had doused kerosene over her and set her ablaze. He informed the victim's parents about the incident on the day of the incident and on the next date, they went to the GMCH.

24. PW-3 further deposed that the victim got married to A-1 in the Court on 04.07.2007. As he is closely acquainted with the appellants, he used to visit them and he learnt from the victim that the appellants used to subject her to cruelty to meet their illegal demand of dowry, as her parents were unable to fulfil their demand of dowry due to financial constraints. He further deposed that the Police did not record his statement during investigation.

25. In his cross-examination, PW-3 has testified that the accused persons' house would be a kilometre away from his house. He has admitted that he did not witness the incident. Hiran Das, Madhab Malakar and other persons were present at the place of occurrence (PO, for short), at the time of the incident. He also stated in his cross-examination that the appellants demanded furniture, utensils etc., from the victim.

26. It is also pertinent to mention at this juncture that PW-1 has deposed that her daughter informed her that the appellant A-1 poured kerosene over her and set her ablaze, whereas PW-3 has stated that the victim had mentioned before him that both the appellants have poured kerosene over her and set her ablaze. The learned counsel for the appellants has submitted that there is a deviation in the evidence as one witness has implicated only A-1 and the other witness has implicated both the appellants. This exonerates the appellants and the appellants ought to be given the benefit of doubt.

27. This Court cannot be oblivious of the conduct of the appellants after the incident. Their

conduct does not at all exonerate them. It has surfaced from the evidence that the victim was lying in the verandah and PW-3 found the victim lying in the verandah and he took the initiative to take the victim for medical treatment. The victim has sustained grievous burn injuries and she was lying in the verandah, but the family members or the appellants were unshaken by her plight. No endeavours were made by the appellants and their family members to provide treatment to the victim and now, at this stage, they are taking the plea that the victim has committed suicide. Assuming a woman commits suicide by setting herself ablaze, she will not lie down silently on the verandah. Definitely, she will be screaming out of pain. As per Section 8 of the Evidence Act, the subsequent conduct of the appellants after the incident is a relevant fact. Section 8 reads:-

“8. Motive, preparation and previous or subsequent conduct.

Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.

The conduct of any party, or of any agent to any party, to any suit or proceeding, in reference to such suit or proceeding, or in reference to any fact in issue or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

Explanation 1. - The word "conduct" in this section does not include statements; unless those statements accompany and explain acts other than statements; but this explanation is not to affect the relevancy of statements under any other section of this Act.

Explanation 2. - When the conduct of any person is relevant, any statement made to him or in his presence and hearing, which affects such conduct, is relevant.”

28. In this case, the subsequent conduct of the appellants speaks volumes. The evidence of

PW-3 depicts that he noticed a crowd in front of the appellants' house and stopped there and went inside the premises and noticed the victim's body lying on the ground in a burnt condition and she unconscious. He immediately called the 108 Ambulance and took the victim to the Hajo CHC. Thus, the conduct of the appellants after the incident is a strong circumstance against the appellants.

29. Reverting back to the evidence, the victim's father, Sri Sushil Das deposed as PW-2 that after his daughter's marriage with A-1 in the year 2007, the appellants along with the father of A-1 visited their house and demanded furniture and money from them. He could not fulfil their demand and hence, on several occasions, his daughter was subjected to mental and physical cruelty. Once, his daughter visited them and informed them that she was subjected to cruelty due to non-fulfilment of demand of dowry by the appellants. On 27.12.2007, both the appellants set his daughter aflame, as she failed to meet their illegal demand of dowry. His in-laws' family members informed them about the incident and they were taken to meet their daughter at GMCH. They found their daughter with burn injuries. His daughter informed them that she had sustained burn injuries. His daughter was alive and she was in a position to speak slowly. His daughter underwent treatment for about 1 ½ month. When his wife asked his daughter about the incident, his daughter told his wife that the appellants set her on fire. After about 1 ½ month, his daughter succumbed to her injuries at GMCH. The Police held inquest in his presence. He has proved his signature on the inquest report as Exhibit-2 (1). His daughter's body was handed over to him. His wife lodged the FIR with the Police.

30. Highlighting the evidence of PW-2, the learned counsel for the appellants laid stress in her argument that although he had a conversation with his daughter, his daughter did not

inform him that she was set ablaze by the appellants. His daughter informed him that she had sustained burn injuries, but his evidence reveals that his wife was informed by his daughter about the burn injuries. The benefit of doubt has to be extended to the appellants, because, PW-2 was hesitant to depose that his daughter was set ablaze by the appellants. He stated that his daughter informed him that she had sustained injuries and on being asked, the victim told his wife that the appellants set her ablaze.

31. In his cross-examination, PW-2 has admitted that he could not remember the exact date and time when the appellants went to his house to demand furniture and money. He has also stated in the cross-examination that he could not recall when his daughter informed him about the incident, but he was present at that time. He has also denied the suggestion of the defence that his daughter did not disclose that the appellants set her ablaze as she failed to fulfil their illegal demands.

32. A scrutiny of the evidence of PW-1, PW-2 and PW-3 reveals that no contradictions could be elicited through the cross-examination of the witnesses as per Section 145 of Evidence Act, 1872 (Evidence Act, for short) qua Section 162 of the CrPC. It has to be borne in mind that in a case of dowry death, it is not necessary that the injuries have to be homicidal in nature. The circumstances have to be unnatural. The cross-examination of the IO reveals that no contradiction could be elicited through the cross-examination of the witnesses.

33. Sri Mina Kanta Dutta, deposed as PW-5 that on 24.04.2008, while serving as SI of Police at Hajo Police Station, the OC of the Hajo Police Station endorsed him with the investigation of the instant case. The earlier IO, SI M Rahman was transferred and he (PW-5) was entrusted to complete the investigation. Accordingly, he took up the investigation and

visited the PO, recorded the statements of witnesses and arrested A-1 and forwarded him to the Court. He prepared the sketch map, Exhibit-7. He has put his signature on the sketch map as Exhibit-7 (1). He learnt that the victim died in the GMCH on 08.02.2008 and he prayed for adding Section 304-B IPC and his prayer was allowed. Meanwhile, he was transferred from Hajo Police Station and he handed over the Case Diary to the OC.

34. In his cross-examination, he has deposed that the FIR was registered on 01.01.2008 and he took up the investigation on 24.04.2008. He could not find any independent witness near the PO and did not record any such statement. He has recorded the statements of the informant, Smt Mina PW-1 and Sushil Das, but he did not seize any article from the PO. He did not record the statement of the doctor, who provided treatment to the victim while she was alive. He did not find any dying declaration in the Case Diary.

35. Now, the core question is whether the evidence of the three related witnesses can be discarded only on the ground that they are related and are thus unreliable witnesses.

36. Before arriving at the conclusion, the evidence of the MO is also relevant. Dr R Chaliha deposed as PW-4 that on 08.02.2008, he performed Post-Mortem Examination on the body of Rubi Malakar with reference to the instant case and his opinion was that:-

“Death was due to ‘exhausted’ as a result of ante mortem burn injuries sustained on the body covering approximately 40% of the total body surface area.

Time since death was 4 to 8 hours approximately.”

He has proved the Post-Mortem Report as Exhibit-3 and his signature as Exhibit- 3 (2) and the signature of Dr A P Baruah as 3 (1).

37. Now, when no contradiction could be elicited through the cross-examination of the witnesses relating to the initial statement made before the IO, can the witnesses be termed as unreliable witness, because they are related witnesses.

39. The learned counsel for the appellants has relied on the decision of Hon'ble the Supreme Court in **Charan Singh @ Charanjit Singh –Vs- State of Uttarakhand;** reported in **2023 SCC OnLine SC 454**, wherein it has been held and observed that-

“21. In the aforesaid evidence led by the prosecution, none of the witnesses stated about the cruelty or harassment to the deceased by the appellant or any of his family members on account of demand of dowry soon before the death or otherwise. Rather harassment has not been narrated by anyone. It is only certain oral averments regarding demand of motorcycle and land which is also much prior to the incident. The aforesaid evidence led by the prosecution does not fulfil the pre-requisites to invoke presumption under Section 304B IPC or Section 113B of the Indian Evidence Act. Even the ingredients of Section 498A IPC are not made out for the same reason as there is no evidence of cruelty and harassment to the deceased soon before her death.

22. Defence had produced Gurmej Singh as DW-1, who was head of the village at the time of incident. He stated that the information about the death was given to the parents of the deceased and other family members. He stated that belongings of the deceased were handed over to her maternal grandmother and uncle after cremation. His statement is in line with the admission made by Biro Bai (PW-3), maternal grandmother, Balbir Singh (PW-2). Meaning thereby that there was no suspicion regarding the death of the deceased.

23. On a collective appreciation of the evidence led by the prosecution, we are of the considered view that the pre- requisites to raise presumption under Section 304B IPC and Section 113B of the Indian Evidence Act having not been fulfilled, the conviction of the appellant cannot be justified. Mere death of the deceased being unnatural in the matrimonial Criminal Appeal No. 447 of 2012 home within seven years of marriage will not be sufficient to convict the accused under Section 304B and 498A IPC. The cause of death as such is not

known.

24. For the reasons mentioned above, in our opinion, the conviction and sentence of the appellant under Section 304B, 498A and 201 IPC cannot be legally sustained. The appeal is accordingly allowed. The impugned judgment of the High Court is set aside. The bail bonds stand cancelled.”

40. Reverting back to this case, it is held that the decision of **Charan Singh @ Charanjit Singh (supra)** is not relevant to this case. In this case, although the witnesses are related witnesses their uncontradicted evidence clearly reveals that the victim was subjected to inhuman cruelty by the appellants within one year of her marriage.

41. The learned counsel for the appellants has also relied on the decision of Hon'ble the Supreme Court in **Uttam –Vs- State of Maharashtra;** reported in **(2022) 8 SCC 576,** wherein it has been held and observed that-

“34. A perusal of the testimonies of PW-2 and PW-12 show that they have offered varying versions of what had allegedly been narrated to them by the deceased. Both of them stated that failure to satisfy the appellant's constant dowry demands had led to the incident. There was no mention of the illicit relationship of the appellant with a widow in the neighbourhood Criminal Appeal No.485 of 2012 which was a constant cause of quarrel between the deceased and her husband and had led to the incident. Pertinently, both the said witnesses stated that their statements were not recorded by the police during the investigation and that they had deposed for the first time only when they had entered the witness box during the trial.

35. In Arun Bhanudas Pawar (supra), cited by learned counsel for the appellant, this Court had declined to accept the testimony of an interested witness who happened to be the mother of the victim, in the absence of any corroboration from an independent witness including the Medical Officer who was attending to the victim, to prove that the victim had regained consciousness when the mother had met him in the hospital and had named the

accused as the assailant along with two other associates. An additional factor that weighed with the court for rejecting the testimony of the mother was that she had not stated so in her statement recorded by the Police under Section 161 Cr.P.C. and it was for the first time before the Court that she had made such a statement. Holding that the oral dying declaration made by the deceased ought to be treated with care and caution, since the maker of the statement cannot be subjected to any cross-examination, the Court found fault with the High Court and trial Court for having accepted the said oral dying declaration allegedly made by the deceased to her mother, an interested witness, when there was nothing to show that the deceased was in a fit condition to make an oral declaration to his mother. In Poonam Bai (supra), a similar view was taken by this Court and it was held thus:

“16. As far as the oral dying declaration is concerned, the evidence on record is very shaky, apart from the fact that evidence relating to oral dying declaration is a weak type of evidence in and of itself. As per the case of the prosecution, the deceased had made an oral dying declaration before Lalita Sahu (PW 2), Pilaram Sahu (PW 3), Parvati Bai (PW 4), and others. Though PWs 2, 3 and 4 have deposed that the deceased did make an oral dying declaration before them implicating the appellant, this version is clearly only an afterthought, inasmuch as the same was brought up before the trial court for the first time. In their statements recorded by the police under Section 161 of the Code of Criminal Procedure, these witnesses had not made any statement relating to the alleged oral dying declaration of the deceased. These factors have been noted by the trial court in its detailed judgment. Thus, the evidence of PWs 2, 3 and 4 relating to the oral dying declaration is clearly an improved version, and this has been proved by the defence in accordance with law.”

38. In the light of the evidence discussed above and being mindful of the principles governing appreciation of the evidence related to multiple dying declarations, we find it difficult to endorse the conclusion arrived at by the High Court. The evidence of PW-2 and PW-12 cannot be treated as stellar enough to hold the appellant guilty for the offence of murdering his wife. Hence, he is entitled to being granted benefit of doubt”

42. Reverting back to this case, it is held that this case is not similar to the case of ***Uttam's case (supra)***. In the instant case, there is not a single contradiction relating to the earlier statement of the witnesses. PW-1, PW-2 and PW-3 may be related witnesses, but the defence could not contradict their testimonies as per Section 145 of the Evidence Act, vis-à-vis under Section 162 of the CrPC. Moreover, this is not a case of homicide, this is a case of dowry death. The prosecution has adduced evidence of corroborating oral dying declaration made by the victim to PW-1 and PW-3. I would also like to reiterate that this statement of oral dying declaration has not been contradicted by the defence.

43. The Hon'ble Supreme Court in the case between ***Shanti –Vs- State of Haryana;*** reported in **AIR (1991) SC 1226**, had observed that-

“.....but even presuming that it is a case of suicide even then it would be death which had occurred in unnatural circumstances, even in such a case Section 304(B) of IPC is attracted and this position is not disputed. Therefore, the prosecution has established that the appellant has committed an offence punishable under Section 304(B) of IPC beyond all reasonable doubt.

44. In this case, it is apparent from the evidence that immediately after her marriage, the victim was subjected to cruelty by her in-laws, to meet their illegal demand of dowry. All the witnesses, PW-1, PW-2 and PW-3 have deposed in chorus that the victim has informed that she was subjected to cruelty by the appellants to meet their illegal demand of dowry. Section 304-B reads:-

“304B. Dowry death. -- (1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal

circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death.

(2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life"

45. In conjunction with Section 304-B of the IPC, Section 113-B of the Evidence Act, reads:-

"113B. Presumption as to dowry death. -- When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman had been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the court shall presume that such person had caused the dowry death."

46. In this case, there is not an iota of doubt that the victim was subjected to cruelty and the victim finally succumbed to severe burn injuries. This case is nothing but a case of dowry death, but are both the appellants liable in this case.

47. The evidence of PW-1 can answer this question. It would be apt to reiterate that PW-1 has stated that "once the appellant, A-1 assaulted her daughter in her house". Her allegations were basically directed towards the appellant, A-1. It is true that she has also incriminated her daughter's mother-in-law. PW-1 has categorically stated that her daughter has stated that her husband's family had assaulted her and poured kerosene on her body. Assuming that her daughter has not made this allegation against the appellants before PW-1, yet the fact that

the victim was subjected to cruelty cannot be ruled out. However, the grain has to be separated from the chaff. The witnesses have stated that the appellant A-1 and his family members used to subject the victim to cruelty, to meet their illegal demand of dowry, has been proved beyond a reasonable doubt against the appellant A-1, but A-2 has not been directly alleged and specifically, named by any of the witnesses. Through her FIR and her deposition, PW-1 has specifically alleged that A-1 used to subject her daughter to cruelty. In the Fir, PW-1 has stated that A-1, at the behest of A-2, used to subject her daughter (Rubi) to cruelty. In her evidence in chief, PW-1 has categorically stated that A-1 doused the victim with kerosene and set her ablaze. PW-2 did not directly incriminate the appellants. He has stated that his daughter informed his wife that the appellants set her ablaze. Domestic violence was prevalent in the household. There is incriminating evidence that A-1 and A-2 subjected the victim to cruelty, but there are specific allegations against A-1. A-2 has been implicated in a blanket manner. All the witnesses have referred to A-2 as appellant's A-1's family. Now, it is not clear from the evidence whether the appellants' family consists of only his mother or the other accused. Thus, the appellant, A-2 deserves a benefit of doubt. Although A-2 was also charged and convicted under Section 304-B IPC, a benefit of doubt is extended to A-2.

48. I would like to rely on the decision of Hon'ble the Supreme Court in ***Mohd. Rojali Ali And Others –Vs- State of Assam, Ministry of Home Affairs through Secretary,*** reported in **(2019) 19 SCC 567**, wherein it has been observed that-

“14. In criminal cases, it is often the case that the offence is witnessed by a close relative of the victim, whose presence on the scene of the offence would be natural. The evidence of such a witness cannot automatically be discarded by labelling the witness as interested.

Indeed, one of the earliest statements with respect to interested

witnesses in criminal cases was made by this Court in Dalip Singh v. State of Punjab, 1954 SCR 145, wherein this Court observed:

“26. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person...”

15. In case of a related witness, the Court may not treat his or her testimony as inherently tainted, and needs to ensure only that the evidence is inherently reliable, probable, cogent and consistent. We may refer to the observations of this Court in Jayabalan v. Union Territory of Pondicherry, (2010) 1 SCC 199:

“23. We are of the considered view that in cases where the Court is called upon to deal with the evidence of the interested witnesses, the approach of the Court while appreciating the evidence of such witnesses must not be pedantic. The Court must be cautious in appreciating and accepting the evidence given by the interested witnesses but the Court must not be suspicious of such evidence. The primary endeavour of the Court must be to look for consistency. The evidence of a witness cannot be ignored or thrown out solely because it comes from the mouth of a person who is closely related to the victim.”

16. In the instant matter, as already discussed above, we find the testimony of the eye-witnesses to be consistent and reliable, and therefore reject the contention of the appellants that the testimony of the eye-witnesses must be disbelieved because they are close relatives of the deceased and hence interested witnesses.”

49. It has been held by Hon'ble the Supreme Court in **Balraje @ Trimbak –Vs- State of Maharashtra**; reported in **(2010) 6 SCC 673** that-

“14) Law is fairly well settled that even if acquittal is recorded in respect of the co-

accused on the ground that there were exaggerations and embellishments, yet conviction can be recorded if the evidence is found cogent, credible and truthful in respect of another accused. The mere fact that the witnesses were related to the deceased cannot be a ground to discard their evidence. In law, testimony of an injured witness is given importance. When the eyewitnesses are stated to be interested and inimically disposed towards the accused, it has to be noted that it would not be proper to conclude that they would shield the real culprit and rope in innocent persons. The truth or otherwise of the evidence has to be weighed pragmatically. The court would be required to analyse the evidence of related witnesses and those witnesses who are inimically disposed towards the accused. But if after careful analysis and scrutiny of their evidence, the version given by the witnesses appears to be clear, cogent and credible, there is no reason to discard the same. Conviction can be made on the basis of such evidence. In our case, as observed earlier, the Trial Court and the High Court have analysed the testimony of PWs 1, 2 and 4 in great detail. It is revealed that the appellant had inflicted the first blow on the deceased in his chest and he fell on the ground. The High Court found that the role ascribed to the others was not fully satisfied.”

50. Reverting back to this instant case, it is held that the argument of the learned defence counsel that the evidence of related witnesses cannot be relied upon, can be safely brushed aside. It is thereby held that the prosecution could prove beyond a reasonable doubt that the appellant, A-1 is guilty of offence of dowry death. It has emerged from the evidence that the victim died within one year of her marriage. There is robust and overwhelming evidence that the victim was subjected to cruelty by A-1. The evidence of the witnesses have not been contradicted through extensive cross-examination by the defence. The argument of the learned counsel for the appellants that not a single FIR was lodged relating to cruelty, can also be ignored. The incident happened within one year of marriage between the appellant,

A-1 and the victim. The victim did not even have time to lodge an FIR relating to the cruelty extended to her.

51. In the wake of my foregoing discussions, the appeal is partly allowed. The conviction of the appellant, A-2, Labanya Malakar, under Section 304-B IPC, is set aside and she is acquitted from the charges on benefit of doubt. The order of conviction of the appellant, A-1, Dipjyoti Malakar, is upheld, but the punishment is modified and scaled down to 7 (seven) years. The appellant, A-1, Dipjyoti Malakar is sentenced to undergo Rigorous Imprisonment for 7 (seven) and pay a fine of Rs. 1,000/- and in default of payment of fine, to undergo Rigorous Imprisonment for one month. The period of detention of the appellant, A-1 during investigation and trial is set off with the custodial sentence.

52. Appeal is partly allowed.

53. Send back the Trial Court Record.

JUDGE

Comparing Assistant