

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

Judgment reserved on: May 21, 2010
Judgment delivered on: June 03, 2010

+ **CRIMINAL APPEAL NO.887/2009**

BUDH RAM @ PAPPU & ORS.APPELLANTS
Through: Mr. Sunil K. Mittal, Advocate with
Mr. Kshitij Mittal, Advocate

Versus

STATERESPONDENT
Through: Mr. Lovkesh Sawhney, APP

CORAM:
HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE AJIT BHARIHOKE

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

Yes

AJIT BHARIHOKE, J.

1. This appeal is directed against the impugned judgment dated 18th August, 2009 in Sessions Case No. 118/08, FIR No. 331/07, P.S. Dabri, in terms of which the appellants Budh Ram, Hazari Lal and Ms. Kamli have been convicted for the offences punishable under Section 498A IPC read with Section 34 IPC and Section 302 IPC read with Section 34 IPC. They have been sentenced to undergo imprisonment for life and also to pay a fine of Rs. 5000/- each, in default of payment of fine, to

undergo SI for the period of 6 months for the offence of murder punishable under Section 302 IPC and for the offence punishable under Section 498A IPC, all three of them have been sentenced to undergo RI for the period of 2 years and to pay a fine of Rs. 5000/-, in default, to undergo SI for further period of 6 months.

2. Briefly stated, case of the prosecution is that Anita (hereinafter referred to as 'deceased') and her elder sister Sunita were married on 06th March, 2002 to the appellant Hazari Lal and his elder brother Murari Lal (PW12) respectively. Appellants Budh Ram and Ms. Kamli are the parents of appellant Hazari Lal.

3. It is the case of prosecution that after the marriage, elder sister Sunita started living in her matrimonial home but the deceased continued to live with her parents till her 'gona' ceremony was performed in the year 2005. It is claimed by the prosecution that immediately after the 'gona' ceremony, the in-laws of Anita including her husband, brother-in-law Yogesh and sister-in-law Seema started harassing and ill-treating her on account of insufficient dowry brought by her. This continued till 'bhai-dhuj' of the year 2006 when the deceased was turned out of her matrimonial house. Thereafter, the deceased continued to live with her parents till about 10 days prior to the fateful day i.e. 19th April, 2007, when the deceased sustained burn injuries due to fire. It is the case of the prosecution that 10 days prior to 19th April, 2007, the in-laws of the deceased visited her parents' house with some members of 'biradri' and persuaded them to send the

deceased to her matrimonial home. On the persuasion of 'biradri' people, the parents of the deceased sent her to her matrimonial home. However, there was no change in the attitude of the appellants towards the deceased and they continued to ill-treat her. It is alleged that in the morning of 19th April, 2007, the deceased sustained 55% burn injuries and she was admitted in DDU Hospital by her husband and parents-in-law. As per the MLC Ex.PW4/A prepared at the DDU Hospital, the deceased was brought to the hospital by appellant Hazari Lal on 19th April, 2007 at 06:30 a.m. with the alleged history of "burn injuries as told by the Pt. herself and B/B" and she was smelling of kerosene. Intimation about her admission in the hospital was sent by the Duty Constable to the police station, which was recorded as DD No.14B, P.S. Dabri. Copy of said DD report was entrusted to ASI Hari Kishan (PW17) for verification. ASI Hari Kishan (PW17) reached DDU Hospital and collected the MLC of the deceased. However, by that time, Anita had been referred to RML Hospital for further treatment. ASI Hari Kishan (PW17) then reached at the spot of occurrence i.e. House No. RZ-A3/49, Gali No. 1, Durga Park, New Delhi along with Constable Pawan Kumar. On inspection, he did not find any sign of burning in the form of burnt clothes etc. and on spot inspection, it appeared that the house had been cleaned of signs of the occurrence. He intimated senior officers and the SDM. Photographer and Crime Team were also summoned at the spot. On local enquiry, he found that the incident had taken place in the bathroom located at the

ground floor of the house. Smell of kerosene oil was present in the bathroom as well as in the portion of 'gali' adjoining the bathroom. Crime Team inspected the spot and prepared its report Ex.PW15/A. The Investigating Officer thereafter went to RML Hospital and moved an application (Ex.PW17/A) seeking permission to record the statement of Anita (deceased). The doctor declared her unfit for statement and this information was conveyed to the Executive Magistrate Surender Singh (PW9), who was looking after the work of SDM, Palam. On 20th April, 2007, ASI Hari Kishan (PW17) reached at RML Hospital on instructions of the SDM. The SDM also reached there and recorded statement of the deceased after she was declared fit for making statement by the doctor concerned.

4. The deceased Anita in her statement Ex.PW9/A, which is now treated as her dying declaration because of her death, named the appellants as well as her brother-in-law Yogesh and sister-in-law Seema as the persons responsible for her burn injuries. She stated that on 19th April, 2007 at around 03:00 a.m., while she was sleeping, her sister-in-law, brother-in-law and father-in-law caught hold of her and her mother-in-law and husband set on fire after pouring kerosene oil on her. She shouted for help but no-one came to her help. Thereafter, her husband and parents-in-law brought her to the hospital where she became unconscious. When she regained consciousness, her family members were by her side and she was in RML Hospital. On the basis

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of said statement, formal FIR (Ex.PW7/A) was registered under Section 498A/307/34 IPC.

5. The deceased ultimately succumbed to her injuries on 03rd May, 2007. Intimation about her death was conveyed to the police station by Duty Constable vide DD No. 80-B, P.S. Dabri. Copy of the DD report was entrusted to Inspector Dharambir for verification. He visited RML Hospital, arranged for the post-mortem examination of the dead body, completed the formalities of investigation and on completion of investigation, filed charge-sheet against the appellants, showing Yogesh and Seema as absconders.

6. On consideration of the charge-sheet, the appellants were charged for the offences punishable under Sections 302/498A/304B/201 IPC all read with Section 34 IPC. The appellants pleaded not guilty to the charges and claimed to be tried.

7. In order to bring home the guilt of the appellants, the prosecution has examined as many as 19 witnesses. The material witnesses, however, are PW3 Munna Lal and PW6 Jilla Devi, parents of the deceased besides PW9 Surender Singh, Executive Magistrate.

8. The appellants, when examined under Section 313 Cr.P.C. to explain the incriminating evidence appearing against them, denied the prosecution case. Appellant Hazari Lal explained that the deceased did not wish to live with him. In defence, appellants have examined two witnesses namely DW1 Ram Kishan and DW2 Om Prakash.

9. On perusal of the record, it transpires that there is no eye-witness to establish the charge under Section 302 read with Section 34 IPC against the appellants. The case of the prosecution as regards this charge is primarily based upon the purported dying declaration of the deceased Anita made in presence of PW9 Surender Singh, Executive Magistrate, Palam, New Delhi. As regards the charge under Section 498A IPC, the prosecution case rests on the testimony of PW3 Munna Lal and PW6 Jilla Devi, parents of the deceased. Other witnesses are formal witnesses who either identified the dead body or who were associated with the preparation of MLC of the deceased and her post-mortem examination or with the investigation of the case. Before advertent to the submissions made on behalf of the appellants, it would be appropriate to have a look at the testimony of some of the important witnesses.

10. PW3 Munna Lal has testified about the marriage of his daughter Anita with appellant Hazari Lal on 06th March, 2002. He stated that on the same day, his elder daughter Sunita was also married to Murari Lal, brother of the appellant Hazari Lal. According to him, 'gona' of Anita took place three years after his marriage. Thereafter, she stayed for some time in her matrimonial home and then, she shifted to her parental home. He stated in his examination-in-chief that Hazari Lal used to beat his daughter after consuming liquor and he also used to demand dowry from his daughter. Sometimes, appellant Hazari Lal demanded motor-cycle and sometimes, he demanded cash of Rs.

50,000/- and because of that reason also, he used to beat the deceased. PW3 also stated that 10 days before the incident of burning, a common meeting of 'biradri' was held to resolve the issue between his daughter Anita and her in-laws. Though, he was not willing to send his daughter back to her matrimonial home, on the insistence of 'biradri', he agreed to send Anita to her matrimonial home and she was sent with the appellants. He further stated that on the fateful day i.e. 19th day of the month, he received a phone call at the house of his neighbour that his daughter Anita has suffered burn injuries. He along with his brother Jagdish and wife reached DDU Hospital where he found the deceased lying unconscious in an ambulance. They were informed that the deceased was being shifted to Safdarjung Hospital. He further stated that the deceased remained under treatment in Safdarjung Hospital for 15 days but she ultimately succumbed to her injuries. This witness was cross-examined by learned APP after seeking permission from the Court and in the cross-examination, he admitted the suggestion that after the 'gona' ceremony, Anita (deceased) was told that the dowry brought by her was too meagre and the appellants as well as Yogesh and Seema used to taunt and harass her on that count. PW6 Jilla Devi, mother of the deceased has also deposed to more or less similar effect. She was also declared hostile and in her cross-examination by learned Prosecutor, she admitted the suggestion that the deceased was tortured in respect of the dowry demand and she volunteered that a motor-cycle and a sum of Rs. 50,000/- in cash was

demanded as dowry. In her cross-examination by learned counsel for the State, PW6 Jilla Devi stated that Anita (deceased) was brought back to her parental home three or four days after 'gona' and thereafter, she stayed with them for about one year. She further stated that no complaint regarding dowry demand was lodged against the accused persons during said period of one year. She denied the suggestion that the deceased was having some love affair, because of which, she stayed at her paternal home. She also denied the suggestion that the deceased Anita sustained burn injuries of her own.

11. PW9 Surender Singh, Executive Magistrate has stated that on 19th April, 2007, he was posted as Executive Magistrate, Palam. On that day, he was informed by Investigating Officer that a lady has been admitted in DDU Hospital in burnt condition and on this, he instructed the Investigating Officer that the moment said lady is declared fit for statement, he should be called. He further stated that on 20th April, 2007, said lady i.e. Anita (deceased) was declared fit for statement. He went to RML Hospital and recorded her statement Ex.PW9/A. The deceased in her statement disclosed that she was caught hold of by her mother-in-law and father-in-law and kerosene oil was poured upon her on 19th April, 2007 at 03:00 a.m. The witness immediately thereafter corrected himself and stated that he does not remember on whom allegations regarding pouring kerosene oil was levelled.

12. PW17 ASI Hari Kishan conducted initial investigation of the case. He has stated that when he reached at the place of occurrence i.e.

House No. RZ-A3/49, Gali No.1, Durga Park, New Delhi, on inspection he did not find any sign of burning such as burnt clothes etc. and the house appeared to have been swept clean. He also stated that he informed the senior officers and SDM about the incident and his local inquiry revealed that the incident had taken place in the bathroom of the ground floor which was smelling of kerosene oil.

13. PW18 Inspector Dharmvir conducted subsequent investigation of the case and he also recorded statement of Anita (deceased) under Section 161 Cr.P.C. besides the statements of other witnesses.

14. DW1 Ram Kishan has stated that on the date of incident at around 5.45 - 6.00 a.m., on hearing the cries of the deceased 'bachao bachao', he came out in the 'gali' and saw the deceased Anita aflame. Thus, he called the appellant Budh Ram who came out of the house and took the deceased inside and placed a blanket on her. Thereafter, Budh Ram alongwith his wife Kamli and son Hazari Lal removed Anita to the hospital in a taxi. This witness stated that no quarrel took place between Anita and her in-laws and also stated that there is no custom of giving or taking of dowry in their community.

15. DW2 Om Prakash claims that he had gone alongwith the appellant Budh Ram, Badri Prashad, Mala Ram and Madan Lal to the house of Munna Lal, father of the deceased at Ranjit Nagar for bringing the deceased back to her matrimonial home. He stated that said meeting was attended from the girl's side by Munna Lal (father), his

brother Jagdish, his another brother and 3/4 neighbours. When he asked Munna Lal as to why he was not prepared to send Anita to her matrimonial home, Munna Lal explained that Anita was being immature and was not agreeable to go back to her matrimonial home. On this, neighbours of Munna Lal told him that he was bound to send Anita to her matrimonial home. Munna Lal agreed and asked Anita to get ready to go to her matrimonial home. The deceased Anita, however, created a scene and insisted that she would not go. The witness further stated that when they were talking, he over-heard Anita saying that if she was forced to go to her matrimonial home, she would do something untoward and on this, he expressed his apprehension that if Anita did something untoward in her matrimonial home, it would create problem. However, Munna Lal and neighbours ignored said apprehension and said that the deceased was being immature and there was no cause for worry on that count.

16. On consideration of evidence, the defence version did not find favour with the learned Trial Judge and relying upon the prosecution evidence, the learned Additional Sessions Judge found the appellants guilty of the charges under Section 302 read with Section 34 IPC and Section 498A read with Section 34 IPC and convicted and sentenced them accordingly.

17. Learned counsel for the appellants has submitted that there is no eye-witness to the occurrence and the case of the prosecution is based upon the dying declaration of the deceased and the testimony of her

parents PW3 Munna Lal and PW6 Jilla Devi in support of the charges under Section 302 and 498A IPC. He submitted that the dying declaration of the deceased is not reliable, being unnatural and inconsistent with the other evidence on record. Otherwise also, the dying declaration is suspicious as it has not been recorded in accordance with Delhi High Court Rules pertaining to the procedure to be followed while recording dying declaration. Learned counsel further submitted that the testimony of PW3 Munna Lal and PW6 Jilla Devi regarding the demand for dowry or causing of harassment or cruelty to the deceased is vague and is bereft of specific instances. Therefore, it is not safe to rely upon their evidence. Thus, he has summed up that the impugned judgment of conviction cannot be sustained under law.

18. Learned counsel for the State, on the other hand, has canvassed in favour of the impugned judgment. He has submitted that in the instant case, the dying declaration Ex.PW9/A has been recorded by the Executive Magistrate, who had no axe to grind either with the appellants or with the family of the deceased. Therefore, there is no reason to suspect its correctness. Learned counsel for the State has drawn our attention to the application Ex.PW17/A / Ex.PW11/DA dated 19th April, 2007 addressed by the Investigating Officer ASI Hari Kishan (PW17) to the CMO, Ward No. 12, RML Hospital seeking permission for recording statement of the deceased. On this application, there is an initial endorsement dated 20th April, 2007 wherein the doctor concerned has declared the patient fit for statement. In view of this,

learned counsel for the State has submitted that there is no force in the submission of the learned counsel for the appellants that the certificate of fitness of the deceased was not obtained by the Executive Magistrate Surender Singh (PW9) before recording her dying declaration Ex.PW9/A. Thus, learned counsel for the State has summed up that the learned Trial Judge has rightly relied upon the dying declaration to return to finding of guilt of the appellants.

19. On perusal of the impugned judgment, it is clear that the conviction of the appellants for the offence under Section 302 IPC read with Section 34 IPC is based solely upon the purported dying declaration of the deceased Anita. Therefore, before advertng to the rival contentions against the impugned conviction, we deem it appropriate to discuss the legal principles relating to the dying declaration.

20. In the case of **Nallapati Sivaiah Vs. Sub-Divisional Officer, Guntur, A.P. 2007 V AD(Cr.) (S.C.) 45**, the Hon'ble Supreme Court while discussing the issue of evidentiary value of dying declaration, inter alia, observed thus:

"18. It is equally well settled and needs no restatement at our hands that dying declaration can form the sole basis for conviction. But at the same time due care and caution must be exercised in considering weight to be given to dying declaration inasmuch as there could be any number of circumstances which may affect the truth. This court in more than one decision cautioned that the courts have always to be on guard to see that the dying declaration was not the result of either tutoring or prompting or a product of imagination. It is the duty of the courts to find that the deceased was in a fit state of mind to make the dying declaration. In order

to satisfy itself that the deceased was in a fit mental condition to make the dying declaration, the courts have to look for the medical opinion.

19. It is not difficult to appreciate why dying declarations are admitted in evidence at a trial for murder, as a striking exception to the general rule against hearsay. For example, any sanction of the oath in the case of a living witness is a thought to be balanced at least by the final conscience of the dying man. Nobody, it has been said, would wish to die with a lie on his lips. A dying declaration has got sanctity and a person giving the dying declaration will be last to give untruth as he stands before his creator. There is a legal maxim "Nemo Moriturous Praesumitur Mentire" meaning, that a man will not meet his maker with lie in his mouth. Woodroffe and Amir Ali, in their treatise on Evidence Act state : "when a man is dying, the grave position in which he is placed is held by law to be a sufficient ground for his veracity and therefore the tests of oath and cross-examination are dispensed with.

20. The court has to consider each case in the circumstances of the case. What value should be given to a dying declaration is left to court, which on assessment of the circumstances and the evidence and materials on record, will come to a conclusion about the truth or otherwise of the version, be it written, oral, verbal or by sign or by gestures. It is also a settled principle of law that dying declaration is a substantive evidence and an order of conviction can be safely recorded on the basis of dying declaration provided the court is fully satisfied that the dying declaration made by the deceased was voluntary and reliable and the author recorded the dying declaration as stated by the deceased. This court laid down the principle that for relying upon the dying declaration the court must be conscious that the dying declaration was voluntary and further it was recorded correctly and above all the maker was in a fit condition - mentally and physically - to make such statement."

21. In the case of **Smt. Paniben vs. State of Gujarat** AIR 1992 S.C. 1817, Hon'ble Supreme Court has summed up the principles governing dying declaration as under:-

- (i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration (**Munnu Raja v. State of M.P.**) (1976) 3 SCC 104; 1976 SCC (Cri.)376; (1976) 2 SCR 764.

(ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. (**State of U.P. v. Ram Sagar Yadav**) (1985) 1 SCC 552: 1985 SCC (Cri) 127: AIR 1985 SC 416; **Ramavati Devi v. State of Bihar** (1983) 1 SCC 211: 1983 SCC (Cri) 169: AIR 1983 SC 164.

(iii) This 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 opportunity to observe and identify the assailants and was in a fit state to make the declaration. (**K. Ramchandra Reddy v. Public Prosecutor**) (1976) 3 SCC 618: 1976 SCC (Cri) 473: AIR 1976 SC 1994.

(iv) Where dying declaration is suspicious it should not be acted upon without corroborative evidence. (**Rasheed Beg v. State of M.P.**) (1974) 4 SCC 264 : 1974 SCC (Cri) 426.

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. (**Kake Singh v. State of M.P.**) 1981 Supp. SCC 25 : 1981 SCC (Cri.) 645 : AIR 1982 SC 1021.

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. (**Ram Manorath v. State of U.P.**) (1981) 2 SCC 654 : 1981 SCC (Cri) 581.

(vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected. (**State of Maharashtra v. Krishnamurti Laxmipati Naidu**) 1980 Supp. SCC 455 : 1981 SCC (Cri) 364 : AIR 1981 SC 617.

(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. (**Surajdeo Oza v. State of Bihar**) 1980 Supp. SCC 769 : 1979 SCC (Cri) 519 : AIR 1979 SC 1505.

(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 has said that the deceased was in a fit and conscious state to make this dying declaration, the

medical opinion cannot prevail. (**Nanahau Ram and Anr. v. State of M.P.**) 1988 Supp. SCC 152 : 1988 SCC (Cri) 342 : AIR 1988 SC 912.

x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. (**State of U.P. v. Madan Mohan**) (1989) 3 SCC 390 : 1989 SCC (Cri) 585 : AIR 1989 SC 1519."

22. The legal position which emerges from above is that there is no rule of law or prudence that a dying declaration cannot be acted upon without corroboration. However, when the case is based solely upon the dying declaration, the court must not lose sight of the fact that dying declaration is an untested piece of evidence as the accused did not get a chance to test the veracity of the declaration on the anvil of cross-examination. Thus, it becomes obligation of the Court to scrutinize the dying declaration carefully and before acting upon the same, the conscience of the court must be satisfied that dying declaration is not the result of tutoring, prompting, imagination or vengeance and that the deceased was in a fit state of mind to make the declaration. It is also essential that the dying declaration, before it is acted upon, must inspire the confidence of the Court and it should be beyond suspicion.

23. On careful consideration of the evidence on record, we find substantial merit in the submissions of learned counsel for the appellants. Ex.PW9/A is the purported dying declaration of the deceased Anita. In this dying declaration, the deceased had narrated the manner in which the incident of burning took place that "on 19th

April, 2007 at 03:00 a.m. in the morning while she was sleeping, her sister-in-law, brother-in-law and father-in-law caught hold of her and her mother-in-law and husband set her on fire after pouring kerosene oil on her". If this version is to be believed, then the incident took place in the bedroom of the house. This fact is belied by the testimony of Investigating Officer ASI Hari Kishan (PW17), who is the first police officer to reach the house of the appellants where the incident took place as per the prosecution case. It is not clear from his evidence if he inspected the bedroom of the house. He has stated that on inspection of house, he did not find any tell tale sign of burning in the house such as burnt clothes etc. He also stated that on local inquiry conducted by him, it transpired that the incident had taken place in the bathroom on the ground floor of the house and there was odour of kerosene oil in the bathroom as well as in the 'gali' near the bathroom. This circumstance rules out the possibility of the occurrence having taken place in the bedroom and makes the dying declaration suspect.

Otherwise also, the story in the dying declaration Ex.PW9/A appears to be unnatural and it gives an impression that an attempt has been made to rope in entire family of the husband of the deceased. On further perusal of dying declaration, it transpires that the deceased Anita purportedly stated that when she was set on fire, she raised alarm for help but nobody came forward. Thereafter, her husband, father-in-law and mother-in-law took her to DDU Hospital where she became unconscious and when she regained consciousness, her

parental family members were present by her side in RML Hospital. The fact that the family members of the deceased had met her before the arrival of the Executive Magistrate raises a possibility of the dying declaration being the result of tutoring and prompting by the parents of the deceased. Thus, we do not find it safe to rely upon the dying declaration of the deceased.

24. The other criticism against the dying declaration is that it has not been recorded in accordance with the procedure for recording dying declaration as provided under Delhi High Court Rules. Delhi High Court Rules, Volume III, Chapter 13A deals with the procedure for recording the dying declaration. Rule III of this Chapter provides that before proceeding to record the dying declaration, the Magistrate shall satisfy himself that the declarant is in fit condition to make a statement and if the medical officer is present or his presence can be secured without loss of time, his certificate as to the fitness of declarant to make statement should be obtained. The Rule further provides, if however, the circumstances do not permit waiting or the attendance of medical officer, the Magistrate may, in such a case proceed to record the dying declaration but he should note down why he considered it inadvisable to wait for the doctor's attendance. Learned counsel for appellants submitted that above rule was not followed by the Executive Magistrate. Learned counsel for the State has submitted that in the instant case, above-said Rule has been followed before recording the dying declaration. In support of this contention, learned counsel for the

State has drawn our attention to the application Ex.PW17/A / Ex.PW11/DA dated 19th April, 2007 addressed by the Investigating Officer to CMO seeking permission for recording the statement of the deceased. On this application, of course, there is an endorsement dated 20th April, 2007 "patient fit for statement". However, it is not clear from this endorsement as to which doctor had appended this endorsement and even the time at which the patient was declared fit for statement is not mentioned. The concerned doctor, who purportedly declared the patient fit for statement, has not been examined to prove this endorsement. Dr. Poras Chaudhary, Sr. Resident, RML Hospital was examined in this case as PW11. Though, he has proved his endorsement dated 19th April, 2007 on the said application declaring the patient unfit for statement on said day at 12:50 p.m., he has not stated anything about the endorsement dated 20th April, 2007 declaring the patient fit for statement. Learned Prosecutor did not even care to ask him to identify the handwriting and signature of doctor concerned. Further, on perusal of the charge-sheet, it transpires that the concerned doctor, who had declared the patient fit for statement has not even been cited as a witness in the list of witnesses detailed in the report under Section 173 Cr.P.C. Under these circumstances, the prosecution cannot take advantage of the aforesaid endorsement which has not been proved on record. Even if for the sake of argument, it is assumed that this endorsement was made by the doctor concerned, there is no clue at what time the

patient was declared fit for statement so as to give an assurance that when the Executive Magistrate proceeded to examine the deceased, she was in a fit condition to make clear and concise declaration. This circumstance also makes the dying declaration vulnerable. Further, on perusal of the MLC of the deceased Ex.PW4/A prepared at DDU Hospital, it transpires that MLC records "alleged history of burn injury as told by patient herself and brought by". From this, it transpires that in the first instance, when the deceased Anita was examined by the concerned doctor at DDU Hospital, though she stated that she had suffered burn injury, she did not blame either of the appellants. This circumstance, coupled with the fact that the deceased was taken to the hospital by her husband Hazari Lal (appellant) also goes in favour of the appellants and compounds the suspicion against the correctness of the dying declaration. Thus, we do not find it safe to rely upon the dying declaration Ex.PW9/A. Once dying declaration is held unworthy of reliance, we find it difficult to sustain the conviction of the appellants under Section 302 IPC.

25. As regards the offence under Section 498A IPC, the case of prosecution hinges on the testimony of PW3 Munna Lal and PW6 Jilla Devi, parents of the deceased. Munna Lal (PW3) has testified that the appellant Hazari Lal was in the habit of drinking and after drinking, he used to beat the deceased. He also stated that the appellant Hazari Lal used to demand motor-cycle as well as cash Rs. 50,000/- from his daughter and for that reason, he used to beat her. PW6 Jilla Devi has

stated that the deceased was married to Hazari Lal (appellant) on 06th March, 2002. Her 'gona' took place three years after the marriage. Immediately after 'gona', appellant Hazari Lal, parents-in-law of the deceased and her sister-in-law quarrelled with her. She however could not tell the reason for said quarrel. She has stated that her daughter gave her a telephone call and she brought her back to her parental home and she stayed with them for about one year till the appellants along with other visited their house and assured that they would not quarrel with the deceased and took her along with them. In her entire examination-in-chief, she did not state about any demand for dowry made by the appellants. However, when she was cross-examined by learned APP with the permission of the Court, she admitted a suggestion that her daughter was tortured for the demand of dowry and volunteered that a motor-cycle and a sum of Rs. 50,000/- was demanded in cash. She also admitted the suggestion put by learned APP that the deceased was tortured by her husband, parents-in-law, brother-in-law Yogesh and sister-in-law Seema.

26. The above-said version of PW3 Munna Lal and PW6 Jilla Devi is not reliable as it is vague in nature and it is bereft of the specific instances and specific dates on which the deceased was meted out with cruelty or dowry demands. Admittedly, elder sister of the deceased was also married in the same family on the same day to the elder brother of the appellant. There is no complaint by the elder sister of the deceased about any dowry demand from her. It is improbable, if

not impossible, that the parents-in-law of the deceased would demand dowry and ill treat only one of their daughters-in-law. Neither Munna Lal (PW3) nor Jilla Devi (PW6) are categorical that anyone of the appellants had ever demanded dowry from them. Admittedly, Sunita, sister of the deceased was married in the same house, therefore, if the story regarding demand of dowry is true, Sunita was the best person to know about the demand as well as the cruel treatment meted out to her sister. She has neither been cited as a witness nor examined by the prosecution. Her husband Murari Lal was examined as PW12 with a view to prove the CD Ex.PX of videography done at the time of marriage of the deceased and her sister. No question was asked by learned Prosecutor to Murari Lal (PW12) regarding the treatment meted out to the deceased in her matrimonial home. From the above, we do not find it safe to rely upon the testimony of PW3 Munna Lal and PW6 Jilla Devi. Further, it is admitted case of the prosecution that the deceased was sent to her matrimonial home by her parents after a 'biradri' meet at the instance of the appellants. Had there been any issue of dowry demand or cruelty, obviously, under the natural course of circumstances, that issue would have cropped up in the discussions in the 'biradri' meet. None of those persons who were part of the said meeting have been examined by the prosecution to prove as to what was discussed in the 'biradri' meet. This circumstance also leaves a lacuna in the prosecution case and goes against the prosecution. Thus, under the circumstances, we are not inclined to rely upon the

testimony of PW3 Munna Lal and PW6 Jilla Devi. Therefore, the charge under Section 498A IPC must fail.

27. Learned counsel for the State has submitted that even if it is presumed that the prosecution has failed to establish the guilt of the appellants under Section 302 IPC, they still are guilty of the offence of committing dowry death of Anita punishable under Section 304B IPC since it is established on record that the deceased Anita was married to the appellant Hazari Lal son of the other two appellants on 06th March, 2002 and she sustained burn injuries at her matrimonial home on 19th April, 2007 which ultimately proved to be fatal when Anita expired on 03rd May, 2007 i.e. within 7 years of her marriage.

28. We do not find merit in this contention for the reason that one of the most essential ingredients to attract Section 304B IPC which raises a presumption of guilt against the accused persons is that the deceased soon before her death must have been subjected to cruelty or harassment by her husband or any relative of her husband in connection with the demand for dowry. On consideration of evidence, we find that the prosecution has failed to prove this essential ingredient of offence under Section 304B IPC. In the discussion while dealing with charge under Section 498A IPC, we have already concluded that the evidence of PW3 Munna Lal and PW6 Jilla Devi, parents of the deceased pertaining to dowry demand or cruelty or harassment caused to the deceased is unreliable. Apart from the testimony of aforesaid two witnesses, there is no other evidence on

record to suggest that the deceased was subjected to cruelty or harassment by the appellants in connection with demand for dowry soon before her death. Therefore, in our view, the charge under Section 304B IPC must fail.

29. The result of above discussion is that the prosecution has failed to establish the guilt of the appellants under Section 302 IPC and under Section 498A IPC both read with Section 34 IPC or under Section 304B IPC. We, therefore, set aside the impugned judgment of conviction and consequent order on sentence and acquit the appellants, giving them benefit of doubt.

30. The appellants are reported to be in custody. They may be released forthwith if not required in any other case.

31. The appeal stands disposed of accordingly.

AJIT BHARIHOKE, J.

A.K. SIKRI, J.

JUNE 03, 2010
akb.