

***IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH***

**Criminal Appeal No.D-789-DB of 2009
Date of Order: 7th May, 2015**

1. Balbir son of Nomi
 2. Ashok Kumar son of Balbir
 3. Dayawanti wife of Balbir
- All residents of Village Mokhra, District Rohtak.

...Appellants

Versus

State of Haryana

...Respondent

**CORAM: HON'BLE MR. JUSTICE RAJIVE BHALLA
HON'BLE MR. JUSTICE AMOL RATTAN SINGH**

Present: Mr. H. M. Singh, Advocate, and
Mr. Ashish Rawal, Advocate,
for the appellants.

Mr. Sandeep Vermani, Additional Advocate Genera, Haryana

AMOL RATTAN SINGH, J.

This is an appeal filed by the appellants, challenging their conviction, vide order dated 14.07.2009, passed by the Additional Sessions Judge (Fast Track Court), Rohtak, for an offence punishable under Section 302 read with Section 34 of the Indian Penal Code, and their sentences, vide order dated 17.07.2009, in the following terms:-

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|----------------|--|
| 1. Balbir | To undergo rigorous imprisonment for life and to pay a fine of Rs.10,000/- and in default of payment of fine to further undergo rigorous imprisonment for one month. |
| 2. Ashok Kumar | To undergo rigorous imprisonment for life and to pay a fine of Rs.10,000/- and in default of |

payment of fine to further
undergo rigorous imprisonment
for one month.

3. Dayawanti

To undergo rigorous imprisonment
for life and to pay a fine of
Rs.10,000/- and in default of
payment of fine to further
undergo rigorous imprisonment
for one month.

The deceased in the present case was Geeta, wife of Ashok Kumar and daughter-in-law of Balbir and Daya Wanti, the appellants.

2. HC Udham Singh, of Police Station Meham (later PW-10), received a V.T message on 08.10.2007, from Police Post, PGIMS, Rohtak, Ex.P14, that Geeta wife of Ashok Kumar, resident of Mokhra, had been admitted to the PGIMS, Rohtak, with burn injuries. PW10 forwarded the information to the Investigating Officer and then along with Constable Bhagat Singh, reached Police Post, PGIMS, Rohtak, collected a "rukka" and MLR and upon reaching Ward No.6 of the hospital, filed an application, Ex.P-5, dated 08.10.2007, before the attending doctor, seeking information whether Geeta was fit to make a statement or not. The doctor opined that the statement may be recorded by a Magistrate. HC Udham Singh appeared in the Court of Mrs. Sangeeta Rai Sachdeva, JMIC, Rohtak, informed her of the necessity of recording the statement of Geeta, injured, and escorted the Judicial Magistrate to the hospital. The learned Magistrate recorded the statement of Geeta, Ex.P-15. A copy of the statement was handed over to HC Udham Singh, who appended an endorsement, Ex.P-16, and forwarded it to Police Station, Meham, through Constable Bhagat Singh. The statement led to registration of FIR No.261, dated 08.10.2007, Ex.P-26, by ASI Om Parkash, for the alleged commission of offences punishable under Section 307/498-A IPC. Udham Singh was met at the gate of PGIMS, Rohtak, by

Jeewan son of Hans Raj, resident of Farmana and then proceeded to village Mokhra, the place of occurrence, prepared a rough site plan, Ex.P-17, lifted a plastic can, a match box and a piece of burnt quilt, which were taken into possession and after making them into a separate parcel, sealed with the seal 'HS', handed over to Bhagat Singh, vide memo Ex.P18, attested by Jeevan Dass. The DSP and the SHO, Police Station, Meham, arrived at the spot and verified these facts.

PW15 ASI Harpal Singh, was posted at Police Station, Meham, on 09.10.2007, and after receipt of the V.T message, Ex.P14, proceeded to PGIMS, Rohtak, where he conducted “inquest” proceedings, Ex.P26, forwarded the dead body for post mortem examination through Constable Naresh Kumar and thereafter began to search for the accused. The 2nd appellant, Ashok Kumar, husband of the deceased, was arrested on 11.11.2007, in front of his house. Balbir, appellant, father-in-law of the deceased, was produced before PW15 by Om Parkash, Sarpanch, on 20.11.2007 and arrested; Dayawanti, appellant, mother-in-law of the deceased, was produced on 03.12.2007 and arrested. The brother-in-law of Daya Wanti (brother of appellant no.1), alongwith her, is stated to have produced dowry articles, which were taken into possession, vide recovery memo, Ex.P4. The list of dowry articles is Ex.P27. The evidence collected by the police was forwarded to the Forensic Science Laboratory for examination.

3. Upon conclusion of investigation, the police filed a final report before the Magistrate, making out a case punishable under Sections 498-A and 302 of the IPC, citing the appellants as accused. The Magistrate committed the case to the Court of Sessions, as the offences disclosed in the

final report were exclusively triable by the Court of Sessions. The trial was eventually placed before the Additional Sessions Judge (Fast Track Court), Rohtak, where charges were framed under Sections 304-B/302/34 IPC, but as the appellants pleaded not guilty and claimed trial, the prosecution was directed to adduce its evidence.

4. The prosecution, in order to prove its case, examined the following witnesses:-

PW1 was Jeewan Dass son of Hansram, father of the deceased.

PW2 was Santosh wife of Jeewan Dass, mother of the deceased,

PW3 was Babli wife of Dilbagh, the lady who arranged the marriage between Geeta (deceased) and Ashok Kumar (the 2nd appellant).

PW4 was Ms. Sangeeta Rai, Sub Division Judicial Magistrate, Guhla, who recorded the dying declaration, Ex.P6, proved application, Ex.P5, order, Ex.P7, and stepped into the witness box to depose with respect to the recording of the dying declaration.

PW5 was Dr. Parminder, who was posted in Ward No.6, Unit No.1, PGIMS, Rohtak, and deposed about the admission of Geeta, deceased wife of Ashok Kumar, as a case of 100% burns and deposed that he requested that a Magistrate be asked to record her statement. He further deposed that the Magistrate obtained his opinion regarding the patient and he opined that the patient is fit to make a statement. PW5 proved his endorsements, Ex.P9 and Ex.P10.

PW6 was Muni Ram son of Bhartu, who solemnized the marriage of Geeta with Ashok Kumar, the appellant, on 09.04.2007.

PW7 was Dhoop Singh son of Sarup Singh, who attended the

marriage of Geeta, prepared a list of articles, which were given in marriage as dowry and proved Ex.P-11, a copy of the 'kanyadan' and the original copy, Ex.P-12. He also testified that Mark 'A' was a photostat copy of the articles given in dowry.

PW8 was ASI Jai Bhagwan, a formal witness, who recorded the statements of Constable Sumit Kumar, Constable Virender Singh, EHC Naresh Kumar, EHC Kulbeer Singh, Satish Bansal, Criminal Ahlmad of Smt. Sangeeta Rai, JMIC, Rohtak.

The Public Prosecutor gave up PWs Surender Singh and Satish Bansal, Take Ram, Chowkidar, Phoolwar and Santram.

PW9 was Sumit Kumar, Draftsman, from the office of the Superintendent of Police, Rohtak, who visited the place of occurrence in village Mokhra, prepared and proved scaled site plan Ex.P-13.

PW10 was HC Udham Singh, who was the first police officer to reach the hospital, as already noticed, who gave an application, Ex.P5, to the doctor regarding the medical condition of Geeta, the deceased, filed an application to requisition the services of a Judicial Magistrate, escorted Ms. Sangeeta Rai, JMIC, to the hospital for recording the statement of Geeta, obtained a copy of the statement and forwarded the same for registration of the FIR. PW10 also testified to getting a rough site plan of the place of occurrence, Ex.P17, prepared, lifted a plastic can, a match box and a piece of burnt quilt etc. from the site.

PW11 was HC Kulbir Singh, who tendered his affidavit into evidence, Ex.P23 and deposed that the case property remained in his custody as Moharar, Malkhana, for 50 days and proved despatch of the property to FSL, Madhuban and its receipt.

PW12 was EHC Naresh Kumar, who deposed that he handed over the dead body of Geeta wife of Ashok Kumar to Sant Ram, resident of Farmana, vide receipt Ex.P25, which he handed over to the Investigating Officer.

PW13 was SI Om Parkash, who received the statement of Geeta, Ex.P15, and endorsement Ex.P16 and recorded formal FIR, Ex.P26.

PW14 was Inspector Telu Ram, who prepared the 'challan' and presented the report under Section 173 Cr.P.C. before the Court.

PW15 was ASI Harpal Singh, the Investigating Officer, who conducted "inquest" proceedings, forwarded the dead body for post mortem etc.

PW16 was Dr. Anil Kumar, who was posted as Senior Resident, Casualty, at PGIMS, Rohtak, who medico legally examined Geeta, deceased, when she was admitted and stated that she was brought by Ashok Kumar, the appellant, on 08.10.2007, in a semi conscious condition with superficial to deep burns, to the extent of 100% and proved ruqa Ex.P-25 sent to the Incharge, Police Post, PGIMS, Rohtak.

PW17 was Constable Virender Singh, who tendered his affidavit, Ex.P29, into evidence, regarding handing over the special report to the Illaqa Magistrate and other officers.

PW18 was Dr. Vikas, Medical Officer, who tendered into evidence his affidavit, Ex.P-30, regarding the conduct of the post mortem examination and proved the port mortem report, Ex.P-32, as well as the "inquest" report.

5. Upon conclusion of prosecution evidence, all the incriminating circumstances were put to the appellants, under Section 313 of the Cr.P.C.

The appellants denied these facts and pleaded their innocence.

Daya Wanti wife of Balbir, stated that she had been falsely implicated and in fact on 08.10.2007, she had gone to her fields to bring fodder for their cattle and when she came back she came to know through her neighbours that her daughter-in-law Geeta had been taken to hospital in a burnt condition.

Balbir son of Nomi, the father-in-law of the deceased stated that on the 7th, 8th and 9th October, 2007, he was away to Delhi, to attend the Radha Swami Satsang and Namdiksha.

Ashok son of Balbir, the husband of Geeta, similarly denied his involvement and stated that on 08.10.2007, he had gone to Rohtak, as usual, in his three-wheeler, for purchase of vegetables, where he received information that Geeta had sustained injuries, upon which he returned to his house and took her to the hospital with the help of neighbours.

6. The appellants produced DW1 Kirpal Singh son of Shri Veer Singh, to prove that on 07.10.2007 and 08.10.2007, Balbir Singh, the 1st appellant was in Delhi as a Sewadar in 'Bhatiminus' Satsang Bhawan. He also exhibited his attendance card, Ex.D1.

DW2, Ramehar son of Pirthi, deposed that he was going to his fields, when he saw that Ashok's wife was burning. He went inside the house and saw Sandeep son of Kanwar Singh, Jai Singh son of Inder and Satbir son of Charan Singh, trying to extinguish the fire. He also deposed that the husband, father-in-law and mother-in-law of the deceased were not present in the house.

DW3 Rekha wife of Sanjay alias Matru, deposed that she was present in the house on the “top portion” when she heard the noise. Her

brother-in-law Sandeep and 2/3 neighbours arrived and extinguished the fire. The relations between Ashok and Geeta were stated, by her, to be cordial. None of the appellants were present in the house at the time of incident as per DW3 also. This witness was the sister-in-law of Ashok, i.e. his elder brother's wife.

DW4 was Sandeep son of Kanwar Singh, a neighbour, who stated that after he heard cries, he took a blanket from a nearby house and tried to extinguish the fire along with Satbir and Jai Singh.

DW5 Ram Niwas son of late Shri Bhim Singh, was a Sewadar at 'Bhatiminus' Satsang Bhawan, New Delhi, and the brother-in-law of appellant Balbir Singh, who deposed that Balbir Singh was present at Delhi on the 7th and 8th October 2007.

DW6 was Satish Bansal, Reader to the JMIC, Bhadurgarh, who proved the statement recorded by Mrs. Sangeeta Rai Sachdeva, Judicial Magistrate Ist Class, Rohtak, and its forwarding to the concerned quarters.

DW7 was Rishi Ram, Naib Nazir, District Courts, Rohtak, who proved the entry Ex.D3 regarding forwarding of the report.

7. The learned trial court after considering the evidence on record and the arguments addressed, acquitted the appellants of the charge under Section 304-B IPC but convicted and sentenced them in the terms referred to above.

8. Mr. H.M. Singh, learned counsel for the appellants, submitted that the appellants having been acquitted of the charge under Section 304-B, their conviction under Section 302 read with Section 34 of the Indian Penal Code is not warranted. The fact that the trial court has held that the prosecution is unable to prove harassment and cruelty, also proves that the

prosecution is unable to prove any motive for the appellants to have set fire to the deceased. The only ground on which the appellants have been convicted, is the dying declaration. He further submitted that a perusal of the evidence on record reveals that before the dying declaration was recorded, the opinion of the attending doctor was not sought. PW5 Dr. Parminder, who has allegedly made an endorsement about the medical condition of the deceased, was, as admitted in his cross-examination, not the attending doctor. The endorsement, Ex.P9, regarding the medical condition of the deceased was, as is apparent, made on the application handed over to PW10 HC Udham Singh and not before recording of the dying declaration. The absence of any certificate as to the medical condition of the deceased prior to recording of the dying declaration, requires the dying declaration to be discarded. This apart, the endorsement, Ex.P9, merely states that the deceased is "Fit for statement", without any reference to her mental or physical condition. The endorsement, Ex.P10, recorded after the dying declaration is again vague and, therefore, should be rejected.

Counsel for the appellant further submitted that PW16, Dr. Anil Kumar, the attending doctor, has in his examination-in-chief, deposed that Geeta (the deceased) was semi conscious and had suffered 100% burns all over the body including head, face, neck, chest, abdomen, back and all four limbs and during cross-examination deposed that the word 'semi conscious' means that the patient will not be in a position to narrate the cause of injuries. The doctor also deposed that in case of 100% burns, the ridge and the curve of thumb including fingers gets pealed off and therefore, it is rather surprising that the prosecution recorded a dying declaration which is allegedly thumb marked by the deceased. The entire story of the dying

declaration has been manipulated by the prosecution. A perusal of the statement made by PW4 Mrs. Sangeeta Rai, Sub Divisional Judicial Magistrate and the dying declaration reveals that the first four sentences allegedly recorded by the deceased are incomplete, thereby proving that the deceased was not in a fit state of mind to make a statement.

Mr. H.M.Singh further submitted that the appellants have produced sufficient evidence in defence to prove that the appellants were not present in the house. Ashok, husband of the deceased had gone to purchase vegetables for sale in the village. Dayawanti, mother-in-law of the deceased had gone to the fields for cutting fodder and as proved by two defence witnesses, Balbir, father-in-law of the deceased had gone to attend the programme of the Radha Swami Satsang, at Delhi. The trial court has not given sufficient consideration to the defence evidence, which proves that the deceased caught fire accidentally.

9. Mr. Sandeep Vermani, learned counsel for the State of Haryana, submitted that the evidence on record is clear, cogent and consistent with the guilt of the appellants. The deceased and Ashok Kumar were married six months prior to the unfortunate incident that led to the demise of Geeta. Admittedly, Geeta caught fire in the appellants' house; the onus, therefore, to prove the circumstances in which Geeta caught fire lay upon the appellants. Apart from producing evidence in defence, the appellants have not explained the circumstances in which Geeta caught fire. The recovery of the plastic can, duly established to contain kerosene, the clothes of the deceased, which contain kerosene, prove that the deceased caught fire after someone had sprinkled kerosene oil upon her. These facts further stand fully corroborated by the dying declaration made by the

deceased, before a judicial Magistrate. Hence, as per learned State Counsel, the appeal deserves to be dismissed.

10. After having considered the arguments raised by the learned counsel for the appellant as also for the State and having gone through the evidence on record in detail, we are faced with the fact that the complainant turned partly hostile, though only with regard to recovery/seizure of a plastic can with some kerosene oil, both allegedly used to set the deceased on fire and to the seizure of a burnt quilt, all from the house of the deceased and the appellants, on 08.10.2007, even though the said seizure memo (Ex.P18) bears his signatures. In cross-examination, the complainant (PW1) stated that he had never visited his daughters' matrimonial home alongwith the police and that nothing had been recovered or sealed in his presence.

However, as regards the allegations of his daughter being taunted for not bringing sufficient dowry and with regard to his son-in-law (appellant Ashok) demanding money, PW1 deposed as per his statement made to the police on 09.10.2007 (exhibited as a part of the FIR as P-26).

11. The mother of the deceased girl, Santosh, who appeared as PW2, initially stated in her examination-in-chief that her daughter had been burnt by Ashok and his Bhabi because of his illicit relations with his sister-in-law Rekha and that on receiving the information of burning, she had gone to the hospital alongwith her husband, where her daughter was in a totally burnt condition and was crying and asking for water again and again.

Immediately thereafter, however, she stated that her daughter had said nothing to her as she was not in a condition to do so and she also denied that her daughter told her anything at all (earlier), as Ashok used to bring her in a tempo and used to go with her from her house.

Upon being declared hostile, she denied that her daughter had told her that her in-laws had caught hold of her and Ashok sprinkled kerosene oil and burnt her. She, in fact, more surprisingly, during cross-examination by the defence counsel, also denied having met the police at PGI, Rohtak, or ever having made a statement to the police and still further stated that she did not meet her daughter as she was perplexed on seeing her (the Hindi version states that “Paagal Ho Gayee Thee”).

Thus, in cross-examination, the statement of this witness (mother of the deceased) is wholly contrary to her statement allegedly recorded under Section 161 Cr. P.C. (Ex.P2), wherein she also gave the list of the dowry articles given to her daughter during marriage and with regard to Geeta being taunted for bringing less dowry. Even so, during cross-examination by the Public Prosecutor, she stated that the dowry articles were as given in the said statement (Ex.P2).

12. Similar is the situation with regard to the testimony of PW3, Babli, who is stated to have been the “go-between”, who arranged the marriage of Geeta and Ashok and was related to both sides, inasmuch as, during cross-examination, she stated that Geeta was the daughter of her uncle (Chacha) and earlier in her testimony, she stated that Ashok is the son of her husbands' elder brother.

However, as per this witness, she was present in her house on 08.10.2007, when she was told that Geeta had burnt herself and she had thereafter, rushed to Geetas' house, “where Geeta was present alone” and told her that she had set herself on fire. She further stated that Geetas' husband (appellant Ashok) reached there later and they had all taken her to the hospital (PGI, Rohtak).

Upon being declared hostile and being cross-examined by the Public Prosecutor, this witness stated that the police had recorded her statement and that she had told the police that Geeta had burnt herself. She was confronted with the said statement recorded under Section 161 Cr. P.C. (Ex.P3), wherein it is not so recorded. However, she admitted that dowry articles were got recovered in her presence, by the police.

In cross-examination by defence counsel, PW3 stated that Geeta was her cousin, being the daughter of her fathers' brother and that she was the mediator in the marriage of Geeta and Ashok. In this cross-examination, she stated that the accused had never made any demand of dowry either before or after the marriage of Geeta and Ashok. She further stated that neither of the accused was present when Geeta “got herself burnt”, though, accused Ashok was present when the deceased was brought to the PGI, Rohtak where he was called as he was away. She further stated that her aunt, Santosh, had sat on the same cot in PGI, Rohtak, where Geeta was lying and that Geetas' statement was recorded by the Magistrate when she (PW3-Babli) was also present. She next stated that Geeta was not in a position to speak properly and was “muttering” while replying to the questions asked by the Magistrate, which were recorded as dictated to her by her mother, Santosh. She again stated that Geeta was not in a position to speak properly and that her mother was speaking on her behalf, which was being recorded by the Magistrate.

PW3 further stated that Geeta had burnt herself as she wanted to marry someone else and her parents had got her marriage solemnised with Ashok on her request (on request of this witness). She had further testified that when she asked Geeta as to what had happened, she stated that she had

“lit herself” and done whatever she wanted to.

13. In defence of the appellants, Ram Mehar (DW2) and Sandeep (DW4) testified to the effect that none of the appellants was present when Geeta caught fire and was seen by them. DW2 testified that DW4 (Sandeep), one Jai Singh and Satbir were trying to extinguish the fire when he went inside the house and seeing that “wife of Ashok was burning”.

DW4, Sandeep, corroborated the same, to the effect that he himself, Satbir and Jai Singh extinguished the fire and that none of the appellants was present at the spot. He also admitted to being a brother of Ashok appellant no.3, (Dayawanti, being his mothers' sister). As per DW4, appellant no.2, Ashok Kumar, came some time after the incident and then they both took Geeta to the Hospital.

DW3, i.e. Rekha wife of the elder brother of Ashok, testified that her mother-in-law (appellant no.3) had gone to the fields to collect the grass and her father-in-law (appellant no.1) had gone to Delhi to a Satsang and that Ashok (appellant no.2) reached there when Geeta was being taken to the hospital by Sandeep etc. and then he (Ashok) also accompanied them to the hospital. She had also stated that her own husband, Sanjay, i.e. elder brother of Ashok, was away to work at the time.

14. Thus, while all these three witnesses corroborated one and another to the effect that none of the three appellants was present at home when the occurrence took place, they are obviously in contradiction to the statement of PW3 (Babli) who turned hostile, inasmuch as, whereas Babli stated that somebody informed her that Geeta had burnt herself and upon reaching the house of Geeta, she found Geeta alone and when she asked her for the reason for setting herself on fire, Geeta had allegedly told her that

she had lit herself up 'as she wanted to'.

However, the presence of Babli (PW3) at the spot when Geeta allegedly burnt herself, has not been corroborated by either DWs2, 3 or 4, who simply stated that Geeta was burning and DWs2 and 4 tried to extinguish the fire. PW3 stated that Geeta was alone when she reached her, upon being told by somebody that she was burning. This, in itself, is strange because if somebody had informed PW3 that Geeta was burning, somebody else would also normally have been present alongwith Geeta. However, even accepting that the same person who saw Geeta burning came and told PW3 about the same thus leaving nobody with Geeta, PW3 nevertheless stated that she and Geeta were alone when she was burning, therefore, DWs2, 3 and 4, or at least one of them, would have made a mention of the fact that Geeta was with PW3-Babli. None of the three defence witnesses having mentioned even the presence of Babli, the same is doubtful. Hence, we find ourselves unable to believe this witness to the effect that Geeta told her that she had burnt herself.

Thus, the testimony of PW3 is not corroborated by any of the defence witnesses, even though PW3 was declared to be hostile. Hence, we find no reason to believe the statement of PW3, who, it is also to be reiterated, was the go between the marriage of Ashok and Geeta and though is a near relative of the complainant, but is also married into the family of the appellants. Thus, we cannot accept her statement, in cross-examination, that Geeta had burnt herself as she wanted to marry someone else. In fact, no other person, not even the accused themselves, in their statements recorded under Section 313 Cr. P.C., even remotely suggested anything to that effect. Though, of course, the statements of the accused are to the effect that they

were not present at the spot when the occurrence took place.

15. It also needs to be examined that DW1, Kirpal Singh, testified that appellant no.1, Balbir Singh, father-in-law of Geeta, was present on 07.10.2007, and on the date of occurrence, i.e. 08.10.2007, at the Satsang at Delhi and that he and Ram Niwas (DW5), alongwith appellant no.1, had taken breakfast together, after which appellant no.1 remained at the Satsang till about 6:00 PM. Ram Niwas (DW5) is none other than the brother-in-law (wives' brother) of appellant no.1, as admitted by him (DW5).

Though DW1, Kirpal Singh, produced his own attendance card at the Satsang in evidence, however, it was admitted by both, DW5 and DW1, that they had no documentary proof of appellant no.1 being present at the Satsang in Delhi on 08.10.2007. Further, as per appellant no.1, he was present at the Satsang on 09.10.2007 also, whereas DW1 stated that he was present there till 6:00 PM on 08.10.2007.

16. Having seen the above, it is now to be seen whether, in the absence of any other eye witness for the prosecution, the dying declaration of the deceased, Geeta, is wholly reliable, to uphold the conviction of the appellants for an offence punishable under Section 302 IPC.

17. Though, in the face of the fact that the said dying declaration was made in the presence of a Magistrate under Section 164 Cr. P.C. and that the said Magistrate testified to that effect in Court, there would be no reason to disbelieve the dying declaration; however, we obviously cannot overlook the contradictory testimonies of three doctors, two of whom virtually testified to the effect that Geeta was neither in a shape to make a dying declaration, nor to record an imprint of her thumb, her body being 100% burnt.

This is discernible from the testimonies of Dr. Anil Kumar (PW16) and Dr. Vikas (PW18). As per PW16, Geeta was brought to the hospital in a semi-conscious state on 08.10.2007 with 100% burns all over her body, including all four limbs. However, he stated that after he medico-legally examined her, he handed over the patient to the Surgeon for further diagnosis and treatment. Yet, in cross-examination, he admitted that semi-conscious means that the patient is not fully conscious and will not be in a position to tell about anything that had happened to him/her. He also stated that in the case of 100% burns, there is peeling of the skin and that the ridge and curve of the thumb and the fingers also got peeled off; though he admitted that he had not mentioned such things in the MLR.

18. PW18, Dr. Vikas, who conducted the post mortem examination, stated in cross-examination that since it was a case of 100% burns, the brain would not have been functioning at all and “in the instant case prior to the death, the patient lost memory and even the speech. Prior to the death, she was in capacity to speech. In the instant case, the total body was blacken and skin was also ruptured”.

The doctor further stated that all the limbs were blackened, including the thumb, toes and fingers of the hands. He further testified that with 100% burns, the blood starts turning into water, including blood in the brain and due to this condition, the ante-mortem state of health of the deceased was that she would not have been able to raise her limbs, including her thumbs and fingers.

The line of cross-questioning and its response, obviously was to try and prove that the deceased was in no shape to make a dying declaration, or even that an imprint of her thumb could be taken.

A perusal of the post mortem report (Ex.P31) shows that there were superficial to deep burns and skin rupture was present with 2 degree burns, which were approximately 100% and that underlying vessels could be seen. However, there is no mention of any water in the brain etc.

The MLRs also shows 100% burns all over the body, including all the four limbs, which are described as superficial to deep burns.

19. As opposed to this, is the testimony of PW5, Dr. Parminder, who testified to his signatures and hand-writing on Ex.P8 which is an intimation to the police Incharge at the PGIMS, Rohtak, asking that a Magistrate be called to record the statement of Geeta who was a patient with 100% burns.

The said doctor also testified to his signatures and endorsement on the dying declaration (Ex.P9), to the effect that Geeta was fit to make a statement. He further testified to his signatures (Ex.P10) stating that "Patient remains fit during the recording of statement. Statement was recorded in my presence".

A perusal of the paper on which the dying declaration was recorded under the signatures of the JMIC, on 08.10.2007 itself, reveals a thumb impression shown to be "LTI Geeta".

The dying declaration itself (Ex.P6), is to the effect that, that morning, at about 8:00 AM to 9:00 AM, her mother-in-law Daya and husband Ashok had burnt her, along with her father-in-law, Balbir.

It further goes on to say that her mother-in-law poured kerosene oil over her and her husband set her on fire with a match stick and that her father-in-law also poured oil over her, all without any reason. The declaration also states that her mother-in-law was telling her to get a car, to

which the declarant refused, as a consequence of which she was burnt.

The statement further goes on to read that appellants no.1 and 3 used to say that she (declarant) is not beautiful and used to quarrel with her and that her sister-in-law, Rekha, also used to quarrel with her on the ground that she (Geeta) did not do any work.

It is further stated in the document that when the declarant was burnt, her husbands' elder brother, Mathru and his wife, Rekha, were at home but made no attempt to save her. However, it is stated therein that Rekha was "with my husband". It also states that she was brought to the hospital by them and that appellants no.1 and 3 used to say that she had got nothing by way of dowry.

It is also stated therein that the declarants' sister-in-law (husbands' elder brothers' wife) has three children who are small.

Finally, upon the Magistrate asking her whether she had anything else to say, the statement recorded is that she was burnt in the room where they slept and that she had nothing further to say.

20. It is important to notice here that the said statement, in Hindi, is on a single sheet of paper, recorded on both sides of the single sheet of paper. The endorsement (Ex.P10) of Dr.Parminder (PW5), to the effect that the patient remained fit during the recording of the statement, in his presence, is on another sheet of paper which is alongwith the one on which the dying declaration is recorded by the Magistrate, with also the thumb impression of the deceased below the dying declaration.

The declaration itself was Ex.P6 before the trial Court, with the endorsement of the doctor (PW5), to the effect that the patient was fit for making a statement, being Ex.P9, which is shown to have been recorded by

the doctor, on the document, at 4:25 PM on 08.10.2007. Thereafter, the second endorsement of the doctor, on a separate sheet, to the effect that the patient remained fit during the recording of the statement, in his presence, is Ex.P10.

21. It also needs to be noticed that the recorded declaration, in the hands of the JMIC (as testified to by her), covers both sides of the papers on which it is recorded, completely, with no space left thereafter, for any further recording, after the Magistrates' signatures on the right hand side and the thumb impression of the deceased on the left hand side. As such, the doctors' endorsement, Ex.P10, would necessarily have to be on a separate page.

22. The above is being specifically taken note of in view of the fact that PW10, HC Udham Singh, who brought the JMIC to the hospital, for the purpose of recording the statement of Geeta, testified in Court that the statement of the patient, recorded by the Magistrate, consisted of two pages only and that he had made his endorsement, Ex.P16, to be sent to Police Station Meham through Constable Bhagat Singh. This witness also referred to the statement of the patient as Ex.15 which was objected to by the defence.

A perusal of the trial Court record shows that Ex.P15 is actually a photostat copy of the dying declaration on two pages (on two legal size sheets of paper) and the endorsement Ex.P16, written in hand in Hindi, bearing the signatures of this witness (HC Udham Singh) is behind the second sheet of paper and is shown to be recorded at 6:30 PM on 08.10.2007.

During cross-examination by the defence counsel (though

PW10 had also been declared to be hostile), this witness stated that the fitness certificate was not obtained in his presence by the Magistrate, because he was outside the room but he admitted that the fitness certificate (by the doctor, PW5) was endorsed on the first page of the statement.

SI Om Parkash, PW13, also, during his cross-examination, stated that Exs.P15 and P16, received by him from HC Udham Singh, consisted of only two pages and the doctors' opinion was given only on the top of the first page of Ex.P15 and that there was no other page, other than these two pages, on which no other opinion of the doctor was recorded.

Similarly, ASI Harpal Singh, PW15, also stated that Ex.P15 was the only statement taken down by the Magistrate and that it consisted of two pages only.

23. The cross-examination on this aspect, of these three witnesses, was obviously to try and show that the doctors' opinion, after the dying declaration had been recorded, was actually not endorsed at the time that the dying declaration was made but was separately endorsed later on, on a separate sheet of paper.

As opposed to this, the JMIC, who stepped into the witness box as PW4, specifically testified that, firstly, the dying declaration was recorded in the presence of the doctor and that after recording the statement, the opinion of the doctor had been taken that the patient remained fit during the course of such recording.

During cross-examination, the JMIC (SDJM at the time of recording of her testimony), admitted that it was not recorded specifically by the doctor that Geeta was physically as well as mentally fit for making a statement. She further admitted that she did not note the exact time of

recording the statement, or that Geeta had been identified by anybody other than the police official who had accompanied her to to the hospital.

The JMIC/SDJM, however, specifically testified, that the dying declaration did not consist of two but three pages.

It is, however, not discernible by this Court, as to what the witness, i.e. the JMIC/SDJM, meant to say when she testified that the dying declaration consisted of not two but three pages, i.e. as to whether she referred to both sides of one sheet of paper as two pages and therefore, the second sheet of paper, upon which the doctor had made his endorsement Ex.P10, to be the 3rd page, which is of course the only possibility, considering that if the second endorsement by the doctor is to be taken as a part of the dying declaration, then obviously the entire declaration would be of three “pages”, though on two sheets of paper. However, the testimonies of the police officials referred to above, PWs10, 13 and 15, is in obvious reference to the photostat copies of the dying declaration, which is on two sheets of paper, none of which contain the second endorsement by the doctor, to the effect that the patient remained fit through out the recording the statement, in his presence. As already noticed, the half page endorsement, Ex.P16, by HC Udham Singh, is behind the second sheet of the (photostat) paper and the second endorsement by the doctor (Ex.P10) is not seen either on Ex.P15, or above or below Ex.P16.

24. Thus, the entire evidence, is now to be seen with the arguments made by the learned counsel for the appellants, that, as a matter of fact, Geeta was not fit to make a statement and her statement was actually recorded by the JMIC, upon Geetas' mother (PW2-Santosh) interpreting all that Geeta was allegedly muttering during the course of the recording.

Learned counsel had further argued that, as a matter of fact, the second endorsement by the doctor (PW5), that the patient remained fit during the recording, in his presence, was a document added later, as the prosecution had actually slipped up in taking the same at the time of the recording of the statement, which is obvious from the fact that the police officials have testified that there was no second endorsement of the doctor on the copy of the dying declaration given to them (Ex.P15).

Learned counsel had further argued that this is to be seen together with the fact that two other doctors, PWs16 and 18, had testified to the effect that with the kind of 100% burn injuries that Geeta had suffered, she would have been in no position to make any dying declaration, especially as even in the MLR (Ex.P28), it is stated that she was in a semi-conscious condition, which had been defined by PW16 (Dr. Anil Kumar) to mean that she would have been unable to speak.

Also, as has already been noticed earlier, PW18 (Dr. Vikas) had testified to the effect that with the kind of burns that he had seen during the course of post mortem examination, the patient would not have been able to retain any memory etc. as to what had happened to her.

25. Therefore, we are in a situation where the Judicial Magistrate has specifically testified to the effect that she herself had recorded the statement of Geeta, to the effect that she had been burnt by the appellants, and a doctor (PW5-Dr.Parminder), corroborated that testimony.

On the other hand, two doctors testified that Geeta was in no position to record the statement and, in fact, virtually testified to the effect that her thumb impression also could not have been taken. The Magistrate, on the other hand, specifically testified to the effect that the left thumb

impression was taken because the right thumb was blackened to an extent that no impression would be taken.

Further, whether or not the second endorsement of Dr. Parminder-PW5, was actually taken at the time immediately after recording of the statement or whether the second sheet of paper, on which the endorsement (P10) is made, was some how inadvertently not handed over to HC Udham Singh (PW10), is something which we can only conjecture upon. However, it is also necessary to notice that as per the Magistrate, during cross-examination, it was specifically admitted that she had not stated that the doctor was present through out such recording. She further admitted that she had not recorded that Geeta had been administered an oath before recording her statement, though, as per the Magistrate, she had actually administered the oath.

PW5, Dr. Parminder, specifically testified that he was very much present when the statement was recorded and that he had endorsed such fact, as Ex.P10, as already noticed. He had further stated that there were about 30 persons “where dying declaration” was recorded, after which he is shown to have voluntarily stated that nobody was present through out recording of the statement.

Next, PW10, HC Udham Singh, had testified that Geeta was in a position to speak and that he was outside the room when the fitness report was obtained by the Magistrate.

PW3, Babli, who was declared to be hostile, as already noticed, on the other hand, stated that Geetas' mother (PW2) was sitting on the bed on which Geeta was lying and that Geetas' statement was recorded by the Magistrate when she (PW3) was present and that Geeta was no in position

to speak properly, but was replying to the questions asked by the Magistrate, as dictated by her mother, and in fact, her mother was speaking on her behalf.

26. Though we have already stated that this witness is not believable in view of the fact that she turned hostile, obviously on account of the fact that, though she was the niece of the complainant, she was also married into the family in which Geeta was married (the family of the appellants), yet we cannot ignore the fact that there is definitely a discrepancy on the issue of whether the doctors' endorsement, to the effect that he was present through out the recording the dying declaration, was actually made at that time itself or was later added, in view of the fact that factually, there is no such statement which forms a part of Ex.P15, i.e. the photocopy of the dying declaration, on the back of which the endorsement Ex.P16, by PW10, HC Udham Singh, has been made.

27. Even so, having considered the entire evidence in detail, we are not inclined to disbelieve the testimony of the Magistrate which is further corroborated, if any such corroboration is needed, by PW5 Dr. Parminder, to the effect that Geeta was fit to make a statement and actually made it in his presence. The possibility of some tutoring, prior to the statement, obviously cannot be ruled out when all her relatives were present there, but that would not detract from the entire statement itself, especially when even PW10, HC Udham Singh, has also testified to the effect that Geeta could speak during her dying declaration.

Hence, the opinion given by PWs16 and 18 (Dr. Anil Kumar and Dr. Vikas) that a patient with 100% burns is not in a position to speak is taken by us to be only an opinion, which indeed it is, it not specifically

being to the effect that Geeta herself could not speak. In fact, Dr. Vikas could not have testified to that effect as he only saw the dead body of the deceased and did not see her at all when she was alive.

As regards the deposition by the defence witnesses, to the effect that none of the three appellants was present at the time of the occurrence, we find them to be self-serving statements, in view of the fact that the defence witnesses who stood as, virtually eye witnesses, allegedly immediately after the occurrence, to state that when Geeta was burning none of the appellants was present, are relatives and a neighbour of the appellants. DW4, Sandeep, admitted that he was the first cousin of Ashok, with appellant no.3, Dayawanti, being his mothers' sister. DW, Rekha, in any case, is the wife of the elder brother of Ashok, appellant no.2. Only DW2, Ram Mehar, who also testified that he saw the wife of Ashok burning and went inside the house and saw Sandeep, Jai Singh and Satbir present there trying to extinguish the fire, on the body of Geeta, does not seem to be immediately related to the appellants. However, he stated that he is a neighbour of the appellants, though not an immediate neighbour.

Further, though Sandeep stood in defence of the appellants, neither Jai Singh nor Satbir, above named, stood as defence witnesses.

As regards DW1, we have already stated that there is a discrepancy between his statement and that of appellant no.1 (under Section 313 Cr.P.C.), to the effect that whereas DW1 stated that appellant no.1 was present at the Satsang upto 6:00 PM on 08.10.2007, appellant Balbir Singh stated that he remained there till 09.10.2007. Further, despite producing his own attendance card, neither DW1 nor appellant no.1, could produce any proof of Balbir Singh being present at the Satsang. As to why one person

would be given an attendance card and not the other, is something which is too obvious to be ignored, in the entire circumstances.

Similarly, as already seen, Ram Niwas (DW5) who stated that he was also present at the Satsang in Delhi, is admittedly the brother-in-law of appellant no.1.

Hence, we are not inclined at all to accept the statements of the defence witnesses, in the face of the dying declaration of the deceased, the correctness of which was testified to by the Judicial Magistrate herself and the doctor in whose presence it was recorded.

28. Further, after having gone through the evidence, even though the State or the complainants are not in appeal against the acquittal of the appellants for an offence punishable under Section 304-B of the IPC, we are bound to look into that aspect in the light of the evidence before us.

29. The only reason given by the trial Court, for acquitting the appellants for an offence punishable under Section 304-B, is to be found in paragraphs no.44 and 45 of the judgment of that Court, which is to the effect that it could not be proved that the demand of dowry was made soon before the occurrence/incident.

In our opinion, the trial Court wholly erred in interpreting the phrase “**soon before her death**”, as contained in Section 304-B of the IPC.

The Hon'ble Supreme Court while interpreting the said phrase, in **Dinesh vs. State of Haryana (2014) 12 SCC 532**, held as follows:-

“15. The expression “soon before” is a relative term as held by this Court, which is required to be considered under the specific circumstances of each case and no straitjacket formula can be laid down by fixing any time of allotment. It can be said that the term “soon before” is synonymous with the term “immediately before”. The determination of the period which can come within term “soon before” is left to be determined by the courts

depending upon the facts and circumstances of each case.

16. In *Kans Raj v. State of Punjab*⁴ it was held that in case of dowry death the circumstances showing the existence of cruelty or harassment to the deceased are not restricted to a particular instance but normally refer to a course of conduct. Such conduct may be spread over a period of time. If the cruelty or harassment or demand of dowry is shown to have persisted, it shall be deemed to be “soon before death”.

17. Prima facie we are of the view that neither definite period has been indicted in the aforementioned section nor the expression “soon before” has been defined. In *Dhian Singh v. State of Punjab*⁵, this Court held that: (SCC pp. 761-62, para 7)

“7. The contention of the appellant’s counsel is that even if it is proved that there was cruelty on account of demand of dowry, such cruelty shall be soon before the death and there must be proximate connection between the alleged cruelty and the death of the deceased. It is true that the prosecution has to establish that there must be nexus between the cruelty and the suicide and the cruelty meted out must have induced the victim to commit suicide. The appellant has no case that there was any other reason for her to commit suicide. The evidence shows that the first appellant had demanded dowry and he had sent her away from his house and only after mediation she was taken back to the appellant’s house and death happened within a period of two months thereafter. These facts clearly show that the suicide was the result of the harassment or cruelty meted out to the deceased. The presumption under Section 113-B of the Evidence Act could be invoked against the appellant and the Sessions Court rightly found the appellant guilty of the offence punishable under Section 304-B IPC and Section 201 IPC.”

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In the present case, the complainant in his complaint Ex.P1, as also in his testimony as PW1, was consistent in stating that his daughter was being harassed for not bringing sufficient dowry. As PW1 he testified that his daughter had come 5-6 days before the incident to his house, after which she was forcibly taken from there by appellant no.2. In his statement Ex.P1, he testified that had she had come 20 days prior to the incident and told him of the tidings in her matrimonial home.

Though he was declared hostile, as he testified that no recoveries were made in his presence, of a kerosene oil can etc. from the place of occurrence, despite that, he still stuck to his statement that a demand of dowry had been made.

Undoubtedly, the mother of the deceased (PW2-Santosh) made a complete volte-face during her cross-examination, except to the extent that dowry articles, as had been stated by her in her statement Ex.P2 (made under Section 161 Cr. P.C.), had been given to the appellants at the time of marriage. However, that does not detract from the dying declaration made by the deceased in the presence of the Magistrate, which we have already believed, after appraising all the evidence in relation thereto.

Hence, we do not understand as to how, in the face of the above, it could be held that the deceased was not subjected to harassment for dowry soon before her death, as held by the trial Court. This is to be specifically seen in the light of the fact that the marriage was only six months old, having taking place on 09.04.2007, with the death occurring on 08.10.2007. As per PW1, the problem had started about 2 or 3 months after the marriage, which continued till the death of the deceased on 08.10.2007.

30. Learned counsel for the appellants had cited before us the judgment of the Supreme Court in **Lokendra Singh vs. State of M.P (1999) SCC (Cri.) 371**, which in turn had referred to the earlier judgment in **Sangaraboina Sreenu vs. State of A.P., (1997) 5 SCC 348**, to hold that if an accused has been acquitted of a charge framed under Section 302 IPC, and no finding was recorded by the trial Court with regard to a charge under Section 306 IPC, the High Court erred in convicting the accused for an offence punishable under Section 306 IPC.

Firstly, of course, the present case is wholly different, inasmuch as, the trial Court held the appellants guilty for an offence punishable under Section 302 but recorded a finding of acquittal in respect of an offence punishable under Section 304-B IPC, after a charge had been framed for that offence

Secondly, the ratio of the judgment in *Sangaraboina Sreenus'* case (supra), has been specifically reversed by a three-Judge Bench of the Supreme Court in **Dalbir Singh vs. State of U.P. (2004) 5 SCC 334**, holding as under:-

“16. This question was again examined by a three-Judge Bench in *Gurbachan Singh v. State of Punjab* in which it was held as under:-

“[I]n judging a question of prejudice, as of guilt, courts must act with a broad vision and look to the substance and not to technicalities, and their main concern should be to see whether the accused had a fair trial, whether he knew what he was being tried for, whether the main facts sought to be established against him were explained to him fairly and clearly and whether he was given a full and fair chance to defend himself.”

17. There are a catena of decisions of this Court on the same lines and it is not necessary to burden this judgment by making reference to each one of them. Therefore, in view of Section 464 Cr.P.C., it is possible for the appellate or revisional court to convict an accused for an offence for which no charge was framed unless the court is of the opinion that a failure of justice would in fact occasion. In order to judge whether a failure of justice has been occasioned, it will be relevant to examine whether the accused was aware of the basic ingredients of the offence for which he is being convicted and whether the main facts sought to be established against him were explained to him clearly and whether he got a fair chance to defend himself.

We are, therefore, of the opinion that *Sangaraboina Reeenu* was not correctly decided as it purports to lay down as a principle of law that where the accused is charged under Section 302 IPC, he cannot be convicted for the offence under Section 306 IPC.”

Yet, *Dalbir Singhs' case* (supra) was one in which the trial Court had convicted the accused for an offence punishable under Section 302 IPC but had acquitted him of the charge framed under Section 304-B. The High Court, in that case, in appeal, had acquitted the accused for an offence punishable under Section 302 IPC but despite coming to the conclusion that he was guilty of an offence punishable under Section 306 IPC, had held that he could not be convicted for the said offence as he had not been charged for the same.

Thus, the principle laid down in *Dalbir Singhs' case* was that even if an accused is not charged with a particular offence but is charged of a more serious offence, the Appellate Court while acquitting him of that more serious offence, could still convict him for a lesser offence, as long as the accused understood the entire nature of charges and as such, the conviction for a lesser offence, does not amount to failure of justice.

In the present context, though Section 386 (b)(ii) of the Code of Criminal Procedure, 1973, empowers the Appellate Court to alter the finding of the trial Court, the sentence imposed is to be maintained.

Since we have not altered the finding of the trial Court, with regard to the culpability of the appellants for an offence punishable under Section 302 IPC, we cannot, in the absence of an appeal against their acquittal in respect of the charge framed under Section 304-B, convict them

for the same, despite holding that the trial Court erred in recording a finding of

acquittal in respect of the said charge.

This would be specially so in view of the law laid down in various judgments, including **Appasaheb vs. State of Maharashtra (2007)**

9 SCC 721, wherein it was held as follows:-

“As already stated, the appellants were also charged under Sections 498-A and 306 read with Section 34 IPC but were acquitted of the said charges by the learned Sessions Judge, which order has attained finality for the reason that the State did not prefer appeal against the same. The appeal before the High Court and also in this Court has been preferred by the appellants challenging their conviction under Section 304-B read with Section 34 IPC. It has been held in *State of A.P. v. Thadi Narayana* that Section 423(1)(b)(i) of the Code of Criminal Procedure, 1898 [which corresponds to Section 386 (b)(i) of the Code of Criminal Procedure, 1973] is clearly confined to cases of appeals preferred against orders of conviction and sentence, the powers conferred by this clause cannot be exercised for the purpose of reversing an order of acquittal passed in favour of a party in respect of an offence charged, in dealing with an appeal preferred by him against the order of conviction in respect of another offence charged and found proved. Therefore, we have refrained from expressing any opinion as to whether the appellants could be held guilty of having committed the offence under Section 498-A or 306 IPC on the basis of evidence available on record as their acquittal under the aforesaid charges has attained finality and cannot be reversed in the appeal filed by the appellants challenging their conviction under Section 304-B IPC.”

Keeping in view the ratio of the above judgment, we cannot reverse the finding of the acquittal in respect of the charge framed under Section 304-B IPC.

However, in view of the detailed discussion on the evidence

and the finding that we have arrived at in respect of the charge framed under Section 302, we find no error in the judgment of the learned trial Court as regards the conviction and sentence of the appellants for an offence punishable under Section 302 read with Section 34 of the IPC.

Consequently, the present appeal is dismissed.

(AMOL RATTAN SINGH)
JUDGE

(RAJIVE BHALLA)
JUDGE

May 7th, 2015
dinesh