

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

+ **CRIMINAL APPEAL NO. 60/2000**

% **Reserved on:** 3rd August, 2015
Date of Decision: 24th November, 2015

MAHENDER KAUSHIK & ANOTHERAppellants
Through Mr. Jitender Sethi & Mr. Hemender Jailiya,
Advocates.

Versus

STATE OF DELHI ...Respondent
Through Mr. Varun Goswami, APP along with
Inspector Neera, P.S. Krishna Nagar.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.K. GAUBA

SANJIV KHANNA, J.

Judgment under challenge dated 31st January, 2000 convicts Mahender Kaushik and his mother Rameshwari under Sections 302 read with Section 34 and 498A read with Section 34 of the Indian Penal Code, 1860 (IPC, for short) for having committed murder of Anita, wife of Mahender Kaushik and for having subjected her to cruelty on account of dowry, unlawful demands and harassment. By order on sentence also dated 31st January, 2000, the appellants have been sentenced to imprisonment for life, fine of Rs.10,000/- each and in default to undergo simple imprisonment of one month under Section 302/34 IPC and rigorous imprisonment for three years, fine of Rs.5,000/- each and in default to undergo simple imprisonment of 15 days for the offence under Section 498A/34 IPC.

2. The undisputed and accepted position is that deceased Anita and the appellant-Mahender Kaushik had got married on 16th January, 1992 and thereafter, deceased Anita started residing in her matrimonial home at A-27, New Gobindpura, Delhi. Anita and Mahender Kaushik had two children, and Anita was carrying a child in her womb, when she suffered extensive burn injuries on 21st May, 1996 at her aforesaid matrimonial home. Dr. Ashish Gupta (PW-1) on 21st May, 1996 at about 1 P.M., had examined Anita when she was brought to Lifeline Hospital, A-13, Priyadarshini Vihar, Delhi with about 70% burns mostly deep in nature. Anita was smelling of kerosene. Dr. Ashish Gupta (PW-1) had prepared MLC vide Ex.PW-1/A, which we will be referring to subsequently. At about 3 P.M. on 21st May, 1996, Anita was shifted to the Guru Teg Bahadur Hospital (GTB Hospital), where she died at about 1.45 A.M. on 22nd May, 1996 as per death summary report, Ex.PW-6/E. The post-mortem report (Ex.PW-5/A) records the time of death as 1.45 A.M. on 22nd May, 1996 and that the deceased had ante-mortem superficial to deep burn wounds present over head, face, neck, upper half of chest, whole of back, hips and thighs (back), left upper extremity, right arm upper half and few patches over her legs covering about 60% of the total body surface. The cause of death was shock due to ante-mortem superficial to deep burn wounds covering 60% of the total body surface, which it was opined was likely to be produced by flame. The aforesaid report was proved by Dr. S.K Verma (PW-5), who had conducted the post-mortem and whose court testimony has remained unchallenged.

3. The core and the main issue raised in the present appeal is whether the two appellants were the perpetrators, who had committed the offence under Section 302 read with Section 34 IPC by deliberately and intentionally causing burn injuries or the deceased Anita had suffered

accidental burns while cooking food. The occurrence in question it is accepted had taken place in the matrimonial home of the deceased Anita. The prosecution version does not rely on any eye witnesses and is primarily predicated on the dying declaration recorded by Vishwamohan (PW-2), Sub-Divisional Magistrate, Shahdara marked Ex.PW-2/A recorded on 21st May, 1996 at about 5.50 P.M. in the GTB Hospital. The said dying declaration has been translated and reproduced in the impugned judgment and for the sake of clarity and convenience, we would also like to reproduce:-

"Q:-1 What is your name?

A: Anita.

Q:-2 What is your husband's name?

A: Mahender.

Q:-3 When were you married?

A: Five years back.

Q:-5 Have you any children?

A: Two: Rahul and Ricky.

Q:-6 How did you get burnt?

A: I was cooking food. My husband poured kerosene on me. Mother-in-law showed the match stick. Then they started throwing water in order to show this to mohallawallas.

Q:-7 When did this happen?

A: At about 12 noon.

Q:-8 What is the name of your mother-in-law?

A: Rameshwari.

Q:-9 What was the complaint of your in-laws?

A: Mother used to say that my father does not give 10/10 sarees. Husband used to say my father does not give maruti. Taunts were hurled daily that you were 'kanjari' (Prostitute) and when you would die, I would marry my son again. Similar taunts were being hurled since morning today. I telephoned my father at about 9.30 A.M. to take me away. Thereafter my in-laws locked the telephone saying that my father would not pay the bill. I continued cooking food...to take out.....I went to the store. In the meantime, my

husband poured kerosene from one can and mother-in-law showed the match stick.

Q:-10 Do you want to say anything else?

A:No. “Bas yehi baat hai lene-dene ki”. I was burnt on account of dowry so that more dowry could be taken by second marriage.”

4. The aforesaid dying declaration does not bear certification or signature by a doctor that Anita was fit for making a statement, but an endorsement to the said effect recorded at 5.30 P.M. dated 21st May, 1996 is to be found on the MLC marked Ex.PW-3/A. The said MLC was proved by Dr. Rakesh Chugh (PW-3), who was on duty in the said hospital on 21st May, 1996 and had examined the patient. He has opined that the patient was conscious and oriented and was given treatment with TTS, IV fluids and injection pathedin and phenargon. However, pulse and blood pressure of the patient could not be taken due to oedema. PW-3 in his examination-in-chief has testified that the declaration that the patient was fit for statement was written, signed and given by some other doctor and not by PW-3. This is one of the reasons to challenge and question the said dying declaration marked Ex.PW-2/A. However, we do not find any merit in the said contention for the reason that Dr. Rakesh Chugh (PW-3) in his examination-in-chief has unequivocally stated that the patient was conscious and oriented. PW-3 has affirmed that another doctor, who had examined the patient, had made the endorsement on the MLC marked Ex.PW-3/A at portion A that the patient, (i.e., Anita) was in a fit state to make the statement. Failure and lapse on the part of the said doctor to mention his name or even Vishwamohan (PW-2) to note and record the doctor's name is not fatal and would not justify ignoring the dying declaration marked Ex. PW-2/A. There could be no reason and cause for Vishwamohan (PW-2), the SDM, to concoct, fabricate or prompt a false dying declaration. We accept the positive assertion of Vishwamohan (PW-

2), SDM that he had recorded the statement of Anita vide Ex.PW-2/A. PW-2 had on the dying declaration Ex.PW-2/A at point C recorded that the patient had been declared fit for statement by the doctor on duty. Dr. Rakesh Chugh's deposition as to the condition of Anita is a positive avowal that Anita was able and physically and mentally convalescent to give and state her version. We shall also subsequently refer to the ocular statements of Yogesh Sharma (PW-6), Jai Chand Sharma (PW-7), Gian Wati (PW-9) and SI Hari Singh (PW-15), who have testified and confirmed that the patient Anita at that time was mentally alert and in a physical condition to make the statement. Reference can also be made to the deposition of Dr. Ashish Gupta of Lifeline Hospital and MLC Ex.PW-1/A which has been dealt with below.

5. The contention of the appellants that the dying declaration was not signed by the doctor on duty is factually correct, but of no consequence. This was not required and necessary. The doctor was not required to be a witness to the statement. It is not mandated by law that the doctor should sign the dying declaration before it can be accepted. The MLC marked Ex.PW-3/A certainly mentions and records certification of a doctor that the patient was fit to make a statement.

6. Another challenge to the dying declaration marked Ex.PW-2/A is that the same has RTI of the deceased Anita at point 'A'. Vishwamohan (PW-2) has testified that the dying declaration marked Ex.PW-2/A was written by him and Anita had put her thumb impression at point 'A', which was attested by him (i.e. Vishwamohan (PW-2)) at point 'B'. The contention highlights absence of the thumb impression of Anita in the MLC (Ex.PW3/A), in a circle drawn for obtaining the patient's thumb impression. It elucidates that Dr. Rakesh Chugh (PW-3) when specifically questioned on the failure or absence of thumb impression of the patient in

the encircled portion of the MLC (Ex.PW-3/A), had stated that the thumb impression could not be taken on account of severe burn injuries on Anita's hands and thus the circle was left blank with the remarks 'marks of identification not traceable'. It is apparent that PW-3 was taken by a surprise and his response was predicated on what stands recorded in the MLC marked Ex.PW3/A. We do not think the use of the expression 'marks of identification not traceable' in the MLC marked Ex.PW2/A would show and establish that the RTI of Anita on Ex.PW2/A is forged and fabricated. The doctor concerned who had made the said endorsement did not take the thumb impression for the reason mentioned and indicated. It is not recorded that because of burns, thumb impression could not be taken. However, Vishwamohan (PW-2) is positive and has affirmed that the thumb impression of Anita was obtained by him. Thumb impression or RTI could have been taken on paper, even if the marks were not prominent. We would therefore not give much credence and credibility to the statement of Dr. Rakesh Chugh (PW-3) that the thumb impression of the patient could not be taken due to severe burn injuries on the hand and would agree with the deposition of Vishwamohan (PW-2) that he had taken thumb impression of the patient as the impression was possible and obtained. The expression "marks of identification not traceable" is distinct and should not be read as recording and confirming presence of severe burn injuries on the hand, making it impossible to take RTI. Noticeably, MLC, Ex.PW-1/A, of Lifeline Hospital heavily relied by the appellants also of the patient, i.e. Anita, has a thumb impression duly encircled and noted as 'RTI'. This clearly indicates that it was possible to take the right thumb impression of the patient, i.e., Anita. If we accept the contention of the appellants apropos RTI, we would have to reject and ignore the MLC of lifeline hospital marked Ex.PW1/A. Presence of RTI impression of Anita on MLC marked

Ex.PW1/A would justify and alludes our findings that presence of RTI on Ex.PW2/A cannot and should not be a reason to reject the dying declaration.

7. Faced with the aforesaid situation, learned counsel for the appellants raised a rather far-fetched and feeble argument that RTI in Ex.PW-1/A refers to right toe impression of the patient, (i.e., Anita) and not her right thumb impression. The contention is sceptical and fatuous rather than of substance. Thumb or finger impressions are normally taken and whenever for some reason thumb or finger impressions cannot be taken, as an alternative impression of the toe or fingers is taken. Common sense would indicate that when toe impression is taken, it is specifically so stated. We should take judicial notice that in absence of specific endorsement, RTI would refer to “right thumb impression”. Dr. Ashish Gupta (PW-1) did not in his examination-in-chief or otherwise in his cross-examination ever state that he had taken the toe impression of Anita. Dr. Rakesh Chugh (PW-3)'s version that they could not take thumb impression of the patient due to burn injuries, therefore, does not appear to be a correct in view of the categorical assertion by Vishwamohan (PW-2) and also the factum that right thumb impression is to be found in the MLC marked Ex.PW-1/A of Anita at Lifeline Hospital.

8. After the aforesaid discussion dealing and examining somewhat ineffective and prosaic contentions, we would examine the question of purity and integrity of the dying declaration marked Ex.PW2/A. This question cannot be answered in isolation without examining credibility and infallibility of the dying declaration recorded by Dr. Ashish Gupta (PW-1) of the Lifeline Hospital. MLC (Ex.PW-1/A) of Anita at Lifeline Hospital mentions and records that the patient was brought to the hospital at about 1 P.M. on 21st May, 1996 and under the heading 'details of medical

condition' it is recorded alleged history of sustaining burn injuries while working on kerosene stove (as told by the patient herself). The patient it stands mentioned was smelling of kerosene, conscious, coordinated and speaking relevantly (sic, coherently).

9. SI Hari Singh (PW-15), the Investigating Officer, who had visited the Lifeline hospital after DD No. 45B (Ex.PW-4/C) was marked to him for verification has testified that on reaching the Hospital, he could not speak to the patient as she was not in a position to make any statement, but the patient had told him that she had already stated the facts to the doctor. In his cross-examination PW-15 professed that he had inquired from Dr. Ashish Gupta (PW-1), who had told him that Anita had stated that she had suffered the burns accidentally. SI Hari Singh (PW-15) on further cross-examination claimed that on inquiries, relatives of Anita had expressed inability or reluctance to make a statement at that time and had stated that they would make a statement subsequently. They did not impeach and indict anyone. On inquiry, the parents and brother of Anita had informed that Anita at the Lifeline Hospital had not revealed and stated how she had suffered the burns. SI Hari Singh (PW-15) affirms that from the Lifeline Hospital he had gone to the place of occurrence, i.e., matrimonial home of Anita at A-27, New Gobindpura, Delhi-51 and had noticed and lifted a burnt piece of cloth of Anita lying in a drain, adjoining kitchen and store. The drain smelt of kerosene oil. S.I. Hari Singh (PW-15) in his cross-examination on 11.11.1999 has stated that he had gone inside the kitchen where a kerosene oil stove was found lying, yet PW-15 professed not remembering if he had got the place i.e. the kitchen where the kerosene oil stove was lying photographed. Noticeably PW-15 has stated that he did not find kerosene oil can in the kitchen. There is an inherent contradiction emerging when we read the said assertions. The site plan prepared by PW-

15 marked Ex.PW-6/C specifically mentions and records presence and location of kerosene oil can in the store at point 'A' and burnt cloth at point 'B', which is outside the door of the store. The site plan does not mention or record presence of a kerosene oil stove in the kitchen or at any other place. Pertinent and affirmative on the said point is the testimony of Constable Kiranpal (PW-10), who was with Hari Singh (PW-15). She has not deposed or stated that any kerosene oil stove was found in the kitchen or in any other area. She was not cross-examined on the said aspect. The plastic can smelling of kerosene oil and a cloth (burnt cloth) were found and sealed with the seal of HS vide memo Ex.PW-10/A. No kerosene oil stove was obviously found and therefore not seized and sealed. PW-10 identified the said plastic can as Exhibit P-1 and the clothes as Ex.P2. Constable Sunder Singh (PW-14) the photographer has deposed that he had taken photographs (four in number) at A-27, New Govindpura, Delhi. Photograph Ex.P-Y2 is of a portion of a kitchen which shows presence of gas cylinder and stove (gas stove and not kerosene stove). PW-14 when cross-examined on photographs affirmed having reached the spot at 2:00 p.m. and that S.I. Hari Singh (PW-15) was present. He had photographed the kitchen and the surrounding areas, where the stove and other articles were lying. The reference to "stove" would be to the gas stove, which can be clearly seen in photograph, Ex.P-Y2. Thus, the photographs Ex.PY2 and PY4 were taken before Anita's dying declaration marked Ex.PW2/A implicating the two appellants but after the MLC Ex.PW-1/A had been recorded at the Lifeline hospital; i.e. patient Anita had stated that it was a case of accidental burns.

10. The plastic can P-1 was deposited in the malkhana along with the burnt clothes on 21st May, 1996 as deposed by Head Constable Ishwar Singh (PW-12) and entry in this regard was made in register No. 19. The

FSL report marked Ex.PW-11/A refers to presence of kerosene in one sealed plastic can having 20 ml of dirty liquid, when analysed by gas liquid chromatograph. The partly burnt piece of cloth Exhibit P-1, sealed cardboard box having two unburnt bed sheets and three woolen blankets, one sealed envelope containing hair also had presence of kerosene residues.

11. We have serious reservations and doubts on several portions of the statement of SI Hari Singh (PW-15), who though the Investigating Officer, it is apparent, has deftly stated perfidious facts in favour and support of the appellants. We would and must record our reasons and grounds for impeaching and doubting objectivity and impartiality of the said witness. What affirms our finding, calling in question neutrality and fairness of SI Hari Singh (PW-15), is his statement that both hands, feet and other body parts of Anita were completely burnt and his assertion that he had learnt that two workers had thrown water on Anita to drowse the fire. Regarding the presence of two workers at the matrimonial home of Anita by SI Hari Singh (PW-15), it is noticeable that PW-15 did not give their names, identification and has not stated what was stated by them. PW-15 was silent whether any other house member was present at the spot. Why and for what reason SI Hari Singh (PW-15) did not record or mention these enlivening and encapsulating facts in the police case dairy or brought them on record in the charge-sheet, is not forthcoming and cannot be rationally explained, except for the reason elucidated in our judgment. No such assertion was made by Ct. Kiranpal (PW- 10) and no suggestion or question was put to her on the presence of two workers. We have already noted and recorded our findings on the thumb impression of Anita in the MLC marked Ex.PW-1/A of the Lifeline Hospital and in the dying declaration marked Ex. PW-2/A. As recorded above, this version given by

SI Hari Singh (PW-15) in his cross-examination has to be deprecated and rejected as fanciful and a morse attempt to help and absolve the appellants.

12. We have referred to the recording made in the MLC marked Ex.PW-1/A that Anita on being questioned had stated and informed Dr. Ashish Gupta (PW-1) of Lifeline Hospital that she had suffered burn injuries while working on a kerosene stove. Once we reject and hold that no kerosene stove was being used or could be seen, the dying declaration Exhibit PW-1/A falters and has to be rejected as incorrect and untrue version. We would elaborate further and take on record other incriminating material and evidence to establish that dying declaration marked Ex.PW-2/A states the truth and should be accepted.

13. MLC Ex.PW-1/A is descriptive and records details of injuries both in front and back portions of Anita's body. The burnt area has been specifically marked. What is discernible and striking is that the back portion of the body of Anita was the worst affected. Anita had suffered burn injuries on the entire back, left arm and hand and substantially on right portion of her arm. The burn injuries were as present on her buttocks, thighs and even below the knees. Conspicuously, burn injuries were not indicated and suffered on the front portion of Anita, below her chest. The burn injuries were noticed by the doctors on a small part towards the side on the left and the right leg. The post-mortem report Ex.PW5/A opines that the entire back was affected and burns were suffered on the upper half of the chest. Thus, the back portion of the body of Anita was the worst affected. FSL report marked Ex.PW-11/A affirms presence of kerosene residues in the hair of the deceased. In case Anita had suffered burns while working on a kerosene oil stove, the front portion of her body would have been the worst affected. On the other hand, if someone had thrown

kerosene oil from the back side and then ignited the fire, back portion of the victim would be the worst affected area.

14. We are not doubting and questioning the recording made by Dr. Ashish Gupta (PW-1) in the MLC (Ex.PW-1/A) for the same may be the version given by Anita at the first instance. This statement was given by Anita immediately after the occurrence, when she was taken to the hospital by her in-laws, including the two appellants. Anita at that time was pregnant. She was mother of two children. We perceive and believe that Anita at that time wanted to still save and protect her in-laws i.e. the two appellants and, therefore, did not blame them or state the true facts. Subsequently when reality dawned on her and she felt reassured, Anita revealed and had narrated the truthful version to Vishwamohan (PW-2). The reason why we accept the version given in Ex.PW-2/A is apparent and corroborated from the affirming facts elucidated above, including the testimony of Constable Kiranpal (PW-10).

15. We have referred to the Site plan without scale marked ExPW-6/C and at this stage would like to elaborate. The site plan without scale marked Ex.PW-6/C proved by Yogesh Sharma (PW-6), brother of deceased Anita is exemplifying and discloses the correct and true picture. The kitchen and store stands demarcated. The store was adjacent and by the side of the kitchen but have separate entrances or doors. SI Hari Singh (PW-15) has deposed that he had prepared the site plan marked Ex.PW-6/C and was proved by him in his examination-in-chief recorded on 9th August, 1999. This plan Ex.PW6/C specifically records that the kerosene oil can was found in the store room at point 'A' and not in the kitchen. Similarly, the burnt piece of cloth was found outside the door of the store room and not in or outside the door of the kitchen.

16. We would like to now examine the dying declaration of the deceased Anita marked Ex.PW2/A and check and enquire into its veracity with reference to the facts narrated and stated therein. In the answer to question No. 9, Anita had averred that she had continued to make food and had gone to the store to take out something. There her husband had poured kerosene oil from a can and her mother-in-law had alighted the match stick. This narration shows that Anita had gone to the store room and it is in the store room that the kerosene oil was poured from the can and she was set ablaze. Presence of can in the store room is proven and established.

17. The dying declaration marked Ex.PW-2/A also mentions that after igniting the fire, her husband and mother-in-law, i.e., the two appellants, had thrown water in order to show that they had tried to save the deceased. Anita was taken to the hospital. The site plan ExPW-6/C and deposition of Ct. Kiranpal (PW-10) and even SI Hari Singh (PW-15) supports the said narration.

18. The dying declaration marked Ex.PW-2/A mentions the cause why the deceased Anita was set ablaze. Her mother-in-law used to chastise and taunt Anita for not getting/ gifting sarees and her husband wanted a car. At 9.30 A.M., Anita had made a telephone call to her family to request them to take her away. At that time, her in-laws had objected and had locked the phone stridently commenting; who would pay the bill. The fact that at 9.30 A.M., a call was received from the residence of the appellants stands confirmed by Murti Devi (PW-13), wife of Deep Chand. PW-13 has deposed that Anita had made a call at their residence and had requested them to call someone. PW-13 had called Yogesh Sharma, who had attended the call. Yogesh had then talked to Anita and after the call, PW-13 had inquired from Yogesh, what was the matter. Yogesh was nervous and had told them that the in-laws of Anita were quarrelling with her. In

her cross-examination, Murti Devi (PW-13) has accepted that earlier Anita had never made a call. She affirmed that the police had not recorded her statement and she had deposed in the court for the first time. Learned counsel for the appellants has pointed out that the statement of Murti Devi (PW-13) under Section 161 of the Code of Criminal Procedure, 1973 (Cr.P.C., for short) was recorded by SI Devi Charan (PW-11) as per the police version only on 21st August, 1996. PW-11 had taken over the investigation only on 25th June, 1996 and had then recorded statement of Murti Devi (PW-13) and obtained the CFSL report. PW-11 has affirmed that Murti Devi's (PW-13) statement was not recorded by the earlier IO i.e. SI Hari Singh (PW15). Deceased Anita in her dying declaration marked Ex.PW-2/A has made specific mention to telephone call made by her on the date of occurrence at 9.30 A.M. The aforesaid factum of a call by Anita on 21st May, 1996 stands affirmed by Yogesh Sharma (PW-6), Anita's father, Jai Chand Sharma (PW-7) and mother Gian Wati (PW-9). They did not have any telephone in their house. It is obvious, therefore, that the telephone call made by Anita would have been in the neighbourhood. Yogesh (PW-6) affirms having attended a call from Anita on 21st May, 1996 in a neighbour's house. However, PW-6 has given the name of the neighbour as Hari Ram Sharma and stated that the call was made at 11.30 A.M.. PW-6 in his cross-examination has deposed that Deep Chand was their neighbour and that Murti Devi (PW-13), wife of Deep Chand had come to their house on 21st May, 1996 to inform that Anita had suffered burns. Testimony of Yogesh Sharma (PW-6) on the time and place of the telephone call is not fully in seriatim with the dying declaration, but deposition of Murti Devi (PW-13) affirms and corroborates the dying declaration marked Ex.PW2/A. The aforesaid facts, notwithstanding the discrepancy regarding the time and place, confirm that

a call was made by Anita a few hours before her death. She had then expressed concern and anguish. This was the precursor to the events which followed. The facts reflect and are pointers of a dispute or a quarrel which was fostering between Anita and her in-laws. The fact that Anita had spoken to Yogesh Sharma (PW-6) in the morning was not specifically challenged in PW6's cross-examination. Yogesh (PW-6) has testified that after receiving the telephone call, he had proceeded to the shop on the cycle and informed his father that Anita was being harassed and she should be brought home. Thereafter, PW-6, his father and mother and others had proceeded to the matrimonial home of Anita, where they had met brother of the appellant-Mahender Kaushik, and learnt that Anita had suffered burn injuries and had been taken to the Lifeline Hospital. They then proceeded to the Lifeline Hospital where Anita was admitted for treatment. Jai Chand Sharma (PW-7) claims that at the time of marriage they had given Rs.31,000/- in cash, a scooter, colour television, fridge, washing machine, sofa set, bed, wrist watch, gold ring, gold chain, etc. After about one year, the appellant-Rameshwari, mother-in-law started demanding sarees. Anita's husband would taunt her for her skin colour and had demanded a Maruti car. He had threatened that he would perform a second marriage. Anita used to complain of harassment. Shawl etc. were also given by them to Anita. About four days prior to the occurrence, they had visited matrimonial home of Anita. At that time Anita's in-laws had quarrelled and demanded a car. PW-7 affirms that Yogesh (PW-6) had informed him about the telephone conversation, he had with Anita at about 11:30 AM on 21st May, 1996.

19. Jai Chand Sharma (PW-7) claims that Anita had told him in the Lifeline Hospital that her husband had poured kerosene oil on her and her mother-in-law had set her on fire. In GTB Hospital, Anita had stated that

she was pregnant and carrying a female child. Anita was taunted by her mother-in-law. The appellants did not have any sign of burns on hand or body.

20. Gian Wati (PW-9) has similarly deposed that the appellant-Mahender Kaushik used to demand a car. On 21st May, 1996, Anita had called and Yogesh (PW-6) had spoken to her. Thereafter, PW6 had narrated and informed PW9 in detail about the conversation he had with Anita. PW-9 claims that she had spoken to Anita in the hospital, where Anita had confessed that the appellant-Mahender Kaushik had poured kerosene oil on her, and her mother-in-law had lighted the fire. Anita had not earlier deposed true facts as she was threatened.

21. One of the contentions raised by the appellants before us is that Vishwamohan (PW-2) has testified that Gian Wati (PW-9) was not present when he had recorded the dying declaration of Anita (Ex.PW-2/A). Vishwamohan (PW-2) has specially denied the suggestion that mother of Anita was present when her statement was recorded. PW-2 did not remember whether Anita's mother had identified her (i.e. Anita) but when confronted with the endorsement in the dying declaration, accepted that Anita was identified by her mother Gian Wati (PW-9) and proclaimed that the mother of the deceased was present at the time of identification, but was not present when he was recording Anita's statement. This version given by PW-2 is at variance with the statement of Gian Wati (PW-9), who has stated that she was present when dying declaration marked Ex.PW-2/A was recorded. Presence of Gian Wati (PW-9) at the time when the statement of Anita was recorded appears to be the correct and true version. The patient was certainly identified by Gian Wati (PW-9) and we would accept as reasonable and plausible that PW-9 had remained present when the dying declaration (Ex.PW2/A) was recorded. Testimony of Vishwamohan (PW-

2) would indicate that the mother did not prompt or tutor Anita. In any case, this divergence or difference in the version of PW2 and PW9 is not material and of no consequence. What we are concerned and are required to adjudicate is the credibility and truthfulness of the dying declaration marked Ex.PW2/A purportedly made by Anita. We do not think the said dying declaration (Ex.PW2/A) is tutored or a false declaration made at the behest of the brother and parents of Anita, i.e., Yogesh (PW-6), Jai Chand Sharma (PW-7) and Gian Wati (PW-9). It is apparent to us that Anita initially was protective and wanted to save her in-laws, being a mother of two children. She inspite of the occurrence did not want to blame and implicate her husband and mother-in-law. It is only subsequently that Anita gathered the courage once she realised that she may not survive due to burn injuries that the dying declaration marked Ex.PW-2/A was made.

22. Learned counsel for the appellants had also drawn our attention to the photographs showing that the deceased Anita and her husband, i.e., appellant-Mahender Kaushik had travelled to Vaishno Devi, etc. and that *prasad* was also sent to the family of Anita. This is correct, but would not in our opinion affect the verdict and the final outcome, in view of the evidence and material on record. Anita did not implicate the entire or everyone in the family of her in-laws. She did not refer to her father-in-law and brother-in-law. It has come on record that the father-in-law of the deceased Anita was differently-abled. Brother-in-law, Sunil Kumar was at home and was present when Yogesh (PW-6) who had met him and was informed that Anita had suffered burns and had been taken to Lifeline Hospital. The appellants in their statements under Section 313 Cr.P.C have relied on a photocopy of a FDR purportedly in the name of the deceased Anita, mark DX. We cannot rely on a mere photocopy. No evidence was lead to establish and prove the said photocopy.

23. The contention that Anita must have been sedated and due to medication, she was mentally and physically unfit to make a statement, has to be rejected. Statement of Vishwamohan (PW-2) and the medical reports Ex.PW6/E and Ex.PW3/A are to the contrary. The contention that the deceased, Anita was unfit and not in a condition to make the dying declaration is belied by the death summary report, Ex.PW-6/E, which records that Anita aged about 23 years was admitted to the Burns Ward at 4:28 p.m. on 21.5.1996 with about 60% kerosene oil burns. The patient (i.e. Anita) at the time of admission was conscious and oriented, though poorly hydrated. Treatment of the patient was started, but the patient suffered respiratory distress at 1:30 a.m. on 22.5.1996 and was declared dead at 1:45 a.m. on 22.5.1996. A division bench of this court in Cr.L.A.10/2000; *Latoor Singh v/s State of NCT of Delhi* decided on 17.03.2015 had repelled a similar contention that a victim who has suffered burn injuries or is under treatment for ‘burn’ injuries, should be assumed as unfit to make a dying declaration, in the following words:

“20. In burn cases, usually it is argued that the victim was possibly not capable of making the dying declaration because of burns or due to sedation given by the doctors, which is, in a way, the preliminary or first treatment to relieve and soothe the pain and anxiety. However, expert medical opinion does allay such suggestions, for they reject that the impact of burn wounds or drugs used to treat burns, affect the higher functions of brain. They accept the proposition that *compos mentis* is neither affected by burns nor by treatment (refer Gupta BD, Jani CB. Status of *compos mentis* in relation to dying declaration in burn patients. Journal of Indian Academy of Forensic Medicine (JIAFM) 2004; 25(4) : 133 to 136) . Thus such arguments should not be accepted, without reference to the factual matrix and the deposition of the witness recalling and asserting that he had recorded the dying declaration.

21. In cases of 100 per cent burn injuries, a person can make a dying declaration or put a thumb impression. There are several decisions where the Supreme Court has relied on such dying

declarations (See *Mafabhai Nagarbhai Rawal vs. State of Gujarat*, : AIR 1992 SC 2186; *Rambhai vs. State of Chhattisgarh*, : (2002) 8 SCC 83; *Laxman vs. State of Maharashtra*, : AIR 2002 SC 2973; *Koli Chunilal Savji vs. State of Gujarat*, : AIR 1999 SC 3695; *Smt. Laxmi vs. Om Prakash and Ors.*, : AIR 2001 SC 2383; *Govindappa and Ors. vs. State of Karnataka*, : (2010) 6 SCC 533 and *The State of Punjab vs. Gian Kaur and Anr.*,: AIR 1998 SC 2809).”

24. We have extensively and in detail referred to the entire evidence and material on record and have tested the correctness of the dying declaration, Ex.PW2/A, and thereby reached an affirmative finding that the said declaration is reliable, trustworthy and truthful. It was not a result of tutoring or prompting by another person or imagination of the maker. The parameters and tests applied by us are in consonance and accord with the decision in *Smt. Paniben v/s State of Gujarat*; AIR 1992 SC 1817.

25. Learned counsel for the appellants relying upon the testimony of the defence witnesses Govind Ram (DW-1), Mohd. Suleman (DW-2) and Sunil Kumar (DW-3) had submitted that the prosecution has withheld best and independent evidence i.e. the two workers, who were working in the matrimonial home of Anita at the time of the occurrence. Our attention was drawn to the statement of SI Hari Singh (PW-15) who in his cross-examination has referred to presence and his interaction with two workers. We have elaborately and extensively examined and have adversely commented on this part of the SI Hari Singh’s deposition. The trial court has rightly disbelieved the versions given by Govind Ram (DW-1) and Mohd. Suleman (DW-2) on the presence of the two workers. The name of the workers have not been stated or even recorded. If the workers were present at the spot and had seen the occurrence, their names and details could have been mentioned and so stated to the police and before the trial court at the earliest. The police officers connected with the case would

have been so informed, so that the workers' version could be recorded. They would have been the prime witnesses, who would have deposed, whether or not that the appellants were the perpetrators and whether this was a case of accidental burns or deliberate burning after pouring kerosene oil. Noticeably, SI Hari Singh (PW-15) in his cross-examination has stated that water had been thrown by two workers, who had extinguished the fire. No such factual narration is mentioned in the police case diary recorded by SI Hari Singh (PW-15). If we accept the defence witnesses and SI Hari Singh's (PW-15) version, then the two workers had continued to work even after the occurrence and burn injuries. This is rather difficult to accept and would be unnatural. Govind Ram (DW-1) and Mohd. Suleman (DW-2) were certainly not present in the house at the time of occurrence. They profess standing together, when they heard noise and had proceeded to the matrimonial home of Anita, yet they assert and claim that the appellant-Mahender Kaushik, was sleeping on the first floor and had come running down stairs and the appellant No. 2, Rameshwari was in the bathroom and had thereafter arrived at the spot hurriedly. The two appellants, who were present in the house, would have certainly reached the kitchen/store earlier and before DW1 and DW2, who were standing outside and would have taken time to enter. DW1 and DW2 have accepted that they never wrote any letter or made a complaint that their statement or versions have not been recorded. Sunil Kumar (DW-3) affirms that Anita was taken to Lifeline Hospital in a TSR by the appellants Mahender Kaushik and Rameshwari. Before leaving, DW-3 had been asked to report the occurrence to the parents of Anita and he had accordingly informed Yogesh that his sister Anita had suffered burns and had been taken to the Lifeline Hospital. Father of Anita was not present in the house, but was in his shop. Thereupon, DW-3 and Yogesh Sharma (PW-6) had proceeded to

the shop of PW-6's father and from there the three had gone to the Lifeline Hospital where Anita was admitted. This version given by DW-3 is not believable and some-what un-natural. The two appellants, Mahender Kaushik and Rameshwari, in their statements under Section 313 Cr.P.C have stated that Sunil Kumar and Mahender Kaushik had conveyed information to the family of Anita on telephone. Given the seriousness and urgency, Yogesh (PW-6) and family members would have rushed to the matrimonial home of Anita or the hospital and Yogesh (PW-6) would not have waited for DW-3 to come and then proceed to the shop of his father, as deposed by DW-3.

26. Learned counsel for the appellants has relied upon the following judgments in *Chinnamma versus State of Kerala*, 2004 IIIAD (SC) 520, *Raghubiri Devi versus State (GNCT Govt. of Delhi)*, (2014) DLT (Crl.) 201(DB), *Bhanwar Pal Singh versus The State Govt. of NCT of Delhi*, (2009) 4 JCC 2593, *State versus Hori Lal and Another*, (2006) VII AD (Delhi) 585, *Laxmi versus Om Prakash and Others*, 92 (2001) DLT 447 (SC), *Jagdish Lal Malhotra versus The State*, (1983) CC Cases 558 (HC), *T.K. Reddy versus State of A.P.*, (2002) 3 JCC 1575, *State of Gujarat versus Mohan Bhai Raghbhai Patel*, (1990) Crl.L.J. 1462, *State of Punjab and Others versus Gurmail Singh* and connected appeals (1990) Crl.L.J. 1464, *State of Rajasthan versus Prithvi Raj*, (1995) CAR 335, *Ramesh Kumar Gupta versus State of M.P.*, (1995) CAR 337, *Ganesh Bhavan Patel and Another versus State of Maharashtra*, AIR 1979 SC 135.

27. We do not deem it appropriate and necessary to refer to the said case laws for the reason that reliance was placed by pleading factual similarities. Factual narration and factual findings are not the *ratio decidendi*. Facts

cannot and would possibly never be identical, though some or partial similarities may exist. Facts noticed and found in one case can lead to acquittal or conviction, but small differences can be significant and could justify and mandate an opposite conclusion. A small difference in facts can lead to opposite and distinct findings. Truthfulness and credibility of a dying declaration has to be adjudged and adjudicated keeping in mind the factual matrix of a particular case. Every case has its own facets and peculiarities and, therefore, some similarities in the factual matrix of a decided case cannot determine, whether or not the dying declaration should be accepted or rejected. In the present case, we have referred to the dying declarations relied by the prosecution and the defence, scrutinised and elucidated upon the evidence and material on record to accept the finding of the trial court.

28. In view of the aforesaid discussion, we do not find any merit in the present appeal by Mahender Kaushik and Rameshwari challenging their conviction under Section 302 read with Section 34 IPC and 498A read with Section 34 IPC. We also do not see any reason to interfere with the order of sentence. The appeal is accordingly dismissed.

29. The appellants were released on bail during pendency of the present appeal on suspension of sentence vide order dated 19th March, 2002 in the case of Rameshwari and 17th November, 2006 in the case of Mahender

Kaushik. They shall surrender within fifteen days from today to undergo the remaining sentence. In case they do not surrender, steps for their detention and arrest would be taken in accordance with law. Copy of this judgment will be sent to the trial court for compliance.

(SANJIV KHANNA)
JUDGE

(R.K. GAUBA)
JUDGE

NOVEMBER 24th, 2015
VKR