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

+ CRL.A. 272/2000

% ***Judgment dated 6th May 2016***

ANGOORI DEVI & ANR. Petitioners

Through: Mr.M.L. Yadav, Adv.

versus

STATE Respondent

Through; Ms. Aasha Tiwari, APP for State.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G.S.SISTANI, J. (ORAL)

1. Present appeal arises out of a judgment dated 21.02.2000 and an order on sentence dated 03.04.2000, passed by the Additional Sessions Judge, Shahdara, Delhi, in Session Case No.11/97, in case FIR No.364/96 registered under Sections 498A/302/34 IPC at Police Station Bhajanpura, whereby the appellants were convicted for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code and sentenced to undergo imprisonment for life with fine of Rs.10,000/-, each, and in default of payment of fine to undergo Rigorous Imprisonment for one year. The appellants were also convicted for the offence punishable under Section 498A IPC and they were directed to undergo Rigorous Imprisonment for three years with fine of Rs.5,000/-, each, and in default of payment of fine, to undergo Rigorous Imprisonment for six months.
2. At the outset, we may notice that appellant no.1, Smt.Angoori Devi, mother-in-law of the deceased, has since died.
3. The brief facts of the case, as noticed by the learned trial court, are as under:-

“1. The case of the prosecution is that on 03.07.1996 at 11.35 am an information was received at PS Bhajanpura from PCR that an information has been received there that one person was burning his wife in street no.1, Vijay Park. On this DD No.8A was recorded and ASI Chottu Ram was deputed for the spot. ASI Chottu Ram alongwith Constable Dhani Ram reached at the spot i.e. House No.486, Gali No.1, Vijay Park. There a PCR van and the ACP Seelampur were present. He came to know that injured has been removed to GTB Hospital. So, he went there.

2. He obtained the MLC of Chetna w/o Rakesh. As per the MLC, she had received 95% burns and was unfit for making statement. The husband of injured Rakesh was also admitted in the hospital. He also obtained his MLC. He was also unfit for making statement at that juncture. In the night an information was received at the police station that injured Chetna has re-gained consciousness. So, SI Arun Kumar reached at GTB hospital alongwith SDM/North-East District. On 04.7.1996 at about 4.20 am SDM/N-E recorded statement of injured Chetna.

3. In her statement the injured disclosed that she was married on 04th July of the last year. On that day a quarrel was taking place in her house. Her husband had gone to Bazaar. When she returned to her house, after making a phone call from outside, her mother-in-law asked her as to where she had been. She further stated that she had been very bold in coming out. Upon this, her ever caught hold of her and her Nanadh poured oil on her and her mother in law set her on fire. She was put on fire because her in laws had been asking for dowry from her parents. Her mother-in-law used to tell her husband that he should leave Chetna so that he may be married again with sufficient dowry. She further told that her husband had gone to bazaar when she was burnt by these persons. When her husband returned, he tried to extinguish the fire. She had made the phone call from a flour mill near her house in order to convey her mother that a serious quarrel is going on at her house.

4. The SDM made his endorsement on the said statement, on the basis whereof a case under Section 498A/307 IPC was registered against the accused persons. The investigation was transferred to SI Raghbir Sharan. He prepared the site plan, recorded the statements of witnesses. On 07.07.1996 deceased Chetna expired in the hospital. He got the post-mortem examination done on the body

of Chetna on 08.07.1996. After post-mortem examination, the dead body was handed over to her heirs.”

4. The prosecution, in order to prove its case, has examined 16 witnesses. No witness was examined by the defence. Statements of the appellants were recorded under Section 313 Cr.P.C.
5. Mr.Yadav, learned counsel for the remaining appellant, namely, Dinesh Kumar, who is the brother-in-law of the deceased (*dewar*), submits that the judgment passed by learned trial court is contrary to the facts and law established on record and there is no evidence against the appellant, who was approximately 23 years of age at the time of the incident.
6. Learned counsel further submits that the trial court has placed reliance on the dying declaration of the deceased without taking into consideration that the deceased was admitted to the hospital with 95% burns and even as per the first endorsement on the MLC, she was unfit to make a statement. One of the endorsements made by the Doctor on the MLC is Ex.PW7/A. It is further submitted that the subsequent endorsement made in the MLC is mechanical in nature and the said endorsement does not stand proved.
7. Mr.Yadav further submits that even the SDM did not made any endeavour to ascertain the fitness of the patient before the statement of the deceased was recorded. It is, thus, submitted that in the absence of any evidence of the Doctor who made the endorsement that the patient was fit for statement, no reliance can be placed on the dying declaration.
8. It is also contended by learned counsel for the appellant that the time of the incident was approximately 11.30 a.m. on 03.07.1996 while the dying declaration was sought to be recorded in the early hours in the morning of 04.07.1996 which gave sufficient time to the family members of the deceased to tutor the deceased. Mr.Yadav, counsel for the appellant further submits that in the family matters more particularly, matrimonial

matters, there is a strong tendency of roping in all the family members and the present case is a perfect example of such an endeavour made by the deceased and her family members.

9. It is further contended by learned counsel for the appellant that although the trial court has found the mother-in-law, sister-in-law and the brother-in-law guilty under Section 498-A but a careful examination of the testimonies on record would show that there are no specific allegations against the appellant, Dinesh Kumar. Counsel also contends that being a bachelor and very young in age, it is improbable that the appellant herein (brother-in-law) would have raised any demand in his individual capacity and he neither had the stature nor he was in a position to make such a demand, and, thus, there would be no motive or reason for him to have participated in the quarrel which had taken place prior to the incident and on the date of the incident.
10. It is also contended by Mr.Yadav that there is no evidence to suggest that the act of burning the deceased was pre-planned or there was any meeting of minds between the appellant, the mother-in-law and the sister-in-law. It is further contended that it is alleged that the sister-in-law of the deceased poured kerosene oil on the deceased, the mother-in-law lit the fire and as per the version of the prosecution the appellant had caught hold of the deceased, which would show that the appellant has simply been roped into the incident. The appellant did not pour the kerosene oil or light the matchstick and thus the conclusion of guilt by the trial court is fallacious.
11. Learned counsel for the appellant further submits that the conduct of the appellant, Dinesh Kumar, would show that there is no role of foul play in the entire incident as he was the one who removed the deceased to the hospital and in case the appellant had any intention to kill the deceased, he would not have taken any steps to save her by removing her to the

hospital and providing the medical attention.

12. Mr.Yadav, learned counsel for the appellant, also contends that neither the burnt clothes of the deceased nor her hair from the scalp were sent for medical examination to ascertain the presence of kerosene oil. It is further submitted that the stove in question was also not sent to Forensic Science Laboratory for its opinion. Further there is also no evidence, which shows that the stove contained kerosene oil. Thus, in the absence of any report from the Forensic Science Laboratory with regard to presence of kerosene oil in the stove, pouring of the kerosene oil on the deceased from the stove has not been proved.
13. Mr.Yadav also submits that the appellant has already been in incarceration for almost over 6½ years including the remission earned by him, he is now a married man with children and is supporting his old infirm and ailing father.
14. Ms.Aasha Tiwari, learned APP for the State, submits that the prosecution has been able to prove its case beyond any shadow of doubt, the Trial Court has rightly relied upon the dying declaration which is a reliable piece of evidence, and there is no necessity of a fitness certificate prior to recording of dying declaration of a deceased.
15. Ms.Tiwari further submits that the SDM in his cross-examination has clearly deposed that the voice of the deceased was coherent which would show that the SDM was satisfied about the fitness of the deceased. Counsel further submits that a reading of the statement would show that there was no puffing up, the statement was in a question-answer form and is explicit. The role of each person i.e. sister-in-law (since deceased) of pouring kerosene oil; the mother-in-law (since deceased) of lighting the fire; and the appellant of catching hold of the deceased, have been clearly stated therein.

16. Learned counsel for the State further submits that on account of any lapse on the part of the investigating agency, the appellant cannot derive any benefit of the same. Counsel further points out that although the stove and burnt pillow were seized but they were not sent to the Forensic Science Laboratory for opinion.
17. We have heard learned counsel for the parties, considered their rival submissions and also examined the judgment and order on sentence passed by the learned trial court.
18. As per the dying declaration, the genesis of the quarrel was the demand of dowry. We may also notice that the Trial Court has convicted the accused person under Section 498A IPC as well as Section 302 IPC. Mr.Yadav submits that since the appellant has served the sentence for more than 6½ years, he does not contest the order on conviction and sentence as far as Section 498-A is concerned, as the period already stands undergone by him.
19. Before the submission of learned counsel for the parties are considered, we deem it appropriate to discuss the testimonies of some of the material witnesses.
20. PW-1, Sh.Bachchan Lal, is the father of the deceased. He has testified that he had given dowry to the best of his capability at the time of marriage of his daughter, Chetna. He has further testified that within two or four days of the marriage of her daughter, quarrel started taking place in the matrimonial house of his daughter on the issue that the bed, which was given in the marriage, was not up to the expectation and the bed was returned by the appellants. PW-1 has further testified that the quarrel was started by the mother-in-law, sister-in-law and brother-in-law of the deceased. According to the testimony of PW-1, all the three accused persons used to harass his daughter for bringing insufficient dowry. PW-1

has further deposed that he had then gone to the matrimonial house of his deceased daughter and brought her back. The deceased had informed him that the mother-in-law had been pressurising him to bring TV, sofa set and she had also demanded Rs.50,000/- in cash. PW-1 had then left his daughter to her matrimonial home. PW-1 also told the accused persons that he was not in a position to meet their demands and had already given sufficient dowry at the marriage as per his capabilities. The accused persons then not only humiliated PW-1 but also humiliated his daughter. After few days the deceased was left by the accused persons at the house of PW-1. The daughter stayed in the house of PW-1 for three months, during which period he lodged a complaint at Sudhar Samiti, Karzon Road, New Delhi. The accused persons had given in writing before the Sudhar Samiti that they would not maltreat his daughter. This witness has also testified that at about 4.00 a.m. after her daughter was admitted in the hospital in a burnt condition on 3.6.1996, his daughter had told him that the appellant Dinesh Kumar (brother-in-law) caught hold of her while sister-in-law sprinkled kerosene oil on her body and the mother-in-law set her on fire.

21. PW-1 witness was cross-examined in detail. During cross-examination, PW-1 has stated that his daughter had not told him anything initially as she was not capable of making any statement at that time, but later had disclosed about the circumstances leading to her death at 4.00 a.m. on the fourth. PW-1 had remained in the hospital till the time of death of his daughter. PW-1 has further stated that it was correct that his daughter was being oxygenated throughout through an apparatus. PW-1 has also admitted that there was a lot of swelling on the face of his daughter on account of burning at that time. He has also stated that it was correct that Dinesh and Chanchal along with Rakesh, husband of her daughter, had admitted his

daughter in the hospital. PW-1 has also admitted that he had met the Police on the fourth in the hospital when the SDM visited the hospital. PW-1 has also stated to be correct that when the SDM visited the hospital, he along with his wife was present in the hospital. PW-1 has also admitted that the Doctors were not present when the SDM visited his daughter. PW-1 has also admitted that he had talked to his daughter for five/ten minutes prior to the arrival of the SDM. It has also been admitted by this witness that his daughter was interrogated by the SDM in his presence. PW-1 has also stated that it was correct that no Doctor was present at the time of recording of his statement by the SDM. PW-1 has admitted to be correct that two-three Police officials were present at the time of recording of statement of his daughter by the SDM.

22. PW-3, Smt.Kiran, is the mother of the deceased. PW-3 has testified on similar lines as that of her husband. PW-3 has testified that soonafter the marriage of her daughter, a demand for sofa and cash in the sum of Rs.50,000/- were made. According to PW-3, the demands were made by her "*mother-in-law, etc.*". PW-3 has further testified that the accused person (mother-in-law of her daughter) present in Court told PW-3 that she should take her daughter as she did not want to keep her. PW-3 had brought her daughter with her for three months. A settlement had been arrived at and the deceased was taken by the mother-in-law, father-in-law and the husband from the office of Sudhar Samiti. In her testimony, PW-3 has further testified that she was informed that her daughter was beaten up on account of the fact that as to why her daughter had informed her mother (PW-3) on telephone and that she was caught from her hands and feet by the appellant Dinesh Kumar (brother-in-law), the sister-in-law (since deceased) poured kerosene oil on her daughter and the mother-in-law put fire.

23. During cross-examination, PW-3 has testified that she was near her daughter at the time statement of her daughter was being recorded by the SDM. In fact, the head of her daughter was in the lap of her husband. Besides PW-3 and her husband, there were two Police officials with the SDM at the time of recording of statement of her daughter. The IO was not near them although he was present in the hospital. PW-3 has also testified that a Doctor had examined her daughter before the arrival of the SDM but he left before the arrival of SDM. PW-3 has also testified that hands, feet and face of her daughter were burnt. This witness has also testified that there was something cage type, which was made of iron, kept over the body of her daughter in the hospital. PW-3 has also testified that it was correct that there were swelling on the lips of his daughter because of burns.
24. PW-6, Dr.K.K. Banerjee, from GTB Hospital, has testified that he had conducted post-mortem on the dead body of the deceased. Details of the injuries opined by PW-6 read as under:

“Details of injuries:-

1. *Deepto superficial infected antimortem, burn injuries present over:-*

- (i) Whole of face (2) front and back of chest*
- (3) front and back of upper part of abdomen*
- (4) Both right and left hands.*
- (5) Both the right and left legs.*

Zone of erythema present between burnt and unburnt area. Feeling off of skin present at places. The burnt area having yellowish green found smelling discolouration. The total body surface affected burnt injuries 90%.

INTERNAL EXAMINATION:

Scalp- Evidence of singeing of scalp hairs present.

Skull brain :- NAD

Lungs :-

Right and left cavity contains pale yellow liquid. Cut section shows scattered pockets of pus mainly in the hilar area. Congested.

Heart : NAD

Liver : Congested

Spleen : Right left scattered pockets of pus present in the cut section.

Stomach : Contains pale yellow liquid. Voles congested.

Intestines : NAD

Bladder : NAD

Uterus : NAD

Cause of Death : Septicaemia as a result of deep to superficial infected antemortem burns covering 90% of body surface likely to be caused by flame.

Time since death : About one and half day.”

25. PW-7, R.K. Nagar, CMO, GTB Hospital, Delhi, has testified as under:

“On 3.7.96 I was working as C.M.O. On that day Dr.Sandeep Chhabra, who was working as Jr.Resident, examined Chetna w/o Rakesh Kumar, vide MLC No.C-2266/96 and Rakesh s/o Laxmi Dass, vide MLC No.C-2267. Both these MLCs bear the signatures of Dr.Sandeep Chhabra. I can identify his handwriting and signatures. Dr.Sandeep Chhabra has since left the services of this hospital and his present whereabouts are not known. The MLCs are Ex.PW7/A and Ex.PW7/B.”

26. PW-9, Sh.Vishwa Mohan, Deputy Director (Transport), the then SDM, who recorded the statement of the deceased, has testified as under:

“1. On 3.7.96 I was posted as SDM, Shahdara. On that day, I received information from SHO Gokalpuri regarding admitting of one lady with burn injuries in GTB Hospital, within 7 years of her marriage. I visited the said hospital. However, the lady Smt. Chetna w/o Rakesh Kumar was unfit for statement. I again visited the hospital on 4.7.96 in the morning. At that time, Smt.Chetna was fit for statement and was also declared fit for statement by doctor on duty. I recorded her statement which is Ex.PW9/A. It was recorded in the question-answers form.

2. I obtained the thumb impression of Chetna point X and I signed at point A, and point B. I made the endorsement for taking necessary action against the accused persons through SHO Bhajanpura, as the case pertained to the jurisdiction of PS Bhajan Pura. I also signed at point B.”

27. It would also be useful to record the relevant portion of the cross-examination of PW-9, which read as under:

“..... I do not remember whether anybody i.e. girl's relatives, police officials were or were not present when I recorded the statement (Vol. Generally I adopt the practice of telling every relatives and police officials to go our when I start writing the statement.

CQ: Did you ask in this case to the relatives or police officials to leave before starting recording statement.

Ans: I asked, them to leave the place before I started recording the statement but I do not remember whether they left or not.

8. I did not ask any member of hospital staff to remain present at the time of recording the statement. The speech of the deceased was coherent. She was taking normal time to answer the questions. Normal time means as you and I are speaking. I do not remember whether the lips of the deceased were burnt or not. I do not remember hence I cannot tell whether the entire body of the deceased was bandaged, nor I remember if her body was visible or covered. I cannot tell whether some blood bottle, Glucose or Oxygen was being administered to her.

CQ : Do you know in what manner the Oxygen is administered to

a patient?

Ans: I do not know.

9. There was no mask on the face of patient for administering Oxygen to her. I do not remember if a cage type of coverage was there covering the bed of deceased. ”

28. Mr.Yadav, learned counsel for the appellant, has strongly urged before this Court that dying declaration cannot be relied upon as the Doctor, who made the endorsement ‘fit for statement’, was not examined by the prosecution and in the absence of this, dying declaration cannot be relied upon.
29. The law with regard to dying declaration is very well-settled. It has been held that there is no special form in recording a dying declaration. For a dying declaration to be admissible, it is not necessary that it is recorded by a SDM. The underlying principal with regard to placing reliance on the dying declaration is that the same should be reliable and the same should be corroborated by any other form of evidence, however, there is no rule that a conviction can be made solely on the basis of a dying declaration.
30. The Hon’ble Supreme Court has laid down in several judgments the principles governing dying declaration, which could be summed up as under as indicated in ***Smt. Paniben v. State of Gujarat*** reported in 1992 Cri LJ 2919:

“(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration.

(ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration.

(iii) The Court has to scrutinize the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had an opportunity to

observe and identify the assailants and was in a fit state to make the declaration.

(iv) Where dying declaration is suspicious, it should not be acted upon without corroborative evidence.

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected.

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction.

(vii) Merely because a dying declaration does contain the details as to the occurrence, it is not to be rejected.

(viii) Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth.

(ix) Normally the Court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eyewitness said that the deceased was in a fit and conscious state to make the dying declaration, the medical opinion cannot prevail.

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon.

(xi) Where there are more than one statement in the nature of dying declaration, one first in point of time must be preferred. Of course, if the plurality of dying declaration could be held to be trustworthy and reliable, it has to be accepted.”

31. In a decision reported in ***Rafique @ Rauf & Others v. State of U.P.***, reported at 2013 (7) SCALE 708, the Supreme Court considered in detail the provisions concerning the extent of reliance that can be placed upon the dying declaration. Paras 13 to 20 read as under:

“13. In this context when we make reference to the statutory provisions concerning the extent of reliance that can be placed

upon the dying declaration and also the implication of Section 162(2) Cr.P.C. vis-à-vis Section 32(1) of the Evidence Act, 1872, we feel that it will be appropriate to make a reference to the decision of this Court reported in Khushal Rao vs. State of Bombay - AIR 1958 SC 22. Justice Sinha speaking for the Bench after making further reference to a Full Bench decision of the High Court of Madras headed by Sir Lionel Leach, C.J., a decision of the Judicial Committee of the Privy Council and 'Phipson on Evidence' – 9th Ed., formulated certain principles to be applied to place any reliance upon such statements. We feel that the substance of the principles stated in the Full Bench decision and the Judicial Committee of the Privy Council and the author Phipson's view point on accepting a statement as dying declaration can also be noted in order to understand the principles ultimately laid down by this Court in paragraph 16.

14. The Full Bench of the Madras High Court reported in In re, Guruswami Tevar - ILR 1940 Mad 158 at page 170 (AIR 1940 Mad 196 at p.200) in its unanimous opinion stated that no hard and fast rule can be laid down as to when a dying declaration should be accepted, except stating that each case must be decided in the light of its own facts and other circumstances. What all the Court has to ultimately conclude is whether the Court is convinced of the truthfulness of the statement, notwithstanding that there was no corroboration in the true sense. The thrust was to the position that the Court must be fully convinced of the truth of the statement and that it should not give any scope for suspicion as to its credibility. This Court noted that the High Court of Patna and Nagpur also expressed the same view in the decisions reported in Mohamad Arif vs. Emperor – AIR 1941 Pat.409 (J) and Gulabrao Krishnajejee vs. Emperor – AIR 1945 Nag. 153 (K).

15. The Judicial Committee of the Privy Council while dealing with a case, which went from Ceylon, which was based on an analogous provision to Section 32(1) of the Indian Evidence Act, took the view that apart from the evidence of the deceased the other evidence was not sufficient to warrant a conviction. It was, however, held that in that case when the statement of the deceased was received and believed as it evidently was by the jury it was clear and unmistakable in its effect and thereby, the conviction was fully justified and was inevitable. The Judicial Committee noted that the factum of a murderous attack, though resulted in the cutting of the

throat and the victim was not in a position to speak but yet by mere signs she was able to convey what she intended to speak out, and the said evidence was brought within the four corners of the concept of dying declaration, which formed the sole basis ultimately for the Court to convict the accused, which was also confirmed by the Supreme Court of Ceylon, as well as by the Judicial Committee of the Privy Council.

16. The author Phipson in his 9th Ed., of the book on Evidence made the following observations:

".....The deceased then signed a statement implicating the prisoner, but which was not elicited by question and answer, and died on March 20. It was objected that being begun in that form, it was inadmissible:- Held (1) the questions and answers as to his state of mind were no part of the dying declaration; (2) that even if they were, they only affected its weight, not its admissibility; and (3) that the declaration was sufficient, without other evidence, for conviction R. v. Fitzpatrick, (1910) 46 Ir. L.T. 173 (M)."

17. After considering the above legal principles, this Court has set down the following six tests to be applied for relying upon a material statement as a dying declaration:

"16. On a review of the relevant provisions of the Evidence Act and of the decided cases in the different High Courts in India and in this Court, we have come to the conclusion, in agreement with the opinion of the Full Bench of the Madras High Court, aforesaid, (1) that it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated; (2) that each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made; (3) that it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other pieces of evidence; (4) that a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence; (5) that a dying declaration which has been recorded by a competent magistrate in the proper

manner, that is to say, in the form of questions and answers, and, as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character, and (6) that in order to test the reliability of a dying declaration, the Court has to keep in view the circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the facts stated had not been impaired at the time he was making the statement, by circumstances beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties.”

(Emphasis added)

18. We also wish to add that as on date, there is no statutory prescription as to in what manner or the procedure to be followed for recording a dying declaration to fall within the four corners of Section 32(1) of the Evidence Act. The presence of Magistrate; certification of the doctor as to the mental or the physical status of the person making the declaration, were all developed by judicial pronouncements. As has been repeatedly stated in various decisions, it will have to be found out whether in the facts and circumstances of any case the reliance placed upon by the prosecution on a statement alleged to have been made by the deceased prior to his death can be accepted as a dying declaration, will depend upon the facts and circumstances that existed at the time of making the statement. In that case it would mainly depend upon the date and time vis-à-vis the occurrence when the statement was alleged to have been made, the place at which it was made, the person to whom the said statement was made, the sequence of events, which led the person concerned to make the statement, the physical and mental condition of the person who made the statement, the cogency with which any such statement was made, the attending circumstances, whether throw any suspicion as to the factum of the statement said to have been made or any other factor existing in order to contradict the statement said to have been made as claimed by the prosecution, the nexus of the person who made

the statement to the alleged crime and the parties involved in the crime, the circumstance which made the person to come forward with the statement and last but not the least, whether the said statement fully support the case of the prosecution.

19. In this context, we can also make a reference to a decision of this Court reported in Cherlopalli Cheliminabi Saheb and another vs. State of Andhra Pradesh - (2003) 2 SCC 571, where it was held that it was not absolutely mandatory that in every case a dying declaration should be recorded only by a Magistrate. The said position was reiterated in Dhan Singh vs. State of Haryana – (2010) 12 SCC 277 wherein, it was held that neither Section 32 of the Evidence Act nor Section 162(2) of the Cr.P.C., mandate that the dying declaration has to be recorded by a designated or particular person and that it was only by virtue of the development of law and the guidelines settled by the judicial pronouncements that it is normally accepted that such declaration would be recorded by a Magistrate or by a doctor to eliminate the chances of any doubt or false implication by the prosecution in the course of investigation.

20. In a recent decision of this Court reported in Sri Bhagwan vs. State of U.P. – 2012 (11) SCALE 734, to which one of us was a party, dealt with more or less an identical situation and held as under in paragraphs 21 and 22:

“21. As far as the implication of 162 (2) of Cr.P.C. is concerned, as a proposition of law, unlike the excepted circumstances under which 161 statement could be relied upon, as rightly contended by learned senior counsel for the respondent, once the said statement though recorded under Section 161 Cr.P.C. assumes the character of dying declaration falling within the four corners of Section 32(1) of Evidence Act, then whatever credence that would apply to a declaration governed by Section 32 (1) should automatically deemed to apply in all force to such a statement though was once recorded under Section 161 Cr.P.C. The above statement of law would result in a position that a purported recorded statement under Section 161 of a victim having regard to the subsequent event of the death of the person making the statement who was a victim would enable the prosecuting authority to rely upon the said statement having

regard to the nature and content of the said statement as one of dying declaration as deeming it and falling under Section 32(1) of Evidence Act and thereby commend all the credence that would be applicable to a dying declaration recorded and claimed as such.

22. Keeping the above principle in mind, it can be stated without any scope for contradiction that when we examine the claim made on the statement recorded by PW-4 of the deceased by applying Section 162 (2), we have no hesitation in holding that the said statement as relied upon by the trial Court as an acceptable dying declaration in all force was perfectly justified. We say so because no other conflicting circumstance was either pointed out or demonstrated before the trial Court or the High Court or before us in order to exclude the said document from being relied upon as a dying declaration of the deceased. We reiterate that having regard to the manner in which the said statement was recorded at the time when the crime was registered originally under Section 326 IPC within the shortest time possible within which it could be recorded by PW-4 in order to provide proper medical treatment to the deceased by sending him to the hospital, with no other intention pointed out at the instance of the appellant to discredit contents of the said statement, we hold that the reliance placed upon the said statement as the dying declaration of the deceased was perfectly justified. Having regard to our above conclusion, the said submission of the learned counsel for the appellant also stands rejected.”

32. The case in hand is to be decided on the touchstone of the law laid down by the Supreme Court of India with regard to dying declarations.
33. In the case of ***Amar Singh v. State of Rajasthan***, reported at 2010 (3) Apex Court Judgments 258 (S.C.), it has been held that in the matters of dowry death there is a general tendency to rope in all the relations of the in-laws of the deceased wives. The relevant portion of the judgment reads as under:

“23. PW2 (father of the deceased) has not stated in his evidence before the Court that Jagdish and Gordhani, in any way, subjected the deceased to any harassment or cruelty. PW4 (mother of the deceased), however, has stated that the deceased used to complain about the demand of a Scooter by Girdhari and harassment by her mother-in-law Gordhani, but PW-4 has not stated what was the exact act of Gordhani by which the deceased felt harassed. The evidence of PW-5 (brother of the deceased) is that whenever the deceased used to come home she used to complain that her in-laws have been teasing her and they were demanding a Scooter or Rs.25,000/- for a shop and that when the deceased came home one month prior to her death, she complained that her mother-in-law and all other in-laws used to torture her and taunt her that she did not bring anything, but PW5 has not described the exact conduct of the mother-in-law and other in-laws on account of which the deceased felt tortured and taunted. On the other hand, the evidence of PW4 is clear that Amar Singh used to taunt her that she has come from a hungry house. Thus, there was evidence in the case of Amar Singh about his exact conduct which caused harassment to the deceased but there was no such evidence in the case of Jagdish and Gordhani. A prosecution witness who merely uses the word “harassed” or “tortured” and does not describe the exact conduct of the accused which, according to him, amounted to harassment or torture may not be believed by the Court in cases under Section 498A and 304B IPC. For this reason, the High Court has taken a view that the charges against Jagdish and Gordhani have not been established beyond reasonable doubt and that their case is distinguishable from that of Amar Singh and that Jagdish and Gordhani appear to have been implicated because they were members of Amar Singh's family.”

24. In Kans Raj v. State of Punjab and Others, 2000 (2) Apex Court Journal 221 (S.C.) : 2000 (5) SCC 207, this Court cautioned that in cases where accusations of dowry deaths are made, the overt acts attributed to persons other than the husband are required to be proved beyond reasonable doubt and by mere conjectures and implications such relations cannot be held guilty for the offence relating to dowry deaths. In the aforesaid case, this Court further observed that a tendency has developed for roping in all relations of the in-laws of the deceased wives in the matters of dowry deaths which, if not discouraged, is likely to affect the case of the prosecution even against the real culprits.

25. *We, therefore, do not find any substance in the contention of Dr.Singhvi that the High Court should have sustained the conviction of Jagdish and Gordhani and we accordingly dismiss this appeal.”*

34. We have discussed in detail the testimonies of the father and the mother of the deceased, being PW-1 and PW-3, respectively, which would show that soonafter the marriage of the deceased i.e. within two-four days of marriage, the parents of the deceased learnt that their daughter was being harassed with regard to demand of dowry. Although, we may again note that the learned counsel for the appellant is not contesting the appeal as far as the conviction of appellant, Dinesh Kumar, under Section 498A IPC is concerned, we may notice that the demands of dowry referred to in the testimony of PW-1 and PW-3 are general in nature and directed against the mother-in-law.
35. In his testimony, PW-1 has testified that the quarrel took place on the issue of giving a bed in the marriage, which was not upto the expectations of the accused persons. The bed was returned by the accused persons. Thereafter as per PW-1 the quarrel started by the mother-in-law, sister-in-law and brother-in-law. While PW-1 has used the words ‘accused persons had pressurized her daughter to bring TV, sofa set and Rs.50,000/- in cash’, the mother (PW-3) used a generalised expression. PW-3 has testified that the demand, according to her daughter, was made by the “*mother-in-law, etc*”. PW-3 has also testified that her daughter was being harassed by the accused persons. There are some specific allegations concerning the mother-in-law, who has since deceased. We find from the testimony of PW-3 that after the settlement was arrived at Sudhar Samiti, the mother-in-law and the husband of the deceased had taken the deceased back to her matrimonial home, but there is no reference to the appellant

Dinesh Kumar, brother-in-law, who was about 23 years of age at the time of the incident.

36. The testimonies of PW-1 and PW-3 in our view do not repose confidence that any specific demand of dowry was made by the appellant, Dinesh Kumar, (brother-in-law) or that he was responsible for torturing, beating or demanding dowry from the deceased.
37. At the cost of repetition, we may notice that a dying declaration can be acted upon without corroboration if the Court is satisfied that the dying declaration is true and voluntary. The Court must carefully examine and scrutinise the dying declaration to ensure that the same is the result of tutoring, prompting and imagination. The Court must also be fully satisfied that the deceased was in a fit mental condition to make the dying declaration.
38. Learned counsel for the appellant has laid great stress that despite an endorsement having been made regarding the patient being fit for statement, the Doctor who made the endorsement, was not produced as a witness. Closely connected to this argument is that the deceased was actually not in a fit state of mind to make the dying declaration as the first endorsement made on the MLC is 'not fit for statement' and 'the patient was being sedated through IU'. Learned counsel has contended that the condition of a patient with 90% burns is likely to deteriorate and not become better. It has also been argued that firstly the patient was not fit for statement and secondly the statement so recorded was as a result of tutoring and prompting as the family members of the deceased were present in the hospital and more particularly in the room of the deceased within fifteen minutes prior to the arrival of the SDM and also during the time when the statement was being recorded.
39. In *Kamalavva v. State of Karnataka*, reported at (2009) 13 SCC 614, the

Court rejected the technical objection regarding the non-availability of a certificate and endorsement from the Doctor regarding mental fitness of the deceased. It was further held that it was a mere rule of prudence and not the ultimate test as to whether or not the dying declaration was truthful or voluntary.

40. It would, thus, require consideration that is the dying declaration reliable, true and voluntary or is it a result of tutoring, prompting or imagination.
41. The SDM has also testified that at the time of his recording the statement of the deceased no Doctor was present and in fact no relation of the deceased was present when he recorded the statement. The SDM did not remember if any relative of the girl or any Police officials were present at the time when he recorded the statement. The SDM volunteered to say that he adopted a practice of telling every relative and Police official to go out when he used to start writing the statement. There is absolute contradiction as far as this part of the testimony of the SDM is concerned as during cross-examination the mother of the deceased (PW-3) had stated that not only she and her husband were present in the room, they were present in the room even prior to the recording of the statement and in fact the head of her daughter was in the lap of her husband. PW-3 has also testified during cross-examination that she, her husband and two Police officers (body guard of the SDM) were present at the time when the statement was being recorded. This fact is corroborated by the evidence of PW-1, father, who had testified that he and his wife were present in the hospital throughout. PW-1 has also testified during cross-examination that he had talked to his daughter five-ten minutes before the arrival of the SDM, the head of the deceased was towards West and his daughter was being interrogated by the SDM in his presence.
42. Keeping these factors in mind, we are of the view that there was element

of tutoring by the parents of the deceased soon before the statement of the deceased was recorded by the SDM and the facts that the head of the deceased was in the lap of her father when the statement was being recorded casts a grave suspicion of prompting and tutoring.

43. It may be noticed that both, PW-1 and PW-3, have testified that the deceased had swelling on her face, her lips were swollen, a cage type of box of metal was kept over the body of the deceased and the deceased was also on oxygen. The mother has also testified that the deceased was talking slowly but the SDM has testified that the deceased was talking in a normal way.
44. The inclusion of the name of the appellant (brother-in-law) seems to be an attempt to rope in all the family members.
45. Although in every case, the endorsement 'fit for statement' may not be necessary but in the present case since the girl was admitted to the hospital with 90% burns and the first endorsements on the MLC i.e. 'not fit for statement' and 'the patient was being sedated through IU' is concerned, it seems improbable that instead of her condition worsening the deceased became fit for statement and it is in this contest that the Doctor, who had made the endorsement 'fit for statement' should have been produced as a witness in this case, especially when PW-1 and PW-3 have decided that the deceased had swelling on her face, her lips were swollen and a cage type box of metal was kept over her body and she was on oxygen.
46. The Court must ensure that there is no miscarriage of justice and if the facts and circumstances of a case so demand then benefit of doubt must be given to the accused person provided a reasonable doubt is not imaginary, trivial, or merely a probable doubt, but a doubt based upon reasoning and common sense. In the case of ***Raj Kumar Singh @ Raju @ Batya Vs.***

State of Rajasthan, reported at (2013) 5 SCC 722, the Apex Court has held as under:

“17. Suspicion, however grave it may be, cannot take the place of proof, and there is a large difference between something that 'may be' proved and 'will be proved'. In a criminal trial, suspicion no matter how strong, cannot and must not be permitted to take place of proof. This is for the reason, that the mental distance between 'may be' and 'must be' is quite large and divides vague conjectures from sure conclusions. In a criminal case, the Court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof. The large distance between 'may be' true and 'must be' true, must be covered by way of clear, cogent and unimpeachable evidence produced by the prosecution, before an accused is condemned as a convict, and the basic and golden rule must be applied. In such cases, while keeping in mind the distance between 'may be' true and 'must be' true, the Court must maintain the vital distance between conjectures and sure conclusions to be arrived at, on the touchstone of dispassionate judicial scrutiny based upon a complete and comprehensive appreciation of all features of the case, as well as the quality and credibility of the evidence brought on record. The Court must ensure, that miscarriage of justice is avoided and if the facts and circumstances of a case so demand, then the benefit of doubt must be given to the accused, keeping in mind that a reasonable doubt is not an imaginary, trivial or a merely probable doubt, but a fair doubt that is based upon reason and common sense. (Vide: Hanumant Govind Nargundkar and Anr. v. State of M.P.: AIR 1952 SC 343; Shivaji Sahabrao Bobade and Anr. v. State of Maharashtra: AIR 1973 SC 2622; Sharad Birdhichand Sarda v. State of Maharashtra: AIR 1984 SC 1622; Subhash Chand v. State of Rajasthan: (2002) 1 SCC 702; Ashish Batham v. State of M.P. : AIR 2002 SC 3206; Narendra Singh and Anr. v. State of M.P. : AIR 2004 SC 3249; State through CBI v. Mahender Singh Dahiya: AIR 2011 SC 1017; and Ramesh Harijan v. State of U.P. : AIR 2012 SC 1979)It is a case of circumstantial evidence and it is well-settled that the prosecution has to establish each circumstance by independent evidence and the circumstances so established should form a Complete chain without giving room to any other hypothesis and should be consistent with his guilt and inconsistent with his innocence.”

47. In the case of **Rajiv Singh v. State of Bihar and Ors.**, reported at 2016 (1)

ACR 510, it was held that it is well-established cannon of criminal justice that *"fouler the crime higher the proof"*. Relevant portion of the judgment reads as under:

"60. It is well entrenched principle of criminal jurisprudence that a charge can be said to be proved only when there is certain and explicit evidence to warrant legal conviction and that no person can be held guilty on pure moral conviction. Howsoever grave the alleged offence may be, otherwise stirring the conscience of any court, suspicion alone cannot take the place of legal proof. The well established cannon of criminal justice is "fouler the crime higher the proof". In unmistakable terms, it is the mandate of law that the prosecution in order to succeed in a criminal trial, has to prove the charge(s) beyond all reasonable doubt.

61. The above enunciations resonated umpteen times to be reiterated in Raj Kumar Singh @ Raju @ Batya v. State of Rajasthan : (2013) 5 SCC 722 as succinctly summarized in paragraph 21 as hereunder:

21. Suspicion, however grave it may be, cannot take the place of proof, and there is a large difference between something that "may be" proved and "will be proved". In a criminal trial, suspicion no matter how strong, cannot and must not be permitted to take place of proof. This is for the reason that the mental distance between "may be" and "must be" is quite large and divides vague conjectures from sure conclusions. In a criminal case, the court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof. The large distance between "may be" true and "must be" true, must be covered by way of clear, cogent and unimpeachable evidence produced by the prosecution, before an accused is condemned as a convict, and the basic and golden rule must be applied. In such cases, while keeping in mind the distance between "may be" true and "must be" true, the court must maintain the vital distance between conjectures and sure conclusions to be arrived at, on the touchstone of dispassionate judicial scrutiny based upon a complete and comprehensive appreciation of all features of the case, as well as the quality and credibility of the evidence brought on record. The court must ensure that

miscarriage of justice is avoided and if the facts and circumstances of a case so demand, then the benefit of doubt must be given to the accused, keeping in mind that a reasonable doubt is not an imaginary, trivial or a merely probable doubt, but a fair doubt that is based upon reason and common sense.”

48. Since in the present case, the genesis of the entire quarrel between the parties was demand of dowry and there is no specific allegation against the appellant, the analysis of the entire evidence would show that the name of the appellant was included by the deceased on account of tutoring and with a view to rope in all the family members. Resultantly, the judgment of the trial court is set aside. We are informed that the appellant is already on bail. Let the bail bonds be cancelled.

49. Appeal stands disposed of.

G.S.SISTANI, J

SANGITA DHINGRA SEHGAL, J

MAY 06, 2016
neelam/msr