

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 665 of 2013

1. Mohd. Vakeel, S/o Abdul Jaleel, aged about 26 years.
2. Momeena Bano @ Munni Bai W/o Abdul Jaleel, aged about 50 Years.

Both R/o Near Ganesh Temple, Zone-3, Balaji Nagar, Khursipar, PS
Khursipar, Distt. Durg C.G.

---- Appellants

Versus

- State Of Chhattisgarh Through P.S. Khursipar, Distt. Durg C.G.

---- Respondent

For Appellant	:	Shri R.K. Jain, Advocate.
For Respondent	:	Smt. Madhunisha Singh, Panel Lawyer.

Hon'ble Shri Justice Pritinker Diwaker
Hon'ble Shri Justice Ram Prasanna Sharma

Judgement

Per P. Diwaker, J

26/09/2017

1. This appeal has been filed against the judgment of conviction and order of sentence dated 17.5.2013 passed by the 2nd Additional Sessions Judge, Durg in S.T. No.33/11 convicting the accused/appellants under Sections 498A & 302 of the Indian Penal Code (for short 'the IPC') and sentencing each of them to undergo R.I. for 3 years & fine of Rs.500/- and R.I. for Life and fine of Rs.5,000/-, with default stipulations, respectively.
2. In the present case name of deceased is Shabana Anjun, wife & daughter-in-law of accused/appellants respectively.
3. According to the prosecution, marriage of Shabana Anjum (since deceased) and accused/appellant No.1 was solemnized sometime in the

year 2005 and she suffered 70% burn injuries on 22.8.2010 when appellant No.2 poured kerosene oil on her and appellant No.1 set fire on her. Said Shabana Anjum was immediately taken to the hospital where Dehati Nalishi (Ex.P-19) was recorded at her instance in which she has disclosed that she was subjected to cruelty by accused/appellants for non fulfilment of demand of dowry and on the date of incident, she was first abused by her mother-in-law (accused No.2), who subsequently poured kerosene oil on her and then was set ablaze by her husband (accused No.1). She further states that she somehow managed to extinguish fire by pouring water upon her. Based on this dehati nalishi, FIR (Ex.P-20) was registered against the accused persons under Section 307/34 IPC on 23.8.2010 itself. After hospitalization of said Shabana Anjum, her MLC was done by the doctor (PW-4) vide Ex.P-1 and he noticed 70% burn injuries on her body. On 23.8.2010 itself a letter of request was issued to the Executive Magistrate (PW-8) requesting him to visit the hospital and record statement of injured Shabana Anjum. After certification by the doctor that injured Shabana is in a position to give statement, the Executive Magistrate recorded her dying declaration vide Ex.P-12. Statement of said Shabana under Section 161 of CrPC was also recorded vide Ex.P-24 in which also she narrated as to the manner in which she was burnt by the accused/appellants. Said Shabana Anjum succumbed to her burn injuries while undergoing treatment in the hospital on 28.9.2010. On receipt of death intimation, the offence has been converted into Sections 498A & 302 of IPC. Inquest on the body of deceased was conducted vide Ex.P-6 in presence of the witnesses. After the inquest, the dead body was sent for post-mortem examination which was conducted by Dr. V.S. Baghel (PW-2) and he noticed ante-mortem flame burns almost all over the body of deceased. He opined that the deceased died

of shock due to extensive deep burns along with septicaemia & anaemia.

4. After completing investigation, the charge sheet against the accused/appellants has been filed in the Court of Judicial Magistrate 1st Class, Durg who committed the case to the Court of Sessions from where the Additional Sessions Judge has received the same on transfer for trial. On hearing the prosecution and the accused, the Additional Sessions Judge framed charges under Sections 498A & 302 of IPC, read over and explained the same to the accused/appellants and they pleaded not guilty and claimed to be tried. To bring home the guilt of accused/appellants for the offences with which they stood charged, the prosecution examined 15 witnesses. Statements of accused/appellants under Section 313 CrPC were also recorded in which they pleaded innocence and false implication. They examined three witnesses in their defence to establish that the deceased set herself ablaze.
5. The trial Judge on appreciation of the evidence brought on record, found the accused/appellants guilty for the offences under Sections 498A & 302 of IPC and convicted them accordingly and sentenced them as mentioned above.
6. Counsel for accused/appellants submits that;-
 - the appellants have been falsely implicated in the crime in question which is evident from the discharge summary, which is part of documents Ex.P-1, wherein the deceased herself had informed that she set herself on fire after pouring kerosene on her body.
 - there is no evidence whatsoever that prior to the date of occurrence, the deceased was subjected to cruelty by the appellants and therefore their conviction under Section 498A of IPC is bad in law and untenable.
 - the deceased died after 36 days of the occurrence and the doctor

who conducted post-mortem examination has opined that the death was as a result of septicaemia & anaemia. In other words, according to the counsel, but for the infection, she would not have died and therefore it is not a case of murder.

- from the dying declarations of the deceased, it is clear that before the occurrence there was a quarrel between the deceased & the appellants and in the course of quarrel, accused/appellant No.2 assaulted the deceased and thereafter accused/appellant No.1 poured kerosene oil on the body of deceased and accused/appellant No.2 set the deceased on fire. Thus, it is clear that during the quarrel, out of sudden provocation, the accused/appellants had poured kerosene oil on the deceased and set fire on her. Hence, the offence squarely falls within the 3rd limb of Section 300 of IPC and therefore they are liable to be punished under Section 304 Part I of IPC and not under Section 302 of IPC as has been done by the trial Court. Reliance is placed in the matters of Kalu Ram v. State of Rajasthan reported in 2000 SCC (Cri.) 86; Yomeshbhai Pranshankar Bhatt v. State of Gujarat reported in (2011) 6 SCC 312 and Maniben v. State of Gujarat reported in (2009) 3 SCC (Cri.) 952.

7. On the other hand, supporting the impugned judgment learned counsel for the State submits that conviction of accused/appellants is strictly in accordance with law and there is no illegality or infirmity in the same warranting interference by this Court. She submits that statements of deceased are consistent that it was the accused/appellants who poured kerosene and set her on fire and thereby she sustained burn injuries for which she succumbed while undergoing treatment in the hospital. She also submits that once the appellants poured kerosene and ignited the

deceased, it had to be presumed that they intended to cause her death. She submits that since beginning the deceased was subjected to cruelty by the accused/appellants and even on the date of incident she was badly beaten by accused/appellant No.1. She also submits that septicaemia is not the prime cause and the death was due to extensive deep burn injuries to the deceased and therefore it cannot be said that death of the deceased was due to septicaemia.

8. We have heard counsel for the parties and perused the evidence available on record.
9. Smt. Sabra (PW-1) is the mother of deceased. She has stated that marriage of the deceased was solemnized with accused/appellant No.1 about 5 to 6 years prior to the incident. She has further stated that immediately after 2-3 months of the marriage, the accused persons started treating the deceased with cruelty for demand of dowry. She has further stated that on coming to know about the incident, when she reached the District Hospital, Durg along with her husband, they found the deceased lying in burnt condition and accused/appellants were not there. She further states that she and her husband had shifted the deceased to Sector-9 Hospital, Bhilai for better treatment. The deceased informed them in the hospital that her mother-in-law (accused No.2) had poured kerosene oil on her body and thereafter her husband (accused No.1) set her on fire.
10. Dr. V.S. Baghel (PW-2) is the doctor who conducted autopsy on the body of deceased and opined that cause of death was shock due to extensive deep burns along with septicaemia & anaemia.
11. Mohammed Naseem (PW-3) did not support the prosecution case and turned hostile.
12. Dr. B.N. Wahane (PW-4) is the doctor who treated the deceased in the

Civil Hospital, Supela. He has stated that the husband of the deceased informed him that the deceased has suffered burn injuries early in the morning. This witness has clarified that husband and relatives of the deceased have informed him that the deceased had set herself on fire.

13. Mohammed Shabbir (PW-5) has stated that two years prior to occurrence 3-4 meetings were held in the locality regarding matrimonial dispute between the accused/appellants and the deceased. On being asked by the Court, this witness has stated that husband of the deceased used to commit torture upon the deceased. At this stage, the prosecution has declared this witness hostile.
14. Mohammed Akbar (PW-6) has also made almost similar statement as has been made by Mohammed Shabbir (PW-5). He too has stated that meetings were held for resolving the matrimonial dispute between the deceased and her in-laws.
15. Mohammed Ismail (PW-7) did not support the prosecution case and turned hostile.
16. B.P. Panchbhai (PW-8) is the Executive Magistrate who recorded dying declaration (Ex.P-12) of the deceased. According to this witness, on receipt of request (Ex.P-11) requesting him to record dying declaration of injured Shabana, he went to the Sector-9 BSP Hospital and recorded dying declaration of injured Shabana. He has further stated that he recorded the dying declaration of deceased as was told by her and nothing was added or deleted by him of his own. In the cross-examination this witness has admitted that he did not obtain any certificate from the doctor as to the fitness of the mind of declarant, but the document Ex.P-21 reveals that fitness certificate was obtained by the police from the doctor concerned.
17. Manoj Kumar Tiwari (PW-9) is the police person who took the body of

deceased to the District Hospital, Durg for post-mortem examination.

18. Dr. Uday Kumar is the person who treated the deceased in Sector-9 Hospital, Bhilai.
19. Kallu (PW-12), father of the deceased, has stated that the deceased was subjected to cruelty for demand of dowry by the accused persons. He has further stated that in the hospital the deceased made oral dying declaration to the effect that her mother-in-law had poured kerosene oil on her and thereafter her husband set her ablaze with help of match stick.
20. Dr. Parag Gupta (PW-13) is the doctor who treated the deceased in Sector 9 Hospital. He has stated that best possible treatment was given to the deceased.
21. N.K. Sahu (PW-15) is the investigating officer who has duly supported the prosecution case.
22. Aasma Begum (DW-1), Aameena (DW-2) & Noorjahan (DW-2) are the neighbours of deceased and accused. They have stated that the deceased set herself afire after bolting the doors from inside. On breaking open the door, they found the deceased sitting inside the room and she herself had extinguished the fire by pouring water on herself.
23. In order to connect the accused/appellants with the homicidal death of deceased Shabana Anjum, the prosecution has mainly relied upon Ex.P-12, dying declaration of deceased recorded by PW-15 at Sector 9 Hospital, Bhilai. Apart from this the prosecution has also relied upon the oral dying declaration made by deceased to her parents in the hospital.
24. It is said that truth triumphs on the lips of dying person. In that view of the matter if the dying declaration of deceased, inspire confidence that could be made the sole basis for conviction irrespective of any other evidence. But that dying declaration, as pointed out, should inspire confidence as it is not subjected to any cross examination. It has got to be tested from

various angles to find out whether the dying declaration of the deceased relied upon by the prosecution is the dying declaration of the deceased. If any suspicion is found from the material on record then it becomes doubtful and no reliance can be placed on the same.

25. Lord Chief Justice Baron Eyre {See. R. v. Woodcock, (1789) 1 Lea 502} expressed his view relating to dying declaration as follows: -

“...That such declarations are made in extremity, when the party is at the point of death, and when every hope of this world is gone; when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn and so awful is considered by the law as creating an obligation, equal to that which is imposed by a positive oath in a court of justice...”

26. The Hon^{ble} Supreme Court in Atbir v. Govt. (NCT of Delhi) reported in (2010) 9 SCC 1 after going through all authoritative pronouncements on dying declarations summed up the law relating to dying declarations as under:

"22. The analysis of the above decisions clearly shows that:

- (i) Dying declaration can be the sole basis of conviction if it inspires the full confidence of the court.
- (ii) The court should be satisfied that the deceased was in a fit state of mind at the time of making the statement and that it was not the result of tutoring, prompting or imagination.
- (iii) Where the court is satisfied that the declaration is true and voluntary, it can base its conviction without any further corroboration.
- (iv) It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence.
- (v) Where the dying declaration is suspicious, it should not be acted upon without corroborative evidence.

- (vi) A dying declaration which suffers from infirmity such as the deceased was unconscious and could never make any statement cannot form the basis of conviction.
- (vii) Merely because a dying declaration does not contain all the details as to the occurrence, it is not to be rejected.
- (viii) Even if it is a brief statement, it is not to be discarded.
- (ix) When the eyewitness affirms that the deceased was not in a fit and conscious state to make the dying declaration, medical opinion cannot prevail.
- (x) If after careful scrutiny, the court is satisfied that it is true and free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal impediment to make it the basis of conviction, even if there is no corroboration."

27. The Hon^{ble} Supreme Court again in Surinder Kumar v. State of Punjab reported in (2012) 12 SCC 120 held as under:

"19. Insofar as the case before us is concerned, we may only note that there is no format prescribed for recording a dying declaration. Indeed, no such format can be prescribed. Therefore, it is not obligatory that a dying declaration should be recorded in a question- answer form. There may be occasions when it is possible to do so and others when it may not be possible to do so either because of the prevailing situation or because of the pain and agony that the victim might be suffering at that point of time."

28. In the light of the same now we would examine both Ex.P-12 and oral dying declaration made by the deceased before her parents.

29. In the instant case, after the occurrence at about 7.00 p.m. the deceased was admitted in the Civil Hospital, Supela, District Durg by accused/ appellant No.1 (husband of deceased) and the doctor (PW-4) who

admitted and examined her in the hospital has stated in his evidence that at that time of admission the deceased was conscious and in fit state of mind. Looking to the critical condition of the deceased, she was shifted to Sector 9 Hospital, Bhilai for better treatment where her dying declaration was recorded on 23.8.2010 at 5.00 p.m. and in this dying declaration, the deceased had specifically stated that on 22.8.2010 her mother-in-law was abusing her in filthy language and when she answered back, her husband beat her and thereafter her mother-in-law poured kerosene oil on her and her husband set her ablaze with the help of match stick. According to the deceased, since no body came to her rescue, she put off the fire by herself by pouring water on her and thereafter accused/appellants have admitted her in Sector 9 Hospital, Bhilai for treatment. According to PW-8 B.B. Panchbahi, Executive Magistrate, who had recorded dying declaration of the deceased vide Ex.P-12 has stated that the dying declaration was written by him in the language of the deceased and nothing was added or deleted by him of his own. According to the Executive Magistrate, only after being informed by the police that they have already obtained certificate from the treating doctor to the effect that the deceased is fit to give statement, he proceeded to record her dying declaration. He has further stated that he has also put necessary questions to confirm whether the deceased was conscious and in a fit state of mind to give dying declaration. In the cross-examination this witness has denied the suggestion that as the deceased had sustained burn injury on both her hands, she was not in a position to sign the dying declaration. He has also denied the suggestion that the deceased remained unconscious continuously for three days after the incident. According to this witness, at the time of recording of dying declaration, nobody was present in the room and hence the question of tutoring the

deceased is also ruled out. To our mind, unless the dying declaration was voluntarily made by the victim, the Executive Magistrate would not have falsely stated that the deceased made statement incriminating the appellant in his presence. After all, he had no animosity or axe to grind against the appellant. For the same reason, the treating doctor would not have endorsed that the victim was in a fit condition to make the statement. In **Ravi Chander v. State of Punjab** reported in **(1998) 9 SCC 303** the Supreme Court observed that;

“the Executive Magistrate is a disinterested witness and is a responsible officer and there is no circumstance or material on record to suspect that the Executive Magistrate had any animus against the accused or was in any way interested in fabricating the dying declaration and, therefore, the question of genuineness of the dying declaration recorded by the Executive Magistrate to be doubted does not arise.”

30. It is true that there is no endorsement of the doctor on the dying declaration (Ex.P-12) that the deceased was in a position to give statement, but it is not like that there is no certification of the treating/duty doctor at all. From perusal of the document Ex.P-21 it is clear that the investigating officer has put a specific question to the doctor to confirm whether the deceased was conscious and in a fit state of mind to give statement and the same has been answered in affirmative by Dr. Gaurav Gupta (PW-8) by making an endorsement on Ex.P-21 to the effect that “the patient is in a position to give statement”. As per record, certificate regarding mental fitness was given by the doctor at 4.45 p.m. on 23.8.2010 and the dying declaration (Ex.P-12) was recorded at 5.00 p.m. on 23.8.2010 itself. Merely because the endorsement was not made on the dying declaration itself but on the application, that would not render

the dying declaration suspicious in any manner. In **Harjit Kaur v. State of Punjab** reported in **(1999) 6 SCC 545**, the Hon'ble Supreme Court in Para-5 has held thus;

“.....As regards the condition of Parminder Kaur, the witness has stated that he had first ascertained from the doctor whether she was in a fit condition to make a statement and obtained an endorsement to that effect. Merely because that endorsement was made not on the Dying Declaration itself but on the application, that would not render the Dying Declaration suspicious in any manner. The said endorsement made by the Doctor was produced by him and it has become evidence in the case.”

31. After recording of dying declaration (Ex.P-12), statement of deceased under Section 161 CrPC has been recorded vide Ex.P-21 where in she had reiterated the facts stated in the dying declaration. Dehati Nalishi (Ex.P-19) was also recorded at the instance of deceased narrating the same fact that accused/appellant No.2 poured kerosene oil on her and accused/appellant No.1 set fire on her. After the death of deceased, such statements made by the deceased can be treated as dying declaration under Section 32 of the Evidence Act and there is no requirement of law that such a statement must necessarily be made to a Magistrate.
32. The above statements of the deceased stand corroborated not only by the medical evidence but oral dying declaration made by the deceased to her parents, i.e. Smt. Sabra (PW.1) and Kallu (PW.12) who were examined in the court. According to these witness, on coming to know about the incident, they went to the hospital to see the deceased where the deceased narrated them when they questioned her, that she sustained burn injuries on account of accused/appellants setting fire to her after

pouring kerosene. According to medical evidence also, the burn injuries were ante-mortem in nature and cause of death of the deceased was shock due to extensive deep burn along with septicaemia & anaemia.

Thus, in our considered opinion, the dying declaration (Ex.P-12) does not suffer from any infirmity. Dying declaration is not only truthful but reliable as also it inspires confidence. There is, therefore, no reason whatsoever to disbelieve the version of deceased Shabana Anjun as recorded in the dying declaration which has been recorded after following all the necessary safeguards. There is also corroboration of the dying declaration (Ex.P-12) as pointed out above.

33. As regards the oral dying declaration said to have been made by the deceased at the time of admission in the hospital wherein she has allegedly stated that she set herself on fire after pouring kerosene oil. The endorsement as made is indicative of the position that a statement was made at the time of admission of the deceased where apart from the accused/appellants and the doctor, none else was present. Record goes to show that immediately after the incident, the accused/appellants took the deceased to the Civil Hospital, Supela and as soon as they reached the hospital, they informed the attending doctor i.e. PW-4, that the deceased had set herself ablaze. Thus, taking into consideration cumulative effect of all the circumstances the possibility that the accused/appellants, who were with the injured at the hospital, got mentioned the said fact in Ex.P-1, cannot be ruled out.

34. Yet another contention of learned counsel for the appellants is that death of the deceased was only due to septicaemia. In other words, according to him, but for the infection, she would not have died. In answering the question whether a wound is dangerous to life, the danger must be assessed on the probable primary effects of the injury. Such possibilities

as the occurrence of tetanus or septicaemia, later on, are not to be taken into consideration. Admittedly, the medical opinion, in this case, was that the death was due to extensive deep burn with septicaemia & anaemia, but it does not mean that septicaemia is the primary cause of death. The medical evidence on record do clearly establish that septicaemia is not the primary cause and the death was due to extensive deep burn injuries caused to the deceased. Septicaemia would, therefore, not be taken into account.

True, there was a quarrel between the accused and the deceased before the occurrence and during the course of quarrel, accused/appellant No.2 poured kerosene oil on her and thereafter accused/appellant No.1 set fire on the deceased. However, in the dying declaration of the deceased, it is clearly stated by the deceased that she herself went burning near the water tank and extinguished fire by pouring water on her. The subsequent conduct of accused/appellants in not making any efforts to extinguish fire to save the life of the deceased is indicative of the fact that both the appellants intended to kill the deceased and hence it cannot be said that offence under Section 302 of IPC is not made out against the appellants.

So far as the judgement in the matter of Kalu Ram (supra), Maniben (supra) & Yomeshbhai Prashankar Bhatt (supra) relied by counsel for the appellant in support of his contention that the act attributed to appellants would fall within the ambit of Section 304 Part II of IPC is concerned, the same being related to case distinguishable on facts from the present one is of help. In Kalu Ram's case, the deceased refused to give her ornaments to her accused husband which infuriated him and he doused her with kerosene, wanted her to die and gave her match box to set herself ablaze and on her failure, he took the matchbox and ignited one

matchstick setting her ablaze, but finding the flames flaring up he poured water to save her. In these circumstances the Supreme Court has held that the appellant had not intended to cause the injuries to the deceased which she sustained due to his act. However, in the present case, after setting the deceased on fire the accused/appellants did not make any effort to rescue her and it is the deceased who herself got extinguished the fire by pouring water. Thus the subsequent conduct of accused/appellants that they did not make any effort to rescue the deceased or ask for help is indicative of the fact that they intended to cause her death.

In Maniben's case, looking to the age of the accused which was 85 years, the Supreme Court altered the conviction of appellant from Section 302 IPC to Section 304 Part II of IPC, with a rider that the case not to be treated as a precedent and therefore the appellants do not get any help from the said judgment. Likewise, the judgment in the matter of Yomeshbhai's case (*supra*) is also of no help to the accused/appellant being related to a case distinguishable on facts from the present one.

35. Coming next to the conviction and sentence of appellants under Section 498A IPC. A reading of Section 498A IPC shows that whoever being the husband or the relative of the husband of a woman subject (s) such woman to such cruelty, shall be punished for imprisonment for a term which may extend to three years and shall, also, be liable for fine. The explanations (a) and (b) to Section 498A IPC, furnish an explanation for the word 'cruelty' which means any wilful conduct which is of such a nature as is likely to drive a woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or harassment of the woman where such harassment is with a view to forcing her or any person related to her to meet any demand or

property or security or on account of failure to her or any person related to her to meet such demand. In the instant case, from the dying declaration on record it is clear that the deceased was being treated with cruelty by her mother-in-law for bringing inadequate dowry in the marriage and that her husband used to beat her mercilessly everyday after consuming liquor. In fact, on the date of incident also the deceased was filthily abused by her mother-in-law and when she answered back, her husband beat her and set her ablaze after the kerosene oil was poured on her by accused mother-in-law. Thus, it is apparent that the deceased was being cruelly treated by accused/appellants which is a necessary ingredient for bringing home the charge under Section 498A of IPC and being so, the conviction of accused/appellants under Section 498A of IPC by the trial Court cannot be faulted with.

36. In view of above discussion we find that the appellants have been rightly convicted and sentenced for commission of offence under Sections 302 & 498A of IPC. Accordingly, the appeal fails and is dismissed. Since the appellants are already in jail, no direction regarding their surrender etc. is needed.

Sd/-
(Pritinker Diwaker)
Judge

Sd/-
(RP Sharma)
Judge

roshan/-