

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 359 of 2014**

1. Rani Bai W/o. Lallu Lodhi Aged About 32 Years R/o. Vill. Birejhar, P.S. Bori, Distt. Durg C.G.
2. Pilaram S/o. Hulas Lodhi Aged About 60 Years R/o. Vill. Birejhar, P.S. Bori, Distt. Durg C.G.

---- Appellants**Versus**

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

---- Respondent

For Appellants	:	Shri B.P.Singh, Advocate
For State	:	Shri Suryakant Mishra, Panel Lawyer

D.B. : Hon'ble Shri Justice Manindra Mohan Shrivastava**Hon'ble Smt. Justice Rajani Dubey****Judgment On Board****19/02/2019****Per Manindra Mohan Shrivastava, J.-**

This appeal is directed against impugned judgment of conviction and order of sentence dated 31/03/2014 passed by the Additional Sessions Judge, Durg (CG) in Sessions Trial No.62/2011, by which, the learned Trial Court has held the appellants guilty of commission of offence and sentenced as described below -

	<u>Conviction</u>	<u>Sentence</u>
1	U/s 498-A of IPC	Three years rigorous imprisonment and fine of Rs.1000/- (in default of payment of fine, additional R.I. of 1 month)
2	U/s 304-B/34 and 302 /	Life imprisonment and fine of Rs.1,000/- (in default

	34 of IPC	of payment of fine, additional 6 months R.I.) (single sentence for Section 304-B/34 and 302 / 34 IPC)
3	U/s 498A of IPC (Appellant No.1 – Rani Bai)	Three years R.I. and fine of Rs.1,000/- (in default of payment of fine, additional 1 month R.I)
4.	U/S 304 (B) /34 and 302/34 of IPC (Appellant No.1 – Rani Bai)	Life imprisonment and fine of Rs.1000/- (in default of payment of fine, 6 months additional R.I.) (Single sentence for Section 304(B)/34 and 302/34 IPC)
(All the sentences awarded to the appellants shall run concurrently)		

2. Lalli Bai (the deceased) was married to Omprakash. On 05/01/2011, she was found having sustained burn injuries and was admitted in the hospital. She was under treatment. However, she could not recover and finally, succumbed to death on 24/01/2011.

The prosecution story was that Lalli Bai was being harassed and subjected to cruelty in connection with demand of dowry and on 05/01/2011, she was set on fire by her father-in-law, mother-in-law and sister-in-law namely Pila Ram, Geeta Bai and Rani Bai respectively. According to the prosecution, an FIR was already lodged while Lalli Bai was under treatment, on 12/01/2011 in Ex.P/19. In the said FIR, lodged at the instance of the father of the deceased - Gend Singh (PW4), his daughter was being subjected to harassment and on 05/01/2011, at about 8 am in the morning, a quarrel was going on between the deceased and her mother-in-law, father-in-law and sister-in-law which was informed to him by his daughter – Lalli Bai and then, at about 5 PM on the same day, an information was received that his daughter sustained burn injury and taken to hospital. According to him, when he went to see his daughter, she was unconscious and not able to speak. When she regained consciousness after 14 days, she stated that her father-in-law – Pila Ram

told Rani Bai to set ablaze the deceased, snatched her daughter – Khushbu and went away. Thereafter, Rani Bai dragged the deceased, poured kerosene on her and set her ablaze. Offence under Section 307, 498A/34 IPC was registered.

Prosecution also came out with a case that on 09/01/2011, the Executive Magistrate recorded dying declaration in Ex.P/15, in which, the deceased Lalli Bai stated that she was set on fire by her sister-in-law – Rani Bai. She stated that her daughter – Khushbu was snatched away from her and her father-in-law told her sister-in-law to set her on fire and he went away with the child. According to the prosecution, another dying declaration (Ex.P/7) was recorded by the investigating officer. The prosecution, thus, came out with a case of deceased having been subjected to murder. Since, there were allegations of demand of dowry and cruelty connected therewith soon before her death, the police also registered offence under Section 304 (B) IPC. The charge sheet came to be filed against the father-in-law, mother-in-law and sister-in-law namely Pila Ram, Geeta Bai and Rani Bai.

3. Learned Trial Court framed charges against each of the accused including present appellants not alleging commission of offence under Section 302 IPC but also framed charges alleging commission of offence of dowry death punishable under Section 304-B IPC. The appellants having abjured guilt, were put to trial.

4. In order to bring home the guilt of the appellant, the prosecution came out with the evidence of harassment, cruelty, oral dying declaration, written dying declaration and that the death was as a result of burn injuries.

The defence of the appellants was that the deceased had sustained burn injuries because of accident while working on a stove in kitchen as stated by Dr. Mamta Thakur (PW9). Though, she was conscious and in fit state to give dying declaration, no dying declaration was recorded for almost four days and by the time, the Executive Magistrate came to record the dying declaration, as late as on

09/01/2011, Lalli Bai was tutored by her family members who constantly remained with her during hospitalization during these days.

Learned Trial Court, however, leaned in favour of prosecution evidence, particularly the dying declaration recorded by the Executive Magistrate and disbelieved the defence story except to the extent that involvement of Geeta Bai – mother-in-law was not proved beyond reasonable doubt. Resultantly, though Geeta Bai was acquitted of charges under Section 304-B IPC and Section 302 IPC, she was convicted under Section 498-A of IPC. It was held that the prosecution proved that Pila Ram and Rani Bai committed murder of the deceased – Lalli Bai. Learned Trial Court convicted the appellants not only under Section 302 IPC but also under Section 304-B IPC. This appeal, thus, arises at the instance of the convicted accused.

5. Learned counsel appearing for the appellants argued in extenso and contended that if cumulative view of all the evidence and circumstances is taken, it cannot be said that the prosecution has proved its case beyond reasonable doubt. He would argue that Dr. Sarita Minj (PW8) and Dr. Mamta Thakur (PW9) both have clearly recorded in their medical examination report and observed that it was a case of accidental burn. Dr. Mamta Thakur (PW9) has stated that when she asked Lalli Bai as to how she sustained burn injuries, she stated that she caught fire while working on a stove. Lalli Bai remained conscious and fit but at that time, no attempt was made to record her dying declaration by the Executive Magistrate. For next four days, she remained in the company of her parents and her relatives during which, she was tutored and then only the Executive Magistrate was called as late as on 09/01/2011. These circumstances renders probable that what was stated by the deceased before the Executive Magistrate was not voluntary but it was an outcome of pressure and tutoring on the deceased so as to falsely implicate the family members. He would next submit that the dying declaration (Ex.P/7) said to be

recorded by the Investigating Officer is highly doubtful because in the said dying declaration, neither the time nor the date has been mentioned. The investigating officer has not explained. The investigating officer also does not state that he satisfied himself regarding fitness and therefore, this dying declaration is extremely doubtful and only an outcome of false implication. He would next argue that as far as the so called oral dying declaration said to be given by the deceased to her uncle (PW3) and father (PW4) are concerned, their evidence in that regard is contradictory to what has been recorded by the Executive Magistrate. Therefore, those oral dying declarations are only acts of false implication. According to him, the allegations of cruelty, demand of dowry, apart from being omnibus, are improvement on diary statements. Therefore, the prosecution has failed to prove that there were disputes or strained relation between the husband and the wife on one hand and father-in-law and sister-in-law on the other. He would also argue that the prosecution has failed to explain why the family members who got the deceased admitted in the hospital on 05/01/2011 and the doctor who treated her, did not report the matter to the police till 12/01/2011 during which, Lalli Bai was receiving treatment in the hospital. It is argued that all these circumstances renders the entire case of the prosecution doubtful and that the dying declaration recorded on 09/01/2011 was an outcome of tutoring and not voluntary. In support of his submission, learned counsel for the appellant placed reliance upon the judgment of the Supreme Court in the cases of **Harish Kumar v. State of Haryana, (2015) 2 SCC 601, Brundaban Moharana and anr. v. State of Orissa, (2010) 3 SCC 381, Umakant and anr. v. State of C.G., 2014 (3) CGLJ 432 (SC)** as also judgment of this Court in the case of **Bisahuram Katlam and anr. v. State of Chhattisgarh (Cr.A.No.262/2011).**

6. On the other hand, learned State counsel supports the judgment of conviction and order of sentence and argued that the prosecution has led reliable evidence with regard to there being frequent quarrels, demands and harassment on the deceased

by her in-laws, proved from the evidence of Durpat (PW1), Radheyshyam Patel (PW3) and Gend Singh (PW4). According to him, the prosecution evidence proves that on the date of incident, in the morning, Lalli Bai had given a call to her father on mobile stating that her mother-in-law, father-in-law and sister-in-law are quarreling with her on certain demands and in the evening, when he reached, he found that his daughter was lying burnt in the hospital. Next submission is that the prosecution case is based on clinching evidence of dying declaration in Ex.P/15 recorded by the Executive Magistrate after due check up by the doctor and his certificate that Lalli Bai was fit to give her statement. The said dying declaration has been proved and there is nothing to doubt the testimony of the Executive Magistrate and the contents of the dying declaration. It was next submitted that this dying declaration finds corroboration from the dying declaration (Ex.P/7) which was recorded by the Investigating Officer as also the evidence of oral dying declaration given by the deceased to Radheyshyam Patel (PW3) and Gend Singh (PW4). Learned State counsel would further argue that as compared to the oral dying declaration said to be given to Dr. Mamta Thakur (PW9), the written dying declaration recorded by the Executive Magistrate, once proved, will carry much higher credence and reliability. He would next argue that the allegation of false implication is not probable because the deceased, in her dying declaration, has only involved her father-in-law and sister-in-law and she did not involve her mother-in-law or her own husband. In support of his submission, learned State counsel has placed reliance upon the decision of the Supreme Court in the case of **Laxman v. State of Maharashtra, 2002 (6) SCC 710**, and judgment of this Court in the case of **Nirmala Bai v. State of M.P.** (now State of Chhattisgarh), **2014 (1) CGLJ 132**.

7. We have heard the submission of learned counsel for the parties and perused the records.

8. The prosecution case of deceased – Lalli Bai having been set ablaze by the appellants i.e. her father-in-law and sister-in-law, is based on two dying declarations, one recorded by the Executive Magistrate and the other by the Investigating Officer and also from the evidence of oral dying declaration given by the deceased to her uncle - Radheyshyam Patel (PW3) and Gend Singh (PW4). The oral dying declaration given by the deceased to Dr. Mamta Thakur (PW9) is pitted against set of written and oral dying declarations. We would thus find that while the prosecution has come out with the written and oral dying declaration, the defence has come out with one oral dying declaration.

9. Before we proceed to deal with the material on record, we consider it appropriate to mention few judgments of the Supreme Court wherein the Supreme Court dealt with cases involving more than one dying declarations laid down principles of appreciation of prosecution and defence evidence with regard to multiple dying declaration.

10. In the case of **Sudhakar v. State of Madhya Pradesh, (2012) 7 SCC 569**, Their Lordships in the Supreme Court, while dealing with the case of more than one dying declarations, referring to its earlier decision in number of cases, observed thus:-

“20. The ‘dying declaration’ is the last statement made by a person at a stage when he in serious apprehension of his death and expects no chances of his survival. At such time, it is expected that a person will speak the truth and only the truth. Normally in such situations the courts attach the intrinsic value of truthfulness to such statement. Once such statement has been made voluntarily, it is reliable and is not an attempt by the deceased to cover up the truth or falsely implicate a person, then the courts can safely rely on such dying declaration and it can form the basis of conviction. More

so, where the version given by the deceased as dying declaration is supported and corroborated by other prosecution evidence, there is no reason for the courts to doubt the truthfulness of such dying declaration.

21. Having referred to the law relating to dying declaration, now we may examine the issue that in cases involving multiple dying declarations made by the deceased, which of the various dying declarations should be believed by the Court and what are the principles governing such determination. This becomes important where the multiple dying declarations made by the deceased are either contradictory or are at variance with each other to a large extent. The test of common prudence would be to first examine which of the dying declarations is corroborated by other prosecution evidence. Further, the attendant circumstances, the condition of the deceased at the relevant time, the medical evidence, the voluntariness and genuineness of the statement made by the deceased, physical and mental fitness of the deceased and possibility of the deceased being tutored are some of the factors which would guide the exercise of judicial discretion by the Court in such matters.”

11. Referring to its earlier decision in the case of **Lakhan v. State of M.P., (2010) 8 SCC 514** dealing with law of dying declarations as also the question as to which of the dying declarations has to be preferably relied upon by the Court in deciding the question of guilt of the accused under the offence with which he is charged. Taking note of the facts in the case of **Lakhan** (supra) that there were two dying declarations which were mutually at variance, it was observed:-

“In *Lakhan*, this Court provided clarity, not only to the law of dying declaration, but also to the question as to which of the dying declarations has to be preferably relied upon by the Court in deciding the question of guilt

of the accused under the offence with which he is charged. The facts of that case were quite similar, if not identical to the facts of the present case. In that case also, the deceased was burnt by pouring kerosene oil and was brought to the hospital by the accused therein and his family members. The deceased had made two different dying declarations, which were mutually at variance. The Court held as under :

“9. The doctrine of dying declaration is enshrined in the legal maxim *nemo moriturus praesumitur mentire*, which means “a man will not meet his Maker with a lie in his mouth”. The doctrine of dying declaration is enshrined in Section 32 of the Evidence Act, 1872 (hereinafter called as “the Evidence Act”) as an exception to the general rule contained in Section 60 of the Evidence Act, which provides that oral evidence in all cases must be direct i.e. it must be the evidence of a witness, who says he saw it. The dying declaration is, in fact, the statement of a person, who cannot be called as witness and, therefore, cannot be cross-examined. Such statements themselves are relevant facts in certain cases.

10. This Court has considered time and again the relevance/probative value of dying declarations recorded under different situations and also in cases where more than one dying declaration has been recorded. The law is that if the court is satisfied that the dying declaration is true and made voluntarily by the deceased, conviction can be based solely on it, without any further corroboration. It is neither a rule of law nor of prudence that a dying declaration cannot be relied upon without corroboration. When a dying declaration is suspicious, it should not be relied upon without having corroborative evidence. The court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased must be in a fit state of

mind to make the declaration and must identify the assailants. Merely because a dying declaration does not contain the details of the occurrence, it cannot be rejected and in case there is merely a brief statement, it is more reliable for the reason that the shortness of the statement is itself a guarantee of its veracity. If the dying declaration suffers from some infirmity, it cannot alone form the basis of conviction. Where the prosecution version differs from the version given in the dying declaration, the said declaration cannot be acted upon. (Vide *Khushal Rao v. State of Bombay*¹, *Rasheed Beg v. State of M.P.*, *K. Ramachandra Reddy v. Public Prosecutor, State of Maharashtra v. Krishnamurti Laxmipati Naidu*, *Uka Ram v. State of Rajasthan*, *Babulal v. State of M.P.*, *Muthu Kutty v. State, State of Rajasthan v. Wakteng* and *Sharda v. State of Rajasthan*.)

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23. The second dying declaration was recorded by Shri Damodar Prasad Mahure, Assistant Sub-Inspector of Police (PW 19). He was directed by the Superintendent of Police on telephone to record the statement of the deceased, who had been admitted in the hospital. In that statement, she had stated as under:

“On Sunday, in the morning, at about 5.30 a.m., my husband Lakhan poured the kerosene oil from a container on my head as a result of which kerosene oil spread over my entire body and that he (Lakhan) put my sari afire with the help of a chimney, due to which I got burnt.”

She had also deposed that she had written a letter to her parents requesting them to fetch her from the matrimonial home as her husband and in-laws were harassing her. The said dying declaration was recorded after getting a certificate from the doctor stating that she was in a fit physical and mental condition to give the statement.

24. As per the injury report and the medical evidence it remains fully proved that the deceased had the injuries on the upper part of her body. The doctor, who had examined her at the time of admission in hospital, deposed that she had burn injuries on her head, face, chest, neck, back, abdomen, left arm, hand, right arm, part of buttocks and some part of both the thighs. The deceased was 65% burnt. At the time of admission, the smell of kerosene was coming from her body.

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26. Undoubtedly, the first dying declaration had been recorded by the Executive Magistrate, Smt Madhu Nahar (DW 1), immediately after admission of the deceased Savita in the hospital and the doctor had certified that she was in a fit condition of health to make the declaration. However, as she had been brought to the hospital by her father-in-law and mother-in-law and the medical report does not support her first dying declaration, the trial court and the High Court have rightly discarded the same.

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30. Thus, in view of the above, we reach the following inescapable conclusions on the questions of fact:

(c) The second dying declaration was recorded by a police officer on the instruction of the Superintendent of Police after getting a certificate of fitness from the doctor, which is corroborated by the medical evidence and is free from any suspicious circumstances. More so, it stands corroborated by the oral declaration made by the deceased to her parents, Phool Singh (PW 1), father and Sushila (PW 3), mother.”

12. From the aforesaid observations made by the Supreme Court, referring to number of its earlier decisions, referred to hereinabove, it has to be held that

whenever a Court is faced with multiple dying declarations, each dying declaration has to be considered independently on its own merit so as to appreciate evidentiary value and one cannot be rejected because of the contents of the other. It has been authoritatively pronounced that where there is more than one dying declaration, it is the duty of the Court to consider each one of them in its correct perspective and satisfy itself which one of them reflects the true state of affairs.

13. As observed in the aforesaid decisions, 'dying declaration' is the last statement made by a person at a stage when he is in serious apprehension of his death and expects no chances of his survival. It is, therefore, expected that the person will speak the truth and only the truth. Normally in such situations, the courts attach the intrinsic value of truthfulness to such statement and once it is found to have been given voluntarily, it could be relied upon, if it is found that it is not an attempt by the deceased to cover up the truth or to falsely implicate a person. Furthermore, where version given by the deceased is supported and corroborated by other prosecution evidence, the courts can safely rely upon such dying declarations.

14. In the case of **Sher Singh v. State of Punjab, (2008) 4 SCC 265**, the Supreme Court also cautioned and laid down necessity of cautious approach to ensure that the statement was not as a result of tutoring or prompting or a product of imagination, in following words:-

“16. We may, now, refer to some of the judgments of this Court in regard to the admissibility and evidentiary value of a dying declaration. In the case of *Bhajju @ Karan v. State of M.P.* [(2012) 4 SCC 327], this Court clearly stated that Section 32 of the Evidence Act was an exception to the general rule against admissibility of hearsay evidence. Clause (1) of Section 32 makes statement of the deceased admissible, which has been generally described as dying declaration. The court, in

no uncertain terms, held that:

“24.....It cannot be laid down as an absolute rule of law that dying declaration cannot form the sole basis of conviction unless it is corroborated by other evidence. The dying declaration, if found reliable, could form the basis of conviction. This principle has also earlier been stated by this Court in the case of *Surinder Kumar v. State of Haryana* (2011) 10 SCC 173 wherein the Court, while stating the above principle, on facts and because of the fact that the dying declaration in the said case was found to be shrouded by suspicious circumstances and no witness in support thereof had been examined, acquitted the accused. However, the Court observed that when a dying declaration is true and voluntary, there is no impediment in basing the conviction on such a declaration, without corroboration.

17. In the case of *Chirra Shivraj v. State of Andhra Pradesh* [(2010) 14 SCC 444], the Court expressed a caution that a mechanical approach in relying upon the dying declaration just because it is there, is extremely dangerous. The court has to examine a dying declaration scrupulously with a microscopic eye to find out whether the dying declaration is voluntary, truthful, made in a conscious state of mind and without being influenced by other persons and where these ingredients are satisfied, the Court expressed the view that it cannot be said that on the sole basis of a dying declaration, the order of conviction could not be passed.”

15. In a more recent decision **Raju Devade** (supra) while adumbrating the legal position stated in earlier decisions including the decision in the case of **Sudhakar** (supra), again dealing with the case where there were more than one dying declarations, the Supreme Court reiterated the judicial approach required to be followed in such cases as below:

“22. This court had clearly laid down that the each dying declaration has to be considered independently on its own merit so as to appreciate its evidentiary value and one cannot be rejected because of the contents of the other. In cases where there is more than one dying declaration, it is the duty of the court to consider the each one of them in its correct perspective and satisfy itself that which one of them reflects the true state of affairs.

“23. It is also relevant to refer to judgment of this court in Ranjit Singh and others versus State of Punjab, 2006 (13) SCC 130 wherein this court has clearly laid down that the conviction can be recorded on the basis of the dying declaration alone if the same is wholly reliable. In the event, if there are suspicions as regards to the said dying declaration, the court should look for some corroborating evidences. Court has further observed that in the event of inconsistencies in the dying declarations the court should lean towards the first dying declaration. Following was observed in para 13:

“13. It is now well settled that conviction can be recorded on the basis of a dying declaration alone, if the same is wholly reliable, but in the event there exists any suspicion as regards correctness or otherwise of the said dying declaration, the courts in arriving at the judgment of conviction shall look for some corroborating evidence. It is also well known that in a case where inconsistencies in the dying declarations, in relation to the active role played by one or the other accused persons, exist, the court shall lean more towards the first dying declaration than the second one.”

16. In the case of **Sharda v. State of Rajasthan, 2010 SAR (Criminal) 111**, wherein the Court was dealing with multiple dying declarations, having dealt with every dying declaration independently, found that the dying declaration involving the

accused was not found reliable but the other dying declaration which did not involve the accused were found to be having greater degree of reliability. The Court, therefore, preferred the dying declarations with greater probability and acquitted the accused. The legal principles applicable in the matter of dying declaration were stated thus:-

33. It is indicative of the fact that a man who is on Crl.A.No. 699/08 a death bed would not tell a lie to falsely implicate an innocent person. This is the reason in law to accept the veracity of her statement. It is for this reason, the requirements of oath and cross-examination are dispensed with. Besides, if the dying declaration is to be completely excluded in a given case, it may even amount to miscarriage of justice as the victim alone being the eye-witness in a serious crime, the exclusion of the statement would leave the court without a scrap of evidence.

34. Though a dying declaration is entitled and is still recognized by law to be given greater weightage but it has also to be kept in mind that accused had no chance of cross-examination. Such a right of cross-examination is essential for eliciting the truth as an obligation of oath. This is the reason, generally, the court insists that the dying declaration should be such which inspires full confidence of the court of its correctness. The court has to be on guard that such statement of deceased was not as a result of either tutoring, prompting or product of imagination. The court must be further satisfied that deceased was in a fit state of mind after a clear opportunity to observe and identify the assailants. Once the court is satisfied that the aforesaid requirement and also to the fact that declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It is not 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.

In this regard, we may profitably quote the following para from (1985) 4 SCC 476 titled State (Delhi Administration) Vs Laxman Kumar & Ors :

"40. We have also come to the conclusion that the High Court failed to take into account one material aspect while appreciating the evidence of the prosecution witnesses. It is a fact that Sudha had been burnt and according to the medical opinion that was to the extent of 70%. As the evidence shows, Sudha was in her senses and was capable of talking at the time when she was being removed to the hospital or even after she had been admitted as an indoor patient. The two sisters or their respective husbands had no apprehension that Sudha would not live. In case Sudha came round, she was to have lived in the family of her husband. No one interested in the welfare of Sudha was, therefore, prepared to make a statement which might prejudice the accused persons and lead to the straining of relationship in an irreparable way. Therefore, Crl.A.No. 699/08 the silence or avoidance to make a true disclosure about the cause of fire particularly so long as Sudha was alive, cannot be over- emphasised an adverse inference drawn by the High Court from the conduct of the sisters was indeed not warranted in the facts of the case.

17. From the aforesaid judicial pronouncement, the general principle which emerges is that where there are more than one dying declarations, the Court is under a duty to independently examine and analyze each dying declaration in its perspective and surrounding circumstantial evidence and then only come to conclusion as to whether which of the dying declaration is reliable. Each case will have its own peculiar facts and circumstances and therefore the conclusion will depend upon the facts of every case and there is no straitjacket formula as to which of the dying declaration should be accepted or which should be rejected. Moreover,

the law propounded is also to the effect that though conviction can be ordered solely on the basis of dying declaration, since the accused has no opportunity of cross-examination, the Courts should insist that the dying declaration should be of such a nature as to inspire full confidence of the Court in its truthfulness and correctness and that the Court must ensure that it is not tutored or false implication or result of imagination. Keeping in forefront the aforesaid settled principles, we shall now advert to the material on record.

18. The prosecution has come out with a case of there being cruelty and demand from the deceased made by her in-laws and to prove this, the prosecution has examined Durpat (PW1), Radheyshyam Patel (PW3) and Gend Singh (PW4), who are sister, uncle and father of the deceased respectively. In her evidence, Durpat (PW1), though makes an allegation that the mother-in-law and sister-in-law used to quarrel raising demands and get her share separated and there was demand of motor cycle by them, in her cross-examination, these statements are elicited as improvement upon diary statement. A suggestion, however, that on the date of incident, when her husband refused to allow her to go to parental house, she committed suicide by pouring kerosene on her, has been denied.

19. Radheshyam Patel (PW3), who is the uncle of the deceased, initially in his examination-in-chief, did not depose regarding demand, quarrel, cruelty but after having been declared hostile, suggestions have been given to him by the prosecution and he has admitted that in his conversation with Lalli Bai, she used to disclose that her mother-in-law – Geeta Bai and father-in-law – Pila Ram used to quarrel by asking her to get motor cycle and get partition also done. In his cross-examination, he admits that till marriage, no demand was made and that as and when Lalli Bai expressed her willingness to go to parental house, she was allowed to go.

20. Gend Singh (PW4)-father of the deceased has stated in examination-in-chief that his daughter – Lalli Bai was being tortured on demand of motor cycle and that she should seek partition and that on the date of incident, Lalli Bai called him on mobile, stating that the three accused (including appellants) are quarreling with her, she has been locked inside a room to which he had stated that he would be coming there. The witness has been cross-examined and contradictions with regard to demand have been brought about.

21. The manner in which these three witnesses have stated regarding dispute, quarrel and demand, followed by the incident of quarrel in the morning of 05/01/2011 and mobile call given by her to her father- Gend Singh (PW4), we find that as far as demand of dowry is concerned, the evidence in this regard is an improvement upon diary statements but the statement regarding deceased having strained relations with the appellants and call on mobile of her father on 05/01/2011 that quarrel is going on, appears to be probable and reliable.

22. Dr. Sarita Minj (PW8) has deposed that Lalli Bai was brought to the hospital on 05/01/2011 at about 4:30 in the evening by her husband – Omprakash Lodhi. She has further deposed that she minutely examined and found burn injuries. According to her, she was also pregnant and carrying pregnancy of three months, though this fact was not disclosed to the doctor by the family members. The papers relating to admission and treatment in Ex.P/16 has been proved by this doctor. She has further deposed that on 24/01/2011, the condition of the patient had become quite critical at 11 O'clock in the night and she was provided with oxygen but could not be saved. In her cross examination, it has been elicited that the extent of burn injury was not sufficient to lead to unconsciousness. She has also stated that no query was made by the police with regard to burn injuries. She has also deposed that if kerosene is poured on the head, it would spread on the head, face, shoulders

etc. but would depend upon the quantity of poured kerosene. She has admitted that on 6th, 7th and 8th January, 2011, Lalli Bai was conscious and it has also been elicited that on 09/01/2011, she was checked up and her blood pressure pulse was not recorded but she was conscious. The evidence of this doctor only talks about the mental condition of the patient. In the document (Ex.P/16), which contains recording of results of medical examination, there is a mention of "accidental burn by stove", but there is nothing in the evidence of this doctor as to on whose disclosure, this history was recorded. The doctor has not stated that this was disclosed to her by the patient – Lalli Bai nor does she say that it was disclosed to her by her husband who brought her. Therefore, much credence cannot be laid on this document to form an opinion that it was on the disclosure of Lalli Bai that such noting was made. The other doctor who treated Lalli Bai is Dr. Mamta Thakur (PW9) has stated that Omprakash Lodhi brought Lalli for treatment in the hospital and at that time, she was conscious and it was Omprakash who disclosed that Lalli had sustained accidental burn. According to her, Lalli Bai sustained 50–60% burn injuries. Though she does not talk of any oral dying declaration given by the deceased with regard to the manner in which she sustained injuries, in the cross-examination, she has stated that when she asked Lalli regarding burn injury, she said that it was caused by an incident. The Court then put a question to this witness, to which, the doctor says that Lalli disclosed to her that she got burnt due to accident. She admits that when Lalli Bai was brought to the hospital on 05/01/2011 at 4:30 PM, she was conscious. From the evidence of this doctor, it appears that when Lalli was brought to the hospital, first disclosure was made by her husband – Omprakash that she sustained burn injuries which was followed by disclosure of burn injuries by the patient – Lalli Bai.

The evidence of this doctor regarding oral and dying declaration suffers from certain infirmities. Firstly, this fact was not stated by the doctor in her examination-in-chief and it is only in the cross-examination, she states this fact for the first time. Secondly, the disclosure that the burn was a result of accident, was first disclosed by

the husband. Thirdly, in the report prepared by the doctor, there is no noting that history of burn injury by accident was recorded as per disclosure of the patient. Therefore, when Lalli was first brought to the hospital by her own husband, there being no other person present and the disclosure made by her husband, stating it to be burn injury, this evidence of oral dying declaration given to Dr. Mamta Thakur (PW9) would require independent corroboration. It would not be safe to rely upon them without any corroboration.

23. We are reminded of important observations made by the Supreme Court in the case of **Surinder Kumar v. State of Punjab, (2012) 12 SCC 120** in para 20 thereof as below -

"20. It is also not obligatory that either an Executive Magistrate or a Judicial Magistrate should be present for recording a dying declaration. It is enough that there is evidence available to show that the dying declaration is voluntary and truthful. There could be occasions when persons from the family of the accused are present and in such a situation, the victim may be under some pressure while making a dying declaration. In such a case, the court has to carefully weigh the evidence and may need to take into consideration the surrounding facts to arrive at the correct factual position."

24. The aforesaid decision was referred to in the recent decision in the case of **Harish Kumar** (supra) also.

While discussing the circumstances relevant to decide whether dying declaration is voluntary and truthfully, the Supreme Court took into consideration the situation where a person from the family of accused is present while giving oral dying declaration or recording dying declaration and that the victim in such case, may be in some pressure while making such declaration. The rule of caution is that the Court has to weigh carefully the evidence and surrounding facts to arrive at the correct

factual position.

Indeed, the aforesaid principle cast obligation on this Court to remain cautious and careful, particularly when the dying declaration is oral one and not written and made in the presence of the husband immediately after admission in the hospital. Certainly, we would have given far more weight to the evidence of the dying declaration, if any, recorded by the Executive Magistrate.

25. We would next examine the evidentiary value of the dying declaration recorded by the Executive Magistrate. The dying declaration (Ex.P/15) is said to be recorded by the Executive Magistrate- Ghanshyamlal Kanwar (PW6) on 09/01/2011. In his deposition, the Executive Magistrate has stated that upon receipt of requisition letter (Ex.P/14), he went to the hospital where Lalli Bai was admitted and contacted the doctor that dying declaration is to be recorded and therefore, he may be informed whether she is in fit condition to give statement. He deposes that the doctor informed that her statement can be taken, whereafter, at about 3 PM, he recorded the dying declaration in Ex.P/15 as proved by his signature. It is also deposed that Lalli Bai put her thumb impression. His further evidence is that he recorded it in the manner disclosed by Lalli Bai that her father-in-law – Pila Ram was harassing her and asking her to sell out her share of land and also to bring motor cycle and that he used to abuse her. He has further deposed that on 04/01/2011, in the night at about 8 PM, her father-in-law – Pila Ram came in drunken state, started abusing in the presence of her mother-in-law – Geeta Bai and when on the next day, i.e. on 05/01/2011, she was sitting in the courtyard with the child after taking meals, her father-in-law came in along with her sister-in-law - Rani Bai, her child was snatched away by Pila Ram telling Rani Bai to set Lalli Bai on fire. Thereafter, she was dragged out, kerosene was poured on her and set on fire. When she started crying for help, her husband came there and extinguished fire and at that time, nobody was there. She fainted. When she regained consciousness, she found that she was in the hospital and her

husband told that now, she has come to the hospital and she will become alright. The contents of the dying declaration (Ex.P/15) which have been narrated by the Executive Magistrate in his deposition before the Court, as we find, is what has been written in the dying declaration (Ex.P/15). The Executive Magistrate has been subjected to detailed cross-examination. It has been elicited that he does not remember the name of the duty doctor with whom he consulted and that he himself had not seen treatment papers, though, he reaffirms that upon being asked from the duty doctor, he has stated that statement could be taken at about 3 PM and no fitness certificate was given to him by the doctor. He, then, states that immediately thereafter, he went to record the statement of Lalli Bai. He also admits that as the doctor stated that Lalli Bai is fit to give statement, he did not make any further query regarding fitness of Lalli Bai.

Even though, in view of the Constitution Bench judgment of the Supreme Court in the case of **Laxman** (supra), the dying declaration otherwise truthful and voluntary could not be discarded only on the ground that medical certificate of fitness was not there, in the present case, we find that fitness of Lalli Bai has been proved by the prosecution from the evidence of Dr. R.K.Nayak (PW10). He has stated that upon being asked to give his opinion, he went to the burn unit on 09/01/2011 and checked up Lalli Bai. Her general condition was normal, she was conscious and was in a fit state to give statement. It was not only the oral evidence of this doctor but he has also proved his own signature in Ex.P/17 which also records similar noting regarding fitness. This doctor has been subjected to cross examination and denied suggestion that Lalli Bai was not conscious by explaining that 'conscious oriented' would mean that patient was conscious, alert and was able to understand the surrounding circumstances. He has also stated that mention regarding blood pressure, pulse and breath was not given because the patient was not cooperating because of burn injury. He has further stated that after check up and preparing report, he left the place to attend other patients. The suggestion that Lalli Bai was

not normal, conscious and not fit to give statement has been denied.

26. We do not find any reason to disbelieve the testimony of Dr.R.K.Nayak (PW10) with regard to Lalli Bai being medically fit and conscious to make statement on 09/01/2011.

It would be relevant to notice that the Executive Magistrate (PW6) has emphatically stated that after having contacted the doctor and satisfied with regard to the fitness, he had immediately proceeded to take the statement of Lalli Bai at 3 PM. The evidence of the Executive Magistrate in this regard has remained uncontroverted and unimpeachable. That means, soon after the doctor gave opinion of fitness, the Executive Magistrate immediately moved to record the statement.

27. The aforesaid dying declaration in writing, recorded by the Executive Magistrate is, however, sought to be impeached mainly on two counts. Firstly, that the statement was recorded in the presence of the family members of the deceased and secondly, that there was delay in recording dying declaration (Ex.P/15) because Lalli Bai was admitted in the hospital on 05/01/2011 and the evidence of Dr. Sarita Minj (PW8) and Dr. Mamta Thakur (PW9) broadly showing Lalli Bai's continuous state of consciousness, it was the obligation cast on the prosecution to explain satisfactorily as to on what compelling circumstances, the dying declaration could not be recorded for four days. According to learned counsel for the appellant, this assumes relevance because during these four days, there is all possibility of the deceased being tutored by her own family members to implicate the in-laws. The evidence of Ghanshyamlal Kanwar (PW6) as has been elicited in the cross-examination, is that when the statement of Lalli Bai was being recorded, her mother—Kumari Bai, father- Gend Singh and uncle – Radheyshyam Patel were present but has denied suggestion that at that time, these persons were talking to Lalli. He himself has stated that they all were standing aside. The dying declaration was

recorded by a responsible officer of the rank of Executive Magistrate. Without there being any specific evidence, we would not presume that mere presence of the family members would create any kind of pressure. The two situations, one where declaration is given in presence of in-laws and declaration given in presence of her own parents or relatives, cannot be equated. Where daughter-in-law suffers burn injuries in her matrimonial house and has made dying declaration in presence of her in-laws or husband, there are probabilities and chances that she would hesitate to give true state of affairs in their presence. But this is not probable that presence of her own parents or relatives will create any pressure on her, not to speak truth. Rather in such cases, there has to be specific and reliable evidence of tutoring. Unless there is something to raise a suspicion that the dying declaration was a result of tutoring, mere presence of the parents and uncle would not lead to the presumption of tutoring.

There is yet another reason why we find that it is not a case of tutoring, that is, the deceased has not involved each and every member of her family. In her dying declaration, only two persons have been involved i.e. father-in-law and sister-in-law. The deceased has neither involved her mother-in-law nor her husband. On the contrary, when her husband came, he extinguished fire. This is also against possibility of false implication because in such cases, there is tendency to involve each and every member of the family.

28. The other circumstance that the dying declaration was recorded belatedly after about four days, could be a matter of further enquiry as relevant question in that regard is to be asked from the investigating officer. We have seen that in the present case, the patient was suffering from burn injuries and mere consciousness cannot be equated with fitness. The condition of the patient coupled with coordination of the police with the Executive Magistrate for ensuring recording of dying declaration at the earliest, are various interconnected factors which result in recording of dying

declaration. We do not find in the present case that the requisition for calling Executive Magistrate was quite belatedly sent by the police. This perhaps can be one of the circumstance to doubt the case of the prosecution, had the investigating officer failed to explain the circumstance. But then we find that no such question was put to the investigating officer in this regard. Therefore, the accused cannot seek benefit on this ground. Moreover, we do not find any clear evidence of two doctors – Dr. Sarita Minj (PW8) and Dr. Mamta Thakur (PW9) that from 5th to 9th January, 2011, the Lalli Bai was continuously in a fit state to give dying declaration. Though there is evidence of Dr. Sarita Minj (PW8) that Lalli Bai was conscious, only on this basis, presumption of fitness cannot be drawn. All that can be said from the evidence on record is that on 05/01/2011, immediately when she was brought to the hospital, she was in a conscious condition. Thereafter, on 09/01/2011, when she was again checked by Dr. R.K.Nayak (PW10), she was found to be in a fit condition to give dying declaration. Whether it was a case that on 6th, 7th and 8th January, 2011, the dying declaration could not be taken on account of unfit condition or it was mere negligence on the part of the police officer in requisitioning Executive Magistrate or a lapse on the part of SDM or Executive Magistrate to immediately respond to the situation, could be cleared only when such question would have been asked from the investigating officer. At this stage, we consider it appropriate to highlight the observations made by the Constitutional Bench of the Supreme Court in the case of **Laxman** (supra) with regard to the evidentiary value to be attached to the dying declaration recorded by the Executive Magistrate as below -

“4. xxxxxxxxxx The Magistrate being a disinterested witness and a responsible officer and there being no circumstances or material to suspect that the Magistrate had any animus against the accused or was in any way interested for fabricating a dying declaration, question of doubt on the declaration, recorded by the Magistrate does not arise.”

As between the oral dying declaration given to the doctor in the presence of

the husband, when no other member of the parental side is present, which is not even mentioned in the medical papers by the doctor, an otherwise reliable text of the Executive Magistrate proving written dying declaration fully backed by reliable evidence of the doctor proving fitness to give statement, would definitely carry higher evidentiary value. The possibility of the doctor being influenced by the husband is much more probable than the possibility of the Executive Magistrate being influenced by the family members of the deceased.

29. The corroboration of the dying declaration (Ex.P/15) recorded by the Executive Magistrate is not necessary in the present case because the evidence of the Executive Magistrate - Ghanshyam Kanwar (PW6) and Dr. R.K.Nayak (PW10) is unimpeachable and no doubt is cast on it. There being no extrinsic evidence of tutoring or strong possibility thereof, adds to the reliability of written dying declaration (Ex.P/15).

30. Even though we do not find that as a rule of caution, we must look for corroboration of dying declaration (Ex.P/15) recorded by the Executive Magistrate, there are corroborative evidence available on records of the case in the form of dying declaration recorded by the investigating officer and the oral dying declaration given by the deceased as stated by Radheyshyam Patel (PW3) and Gend Singh (PW4). The investigating officer-Vishnu Prasad Thakur (PW12) has deposed regarding recording of dying declaration in Ex.P/7 and has proved the same by specific evidence. It is sought to be impeached on the submission that it does not bear date and time. If we look into the evidence of the investigating officer, he has deposed that after receipt of information in the police station by lodging of FIR on 12/01/2011, he had proceeded to the hospital and recorded dying declaration of Lalli Bai. The contents of dying declaration (Ex.P/7) as recorded by the investigating officer (PW12) and that of dying declaration (Ex.P/15) recorded by the Executive Magistrate (PW6)

are coherent, both with regard to the manner in which the incident happened and the persons involved. In both the dying declarations, it has been stated that the child was snatched from the lap of the deceased and her father-in-law told her sister-in-law to set Lalli Bai on fire, whereafter, kerosene was poured on her and she was set on fire. Thus, the dying declaration recorded by the investigating officer also can be used as a corroborative piece of evidence to support the dying declaration (Ex.P/15).

31. The oral dying declaration given to her uncle-Radheshyam Patel (PW3) and father – Gend Singh (PW4) appear to be exaggerated, though, not wholly concocted. Radheshyam Patel (PW3) has deposed that Lalli Bai stated in the hospital that she was set on fire by her father-in-law, mother-in-law and sister-in-law by pouring kerosene on her. Father – Gend Singh (PW4) has also deposed that in the hospital, Lalli Bai disclosed to him that kerosene was poured on her by Rani Bai, while Geeta Bai caught hold on her and her father-in-law – Pila Ram had closed the door. The testimony of these two witnesses, in so far as it seeks to involve – mother-in-law – Geeta Bai, is doubtful because in dying declaration (Ex.P/7) and (Ex.P/15), there is no mention of mother-in-law – Geeta Bai playing role in setting Lalli Bai on fire. But then, involvement of Rani Bai is direct. Therefore, the testimony of these two witnesses in so far as it seeks to involve Pila Ram and Rani Bai also corroborates the dying declaration (Ex.P/15) recorded by the Executive Magistrate.

32. Nothing could be elicited from the medical evidence to hold that the pattern and nature of burn injury is wholly incompatible with the prosecution case of the deceased having been set on fire or that it is so compatible with accidental burn that the entire prosecution story is liable to be rejected. On the contrary, we have seen the photographs of the deceased attached with the record which shows that there was no injury on her face and it was absolutely clear. The defence is that while she was working on stove, she caught fire. If while working on the stove, the stove burst,

it is quite improbable that there will be no burn injury on the face. Moreover, we find that when the police carried out search, stove was not found on the spot. The defence story does not explain as to how the accident occurred. Therefore, the story of deceased Lalli Bai sustaining burn injuries because of accident, appears to be wholly improbable.

The other submission of learned counsel for the appellant that when kerosene is poured, some injury could be found in the head, in the peculiar facts and circumstances of the present case, cannot be accepted. This is so because, it is not stated in the dying declaration of the deceased that kerosene was poured on her head while she was working on the stove in the kitchen, rather the story is that she was dragged and then kerosene was poured on her. Had she stated in her dying declaration that it was poured on her head and then set afire, there would be possibility of burn in the scalp and the face. Thus, viewed from all angles, particularly reliable testimony of Executive Magistrate and dying declaration recorded by him, the prosecution case of deceased having been burnt by her sister-in-law satisfies the test of reliability.

33. In the case of **Harish Kumar** (supra), defence had come out that a dying declaration recorded by Nayab Tahsildar in the presence of the doctor discharges the accused of his burden to rebut the presumption which could be drawn under Section 113-B of the Evidence Act, 1872. On this factual premise, coupled with doctor's opinion that the patient was brought to the hospital by her husband and was not unconscious, recorded that presumption of dowry death was rebutted. In the present case, the defence case is based on oral dying declaration and not the dying declaration recorded by the Executive Magistrate.

34. In the case of **Brundaban Moharana** (supra), the Court was faced with two dying declarations, one recorded by the doctor and another by the investigating

officer. That means, that was not a case where prosecution has come out with the evidence of dying declaration recorded by the Executive Magistrate. In this background, the Supreme Court observed that if a doubt can be cast by the defence that the injured was not in a position to make dying declaration or that the dying declaration was itself shrouded in mysterious circumstances, the prosecution evidence would automatically fall through. The evidence of the investigating officer who claimed to have recorded dying declaration was scrutinized and a doubt was cast keeping in view that the very capacity of the injured to make a statement was in doubt and therefore, prosecution case required corroboration.

35. In the case of **Umakant** (supra), the factual background was that the prosecution case of deceased having been set on fire was disbelieved as the doctor's evidence that he was informed that the victim caught fire accidentally, was recorded in the presence of her own sister and brother-in-law. In this background, the dying declaration was doubted on the ground that it could be a product of tutoring. Moreover, in that case, it was found that the deceased had not disclosed the fact regarding she having been set on fire to anybody for 11 long days during her treatment in the hospital. In the present case, the first oral dying declaration was said to have been given to Dr. Mamta Thakur (PW9) when the husband alone was with the deceased and nobody else, much less any member from her parents side and secondly, as has been stated in oral dying declaration given by the deceased to her uncle Radheyshyam Patel (PW3) and Gend Singh (PW4), the deceased had informed them regarding the incident which was followed by dying declaration recorded by the Magistrate on 09/01/2011.

36. In the case of **Bisahuram Katlam** (supra), this Court convicted the accused under Section 307 IPC even after death of the victim, in the peculiar circumstances that the deceased survived for 3½ months and she was also discharged after

treatment and then died later on and also that, as per medical report, the burn injury was only on the lower part and not on the upper part of the body. The said judgment is, therefore, distinguishable on facts.

37. We, however, find that the learned Trial Court convicted the appellants both under Section 302 IPC as well as under Section 304-B IPC. In the present case, in the absence of there being any clinching evidence that she was subjected to cruelty in connection with demand of dowry soon before her death, her conviction under Section 304-B IPC could not be sustained. Therefore, to that extent, conviction of the appellants cannot be sustained. Except the said part, conviction of the appellants is affirmed. The appeal is accordingly partly allowed only to the extent of acquittal of the appellants from the charges of commission of offence under Section 304-B IPC.

Sd/-

(Manindra Mohan Shrivastava)
Judge

Sd/-

(Rajani Dubey)
Judge