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

+ CRL.A. 84/2019

VINAY TIWARI

..... Appellant

Through: Mr. Kanhaiya Singhal and Mr. Arshid,
Advocates.

versus

STATE

..... Respondent

Through: Ms. Aashaa Tiwari, APP for State

Reserved On: 02nd December, 2019

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Date of Decision: 24th December, 2019

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

J U D G M E N T

MANMOHAN, J:

1. Present appeal has been filed by appellant-convict challenging the judgment dated 22nd December, 2018 and the order on sentence of the same date passed by the Additional Sessions Judge-04, East, Karkardooma Courts, Delhi in Sessions Case No. 970/2016 arising out of FIR No.543/2009 registered with Police Station Mandawali. The appellant-convict has been convicted under Sections 302/498A IPC and sentenced to undergo imprisonment for life with fine of Rs. 5,000/- for offence punishable under Section 302 IPC as well as rigorous imprisonment for three years with fine of Rs. 1,000/- for offence punishable under Section 498A IPC.

CASE OF THE PROSECUTION

2. Briefly stated the case of the prosecution is that the appellant-convict and Rakhi (deceased) had married each other on 5th April, 2006 and thereafter, the appellant-convict had subjected Rakhi to cruelty and harassment for dowry. On 30th October, 2008 Rakhi suffered burn injuries at her home in Chander Vihar, Mandawali, Delhi and was shifted to the LNJP Hospital, where ASI Ramesh Chand (PW-14) as well as the Executive Magistrate (PW-18) recorded her statement on the same day. The deceased made no allegations against the appellant-convict in these statements.

3. As per the prosecution, on 19th November, 2008 Rakhi called her parents using the mobile phone of another patient, who was being treated in the same hospital, bearing No. 9911301654 and informed them about her condition. Thereafter, her parents came to the hospital and she told them that the appellant-convict had poured kerosene on her and set her on fire. Subsequently, the father of the deceased – Prabhu Shankar Tiwari (PW-6) wrote a letter dated 16th December, 2008 to the SDM (Mark PW-6/A) to record the statement of his daughter Rakhi again as the first statement dated 30th October, 2008 was recorded under threat. Another letter dated 26th December, 2008 was addressed to the Hon'ble Chief Justice of this Court by Rakhi herself, in which she stated that her husband (appellant-convict herein) had set her on fire after pouring kerosene and that she had been harassed by her in-laws on account of dowry. On 22nd January, 2009 Rakhi died while being treated at the LNJP hospital.

4. However, no action was taken for several months and the FIR in the present case came to be registered only when a copy of the aforesaid letter

addressed to the Hon'ble Chief Justice was received in the police station Mandawali and the statement of the mother of the deceased (PW-3) was recorded on 23rd October, 2009.

FINDING OF THE TRIAL COURT

5. The Trial Court convicted the appellant-convict under Sections 302/498A IPC. However on account of lack of evidence to prove that the deceased was treated with cruelty, for or in connection with any demand for dowry soon before her death, the appellant-convict was acquitted for the offence punishable under Section 304B IPC. The relevant portion of the impugned Trial Court judgment is reproduced hereinbelow:-

“32. As far as commission of offence u/s 304B IPC is concerned, in Sher Singh @ Pratapa v. State of Haryana, Crl. Appeal No. 1592 of 2011, dated 09.01.2015, the Apex Court held that it is for the prosecution to prove that a “dowry death” has occurred namely, (i) that the death of a woman has been caused in abnormal circumstances by her having been burned or having been bodily injured, (ii) within seven years of a marriage, (iii) and that she was subjected to cruelty or harassment by her husband or any relative of her husband, (iv) in connection with any demand for dowry and (v) that the cruelty or harassment meted out to her continued to have a causal connection or live link with the demand of dowry. It was further held that once the presence of these concomitants are established or shown or proved by the prosecution, even by preponderance of possibility, the initial presumption of innocence is replaced by an assumption of guilt of the accused, thereupon transferring the heavy burden of proof upon him and requiring him to produce evidence dislodging his guilt, beyond reasonable doubt.(Emphasis supplied).

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62. To conclude, at the cost of repetition, in the light of afore-discussed entire facts and circumstances, it is evident that the deceased was conscious and fit to make statements how she suffered burn injuries. The dying declarations exhibit Ex. PW14/B and Ex. PW18/A were not made with free will and voluntarily by the deceased. The evidence available on record also do not corroborate both the aforementioned statements. The dying declarations vide letter Ex. PW3/B was voluntary and truthful, detailing the circumstances leading to the burn injuries sustained by the deceased. Even otherwise the kind of burn injuries suffered by the deceased clearly shows that she was intentionally and deliberately set on fire, which was not accidental in nature as no burst kerosene stove could be found on the scene of occurrence. The testimonies of family members of the deceased as well as the independent witness namely Neeraj (PW10) remained firm and could not be contradicted in any manner whatsoever. On the other hand, the conduct of the accused throughout remained suspicious and unexplained. Hence, in my considered opinion, it was the accused and only the accused who intentionally poured kerosene oil over the deceased and set her on fire on 30.10.2008. The accused is accordingly held guilty for commission of offence punishable under section 302 IPC.

63. From the testimonies of Mala Tiwari (PW3), Prabhu Shankar Tiwari (PW6) and Navin Kumar (PW8) as well as dying declaration of the deceased Ex. PW3/B, as discussed in detail above, it is also established that the deceased was subjected to cruelty by the accused during her life time, which was of such a nature as is likely to cause grave injury or danger to her life, limb or health and therefore, accused is also held guilty for commission of offence punishable u/s 498A IPC.

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65. In view of findings on all points for determination, accused Vijay Tiwari s/o Subhash Tiwari is accordingly convicted for the offence punishable u/s 302/498A IPC. Accused,

however, stands acquitted for commission of offence punishable u/s 304B IPC.”

ARGUMENTS ON BEHALF OF THE APPELLANT-CONVICT

6. Mr. Kanhaiya Singhal, learned counsel for the appellant-convict stated that there had been no allegations against the appellant-convict in the MLC (Ex.PW-4/A) as well as dying declaration recorded by the police (Ex. PW-14/B) or the dying declaration recorded by the Executive Magistrate (Ex. PW-18/A) and the said statements had been recorded after the deceased had been duly certified to be in a *‘fit state of mind’* by the Doctor. Consequently, according to him, these dying declarations inspire confidence.

7. Learned counsel for the appellant-convict stated that the alleged dying declaration (Ex. PW-3/B) of the deceased had been fabricated by the parents of the deceased in conspiracy with Neeraj Kumar (PW-10) and A.K. Pandey, in order to falsely implicate the appellant-convict. He stated that there was no postal proof to show as to when the alleged dying declaration was sent to the Hon’ble Chief Justice of this Court.

8. He laid emphasis on the fact that the prosecution had not proved the thumb impression that was put on the alleged dying-declaration. He also stated that there was no medical evidence on record to show that the deceased was in a *‘fit state of mind’* on 26th December, 2008 i.e. the date of the alleged dying declaration.

9. He contended that a bare perusal of the alleged dying declaration proved that it was a result of legal advice as the words used in it are those that are used by experts in the field only. In support of his contention he

relied upon the judgment of this Court in ***State Vs. Kumari Mubin Fatima & Ors., 2013 (2) JCC 1099.***

10. He further stated that even though as per the prosecution, the parents of the deceased had allegedly visited the hospital for the first time on 19th November, 2008, yet they had not filed any complaint till 26th December, 2008. He contended that since the father of the deceased (PW-6) was a press reporter, it can be inferred that he was not an illiterate person. In view of the said fact, he emphasized that it was unlikely that the father of the deceased was neither aware nor had been advised by Neeraj Kumar (PW-10) or his senior to file a complaint in accordance with Section 156(3) of the Cr.P.C. He also contended that the parents of the deceased had never liked the appellant-convict and which is why they had concocted false evidence. In support of his contention, he relied upon the judgment of this Court in ***Bhanwar Pal Singh vs. State, Govt. of NCT of Delhi, 163 (2009) DLT 170 (DB).***

11. Learned counsel for the appellant-convict contended that when the appellant-convict had taken the deceased to the hospital, their house was left open. He stated that since the police had not reached the spot immediately, it was possible that the stove that had burst and caused burn injuries to the deceased may have been thrown out by someone or may have missed the eye, but it did not mean that the burst stove was not present at the spot.

12. Learned counsel for the appellant-convict contended that if there had been any ill intent on the part of the appellant-convict, he would not have taken the deceased to the hospital or remained in the hospital for such a long

period of time. He emphasized that the conduct of the appellant-convict proved his innocence and consequently, he should be acquitted and set free.

ARGUMENTS ON BEHALF OF THE STATE

13. *Per contra*, Ms. Aashaa Tiwari, learned APP for the State stated that the deceased had made oral dying declarations to her family members i.e. her mother Mala Tiwari (PW-3), father Prabhu Shankar Tiwari (PW-6) and her brother Naveen Kumar (PW-8) while she was admitted in the hospital, wherein she had stated that the appellant-convict had poured kerosene on her on the day of *Bhaiya Dooj* (30th October, 2008) and burnt her. She stated that the testimonies of mother Mala Tiwari (PW-3), father Prabhu Shankar Tiwari (PW-6) and brother Naveen Kumar (PW-8) had not been contradicted in cross examination.

14. Ms. Aashaa Tiwari further stated that the same version of the incident had been reiterated in the letter dated 26th December, 2008 addressed to the Hon'ble Chief Justice of this Court (Ex. PW-3/B). She emphasized that in the aforesaid letter, the deceased had stated that since the appellant-convict had threatened her, she had not disclosed anything to the police or any other person. She also pointed out that the statements given by the deceased to the police and executive magistrate were made as per the directions of the appellant-convict and consequently the said statements were not voluntary.

15. Learned APP for the State stated that the dying declaration letter (Ex. PW-3/B) had been written by Neeraj Kumar (PW-10) who had deposed that he was directed by his senior to accompany the father of the deceased to the hospital to record the statement of the deceased. She emphasized that Neeraj Kumar (PW-10) had testified that even though the deceased was badly

burnt, yet she was conscious and fit to make a statement and consequently, he had recorded the statement of the deceased, verbatim, in his own handwriting and the deceased had put her right thumb impression at Point 'Q' on the same. She pointed out that the testimony of Neeraj Kumar (PW-10) had not been impeached in cross examination and was reliable.

16. She submitted that the Supreme Court in ***Laxman vs State of Maharashtra AIR 2002 SC 2973*** has held that if the officer recording the dying declaration had stated that the deceased was in a fit and conscious state to make said dying declaration, the absence of a fitness certificate by the doctor would not render the dying declaration unacceptable. Consequently, according to her, the contention of the learned counsel for appellant-convict that the doctor should have certified the deceased as '*fit for statement*' was unacceptable.

17. Learned APP for the State pointed out that the deceased, in dying declaration (Ex. PW-3/B), had mentioned that the appellant-convict had given away their daughter to a resident of Jammu. She stated that father of the deceased (PW-6) had informed the police regarding the same and subsequently, the daughter of the deceased was recovered and handed over to the mother of the deceased.

18. In view of the foregoing, she contended that the oral dying declarations made by the deceased to her family members as well as the one made to Neeraj Kumar (PW-10) which he had reduced into a letter (Ex. PW-3/B) were voluntary, truthful and could be relied upon.

19. Learned APP for the State stated that the dying declaration made to ASI Ramesh Chand (PW-14) i.e. Ex. PW-14/B and Executive Magistrate (PW-18) i.e. Ex. PW-18/A, were made in the presence of the appellant-convict and consequently, the possibility of the deceased being threatened or intimidated by the appellant-convict, as stated by the deceased in her dying declaration letter (Ex. PW-3/B), cannot be ruled out. In any event, she contended that the dying declarations to the ASI Ramesh Chand (PW-14) and Executive Magistrate (PW-18) were contrary to the evidence available on record as no stove was found at the spot. In support of her contention she relied upon the testimonies of ASI Ramesh Chand (PW-14) and HC Anil Kumar (PW-13) who had reached the spot on the day of the incident.

20. She contended that as per the testimony of Saroj (PW-9), the appellant-convict was present at the spot at the time of the incident and had taken the deceased to the hospital. She pointed out that the testimony of Saroj (PW-9) also negates the content of dying declarations made to ASI Ramesh Chand (PW-14) and Executive Magistrate (PW-18) as in those statements it was mentioned that the neighbours had taken the deceased to the hospital. She emphasized that even in the MLC (Ex. PW-4/A) it had been recorded that the deceased was brought by her husband, i.e. appellant-convict, contrary to her dying declarations to the ASI Ramesh Chand (PW-14) and Executive Magistrate (PW-18).

21. Learned APP for the State contended that as per the Post Mortem Report (Ex. PW-7/A), the deceased had burn injuries on her back which could be possible only if kerosene was poured on her and she was set on fire and not in a case of stove-bursting.

22. Learned APP for the State stated that the thumb impressions of the deceased on her dying declaration to the ASI Ramesh Chand (PW-14) and Executive Magistrate (PW-18) i.e. Ex. PW-14/B and Ex. PW-18/A respectively, were not clear and further, her thumb impression on the dying declaration letter (Ex. PW-3/B) did not disclose sufficient number of ridge details, which is why these thumb impressions were found unfit for comparison.

23. Learned APP for the State submitted that in view of Section 8 of Evidence Act, the conduct of the appellant-convict was an important circumstance to establish the case of the prosecution. She contended that after the death of the deceased on 22nd January, 2009, the appellant-convict had absconded and had surrendered only on 27th July, 2015 when proceedings under Section 82 Cr. P.C. had been initiated against him and prior to that, Non Bailable Warrants had also been issued against the appellant-convict on 10th March, 2015.

24. She further submitted that in view of Section 106 of Evidence Act, the burden was on the appellant-convict to explain how the deceased had suffered burn injuries within the four walls of their house; however the appellant-convict had failed to discharge the said burden in his statement recorded under Section 313 CrPC and consequently, adverse inference had to be drawn against him.

25. She relied upon the judgment of the Supreme Court in ***Koli Chunilal Savji and Another Vs. State of Gujarat, (1999) 9 SCC 562*** and ***Shudhakar Vs. State of Madhya Pradesh, (2012) 7 SCC 569***.

COURT'S REASONING

SINCE THERE ARE TWO SETS OF CONTRADICTORY DYING DECLARATIONS HEREIN, THE EVIDENCE ON RECORD HAS TO BE EXAMINED AND THE DYING DECLARATION WHICH IS CORROBORATED BY THE EVIDENCE HAS TO BE RELIED UPON.

26. Having heard learned counsel for both the parties, this Court is of the view that it is essential to first outline the law relating to multiple dying declarations. The Supreme Court in **Jagbir Singh vs. State (NCT of Delhi) (2019) 8 SCC 779**, after analysing previous judgments on this aspect has held as under:-

“31. A survey of the decisions would show that the principles can be culled out as follows:

(i) Conviction of a person can be made solely on the basis of a dying declaration which inspires confidence of the court;

(ii) If there is nothing suspicious about the declaration, no corroboration may be necessary;

(iii) No doubt, the court must be satisfied that there is no tutoring or prompting;

(iv) The court must also analyse and come to the conclusion that imagination of the deceased was not at play in making the declaration. In this regard, the court must look to the entirety of the language of the dying declaration;

(v) Considering material before it, both in the form of oral and documentary evidence, the court must be satisfied that the version is compatible with the reality and the truth as can be gleaned from the facts established;

(vi) However, there may be cases where there are more than one dying declaration. If there are more than one dying declaration, the dying declarations may entirely agree with

one another. There may be dying declarations where inconsistencies between the declarations emerge. The extent of the inconsistencies would then have to be considered by the court. The inconsistencies may turn out to be reconcilable.

(vii) In such cases, where the inconsistencies go to some matter of detail or description but are inculpatory in nature as far as the accused is concerned, the court would look to the material on record to conclude as to which dying declaration is to be relied on unless it be shown that they are unreliable;

(viii) The third category of cases is that where there are more than one dying declaration and inconsistencies between the declarations are absolute and the dying declarations are irreconcilable being repugnant to one another. In a dying declaration, the accused may not be blamed at all and the cause of death may be placed at the doorstep of an unfortunate accident. This may be followed up by another dying declaration which is diametrically opposed to the first dying declaration. In fact, in that scenario, it may not be a question of an inconsistent dying declaration but a dying declaration which is completely opposed to the dying declaration which is given earlier. There may be more than two.

(ix) In the third scenario, what is the duty of the court? Should the court, without looking into anything else, conclude that in view of complete inconsistency, the second or the third dying declaration which is relied on by the prosecution is demolished by the earlier dying declaration or dying declarations or is it the duty of the court to carefully attend to not only the dying declarations but examine the rest of the materials in the form of evidence placed before the court and still conclude that the inculpatory dying declaration is capable of being relied upon?

Our conclusion on multiple dying declarations

32. We would think that on a conspectus of the law as laid down by this Court, when there are more than one dying declaration, and in the earlier dying declaration, the accused is not sought to be roped in but in the later dying declaration, a somersault is made by the deceased, the case must be decided on the facts of each case. The court will not be relieved of its duty to carefully examine the entirety of materials as also the circumstances surrounding the making of the different dying declarations. If the court finds that the incriminatory dying declaration brings out the truthful position particularly in conjunction with the capacity of the deceased to make such declaration, the voluntariness with which it was made which involves, no doubt, ruling out tutoring and prompting and also the other evidence which support the contents of the incriminatory dying declaration, it can be acted upon. Equally, the circumstances which render the earlier dying declaration, worthy or unworthy of acceptance, can be considered.”

(emphasis supplied)

27. Applying the settled law, this Court is of the view that since there are two sets of contradictory dying declarations herein, the present case falls under the third category as mentioned in **Jagbir Singh** (supra). The two sets of dying declarations are as follows:–

A. The first three which favour the appellant-convict i.e. the MLC (Ex. PW-4/A), the statement recorded by the ASI Ramesh Chand (PW-14/B) and the statement recorded by the Executive Magistrate (PW-18/A); and

B. The four subsequent statements which inculcate the appellant-convict i.e. the oral dying declarations made by the deceased to her

mother (PW-3), father (PW-6) and brother (PW-8) and the letter dated 26th December, 2008 addressed to the Hon'ble Chief Justice of this Court.

28. In order to establish which of the dying declarations are truthful and reliable, the evidence on record has to be examined and the dying declaration which is corroborated by the evidence can be relied upon.

THE TESTIMONIES OF MOTHER (PW-3), FATHER (PW-6) AND BROTHER (PW-8) OF THE DECEASED, NEERAJ KUMAR (PW-10) AS WELL AS THE LAST DYING DECLARATION IN FORM OF LETTER DATED 26th DECEMBER, 2008 (EX. PW-3/B) ARE CLEAR, COGENT, CONSISTENT, CREDIBLE, TRUSTWORTHY AND CORROBORATED BY THE EVIDENCE ON RECORD.

29. The mother (PW-3), father (PW-6) and brother (PW-8) of the deceased had deposed in Court with respect to oral dying declarations made to them by the deceased. The relevant portion of their testimonies are reproduced hereinbelow:-

A. Testimony of the mother – Mala Tiwari (PW-3)

“On 19.11.2008, I received a phone call from my daughter Rakhi from mobile No.9911301654 to inform that her condition was very serious and asked me to meet her to LNJP Hospital. I and my husband went to LNJP Hospital and found that Rakhi was in a badly burnt condition. When I asked as to how she got burnt, she informed that she was burnt by her husband by pouring kerosene oil on her on the day of Bhaiya Dooj i.e. on 30.10.2008. She was nine months pregnant at that time. I came to know that after 4-5 days of this occurrence, she delivered a baby body which expired because of burn injuries. Accused had also burnt the daughter of Rakhi and gave her to some other person at Jammu. She was later recovered by the police from Sunil Kumar whose number I do not remember now but I have

this number in my mobile phone. Accused had not informed us that my daughter had got burnt and my daughter had secretly made the telephone call to me. Accused had informed at the hospital that Rakhi was orphan. He had threatened Rakhi to tell that she had got burnt because of bursting of the stove and threatened that he would not get her treated if she made any complaint and forced her give statement to the SDM to support him. On our arrival at the hospital, the doctor requested the SDM to record the statement of the victim again but he refused.

On 26.12.2008, my daughter Rakhi sent a letter to the High Court and thereafter the FIR was registered on the directions of the High Court. During treatment, Rakhi expired on 22.01.2009.....”

B. Testimony of the father – Prabhu Shankar Tiwari (PW-6)

“On 19/11/2008, my daughter Rakhi talked to me on telephone and her voice was not clear and she told me that she was in burnt condition and was admitted to Lok Nayak Hospital, Delhi at burnt ward. I immediately along with my wife reached Lok Nayak Hospital and I saw that my daughter Rakhi was lying on a bed in burnt condition. The accused or any of his family member was not present there. The treatment of my daughter was going on in the hospital as she was not in proper condition. During the treatment, my daughter Rakhi told me that she was forced by the accused Vinay Tiwari and his real uncle Shatrughan Tiwari to give statement in their favour and she had given the statement before tehsildar concerned under pressure of the accused and his uncle Shatrughan Tiwari. My daughter also told me that she had been burnt by accused Vinay Tiwari by pouring kerosene oil upon her and lighting it with fire, about 20 days ago and she also told that she was ready to give her real statement before the authority concerned. Thereafter, I reached PS Mandawali and requested the then SHO and the IO concerned to record the statement of my daughter Rakhi and in this regard I had also given a written application to them but they refused to record statement of my daughter stating that her

statement had already been recorded and there was no need to record her other statement. I have today brought the copy of the request letter dated 16/12/08 in this regard written by me, which is Mark PW-6/A bearing my signatures at point A (copy given) (objected to by the Ld. Defence Counsel on the ground that his document has been produced today for the first time and was not part of investigation).

On 26/11/2008, my statement was recorded by the police and the same is Ex.PW6/B bearing my signatures at point A. After the incident, I was not informed by the accused about the same and I came to know about the incident on 19/11/2008 when my daughter Rakhi talked to me on telephone.

On 26/12/2008, I got recorded the statement of my daughter Rakhi in the hospital through Sh. Neeraj Kumar, Advocate and the statement of my daughter Rakhi was recorded in my presence as verbatim and she had put her thumb impression on the same. Only one of the thumb impression was in proper condition at that time and the other was burnt, I do not recollect as to which of her thumb impression was put on her statement. The said statement is already Ex.PW 3/B bearing right hand thumb impression of my daughter Rakhi at point Q. I asked from the accused in the hospital with regard to my Nati Anamika (daughter of deceased) and on the pressure of the police he told that she had been sent to Jammy and thereafter the police took the contact number and she was brought from Jammu and was handed over to me.

XXXXXX by Sh. M.S. Singh, Ld. Counsel for accused.

.....It is correct that I had stated in my statement Ex.PW6/B dated 26/11/08 that I was having no suspicion on any one. Vol. I had written so in the said statement as the police officers were not taking any action properly and I was being harassed and they were saying that nothing would happened by making complaints and so on t he saying of the police officers, I have written that I have not any suspicion on any one. I did not make any complaint against the police officials to higher police officers in this

regard. I had written in my own handwriting in Ex.6/B that I did not want any legal action. It was written as I was being harassed by the police officers that no fruitful purpose would be served by giving complaint against the offender and due to anger by the conduct of the police officers that I did not want any legal action....”

C. Testimony of the brother – Naveen Kumar (PW-8)

“.....My sister Rakhi was lying admitted in the hospital for the last about 18-20 days prior to the date when I had visited the hospital along with my father. My sister was having burn injuries upwards her waist. So far as I remember, I had visited the hospital 22.11.2008. I had not asked my sister as to how she had sustained burn injuries. At least one of my family members used to remain in the hospital to look after my sister Rakhi. One day, my sister Rakhi had told me that she had been burnt by accused Vinay Tiwari by pouring kerosene oil on her. My sister Rakhi further told me that one day prior to the incident in which she was burnt, accused Vinay Tiwari had brought one bottle containing kerosene oil and when she (Rakhi) asked Vinay Tiwari as to why he had brought the kerosene oil. My sister told me that accused Vinay Tiwari told her that he had brought the same to mix it in paint. I asked my sister as to why she had not given the above said version of the incident of her burning, she told me that at the time when she had given her statement to the SDM, she gave her statement under pressure of accused Vinay Tiwari. My sister Rakhi told me that accused Vinay Tiwari had pressurized her to make particular statement saying that if she did not make such a statement, he would not get her treated in the hospital and would also not look after her. My sister also told me that Shatrughan Tiwari had also pressurized her to make a particular statement before the SDM immediately after the incident. My sister was very much frightened at that time....”

(emphasis supplied)

30. Perusal of the abovementioned testimonies would show that the witnesses have deposed along similar, if not identical, lines and nothing adverse has come out in their cross-examination.

31. The last dying declaration that was in form of letter dated 26th December, 2008 (Ex. PW-3/B) addressed to the Hon'ble Chief Justice of this Court, had been given by the deceased to Neeraj Kumar (PW-10) who had completed his law course and was interning with Mr. A.K. Pandey, Advocate. Neeraj Kumar (PW-10) had recorded the dying declaration verbatim, in his own hand-writing. It is a matter of record that this dying declaration letter had been received in this Court on 29th December, 2008 by Chief Justice Secretariat (CJS) vide diary entry No. 2261. Consequently, the absence of any postal proof makes no difference to the prosecution's case as contended by the learned counsel for the appellant-convict. The English translation of the said dying declaration is reproduced hereinbelow:-

"CJS/2261
29/12

Dated: 26.12.2008

To
Hon'ble the Chief Justice
High Court of Delhi
New Delhi

Sub: Regarding making an attempt by my in-laws to set me afire and thus, kill me after harassing me physically and mentally

Sir,

I, Rakhi W/o Sh. Vinay Tiwari have been residing at U-226, Chander Vihar, PS Mandawli, Delhi C/o Arjun Singh for the last about 15-20 days. Earlier, I resided at 531, Gali No. 10, Vinod Nagar, Mandawli, Delhi-110092. I have got a daughter aged 1 ½ years who was born on 27.09.2007 at LNJP Hospital.

I have always harassed by my in-laws for want of dowry and kept on bearing the physical torture. But I never told about the same out of my social modesty. My father and brother used to visit at my earlier address which was never liked by my in-laws. I had broken my relationship with my parents for the last 3-4 months as per the will and wish of my husband and at the behest of my in-laws and for the betterment of my daughter and husband.

On 30.10.2008, on the occasion of 'Bhaiya Dooj', my brother-in-law (Jeth) Uday Tiwari, my father-in-law (Sasur) Sh. Subhash Tiwari along with my mother-in-law Amravati came over there in the morning and asked me to go out from the room as my brother-in-law (Jeth) and father-in-law (Sasur) had come over there. I went out of the room after obeying them. After staying in the room for about one hour, the said three persons came out from the room and left. When I came in the room, my husband asked me to put the clothes and he will make me visit to my brother as it was 'Bhaiya Dooj'. I became very happy to hear that. When I had changed my clothes, my husband had closed the door. In the meantime, my husband closed the door and set me afire after pouring kerosene oil on me. I kept on crying and screaming in that burnt state but he did not let me reach near the door and made me fall in a corner after hitting me with a stick (danda). The neighbours and the owner of the house came running after hearing my cries. After making hectic efforts, my husband opened the door and by that time I was completely burnt and right from that time I have been in a state of life and death in ward No. 21 of the LNJP Hospital.

I was alone and helpless and taking advantage of my said condition, my husband threatened me on the date of the incident not to disclose anything against him and his family else he will do the same thing with my daughter, parents and brother which he had done to me. My daughter was weeping in a corner. I was much scared and in the meantime Police came over there and got recorded my statement and I made a statement as per the will and wish of my husband. It can be well understood by your

goodself as to what a lady standing at the verge of the death in 60% burnt condition could do at that time. I was not finding any other hope except God at that time. Right from that time my husband has been visiting the hospital and threatens me not to speak or make any complaint else he will strangle me and will get kill my daughter as well.

On 19.11.2008, on getting some relief I informed my father after taking the mobile from a person namely Ghanshyam, lying adjacent to me through mobile number 9911301654. Right from that time, my parents are with me. In the meanwhile, I came to know that my husband had given my daughter to some other person who resides in Jammu after telling him that there was none to look after her except him and his wife whereas, my parents have been residing just adjacent to the hospital for the last about 7 years.

On the arrival of my parents I apprised them with everything and subsequently my father met with the concerned officer and told him everything. The officer told my father that everything was concocted and handed over a paper to my father telling him about the statement so made by me earlier out of coercion. I had made the said statement after seeing the cruelty of my husband and haughtiness of my in-laws and for the sake of love and future of my daughter.

Hence, I humbly request to your Lordship to kindly impart me and my daughter proper justice taking into consideration the above said circumstances. I, voluntarily, am getting written this letter in my rightful 5 senses. My father is running from pillar to post but in vain. I am imploring justice from your Lordship with a great hope.

Thanking you.

Yours Faithfully
RTI of Rakhi
Ward No. 21
LNJP Hospital,

New Delhi 110002

Dated: 26.12.2008

Copy forwarded to:

1. Commissioner of Police, New Delhi
2. DCP (East)
3. Women Commission (-sic-)
4. PS Mandawali”

(emphasis supplied)

32. The aforesaid dying declaration letter (Ex. PW-3/B) written by Neeraj Kumar (PW-10) on behalf of the deceased had been proved by Vinod Kumar, Judicial Assistant (PW-17). Further, Neeraj Kumar (PW-10) withstood the test of cross-examination and the relevant portion of his testimony is reproduced hereinbelow:-

“.....My senior Sh. A.K. Pandey directed me to accompany Sh. Prabhu Shankar Tiwari to LNJP Hospital to record the statement of injured Rakhi. I accordingly reached LNJP Hospital to burn ward where Rakhi was found admitted. She was badly burnt and she was conscious and fit for statement. I recorded her statement as verbatim in my own handwriting. Rakhi had put her right thumb impression on the said statement. The said statement dated 26.12.2008 is already Ex.PW3/B bearing right thumb impression of Rakhi at point ‘Q’. I had written a letter to SHO PS Mandawali dated 12.12.2009 with regard to recording of statement of Rakhi on 26.12.2008 and for taking necessary step in this regard. My said letter is Ex.PW10/A bearing my signature and address at point ‘A’ (objected to by Ld. Defence counsel).....

xxx

xxxx

xxx

.....I had recorded her statement as verbatim and that at that time Rakhi was conscious and fit for statement.”

(emphasis supplied)

33. This Court is also of the view that the contention raised by the learned counsel for the appellant-convict that the language used in the dying declaration letter dated 26th December, 2008 raises suspicion on its authenticity, merits no consideration as no such suggestion/question was put to Neeraj Kumar (PW-10) and the same cannot be raised at this stage. In ***Mahavir Singh Vs State Of Haryana (2014) 6 SCC 716*** the Supreme Court has held as under:-

“16. It is a settled legal proposition that in case the question is not put to the witness in cross-examination who could furnish explanation on a particular issue, the correctness or legality of the said fact/issue could not be raised. (Vide *Atluri Brahmanandam v. Anne Sai Bapuji and Laxmibai v. Bhagwanthbuva.*)”

(emphasis supplied)

34. As per seizure memo Ex. PW-12/A and testimonies of HC Anil Kumar (PW-13) and ASI Ramesh Chand (PW-14), the items recovered from the spot included some burnt clothes with smell of kerosene, one bottle containing kerosene, one steel bowl, few match sticks and a five litre gas cylinder with a burner. In fact, the FSL Report (Ex. PW-29/A) had confirmed that the recovered match boxes, matches and plastic bottle contained kerosene. The relevant portion of the FSL report (Ex. PW-29/A) is reproduced hereinbelow:-

*“Forensic Science Laboratory
Govt. of NCT of Delhi
Sector 14, Rohini, Delhi-10085.*

Accredited by the National Accreditation Board for Testing and Calibration Laboratories (NABL).

EXAMINATION REPORT

No. of pages of report 02

1. Report No. FSL. 2015/C-8090 Date: 31.12.15

xxx

xxx

xxx

8. Details of the Parcels/Exhibits received:

No. of Parcels/Exhibits	No. of Seals & seal impression	Description of Parcels/Exhibits
Parcel-2	Three seals of "RCS"	One sealed cloth parcel. It was found to contain exhibit '2', kept in a polythene.
<u>Exhibit- '2'</u>		<u>Three (3) match box containing some burnt and unburnt matchsticks and one deformed plastic bottle having approx. 2ml of transparent liquid.</u>

xxx

xxx

xxx

11. RESULTS OF EXAMINATION REPORT

On Gas Chromatography examination,

(i) Exhibit '2' was found to contain 'Kerosene'.

(emphasis supplied)

35. Further, there is no evidence on record to support the bald claims made by the learned counsel for the appellant-convict that the dying declaration made by the deceased vide letter dated 26th December, 2008 (Ex. PW-3/B) was false or fabricated.

36. Consequently, this Court is of the view that the testimonies of mother (PW-3), father (PW-6) and brother (PW-8) of the deceased, Neeraj Kumar (PW-10) as well as the last dying declaration in form of letter dated 26th December, 2008 (Ex. PW-3/B) are clear, cogent, consistent, credible, trustworthy and corroborated by the evidence on record.

THE FINGER PRINT BUREAU REPORT OFFERS NO ASSISTANCE TO APPELLANT-CONVICT AS IT STATES THAT ADMITTED THUMB IMPRESSIONS WERE UNCLEAR/BLURRED AND UNFIT FOR COMPARISON.

37. The fact that the thumb impression of the deceased was not proved is of no help to the appellant-convict as it was mentioned in the Finger Print Bureau Report (Ex. PW-21/A) that the admitted thumb impressions with which the thumb impression of the deceased from letter (Ex. PW-3/B) had to be compared, were found to be unclear/blurred and unfit for comparison. The relevant portion of the Finger Print Bureau Report (Ex. PW-21/A) is reproduced hereinbelow:—

“

REPORT

(THE REPORT IS ADMISSIBLE U/S 293 Cr.P.C.)

*Subject:-Comparison of Questioned Thumb impressions in
Case FIR No.543/09 U/s 304 B IPC P.S. Mandawali,
Distt. East, Delhi.*

III RESULT OF EXAMINATION:

1) Questioned Thumb impression of Rakhi marked 'Q' on exhibit NO.2 and Admitted thumb impression of Rakhi marked 'A' on exhibit NO.1 are partial and blurred and do not disclose sufficient number of ridge details in their relative position for comparison, hence they are UNFIT for comparison."

(emphasis supplied)

38. Consequently, both the thumb impressions were partial and blurred and did not disclose sufficient number of ridge details for comparison.

ABSENCE OF A CERTIFICATE BY A DOCTOR IS NOT FATAL TO ACT UPON A DYING DECLARATION. THE REQUIREMENT REMAINS THAT THE PERSON WHO RECORDS THE DYING DECLARATION MUST ENSURE THAT THE PATIENT WAS IN A FIT CONDITION, BOTH MENTALLY AND PHYSICALLY, TO GIVE THE DECLARATION.

39. Insofar as the medical opinion before giving a dying declaration is concerned, it is settled law that medical certification by a doctor is not a pre-requisite to act upon a dying declaration. It is for the person recording the dying declaration to ensure that the patient is in a fit state of mind and is making the dying declaration voluntarily. The Supreme Court in **Jagbir Singh** (supra) has held as under:-

"38. The first question, one must bear in mind, is whether the deceased was in a physical and mental condition to make a dying declaration. It is not in dispute that in the dying declaration dated 27-1-2008, there is no certificate by the doctor certifying that the patient was conscious or that the patient was mentally or physically fit to give the declaration. The patient was, in fact, admittedly lying in the hospital. Even in the narrative of the dying declaration, there are no questions seen put by PW 29 to ascertain

her condition. Undoubtedly, it is true that the certificate by a doctor about the patient being conscious and fit to give a dying declaration would go a long way in inspiring confidence of the court. However, the Constitution Bench in Laxman v. State of Maharashtra, has held as follows: (SCC p. 714, para 3)

“3. ... Where it is proved by the testimony of the Magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise.”

39. We can proceed on the basis that even absence of the certificate by a doctor is not fatal to act upon a dying declaration. However, the requirement remains that the person who records the dying declaration must ensure that the patient was in a fit condition, both mentally and physically, to give the declaration.”

(emphasis supplied)

40. Consequently, the submission of the learned counsel for the appellant-convict that an essential prerequisite of a valid dying declaration is medical evidence to show that the deceased was in a ‘fit state of mind’, is untenable in law.

THE FACT THAT FATHER OF THE DECEASED – PRABHU SHANKAR TIWARI (PW-6) HAD PRIORITISED HIS DAUGHTER’S HEALTH OVER THE INVESTIGATION, CANNOT BE A REASON TO DRAW AN ADVERSE INFERENCE AGAINST THE CASE OF THE PROSECUTION.

41. This Court also finds no merit in the contention of the learned counsel for the appellant-convict that since the father of the deceased (PW-6) was a literate man, he had to necessarily file a complaint under Section 156(3) CrPC. It is a matter of record that the father of the deceased had written a

letter dated 16th December, 2008 (Mark PW-6/A) to the concerned SDM to re-record the statement of his daughter. Even in his statement recorded under Section 161 Cr.P.C. on 26th November, 2008 (Ex.PW-6/B), he had not absolved the appellant-convict of his guilt as he had merely stated that at that point in time, he was focusing on the treatment of his daughter and did not want to cause any impediment to the same. The fact that father of the deceased Prabhu Shankar Tiwari (PW-6) had prioritised his daughter's health over the investigation, cannot be a reason to draw an adverse inference against the case of the prosecution. The conduct of the father of the deceased was normal inasmuch as he reacted how any reasonable parent would react when his child is lying in a critical condition in a hospital.

THE POST MORTEM REPORT REVEALS THAT THE DECEASED HAD SUFFERED BURN INJURIES ON HER BACK–WHICH WOULD BE IMPOSSIBLE IF THE STOVE HAD ACCIDENTLY BURST.

42. The fact that the deceased had been burnt by the appellant-convict by pouring kerosene finds corroboration from the Post Mortem Report (Ex. PW-7/A) as well as the photographs marked A1 to A7, which reveal that the deceased had suffered burn injuries on her back—which would be impossible if the stove had accidentally burst. The relevant portion of the Post Mortem Report (Ex. PW-7/A) is reproduced hereinbelow:-

“IX. EXTERNAL EXAMINATION (Injuries etc.)

Superficial to deep burns present over face, neck, front and back of chest, upper front of abdomen, front and back of both upper limbs, upper part of gluteal region, front of right lower leg and some parts around both knee joints covering approximately 50% of total body surface areas. Peeling of skin present at places revealing greenish, yellowish base covered with greenish,

yellowish necrotic slough. Body hairs are burnt and singed off at places. No other injury present over external surface of body.”
(emphasis supplied)

43. In view of the above, this Court is in agreement with the contention of the learned APP for the State that the injuries received by the deceased could be possible only if kerosene was poured on the deceased and she were set on fire and not by a stove-bursting incident as sought to be contended by learned counsel for appellant-convict.

IN ABSENCE OF RECOVERY OF ANY STOVE, THE DEFENCE OF THE APPELLANT-CONVICT FAILS

44. Also, since the primary stance taken by the deceased in the first three dying declarations was that a stove had burst on account of which she got injured, recovery of the burst stove was imperative to prove those statements. However, as per the evidence on record, no stove of any kind or in any condition was recovered from the spot. In absence of any evidence to indicate that a stove had burst in the house of the deceased, the first three dying declarations inspire no confidence.

THE FIRST THREE DYING DECLARATIONS THAT EXCULPATE THE APPELLANT-CONVICT WERE NOT MADE VOLUNTARILY BY THE DECEASED AND ARE CONTRARY TO EVIDENCE ON RECORD.

45. Insofar as the first three dying declarations which exculpate the appellant-convict are concerned, it is pertinent to mention that they were made on the day of the incident itself i.e. 30th October, 2008 when the appellant-convict was in the hospital with the deceased. In fact, the deceased had explained in her subsequent dying declarations that the appellant-

convict had threatened her which is why she had not disclosed the true facts to anyone that day.

46. In any event, those dying declarations are contrary to evidence on record. In the dying declaration (Ex. PW-18/A) made to the Executive Magistrate, the deceased had stated that she was brought to the hospital by her neighbours and the appellant-convict had been informed subsequently by phone. However, the admitted position is that the deceased was brought to the hospital by the appellant-convict. The said fact finds corroboration in the MLC (Ex. PW-4/A) of the deceased wherein it is stated that the deceased was brought by her husband i.e. appellant-convict as well as the testimony of Saroj (PW-9) who had also deposed that the appellant-convict was present at the spot at the time of the incident and had brought the deceased to the hospital. The relevant portion of the testimony of Saroj (PW-9) is reproduced hereinbelow:-

“.....One day, I was alone at my home and my husband had gone to his place of work. I noticed that some smoke there from the ground floor from the room of the accused. I rushed to the room of the accused and public persons also gathered there and I enquired as to what happened. Accused Vinay Tiwari was present in the said room. I came to know that while boiling the milk on stove and she got burnt, but how she burnt I do not know as I had not seen the same. The accused took her to hospital.....”

(emphasis supplied)

47. Consequently, it is proved that the first three dying declarations that exculpate the appellant-convict were not made voluntarily by the deceased.

APPELLANT-CONVICT HAD FAILED TO DISCHARGE THE BURDEN OF PROOF IMPOSED UPON HIM BY SECTION 106 OF THE EVIDENCE ACT

48. This Court is also in agreement with the submission of learned APP for the State that the appellant-convict in his statement recorded under Section 313 Cr.P.C. has not been able to explain how the deceased had suffered burn injuries within the house and consequently, he had not discharged the burden of proof imposed upon him by Section 106 of the Evidence Act.

THE CONDUCT OF THE APPELLANT-CONVICT POST THE INCIDENT STRENGTHENS THE CASE OF THE PROSECUTION.

49. In view of Section 8 of the Evidence Act, it is relevant to note that the conduct of the appellant-convict after the deceased was injured was peculiar inasmuch as he had given away his minor daughter aged about one and a half year to a man who was living in Jammu and she was recovered only after the deceased had disclosed the said fact in her subsequent dying declarations. The aforesaid fact is corroborated by the testimonies of mother (PW-3) and father (PW-6) of the deceased, which have been mentioned earlier. Secondly, even though the family members of the deceased were residing near the hospital where she was admitted, yet they were not informed till 19th November, 2008 i.e. the day when the deceased herself had managed to make a telephone call to them. Thirdly, the appellant-convict had absconded after the death of the deceased i.e. 22nd January, 2009 and it was only after proceedings under Section 82 Cr.P.C. were initiated against him that he surrendered on 27th July, 2015. In view of the aforesaid, the

conduct of the appellant-convict post the incident strengthens the case of the prosecution.

CONCLUSION

50. Consequently, this Court is of the view that the impugned judgment of conviction and order on sentence do not suffer from any infirmity. Accordingly, present appeal, being bereft of merit, is dismissed. A copy of the judgment be supplied to the appellant-convict through the concerned Jail Superintendent.

MANMOHAN, J

SANGITA DHINGRA SEHGAL, J

DECEMBER 24, 2019

js/rn/KA