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HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.1142 of 2015

{Arising out of judgment dated 31-8-2015 in Sessions Trial No.182/2013 of the 1st Additional Sessions Judge, Durg}

Judgment reserved on: 24-11-2022

Judgment delivered on: 12-12-2022

1. Rakesh Parde, S/o Subhash Parde, aged about 23 years.
2. Smt. Rekha Parde, W/o Subhash Parde, aged about 46 years.
3. Subhash Parde, S/o Late Dharamdas Parde, aged about 56 years.

All R/o R.S.S. Market, Shop No.107, New Bus Stand, Powerhouse, Bhilai, Tahsil and District Durg (C.G.)

(In Jail)
---- Appellants

Versus

State of Chhattisgarh, Through Station House Officer, Police of Police Station Chhawani, District Durg (C.G.)

---- Respondent

For Appellants: Mr. B.P. Singh, Advocate.
For Respondent/State: Ms. Ruchi Nagar, Deputy Government Advocate.

Hon'ble Shri Sanjay K. Agrawal and
Hon'ble Shri Rakesh Mohan Pandey, JJ.

C.A.V. Judgment

Sanjay K. Agrawal, J.

1. By way of this criminal appeal under Section 374(2) of the CrPC, three appellants herein have called in question legality, validity and correctness of the impugned judgment dated 31-8-2015 passed by the 1st Additional Sessions Judge, Durg in Sessions Trial No.182/2013 by which they have been convicted for offences under

Sections 498A read with Section 34, 304B read with Section 34 & 302 read with Section 34 of the IPC and sentenced to undergo rigorous imprisonment for one year & pay a fine of ₹ 500/- each, in default, to further undergo additional rigorous imprisonment for one month; rigorous imprisonment for ten years; and imprisonment for life and to pay a fine of ₹ 1,000/- each, in default, to further undergo additional rigorous imprisonment for two months, respectively.

2. Case of the prosecution, in brief, is that deceased Kavita was married to Rakesh Parde – appellant No.1 herein and the appellants used to treat her with cruelty demanding dowry. On 9-1-2013 at 10.00 a.m. in the morning, after seven years of marriage of Kavita with appellant No.1, he (appellant No.1) poured kerosene oil on the body of Kavita and set her ablaze and thereby committed the offence. Further case of the prosecution is that on 9-1-2013 at 10.00 a.m., deceased Kavita was in the kitchen of the house and at that time, three appellants herein came there and started quarrelling with her demanding dowry and in furtherance of common intention, appellant No.1 poured kerosene oil on her body while appellants No.2 & 3 caught hold of her and appellant No.1 set her ablaze by which she suffered deep burn injuries. Kavita was admitted in the hospital in burnt condition and vide Ex.P-5, the concerned doctor has informed to Police Station Supela pursuant to which an application was made requesting the medical officer to certify as to whether injured Kavita is in fit medical condition to make dying declaration or not which was certified by the medical officer to be in fit medical condition on 9-1-2013 at 3.05 p.m..

Accordingly, dying declaration of the deceased was recorded vide Ex.P-8 by Executive Magistrate G.P. Sharma (PW-4) in which she did not implicate any of the appellants herein stating the burn injuries on account of personal / family reasons. Thereafter, brother of the deceased – Raju Kailash Kuhikar (PW-8) gave an application to the Station House Officer, Police Station Chhawani, Bhilai on 11-1-2013 vide Ex.P-11 to re-record the dying declaration of Kavita alleging undue influence and inducement while recording dying declaration Ex.P-8 pursuant to which again, dying declaration of Kavita was recorded on 15-1-2013 vide Ex.P-9 in which the present appellants were also implicated and thereafter, Kavita succumbed to the injuries sustained by her and died on 16-1-2013. Inquest over the dead body of the deceased was conducted vide Ex.P-10. Stove, match stick, burnt clothes, kerosene oil, etc., were recovered from the spot and dead body was sent for postmortem which was conducted by Dr. Bhewan Markam (PW-10) vide Ex.P-18 and cause of death was stated to be shock and sepsis due to antemortem extensive deep burn. Seized articles were sent for forensic examination to the Forensic Science Laboratory, Raipur from where report Ex.P-25 was brought on record in which kerosene particles were found on the said articles.

3. Statements of the witnesses were recorded under Section 161 of the CrPC. After usual investigation, the accused / appellants were charge-sheeted for offences under Sections 498A read with Section 34, 304B read with Section 34 & 302 read with Section 34 of the IPC and charge-sheet was filed before the jurisdictional criminal

court and the case was committed to the Court of Sessions from where the Additional Sessions Judge received the case on committal for trial and hearing and disposal in accordance with law.

4. The accused / appellants abjured the guilt and entered into defence. In order to bring home the offence, the prosecution examined as many as twelve witnesses and exhibited 28 documents. The defence has examined none, but exhibited four documents Exs.D-1 to D-4.

5. The trial Court upon appreciation of oral and documentary evidence on record, proceeded to convict the appellants under Sections 498A read with Section 34, 304B read with Section 34 & 302 read with Section 34 of the IPC and sentenced them in the manner mentioned in the opening paragraph of this judgment against which the instant appeal under Section 374(2) of the CrPC has been preferred.

6. Mr. B.P. Singh, learned counsel appearing for the appellants, would submit that the deceased died due to an accidental fire in the kitchen. Her first dying declaration was recorded on 9-1-2013 in which she stated that she had suffered an accidental burn in the kitchen. Subsequently, pursuant to the complaint made by Raju Kailash Kuhikar (PW-8) – brother of the deceased, another dying declaration was recorded on 15-1-2013 wherein she made accusations against the appellants. However, the first dying declaration was certified by the doctor as being fit medical condition to make dying declaration. There is no such certification in the second dying declaration. The second dying declaration was

signed inter alia by the mother of the deceased – Laxmi Kailash Kuhikar (PW-7) and has been acknowledged during cross-examination. Both the dying declarations were recorded by the same Naib Tahsildar. As such, the second dying declaration being not reliable, the appellants are entitled for the benefit of doubt and the appeal deserves to be allowed.

7. Ms. Ruchi Nagar, learned Deputy Government Advocate appearing for the State / respondent, would support the impugned judgment and would submit that marriage of the deceased was hardly three years old and death is unnatural. The first dying declaration sought to be relied upon does not bear confirmatory signature of the doctor before recording dying declaration and after conclusion on the declaration itself. Strong reliance has been placed on the evidence of the mother and brother of the deceased to submit that there is evidence of harassment for purposes of dowry. She would further submit that the appeal deserves to be dismissed.

8. We have heard learned counsel for the parties and considered their rival submissions made herein-above and also went through the original records of the trial Court with utmost circumspection and carefully as well.

9. At this stage, it is appropriate to notice Section 32(1) of the Indian Evidence Act, 1872, which reads thus:

> "**32. Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant**.— Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of

> delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:—
>
> **(1) when it relates to cause of death**.—When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.
>
> Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.
>
> xxx xxx xxx"

10. The general ground of admissibility of the evidence mentioned in Section 32(1) of the Evidence Act is that in the matter in question, no better evidence is to be had. The provisions in Section 32(1) constitute further exceptions to the rule which exclude hearsay. As a general rule, oral evidence must be direct (Section 60). The eight clauses of Section 32 may be regarded as exceptions to it, which are mainly based on two conditions: a necessity for the evidence and a circumstantial guarantee of trustworthiness. Hearsay is excluded because it is considered not sufficiently trustworthy. It is rejected because it lacks the sanction of the tests applied to admissible evidence, namely, the oath and cross-examination. But where there are special circumstances which gives a guarantee of trustworthiness to the testimony, it is admitted even though it comes from a second-hand source. The Supreme Court emphasized on the principle enumerated in the famous legal maxim of the Law of Evidence, i.e., *nemo moriturus praesumitur mentire* which means a

man will not meet his Maker with a lie in his mouth. Our Indian Law also recognizes this fact that “a dying man seldom lies” or in other words “truth sits upon the lips of a dying man”. The relevance or this very fact, is an exception to the rule of hearsay evidence.

11. Section 32(1) of the Evidence Act is famously referred to as the “dying declaration” section, although the said phrase itself does not find mention under the Evidence Act. Their Lordships of the Supreme Court have considered the scope and ambit of Section 32 of the Evidence Act, particularly, Section 32(1) on various occasions including in the matter of **Sharad Birdhichand Sarda v. State of Maharashtra**[1] in which their Lordships have summarised the principles enumerated in Section 32(1) of the Evidence Act, including relating to “circumstances of the transaction” as under:

> “21. Thus, from a review of the authorities mentioned above and the clear language of Section 32(1) of the Evidence Act, the following propositions emerge:-
>
> (1) Section 32 is an exception to the rule of hearsay and makes admissible the statement of a person who dies, whether the death is a homicide or a suicide, provided the statement relates to the cause of death, or exhibits circumstances leading to the death. In this respect, as indicated above, the Indian Evidence Act, in view of the peculiar conditions of our society and the diverse nature and character of our people, has thought it necessary to widen the sphere of Section 32 to avoid injustice.
>
> (2) The test of proximity cannot be too literally construed and practically reduced to a cut-and-dried formula of universal application so as to be confined in a straitjacket. Distance of time would depend or vary with the circumstances of each case. For instance, where death is a logical culmination of a continuous drama long in process and is, as it were, a finale of the story, the statement regarding each step directly connected with

1 (1984) 4 SCC 116

the end of the drama would be admissible because the entire statement would have to be read as an organic whole and not torn from the context. Sometimes statements relevant to or furnishing an immediate motive may also be admissible as being a part of the transaction of death. It is manifest that all these statements come to light only after the death of the deceased who speaks from death. For instance, where the death takes place within a very short time of the marriage or the distance of time is not spread over more than 3-4 months the statement may be admissible under Section 32.

(3) The second part of clause (1) of Section 32 is yet another exception to the rule that in criminal law the evidence of a person who was not being subjected to or given an opportunity of being cross-examined by the accused, would be valueless because the place of cross-examination is taken by the solemnity and sanctity of oath for the simple reason that a person on the verge of death is not likely to make a false statement unless there is strong evidence to show that the statement was secured either by prompting or tutoring.

(4) It may be important to note that Section 32 does not speak of homicide alone but includes suicide also, hence all the circumstances which may be relevant to prove a case of homicide would be equally relevant to prove a case of suicide.

(5) Where the main evidence consists of statements and letters written by the deceased which are directly connected with or related to her death and which reveal a tell-tale story, the said statement would clearly fall within the four corners of Section 32 and, therefore, admissible. The distance of time alone in such cases would not make the statement irrelevant."

12. In the matter of **Purshottam Chopra and another v. State (Government of NCT of Delhi)**[2], principles relating to recording of dying declaration and its admissibility and reliability were summed up in paragraph 21 as under: -

"21. For what has been noticed hereinabove, some of

2 (2020) 11 SCC 489

the principles relating to recording of dying declaration and its admissibility and reliability could be usefully summed up as under:-

21.1. A dying declaration could be the sole basis of conviction even without corroboration, if it inspires confidence of the court.

21.2. The court should be satisfied that the declarant was in a fit state of mind at the time of making the statement; and that it was a voluntary statement, which was not the result of tutoring, prompting or imagination.

21.3. Where a dying declaration is suspicious or is suffering from any infirmity such as want of fit state of mind of the declarant or of like nature, it should not be acted upon without corroborative evidence.

21.4. When the eyewitnesses affirm that the deceased was not in a fit and conscious state to make the statement, the medical opinion cannot prevail.

21.5. The law does not provide as to who could record dying declaration nor there is any prescribed format or procedure for the same but the person recording dying declaration must be satisfied that the maker is in a fit state of mind and is capable of making the statement.

21.6. Although presence of a Magistrate is not absolutely necessary for recording of a dying declaration but to ensure authenticity and credibility, it is expected that a Magistrate be requested to record such dying declaration and/or attestation be obtained from other persons present at the time of recording the dying declaration.

21.7. As regards a burns case, the percentage and degree of burns would not, by itself, be decisive of the credibility of dying declaration; and the decisive factor would be the quality of evidence about the fit and conscious state of the declarant to make the statement.

21.8. If after careful scrutiny, the court finds the statement placed as dying declaration to be voluntary and also finds it coherent and consistent, there is no legal impediment in recording conviction on its basis even without corroboration.”

13. Where several dying declarations are made, the test is whether the version of the deceased is proved to be false in respect of the integral part of the case. A dying declaration should satisfy all the necessary tests and one such important test is that if there are more than one dying declarations they should be consistent particularly in material particulars [see **Kamla v. State of Punjab**[3]].

14. In the matter of **Mohanlal Gangaram Gehani v. State of Maharashtra**[4] their Lordships of the Supreme Court held that where there are more than one statement in the nature of dying declaration made by the deceased, one first in point of time must be preferred.

15. In a recent judgment rendered by their Lordships of the Supreme Court in the matter of **Makhan Singh v. State of Haryana**[5] while considering the issue of multiple dying declarations, their Lordships have held as under:

> "**9.** It could thus be seen that the Court is required to examine as to whether the dying declaration is true and reliable; as to whether it has been recorded by a person at a time when the deceased was fit physically and mentally to make the declaration; as to whether it has been made under any tutoring/duress/prompting. The dying declaration can be the sole basis for recording conviction and if it is found reliable and trustworthy, no corroboration is required. In case there are multiple dying declarations and there are inconsistencies between them, the dying declaration recorded by the higher officer like a Magistrate can be relied upon. However, this is with the condition that there is no circumstance giving rise to any suspicion about its truthfulness. In case there are circumstances wherein the declaration has not been found to be made voluntarily and is not supported by any

3 (1993) 1 SCC 1
4 AIR 1982 SC 839
5 AIR 2022 SC 3793 : 2022 SCC Online SC 1019

> other evidence, the Court is required to scrutinize the facts of an individual case very carefully and take a decision as to which of the declarations is worth reliance..
>
> *** *** *** ***
>
> **20.** We therefore find that in the facts and circumstances of the present case, the first dying declaration (Ex. DO/C) will have to be considered to be more reliable and trustworthy as against the second one (Ex. PE). In any case, the benefit of doubt which has been given to the other accused by the trial court, ought to have been equally given to the present appellant when the evidence was totally identical against all the three accused."

16. In the matter of **Khushal Rao v. State of Bombay**[6], it has been held that dying declaration can form the sole basis of conviction provided that it is free from infirmities and satisfies various tests. Relying upon the decision of the Supreme Court in **Khushal Rao** (supra), it has been held by the Supreme Court in the matter of **Smt. Kamla v. State of Punjab**[7] that the statement should be consistent throughout if the deceased had several opportunities of making such dying declarations, that is to say, if there are more than one dying declaration they should be consistent. It has been further held that if a dying declaration is found to be voluntary, reliable and made in fit mental condition, it can be relied upon without even any corroboration. It has also been held that in a case where there are more than one dying declarations if some inconsistencies are noticed between one and the other, the court has to examine the nature of the inconsistencies namely whether they are material or not. In scrutinising the contents of various

6 AIR 1958 SC 22
7 AIR 1993 SC 374

dying declarations, in such a situation, the court has to examine the same in the light of the various surrounding facts and circumstances.

17. Similarly, in the matter of **Kishan Lal v. State of Rajasthan**[8], the Supreme Court held as under: -

> "17. Examining these two dying declarations, we find not only that they gave two conflicting versions but there are inter se discrepancies in the depositions of the witnesses given in support of the other dying declaration dated 6-11-1976. Finally, in the dying declaration before a Magistrate on which possibly more reliance could have been placed the deceased did not name any of the accused. Thus, we have no hesitation to hold that these two dying declarations do not bring home the guilt of the appellant. The High Court, therefore, erred in placing reliance on them by erroneously evaluating them."

18. In the matter of **Lella Srinivasa Rao v. State of A.P.**[9] their Lordships of the Supreme Court have considered the legality and acceptability of two dying declarations and noticing the inconsistency between the two dying declarations, their Lordships held that it is not safe to act solely on the said declarations to convict the accused persons.

19. Further, in the matter of **Amol Singh v. State of M.P.**[10], the Supreme Court noticing inconsistencies between the multiple dying declarations, interfered with the order of sentence and held as under: -

> "13. … it is not the plurality of the dying declarations but the reliability thereof that adds weight to the prosecution case. If a dying declaration is found to be voluntary, reliable and made in fit mental condition, it can be relied upon without any corroboration [but] the statement

8 (2000) 1 SCC 310
9 (2004) 9 SCC 713
10 (2008) 5 SCC 468

> should be consistent throughout. … However, if some inconsistencies are noticed between one dying declaration and the other, the court has to examine the nature of the inconsistencies, namely, whether they are material or not [and] while scruitinizing the contents of various dying declarations, in such a situation, the court has to examine the same in the light of the various surrounding facts and circumstances."

20. In the matter of **Sharda v. State of Rajasthan**[11], the Supreme Court while dealing with three dying declarations and noticing inconsistencies between the dying declarations, set aside the sentence ordered by the Sessions Judge as well as the High Court and held as under: -

> "25. 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 the 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 the 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."

21. Reverting to the facts of the case in light of the aforesaid principles of law laid down by their Lordships of the Supreme Court, it is quite vivid that the deceased has admittedly made two dying declarations on 9-1-2013 and 15-1-2013 – Exs.P-8 & P-9, respectively. The trial Court has relied upon the second dying declaration Ex.P-9 and

11 (2010) 2 SCC 85

convicted the appellants herein. It is the case of the prosecution that on 9-1-2013, deceased Kavita suffered burn injuries and she was admitted to the hospital where her dying declaration was recorded vide Ex.P-8 before the Executive Magistrate – G.P. Sharma (PW-4) and before recording dying declaration, Sharda Banjare (PW-11) – Assistant Sub-Inspector vide Ex.P-18 sought opinion of the doctor of the concerned hospital in which the concerned doctor has certified deceased Kavita to be in fit state of mind and accordingly, the Executive Magistrate recorded dying declaration of deceased Kavita vide Ex.P-8 which states as under: -

> आज दिनांक 09.01.2013 को 10.00 बजे मैं अपने पति को काम के लिए बोली तो भन–भन करने लगा। मेरे पति ने कहा तुमको यहां रहना है रहो, या चले जाओ, मैं बहुत परेशान हो गई थी वो तीन माह से मेरे पति काम नहीं कर रहे है। सास, ससुर, देवर साथ में रहते हैं। मैं स्टोव जला रही थी जिससे आग लगा। तीन वर्ष पूर्व शादी हुई है बच्चे नहीं है परिवार वाले से परेशान होकर स्टोव से जली हूं।

22. A careful perusal of the aforesaid dying declaration would show that the deceased did not implicate any one of the appellants herein and simply stated that while she was igniting stove, she suffered burn injuries and further stated that she had no issue and out of frustration and harassment by family, she suffered burn injuries by stove and she also put her signature in the dying declaration which has been proved by G.P. Sharma (PW-4) – Nayab Tahsildar / Executive Magistrate. Thereafter, it appears that Raju Kailash Kuhikar (PW-8), who is brother of the deceased, resident of Nagpur (Maharashtra), made an application in shape of complaint vide Ex.P-11 on 11-1-2013 for re-recording the statement of his sister deceased Kavita alleging that the dying declaration recorded on 9-

1-2013 is an outcome of pressure and inducement extended by the three appellants herein and therefore again the statement of Kavita be recorded which was acceded to by Assistant Sub-Inspector Sharda Banjare (PW-11) who wrote a memo vide Ex.P-20 on the ground that the brother of the decease had made request for re-recording the dying declaration of the deceased and ultimately vide Ex.P-9, dying declaration of the deceased was re-recorded again on 15-1-2013 by Executive Magistrate G.P. Sharma (PW-4) who had recorded her earlier statement on 9-1-2013. The second dying declaration Ex.P-9 states as under: -

> ''शपथ कथन दिः 15.01.2013
>
> प्रश्न – नाम क्या है?
>
> उत्तर – मेरा नाम कविता है मैं पावर हाउस में रहती हूं।
>
> प्रश्न – तुम्हारे साथ कौन–कौन रहते हैं?
>
> उत्तर – मेरे साथ सेरे सास ससूर और मेरा पति रहता है, कुल चार सदस्य रहते है। मेरा देवर विकास भी साथ में रहता है।
>
> प्रश्न – दिनांक 09.01.2013 को कितने बजे घटना घटी?
>
> उत्तर – दिनांक 09.01.2013 को प्रातः 10.00 बजे मेरे पति ने मुझे मर जा करके बोला मेरी सास रेखा, ससुर सुभाष एवं पति राकेश ने मिटटी तेल डालकर जला दिया। दिनांक 09.01.2013 को मैं अपने कथन में डर के कारण नहीं बता पाई। दिनांक 09.01.2013 को घर में राकेश नशे में था। काम में नहीं जाने पर मैं बोली, तो राकेश ने तेल डालकर जलाया। सास–ससुर मुझे पकड़ लिये थे। आज मैं अपने स्वयं के विश्वास से कथन कर रही हूं। रसोई घर में जल कर मैं सामने कमरे में आई, मेरे सास–ससुर एवं पति हमेंशा दहेज के लिए परेशान करते थे। अपने मायके से पैसा ला, तब राकेश को काम पर लगायेगे एवं हमेशा गाली गलौच कर परेशान करते थे। अपने स्वयं से कथन की। जिला चिकित्सालय में बांये हाथ का अंगूठा लगायी।''

23. A careful perusal of the aforesaid dying declaration Ex.P-9 would reveal that in the said dying declaration, the deceased has again

put her left hand thumb impression on the same and she had explained that on 9-1-2013, all the three appellants herein – mother-in-law, father-in-law and husband have set her ablaze by pouring kerosene oil on her body and on 9-1-2013, she could not state the same on account of fear and pressure, as they used to harass her demanding dowry. Thereafter, she died on the next day on 16-1-2013.

24. Applying the principles of law laid down by their Lordships of the Supreme Court in the judgments noticed herein-above, it is quite vivid that the first dying declaration recorded by the Tahsildar / Executive Magistrate on 9-1-2013 was recorded in the first point of time which was also certified by the doctor vide Ex.P-18, on the request made by the Station House Officer, Police Station Chhawni, to be in fit state of mind to make dying declaration and accordingly, the Tahsildar / Executive Magistrate proceeded to record the statement of the deceased in which she has clearly stated that while igniting stove accidentally, she sustained burn injuries and also said that she has no issue and therefore she is unhappy with the family members, but she did not name any of the appellants herein and had not stated that they have poured kerosene oil on her body and set her ablaze. It is not the case of the prosecution that any of the appellants was present there when she gave dying declaration vide Ex.P-8 and they tutored her or pressurized her to make such dying declaration, particularly when it was recorded by the Executive Magistrate and the Executive Magistrate has not been declared hostile and he has proved the

dying declaration Ex.P-8 as it is. The purpose of recording dying declaration before the revenue officer / Executive Magistrate is that correct and true version of the declarant is recorded free from any bias-ness or undue influence or inducement by any external force including who are interested and who are afraid that the declarant may make declaration against them. As such, there is no good reason to doubt the correctness of the dying declaration recorded by the Executive Magistrate vide Ex.P-8. Thereafter, immediately after few days, brother of the deceased – Raju Kailash Kuhikar (PW-8) came and made an application for recording the dying declaration afresh alleging intimidation and threat by the appellants herein which was acceded to by the investigating officer and again dying declaration was recorded in which the deceased has implicated the present appellants alleging pouring kerosene oil by them and setting her ablaze. The second dying declaration Ex.P-9 was not certified by the doctor that deceased Kavita was in fit state of mind when the dying declaration was recorded and immediately on the next day, after the second dying declaration was recorded i.e. on 16-1-2013, she succumbed to death.

25. Smt. Sakuntala (PW-2), who is neighbour of the deceased has been examined on behalf of the prosecution and she has not been declared hostile. She has clearly stated that deceased Kavita died on account of burn by stove. She has further stated that Kavita had stated to the police that she died by burning by stove. In paragraph 3 of her cross-examination, she has clearly stated that she has given statement to the police that Kavita died instantaneously while

igniting the stove. Not only this, Laxmi Kailash Kuhikar (PW-7) – mother of the deceased, in her statement before the Court, in paragraph 13, has clearly stated that her daughter Kavita's dying declaration vide Ex.P-8 was recorded by the Naib Tahsildar / Executive Magistrate – G.P. Sharma (PW-4) in her presence and her son Raju Kailash Kuhikar (PW-8)'s presence and when the statement vide Ex.P-9 i.e. the second dying declaration was recorded, Smt. Sakuntala (PW-2) and she herself (PW-7) were present.

26. As such, in view of the statement of Laxmi Kailash Kuhikar (PW-7) – mother of the deceased, that she herself and her son Raju Kailash Kuhikar (PW-8), both, were present when the first dying declaration of Kavita Ex.P-8 was recorded on 9-1-2013, the possibility of any threat, inducement or pressure while recording the statement vide Ex.P-8, is absolutely ruled out and it is safely held that after recording of first dying declaration, Raju Kailash Kuhikar (PW-8) tutored his sister deceased Kavita and made application vide Ex.P-11 to the Station House Officer, Police Station Chhawni, Bhilai, that his sister has not given correct version on account of inducement, fear and pressure and therefore her statement be again recorded, which was accepted and second dying declaration was recorded on 15-1-2013 without there being any certificate by the doctor that she was in fit state of mind to give statement and thus, the second dying declaration was an outcome of tutoring and understanding given by Raju Kailash Kuhikar (PW-8) to implicate the appellants herein which makes the second dying declaration

suspicious and unacceptable on the face of record, as their accusation is that the first dying declaration made on 9-1-2013 vide Ex.P-8 at Durg Hospital is on account of pressure and inducement given by the appellants in view of the statement of Laxmi Kailash Kuhikar (PW-7) before the Court in paragraph 13. More particularly, Smt. Sakuntala (PW-2), who is neighbour of the deceased, has clearly stated that the deceased was her neighbour and she has clearly stated that accidentally while igniting stove, the deceased (Kavita) sustained burn injuries and she had also given statement to the police to that effect. Smt. Sakuntala (PW-2) has not been declared hostile.

27. In view of the aforesaid analysis, we are of the considered opinion that the first dying declaration Ex.P-8 is true and voluntary statement of the deceased in which she has clearly stated to have suffered burn injuries while igniting stove which may be said to be accidental burn she suffered and ultimately, the deceased succumbed to death, and the second dying declaration is an outcome of tutoring and understanding given by Laxmi Kailash Kuhikar (PW-7) & Raju Kailash Kuhikar (PW-8) which is shaky and unacceptable. As such, we hereby accept the dying declaration Ex.P-8 in which the deceased has stated that she died on account of accidental burn injuries while igniting stove. It is held accordingly. Accordingly, conviction and sentences of the appellants under Section 302 read with Section 34 of the IPC are not sustainable under the law.

28. The appellants have also been convicted for offences under

Sections 498A read with Section 34 and 304B read with Section 34 of the IPC.

29. In order to consider as to whether, conviction of the appellants for the aforesaid offences would be justified or not, it would be appropriate to refer the statement of mother of the deceased Laxmi Kailash Kuhikar (PW-7). Though in the examination-in-chief, she has stated that after marriage, her daughter's husband Rakesh & others used to treat her daughter with cruelty and always compel her to bring money, but in the cross-examination, paragraph 10, she has clearly stated that marriage of her daughter was performed as a group marriage and further admitted that before marriage, nothing was settled as dowry and since her husband had already left her, she used to maintain her children anyhow by cleaning utensils. She has also admitted in paragraph 18 of her evidence that at the time of marriage, she has not given any household articles to her daughter and son-in-law and in paragraph 19, she has admitted that since her son-in-law Rakesh is not involved in any work, therefore they used to quarrel each other and that is the reason for the incident in question. Similarly, brother of the deceased Raju Kailash Kuhikar, who has been examined as PW-8, has also admitted the same fact that marriage of the deceased and accused / appellant No.1 Rakesh was performed in a group marriage.

30. Statements of Laxmi Kailash Kuhikar (PW-7) & Raju Kailash Kuhikar (PW-8) would reveal that main reason for the dispute between accused / appellant No.1 and the deceased was appellant

No.1 is not in job and he has no source of income, therefore, quarrel is said to have taken place between them as per the statement of Laxmi Kailash Kuhikar (PW-7) – mother of the deceased. Except the self-serving statements of Laxmi Kailash Kuhikar (PW-7) & Raju Kailash Kuhikar (PW-8), there is no evidence of demand of dowry. Therefore, conviction of the appellants for offence under Section 304B read with Section 34 of the IPC is not sustainable under the law.

31. It is appropriate to mention here that the learned trial Court has convicted the appellants for offence under Section 302 as well as 304B of the IPC in addition to Section 498A of the IPC. For those who are direct participants in the commission of offence of death there are already provisions incorporated in Sections 300, 302 and 304 of the IPC and once the death is proved to be homicidal in nature and the accused persons are authors of the crime, they can be convicted under Section 302 of the IPC or in case of culpable homicide not amounting to murder, they can be convicted under Section 304B of the IPC. The provisions contained in Section 304B of the IPC and Section 113 of the Evidence Act were incorporated on the anvil of the Dowry Prohibition (Amendment) Act, 1984, the main object of which is to curb the evil of dowry in the society and to make it severely punitive in nature and not to extricate husbands or their relatives from the clutches of Section 302 of the IPC, if they directly cause death. (See **Muthu Kutty and another v. State by Inspector of Police, Tamil Nadu**[12].)

12 AIR 2005 SC 1473

32. In that view of the matter, conviction of the appellants for offence under Section 302 of the IPC and also for offence under Section 304B of the IPC (for both the offences) is totally illegal. However, Sections 498A & 304B of the IPC are distinct and cruelty however is common ingredient of both offences, a person charged and acquitted under Section 304B can be convicted under Section 498A without that charge being there, if such a case is made out (see Balwant Singh and others v. State of H.P.[13], Gopal v. State of Rajasthan[14]).

33. Sections 304B & 498A of the IPC cannot be held to be mutually inclusive. These provisions deal with two distinct offences. It is true that cruelty is a common essential to both the Sections and that has to be proved. (See Noorjahan v. State[15].)

34. Sections 304B and 498A of the IPC are not mutually exclusive. They deal with different and distinct offences. In both the sections, “cruelty” is a common element. Under Section 498A, however, cruelty by itself amounts to an offence and is punishable. Under Section 304B, it is the dowry death that is punishable and such death must have occurred within seven years of the marriage. No such period is mentioned in Section 498A. Moreover, a person charged and acquitted under Section 304B can be convicted under Section 498A without a specific charge being there, if such a case is made out. (See Arun Garg v. State of Punjab and another[16].)

35. In that view of the matter, conviction of the appellants herein for

13 AIR 2009 SC (Supp) 1129
14 AIR 2009 SC 1928
15 AIR 2008 SC 2131
16 (2004) 8 SCC 251

offence under Section 498A of the IPC is legally permissible and is well merited.

36. In view of the aforesaid analysis, we are unable to sustain conviction and sentences imposed upon the appellants under Sections 302 read with Section 34 & 304B read with Section 34 of the IPC. It is accordingly set aside. The appellants stand acquitted of the charges framed against them for the offences punishable under Sections 302 read with Section 34 & 304B read with Section 34 of the IPC. However, their conviction and sentences under Section 498A read with Section 34 of the IPC are hereby affirmed. The appellants are in jail. We direct that they shall be forthwith set at liberty, unless their custody is required in connection with any other offence.

37. The appeal is allowed in part to the extent indicated herein-above.

Sd/-
(Sanjay K. Agrawal)
Judge

Sd/-
(Rakesh Mohan Pandey)
Judge

Soma