KANTI LAL

v.

STATE OF RAJASTHAN

Criminal Appeal No. 1133 of 2001

APRIL 17, 2009

[LOKESHWAR SINGH PANTA AND B. SUDERSHAN REDDY, JJ.]

PENAL CODE, 1860:

ss.304-A and 498-A – Death of a married woman by burn injuries within 7 years of her marriage – Conviction of husband of victim and his relatives by trial court – High Court convicting the husband and one of his brothers and acquitting all other accused on appeal Held : Trial court and High Court rightly held that prosecution had proved beyond reasonable doubt that the victim had been harassed and tortured by her husband and his brother with demand of dowry – There is no infirmity in findings recorded by High Court warranting interference – Evidence Act, 1872 – s. 113-B.

EVIDENCE ACT, 1872:

s.32 – Dying declaration – Victim died of 90% burn injuries – Defence produced dying declaration alleged to have been made by victim wherein she attributed the burn injuries to accidental fire – Held: The defence witness to whom alleged dying declaration was stated to have been made, ignored the basic principles at the time of recording alleged dying declaration – Trial court and High Court rightly rejected the alleged dying declaration.

The appellant (A-1) and his brothers A-2, A-3, A-4, A-6, father A-5 and mother A-7 were convicted and sentenced u/ss 304-A and 498-A IPC in connection with

A death of wife of A-1 with 90% burn injuries. The trial court convicted and sentenced the accused of the offences charged. It, doubting the veracity of the alleged dying declaration (Ex. D-4) stated to have been made before the Naib Tehsildar (DW-2), directed higher authorities of the B doctor (PW-11), the Station House Officer (PW 12) and DW 2 to take disciplinary action against them for not discharging their official duties properly and diligently. Whereas the accused file appeal challenging their conviction, DW 2 filed a petition u/s 482 Cr.P.C. seeking C to quash the adverse observation made in para 40 of the judgment. The High Court affirmed the conviction and the sentence as regards A-1 and A-3 and acquitted the other accused. It dismissed the petition of DW 2.

In the instant appeals filed by A-1 and A-3, it was D contended for the appellants that the trial court as also the High Court both were not justified in rejecting the dying declaration made by the deceased to DW 2, an officer of the State Government, stating that she received burn injuries as a result of an accidental fire; that the E prosecution also failed to prove that the deceased soon before her death was subjected to cruelty or harassment for or in connection with the demand of dowry.

Dismissing the appeal, the Court

F HELD: 1.1 It is well-settled that one of the important tests of credibility of a dying declaration is that the person, who recorded it, must be satisfied that the deceased was in a fit state of mind. For placing implicit reliance on dying declaration, court must be satisfied that the deceased G was in a fit state of mind to narrate the correct facts of occurrence. If the capacity of the maker of the statement to narrate the facts is found to be impaired, such dying declaration should be rejected, as it is highly unsafe to place reliance on the same. The dying declaration should

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be voluntary and should not be prompted and that physical as well as mental fitness of the maker is to be proved by the prosecution. [Para 21] [541-C-E] A

1.2 In the instant case, DW-2 did not take any certificate from the doctor to prove that the deceased was in a fit state of mind to give statement nor did he record any endorsement to that effect on the alleged dying declaration [Ext.-D-4]. Further, according to the Doctor (PW 11), the dying declaration was not recorded by the Tehsildar (DW 2) but was recorded by his Reader. It is also proved on record that DW-2 did not ask preliminary questions from the deceased before the dying declaration allegedly made by her was recorded and this fact also created doubt about the correctness and truthfulness of the dying declaration. It is also the evidence of DW-2 that after recording the alleged statement of the deceased, he did not seal the dying declaration and the unsealed document was handed over to the Station House Officer (PW 12). [Para 22] [541-F-H; 542-A-B] B C D

1.3 A categorical refusal of putting her signature or thumb- impression on the alleged dying declaration [Ext.-D/4] by PW-6, the mother of the deceased, whom DW-2 stated to be present at the time of recording the dying declaration, would further go to prove that the alleged dying declaration was not at all recorded by DW-2 in the room of the hospital where the deceased was lying before she died. These facts and circumstances would prove that the alleged dying declaration, on which much reliance has been placed by the defence, cannot be said to be an admissible and reliable document. [Para 22] [542-B-D] E F G

1.4 Further, A-1 and A-3 have not proved on record the source of production of the dying declaration by DW-2 who after recording the statement of the deceased was duty bound to hand over the alleged dying declaration H

A **under a sealed cover to the prosecuting agency. The origin and source of the alleged dying declaration produced by DW-2 at the time of his examination as a defence witness is highly doubtful and such document cannot be accepted as genuine and truthful document in**
B **support of the defence of A-1 and A-3. [Para 27] [545-B-C]**

1.5 The trial court as well as the High Court both have concurrently, and rightly rejected the genuineness and credibility of the alleged dying declaration to prove the
C **defence version that the deceased made the said statement to DW-2 and she died because of accidental fire. The courts below rightly recorded the findings and reasoning that the alleged dying declaration [Ext.-D/4] suffered from a number of basic infirmities and such**
D **dying declaration cannot be found admissible and accepted as a genuine document. [Para 22] [542-E-G]**

Kans Raj v. State of Punjab and others **[2000] 5 SCC 207;** *Gaffar Badshaha Pathan v. State of Maharashtra* **[2004]**
E **10 SCC 589;** *Ghurphekan and Others v. State of Uttar Pradesh* **[1972] 3 SCC 361; and** *Kamalakar Nandram Bhavsar v. State of Maharashtra* **[2004] 10 SCC 192, referred to.**

State [Delhi Administration] v. Laxman Kumar and Others
F **and** *Indian Federation of Women Lawyers and Others v. Smt. Shakuntala and Others* **[1985] 4 SCC 476, held inapplicable.**

2.1. The prosecution in support of the charge of
G **dowry death has produced and relied upon the testimony of PW-5, PW-6 and PW-8, father, mother and maternal uncle, respectively, of the deceased. It is not in dispute that the death of the victim was caused by burn injuries within seven years of her marriage. Relying upon the**
H **evidence of PW-5, PW-6 and PW-8, the trial court and the**

High Court came to the conclusion that the prosecution has proved beyond reasonable doubt that the deceased was being constantly harassed and tortured by A-1 and A-3 for the demand of dowry; and that a sum of Rs.50,000/- paid to them as loan amount was also adjusted by them as dowry money. PW-5, PW-6 and PW-8 were subjected to searching cross-examination by the defence, but nothing tangible material was extracted from their evidence to create any shadow of doubt that they were not reliable and truthful witnesses. [Para 30, 35 and 38] [546-D-E; 548-A-B; 549-F-H]

2.2 The presumption u/s 113-B of Evidence Act, 1872 is a presumption of law. On proof of the essentials mentioned therein, it becomes obligatory on the court to raise a presumption that the accused caused the dowry death. [Para 32] [547-B-C]

Pawan Kumar and Others v. State of Haryana **[1998] 3 SCC 309**; *Hira Lal and Others v. State [Govt. of NCT], Delhi* **[2003] 8 SCC 80**; *Kamesh Panjiyar alias Kamlesh Panjiyar v. State of Bihar* **[2005] 2 SCC 388**; *Ram Badan Sharma v. State of Bihar with Surya Kant Sharma v. State of Bihar* **[2006] 10 SCC 115**; *Trimukh Maroti Kirkan v. State of Maharashtra* **[2006] 10 SCC 681**; *Kailash v. State of M.P.* **[2006] 12 SCC 667**; **and** *Appasaheb and Another v. State of Maharashtra* **[2007] 9 SCC 721, referred to.**

3. Having regard to the entire evidence on record and having carefully and closely considered the judgments of the trial court and the High Court, the view taken by the courts below is reasonable and plausible. There is no infirmity or perversity in the findings recorded by the High Court to interfere with the well-reasoned judgment. [Para 39] [550-A-B]

Case Law Reference:

[2004] 10 SCC 589	**referred to**	**Para 23**

A	**[1972] 3 SCC 361**	**referred to**	**Para 24**
	[2000] 5 SCC 207	**referred to**	**Para 25**
	[2004] 10 SCC 192	**referred to**	**Para 26**
B	**[1985] 4 SCC 476**	**held inapplicable**	**Para 28**
	[1998] 3 SCC 309	**referred to**	**Para 31**
	[2003] 8 SCC 80	**referred to**	**Para 32**
	[2005] 2 SCC 388	**referred to**	**Para 33**
C	**[2006] 10 SCC 115**	**referred to**	**Para 33**
	[2006] 10 SCC 681	**referred to**	**Para 33**
	[2006] 12 SCC 667	**referred to**	**Para 33**
D	**[2007] 9 SCC 721**	**referred to**	**Para 33**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1133 of 2001.

E From the Judgment & Order dated 26.04.2001 of the High Court of Rajasthan at Jodhpur, Rajasthan, in S.B. Criminal Appeal No. 125/97.

WITH

F Criminal Appeal NO. 1134/2001

Aishwarya Bhati, Gp. Capt, Karan Singh Bhati, Sweta Rani Rekha G. and Himanshu Singh for the Appellants.

Dr. Manish Singhvi, AAG, Milind Kumar, Sandeep Bajaj G and Aruneshwar Gupta (NP) for the Respondents.

The Judgment of the Court was delivered by

LOKESHWAR SINGH PANTA, J. 1. Both these appeals arising out of a common judgment and order dated 26.04.2001 H

passed by learned Single Judge of the High Court of Judicature for Rajasthan at Jodhpur in S. B. Criminal Appeal No. 125 of 1997 [*Arvind Kumar v. State of Rajasthan*] and S. B. Criminal Misc. Petition No. 202 of 1997 [*Arvind Kumar [DW-2] v. State of Rajasthan*], were taken up and heard together and shall stand disposed of by this common judgment. A B

2. By the impugned order, the High Court while dismissing the appeal of Arvind Kumar [A-1] and Kanti Lal [A-3] and confirming their conviction and sentence under Sections 304B and 498A of the Indian Penal Code, 1860 [for short the "IPC"] recorded by the learned Sessions Judge, Jalore, in Sessions Case No. 25 of 1993, has set aside the conviction of Sanwal Chand [A-2], Bhanwar Lal [A-4], Chetan Lal [A-5], Popat Lal [A-6] and Smt. Bagtu [A-7] and acquitted them of the charged offences. However, S. B. Criminal Misc. Petition No. 202 of 1997 filed by Arvind Kumar Sengwa – Naib Tehsildar [DW-2] under Section 482 of the Code of Criminal Procedure, 1973 praying for expunging adverse observations made by the learned Sessions Judge against him, Dr. Vasudev [PW-11] and Shaitan Singh – Station House Officer [PW-12], contained in paragraph 40 of the judgment, came to be dismissed. C D E

3. The incident, which led to the trial of the accused, occurred on 07.08.1992 at about 9.00 a.m. at Village-Silason, District-Pali. Parasmal [PW-5] – father of Smt. Laxmi lodged written report [Ex.P-7] to Shaitan Singh [PW-12] – Station House Officer, Police Station – Raniwada, District – Pali alleging *inter alia* that about three years prior to the day of incident, his daughter Smt. Laxmi aged about 22 years was married to Arvind Kumar [A-1] - son of Sanwal Chand [A-2], resident of Village Silason. He averred that as per the custom of the area, he had given 20 tolas of gold and other valuable articles to his daughter at the time of her marriage. He alleged that after the marriage, his daughter had lived a happy and peaceful life in her parents-in-law's house for about one year, but soon thereafter whenever his daughter used to come to his F G H

A house or whenever he paid visits to the house of her parents-in-laws, his daughter had made repeated complaints to him in regard to ill-treatment and harassment meted out to her at the hands of the accused for not bringing sufficient dowry. He alleged that about two years after her marriage Smt. Laxmi
B became pregnant and as per the custom of the area, she came to her parents' house for delivery of the first child and at that point of time his son-in-law (A-1) and his son-in-law's elder brother [A-3] had demanded loan amount of Rs.50,000/- from him for starting some business, which amount he had paid to
C them. Smt. Laxmi was blessed with a male child. After the delivery of a child, Smt. Laxmi stayed in his house for a period of about 3-4 months and thereafter she along with her male child, went back to her parents-in-laws' house.

4. The complainant further alleged that he had gone to the
D house of the parents-in-laws of his daughter to find out their welfare, but at that point of time the accused told him that the loan amount of Rs. 50,000/- borrowed by A-1 and A-3 from him will be treated as dowry amount. It was alleged that Smt. Laxmi came to his house about two months prior to her death.
E Bhanwar Lal (A-4), elder brother of A-1, came to his house and asked him to send his daughter to her parents-in-laws' house, but because of darkness in the evening, he declined to send her with an infant child with A-4. He alleged that on the same night at about 9:00 p.m. or 10:00 p.m. three accused, namely
F A-3, A-4 and A-7, came to his house and banged the door of his house. On hearing the repeated sound of banging of the door, he and his wife Bhanvri [PW-6] immediately opened the door of the house and saw A-3, A-4 and A-7 standing outside the house. They without any reason started quarelling with him
G and his wife and told them that the money advanced by him to A-1 and A-3 shall be treated as amount of dowry. On hearing the shouting voices of A-3, A-4 and A-7 at the house of the complainant, one Dayalal Tagir Chand (PW-3), Narayan Chand (PW-7) and some more neighbours gathered there and on their
H intervention A-3, A-4 and A-7 had gone back to their house.

5. It was alleged that about 10 days prior to the date of incident, complainant along with Mahender Singh his brother–in-law and Pratap [PW-10], an acquaintance of the complainant, went to the house of the parents-in-laws of his daughter. He went inside the house to meet his daughter, whereas Mahender Singh and PW–10 remained sitting outside. His daughter had disclosed to him that all the accused had maltreated and harassed her for not bringing adequate dowry. He, in the presence of Mahender Singh and PW–4, requested the accused persons that they unnecessarily should not harass and maltreat his daughter but they paid no heed to his request. It was also stated that in the early morning of the day of incident, one Mishrimal Soni and two Rajputs came to his house and revealed that Smt. Laxmi had been admitted to Raniwada Hospital as she was suffering from stomach pain. He along with his wife PW–6 went to the hospital where they saw their daughter lying on the bed with burn wounds on her body. He advised his wife to stay back by the side of his daughter and himself went to his village for taking the help of his brothers and relatives. He took his brother Angraj and Jayantilal and some more people of the village to the hospital, where they were informed that the victim was being taken to Thonera for further treatment. His wife had also gone with her daughter. After some time, a jeep came there, carrying the dead body of Smt. Laxmi. He was told that Smt. Laxmi had died on the way. On these premises, he lodged a complaint [Ext. P7] before Shaitan Singh (PW-12) Station House Officer, Police Station Raniwada at about 8:00 or 9:00 p.m. on the same day. On the basis of the complaint (Ex. P7), First Information Report bearing Case No. 126/92 [Ex. P8] came to be registered at Police Station Raniwada against the accused persons for offences punishable under Sections 304B and 498A of IPC.

6. Dr. Vasudev (PW-11) Medical Officer posted at Raniwada Hospital, on the request of the police, examined Smt. Laxmi at about 5:45 a.m. on 07.08.1992 and noticed about 90% burn wounds on her entire body starting from the top of

A the head right upto her feet. He prepared injury report (Ext. P-11). According to the doctor's report, the wounds noticed on the person of Smt. Laxmi appeared to be four hours old. He took thumb impression of Smt. Laxmi on the injury report (Ext. P-11).

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7. PW Shaitan Singh, before the death of Smt. Laxmi, went to Primary Health Centre, Raniwada, where she was admitted in injured condition. He requested PW Dr. Vasudev about the condition of Smt. Laxmi. Dr. Vasudev opined that injured Smt. Laxmi was in a fit state of mind to make statement. C PW Shaitan Singh called Arvind Kumar Sengwa [DW-2] – Naib Tehsildar to the hospital, who recorded dying declaration of Smt. Laxmi [Ext.D/4] in the presence of Dr. Vasudev. On receipt of the information about the admission of injured Smt. Laxmi in hospital, Raniwada, Raghubir Singh [PW-13] C.O., Bhinmal, D rushed to the hospital and found Smt. Laxmi dead on account of 90 per cent burn injuries. PW Shaitan Singh prepared panchnama [Ext.P-2] under the instructions and supervision of PW-13. PW-13 before handing over the dead body to PW-5 – father of the deceased got her dead body examined from the E Medical Board. He inspected the spot of the incident and prepared Site Map [Ext. P-12] in the presence of Jalam Singh [PW-1], Shaitan Singh [PW-2] and Ook Singh [PW-4]. On spot inspection, some burnt pieces of the bangles, ash, match-box containing burnt and unburnt sticks, some burnt pieces of the F skin attached with clothes and one 'bhabka' [a kerosene burning lamp which is being used by a goldsmith for placing joints in making of gold ornaments] were collected from the spot. The Investigating Officer seized all those articles and sealed them in a parcel which was deposited with the In-charge of the Police G Station. He recorded the statements of the witnesses. He later on arrested A-1, A-3 and A-6. PW-13 conducted the investigation partly and thereafter as per the order of the D.I.G. Range, Jodhpur, PW-13 on 23.09.1992 handed over the case file for further investigation to Mahender Kumar Govil [PW-14] H – Additional Superintendent of Police, Bikaner. PW-14

recorded the statements of the material witnesses. After the completion of the investigation of the case, Station House Officer prepared chargesheet against accused persons and filed the same in the court of Judicial Magistrate under Sections 304B and 498A of the IPC. The Judicial Magistrate committed the case to the Sessions Judge for trial.

8. The accused pleaded not guilty to the charges and claimed to be tried. The learned Sessions Judge, Jalore, charged the accused for offences under Sections 304B and 498A of the IPC. The prosecution, in order to substantiate its case, examined as many as 15 witnesses. The accused persons in the statements recorded under Section 313 of the Code of Criminal Procedure, 1973 [for short "Cr.P.C."] denied the incriminating evidence appearing against them. Smt. Bagtu [A-7] pleaded that on the day of the incident she was ill. The accused examined Doongarmal [DW-1] and Arvind Kumar Sengwa [DW-2] – Naib Tehsildar, Raniwada, Yashpal [DW-3] and Bhanwar Lal [A-4] in their defence.

9. On examination of the oral and documentary evidence produced on record, the learned Sessions Judge by his order dated 24.02.1997 found the accused guilty of the offences under Sections 304B and 498A of the IPC and sentenced them to suffer 10 years' rigorous imprisonment for offence under Section 304 B of the IPC and 3 years' rigorous imprisonment for an offence under Section 498 A of the IPC with a fine of Rs. 500/- each and in default of the payment of fine, each accused has to undergo simple imprisonment for one month. All the sentences were ordered to run concurrently. The learned Sessions Judge in paragraph 40 of the judgment directed higher officers of PW-11 Dr. Vasudev, PW-12 Shaitan Singh – Station House Officer and DW-2 - Arvind Kumar Sengwa – Naib Tehsildar to take disciplinary action against them for not discharging their official duties properly and diligently.

10. Feeling aggrieved thereby and dissatisfied with the order of conviction, the accused filed S. B. Criminal Appeal No.

A 125 of 1997, whereas Arvind Kumar Sengwa [DW-2] – Naib Tehsildar filed S. B. Criminal Misc. Petition No. 202 of 1997 praying for expunging of the adverse observations made in paragraph 40 of the judgment.

B 11. The High Court dismissed the appeal of A-1 and A-3, whereas the appeal of A-2, A-4, A-5, A-6 and A-7 was allowed and their conviction and sentence imposed upon them by the learned Sessions Judge, Jalore, has been set aside. The Criminal Revision Petition filed by Arvind Kumar Sengwa [DW-2] – Naib Tehsildar has been dismissed. The order of the High C Court reads as under:

> "[1] The appeal filed by the accused appellants no.1 Arvind kumar [Husband of the deceased] and no. 3 Kantilal [Jeth of deceased] is dismissed, after confirming the judgment D and order dated 24.02.1997 passed by the learned Sessions Judge, Jalore so far as they relate to them.
>
> Since accused appellant no. 3 Kantilal [Jeth of deceased] is on bail, he shall surrender himself before the trial court immediately and in case he does not surrender, the trial E court shall take immediate steps for arresting and sending him to jail to serve out the remaining period of sentences.
>
> [2] The appeal filed by the accused appellants no.2 Sanwal Chand [Father-in-law of deceased], no.4 Bhanwar Lal [Jeth F of deceased], no. 5 Chetan Lal [Jeth of the deceased], no. 6 Popat Lal [Devar of the deceased] and no.7 Smt. Bagtu [Mother-in-law of the deceased] is allowed and the judgment and order dated 24.02.1997 passed by the learned Sessions Judge, Jalore so far as they relate to G them, are set aside and they are acquitted of the charges framed against them. Since they are on bail they need not surrender and their bail bonds stand discharged.
>
> [3] The criminal misc. petition filed by the petitioner Arvind Kumar Sengwa, DW-2 is also dismissed."

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12. Now, A-1 and A-3 have filed these two sets of appeals challenging the correctness and validity of the order of the High Court.

13. Ms. Aishwarya Bhati, Advocate appearing on behalf of A-1 and A-3, vehemently contended that the judgment of the High Court confirming the order of conviction passed by the trial court is erroneous in law. She contended that the High Court and the trial court, both were not justified in rejecting the dying declaration [Ext.-D/4] voluntarily made by the deceased to DW-2, an Officer of the State Government, stating clearly therein that on the intervening night of the incident she attempted to lit the chimney with burning match-stick, but in the darkness accidentally kerosene oil fell on the ground of the room, by which her orna [dupatta] caught fire and as a result of the accidental fire she received burn injuries. She stated that the dying declaration [Ext.-D/4] was made by the deceased to DW-2 in the presence of PW Dr. Vasudev who certified that she was in a fit state of mind to make the statement.

14. She next contended that the prosecution case is wholly false and fabricated. According to the learned counsel, the fact of recording of dying declaration by DW-2 has been corroborated by PW-12 – the Station House Officer, who deposed that at the time of recording of dying declaration of Smt. Laxmi by DW-2, the complainant [PW-5] and his wife [PW-6] both parents of the deceased were present and the prosecution deliberately and intentionally concealed the production of dying declaration from the Court and also withheld the examination of DW-2 – the Naib Tehsildar as a prosecution witness with clear intention to conceal true facts of accidental burning of the deceased. She also contended that the High Court has wrongly placed reliance on the evidence of PWs 5, 6 and 8 who are all highly interested witnesses being close relatives of the deceased. She next contended that the judgment of the trial court as affirmed by the High Court holding A-1 and A-3 guilty of the charged offences are both based upon

A conjectures and surmises, therefore, not sustainable. She lastly contended that the prosecution has not led cogent and credible evidence against A-3 [Jeth of the deceased] beyond reasonable doubt who has nothing to do with the offence and therefore, he is entitled for benefit of doubt.

B

15. Dr. Manish Singhvi, AAG appearing on behalf of the State, has canvassed correctness of the views taken by the courts below in the judgments. He submitted that the approach of the High Court in re-appreciating the evidence led by the prosecution cannot be found faulty. He then contended that the C evidence of the eye-witnesses PW-5 Parasmal [father of the deceased], PW-6 Bhanvri [mother of the deceased] and PW-8 Mahender Kumar – Mama [Deceased's mother's brother] is concise, cogent and satisfactory for holding A-1 and A-3 guilty of the charged offences. He lastly contended that the trial court D and the High Court, both have correctly appreciated and re-appreciated the entire evidence of the material witnesses, and this Court shall not be obliged to interfere with the concurrent findings of the facts arrived at by the courts below.

E 16. In order to appreciate the rival contentions of the learned counsel for the parties, we have independently scrutinized the evidence led by the prosecution and examined the judgment of the High Court.

F 17. The dying declaration [Ext.-D/4] allegedly made by the deceased to DW-2 – Naib Tehsildar has been found to be an unreliable document by the trial court and the said finding has been affirmed by the High Court. We think it appropriate to reproduce the true translation of the contents of the alleged dying declaration [Ext.-D/4] which read as under:

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"That on the night, there was darkness and she took match-box to lit the chimney and when she started to lit the chimney, kerosene oil fell on the ground and it caught hold fire, by which her orna caught fire and, thereafter, her H husband tried to save her and people of village gathered

and thereafter, she was taken to hospital." A

18. The dying declaration [Ext.-D/4] was stated to have been thumb-marked by the deceased and duly signed by DW-2 and A-3 and PW Dr. Vasudev. It is the evidence of DW-2 that when he recorded the alleged statement of the deceased, her mother PW-6 was present in the hospital, but she refused to append her signature or thumb impression upon the document. PW Dr. Vasudev has proved on record medical report [Ext.- P/11] of the deceased and in his examination-in-chief, he has not whispered a word in regard to recording of the dying declaration [Ext.-D/4] by DW-2. In cross-examination, Dr. Vasudev admitted that he could not remember whether A-3 was present in the hospital when DW-2 recorded the alleged dying declaration [Ext.-D/4]. He categorically stated that dying declaration was not recorded by DW-2, but the said document was prepared by his Reader. He has shown his ignorance whether DW-2 took thumb-impression of the deceased once or two times on the alleged dying declaration. B C D

19. PW Shaitan Singh – Station House Officer stated that Medical Officer had given to him in writing that Smt. Laxmi before her death was in a fit condition to make statement and therefore, he called DW-2 for recording her statement. He stated that he was not present in the room when DW-2 recorded the alleged dying declaration [Ext.-D/4] of the deceased. E F

20. It is the evidence of DW-2 Arvind Kumar Sengwa that on 07.08.1992 one constable came to him with a letter of request and disclosed that one woman, namely, Laxmi was admitted in the hospital and her statement was to be recorded. He rushed to the hospital and made enquiry from Dr. Vasudev about the fit condition of Smt. Laxmi. Smt. Laxmi was found in a fit state of mind to give statement which he correctly recorded. He admitted that PW Bhanvri – mother of the deceased was present in the room and she refused to put her signature or thumb-impression on the statement of the deceased. In cross- G H

A examination DW-2 admits the following material facts:

"[1] That before recording the statement of the deceased Ex. D/4, Tehreer was given to him in writing by the police and he took out the Tehreer from the pocket of his coat and carbon copy of it, was produced by him during the B course of his examination and the same is marked as Ex.D/5.

[2] That at the time of recording statement of the deceased Ex.D/4, PW-12 Shaitan Singh, SHO was not there.

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[3] That it is correct to say that before recording the statement of the deceased Ex.D/4, he did not take certificate from the doctor on the point that she was in a fit condition to give statement.

D

[4] That before recording statement of the deceased Ex.D/4, he asked the deceased how the fire took place and apart from this, he did not ask any question, but such type of formalities are not mentioned in Ex.D/4.

E

[5] That it is also correct to say that at the time of recording statement Ex.D/4 of the deceased, he did not oust her mother PW-6 Bhanvri and PW-11 Dr. Vasudev.

[6] That it is also correct to say that he did not have any experience how dying declaration should be recorded.

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[7] That it is also correct to say that there is no endorsement on Ex.D/4 of the fact that statement was read over to the deceased and she admitted it to be correct one and, thereafter, her thumb-impressions were taken and for non-G observing these formalities, he could not assign any reason.

[8] That after recording statement of the deceased Ex.D/4, he took signatures of her Jeth Kantilal, accused H appellant no. 3, who was sitting at that time in the Chamber

of the doctor. A

[9] That it is also correct to say that dying declaration Ex.D/4 was not sealed on the spot and it was given open to SHO, PW-2 Shaitan Singh.

[10] That before recording the statement of the deceased Ex.D/4, he did not ask the deceased how incident took place and what she was doing. B

[11] That he took two thumb-impressions of deceased and causes of taking two thumb-impressions have been assigned in the statement, but Ex.D/4 does not bear such reasons." C

21. It is well-settled that one of the important tests of the credibility of the dying declaration is that the person, who recorded it, must be satisfied that the deceased was in a fit state of mind. For placing implicit reliance on dying declaration, court must be satisfied that the deceased was in a fit state of mind to narrate the correct facts of occurrence. If the capacity of the maker of the statement to narrate the facts is found to be impaired, such dying declaration should be rejected, as it is highly unsafe to place reliance on it. The dying declaration should be voluntary and should not be prompted and physical as well as mental fitness of the maker is to be proved by the prosecution. D E F

22. In the present case, as noticed above DW-2 has not taken any certificate from the doctor to prove that the deceased was in a fit state of mind to give statement nor he has recorded any endorsement to that effect on the alleged dying declaration [Ext.-D/4]. Another factor which impairs the credibility of the alleged dying declaration [Ext.- D/4] and belies the statement of DW-2 was that, according to Dr. Vasudev, dying declaration was recorded by the Reader of the Tehsildar and not by DW-2. It is also proved on record that DW-2 did not ask preliminary questions from the deceased before the dying declaration G H

A allegedly made by her was recorded and this fact also created doubt about the correctness and truthfulness of the dying declaration. It is also the evidence of DW-2 that after recording the alleged statement of the deceased, he did not seal the dying declaration and unsealed document was handed over to the B Station House Officer. DW-2 has not produced on record the original copy of the 'Tehreer' submitted to him by a constable requesting him to visit the hospital for recording the alleged dying declaration of the deceased, and a carbon copy whereof was produced by him during his cross-examination. A C categorical refusal of putting her signature or thumb-impression on the alleged dying declaration [Ext.-D/4] by PW-6 – Bhanvri [mother of the deceased] would further go to prove that the alleged dying declaration was not at all recorded by DW-2 in the room of the hospital where the deceased was lying before D she died. The above-stated facts and circumstances would prove that the alleged dying declaration, on which much reliance has been placed by the defence, cannot be said to be an admissible and reliable document. The fact that the alleged dying declaration [Ext.-D/4] did not bear endorsement of DW-2 to the effect that it was read over and explained to the E deceased, also created a doubt on its credibility and truthfulness. The trial court as well as the High Court both have concurrently and, in our considered view, have rightly rejected the genuineness and credibility of the alleged dying declaration to prove the defence version that the deceased made the said F statement to DW-2 and she died because of accidental death. We agree with the findings and reasoning of the courts below that the alleged dying declaration [Ext.-D/4] suffers from a number of basic infirmities and such dying declaration cannot be found admissible and accepted as genuine document.

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23. Ms. Aishwariya, learned counsel, has relied upon the judgments of this Court in *Gaffar Badshaha Pathan v. State of Maharashtra* [[2004] 10 SCC 589] to contend that it is one thing for an accused to attack a dying declaration in a case H where the prosecution seeks to rely on a dying declaration

against an accused but it is altogether different where an accused relies upon a dying declaration in support of the defence of accidental death. In such case, the burden on the accused is much lighter. In the present case, according to the learned counsel, A-1 and A-3 have established beyond reasonable doubt that the statement of the deceased was recorded by DW-2 with *bona fide* intention and without putting any pressure upon the deceased and therefore, the document has to be accepted as admissible and reliable document to indicate that the deceased died due to accidental fire. We have gone through the above cited judgment. In that case, this Court while dealing with the dying declaration produced on record held as under:

> "It is one thing for an accused to attack a dying declaration in a case where the prosecution seeks to rely on a dying declaration against an accused but it is altogether different where an accused relies upon a dying declaration in support of the defence of accidental death. The burden on the accused is much lighter. He has only to prove reasonable probability. The High Court erred in holding that the recording of the dying declaration and story stated therein apparently appears to be false and concocted. The fact whether the dying declaration is false and concocted has to be established by the prosecution. It is not for the accused to prove conclusively that the dying declaration was correct and the story therein was not concocted."

[24] In *Ghurphekan and Others v. State of Uttar Pradesh* [[1972] 3 SCC 361], this Court while dealing with the case, which entirely rested on dying declaration of the deceased held as under:

> "[i] A dying declaration recorded within a few hours after the incident, when it bore the endorsement of the doctor, that the victim was at that time in "proper sense" to be able to give the statement and where the evidence of the recording magistrate showed no flaw in taking it down,

A there is no reason to reject it.

[ii] Where the dying declaration had two weaknesses, namely, it did not mention the name of one of the witnesses present at the spot and it did not account for the injuries on the persons of the attacking party, it cannot be rejected B on those omissions only, if otherwise it could be shown to be true in other respects, by other satisfactory evidence.

[iii] Where the circumstantial evidence negatived the alternative case set up by the defence and the investigating C officer's evidence about the place of incident, the medical officer's evidence in support of the prosecution about the manner of the occurrence of the incident, and the explanation of some witnesses for their presence at the spot, are consistent with the dying statement and the D circumstantial evidence; the dying declaration possess acceptability in spite of any weaknesses pointed out by the defence."

25. In *Kans Raj v. State of Punjab and others* [[2000] 5 E SCC 207], this Court held that the statement of a person "as to any of the circumstances which resulted in his death" must have some close and proximate relation with the actual occurrence and proximity would depend upon the circumstances of each case for the purpose of admissibility of such statement as dying declaration under Section 32 [1] of the F Evidence Act, 1872.

26. In *Kamalakar Nandram Bhavsar v. State of Maharashtra* [[2004] 10 SCC 192], this Court on scrutiny of the evidence on record found that the victim of dowry death/bride G burning had suffered burn injuries to the extent of 94-95 % could not have made dying declaration as stated by the doctor during the cross-examination that a dying declaration was made by the victim when she was in hospital. The alleged dying declaration was admitted in evidence on behest of defence by H trial court supportive to the defence of the accused. On the facts

of the case, this Court observed that source of production of dying declaration was neither mentioned in the trial court's judgment nor was there any evidence to prove the said document. In these circumstances, this Court held that the High Court had rightly rejected the said dying declaration. 27]

In the present case, as noticed in the earlier part of the judgment A-1 and A-3 have not proved on record the source of production of the dying declaration by DW-2 who after recording the statement of the deceased was duty bound to hand over the alleged dying declaration under a sealed cover to the prosecuting agency. In this case, the origin and source of the alleged dying declaration produced by DW-2 at the time of his examination as a defence witness is highly doubtful and such document cannot be accepted as genuine and truthful document in support of the defence of A-1 and A-3.

28. In *State [Delhi Administration] v. Laxman Kumar and Others and Indian Federation of Women Lawyers and Others v. Smt. Shakuntala and Others* [[1985] 4 SCC 476], this Court while dealing a case of bride burning on the basis of dying declaration, held as follow:

> "A dying declaration enjoys almost a sacrosanct status as a piece of evidence as it comes from the mouth of a person who is about to die and at that stage of life he is not likely to make a false statement. Ordinarily, a document as valuable as a dying declaration is supposed to be foolproof and is to incorporate the particulars which it is supposed to contain."

Further, it is held that unless the dying declaration is in question and answer form it is very difficult to know to what extent the answers have been suggested by questions put. What is necessary is that the exact statement made by the deceased should be available to the court. It is also said that if the doctor happened to be present at the time of recording of the dying declaration and he had heard the statement made by the deceased, he would ordinarily endorse that the statement had

A been made to his hearing and had been recorded in his presence. The endorsement as made is indicative of the position that a statement had been recorded and the same was being attested by the doctor.

B 29. In the present case, these basic principles are ignored by DW-2 at the time of recording of the alleged dying declaration of the deceased. As noticed above, the doctor has not made any endorsement on the dying declaration to state that it was recorded in his presence and attested by him. The mother of the deceased refused to put her thumb-impression C on the said document. Thus, the judgment cited above cannot strength the defence of A-1 and A-3 that dying declaration Ext. D/4 had been recorded by DW-2 by observing the principles laid down in the abovesaid case.

D 30. The prosecution in support of the charge of dowry death has produced and relied upon the testimony of PW-5 Parasmal – father, PW-6 Bhanvri – mother and PW-8 Mahender Kumar – *'Mama'* [mother's brother] of the deceased. Before we proceed to deal with and consider the evidence of the E prosecution on the question of dowry death, we may consider the ratio of the law laid down in the cases relied upon before us.

31. In *Pawan Kumar and Others v. State of Haryana* [[1998] 3 SCC 309] this Court held that the ingredient necessary F for the application of Section 304 B are : [a] when the death of a woman is caused by any burns or bodily injury, or [b] occurs otherwise than under normal circumstances [c] and the aforesaid two facts spring within 7 years of girl's marriage [d] and soon before her death, she was subjected to cruelty or G harassment by her husband or his relative, [e] this is in connection with the demand of dowry.

32. In *Hira Lal and Others v. State [Govt. of NCT], Delhi* [[2003] 8 SCC 80], this Court reiterated that the essential H ingredients to attract application under Section 304 B are that:

[i] the death of a woman should be caused by burns or bodily injury or otherwise than under a normal circumstance [ii] such a death should have occurred within seven years of her marriage, [iii] she must have been subjected to cruelty or harassment by her husband or any relative of her husband, [iv] such cruelty or harassment should be for or in connection with demand of dowry, and [v] such cruelty or harassment is shown to have been meted out to the woman soon before her death. Further it is said that the presumption under Section 113-B of Evidence Act, 1872 is a presumption of law. On proof of the essential mentioned therein, it becomes obligatory on the court to raise a presumption that the accused caused the dowry death. The essentials required to be proved for raising the said presumption are that [i] the question before the court must be whether the accused has committed the dowry death of the woman, [ii] the woman was subjected to cruelty or harassment by her husband or his relatives, [iii] such cruelty or harassment was for or in connection with any demand for dowry, and [iv] such cruelty or harassment was soon before her death.

33. Again, in the case of *Kamesh Panjiyar alias Kamlesh Panjiyar v. State of Bihar* [[2005] 2 SCC 388], *Ram Badan Sharma v. State of Bihar with Surya Kant Sharma v. State of Bihar* [[2006] 10 SCC 115], *Trimukh Maroti Kirkan v. State of Maharashtra* [[2006] 10 SCC 681], *Kailash v. State of M.P.* [[2006] 12 SCC 667] and *Appasaheb and Another v. State of Maharashtra* [[2007] 9 SCC 721], this Court reiterated and reasserted the settled principles laid down in *Hiralal's* case [supra].

34. In the light of the above-settled proposition of law, learned counsel for A-1 and A-3 urged that the prosecution has miserably failed to prove that "soon before her death", the deceased was subjected to cruelty or harassment "for or in connection with the demand of dowry".

35. In order to appreciate this contention, we have made independent scrutiny of the evidence led on record to find out

A whether the trial court's order of conviction of A-1 and A-3 as confirmed by the High Court can be sustained or not. In support of the charge of dowry death levelled against A-1 and A-3, the prosecution has examined and relied upon the testimony of PW-5 and PW-8. It is not in dispute that the death of Smt. Laxmi B was caused by burn injuries within seven years of her marriage. The evidence of PW-5 proved that at the time of marriage of Smt. Laxmi with A-1, he gave 20 tolas of gold and other dowry articles to A-1, A-3 and other family members. For about one year after marriage, his daughter lived happy married life in her C parents-in-law's house. Thereafter, whenever Smt. Laxmi used to go to the house of her parents or whenever PW-5 had visited her in-law's house for inviting her to parent's house, Smt. Laxmi used to complain that A-1, A-3 and other family members had mal-treated and harassed her for not bringing adequate dowry. He brought Smt. Laxmi to his house when she was to deliver a D child and at that time A-1 and A-3 demanded Rs. 50,000/- from him as loan for running their business. He paid Rs. 50,000/- to them. Smt. Laxmi stayed at his house for about 3-4 months when she was blessed with a son and after some period Smt. Laxmi was sent to her parents-in-law's house.

E

36. It is the evidence of PW-5 that after about 10 days prior to the fateful incident, he went to village Silason to take his daughter, but A-1, A-3 and other family members [the acquitted accused] had refused to send her unless their demand of dowry F was not fulfilled by him. A-1, A-3 and other accused told him that Rs. 50,000/- borrowed as a loan should be adjusted and treated as dowry money. He did not agree to the proposal of the accused. On this count, the accused started ill-treating and harassing his daughter. The evidence of this witness finds G complete corroboration from the evidence of PW-6 and PW-8 on this count. It is further evidence of PW-5 that about two months prior to the incident Smt. Laxmi had visited his house, when A-4 came to his house to take Smt. Laxmi back to their house but he did not allow her to go with him because it was H not advisable to send her with an infant child in the late hours

of the evening. Later on at about 9.00 p.m. or 10.00 p.m., three accused namely A-3, A-4, A-7 and one Shaitan Singh came to his house and banged the door of his house and on hearing the sound of banging of the door, he and his wife PW-6 opened the door. The abovesaid persons started quarreling with him and impressed upon him to adjust the amount of Rs.50,000/- as dowry money. This incident took place in the presence of PW-3 Taga and PW-7 Narainchand.

37. PW-3 Taga deposed that about two months prior to the death of Smt. Laxmi, he saw A-3, A-4 and A-7 alongwith one Shaitan Singh coming out of the house of PW-5 at about 9.00 p.m. or 10.00 p.m. and at that point of time, they were quarreling with PW-5 and his wife PW-6 over some money transaction. PW-7 Narainchand though turned hostile to the prosecution, yet he admitted that A-3, A-4 and A-7 had a quarrel with PW-5 on some money matter. PW-6 Smt. Bhanvri fully corroborates the testimony of PW-3 and PW-5 her husband on this point.

38. PW-8 Mahender Kumar deposed that on that day he alongwith PW-5 and PW-10 Pratap Singh, visited the house of the accused persons, they threatened PW-5 that if he would make demand of returning a sum of Rs. 50,000/- paid by him as loan to A-1 and A-3, he would face dire consequences. All the accused said that an amount of Rs. 50,000/- shall be adjusted against the demand of dowry money. Thus, relying upon the evidence of PW-5 and PW-8, the trial court and the High Court came to the conclusion that the prosecution has proved beyond reasonable doubt that Smt. Laxmi was being constantly harassed and tortured by A-1 and A-3 for the demand of dowry and a sum of Rs.50,000/- paid to them as loan amount was also adjusted by them as dowry money. PW-5, PW-6 and PW-8 have been subjected to searching cross-examination by the defence, but nothing tangible material has been extracted from their evidence to create any shadow of doubt that they are not reliable and truthful witnesses.

A 39. Having regard to the entire evidence discussed above and having carefully and closely considered the judgments of the trial court and the High Court, it appears that the view taken by both the courts was reasonable and plausible. We find no infirmity or perversity in the findings recorded by the learned B Judges of the High Court to interfere with the well-reasoned judgment.

40. No other point has been raised by the appellants. We, thus, find no merit and substance in any of the submissions made on behalf of the appellants.
C

41. In the result, for the above-stated reasons, there is no merit in these appeals and these are, accordingly, dismissed. Both the appellants are stated to be on bail. Their bail bonds are cancelled and they are directed to surrender forthwith to D serve out the remaining sentence.

R.P. Appeal dismissed.