ANJANAPPA

v.

STATE OF KARNATAKA

(Criminal Appeal No. 1223 of 2008)

NOVEMBER 12, 2013

[RANJANA PRAKASH DESAI AND MADAN B. LOKUR, JJ.]

Penal Code, 1860 – ss.498A, 302 and 304 Part II – Married woman died in hospital due to burn injuries – Deceased gave dying declaration implicating husband-appellant to police official, PW5, which was endorsed by the attending doctor,PW4 – Appellant charge-sheeted – But acquitted by trial court – Conviction of appellant by High Court u/s. 304-II IPC – Justification – Held: Evidence of PW-4 establishes to the hilt that deceased was in a fit mental condition to make statement in which she implicated the appellant – PW4 stated that he made endorsement on the deceased's statement recorded by PW-5 – PW-5 corroborated PW-4 – Both these witnesses were truthful and the trial court erred in rejecting their evidence – There was motive too – Appellant wanted the property standing in the name of the deceased to be transferred to his name, which the deceased was not prepared to do – Besides, the conduct of appellant speaks volumes – He was absconding and could be arrested only much later – Moreover, in his statement recorded u/s.313 CrPC he did not explain how the deceased received burn injuries – His silence on this aspect gives rise to an adverse inference against him – It forms a link in the chain of circumstances which point to his guilt – When there is overwhelming evidence on record to establish that kerosene was poured on deceased and she was set on fire, it is absurd to argue that the prosecution case should be disbelieved because it is not mentioned in certain documents

that kerosene smell was emanating from her body – Further, there was no delay in recording the FIR – Similarly, there was no unexplained delay in forwarding FIR to the Magistrate – High Court perfectly justified in interfering with the trial court's order – Acquittal of appellant was wrongly recorded – Dowry Prohibition Act, 1961 – ss. 3 and 6.

Evidence Act, 1872 – s.32 – Dying declaration – Appreciation of – Certification by doctor – If necessary – Held: Certification by the doctor about the fitness of the declarant's mind is a rule of caution – Once the doctor who examined the deceased, himself states that the deceased was in a position to make a statement and that she was conscious, absence of his endorsement on the statement to that effect is of no consequence.

Evidence – Witness – Witness protection – Held: The reasons why witnesses so frequently turn hostile need to be ascertained – There is no witness protection plan in place – Unless the witnesses are protected the rise in unmerited acquittals cannot be checked.

Appeal – Appeal against acquittal – Held: If the view taken by the trial court is a reasonably possible view, it is not to be disturbed – If two views are possible and if the view taken by the trial court is a reasonably possible view, then the appellate court should not disturb it just because it feels that another view of the matter is possible – However, an order of acquittal will have to be disturbed if it is perverse – On facts, the High Court was justified in setting aside the order of acquittal as it was perverse.

The prosecution case was that the appellant poured kerosene on his wife and set her on her fire thereby causing her burn injuries which subsequently led to her death at the hospital. The deceased gave dying declaration implicating the appellant to a police official, PW5, which was endorsed by the attending doctor, PW4.

The appellant was charged for offences under Sections 3 and 6 of the Dowry Prohibition Act, 1961 and under Sections 498A and 302 of the IPC. Apart from the police witnesses and the doctor, the prosecution examined PW-2 and PW-3, mother and father of the deceased. The parents of the deceased however turned hostile in the court.

The trial court acquitted the appellant *inter alia* holding that the dying declaration could not be relied upon because the doctor had not made any endorsement as to whether the deceased was in a fit condition to make a statement. The trial court held that the deceased was given sedatives, therefore, in all probability she was not in a fit condition to make a dying declaration; and it is doubtful whether the doctor was present when the dying declaration was being recorded. The fact that the parents of the deceased did not support the prosecution case weighed with the trial court. The State carried an appeal to the High Court which set aside the order of acquittal, and convicted the appellant under Section 304 Part-II of the IPC and sentenced him to undergo RI for six years. Hence the present appeal.

Dismissing the appeal, the Court

HELD:1. It is well settled that an order of acquittal is not to be set aside lightly. If the view taken by the trial court is a reasonably possible view, it is not to be disturbed. If two views are possible and if the view taken by the trial court is a reasonably possible view, then the appellate court should not disturb it just because it feels that another view of the matter is possible. However, an order of acquittal will have to be disturbed if it is perverse. In the instant case, the High Court was justified in setting aside the order of acquittal as it was perverse. [Para 9] [815-B-C]

A 2. What weighed with the trial court is the fact that the parents of the deceased turned hostile. They came out with a story which even the appellant did not have in mind. He merely denied the prosecution story. The parents stated that the deceased was heating water on B stove. She caught fire accidentally and sustained burn injuries. If this was true, the appellant would have stated so in his statement recorded under Section 313 of CrPC. The parents were either won over by the appellant or pressurized into supporting the appellant. Their evidence C is a tissue of lies. In any case, even if it is obliterated and kept out of consideration, there is sufficient other evidence on record to establish the appellant's guilt. [Para 10] [815-D-F]

D 3.1. Evidence of PW-4 inspires confidence. There is no reason why he should make-up a story. There is nothing on record to show that he harboured any grudge against the appellant. He is an independent witness who has given his evidence in a forthright manner. His evidence establishes to the hilt that deceased was in a E fit mental condition to make a statement and she implicated her husband. He stated that he made an endorsement on the deceased's statement recorded by PW-5. The High Court noted that PW-4 made endorsement on Exhibit-P19 that deceased was in a fit F condition to make a statement. The High Court also noted that in Exhibit-17, which is the case sheet of deceased, it is stated that she was conscious. But, assuming he has not made any endorsement on deceased's dying declaration that she was in a fit state of mind to make a statement that does not affect the G credibility of the prosecution story. He stated on oath in the court that deceased was in a position to give statement and, therefore, he permitted PW-5 to record her statement. An independent professional like PW-4 must be trusted when he makes such a categorical statement H with a sense of responsibility. Moreover certification by

the doctor about the fitness of the declarant's mind is a rule of caution. Once the doctor who examined the deceased, himself states that the deceased was in a position to make a statement and that she was conscious, absence of his endorsement on the statement to that effect is of no consequence. Besides, PW-4 stated that deceased had received 34% burns. She died about five days after the incident. Therefore, it is not possible to hold that she could not have made any dying declaration. [Para 13] [817-B-H; 818-A-B] A B

3.2. PW-5 has corroborated PW-4. The evidence of PW-4 is fully corroborated by this witness. Both these witnesses are truthful and the trial court erred in rejecting their evidence. [Para 14] [818-C-F] C

Laxman v. State of Maharashtra AIR 2002 SC 2973: 2002 Suppl. SCR 697 – referred to. D

4.1. PW-2 and PW-3 have turned hostile. It is apparent that they have tried to help the appellant. In that effort they have come out with the accidental death theory which was not even urged by the appellant. The appellant could have very easily come out with it in his statement recorded under Section 313 of the Code. PW-2 and PW- are, therefore, completely exposed. It is sad that even parents did not stand by their daughter. It is not understandable how a woman, particularly a mother, turned her back on the daughter. Possibly these witnesses were bought over by the appellant. Such conduct displays greed and lack of compassion. If they were threatened by the appellant and were forced to depose in his favour it is a sad reflection on our system which leaves witnesses unprotected. The reasons why witnesses so frequently turn hostile need to be ascertained. There is no witness protection plan in place. Unless the witnesses are protected the rise in unmerited E F G H

A **acquittals cannot be checked. It is unfortunate that this important issue has not received necessary attention. [Para 15] [818-G-H; 819-A-B; 820-E-F]**

4.2. In any case, the trial court should have seen through the insincerity and dishonesty of PW-2 and PW-3 and having regard to the independent evidence of PW-4, which is corroborated by the evidence of PW-5 the trial court should have held that the deceased was in a fit mental condition to make a dying declaration and, therefore, her dying declaration can be relied upon. [Para 16] [820-F-G]

Zahira Habibullah Sheikh (5) v. State of Gujarat **(2006) 3 SCC 374: 2006 (2) SCR 1081 – referred to.**

5. It is well settled that a conviction can be based on a dying declaration recorded properly when the declarant is in a fit mental condition to make it. It should be truthful and voluntary. All these tests are satisfied in the present case. Inconsistency in dying declaration is not a ground of attack in this case. In any case, there is consistency between the statement of deceased recorded by PW-4 which is at Exhibit-P16(b), the history recorded in deceased's case sheet, which is Exhibit-P17 and statement of deceased recorded by PW-5, which is at Exhibit-P19. The doctor's evidence which is supported by the evidence of PW-5 and other attendant circumstances establishes that the dying declaration of deceased is truthful and it was voluntarily made by her when she was in a fit state of mind. [Para 17] [820-H; 821-A, D-E, G-H]

Nallapati Sivaiah v. Sub-Div. Officer, Guntur A.P. **2007 (10) SCR 347: 2007 (15) SCC 465;** *Mehiboobasab Abbasabi Nadaf v. State of Karnataka* **2007 (8) SCR 713: 2007 (13) SCC 112;** *Kake Singh @ Surendra Singh v. State of M.P.* **(1981) Suppl. SCC 25 and** *Rasheed Beg and ors. v. State of M.P.* **(1974) 4 SCC 264 – held inapplicable.**

6. There is also no substance in the submission that there is no motive. The appellant wanted the property standing in the name of the deceased to be transferred to his name, which the deceased was not prepared to do. There is no reason to disbelieve PW-5 on this aspect. [Para 18] [822-A-B]

7. Besides, the conduct of the appellant speaks volumes. He was absconding and could be arrested only on 19/02/1992. Moreover, in his statement recorded under Section 313 of the Code he has not explained how the deceased received burn injuries. He did not set up the defence of alibi. It was obligatory on him to explain how the deceased received burn injuries in his house. His silence on this aspect gives rise to an adverse inference against him. It forms a link in the chain of circumstances which point to his guilt. [Para 19] [822-B-C]

8. Minor discrepancy in the time of recording of dying declaration creates no dent in the prosecution story which is, otherwise, substantiated by reliable evidence. Certain documents like inquest panchanama and post-mortem notes do not state that kerosene smell was emanating from the body of deceased. When there is overwhelming evidence on record to establish that kerosene was poured on deceased and she was set on fire, it is absurd to argue that the prosecution case should be disbelieved because it is not mentioned in certain documents that kerosene smell was emanating from her body. [Para 20] [822-D-F]

9. The submission that there is delay in lodging the FIR must be rejected. PW-5 recorded the dying declaration at about 10.30 p.m. on 17/10/1991. He, then, presented Memo Exhibit-P18 to the Station House Officer. Thereafter, PW-6 ASI recorded the FIR at about 11.30 p.m. In the facts of this case, there is no delay in recording the FIR. Similarly, there is no unexplained delay in forwarding

A FIR to the Magistrate. FIR was recorded at about 11.30 p.m. on 17/10/1991. PW-6 ASI has explained that since the constable was going to the Court on the next day, he gave the FIR to him on the next day i.e. 18/10/1991 and it reached the Magistrate at about 4.30 p.m. on 18/10/1991. B In the facts of this case this time lag can hardly be described as delay and, in any case, acceptable explanation is offered by PW-6 ASI. If the delay is reasonably explained no adverse inference can be drawn against the prosecution. [Paras 21, 22] [822-F-H; 823-A-C B, D]

Meharaj Singh v. State of U.P. (1994) 5 SCC 188 and *Bijoy Singh and Anr. v. State of Bihar* 2002 (3) SCR 179 – referred to.

D 10. In the ultimate analysis, the High Court was perfectly justified in interfering with the trial court's order. The acquittal of the appellant was wrongly recorded. The High Court, however, adopted a kindly approach and convicted the appellant under Section 304 Part-II of the E IPC and sentenced him to six years RI because the incident is of the year 1991. The High Court was merciful. In the absence of State appeal, at this distance of time, the appeal is dismissed. [Para 23] [823-E-F; 824-A]

F *State of U.P. v. Virendra Prasad* (2004) 9 SCC 37: 2004 (2) SCR 39 – held inapplicable.

Case Law Reference:

2007 (15) SCC 465	held inapplicable	Para 6
G 2007 (13) SCC 112	held inapplicable	Para 6
(1974) 4 SCC 264	held inapplicable	Para 6
(1981) Suppl. SCC 25	held inapplicable	Para 6

H

2002 (3) SCR 179	**referred to**	**Para 7**	A
(1994) 5 SCC 188	**referred to**	**Para 7**	
2004 (2) SCR 39	**held inapplicable**	**Para 7**	
2002 Suppl. SCR 697	**referred to**	**Para 13**	B
2006 (2) SCR 1081	**referred to**	**Para 15**	

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1223 of 2008.

From the Judgment & Order dated 11.07.2007 of the High Court of Karnataka, Bangalore in Criminal Appeal No. 960 of 2000. C

Shekhar G. Devasa, A.K. Joseph, Vishnu (for Dinesh Kumar Garg) for the Appellant. D

Anitha Shenoy for the Resondent.

The Judgment of the Court was delivered by

(SMT.) RANJANA PRAKASH DESAI, J. 1. This appeal, E once again like many other appeals, presents before us the plight of a woman who is burnt to death by her husband. Sadly, her parents turned hostile in the court. This raises the serious question of witness protection which is not addressed as yet.

F

2. Deceased Gowramma was married to the appellant on 17/04/1987. It is the prosecution case that at the time of marriage the appellant demanded dowry and he received Rs.5,000/-, a motor bike, one gold chain and clothes from Hanumantharayappa, the father of Gowramma. After marriage the appellant was harassing the deceased for bringing more G dowry from her parents. The harassment was both physical and mental. The appellant had caused burn injuries on the thighs of Gowramma to compel her to bring more dowry. He had kept one Puttamma as his mistress, which caused mental agony to Gowramma. On 17/10/1991 there was a quarrel between the H

A appellant and Gowramma on the question of transferring Gowramma's property in the appellant's name. At about 6.00 p.m. the appellant poured kerosene on her and set her on fire. Gowramma was taken to the Victoria hospital. At about 7.00 p.m. PW-4 Dr. Parthasarathy admitted her for treatment of burn B injuries. When PW-4 Dr. Parthasarathy asked her about the burn injuries she told him that on the same day at about 6.30 p.m. the appellant had poured kerosene on her and set her on fire. He recorded the said occurrence in the Accident Register. Gowramma's statement recorded by him is at Exhibit-P16(b). C He reported the matter to the police. PW-5 HC Ramachari of Vijayanagara Police Station came to the hospital on 17/10/1991 at about 10.30 p.m. and sought permission to record the statement of Gowramma from PW-4 Dr. Parthasarathy. As Gowramma was in a position to give statement PW-4 Dr. D Parthasarathy permitted PW-5 HC Ramachari to obtain her statement. Thereafter, PW-5 HC Ramachari recorded her statement in Burns Ward, which is Exhibit P-19. She stated that her husband had poured kerosene on her and set her on fire. PW-4 Dr. Parthasarathy put an endorsement on the said statement and signed it. After recording the statement of E Gowramma, PW-5 HC Ramachari presented the memo Exhibit-P18 and statement Exhibit-P19 before the Station House Officer. PW-6 S. Nanjundappa, who was at the relevant time, working as ASI, Vijayanagara Police Station, recorded the FIR at about 11.30 p.m. on 17/10/1991 on the basis of F Gowramma's statement Exhibit-P19. The appellant came to be arrested and charged for offences under Sections 3 and 6 of the Dowry Prohibition Act, 1961 and under Sections 498A and 302 of the IPC.

G 3. The prosecution examined eight witnesses. Apart from the police witnesses and the doctor, the prosecution examined PW-2 Chikkaeeramma, mother of Gowramma and PW-3 Hanumantharayappa, father of Gowramma.

4. The trial court acquitted the appellant. The trial court inter H alia held that the dying declaration could not be relied upon

because the doctor has not made any endorsement as to whether the deceased was in a fit condition to make a statement. The trial court held that the deceased was given sedatives, therefore, in all probability she was not in a fit condition to make a dying declaration. In the opinion of the trial court it is doubtful whether the doctor was present when the dying declaration was being recorded. The fact that the parents of the deceased did not support the prosecution case weighed with the trial court.

5. The State of Karnataka carried an appeal to the High Court. The High Court by the impugned order set aside the order of acquittal, convicted the appellant under Section 304 Part-II of the IPC and sentenced him to undergo RI for six years and to pay a fine of Rs.1,000/-, in default, to undergo further sentence of three months. The said judgment and order is challenged in this appeal.

6. We have heard learned counsel for the parties. We have read written submissions filed on behalf of the appellant. Mr.Shekhar Devasa, learned counsel for the appellant submitted that the prosecution case that the appellant poured kerosene on the deceased and set her on fire is not supported by the parents of deceased Gowramma. They stated that the death of Gowramma was accidental. This affects the veracity of the prosecution case. Counsel submitted that the dying declaration of deceased Gowramma cannot be relied upon because PW-4 Dr. Parthasarathy has stated that he had given sedatives to the deceased. The deceased, therefore, could not have been in a fit condition to make a dying declaration. Besides, the doctor has not made any endorsement to that effect on the dying declaration. The doctor has not stated that kerosene smell was emanating from the body of the deceased. This is also not mentioned in Exhibits P16, 17 and 19. There is a serious doubt about the doctor's presence when the dying declaration was being recorded. Counsel submitted that in the circumstances the dying declaration must be rejected. In support

A of this submission he relied on *Nallapati Sivaiah v. Sub-Div. Officer, Guntur A.P.*[1], *Mehiboobasab Abbasabi Nadaf v. State of Karnataka*[2], *Rasheed Beg and ors. v. State of M.P.*[3] and *Kake Singh @ Surendra Singh v. State of M.P.*[4].

B 7. Counsel submitted that there is a delay in recording FIR. Counsel further submitted that the FIR was recorded at 10.30 p.m. on 17/10/1991. But, it reached the Magistrate at 4.30 p.m. on 18/10/1991. This delay casts a shadow of doubt on the FIR. In this connection he relied on *Bijoy Singh and Anr. v. State of Bihar*[5] and *Meharaj Singh v. State of U.P.*[6]. Counsel further C submitted that motive is not proved. There is also discrepancy in the timing of the dying declaration. Counsel submitted that the conviction of the appellant under Section 304 Part-II of the IPC is not maintainable as his case does not come within the purview of Section 300 of the IPC. It, therefore, cannot fall in D the exceptions thereto. Besides, no reasons are assigned for convicting the appellant under Section 304 Part-II of the IPC which renders the order of conviction unsustainable. In this connection he relied on *State of U.P. v. Virendra Prasad*[7]. Counsel submitted that in the circumstances the impugned E judgment and order deserves to be set aside.

8. Ms. Anita Shenoy, learned counsel for the State of Karnataka, on the other hand, submitted that parents of the deceased were won over by the appellant. However, the F prosecution story is established by the independent evidence of PW-4 Dr. Parthasarathy and PW-5 HC Ramachari, who have deposed about the dying declaration of the deceased. In

1. (2007) 15 SCC 465.
G 2. (2007)13 SCC 112.
3. (1974) 4 SCC 264.
4. (1981) Suppl. SCC 25.
5. (2002) 9 SCC 147.
6. (1994) 5 SCC 188.
H 7. (2004) 9 SCC 37.

her dying declaration the deceased has implicated the appellant. Counsel submitted that the dying declaration inspires confidence and, therefore, the appeal deserves to be dismissed.

9. It is well settled that an order of acquittal is not to be set aside lightly. If the view taken by the trial court is a reasonably possible view, it is not to be disturbed. If two views are possible and if the view taken by the trial court is a reasonably possible view, then the appellate court should not disturb it just because it feels that another view of the matter is possible. However, an order of acquittal will have to be disturbed if it is perverse. We have examined the trial court's order of acquittal in light of above principles. We are of the considered opinion that the High Court was justified in setting it aside as it is perverse.

10. What has weighed with the trial court is the fact that the parents have turned hostile. They came out with a story which even the appellant did not have in mind. He merely denied the prosecution story. The parents stated that the deceased was heating water on stove. She caught fire accidentally and sustained burn injuries. If this was true, the appellant would have stated so in his statement recorded under Section 313 of the Code of Criminal Procedure (**"the code"**). We have perused the evidence of the parents. We have no doubt that they were either won over by the appellant or pressurized into supporting the appellant. Their evidence is a tissue of lies. In any case, even if it is obliterated and kept out of consideration, there is sufficient other evidence on record to establish the appellant's guilt.

11. PW-4 Dr. Parthasarathy is an independent witness. He stated that on 17/10/1991 at 7.00 p.m. he admitted deceased Gowramma in the Victoria Hospital. Her husband and mother had accompanied her. On a query made by him, she told him that on the same day at 6.30 p.m. the appellant had poured kerosene on her and set her on fire. He, then, recorded the occurrence in the Accident Register. The relevant pages of the

A Accident Register are on record at Exhibit-P16(a). The statement of the deceased is at Exhibit-P16(b) and the signature of the witnesses is at Exhibit-P(c). According to PW-4 Dr. Parthasarathy, Gowramma had received 34% burn injuries. Exhibit-P17 is the case sheet of Gowramma. He stated
B that Gowramma died on 21/10/1991 at 7.30 p.m. He reported the case to the police vide Memo dated 17/10/1991, which is at Exhibit-P18. PW-4 Dr. Parthasarathy further stated that at 11.00 p.m. on the same day PW-5 HC Ramachari of Vijayanagara Police Station came to the hospital and sought
C permission to record Gowramma's statement. As Gowramma was in a position to give statement he permitted PW-5 HC Ramachari to record her statement. Thereafter, PW-5 HC Ramachari recorded Gowramma's statement in Burns Ward. PW-4 Dr. Parthasarathy reiterated that even at that time
D Gowramma repeated the story that her husband poured kerosene on her and set her on fire. He stated that he made endorsement on that statement. The said statement is at Exhibit-19, the endorsement is at Exhibit-P19(a) and his signature is at Exhibit-P19(b).

E 12. PW-4 Dr. Parthasarathy's cross-examination has not yielded any material which could be said to be favourable to the defence. In the cross-examination he stated that on 17/10/1991 he was on duty from 2.00 p.m. to 8.00 p.m. After he attended the last patient at 8.00 p.m. another doctor relieved
F him. He added that after 8.00 p.m. he was working in the ward. He stated that till morning of 18/10/1991 he was on duty in the Burns Ward. He stated that Gowramma was admitted in Casualty Ward. He advised that she should be taken to Burns Ward but before sending her to Burns Ward he recorded her
G statement. He further stated that he started Gowramma's treatment in Burns Ward. He gave her sedatives but he has categorically denied the suggestion that when he recorded the statement of Gowramma she was not in a position to give statement. He denied the suggestion that she was not

H

conscious. This shows that when Gowramma gave statement she was not under the effect of sedatives. A

13. Evidence of PW-4 Dr. Parthasarathy inspires confidence. There is no reason why he should make-up a story. There is nothing on record to show that he harboured any grudge against the appellant. He is an independent witness who has given his evidence in a forthright manner. His evidence establishes to the hilt that Gowramma was in a fit mental condition to make a statement and she implicated her husband. He stated that he made an endorsement on the Gowramma's statement recorded by PW-5 HC Ramachari. The High Court has noted that PW-4 Dr. Parthasarathy has made endorsement on Exhibit-P19 that Gowramma was in a fit condition to make a statement. The High Court has also noted that in Exhibit-17, which is the case sheet of Gowramma, it is stated that she was conscious. But, assuming he has not made any endorsement on Gowramma's dying declaration that she was in a fit state of mind to make a statement that does not affect the credibility of the prosecution story. He stated on oath in the court that Gowramma was in a position to give statement and, therefore, he permitted PW-5 HC Ramachari to record her statement. An independent professional like PW-4 Dr. Parthasarathy must be trusted when he makes such a categorical statement with a sense of responsibility. Moreover, in *Laxman v. State of Maharashtra*[8] this Court has made it clear that certification by the doctor about the fitness of the declarant's mind is a rule of caution. But, if the doctor certifies that the patient was conscious, but does not certify that he was in a fit state of mind, the dying declaration is not liable to be rejected if the Magistrate who records the statement deposes about the fit state of mind of the declarant. That would be sufficient to give the dying declaration legal acceptability. On the same analogy once the doctor who examined the deceased, himself states that the deceased was in a position to make a statement and that she was conscious, absence of his endorsement on the statement B C D E F G

8. AIR 2002 SC 2973. H

A to that effect is of no consequence. Besides, PW-4 Dr. Parthasarathy stated that Gowramma had received 34% burns. She died about five days after the incident. Therefore, it is not possible to hold that she could not have made any dying declaration. It is argued that PW-4 Dr. Parthasarathy's B presence in the hospital is doubtful. It is true that PW-4 Dr. Parthasarathy stated that he was relieved from Emergency Ward at 8.00 p.m. But, he has clarified that he was in Burns Ward till morning of 18/10/1991. There is no reason to doubt his statement.

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14. PW-5 HC Ramachari has corroborated PW-4 Dr. Parthasarathy. He stated that on 17/10/1991 when he received the information he went to the Victoria Hospital. He requested PW-4 Dr. Parthasarathy to allow him to record the statement of Gowramma. PW-4 Dr. Parthasarathy told him that he could D record her statement and accompanied him to Burns Ward. He found that Gowramma was in a position to talk. He, then, recorded her statement which is at Exhibit-P19. He further stated that Gowramma told him that at 6.00 p.m. the appellant demanded that house property should be transferred to his E name and then he poured kerosene on her and set her on fire. He, then, presented Memo Exhibit-P18 to the Station House Officer. Thus, evidence of PW-4 Dr. Parthasarathy is fully corroborated by this witness. We have no hesitation to record that both these witnesses are truthful and the trial court erred F in rejecting their evidence.

15. As we have already noted, PW-2 Chikkaeeramma and PW-3 Hanumantharayappa have turned hostile. It is apparent that they have tried to help the appellant. In that effort they have G come out with the accidental death theory which was not even urged by the appellant. The appellant could have very easily come out with it in his statement recorded under Section 313 of the Code. PW-2 Chikkaeeramma and PW-3 Hanumantharayappa are, therefore, completely exposed. It is sad that even parents did not stand by their daughter. We do H not understand how a woman, particularly a mother, turned her

back on the daughter. Possibly these witnesses were bought over by the appellant. Such conduct displays greed and lack of compassion. If they were threatened by the appellant and were forced to depose in his favour it is a sad reflection on our system which leaves witnesses unprotected. The reasons why witnesses so frequently turn hostile need to be ascertained. There is no witness protection plan in place. In *Zahira Habibullah Sheikh (5) v. State of Gujarat*[9] this Court spoke about importance of witnesses and their protection. The relevant paragraphs read as under:

> " "Witnesses" as Bentham said: are the eyes and ears of justice. Hence, the importance and primacy of the quality of trial process. If the witness himself is incapacitated from acting as eyes and ears of justice, the trial gets putrefied and paralysed, and it no longer can constitute a fair trial. The incapacitation may be due to several factors, like the witness being not in a position for reasons beyond control to speak the truth in the court or due to negligence or ignorance or some corrupt collusion. Time has become ripe to act on account of numerous experiences faced by the courts on account of frequent turning of witnesses as hostile, either due to threats, coercion, lures and monetary considerations at the instance of those in power, their henchmen and hirelings, political clouts and patronage and innumerable other corrupt practices ingeniously adopted to smother and stifle the truth and realities coming out to surface rendering truth and justice, to become ultimate casualties. Broader public and societal interests require that the victims of the crime who are not ordinarily parties to prosecution and the interests of the State represented by their prosecuting agencies do not suffer even in slow process but irreversibly and irretrievably, which if allowed would undermine and destroy public confidence in the administration of justice, which may ultimately pave way for anarchy, oppression and injustice resulting in complete

9. (2006) 3 SCC 374.

A breakdown and collapse of the edifice of rule of law, enshrined and jealously guarded and protected by the Constitution. There comes the need for protecting the witness. Time has come when serious and undiluted thoughts are to be bestowed for protecting witnesses so B that the ultimate truth is presented before the court and justice triumphs and that the trial is not reduced to a mockery.

... ...

C ... ...

The State has a definite role to play in protecting the witnesses, to start with at least in sensitive cases involving those in power, who have political patronage and could D wield muscle and money power, to avert trial getting tainted and derailed and truth becoming a casualty. As a protector of its citizens it has to ensure that during a trial in the court the witness could safely depose the truth without any fear of being haunted by those against whom E he had deposed... ... ."

We share the above sentiments. Unless the witnesses are protected the rise in unmerited acquittals cannot be checked. It is unfortunate that this important issue has not received necessary attention.

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16. In any case, the trial court should have seen through the insincerity and dishonesty of PW-2 Chikkaeeramma and PW-3 Hanumantharayappa and having regard to the independent evidence of PW-4 Dr. Parthasarathy, which is G corroborated by the evidence of PW-5 HC Ramachari the trial court should have held that the deceased was in a fit mental condition to make a dying declaration and, therefore, her dying declaration can be relied upon.

17. It is well settled that a conviction can be based on a H dying declaration recorded properly when the declarant is in a

fit mental condition to make it. It should be truthful and voluntary. All these tests are satisfied in the present case. Judgments on which reliance is placed by the appellant's counsel are not applicable to the case on hand. In *Nallapati* the medical evidence on record and other attendant circumstances were altogether ignored and dying declaration was relied upon. In those circumstances this Court while reiterating its view in *Laxman* rejected the dying declaration in the peculiar facts of the case. In *Mehiboobasab* the deceased wife had made four dying declarations in which she had taken contradictory stands. This Court was primarily dealing with inconsistent dying declarations. While observing that a conviction can indisputably be based on a dying declaration if it is voluntarily and truthfully made this Court set aside the conviction based on the dying declarations on the ground of their inconsistency. Inconsistency in dying declaration is not a ground of attack in this case. In any case, there is consistency between the statement of Gowramma recorded by PW-4 Dr. Parthasarathy, which is at Exhibit-P16(b), the history recorded in Gowramma's case sheet, which is Exhibit-P17 and statement of Gowramma recorded by PW-5 HC Ramachari, which is at Exhibit-P19. This judgment is, therefore, not applicable to the present case. *Rasheed Beg* also turns on its own facts. There in the second dying declaration two additional names were added. This Court found it not safe to rely on the dying declarations. This judgment must be restricted to its own facts and has no application to the present case. In *Kake Singh* a good part of the brain of the deceased was burnt. The doctor had not categorically stated that the deceased was conscious when he made the dying declaration. Hence, no reliance was placed on it. In the present case the doctor has categorically stated that the deceased was in a position to make a statement. No parallel can, therefore, be drawn from *Kake Singh*. The doctor's evidence which is supported by the evidence of PW-5 HC Ramachari and other attendant circumstances establishes that the dying declaration of Gowramma is truthful and it was voluntarily made by her when she was in a fit state of mind.

A 18. There is also no substance in the submission that there is no motive. The appellant wanted the property standing in the name of the deceased to be transferred to his name, which the deceased was not prepared to do. There is no reason to disbelieve PW-5 HC Ramachari on this aspect.

B 19. Besides, the conduct of the appellant speaks volumes. He was absconding and could be arrested only on 19/02/1992. Moreover, in his statement recorded under Section 313 of the Code he has not explained how the deceased received burn injuries. He did not set up the defence of alibi. It was obligatory C on him to explain how the deceased received burn injuries in his house. His silence on this aspect gives rise to an adverse inference against him. It forms a link in the chain of circumstances which point to his guilt.

D 20. Minor discrepancy in the time of recording of dying declaration creates no dent in the prosecution story which is, otherwise, substantiated by reliable evidence. Certain documents like inquest panchanama and post-mortem notes do not state that kerosene smell was emanating from the body E of Gowramma. When there is overwhelming evidence on record to establish that kerosene was poured on Gowramma and she was set on fire, it is absurd to argue that the prosecution case should be disbelieved because it is not mentioned in certain documents that kerosene smell was emanating from her body.

F 21. The submission that there is delay in lodging the FIR must be rejected. PW-5 HC Ramachari recorded the dying declaration at about 10.30 p.m. on 17/10/1991. He, then, presented Memo Exhibit-P18 to the Station House Officer. Thereafter, PW-6 ASI S. Nanjudappa of Vijayanagara Police G Station recorded the FIR at about 11.30 p.m. In the facts of this case, we find that there is no delay in recording the FIR. Hence, it is not necessary to refer to *Meharaj Singh* which is relied upon on this aspect.

H 22. Similarly, we find that there is no unexplained delay in

forwarding FIR to the Magistrate. FIR was recorded at about 11.30 p.m. on 17/10/1991. PW-6 ASI S Nanjudappa has explained that since the constable was going to the Court on the next day, he gave the FIR to him on the next day i.e. 18/10/1991 and it reached the Magistrate at about 4.30 p.m. on 18/10/1991. In the facts of this case this time lag can hardly be described as delay and, in any case, acceptable explanation is offered by PW-6 ASI S Nanjudappa. It is, therefore, not necessary to refer to *Bijoy Singh* where this Court was dealing with a case where FIR was registered on 25/08/1991 at about 2.30 a.m. and copy thereof was received by the Magistrate on 27/08/1991. It is pertinent to note that even in that case this Court observed that sending copy of the special report to the Magistrate under Section 157 of the Code is the only external check on the working of the police agency imposed by law which is to be strictly followed. But, that delay by itself does not render the prosecution case doubtful. If the delay is reasonably explained no adverse inference can be drawn against the prosecution.

23. In the ultimate analysis, therefore, we are of the view that the High Court was perfectly justified in interfering with the trial court's order. The acquittal of the appellant was wrongly recorded. The High Court, however, adopted a kindly approach and convicted the appellant under Section 304 Part-II of the IPC and sentenced him to six years RI because the incident is of the year 1991. Surprisingly, the appellant has made a grievance about this and stated that the appellant's case does not fall under Section 300 of the IPC and, therefore, it cannot fall under any of its exceptions and that the High Court has not assigned any reasons for convicting the appellant under Section 304 Part-II. This submission deserves to be rejected. Besides, the High Court has given reasons. So, it is wrong to say that no reasons are assigned by the High Court. Since the State has not approached this Court with a grievance that the sentence awarded is too low and should be enhanced, we refrain from commenting on this argument. Judgment of this Court in *State*

A *of U.P. v. Virendra Prasad*[10] is not at all applicable to this case and hence, it is not necessary to discuss it. The High Court was merciful. In the absence of State appeal, at this distance of time, we are inclined to simply dismiss the appeal. The appeal is, therefore, dismissed. The appellant is on bail. His bail bonds
B stand cancelled. He shall surrender before the concerned court.

Bibhuti Bhushan Bose Appeal dismissed.

10. (2004) 9 SCC 37.