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HARISH KUMAR

v.

STATE OF HARYANA

(Criminal Appeal No. 1297 of 2011)

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DECEMBER 16, 2014.

**[VIKRAMAJIT SEN AND PRAFULLA C. PANT, JJ.]**

*Penal Code, 1860: s. 304B, 498-A – Dowry death – Death by burn injuries – Conviction of husband of victim-deceased – Defence relying on the dying declaration recorded by DW-2, Naib Tehsildar in presence of DW-1, Medical Officer to the effect that burn injuries were accidental and no one responsible for same – Held: As regards cruelty on account of demand of dowry, there was sufficient evidence to establish the charge – However, defence was able to discharge its onus to rebut the presumption u/s.113B of Evidence Act in respect of s.304-B – The dying declaration was voluntary and truthful – DW-1 and DW-2 were not interested witnesses – Rather they were independent public witnesses who had discharged their duties after the police approached DW-2, Tehsildar in response to memorandum (Ruqa) received from DW-1, Medical Officer – The dying declaration was voluntary and truthful – Conviction u/s.498-A is upheld while conviction u/s. 304-B is set aside – Evidence Act, 1872 – s.113B.*

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**Partly allowing the appeal, the Court**

**HELD: 1.** As far as cruelty on account of demand of dowry was concerned, there is sufficient evidence adduced by PW 8 (father of deceased) and PW 9 (mother of deceased) which was corroborated by PW 5 (neighbour) and PW 10 (grand father of the deceased) to establish the charge. As such charge under Section 498A IPC stood proved against accused. But the finding as to whether death of deceased was accidental or not, required careful scrutiny particularly in view of the fact

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that deceased gave dying declaration five days before her death to the public servant in the presence of medical officer, after police requested Tehsildar for recording the same. [Para 17][1307-G-H; 1308-A-C] A

2. Certain facts cannot be ignored in this case. Firstly, immediately after the incident, within half an hour the husband took his wife to the hospital and got her admitted to Civil/General Hospital where medico legal examination was recorded by the doctor PW-1. The parents of the deceased were informed about the incident and they visited their injured daughter in the hospital, as is apparent from the statements of PW-8 and PW-9. The deceased died five days after the incident. It also came on the record that PW-1 sent a memo (ruqa) to police, on which, as stated by PW-13 SI request was sent to Tehsildar for recording of dying declaration. PW-13 SI has stated that Tehsildar marked the request of the police to the Naib Tehsildar on which Naib Tehsildar on 14.9.1993 recorded the dying declaration. DW-1, Medical Officer of the hospital where the deceased was admitted, was present at the time of recording of dying declaration and he made the endorsement that the patient was in a fit condition to make it. [Para 20][1308-F-H; 1309-A-D] B C D E

3. DW-1 and DW-2 were not interested witnesses. Rather they were independent public witnesses who have discharged their duties after the police approached Tehsildar in response to memorandum (Ruqa) received from PW-1. The dying declaration made by the deceased before Naib Tehsildar in the presence of Medical Officer was voluntary and truthful. The defence has discharged its onus to rebut the presumption that could have been gathered under Section 113B of the Indian Evidence Act, in respect of offence punishable under Section 304-B I.P.C. The conviction of the appellant under Section 498A F G

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A IPC, is upheld and sentenced him to rigorous imprisonment for a period of three years, which he has already undergone, and set aside the conviction and sentence recorded against the appellant, in respect of the offence punishable under Section 304B IPC.

B [Paras 22, 23, 25][1310-E-G; 1311-D-G]

*Surender Kumar v. State of Punjab* (2012) 12 SCC 120 : 2012 (9) SCR 1019 ; *Nallam Veera Stayanandam and Ors. v. Public Prosecutor, High Court of A.P.* (2004) 10 SCC 769 – relied on.

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*Smt. Shanti and Anr. v. State of Haryana* AIR 1991 SC 1226 : 1990 (2) Suppl. SCR 675 – referred to.

#### CASE LAW REFERENCE

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1990 (2) Suppl. SCR 675	referred to.	Para 11
2012 (9) SCR 1019	relied on.	Para 23
(2004) 10 SCC 769	relied on.	Para 24

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CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No(s). 1297 of 2011.

From the Judgment and Order dated 07-12-2010 of the High Court of Punjab and Haryana at Chandigarh in Criminal Appeal No. 310-SB of 2001.

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Kaushal Yadav, Adv. for the Appellant.

Manjit Singh, AAG, Tarjit Singh, Mrs. Vivekta Singh, Kamal Mohan Gupta, Advs. for the Respondent.

The Judgment of the Court was delivered by

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**PRAFULLA C. PANT, J.**

1. This appeal is directed against judgment and order dated 7.12.2010, passed by the High Court of Punjab and Haryana in Criminal Appeal No. 310-SB of 2001 whereby the

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High Court has dismissed the appeal of the appellant Harish

Kumar. He was convicted by the Additional Sessions Judge, A  
Hisar in Sessions Case No. 1 of 1994 under Sections 304B  
and 498A IPC, and sentenced to rigorous imprisonment for  
seven years.

2. We have heard learned counsel for the parties at length B  
and perused the record of the case.

3. Brief facts of the present case are that accused Harish C  
Kumar got married with Manisha (deceased) on 14.1.1992.  
The couple was blessed with a son in the month of November,  
1992. They used to live in Hansi in the district of Hisar, Haryana.  
On 13.9.1993 at about 10.30 p.m., Manisha suffered burn  
injuries, and she was immediately taken by her husband Harish  
Kumar (appellant) to Civil/General Hospital where she was  
admitted at 11.00 p.m., i.e., within half an hour of the incident.  
PW-1 Dr. M.L. Kalra, Medical Officer of said hospital, who D  
admitted the patient, recorded following medico legal injuries:

“Superficial burn injuries on anterior part of neck, most  
part of trunk, right side of back, both buttock, both thighs,  
including knees, right foot, most of left upper limb total  
area of burn 50-60%”. E

In the opinion of the Medical Officer (PW-1), nature of  
injuries was dangerous to life, probable duration of injuries  
within 36 hours. In the column - History/outdoor - “accidental  
burn injuries” were mentioned in the medico legal report (Copy  
Annexure P-1). The Medical Officer sent a memo (Ruqa) Ext. F  
PB to Police Station. On next day, i.e., 14.9.1993, a dying  
declaration (Copy Annexure P-2) was recorded by Baru Ram,  
Naib Tehsildar (DW-2) in the presence of Dr. Surender Singh  
(DW-1) of the Civil/General Hospital, Hansi.

4. In her dying declaration recorded on 14.9.1993 by the G  
Naib Tehsildar in the presence of the Medical Officer, the  
deceased made a statement of which English translation reads  
as under: –

- A        *"My marriage was performed with Harish about two years back, and there is a son aged 9 months from the wedlock. There is no quarrel between us. In the night of 13.9.1993 at about 10.30 p.m., all of a sudden, there was failure of power. I went to the room as I wanted to lit*
- B        *the lamp by striking the match stick. I had to take out milk to feed my child. The match box was not in good condition. I had to strike match sticks 3-4 times, and one of it fell on my maxi, which I was wearing at the time. It caught fire from the side of bottom. I tried to*
- C        *douse it. But it kept on spreading. On this I called my husband Harish, who put a blanket on me, and also poured 2-3 matkas of water on me. Then he went out, and on finding a scooter, my husband took me to*
- D        *hospital. No one has set the fire or ablazed, and it was accidental."* (Emphasis supplied)

At the bottom of the above statement Dr. Surender Singh DW-1 certified that Manisha Bhatia (deceased) gave the statement in his presence and he remained present throughout the course of statement, and the patient was fit to give the

E        statement. From Annexure P-2 it reveals that it was recorded at 10.45 a.m. on 14.9.1993, and Manisha put her thumb impression under it. It was also mentioned in Annexure P-2 by PW-13 Sub Inspector Ami Chand, who was posted at Police Station, City Hansi, that the police received a memo (Ruqa)

F        from the Medical Officer of the hospital, but when in the night Constable Patak Singh went there, the patient was not in a fit condition to make the statement at that point of time. It is further endorsed by PW-13 that on 14.9.1993 on the instruction of Tehsildar the dying declaration was got recorded at the hands

G        of Naib Tehsildar (DW-2), after taking the opinion from the Medical Officer (DW1). It is further mentioned at the end of the endorsement by PW-13 that it appears that on striking of a match stick in the night to lit the lamp, it fell and the maxi caught

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fire. It is further endorsed that, however, the matter would be investigated, and action would be taken as per the findings. A

5. It further reveals from the record that parents of Manisha were informed about the incident, and they visited her in the hospital. It has also come on the record that later Manisha was referred to Rohtak Medical College for further treatment. B

6. On 19.9.1993 (about five days after the incident) Manisha succumbed to burn injuries (in Rohtak Medical College, Hospital). It appears that her body was sealed by the police, and sent for post mortem examination. PW-3 Dr. Nalini Cooner conducted post mortem examination on the very day (19.9.1993) and opined that cause of death of the deceased was due to burns and its complications. She further opined that burns were anti mortem in nature and were sufficient to cause death in ordinary course of nature. In her report, she further recorded that probable time that elapsed between death and post mortem was within 24 hours. C D

7. It appears that though the parents of the deceased not only visited their daughter in the hospital, but also came to see her dead body before the same was cremated, but no information was given to the police till 23.9.1993. It is only on 23.9.1993 PW-8 Subhash Chand (father of the deceased) gave First Information Report alleging that husband of the deceased and her in-laws harassed her for non-fulfillment for demand of dowry. He alleged that accused Harish Kumar asked him to buy a house for him but he was not able to fulfill the demand. It is also alleged in the First Information Report by the informant that his son-in-law Harish Kumar also made demand of scooter for which he paid Rs.11,000/- to him, but the accused insisted for full amount of Rs.20,000/-. He (PW-8) admitted (in the FIR) that he went to Rohtak Medical College to see his daughter but she was in unconscious condition. Informant Subhash Chand (PW-8) stated in the Report that he was told by "KISI" E F G

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A that Manisha told him/her that at the time her statement was recorded by the Magistrate, she (deceased) was under threat of Harish, else he would have killed her son.

8. On the above report FIR No. 284 was registered at Police Station, City Hansi at about 7.50 p.m. on 25.9.1993. B After interrogation of the witnesses, the Investigating Officer, PW-11, Inspector Jai Prakash, the then Station House Officer of Police Station, City Hansi, arrested accused Harish Kumar, his younger brother Krishna and his mother Ishwari Devi. On conclusion of investigation charge sheet appears to have been C filed against all the three accused for their trial in respect of offences punishable under Sections 498A, 304B and 506 IPC. The Sessions Judge, on committal of the case, after hearing the parties, framed charge of offences punishable under Sections 498A and 304B IPC and, in the alternative, charge D of offence punishable under Section 302 IPC read with Section 34 IPC on 2.2.1994 against all the three accused who pleaded not guilty and claimed to be tried.

9. Prosecution got examined PW-1 Dr. M.L. Kalra (the E Medical Officer who recorded medico legal injuries at the time of admission in the hospital), PW-2 Shamsher Singh (formal witness), PW-3 Dr. Nalini Cooner (who conducted post mortem examination), PW-4 Subhash Chand (alleged landlord), PW-5 Hans Raj (neighbour of the accused and deceased), PW-6 F Raj Rani (aunt of the deceased), PW-7 S.I. Dharampal (formal witness), PW-8 Subhash Chand (informant and father of the deceased), PW-9 Veena Bhatia (mother of the deceased), PW-10 Hari Chand (grandfather of the deceased), PW-11 Inspector Jai Prakash (who investigated the crime), PW-12 G Inspector Ram Dhan (formal witness) and PW-13 Sub Inspector Ami Chand (who made endorsement in the dying declaration dated 14.9.1993).

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10. Oral and documentary evidence was put to the accused Harish Kumar on 10.2.1999 under Section 313 CrPC in reply to which he alleged that the evidence adduced against him is false. Other accused also pleaded the same. In defence DW-1 Dr. Surender Singh, Medical Officer of Civil/General Hospital before whom dying declaration was recorded, and DW-2 Baru Ram, Naib Tehsildar, who recorded the dying declaration, were examined.

11. The trial court, after hearing the parties, found that the prosecution has sufficiently proved charge of offence punishable under Sections 498A and 304B IPC against all the three accused, namely, Harish Kumar (husband), Krishna (brother-in-law) and Ishwari Devi (mother-in-law) and after hearing on sentence each one of them was sentenced to seven years rigorous imprisonment under Section 304B IPC with the observation that no separate sentence is required to be awarded under Section 498A IPC in the light of **Smt. Shanti and another v. State of Haryana**<sup>1</sup>.

12. Aggrieved by said judgment and order dated 28.2.2001/1.3.2001, passed in Sessions Case No. 1 of 1994, all the three convicts filed Criminal Appeal No. 310-SB of 2001. The High Court after hearing the parties, allowed the appeal of co-accused Ishwari Devi and Krishna, PW 4 has stated that said two accused were not living with deceased and her husband. However, the appeal of Harish Kumar (husband) was dismissed. Hence, this appeal before us by the accused Harish Kumar by way of Special Leave Petition. The leave was granted by this Court on 4.7.2011.

13. Before further discussion we think it just and proper to mention the relevant provisions of law applicable to this case. Section 304B IPC reads as under: -

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<sup>1</sup>AIR 1991 SC 1226

A        **“304B. Dowry death.** – (1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by  
 B        her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called “dowry death”, and such husband or relative shall be deemed to have caused her death.

C        *Explanation* – For the purpose of this sub-section “dowry” shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).

D        (2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life.”

14. Section 498A IPC reads as under: -

E        **“498A. Husband or relative of husband of a woman subjecting her to cruelty.** – Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

F        *Explanation.* – For the purpose of this section, “cruelty” means –

- G        (a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or
- (b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property

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or valuable security or is on account of failure by her or any person related to her to meet such demand.” A

15. Section 113B of the Indian Evidence Act, 1872 provides as under: -

**“113B. Presumption as to dowry death.** – When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death. B C

*Explanation* – For the purpose of this section, “dowry death” shall have the same meaning as in Section 304B of the Indian Penal Code (45 of 1860).” D

16. From the language of Section 304B IPC read with Section 113B of the Indian Evidence Act it is clear that once death of a woman is caused by any burn or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage, and if it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband in connection with demand of dowry, such husband or relative shall be deemed to have caused her death and the court shall presume it. In other words, in the cases of dowry death, as defined in Section 304B IPC, after evidence adduced by the prosecution and conditions mentioned in Section 113B Indian Evidence Act, are fulfilled, court has to take a presumption, and burden shifts on the accused to rebut the presumption. E F

17. As far as cruelty on account of demand of dowry is concerned, there is sufficient evidence adduced by PW 8 Subhash Chand (father of deceased) and PW 9 Veena Bhatia G

A (mother of deceased) which is corroborated by PW 5 Hansraj (neighbour) and PW 10 Harichand (grand father of the deceased) to establish the charge. As such we are not inclined to interfere with the conclusions of the trial court and that of High Court, with regard to the fact that charge under Section  
B 498A IPC stands proved against accused Harish Kumar. But the finding as to whether death of deceased was accidental or not, requires careful scrutiny particularly in view of the fact that deceased has given dying declaration five days before her death to the public servant in the presence of medical  
C officer, after police requested Tehsildar for recording the same.

18. Learned counsel for the appellant submitted that by proving dying declaration of the deceased, recorded on 14.9.1993 by getting examined DW-2 Baru Ram, Naib Tehsildar and DW-1 Dr. Surender Singh, Medical Officer of  
D the hospital, in whose presence the statement was recorded, the accused has discharged the burden to rebut the presumption which could be drawn under Section 113B of the Indian Evidence Act. It is further argued that the courts below have erred in law in ignoring the dying declaration of the  
E deceased.

19. On the other hand, on behalf of the State it is contended that the dying declaration dated 14.9.1993 is given by the deceased under threat from accused Harish Kumar, as  
F such the courts below have rightly not relied upon it.

20. We have considered the rival submissions of the parties and carefully scrutinized the record. There are certain facts which cannot be ignored in this case. Firstly, immediately after the incident at 10.30 p.m. on 13.9.1993, within half an  
G hour the husband took his wife Manisha to the hospital and got her admitted. It is not disputed fact that the husband took the deceased to Civil/General Hospital, Hansi where medico legal examination was recorded by PW-1 Dr. M.L. Kalra at the time of admitting the patient (Manisha). It is also not disputed

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that the parents of the deceased were informed about the incident and they visited their injured daughter in the hospital, as is apparent from the statements of PW-8 Subhash Chand (informant and father of the deceased) and PW-9 Veena Bhatia (mother of the deceased). We have already discussed above that Manisha died on 19.9.1993, five days after the incident. It has also come on the record that PW-1 Dr. M.L. Kalra sent a memo (ruqa) to police, on which, as stated by PW-13 SI Ami Chand, request was sent to Tehsildar for recording of dying declaration. PW-13 SI Ami Chand has stated that Tehsildar marked the request of the police to the Naib Tehsildar on which Naib Tehsildar on 14.9.1993 recorded the dying declaration. It is also relevant to mention here that DW-1 Dr. Surender Singh, Medical Officer of the hospital where Manisha was admitted, was present at the time of recording of dying declaration and he made the endorsement that the patient was in a fit condition to make it.

21. In the above circumstances, we are of the view that the courts below have erred in law in not relying the dying declaration recorded by the Naib Tehsildar in the presence of the Medical Officer, on the request of the police. Strangely, in the First Information Report informant and father of the deceased Subhash Chand (PW 8) has attempted to explain the dying declaration already recorded on 14.9.1993 by mentioning, "MUJHE PATA CHALAKI MERI LADKI MANISHA NE HARISH KE KAHNE PAR JO MAGISTRATE KE SAMNE BAYAAN DIYA THA MANISHA DARADHAMKA RAKHI THI KI LADKE KO BHI JAAN SE MAAR DEGA. MANISHA NE KISI KO YEH BAAT Kahi THI KI MERE PITAJI MILEN TO UNKO YEH BAATTEN BATA DENA." ( I came to know that my daughter who made statement before the Magistrate was under threat from her husband that her son would be killed. Manisha told this to "KISI" (someone) whom she requested to convey it to her father.) The prosecution has attempted to

A explain the Hindi word “KISI” (someone) by saying that it was  
 nick name of PW-6 Raj Rani (aunt of the deceased). The  
 explanation given by the witnesses as to the nick name of PW-  
 6 Raj Rani, is not convincing as PW-6 Raj Rani is admittedly a  
 real sister-in-law of the informant, and real aunt of the  
 B deceased. As such there should have been no difficulty, for  
 the informant to mention in the First Information Report that it  
 was the aunt of the deceased to whom Manisha told to convey  
 the above alleged fact.

C 22. PW-1 Dr. M.L. Kalra, Medical Officer of Civil/General  
 Hospital, Hansi, in his cross-examination, has stated as  
 under: -

D “The patient was brought to the hospital by her husband  
 Harish Bhatia. She was not unconscious when she was  
 brought to the hospital....”

E In the examination-in-chief of this witness it has been  
 stated by him, - “she gave history of accidental burn injuries”.  
 This fact recorded by PW-1 in the medico legal report (copy  
 Annexure P-1) further corroborates the dying declaration  
 recorded on the next day (on 14.9.1993) by the Naib Tehsildar.  
 F Needless to say that DW-1 Dr. Surender Singh and DW-2 Baru  
 Ram, Naib Tehsildar, are not interested witnesses. Rather they  
 are independent public witnesses who have discharged their  
 duties after the police approached Tehsildar in response to  
 memorandum (Ruqa) received from PW-1 Dr. M.L. Kalra.

G 23. Considering the above facts and circumstances, we  
 find that the dying declaration dated 14.9.1993, made by the  
 deceased, before Naib Tehsildar in the presence of Medical  
 Officer, is voluntary and truthful. In ***Surender Kumar v. State  
 of Punjab***<sup>2</sup>, this Court has observed, in para 20, as under: -

“It is also not obligatory that either an Executive Magistrate  
 or a Judicial Magistrate should be present for recording  
 a dying declaration. It is enough that there is evidence

available to show that the dying declaration is voluntary and truthful. There could be occasions when persons from the family of the accused are present and in such a situation, the victim may be under some pressure while making a dying declaration. In such a case, the court has to carefully weigh the evidence and may need to take into consideration the surrounding facts to arrive at the correct factual position.”

24. In ***Nallam Veera Stayanandam and others v. Public Prosecutor, High Court of A.P.***<sup>3</sup>, in the similar facts and circumstances of the case, this Court, at the end of para 6, has observed as under: -

“In cases where there is more than one dying declaration, it is the duty of the court to consider each of them in its correct perspective and satisfy itself which one of them reflects the true state of affairs.”

Therefore, in view of the law laid down by this Court as above, in the present case we find sufficient evidence that the defence has discharged its onus to rebut the presumption that could have been gathered under Section 113B of the Indian Evidence Act, in respect of offence punishable under Section 304-B I.P.C. That being so, following the principle of law laid down in ***Nallam Veera Stayanandam and others v. Public Prosecutor, High Court of A.P.*** (supra), we uphold the conviction of the appellant Harish Kumar under Section 498A IPC, and sentence him to rigorous imprisonment for a period of three years, which he has already undergone, and set aside the conviction and sentence recorded against the appellant, in respect of the offence punishable under Section 304B IPC. The appellant is on bail. He need not surrender. Accordingly the appeal stands partly allowed.