REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO(S). 534-535 OF 2012

Banarsi Dass and others ... Appellant (s)

Versus

State of Haryana ... Respondent (s)

J U D G M E N T

KURIAN, J.:

1. The appellants faced trial under Section 498A read with Section 304B read with Section 34 of the Indian Penal Code (45 of 1860) (hereinafter referred to as 'IPC'). The trial court acquitted them under Section 304B of IPC but convicted them under Section 498A of IPC. The State took up the matter in appeal before the High Court against the non-conviction under Section 304B of IPC. The High Court allowed the appeal and convicted them under Section 304B of IPC also. During the pendency of the appeal, appellant no.1-father-in-law of the deceased and appellant no.2-mother-in-law of the deceased expired. Therefore, the appeals survive only in respect of

appellant no. 2-husband of the deceased, appellant no.3-elder brother of the deceased and appellant no.4-younger brother of the deceased.

2. The deceased Chander Kalan was the sister of PW-12-Mahabir and PW-13-Satpal and the wife of accused-Ramesh Kumar. The marriage was on 14.04.1995. The allegation is that on account of non-payment of the dowry as demanded by the husband and in-laws, she was being ill-treated. One such incident was on 01.01.1997 and she lost a couple of teeth. There was a Panchayat and the matter was compromised and therefore, the case then registered under Section 498A read with Section 323 of IPC was not pursued. It is alleged that even thereafter the attitude of the in-laws did not change. On 18.06.1998, it is alleged that she was beaten and pushed out of the house and at around 02.00 p.m., the accused sprinkled kerosene on her and set her on fire. She was admitted in the hospital by 05.00 p.m. and examined by PW-1-Dr. S.D. Goyal, who found that Chander Kalan suffered burn injuries which were approximately 45%. On his request, PW-16-ASI Jagdeep Singh recorded Exhibit-PM-dying declaration. Thereafter, she was admitted in the hospital of PW-9-Dr. Soni on 19.06.1998 and, on 17.07.1998, she was further shifted to the hospital of PW-5-Dr.

SubhashVerma, where she died on 04.08.1998. PW-2-Dr. V.K. Kawatra conducted the postmortem along with Dr. Arun Gupta.

3. The trial court chose not to believe Exhibit-PM-dying declaration, but relied on the evidence of PW-5-Dr. Subhash Verma and PW-6-Lalman, Tehsildar and ruled out the possibility of burning by the accused. However, having found that there is evidence to establish cruelty, all the accused were convicted under Section 498A of IPC. The High Court, in the appeal by the State, entered the following conclusion at paragraphs-8 to 10:

> "8. Ex.PM the dying declaration of Chander Kalan recorded by PW16 ASI Jagdeep Singh and PW6 Lalman Tehsildar is found to be an important document which ultimately determines the crime committed by the accused. PW1 Dr. S.D. Goyal who examined Chander Kalan on 18.6.1998 at about 5.00 pm has deposed that Chander Kalan was in a fit state of mind. PW6 Lalman Tehsildar and PW16 ASI Jagdeep Singh also would depose that the dying declaration of Chander Kalan was recorded by PW16 ASI Jagdeep Singh only after the opinion was expressed by the doctor that Chander Kalan was in a fit state of mind. It is relevant to note at this state that the occurrence took place as early as on 18.6.1998 at about 2:00 pm. Unfortunately Chander Kalan passed away only on 4.8.1998 in the hospital of Dr. Subhash Verma who was examined as PW5. Chander Kalan had survived for about one and a half month with 40 to 45% burn injuries on her person. The above materials would go to establish that Chander Kalan was infact in a fit state of mind to give declaration as to the cause of her death.
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> 9. PW16 ASI Jagdeep Singh should have in all fairness approached the Judicial Magistrate for recording the dying declaration. Anyway the position of the law is very clear that the dying declaration may not be in

writing. The dying declaration of a dying person can be given to any person for that matter, as otherwise the person who is in the death bed would pass away before the respectable person comes to the hospital for recording the dying declaration. In this case the deceased survived for about one and a half month. She sustained only 40 to 45% burn injuries. She was also in a fit state of mind at the time when PW16 inquired about her health from the doctor who gave treatment to her. As already pointed out by me PW16 had associated PW6 Lalman Tehsildar for recording the dying declaration of Chander Kalan. Just because PW16 failed to associate the learned Judicial Magistrate, the Court cannot throw away the dying declaration given by Chander Kalan, if the dying declaration is found to be truthful and is found to have been given without any influence from outside.

10. Of course, PW6 Lalman Tehsildar would depose that PW13 Satpal was very much present and he was found chatting with Chander Kalan at the time when they descended on the ward to record the dying declaration of Chander Kalan. The relatives of the injured person fighting for life would naturally inquire about the health of the injured person. The relatives cannot be kept away from their natural inquiry about the health of the injured just because dying declaration was to be recorded from the dying person. PW13 Satpal was very much present when the dying declaration was recorded. In fact PW13 Satpal had subscribed his signature to dying declaration Ex.PM as a witness to the same document. The presence of the relative does not *ipso facto* cast a doubt on the veracity of the dying declaration."

4. On the basis of the above discussion, the High Court entered the following finding at paragraph-12, which reads as follows:

"12. I find that the dying declaration given by Chander Kalan to PW16 ASI Jagdeep Singh in the presence of PW6 Lalman Tehsildar is found to be truthful and the same has been given without any external influence.

> The dying declaration gave a graphic account of the earlier occurrence wherein she received an attack from these accused and the persistent demand of dowry made by the accused which culminated in the present occurrence wherein she was put to death by sprinkling kerosene upon her and setting fire by the accused. I do not entertain any doubt as to the veracity of the dying declaration given by Chander Kalan. The trial court has rejected the dying declaration not only on the flimsy ground but also on pure surmise."

5. Heard learned Counsel appearing for both the parties.

6. According to learned Counsel appearing for the appellants, there is absolutely no justification in convicting the appellants under Section 304B of IPC and Section 498A of IPC. However, learned counsel appearing for the respondent-State contends that in view of the overwhelming evidence which has been minutely discussed by the High Court, the conviction under both Section 304B of IPC and Section 498A of IPC are to be sustained.

7. In the nature of the view we propose to take in this case, particularly since the conviction by the High Court is only on the basis of Exhibit-PM-dying declaration, we do not think it necessary to go elaborately into the evidence. It will be sufficient to refer to the evidence of PW-16-ASI Jagdeep Singh, who recorded the dying declaration and the medical evidence. It is seen that the request for recording the statement was first made before the First Divisional Magistrate, Hisar, who in turn directed the Executive Magistrate, Hisar to record the same. The

Executive Magistrate, viz., Tehsildar, Hisar took along with him PW-16-ASI Jagdeep Singh. PW-16 states thus in his evidence:

> "... On reaching the ward Chander Kalan made statement to Tehsildar in my presence and on the asking of Tehsildar I recorded that statement on the dictation of Tehsildar. The statement made by Chander Kalan to the Tehsildar in my presence and dictated to me by Tehsildar Sh. Lal man is Ex.PM. Chander Bhan and Satpal brother of Chander Kalan were standing inside the gate of the ward. They were called and in their presence the statement was read over by me to Chander Kalan and after admitting her statement as correct Chander Kalan thumb marked the statement Ex.PM. Chander Bhan and Satpal also put their signatures under the statement which was attested by the Tehsildar. This statement was forwarded by me to the police station with my endst. Ex.PM/1 got registration of case."
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> (Emphasis supplied)

8. PW-1 is Dr. S.D. Goyal who examined the deceased when she was first brought to the Community Health Centre, Uklana Mandi. He stated as follows:

> "The entire face was having burns. The skin had collected at the edges. The front and back of neck was burnt. The entire front of chest was having burns. Both sides of chest extending a bit to back burnt. Front of abdomen and sides were having burns above umbilicus. There was a small burn patch in lower part of back. Both the arms were having burns in front and back except some part of right fore-arm on back. The hands in front and back were having burns. B.P. was 110/70, pulse 90 per minute, patient was conscious. The duration of injury being within 6 hours. The percentage of burns was 45% approximately."
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> (Emphasis supplied)

9. In cross-examination, it is stated by him that she was brought to the clinic by her husband-Ramesh Kumar along with 3/4 more persons whom the doctor could not identify. It has also clearly come out in the evidence that "except burn injuries, no other injury caused by any other weapon blunt or incised was found on the person of Chander Kalan". And still further, it was noted that there was no sign of any burn mark below umbilicus and on the back of the deceased except one small patch on lower part of the back. The long hair was not affected at all which indicates that the fire was extinguished soon after it caught the clothes of Chander Kalan. According to him, a patient with 45% burns can survive if good and proper medical aid is given to him or her.

10. On the request of PW-1, the patient was shifted to the General Hospital at Hisar for further treatment. PW-9 is Dr. S.K. Soni of Soni Nursing Home, Hisar where the deceased was treated from 19.06.1998 to 17.07.1998. Being a very crucial piece of evidence, we shall extract the same as such:

> "When Chander Kalan was discharged from my hospital she was not having any symptom of septicemia due to infection of burn. Slight infection was there in the burn injuries. This infection could have been cured by skin grafting but the relation of the patient were not prepared for skin grafting operation and for keeping the patient in my hospital. If kerosene had fallen of any part of the body are on the cloth that part of the body and

even it surrounding and the cloth if set ablaze shall catch fire immediately. The burns on the body of Chander Kalan were in the front portion of the body from face to umbilicus. I had advised Chander Kalan and her attendant that Chander Kalan should remain admitted in my clinic for some more days for her complete cure but her relation did not agree and she was discharged. There was no bed sore on the body of Chander Kalan till she remained admitted in my clinic. There were chances of survival of the patient where the burns were 40% if continuous medical care has been given to the patient."

(Emphasis supplied)

11. PW-2 is Dr. V.K.Kawatra, Medical Officer, General Hospital, Hisar, who conducted postmortem. The descriptions of the burns, as noted by him, reads as follows:

"There was a dressed wound on the anterior surface of the both upper limbs, anterior surface of the chest and part of the abdomen above the umbilicus, the anterior surface of the neck and lower part of the face, both shoulders and a little part on the posterior surface of the chest and neck. The dressing was opened. The granulation tissue was present on the front of the chest, arms and neck. There was pus-discharge seen at various places. There were bed sores on the back and at the sacral region. Pus was also seen it. The approximate percentage of burn was 45%."

12. According to Dr. V.K. Kawatra, "the cause of death in the instant case was septicemia due to infected burns". The burns were ante-mortem in nature and sufficient to cause death in the ordinary course of nature.

13. In cross-examination, PW-1-Dr. V.K. Kawatra has deposed as follows:-

> "It is correct to suggest that if proper care should have been taken then the bedsore should not have occurred. There was a great possibility that infection of burn causing septicemia could have been avoided if proper care and treatment had been given to Chander Kalan. I agree in good institution, if there is a proper treatment 45% burns on the parts of the body as found in this case could not have been fatal."
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> (Emphasis supplied)

14. From the evidence which we have extensively extracted above, the emerging factual position is that the dying declaration does not come under Section 32(1) of the Indian Evidence Act, 1872 (hereinafter referred to as "the Evidence Act") and, hence, it is not relevant for the following reasons:

a. The alleged incident of pouring of kerosene on the deceased was on 18.06.1998 at around 02.00 p.m. and the statement is said to have been recorded on the same day.

b. PW-16-ASI Jagdeep Singh, who is also the investigating officer, had not recorded the statement given by the deceased. What he recorded was the statement made by the deceased to the Tehsildar and what the Tehsildar dictated to him. It has come in evidence that the Tehsildar

did not have any problem or difficulty in recording the statement himself. It is also not a case of any translation.

c. The statement does not pertain to the cause of death or circumstances of the transaction which resulted in death. The death in this case on 04.08.1998, after seven weeks of the incident, is not caused by the burns but on account of a serious infection, septicemia caused due to improper management of the wounds.

d. It is to be noted that the patient was initially at the Community Health Centre. Thereafter, she was shifted to General Hospital, from 19.06.1998 to 17.07.1998, she was in Dr. Soni's Hospital and, thereafter, from 17.07.1998 till her death on 04.08.1998 at the Hospital of Dr. Subhash Verma. The available medical evidence clearly shows that the death is not due to the burns. It is due to septicemia and the infection could have been avoided by proper medical care.

15. Section 32(1) of the Evidence Act deals with cases in which statement of the cause of death, by a person who is dead, becomes a relevant fact. To quote:

"**32. Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is**

relevant.-Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:-

(1) when it relates to cause of death.—When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question."

16. A bare analysis of the provision, for the purpose of the case at hand, would show that a statement by a person made before his death to be relevant, the following ingredients are to be satisfied:

i) The statement is made by a person who is conscious and believes or apprehends that death is imminent.

ii) The statement must pertain to what the person believes to be the cause or circumstances of death.

iii) What is recorded must be the statement made by the person concerned, since it is an exception to the rule of hearsay evidence.

iv) The statement must be confidence bearing, truthful and credible as held by this Court in **Laxman v. State of Maharashtra**[1] and consistently followed including the very recent one in **Mallella Shyamsunder v. State of Andhra Pradesh (in Criminal Appeal No. 1381 of 2011 decided on 29.10.2014).**

v) The statement should not be one made on tutoring or prompting.

vi) The court may also scan the statement too see whether the same is prompted by any motive of vengeance.

17. In the case before us, the incident occurred on 18.06.1998 whereas the death is on 04.08.1998. Exhibit-PM-dying declaration was recorded on 18.06.1998 itself. At the time of recording of the statement, the condition of the patient no doubt was very stable and she was in a very good state of mind as recorded by the doctor. The burn injury was only 40-45% of the body and, according to doctor 40-45% burns is not fatal and such a patient can be saved if given proper treatment. It has also

[1] (2002) 6 SCC 710

come out in evidence that the death is not caused by the burns but because of septicemia, an infection on account of improper management of the wounds. It is fairly clear that the patient on 18.06.1998 was not apprehending death, not merely because she lived for more than seven weeks after the incident but because of the nature of the burn injuries which we have referred to above. No doubt, as laid down by this Court in **Najjam Faraghi @ Nijjam Faruqui v. State of West Bengal**[2], merely because a person died long after making the dying declaration, the statement does not become irrelevant. It was a case where the incident was on 29.06.1985 and death was on 31.07.1985 and in that case, there was a certificate by the doctor who conducted the postmortem that death was due to ante-mortem burns and the burns were extending over the whole body. To quote:

> "**9.** There is no merit in the contention that the appellant's wife died long after making the dying declarations and therefore those statements have no value. The contention overlooks the express provision in Section 32 of the Evidence Act. The second paragraph of sub-section (1) reads as follows:
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> > "Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question."

[2] (1998) 2 SCC 45

> No doubt it has been pointed out that when a person is expecting his death to take place shortly he would not be indulging in falsehood. But that does not mean that such a statement loses its value if the person lives for a longer time than expected. The question has to be considered in each case on the facts and circumstances established therein. If there is nothing on record to show that the statement could not have been true or if the other evidence on record corroborates the contents of the statements, the court can certainly accept the same and act upon it. ..."
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> (Emphasis supplied)

In the instant case, however, Exhibit-PM-dying declaration does not either show the cause of death or the circumstances of the transaction which resulted in the death of the declarant-Chander Kalan. The burns were not fatal either.

18. In the facts and circumstances of the present case, Exhibit-PM-declaration does not meet the requirements of a dying declaration under Section 32(1) of the Evidence Act. It has to be noted that the very foundation of the reliability of the dying declaration is the principle of *Nemo moriturus praesumitur mentire* which literally means that no one at the point of death is presumed to lie since one is normally afraid to meet his maker with a lie on his mouth at the time of death.

19. The other major issue is on applicability of Section 304B of IPC. In order to attract Section 304B of IPC, one of the essential ingredients is that death of the married woman should be caused

by burns or bodily injury or that she should have died otherwise than under normal circumstances. In the instant case, it has clearly come out in evidence that the death is not caused by the burns: it is caused by septicemia on account of improper management of wounds. The parts of the body affected by the burns would clearly show that the burns are not caused on account of somebody pouring kerosene on her body and setting her on fire. As can be seen from the medical evidence and the postmortem report, the injuries are on front side of the body from face up to the umbilicus. Her long hair was not burnt at all. The approach of the trial court seems to be quite proper and reasonable, and which, in our view, could not have been better explained. To quote from paragraph-17:

> "According to the version of the accused persons Rajesh accused had come from school and he asked Chander Kalan to prepare meal for him. Chander Kalan who wanted to live separately started grumbling. When Rajesh insisted upon Chander Kalan to prepare meal for him she started lighting the stove and kerosene got sprinkled on her blouse from the stove and it caught fire. Rajesh and his mother Urmila immediately extinguished the fire with the help of a bed sheet and quilt cover. Absence of burn injuries below umbilicus and on the long hair and back of Chander Kalan and recovery of partially burnt bed sheet, partially burnt quilt cover with pieces of blouse of Chander Kalan sticking to these lends support to the defence version that clothes of Chander Kalan caught fire when she was lighting the stove and the fire was immediately extinguished by her mother-in-law Urmila and her husband's brother Rajesh accused. If a stove containing

kerosene is filled with air by pumping and a pin is used for opening the choked nozzle of its burner, the kerosene will gush out of the nozzle with a force and if at that moment a burning stick of match box is used for lighting the stove kerosene will burst into flames which may sometimes rise upto more than a feet. Since the kerosene in such circumstances is partially burnt it may get sprinkled over the face and front portion of the upper garments of the person who is lighting the stove and the garments may catch fire by coming into contact with the rising flames. So, the defence version that clothes of Chander Kalan caught fire when she was lighting the stove appears to be very natural. There is one more aspect of the defence story which lends it credibility. The relation between Chander Kalan and the accused persons were highly strained. All the accused persons subjected her to cruelty in connection with their demand for dowry. Even her teeth were broken by them on 1st January, 1997. The accused also misappropriated the cash and the articles of dowry given to Chander Kalan must have been insisting upon the accused persons to allow her to live separate from them. Because of her strained relations Chander Kalan also must not have liked to cook meal for her husband's brother Rajesh when he came from the school at 2.00 p.m. When she was forced to cook meal for Rajesh, Chander Kalan unwillingly went to the stove in a tense mood and because of tension she must have pumped the air in the stove vigorously and neglected to keep her face and body at a safe distance from the nozzle of the burner of the stove. It was these circumstances which resulted in sprinkling of kerosene on the face and clothes of Chander Kalan and her suffering burn injuries."

20. We are in respectful agreement with the view taken by the trial court as far as the possible version of the burn injuries. The nature of the burn injuries, the extent of the same and the parts of the body affected from face to umbilicus, and the same only

on the front of the body, would clearly show that it was an accident caused while clearing the choked nozzle of the stove.

21. The High Court even otherwise is not justified in reversing the acquittal under Section 304B of IPC on a mere possibility of another view, if at all possible, on the evidence. Unless the judgment of acquittal is passed on no evidence or is perverse or the view taken by the court is wholly unreasonable or is not a plausible view or there is non-consideration of any evidence or there is a palpable misreading of evidence, the High Court is not justified in interfering with the order of acquittal as held by this Court in **Basappa v. State of Karnataka**[3].

22. Thus, Exhibit-PM-statement in the instant case cannot be relied upon at all to convict the accused. The ingredients of Section 304B of IPC are also not made out.

23. The High Court has also found that the appellants are liable to be convicted under Section 498 of IPC holding also that the conviction by the trial court in that regard is to be maintained. On going through the judgment of the trial court, it is fairly evident that the conviction under Section 498A of IPC is on account of the incident on 01.01.1997. That was compromised among the parties and all proceedings were dropped. Thereafter,

[3] (2014) 5 SCC 154

there is no clear evidence as to any cruelty. However, as found by the trial court, there is evidence available regarding harassment of the deceased by the accused/appellant nos. 1, 2, 3, and 5. But in the case of accused/appellant no. 4-Rajesh, who was studying in the school at the relevant time, there is no evidence as to any harassment. Therefore, while maintaining conviction under Section 498A of IPC in respect of appellant nos. 1, 2, 3 and 5, appellant no. 4-Rajesh is liable to be acquitted under Section 498A of IPC as well.

24. Now, regarding the sentence, it is brought to our notice that appellant nos. 2 and 3 have served imprisonment for around two years. Since the appellants are acquitted under Section 304B of IPC and the conviction is only under Section 498A of IPC and since accused/appellant nos. 1 and 5 are no more, and having regard to the facts and circumstances of the case, we are of the view that the sentence of accused/appellant nos. 2 and 3 is to be limited to the period already undergone.

25. In the result, the conviction under Section 304B of IPC in respect of all the appellants is set aside. The conviction under Section 498A of IPC in respect of appellant no. 4-Rajesh is set aside. The conviction under Section 498A of IPC is maintained in respect of accused/appellant nos. 1, 2, 3 and 5.

Accused/appellant nos. 1 and 5 are no more and the appeal as against them is abated. The sentence of accused/appellant nos. 2 and 3 is limited to the period already undergone.

26. It is seen that the deceased had been undergoing treatment from 18.06.1998 till her death on 04.08.1998, initially in two government hospitals and thereafter, for a long period, in two private hospitals. Therefore, we are of the view that the accused/appellants should be made liable to pay compensation to the parents of the deceased. Accused/appellant nos. 2 and 3 are directed to pay total compensation of Rs.1,00,000/- to the parents of the deceased-Chander Kalan within a month from today. In the event of default, the District Magistrate, Hisar shall take appropriate coercive action to recover the amount from accused/appellant nos. 2 and 3 and pay the same to the parents of the deceased, within another six months.

27. The appeals are allowed as above.

.....J.
(KURIAN JOSEPH)

.....J.
(ABHAY MANOHAR SAPRE)

New Delhi;

December 18, 2014.