Mukesh Vs. the State

Mukesh Vs. the State

SooperKanoon Citation : sooperkanoon.com/1170905

Court : Delhi

Decided On : May-16-2014

Judge : Kailash Gambhir

Appellant : Mukesh

Respondent : The State

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI Judgment delivered on: May 16, 2014 + CRL.A. 601/1999 MUKESH Through: ..... Appellant Mr. Krishan Kumar & Ms. Sunita Arora, Advocates with appellant in person Versus THE STATE Through: ..... Respondent Ms. Richa Kapoor, APP for the State with SI Parmendra Kumar, Police Station Paharganj, New Delhi. CORAM: HON'BLE MR. JUSTICE KAILASH GAMBHIR HON'BLE MS. JUSTICE SUNITA GUPTA

JUDGMENT
KAILASH GAMBHIR, J1 By this appeal filed under section 374 of Criminal Procedure Code, 1973 (hereinafter referred to as Cr.P.C.), the appellant seeks to challenge the impugned judgment dated 15.7.1999 and order on sentence dated 16.7.1999 passed by the learned ASJ, whereby the appellant is convicted for committing an offence punishable under Section 302/498-A of the Indian Penal Code, 1860 (hereinafter referred to as IPC). He was sentenced to undergo rigorous imprisonment for life, Crl.A. No.601/1999 together with Page 1 of 35 payment of fine of Rs.1,000/- and in default of payment of fine, he has been

sentenced to further undergo rigorous imprisonment for a period of six months, so far as the offence punishable under Section 302 IPC is concerned. The appellant has also been convicted for the offence punishable under Section 498-A IPC and was sentenced to undergo rigorous imprisonment for one year and to pay fine of Rs.500/- and in default of payment of fine to further undergo rigorous imprisonment for three months.

2. The facts germane to the case of the prosecution are that On 13-6-06, as disclosed in the chargesheet, SI Bhag Chand along with Ct. Gyan Chand, on receipt of DD No.30B, reached place of occurrence at jhuggi No.C-5/C-102, Motia Khan, Pahar Ganj, Delhi, from where it was revealed that Smt. Mamta, the wife of accused Mukesh, had already been removed to RML hospital. In the meanwhile DD No.39-B was received by him and thereupon leaving behind Ct. Gyan Chand at the spot, he reached RML Hospital along with Ct. Ravi Dutt, who had brought the aforesaid DD entry. From the hospital he collected the MLC of injured Mamta, on which the doctor had mentioned 100% burns and declared her unfit for statement. In the hospital itself Smt. Mamtas mother Smt. Teeja met him and gave her statement that her husband died after drinking liquor and that she was working in gum factory at Kamla Nagar and she had two daughters namely Mamta and Sangeeta. Mamta was married to accused Mukesh about 10 years back and out of that wedlock she gave birth to three sons and two daughters, out of which one son died about six months back. Her son-in-law Mukesh started harassing her daughter Mamta because of dowry just after 15/20 days of marriage. He sold the dowry articles which were given to him at the time of marriage and drank liquor. For this, she lodged a complaint with CAW Cell, Nanak Pura and Prasad Nagar. On 12-6-96, her son-in-law Mukesh gave beatings to her daughter Mamta after having consumed liquor and at around 10 pm she came to her jhuggi and told her that on that day her husband Mukesh had again given her beatings. She then told her daughter that she would come in the morning to make Mukesh understand. On the next day, at around 7 am she went to the jhuggi of her daughter and advised her son-in-law and then went for her job at Kamla Nagar. There Smt. Veena, resident of nearby jhuggi, came and told her that Mamta had set herself ablaze after pouring kerosene oil over her. Her daughter burnt herself due to harassment of Mukesh and a legal action was taken against him. In the dying declaration

which was recorded Ex.PW29/B she stated that her husband poured kerosene upon her and set her ablaze.

3. To prove its case the prosecution examined as many as 29 witnesses. After the completion of prosecution evidence, statement of the accused person was recorded under Section 313 of Cr.P.C. wherein the entire incriminating evidence was put to the appellant and in reply the appellant pleaded innocence and false implication at the instance of parents of the deceased. The appellant has also examined two witnesses in his defence.

4. On behalf of the appellant, arguments were addressed by Mr. Krishan Kumar, Advocate. The State was led by Ms. Richa Kapoor, learned Additional Public Prosecutor.

5. Addressing arguments on behalf of the appellant, Mr. Krishan Kumar, Advocate contended that the case of the prosecution primarily rests on the alleged dying declaration made by the deceased proved on record as Ex.PW-29/B but the prosecution has miserably failed to prove the said dying declaration in accordance with law throwing serious doubts on the recording of the said dying declaration by the Investigating Officer. Learned counsel further submitted that in the MLC of the deceased, proved on record as Ex.PW-23/A, there is an endorsement of the doctor certifying the victim fit for statement at 5.30 pm although there are two other endorsements recorded at 11.10 am and 11.45 am declaring the patient unfit for statement, but the prosecution did not cite any doctor as witness or examined him to prove the said endorsements on the MLC. Learned counsel further argued that PW-26 Dr. Renuka Malik was examined by the prosecution but she was not the doctor who had prepared the MLC (Ex.PW-23/A) but had appeared to depose that Dr.Rashmi, who had examined the victim and also prepared the MLC, was working under her supervision. Learned counsel further submitted that the prosecution has also failed to produce the doctor, who had conducted the medical examination of the victim at the time of admission in Dr. Ram Manohar Lohia Hospital and further, Dr.Renuka Malik also did not depose about the doctor who had made the said endorsement with regard to the medical condition of the victim, declaring her to be fit and unfit for giving her statement. Learned counsel thus

argued that the most important evidence was withheld by the prosecution.

6. To further raise suspicion on the dying declaration, learned counsel argued that the material piece of evidence was a thumb impression of the deceased Mamta which she was not in a position to affix because of her suffering 100% burn injuries. Referring to the post mortem report, learned counsel submitted that the same categorically mentions infected superficial to deep burn present all over the body except lower front of Lt leg and both sole at places burnt area shows blackening and therefore having suffered with such extensive burn injuries, it was highly improbable and impossible for the deceased to have put a thumb impression on the alleged dying declaration.

7. The third contention raised by learned counsel for the appellant to challenge the genuineness of the dying declarations was that Dr.Deepak Nanda, who had signed the dying declaration neither gave his statement under Section 161 of Cr.P.C. nor was examined in the court. The contention raised by counsel was that in the absence of examination of such a material witness there is every reason to disbelieve the said dying declaration. In support of his arguments, impinging on the credibility of the dying declaration, learned counsel for the appellant placed reliance on the following judgments:- 8. a) Kanchy Komuramma: Kanchy Ramchander vs. State of A.P., 1995 (Supp.4) SCC118b) Kamla & Ors. Vs. State of Delhi (Crl. A. No.829/2001 decided on 23.8.2011 by the High Court of Delhi) c) The State by Kamala Nagar Police Station represented by Addl. State Public Prosecutor Office of the Advocate General Gulbarga vs. Tanaji, (Crl. A. No.3729/2010 decided on 27.1.2014 by the High Court of Karnataka) d) Uka Ram vs. State of Rajasthan, 2001 Air (SC) 1814; e) Manohar Dadarao Langde vs. State of Maharashtra, 1999 (Supp.1) Bom. C.R. 215; f) Waman Gulab Kadam & Ors vs. State Maharashtra, 2011 Legal Eagle (Bom) 1016; g) Rajaram vs. State of NCT of Delhi (Crl. A. No.1366 of 2011 decided on 1.2.2012 by the Division Bench of High Court of Delhi). of The next contention raised by the learned counsel was that the alleged incident had occurred in broad day light i.e. at 9.30 am or so, but it is quite strange that no one had seen the appellant running from his house after setting his wife ablaze. Learned counsel also submitted that none of the witnesses examined by the prosecution has even whispered to show the presence of the appellant at

his house or his moving out of his house after committing the said crime. Learned counsel also argued that none of the witnesses, who had tried to put off the flames was examined by the prosecution which further raises serious doubts on the version of the prosecution case. Learned counsel also argued that none of the prosecution witnesses have deposed that there was any kind of acrimony between the appellant and his wife to provoke him to murder his wife. Attention of the court has been invited to the deposition of Ms. Angoori Devi (PW-3), where she deposed that accused Mukesh was keeping his wife properly and he never gave beatings to Mamta or harassed her prior to the said incident.

9. Castigating the deposition of PW-4, totally untrustworthy, learned counsel for the appellant pointed out that he was the maternal uncle of the deceased Mamta but he failed to state as to when his niece had married the appellant. Contention raised by the learned counsel was that it is inconceivable that the maternal uncle would not know even the year of marriage of his niece and therefore, no reliance can be placed on the testimony of PW-4.

10. Learned counsel had drawn attention of this court to the deposition of PW-6, PW-7 and PW-8 to point out that these witnesses in their depositions have denied the suggestions given by the defence that appellant often used to beat appellants wife Mamta after consuming liquor. Learned counsel also submitted that PW8 had even denied his presence at the time of seizure of can (plastic) and the sealing of match stick and the earth. Learned counsel also submitted that this denial of presence of PW-8 clearly shows that the signature of PW-8 was obtained by the police on a blank paper so as to misuse the same to support the case of the prosecution.

11. Based on these above submissions, the learned counsel for the appellant strongly urged for the acquittal of the appellant.

12. Per contra, Ms. Richa Kapoor, learned APP for the State vehemently contended that the case of the prosecution is an open and shut case and every piece of evidence has been critically examined and analysed by the learned trial court before arriving at the conclusion of holding the appellant guilty for committing the offence under Section 302/498A IPC leaving no scope to challenge the same

on any tenable ground.

13. Learned APP submitted that the case of the prosecution is primarily based on the dying declaration of the deceased and the motive to commit the crime on the part of the appellant to burn his own wife is duly reflected in her dying declaration. Crl.A. No.601/1999 The learned APP further Page 8 of 35 submitted that the victim Mamta was admitted in Dr. Ram Manohar Lohia Hospital, New Delhi on 13th June, 1996 at 10.25 a.m. and on her medical examination she was found conscious despite having suffered 100% burn injuries. Learned APP also submitted that the victim Mamta was unfit for giving statement at 11.10 a.m. and 11. 45 a.m. but later at 5.30 p.m. on the same day she was certified to be fit for statement. Learned APP also argued that the dying declaration of the victim Mamta was recorded by the IO in the presence of Dr. Deepak Nanda after she was declared fit for recording her statement. Learned APP also argued that in the dying declaration the victim had given true and correct account of the sequence of events which took place prior to the appellant setting the deceased - Mamta ablaze. Learned APP also argued that at the end of her statement, the victim had put her thumb impression of her left hand and the said dying declaration was duly proved on record by the PW-29 IO of the case in his evidence. Learned APP also argued that the signatures of Dr. Deepak Nanda on the said dying declaration were also proved as Ex. PW-23/B in the evidence of PW-23-Surinder Singh who in his deposition stated that Dr. Deepak Nanda had left the services of the hospital and his present whereabouts were not known. He also deposed that he had seen him writing and signing and therefore, could identify his writing and signatures. Learned APP also argued that there can be no reason to disbelieve the said dying declaration made by the victim which was recorded by the IO of the case after she was certified to be fit for giving statement and her statement was recorded in the presence of Dr. Deepak Nanda. Learned APP also argued that PW-29 in his deposition clearly stated that before recording her dying declaration victim Mamta was declared fit for statement and he had recorded the statement in the presence of Dr. Deepak Nanda and after recording her statement, the same was read over to her before she had affixed LTI at point A on the said dying declaration Ex. PW-29/B. Learned APP also argued that the defence has not challenged the deposition of PW-29 in examination-inchief to attribute any false implication of the

accused or the IO having any kind of motive or ill will qua the accused to falsely implicate him. Learned APP thus stated that the testimonies of PW-29 and PW-23 remained unchallenged and uncontroverted with regard to the dying declaration made by the victim Mamta which was duly recorded by the IO of the case in the presence of Dr. Deepak Nanda and therefore, there can be no earthly reason to disbelieve the said dying declaration of the deceased. Learned APP also argued that there is a complete track record of appellant subjecting her to cruel treatment and on various occasions he had threatened to physically harm her. Learned APP also submitted that the complaints lodged to various authorities by the deceased Mamta against the cruel conduct of her husband were duly proved on record as Ex. PW-15/B. Learned APP also submitted that on many occasions the police had intervened to persuade the appellant and his deceased wife to reconcile their disputes and one such compromise was recorded by the Crime Against Women Cell which was proved on record as Ex. PW14/D.

14. Learned APP also argued that the learned counsel for the appellant has placed reliance on the testimonies of PW6, PW7, PW8, PW9 and PW19 who had turned hostile although on material facts their testimonies remained consistent to prove the case of the prosecution. Learned APP also argued that the testimonies of PW2, PW4 and PW5 fully corroborate the dying declaration made by the deceased and PW2 was even a witness to the last seen evidence as she had visited the house of her daughter on the morning of 13th June, 1996 at 7.00 a.m. and left the place at about 9.00 a.m. after making a vain attempt to make the appellant Mukesh, understand that he shouldnt consume liquor and beat her daughter and thereafter she went to her duty. Based on the above submissions, the learned APP strongly urged for maintaining the conviction of the appellant and the order on sentence as passed by the learned trial court.

15. We have heard the learned counsel for both the parties at a considerable length and given our thoughtful consideration to the arguments advanced by them. We have also gone through the records of the learned trial court.

16. At the time of hearing of the appeal we had noticed a shabbily dressed middle aged frail person sitting in the last row of the court. Our attention had gone

towards him because he was not able to hold his hands as they were shaking. On being enquired by the court about his identity, the man informed that he was the appellant in this case. He was accompanied by his sister-in-law and the reason of his shaking hands was disclosed by her to be a symptom of alcohol dependence induced by his non-consumption of alcohol at that moment. When enquired from the lady about the source of his income, in her reply she stated that appellant keeps begging for money from his relatives and unknown persons and sometimes works as a street vendor.

17. Poverty itself is one of the biggest curse and then from poor earnings to spend major portion of the money in buying liquor and drugs is a self invited curse. The appellant was married to Mamta about 10 years prior to the date of incident and with the passage of time five children were born out of the wedlock. Right from the inception of marriage Mamta was subjected to harassment and physical assaults for not bringing sufficient dowry in the marriage. To the appellant, alcohol was dearer than his family so much so that he kept on selling even the dowry articles to satisfy his unending desire of consuming more and more liquor. It was never his priority to take care of his family and to provide them with two square meals a day and most of the time they were kept half fed. Various complaints were lodged by Mamta prior to the said incident and through these complaints one can understand the tragic plight of the said lady and her family. The appellant used to threaten to chop off her nose and many a times he used to tear off her clothes and then turn her out on the road/street. As per her complaint lodged in June, 1995, he had earlier also made an attempt to set Mamta on fire with the help of his parents.

18. After having spent ten years of such a dreadful life, Mamta met her tragic end on the morning of 13th June, 1996 when the appellant had set her ablaze after pouring kerosene oil over her and thereafter ran away from the Jhuggi. As per the dying declaration of Mamta, her only fault was that she had brought medicine for her ailing son- Sunil after borrowing money from her mother and when she was questioned by the husband about the source of money used for buying the medicine, Mamta informed him that she took the money from her mother at which he started beating her and also harassing her as to why her mother had not given money in their marriage. After receiving the beatings, Mamta had gone to inform

her mother about the cruel and deviant conduct of her husband of beating her again and then her mother said that she would come on the next morning to make her husband understand to mend his ways. On the morning of 13th June, 1996, the mother came to the Jhuggi of her daughter Mamta and when the mother told her son-in-law (appellant) that she had no money to give, the appellant retorted that it was better for her to take her daughter along with her to her house. It was thereafter when the mother had left for her duty on 13th June, 1996, the appellant had set his wife Mamta on fire after pouring kerosene oil over her.

19. Mamta was rushed to Dr. Ram Manohar Lohia Hospital, New Delhi where she was brought by PW12 Constable Ram Singh. Mamta was brought to the hospital at 10.25 a.m. on 13.06.1996. As per her MLC report proved on record as Ex. PW23A, she was found with 100% burn injuries but in a conscious state. Dr. Rashmi was the doctor at the time of her admission in Dr. RML Hospital, New Delhi. At the hospital, the IO met PW-2 Smt. Teeja, the mother of Mamta, and he had recorded her statement which was proved on record as Ex. PW2A. The IO made an endorsement on the said statement and sent the rukka for registration of FIR. The FIR was accordingly registered vide FIR No.338/1996, under Sections 498-A/309 IPC. After recording the statement of Mamta, the offence was converted to Section 307 IPC and after death of Mamta on 21st June, 1996, the offence was converted to Section 302 IPC.

20. As per MLC report proved on record as Ex. PW23A, Mamta was certified to be not fit for statement at11.45 a.m. and was declared fit for statement by the concerned doctor at 5.30 p.m. on 13.06.1996. As per the deposition of PW29 Bhag Chand, IO of the case, he had received the information from the hospital that Mamta was fit for statement and thereafter he had reached the hospital to record her statement in the presence of the doctor. The statement of Mamta after her death was treated as a dying declaration which was proved on record as Ex. PW29/B in the evidence of the said IO. This dying declaration of the deceased in fact is at the heart of the controversy and therefore, it will be appropriate to reproduce the English translation of the last statement made by the deceased Mamta on the evening of 13.06.1996 and the same is as under:

Statement of Mamta, wife of Mukesh, R/o Jhuggi No.C-5/ C-102, Motia Khan, Paharganj, New Delhi, aged about 25 years. I reside at above address along with my family. My husband Mukesh is engaged in preparing iron tasla and I married him according to Hindu rites and ceremony about 10-12 years ago. Three boys and two daughters were born out of the said wedlock out of which one son had died. On 12.06.1996 my son Sunil was sick and after having taken money from my mother, I went to Najafgarh, Delhi for purchasing medicine for him and when came back to my Jhuggi at about 4 p.m. then my husband enquired from me as to from where have taken money for buying the medicine, at which I told him that my mother had given the money. Thereupon he retorted that my mother had no money to give in the marriage and at the same time started beating me. At about 10.00 p.m. I went to my mothers house and told her that he had again quarrelled with me then my mother told me that she would come on the next morning to make her husband understand. I returned back to my Jhuggi and went to sleep. My mother came in the morning at 7.00 p.m. and after addressing him as her son told my husband that she was not having any money. At this my husband Mukesh said that she should take her daughter to her house. Thereafter, my husband had poured kerosene oil over me and then set me on fire with the help of match box. After setting me on fire he ran away from Jhuggi.

This statement was attested by the IO- Bhag Chand and was also signed by Dr. Deepak Nanda. Mamta had affixed her left thumb impression below her statement on the right side.

21. As already stated above, serious doubts have been raised on the genuineness and truthfulness of the said dying declaration made by the deceased and the same inter-alia were that there was no endorsement of the doctor on the dying declaration certifying her to be fit for statement; no doctor was cited as a witness or produced in the evidence to prove the said endorsement on the MLC report; PW-26 Dr. Renuka Malik was examined by the prosecution but she was not the doctor who had conducted MLC Ex. PW23/A; Mamta who had suffered 100% burn injuries was not in a position to affix her left thumb mark on the dying declaration and lastly Dr. Deepak Nanda who had signed the dying declaration neither gave statement under Section 161 Cr.P.C. nor was examined in the court.

22. Before we consider the said objections raised by the counsel for the appellant to challenge the reliability of the said dying declaration of the deceased, let us first refer to settled legal position to test the reliability of any dying declaration. The principles on which the dying declarations are admitted in evidence are based upon the legal maxim Nemo moriturus praesumitur mentire which means that a man will not meet his maker with a lie in his mouth. While keeping this age old principle in view, it should not be forgotten that though a dying declaration is entitled to great weight yet before its acceptance, the Court should be fully satisfied with regard to its reliability and correctness due to the fact that the maker of the statement is no more there to be subjected to cross-examination. The court is also to be on guard that the statement of the deceased was not a result of either tutoring, prompting or a product of imagination. The principles governing the dying declaration were eloquently summed up long back by the Honble Apex Court in the matter of Paniben vs. State of Gujarat reported in AIR 1992 SC1817 The same are reproduced as under:

(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. (ii) If the court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. (iii) The court has to scrutinize the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had opportunity to observe and identify the assailants and was in a fit state to make the declaration. (iv) Where dying declaration is suspicious it should not be acted upon without corroborative evidence. (v) Where the deceased was unconscious and could never make any dying declaration, the evidence with regard to it is to be rejected. (vi) A dying declaration which suffers cannot form the basis of conviction. from infirmity (vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected. (viii) Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth. (ix) Normally the court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration has to look to the medical opinion. But where the eye-witness has said that the deceased was in a fit conscious state to make this dying declaration, the medical opinion cannot prevail. (x) Where the prosecution version differs from the

version as given in the dying declaration, the said declaration cannot be acted upon. (xi) Where there are more than one statement in the nature of dying declaration, one first in point of time must be preferred. Of course, if the plurality of dying declaration could be held to be trustworthy and reliable, it has to be accepted.

23. In the matter of Laxman vs. State of Maharashtra, (2002) 6 SCC710 the Constitution Bench of the Honble Supreme Court took a view that there is no requirement of law that there should always be medical certification that injured was in a fit state of mind at the time of making a A dying declaration, as a piece of evidence, stands on the same footing as any other piece of evidence, it has to be judged and appreciated in the light of the surrounding circumstances and its weight determined by reference to the principles governing the weighing of evidence. It is, as if the maker of the dying declaration was present in the Court, making a statement, stating the facts contained in the declaration, with the difference that the declaration, is not a statement on oath and the maker thereof be subjected to cross-examination.

The Court also took a view that there is no requirement of law that the dying declaration must necessarily be made to a Magistrate and when such statement is recorded by the Magistrate there is no specified statutory form for such recording. The Court also held that a certification by the doctor is essentially a rule of caution and, therefore, voluntary and truthful nature of the declaration can be established otherwise. The relevant para of the said judgment is reproduced as under:

3. The justice theory regarding acceptability of a dying declaration is that such declaration is made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the man is induced by the most powerful consideration to speak only the truth. Notwithstanding the same, great caution must be exercised in considering the weight to be given to this species of evidence on account of the existence of many circumstances which may affect their truth. The situation in which a man is on death bed is so solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason the requirements of oath and crossexamination

are dispensed with. Since the accused has no power of cross-examination, the court insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The court, however has to always be on guard to see that the statement of the deceased was not as a result of either tutoring or promoting or a product of imagination. The court also must further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Normally, therefore, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration look up to the medical opinion.

24. The issue of reliability of dying declaration also came up for consideration before the Supreme Court in State of Rajasthan vs. Wakteng, AIR 2007 SC2020and it was held as under:

While great solemnity and sanctity is attached to the words of dying man because a person on the verge of death is not likely to tell lie or to concoct a case so as to implicate an innocent person but the Court has to be careful to ensure that the statement was not the result of either tutoring, prompting or a product of the imagination. It is, therefore, essential that the Court must be satisfied that the deceased was in a fit state of mind to make the statement, had clear capacity to observe and identify the assailant and that he was making the statement without any influence or rancour. Once the Court is satisfied that the dying declaration is true and voluntary it is sufficient for the purpose of conviction.

25. In Surinder Kumar v. State of Haryana, reported in (2011) 10 SCC173 the Apex Court in following paras held as under:

Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of crossexamination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the court also insists that the dying declaration should be of such a nature as to inspire full confidence of the court in its correctness. The court has to be on guard that the statement of deceased was not as a result of either tutoring or prompting or a product of imagination. The court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailant.

Once the court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence.

26. It may also be useful to cite the judgment of the Apex Court in the case of Jaswant Singh v. State (Delhi Admn.) reported in AIR 1979 SC190 where the Apex Court observed as under:

It is true that the dying declaration which is not recorded by a Magistrate has to be scrutinized closely but it is well settled that if the court is satisfied on a close scrutiny of the dying declaration that it is truthful, it is open to the court to convict the accused on the basis thereof without any independent corroboration. In the instant the dying declaration recorded by the Sub-Inspector in the presence of the duty doctor who also verified its genuineness, was truthful and convincing and it could not be brushed aside merely on the ground that it was not recorded by a Magistrate.

27. As can be seen from the above principles, there can be no empirical rule or test or straight jacket formula which can be laid down to test the truthfulness and reliability of any dying declaration. Facts of each case only would determine whether in a given facts of the case a dying declaration should be accepted as the sole basis to convict an accused person or the dying declaration is surrounded by suspicious circumstances, and therefore, it will not be considered safe to base a conviction on such suspicious dying declaration without the help of corroborative evidence. It is the duty of the prosecution to clear the clouds of suspicion in order to believe the dying declaration. However, ultimately the confidence of the court is the summum-bonum and in the event of there being any affirmation thereto in the judicial mind, question of any disbelieve or distrust then would not arise (held in Panchdeo Singh v. State of Bihar, (2002) 1 SCC577.

28. Adverting back to the facts of the present case, the dying declaration of Mamta was recorded by PW-29 SI Bagh Chand who was the Investigating Officer of the case. It is a well settled legal position that the mere fact that the dying declaration

was recorded by a police official cannot be a ground to discard the same. It is for the defence to probablise that the IO has some agenda or motive to record a false statement or to fabricate the statement of the victim of the crime. The IO had recorded the said dying declaration in the presence of Dr. Deepak Nanda. PW23Surinder Singh, record clerk of Dr. RML Hospital, New Delhi had appeared in the witness box and proved the said signature of Dr. Deepak Nanda at the bottom of the statement of Mamta. This witness in his deposition clearly deposed that Dr. Deepak Nanda had left the services of the hospital and his whereabouts were not known. He also produced the admission record and the case sheet of injured Mamta which was proved on record as Ex. PW23/C. The endorsement of Dr. Deepak Nanda was also exhibited as Ex. PW23/B on the said dying declaration. The medical fitness of Mamta can be found from the MLC report proved on record as Ex. PW-23/A, and it has come on record that after the IO got the information from the hospital that Mamta was fit to give her statement then only he had reached the hospital to record her statement. Mamta was certified to be fit for statement at 5.30 p.m. on 13.06.1996. Undeniably the prosecution failed to lead any evidence to show as to which doctor had certified the medical condition of Mamta at 5.30 p.m. on 13.06.1996 but this lapse on the part of the prosecution will not be of any help to the defence to disbelieve the dying declaration made by the deceased because of two reasons. Firstly, her said dying declaration was separately signed and endorsed by Dr. Deepak Nanda whose presence and signatures were duly proved by PW-23. Secondly, defence failed to lay any challenge to dispute the medical condition of Mamta or to even challenge the presence of Dr. Deepak Nanda at the time of recording her statement. PW-29 Bhag Chand categorically deposed in his examination-in-chief that on the same day, i.e., on 13.06.1996 he had received information from the hospital that Mamta was fit for statement and he had recorded the statement of Mamta in the presence of Dr. Deepak Nanda. He further deposed that the said statement was read over to Mamta and she had put her LTI at point A which was attested by him at point B. Not even a bald suggestion has been given by the defence to challenge or controvert the said deposition of PW-29 Bhag Chand or even the deposition of PW-23 Surinder Singh and therefore, in the absence of any such challenge raised by the defence during the cross-examination of these important witnesses, the

appellant cannot successfully raise any plea to challenge their depositions at the appellate stage. The purpose of cross-examination of the witnesses is to elicit the truth from the witnesses and in the absence of cross-examination the defence at the appellate stage cannot now impeach to challenge the testimonies of the said witnesses.

29. To further elucidate the purpose of cross-examination, it will be useful to refer to the judgment of Sat Paul v. Delhi Administration, AIR 1976 SC294 The same is reproduced as under:

The fallacy underlying this view stems from the assumption that the only purpose of cross-examination of a witness is to discredit him; it ignores the hard truth that another equally important object of cross-examination is to elicit admissions of facts which would help build the case of the crossexaminer. When a party with the leave of the court, confronts his witness with his previous inconsistent statement, he does so in the hope that the witness might revert to what he had stated previously. If the departure from the prior statement is not deliberate but is due to faulty memory or a like cause, there is every possibility of the witness veering round to his former statement. Thus, showing faultiness of the memory in the case of such a witness would be another object of cross-examining and contradicting him by a party calling the witness. In short, the rule prohibiting a party to put questions in the manner of cross-examination or in a leading form to his own witness is relaxed not because the witness has already forfeited all right to credit but because from his antipathetic attitude or otherwise, the court feels that for doing justice, his evidence will be more fully given, the truth more effectively extricated and his credit more adequately tested by questions put in a more pointed, penetrating and searching way.

We also find that the dying declaration made by the deceased also stands corroborated by the evidence of PW-4 Hira Lal and PW-5 Shri Kale. PW4 Hira Lal in his deposition clearly deposed that on reaching the hospital he spoke to his niece Mamta and she told him that her mother-inlaw had demanded money and the Mukesh accused had set her on fire. On the same line is the deposition of PW-5 Shri Kale who also deposed that when he had gone to see his niece Mamta in

the hospital she told him that she was burnt by the accused Mukesh. Nothing contrary could be elicited by the defence in the cross-examination of these witnesses except that the statements of these witnesses were not recorded by the police under Section 161 Cr.P.C. and this lapse on the part of the prosecution alone cannot discredit their depositions. To prove its case against the appellant, the prosecution also derived its strength from the previous complaints made by the deceased against the atrocious and cruel conduct of the appellant, to various authorities. These complaints were proved on record as Ex. PW141 to PW145. As per these complaints, the accused had attempted to burn her- Mamta on 10.06.1995 at about 6.00 p.m., when she was busy cooking meals for children and other family members, the accused appeared in the house fully drunken and after lighting a match stick wanted to set the sari which she was wearing on fire. She also complained that her mother-in-law was holding kerosene oil in her hands and her father-in-law asked her to feel free to kill her on that day. She further stated that on learning about their bad designs and dangerous ideas, she had run away from there to save her life and reached her mothers house with her child Sunil in one hand. She also stated that her husband and other members of the family had all the ideas to kill her and thereafter to get her husband remarried somewhere else. PW-25 SI Pitamber Singh in his deposition also referred to one such complaint lodged by Mamta which was proved on record as Ex. PW25A and in this complaint he conducted an inquiry and recorded the statement of both the parties and others and as per his report proved on record as Ex. PW25O, he found that this accused was habitual drinker and used to beat his wife under the influence of liquor. He also found that in-laws of Mamta were quite aggressive. In his report, he also referred to a complaint made by Mamta against her husband at Crime Against Women Cell, Nanak Pura, wherein also the complainant had complained about the drinking habit of her husband and cruel conduct of her husband of harassing and beating her.

30. From the aforesaid discussion, we see no reason to disbelieve the statement made by victim Mamta to the IO PW-29 which was later treated as a dying declaration and which stands fully corroborated by her oral dying declaration made to PW-4 and PW-5 and the background of complaints lodged by her with the various authorities further highlights such kind of conduct of the appellant who had

earlier also made an attempt to kill her on 10.06.1995.

31. In dealing with the next contention raised by the counsel for the appellant that the victim Mamta was not in a position to affix her left thumb impression at the end of her statement after having suffered 100% burn injuries and therefore, every reason to suspect the recording of any statement of the victim by the IO. The learned trial court in para 51 of the judgment has dealt with this contention and we find no reason to disagree with the reasoning given by the learned trial court. The learned trial court observed that neither in the MLC nor in the post mortem report, it is indicated that both the hands of the victim including her finger and thumb were also burnt and the learned trial court also held that even otherwise the learned counsel for the accused did not challenge this aspect to suggest that Mamta could not affix her left thumb impression at the end of her statement because of 100% burn injuries suffered by her. The post mortem of the deceased was conducted by PW-22 Dr. Yashoda Rani and as per the post mortem report proved on record as Ex. PW-22/A, the deceased had suffered 96-98% total surface area burn injuries. No question was put by the defence to PW-22 on the issue that with such severity of burn injuries with surface area burnt covered upto 96-98%, the deceased was not in a position to affix her LTI over her statement. No such question was put by the defence to PW-29 Bhag Chand who was Investigating Officer and who had recorded the statement of Mamta and affixed her LTI on the statement. In the absence of any cross- examination by the defence of these witnesses the said contention raised by the counsel for the appellant to raise the issue of inability of the victim to affix her thumb impression over her statement, cannot be appreciated at this stage. Undeniably, as per the post mortem report, total surface burnt area of the body was between 96-98% and on external examination the burn injuries were classified from superficial to deep burn present all over body except lower front of left leg and both soles at places burnt areas showed blackening rest of the area cuticle peeled off and skin was covered with thick pus greenish and yellowish with some sign of sealing. With this report it cannot be deciphered with certainty that whether the deceased had suffered only superficial injuries on her left hand and thus could disable her to affix her left thumb impression over her statement. Considering the fact that the defence failed to put any question to the said two witnesses PW-23 and PW-29, and therefore, in the absence of any challenge

made by the defence we see no reason to disbelieve the LTI of Mamta at the end of her statement proved on record as Ex.PW-29/B. We thus find no substance in the contention raised by the counsel for the appellant disputing the left thumb impression of Mamta over her statement proved on record as Ex.PW-29/B.

32. The next contention raised by the counsel for the appellant was that the prosecution failed to join any of the public witnesses who had tried to put off the flames and whose presence could not be disputed. By now, this fact has been well accepted that public witnesses do not easily come forward to assist the Investigating Agency in any criminal case. There are so many fears due to which public witnesses do not lend a helping hand to join investigation in criminal cases, first is the fear of inviting enmity of an accused, then is the fear of harassment at the hands of the police and third is the ordeal to be faced in appearing in the court. We are not suggesting that the police should not make all possible endeavours to seek the help of independent public witness to prove any criminal case as the evidence of independent witness stands at higher pedestal to prove a case against any criminal. However, the courts cannot shut their eyes from the hard realities of life, therefore, we cannot attach any significance for non-joining of the public witnesses by the police who were present at the spot to extinguish the burn flames.

33. Reasons for non appearance of witnesses in criminal cases have been rightly cited by Justice Y.V. Chandrachud in the case of Pandharinath Shridhar Rangnekar v. Dy. Commr. of Police, The State of Maharashra, AIR 1973 SC630which has been subsequently upheld in Lt. Governor, NCT and Ors. v. Ved Prakash @ Vedu, (2006) 5 SCC228 The same is reproduced as under:

There is a brand of lawless element in society which it is impossible to bring to book by established methods of judicial trial because in such trials there can be no conviction without legal evidence. And legal evidence is impossible to obtain, because out of fear of reprisals witnesses are unwilling to depose in public.

34. The next contention raised by the learned counsel for the appellant is that, the maternal uncle of deceased Mamta PW- 4 failed to disclose the year as to when his niece was married, therefore, his testimony should not be believed. This

contention of the counsel deserves outright rejection. The evidence of any witness is based on what he states on vital facts of the case and not on what is totally irrelevant to the facts of the case in hand. In any case, the defence did not dispute the visit of PW-4 in the hospital on the same day when she was burnt by fire nor the defence had challenged his relationship with the deceased as that of uncle and niece.

35. Dealing with the last contention raised by the counsel for the appellant with regard to the inconsistencies in the depositions of PW6, PW7 and PW8, it will suffice to state that these witnesses turned hostile and therefore, reference to the inconsistencies in their depositions become irrelevant and particularly when the prosecution was able to convincingly prove its case with the help of other cogent and clinching material.

36. The present case clearly appears to be an instance of bride burning. When the actions of a person become governed by his insatiable hunger for more, his sense of reason and morality tend to elude him. It is in this state of mind that a man may be driven to murder his wife by pouring kerosene over her and setting her on fire. It is a sorry state of affairs that the Indian society still finds itself plagued with numerous such instances of household violence. As per the 2012 report of National Crimes Records Bureau, the cases of dowry deaths increased by 2.7% during the year 2011 over the previous year (8,391 cases) and in 2012 this number remained 8,233. To threaten the wife, beat her up and ultimately burn her to death for issues as despicable as dowry or while acting under the influence of alcohol appears to have become a practice especially common in certain families with a poor economic and educational background. It is at this juncture that law must invade into these houses to ensure that protection is given to the woman and justice is delivered, for a society where women are not safe in their own houses cannot progress far on the path of social development. Every time a bride is burnt, it is the moral figment of the society that turns into ashes. Therefore, we are of the opinion that an intolerant approach needs to be taken while dealing with such appalling crimes. The Supreme Court has also strongly deprecated this practice in the case of Ashok Kumar v. State of Rajasthan, AIR 1990 SC2134where its noted as under :

Bride burning is a shame of our society. Poor never resort to it. Rich do not need it. Obviously because it is basically an economic problem of a class which suffers both from ego and complex. Unfortunately, the high price rise and ever increasing cost of living coupled with enormous growth of consumer goods effacing difference between luxury and essential goods appear to be luring even the new generation of youth, of the best service, to be as much part of the dowry menace as their parents and the resultant evils flowing out of it. How to curb and control this evil?. Dowry killing is a crime of its own kind where elimination of daughter-in-law becomes immediate necessity if she or her parents are no more able to satiate the greed and avarice of her husband and their family members, to make the boy available, once again in the marriage market Eliminate it and much may stand resolved automatically. Social reformist and legal jurists may evolve a machinery for debarring such a boy from remarriage irrespective of the member of family who committed the crime and in violation penalise the whole family including those who participate in it. That is social ostracism is needed to curtail increasing malady of bride burning.

37. Similarly in the case of Pawan Kumar & Ors. v. State of Haryana, AIR 1998 SC958 the Apex Court observed as under: For more than a century, inspite of tall words of respect for w omen, there has been an onslaught on their liberties through 'bride burning' and 'dowry deaths'. This has caused anxiety to the legislators, judiciary and law enforcing agencies, who have attempted to resurrect them from this social choke. There have been series of legislations in this regard, without much effect This led to the passing of Dowry Prohibition Act in 1961. Inspite of this, large number of 'brides burning' and dowry deaths continued. To meet this, stringent measures were brought in the Indian Penal Code and the Evidence Act through amendments. It seems, sections of society are still boldly pursuing this chronic action to fulfil their greedy desires. Inspite of stringent legislations, such persons are still indulging in these unlawful activities, not because of any shortcomings in law but under the protective principle of criminal jurisprudence of benefit of doubt. Often, innocent persons are also trapped or brought in with ulterior motives. This places an arduous duty on the Court to separate such individuals from the offenders. Hence the Courts have to deal such cases with circumvention, sift through the evidence with caution, scrutinise the

circumstances with utmost care.

38. In the light of the aforesaid discussion we find ourselves fully satisfied that the said dying declaration was made by the deceased voluntarily and truthfully, free from any kind of prompting or tutoring and it was duly recorded by the IO.

39. We are of the view that in the reasons given by the learned trial court there lies no perversity or illegality and the impugned judgment suffers no error. The learned trial court has rightly convicted the appellant for the offence committed by him under Section 302 and Section 498A IPC. Hence, the order on conviction and sentence dated 15.07.1999 and 16.07.1999 respectively passed by the learned Sessions Judge is upheld. There lies no merit in present appeal and it is dismissed accordingly.

39. A copy of this order be sent to the concerned Jail Superintendent for information and necessary compliance. KAILASH GAMBHIR, J.

SUNITA GUPTA, J.

MAY16 2014 pkb/v