

Girjesh @ Babloo vs.state

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Court : Delhi

Decided On : Sep-26-2018

Appellant : Girjesh @ Babloo

Respondent : State

Advocate for Pet/Ap. : Mr. Adit S. Pujari, Ms. Tusharika Mattoo

Judgement :

\$~ * IN THE HIGH COURT OF DELHI AT NEW DELHI Reserved on:

14. h September 2018 Decided on:

26. h September 2018 + CRL.A. 497/2018 GIRJESH @ BABLOO Appellant
Through: Mr. Adit S. Pujari and Ms. Tusharika Mattoo, Advocates. versus STATE
CORAM: JUSTICE S. MURALIDHAR JUSTICE VINOD GOEL Through: Mr. Hirein
Sharma, APP. Respondent JUDGMENT Dr. S. Muralidhar, J.:

1. This appeal is directed against the judgment dated 18th December 2017 passed by learned Additional Sessions Judge-IV (North), Rohini Courts, Delhi in SC No.57509/2016 arising out of FIR No.154/2014 registered at PS Jahangirpuri convicting the Appellant for the offence punishable under Sections 302 and 324 IPC. The appeal is also directed against the order on sentence dated 11th January 2018 whereby, for the offence under Section 302 IPC, he was sentenced to imprisonment for life along with payment of fine of Rs.50,000/- and in default of payment of fine, to undergo simple imprisonment (SI) for one year. For the offence

under Section 324 IPC, he was sentenced to rigorous imprisonment (RI) for three years along Crl.A. 497/2018 Page 1 of 31 with payment of fine of Rs.5,000/- and in default of payment of fine, to undergo SI for two months. The sentences were directed to run consecutively.

2. The trial Court in effect, while convicting the Appellant for murdering his wife, acquitted him of the offences of subjecting her to cruelty and causing her dowry death. The trial Court, after noting that the two children born to the Appellant and the deceased were, after her death, residing with their grandfather at Gorakhpur in Uttar Pradesh, recommended to the Secretary of the District State Legal Services Authority, North (DLSA) to award the children compensation in terms of Section 357A Cr PC.

3. During the pendency of the present appeal, this Court directed the Secretary of the Delhi State Legal Services Authority (DSLSA) to get in touch with his counterpart in Uttar Pradesh, so that the Secretary of the DLSA at Gorakhpur could be requested to visit the Appellants children and make arrangements with the local administration to ensure that their education is not discontinued on account of their fathers incarceration. The Member Secretary of the DSLSA filed a report dated 13th August 2018 in which inter alia he stated that the Secretary of the DLSA, Gorakhpur had personally visited the house of the relatives of the Appellant, who confirmed that the Appellants daughter had been admitted in school and had received free books and a school bag. As far as the daughter was concerned, she was residing with her aunt and was four years old. She was likely to be admitted into school next year. Crl.A. 497/2018 Page 2 of 31 The charge 4. The first charge framed against the Appellant was that his wife had on 2nd March 2014 at House No.H-4/429, Jahangirpuri, died due to burns otherwise than under normal circumstances within seven years of their marriage and shortly prior to her death, she was subjected to cruelty or harassment by him in connection with the demand for dowry and he thereby committed the offence punishable under Section 304B IPC. He was also charged with having subjected the deceased to cruelty in order to meet his unlawful demand of dowry thus committing the offence punishable under Section 498A IPC. The third charge framed against the Appellant was that he caused burn injuries to his six month old daughter with such

intention or knowledge that had that caused her death, he would have been guilty of committing her murder and thus he committed the offence punishable under Section 307 IPC.

5. The alternative charge framed against the Appellant was that he murdered his wife Pushpa (the deceased) at around 9 pm on the above date and the aforesaid place by pouring kerosene oil on her and setting her on fire and thereby committed the offence punishable under Section 302 IPC. The incident 6. Information was received at the Police Control Room (PCR) at 8:42 pm on 1st March 2014 that at Block H, Jahangirpuri, in a jhuggi near the dispensary, there was a fire involving a lady and a man, with both suffering serious injuries. The caller was Zulfikar @ Jeetu (PW-14). The noting in the PCR form (Ex.PX2) at 8:48 pm on 1st March 2014 was to the effect that a Crl.A. 497/2018 Page 3 of 31 lady, a man, and a child were injured and they were being taken to the hospital. The further noting at 9:15 pm was that the fire had been doused.

7. The version of Malti (PW-13), a resident of jhuggi B-447 in the same area, was that at 7:30 pm, she was returning home when she noticed that the Appellants jhuggi was on fire. Meanwhile, nearby residents also gathered there and doused the fire by pouring water.

8. Zulfikar (PW-14) stated that he had returned home at around 7 pm after attending to his duties as a tailor at Gandhi Nagar. He was present at the third floor of his jhuggi when he heard a noise from the gali. He came downstairs and saw many public persons outside the jhuggi of the Appellant. He also noticed fire inside the jhuggi of the Appellant. He along with other public persons doused the fire by pouring water. Thereafter, he made a call at the 100 number from his mobile phone. He confirmed that in the fire, the Appellant, the deceased, and their daughter had received burn injuries. He stated, When I entered inside the said jhuggi, smell of kerosene oil was noticed by me.

9. HC Manoj Kumar (PW-15) was posted at the PCR and was in charge of PCR van C-46. He received a call from Commander-1 regarding the fire at the house of the Appellant at 8:45 pm. He along with the other staff of PCR Commander-46 went to the spot. He noticed public persons bringing three injured persons. He

immediately took them to the BJRM Hospital. At the hospital, PW-15 ascertained the names of the three injured persons.

10. The doctor who first attended to the injured at the BJRM Hospital noted CrI.A. 497/2018 Page 4 of 31 that the deceased had sustained 90% burns. According to PW-15, the smell of kerosene oil was coming from the body of the Pushpa. In my presence, the concerned doctor had made enquiries from Pushpa and Pushpa was pointing out towards accused Girjesh @ Babloo. PW-15 further stated that Pushpas brother Suraj (PW-11) also accompanied them to the hospital. PW- 11 informed PW-15 that about 15-20 minutes prior to the occurrence, the Appellant had an altercation with the deceased and after settling the altercation, PW-11 went to the house of his neighbour to watch television.

11. The right side column of the PCR form (Ex.PX2) notes that according to the doctor, the lady had suffered 90% burns while the daughter had mild burns and that from the body of the deceased the smell of kerosene oil emanated. It was further noted in the PCR form that upon being asked, the deceased pointed to her husband. It also noted that PW-11 had stated that around 20-25 minutes prior to the incident, a fight had ensued between the husband (i.e. the Appellant) and the deceased and that PW-11 had settled that dispute and left.

12. PW-11 stated likewise in his deposition in the trial Court. He added that the Appellant and the deceased had been married for over five years prior on the date of the incident. Around four months prior to the incident, PW-11 began residing with them in the aforementioned jhuggi. PW-11 and the deceased were natives of Assam. According to PW-11, the Appellant used to consume liquor excessively and beat the deceased every day. When his sister, i.e. the deceased, objected to this, the Appellant used to beat her further. According to PW-11, the Appellant would also taunt the deceased CrI.A. 497/2018 Page 5 of 31 that her parents had not given him sufficient dowry in the marriage but on the following morning he would say Mein to aise hi majaak karta hoon.

13. According to PW-11, on the date of the occurrence, at around 9 pm, he was sitting in the house of his neighbour Ram Raj. Before leaving the Appellants house, PW-11 had settled the quarrel between his sister and the Appellant. He

remained at the house of said neighbour for about 15-20 minutes and while returning, he noticed smoke coming from the house of his sister. He tried to open the main door but it was bolted from inside. As he was trying to break the door open, it was opened by the Appellant. Upon entering the house, PW-11 noticed the deceased in flames. He noticed that the daughter of the deceased, aged around 4-5 months, had suffered burn injuries. PW-11 raised a hue and cry and public persons gathered there and with their help, the fire was doused. He stated that he too accompanied the injured to BJRM Hospital. At the BJRM Hospital 14. The MLC of the deceased (Ex.PW-5/A) prepared at BJRM Hospital shows that she was brought there at 9:15 pm on 1st March 2014 with an alleged history of burns. Dr. Ronal Kori (PW-5) examined the deceased there. She noticed that the deceased had suffered 90% burns due to which even the thumb impression of the deceased could not be taken. No identification mark could be found due to excessive burns. After medical examination, PW-5 referred the deceased to the Senior Resident (SR) (Surgery). She also opined that the deceased was fit for statement.

15. PW-5 also noticed that the five month old baby was suffering from CrI.A. 497/2018 Page 6 of 31 approximately 4% burns over the left knee bones and thighs. She too was referred to SR (Surgery). This examination took place at 9:45 pm.

16. The SR (Surgery) at the BJRM Hospital, Dr. Narender (PW-10), examined the deceased. He noticed that she was drowsy having suffered approximately 95% burn injuries and that the smell of kerosene oil was found present all over the body. It was PW-10 who referred the deceased to LNJP Hospital. He also examined the infant child of the Appellant and the deceased. He confirmed that the deceased had been declared fit for statement between 9:15 pm and 9:30 pm. On cross-examination by counsel for the accused, PW-10 stated, There is every possibility that a patient who had suffered approximately 95% burn injury is able to make a statement.

17. All three injured persons were shifted from the BJRM Hospital to the LNJP Hospital for further treatment. The Appellant was examined there by Dr. Rashmi

Shrivastava (PW-6). She noticed that he had 25% burns. He was discharged on 7th March 2014 with a discharge summary (Ex.PW-6/A). Recording of dying declaration 18. SI Narender (PW-19) went first to BJRM Hospital and collected the MLCs of the three injured persons. According to him, at BJRM Hospital, he made enquiries from the deceased who told him that her husband had burnt her by pouring kerosene oil over her and then set her on fire with the help of a matchstick. PW-19 attempted to contact the concerned Sub Divisional Magistrate but was not able to do. Thereafter, he contacted the Vinod Kumar Dhatrawal (PW-1), the Tehsildar/Executive Magistrate of Model Town, and briefed him about the facts of the case. By the time PW-1 reached BJRM Hospital, the deceased and the Appellant had been referred to LNJP Hospital. PW-19 then accompanied PW-1 to LNJP Hospital.

19. Dr. Ravi Kumar Meena (PW-17) was on 24-hour duty as a Junior Resident in the Burns and Plastic Ward of LNJP Hospital. The statement of the deceased was recorded by PW-1 on 1st March 2014 in the presence of PW-19, PW-11, and PW-17. The said dying declaration (Ex.PW-1/A) was hand written by PW-1. He noted the time of the recording as 11:15 pm at the LNJP Hospital. The preamble to the dying declaration read as under: A call from Shri Narender Kumar, SI of PS Jahangir Puri was received from his mobile (9953957894) at about 9.30 pm on 01.03.2014 informing therein that a woman named Ms Pushpa has been burnt in her jhuggi at H-4, Jhuggi No.429, Jahangir Puri. The IO Shri Narender Kumar informed that the victim is taken to BJRM Hospital. SHO Jahangir Puri was contacted who confirmed the incident and requested to come to BJRM Hospital. I reached BJRM Hospital at 10.30 pm and came to know that the victim has been shifted to the LNJP Hospital. I along with IO Shri Narender reached LNJP Hospital at about 11.10 pm at recorded the statement of the victim Ms Pushpa Devi. Particulars of the victim: Name: Pushpa Devi wife of Shri Babloo resident of Jhuggi No.429, H-4, Jahangir Puri, Delhi. 25 years Age: Child: Parents: Crl.A. 497/2018 A female baby of 6 months and a male baby of about 3 years. Father Shri Rajman Prasad Page 8 of 31 Colour: Height: Qualification: Date of Marriage: Fair 52 (approx.) Illiterate 5-6 years ago, as stated by the victim Pushpa Devi. 20. Immediately following the above portion is the noting by PW-1 to the effect that the doctor on duty Dr. Ravi Kumar of BNP Ward of LNJP Hospital stated that the

victim can speak and statement can be recorded.

21. On this aspect, PW-17 was asked specifically and in his examination-in- chief he stated as under: Before recording the statement of Smt. Pushpa Devi, I had stated to Sh. Vinod Dhatarwal that the victim i.e. Smt. Pushpa Devi could speak and her statement could be recorded. 22. PW-1 then recorded the statement of the deceased in a question-answer form. The seven questions and answers thereto read as under: Q.1 Apka naam kya hai?. Ans. Pushpa Devi. Q.2 Apke pati ka kya naam hai?. Ans. Babloo. Q.3 Kahan rahti ho?. Ans. Jahangir Puri. Q.4 Apko kisne jalaya?. Ans. Mere pati Babloo ne diyasalai se jalaya. Q.5 Diyasalai se itna kaise jali?. Ans. Babloo ne pahle kerosene ka tail dala phir diyasalai se Crl.A. 497/2018 Page 9 of 31 jalaya. Isse pahle bhi Babloo aapse maar peet karta tha?. Q.6 Ans. Haan, roz daroo pikar aata tha aur mujhe maarta tha. Q.7 Apke pati ne kabhi dahej waghera ki maang ki thi kya?. Ans. Haan dahej bhi mangta tha tatha kahta tha ki tum sundar nahi ho.

23. Below the above questions and answers, PW-1 made the following noting: The victim is not able to put her signatures or thumb impression being burnt almost 95%. The statement has been recorded in the presence of Dr. Ravi Kumar who is on duty. Victims brother Shri Suraj Prasad son of Rajman Prasad also resides with the victim. 24. He then noted that on the basis of the statements made by the victim, foul play cannot be ruled out. SHO Jahangir Puri is directed to initiate action as per law. Registration of FIR and investigation 25. PW-19 then discussed the contents of the statement with the Station House Officer (SHO) Inspector J.P. Meena (PW-20) of PS Jahangirpuri. The statement of PW-11 had been recorded by this time. After making an endorsement thereon, the rukka (Ex.PW-1/C) was sent to the PS for registration of the FIR.

26. PW-19 accompanied PW-1 to the place of occurrence. It was then Crl.A. 497/2018 Page 10 of 31 inspected by PW-1. Ct. Praveen, who was at the spot, informed PW-19 that the crime team officials had visited the spot and inspected the place of occurrence.

27. At this stage, it must be noticed that the crime team report (Ex.PW-16/A) contains a noting to the effect that there was a plastic can with kerosene found at

the spot. There were burnt clothes and a matchbox.

28. PW-19 lifted exhibits from the spot. There were as many as 11 burnt clothes which were wet. He kept the clothes in a brown bag and sealed said bag. He also seized the plastic kerosene oil can, which still had some kerosene oil in it. PW-19 also seized one wet matchbox with six matchsticks, out of which two were burnt and four were not. He seized a burnt piece of a saree lying on the floor near the bed. That saree was kept in a polythene bag which in turn was kept in a cloth pulanda and then sealed. The case property was deposited in the malkhana at the PS.

29. The deceased died at the LNJP Hospital on 2nd March 2014 at around 8:35 am. PW-19 then arranged to have the body shifted to the mortuary. On 5th March 2014, PW-19 accompanied by PW-20 and PW-1 went to the mortuary where PW-1 prepared the inquest papers. Rajman Prasad (PW-12), the father of the deceased, was also present at the hospital. Post mortem examination 30. The post mortem examination of the deceased was performed by Dr. Anju Rani (PW-9). The post mortem report (Ex.PW-9/A) noted the time of death as 7:10 am on 2nd March 2014. As far as the general appearance is Crl.A. 497/2018 Page 11 of 31 concerned, it was inter alia noted that black soot was present in both nostrils. It was noted that the deceased had suffered 95% burns. The hypostasis was not distinguishable due to the extensive burn injuries. The probable time since death was three and a half days. The external examination revealed the following two injuries: IX. EXTERNAL EXAMINATION1 Dermo-epidermal burn injuries were present all over the body involving head, neck, face, both palms and genitalia; sparing front of lower abdomen below umbilicus, adjacent area (if both inguinal regions, inner- front of left upper thigh and both sales. A vertical Patch of burn was present over right front of abdomen connecting the area of upper abdominal burn to genital burn. Superficial layers of skin over burnt area was burnt, blackened and peeled off at places revealing red erythematous base. Fluid filled blisters were present over burnt area of both thighs at places. Skin of both hands de- gloved completely leaving behind reddened base. Red line of demarcation was present between burnt and unburnt area of abdomen and thighs. Scalp hairs were burnt and singed at places and were easily pluckable. No smell of kerosene or any other

volatile liquid present Approximate area of burn is 95% of total body surface area. Lacerated wound, reddened, 1.2 cm x 0.5 cm x muscle deep present over right side of forehead just above the outer margin of right eyebrow. The margins of wound were irregular and tissue bridges were present at the base. 2.

31. As far as the neck is concerned, while no extravasation of blood was present in the neck vessels, it was noted that trachea showed presence of thick layer of soot in its lumen and mucosa was reddened. The opinion as to the cause of death was given as under: Crl.A. 497/2018 Page 12 of 31 Death in this case occurred as a result of shock consequent upon burn injuries. All injuries are ante-mortem and are fresh in duration. Injury No.1 is caused by flames of fire and injury no.2 is caused by blunt force trauma. 32. It must be noted at this stage that in her cross-examination, PW-9 stated that she observed no smell of kerosene or any other volatile liquid present. She answered: It depends upon the conscious state of patient as to whether a patient who had suffered 95% burn injuries could make a statement. According to her, This fact has to be assessed by the examining/attending doctor.

33. The Appellant was discharged from the hospital on 7th March 2014, on which date, PW-20 recorded the statements of the father and brother of the deceased. On 8th March 2014, PW-20 along with Ct. Pawan Kumar went to the house of the Appellant, interrogated him, and thereafter arrested him. He was thereafter sent to judicial custody.

34. On 21st April 2014, PW-20 accompanied the draftsman Inspector Manohar Lal and SI Narender to the place of occurrence and a scaled site plan (Ex.PX-6) was prepared. Forensic report 35. A charge sheet was filed by PW-20 on 18th May 2014. By that time, the FSL result (Ex.PW-21/A) had not been obtained. That report authored by Amit Rawat (PW-21) was made available on 30th June 2014. Four sealed parcels had been sent to the FSL for examination. Ex.1 was a bunch of black hair being the scalp hair of the deceased. Ex.2 was a damp, partially burnt, Crl.A. 497/2018 Page 13 of 31 and melted light brown unidentified cloth piece. Ex.3 was the kerosene oil can. Ex.4 was a partially burnt dark grey coloured pant, one partially burnt off-white coloured lower, one partially burnt and torn sky

blue colour kids warm suit, a partially burnt multi-coloured towel, sky blue half sleeved sweater, grey lower, light brown vest, and some other clothes. The report stated that Ex.3 contained kerosene oil, whereas residues of kerosene could not be detected on the Ex.1, 2, and 4. PW-21 was not subjected to any cross-examination. Appellants statement 36. When incriminating circumstances were put to the Appellant under Section 313 Cr PC, he denied that he used to consume excessive liquor and beat his wife every day. He also denied taunting the deceased for not bringing enough dowry. According to him, he was never in the habit of consuming liquor. When the evidence of PW-11 was put to him, to the effect that he used to treat the deceased with cruelty and complain about insufficient dowry but on the morning of the next day he used to say mein to aise hi majak karta hoon, the Appellant stated, I only used to say the above words to my wife in ordinary manner. According to the Appellant, no quarrel took place between him and the deceased 10-15 minutes prior to the incident.

37. On the specific point of the Appellant himself opening the door and PW-11 noticing the deceased in flames, and the Appellant and their daughter also burnt, he stated as under: Ans. In fact an incidental fire took place in my house, while I along with my minor child and my wife were present in our CrI.A. 497/2018 Page 14 of 31 house. At that time was sleeping inside my house, upon noticing the said fire I woke up and saw my wife under flames and the flames by that time had also went up to my minor child. I immediately woke up and tried to save my wife and my minor child. I had also received severe burn injuries while saving them. 38. The Appellant admitted that all three of them were taken to BJRM Hospital first and then referred to LNJP Hospital. He maintained that the fire was accidental and that he had no fight with his wife. He denied any dying declaration having been made by the deceased to PW-1. According to him, PW-1 never visited LNJP Hospital. The Appellant also stated that his wife was not in a position to make any statement and that PW-1 had given false directions to the concerned SHO. According to him, the PWs had falsely identified the case property and he had been falsely implicated.

39. When asked what else he had to say, the Appellant answered as under: Ans. I am innocent and have been falsely implicated. In fact an incidental fire took place

in my house, while I along with my minor child and my wife were present in our house. At the time of incident, I was sleeping inside my house and my wife was cooking food. While I was sleeping, I felt some smoke in my jhuggi and accordingly, I woke up and saw my wife under flames and the flames by that time had also went up to my minor child. I immediately woke up and tried to save my wife and my minor child. I had also received severe burn injuries while saving them. I had a cordial relations with my wife and in-laws and that is why I had called my brother-in law i.e. PW- 1 to my house for arranging job for him. Prior to the occurrence to the present case, there was absolutely no complaint against me by my in-laws either at my native village or at Delhi. My wife had not made any statement/dying declaration before the doctor, police or any other person. In fact, the same was manipulated at the instance of PW-1 my brother-in-law. Crl.A. 497/2018 Page 15 of 31 Defence evidence 40. Five defence witnesses were examined. Usha Devi (DW-1) a resident of H Block, Jahangirpuri. On 1st March 2014, at around 9 pm, she noticed that the jhuggi of the deceased had caught fire. On hearing the noise raised by the nearby residents, she went outside her own jhuggi and learnt about the brother of the deceased and others going inside the jhuggi of the deceased and noticing that the deceased, the Appellant and their daughter had been burnt in the fire. According to DW-1, PW-11 was not present at the time of the fire and arrived only one hour afterwards. By the time PW-11 reached, the PCR officials had already removed the deceased, the Appellant and their minor daughter to the hospital.

41. Kalawati (DW-2) was another resident of the locality according to whom, at about 6 pm, she had gone to the house of the deceased as the latter had called her there to see her daughters throat. According to DW-2, she asked the deceased as to why she had shredded a lot of coconut, on which the deceased conveyed that she was going to prepare something. According to DW-2, the deceased then asked her for kerosene oil and thereafter, DW-2 had given kerosene oil in a plastic bottle to the deceased. In her cross- examination, she stated that the Appellant was like her son and she had come to depose at the instance of his father. According to her, no police official came to make any enquiries from her and when she went to the PS, she was not heard.

42. Sangam (DW-3) too noticed the public having gathered inside the gali Crl.A. 497/2018 Page 16 of 31 and they were all saying that a fire had taken place in the jhuggi of the Appellant. Ram Narayan (DW-4), another resident of the jhuggi, spoke likewise. Judgment of the trial Court 43. In the impugned judgment, the trial Court came to the following conclusions: (i) If the fire had been accidental, the natural conduct of the Appellant would have been to put a blanket or pour water over his wife and call the police and ambulance or at least seek the assistance of the neighbours instead of letting her burn till her last breath. The Appellant did not mention what steps were taken by him to save his wife. Therefore, the defence story did not inspire confidence. (ii) The testimony of DW-1 who was not present at the spot but arrived later on was of no help to the Appellant. Likewise, DW-2 admitted that the Appellant was like her son and that she did not approach any police official or the Court to make a statement about having given the deceased kerosene oil in a plastic bottle. Even otherwise, as per the prosecution, what was found was a plastic can of kerosene and not a plastic bottle. (iii) DW-3 had deposed to events that took place after the incident, and he admitted in his cross-examination that he was present inside his house at the time of the occurrence. His testimony too was therefore not helpful to the Appellant. (iv) All the injuries were confirmed to be ante mortem in nature and fresh in duration. Injury No.1 was caused by fire and Injury No.2 by blunt Crl.A. 497/2018 Page 17 of 31 force trauma. The act of setting fire itself showed the intention of the Appellant to cause death or such bodily harm and injury as would be likely to cause death. (v) The statement of a dying person was sufficient to convict a person even without corroboration. Reference was made to the decision in *Atbir v. Govt. of NCT of Delhi* (2010) 9 SCC1 The trial Court found no reason for disbelieving the dying declaration made by PW-1 which was duly supported by the testimonies of PWs 11 and 12 and the other circumstantial evidence. (vi) PW-11 in his cross-examination deposed that his sister used to cook food on the gas stove attached with the gas cylinder and never used kerosene for cooking. His testimony to the above effect remained unchallenged. In any event, no kerosene stove was found at the place of occurrence, although a kerosene oil can which still had kerosene in it was recovered from the spot.

44. For all of the aforementioned reasons, the trial Court concluded that the charges against the Appellant for the offences under Sections 498-A, 304-B and 307 IPC were not proved. The trial Court, however, held the Appellant guilty of the offences punishable under Sections 302 and 324 IPC. The trial Court then proceeded to sentence the Appellant in the manner indicated hereinbefore. Submissions of counsel 45. Mr. Adit Pujari, learned counsel for the Appellant, focussed considerable attention on the dying declaration and submitted that it was not reliable. CrI.A. 497/2018 Page 18 of 31 According to him, the record shows that there was soot in the trachea of the deceased and it would have been virtually impossible, with black soot also being present in the nostrils, for the deceased to have been in a position to make an oral dying declaration.

46. According to Mr. Pujari, even PW-15 mentioned the fact that when the doctor enquired from the deceased, she pointed to the Appellant. This showed that the deceased was not in a position to speak. It is further submitted, with reference to the Delhi High Court Rules concerning dying declaration that it ought not to be recorded by the SDM putting leading questions.

47. It was submitted by Mr. Pujari that there was no certification by PW-17 anywhere on the dying declaration about the fitness of the deceased to make statement. Even according to PW-1, PW-17 refused to make an endorsement and the only inference possible to be drawn was that the deceased was in fact not in a position with 95% burns all over the body to make any statement whatsoever. Reference was made to the decisions in *Laxman v. State of Maharashtra* (2002) 6 SCC710 *Arvind Singh v. State of Bihar* 2001 (3) SCALE549 *State v. Sanjay* 2011 (4) JCC2478 and *State of Rajasthan v. Wakteng* AIR 2007 SC2020 48. Reference was also made to medical literature on hyperpyrexia which stated that with 95% burns, the patient was likely to be in a delirious and confused mental state. Mr. Pujari submitted the actual positioning of the kerosene oil can from the photographs showed that the crime scene had been tampered. The desiccated coconut in the tray was visible in the photograph. CrI.A. 497/2018 Page 19 of 31 It was, therefore, likely that the deceased was cooking. Although the photographs showed the gas stove, the cylinder itself was not visible. It is submitted that the Appellant himself suffering 25% burns was indicative of the fact that he was in fact

trying to save the deceased and his daughter and there is no occasion for him to set the deceased on fire.

49. On the other hand, Mr. Hirein Sharma, learned APP, points out that the rule on dying declarations permits putting leading questions to the injured person for greater clarity. It is also pointed out that while PW-17 may not have made an endorsement on the dying declaration but he clearly mentions in his testimony advising PW-1 that the deceased was fit to make a statement. He also referred to the deposition of PW-15 who noted that when the doctor asked her, the deceased pointed to the Appellant. The PCR form also had noted likewise. He submitted that the dying declaration in the present case was clear and categorical and pointed unmistakably to the guilt of the Appellant. Reliability of the dying declaration 50. The law in relation to dying declaration has been fairly well settled. In *Laxman* (supra), a Constitution Bench of the Supreme Court held that the trial Court had to always been 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 had to decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. There was no hard and fast rule that a dying declaration must necessarily be made to a Magistrate and further, there is no specified statutory form for the same. CrI.A. 497/2018 Page 20 of 31 What evidentiary value was to be attached to such a statement depended on the facts and circumstances of every case. The recording of the dying declaration even without examination by the doctor can be acted upon provided that the Court ultimately holds the same to be voluntary and truthful.

51. In *Nalapatti Sivaiah v. Sub Divisional Officer, Guntur* (2007) 15 SCC465 the Supreme Court, after noticing the above decision of the Constitution Bench in *Laxman* (supra) observed as under: 36. The Constitution Bench in its authoritative pronouncement declared that there is no requirement of law that dying declaration must necessarily contain a certification by the doctor that the patient was in a fit state of mind especially when a dying declaration was recorded by a Magistrate. It is the testimony of the Magistrate that the declarant was fit to make the statement gains the importance and reliance can be placed upon declaration even in the absence of the doctor provided the court ultimately holds the same to be voluntary

and truthful. The judgment does not lay down a proposition that medical evidence, even if available on record, as also the other attending circumstances should altogether be ignored and kept out of consideration to assess the evidentiary value of a dying declaration whenever it is recorded by a Magistrate. 52. In Arvind Singh (supra), it was observed: 20. Dying declarations shall have to be dealt with care and caution and corroboration thereof though not essential as such, but is otherwise expedient to have the same in order to strengthen the evidentiary value of the declaration. Independent witnesses may not be available but there should be proper care and caution in the matter of acceptance of such a statement as trustworthy evidence. In our view question of the dying declaration to the mother is not worth acceptance and the High Court thus clearly fell into an error in such an acceptance. Crl.A. 497/2018 Page 21 of 31 53. The same position was reiterated in Wakteng (supra) thus: Though great solemnity and sanctity is attached to the words of a 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 however it cannot be sufficiently emphasized that 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 a 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. 54. In light of the above legal exposition, in the present case, it is seen that the medical evidence is consistent about the fitness of the deceased to make a statement. This was recorded by PW-5 in the MLC at the very first instance when she was taken to BJRM Hospital. This was also confirmed by PW-10. Clearly, therefore, the fitness of the deceased to make a statement between 9:15 and 9:30 pm was proved.

55. The deceased was then shifted to the LNJP Hospital where she was seen first by PW-17. As noticed earlier, in his examination-in-chief, PW-17 confirmed that he had stated to PW-1 that the deceased could speak and her statement could be recorded. In his cross-examination, PW-1 also confirmed about PW-17 telling him the same. In his cross-examination, he stated that he had requested PW-17 to endorse the statement but the said doctor was reluctant to put his signature on the

statement of victim Pushpa. He, of course, admitted that he had not made any such endorsement to the CrI.A. 497/2018 Page 22 of 31 above effect himself on the dying declaration. He also did not obtain any separate certificate from PW-17 regarding her fitness to make the statement. When PW-17 was asked about this, he stated that generally they would state in the MLC whether the victim was fit to make a statement but admits that he did not put any signature on that day on the said statement. According to him, the concerned Tehsildar had not asked me to sign on the statement. Although there might be some discrepancy on whether or not PW-17 in fact refused to endorse the statement, he confirmed having told PW-1 that the deceased was fit to make a statement. There was no particular interest of PW-17 to falsely make a statement regarding the fitness of the deceased or for that matter even PW-1 to be interested in recording any such false dying declaration.

56. As regards the submission of counsel for the Appellant about the manner in which the dying declaration was recorded, ideally PW-1 should have simply asked the deceased, in the first instance, to tell him what had happened. Instead, his very first question was who set you on fire?. One way of viewing this is a lack of objectivity on the part of PW-1 and indicative of his prior knowledge that the deceased was set on fire by someone. This might have raised doubts about the dying declaration. However, in the present case, the fact that the deceased was set on fire was already recorded in the BJRM MLC which must have been seen by the SDM. It was noted that she was smelling of kerosene. It was already 11.15 pm when the dying declaration was being recorded. With time clearly running out, the decision of the SDM to resort to recording the dying declaration in a question and answer format was understandable. CrI.A. 497/2018 Page 23 of 31 57. PW-1 was subjected to extensive cross-examination. His answers reveal that he had no particular interest in ensuring that the Appellant was found guilty. Clearly, he had nothing to gain in recording a false dying declaration of the deceased 58. This Court has perused the Delhi High Court rules and in particular Chapter 13A which governs dying declarations. Para 3 thereof does envisage a situation where the Magistrate may, without waiting for a medical officer, proceed to record the dying declaration. However, the Magistrate in such cases is expected to note down why he considered it impracticable or inadvisable to wait for the doctors attendance.

The Court is not persuaded by the submission of counsel for the Appellant that in the instant case, PW-1 proceeded without such fitness being conveyed to him by PW-17.

59. Para 4 of Chapter 13A of the Delhi High Court Rules reads as under: 4. The statement of the declarant should be in the form of a simple narrative- The statement, whether made on oath or otherwise, shall be taken down by the Judicial Magistrate in the form of a simple narrative. This, however, will not prevent the Judicial Magistrate from clearing up any ambiguity, or asking the declarant to disclose the cause of his apprehended death or the circumstances of the transaction in which he sustained the injuries. If any occasion arises for putting questions to the dying man, the Judicial Magistrate should record the question also the answers which he receives. The actual words of the declarant should be taken down and not merely their substance. As far as possible the statement should be recorded in the language of the declarant or the Court language. Crl.A. 497/2018 Page 24 of 31 60. Learned APP is right in his submission that it is permissible, in terms of the above provision, for the Magistrate to ask the declarant supplementary questions to clear up any ambiguity. However, the Magistrate should in the first instance attempt to record the statement in the form of a simple narrative. It must be remembered that the deceased here was already 95% burnt. It is possible that due to hyperpyrexia, she was not in a position to simply give a narrative except on being prodded by questions. The recording of the questions and answers by PW-1 was in the presence of PWs 11, 19 and 17. They do confirm that the recording of the dying declaration was in the question and answer form.

61. The Court is persuaded to conclude that on account of the inability of the deceased to provide a simple narrative of what had transpired, it became necessary for PW-1 to resort to recording the entire dying declaration in a question and answer form. While it might have been better for PW-1 to have first also recorded the fact that the deceased was not in a position to give a simple narrative of her own except upon being asked, this by itself does not detract from the genuineness of the dying declaration.

62. The medical evidence in the present case does not point to the inability of the deceased to make a dying declaration notwithstanding her 95% burns and notwithstanding that she may have been in a state of hyperpyrexia. These are matters for expert evidence and in the present case all doctors have consistently spoken about the possibility of a person with 95% burns being able to give an oral dying declaration. Consequently, it is not possible for this Court to ignore such medical evidence and to conclude that it is not *Crl.A. 497/2018* Page 25 of 31 feasible for a person with 95% burns to give a dying declaration. Even the presence of soot in the trachea may not automatically result in the person not being able to speak at all. No specific question was put to either PW-17 or PW-9 in this regard. This was indeed a matter for the opinion of an expert. It cannot be substituted by the opinion of the Court.

63. Mr. Pujari also contended that the word *diyasalai* (match stick) used in the dying declaration was not the language that a person who has suffered 95% burns would normally use. However, this Court cannot surmise solely on the basis of the usage of that word that the deceased in fact did not make any such dying declaration. If she had used the word *maachis* and PW-1 instead wrote *diyasalai*, that by itself would not take away from the veracity of the statement made when viewed as a whole. While indeed dying declarations have to be taken down carefully and the actual words used have to be written, it is not possible to second guess whether the deceased was in a position to use such words or not.

64. Mr. Pujari referred to *Godhu v. State of Rajasthan* (1975) 3 SCC241 wherein the Supreme Court made the following observation as regards severability of a dying declaration in para 16 of its judgment: 16. We are also unable to subscribe to the view that if a part of the dying declaration has not been proved to be correct. It must necessarily result in the rejection of the whole of dying declaration. The rejection of a part of the dying declaration would put the court on the guard and induce it to apply a rule of caution. There may be cases where in the part of the dying declaration which is not found to be correct is so indissolubly linked with the other part of the dying declaration that it is not possible to sever the two parts. In such an event the court *Crl.A. 497/2018* Page 26 of 31 would well be justified in rejecting the whole of the declaration There may, however, be other cases where

in the two parts of the dying declaration may be severable and the correctness of one part does not depend upon the correctness of the other part. In the last mentioned cases the court would not normally act upon a part of the dying declaration the other part of which has not been found to be true, unless the part relied upon is corroborated in material particulars by the other evidence on record. If such other evidence shows that part of the dying declaration relied upon is correct and trustworthy, the court can act upon that part of the dying declaration despite the fact that another part of the dying declaration has not been proved to be correct. 65. In the present case, the other evidence on record does persuade the Court to rely upon that portion of the dying declaration which speaks of the Appellant pouring kerosene over the deceased and setting her on fire and to sever that portion which speaks of his demand for dowry. The decision in the case of *Satish Kumar v. State of Punjab* JT2002(9) SC286 as relied upon by the learned counsel for the Appellant, concerned a case of two dying declarations being recorded whereas in the present case, we are concerned only with a single dying declaration. Therefore, the said decision is distinguishable in its application to the facts of the present case. Other circumstances corroborate the dying declaration 66. Having been satisfied as to the reliability of the dying declaration, this Court now proceeds to examine the other evidence which corroborates what was spoken to by the deceased.

67. That the deceased was in flames when the jhuggi door was opened by the Appellant himself is spoken to by PW-11 as well as other neighbours Crl.A. 497/2018 Page 27 of 31 whose evidence has been adverted to. There was a kerosene can found in the jhuggi which still had kerosene in it. The photographs do show the presence of that kerosene can. It was seized, sent to the FSL. The presence of kerosene in it has been confirmed in the FSL report. The absence of kerosene residue found on the clothes and the scalp hair would not per se negate the fact that kerosene was poured on the deceased and then she was set on fire.

68. Nothing much turns on the answer given by PW-9, the doctor who conducted the post mortem examination on 5th March 2014, that she did not detect any smell of kerosene. It must be recalled that this was four days after the incident. It is possible that by this time, the smell of kerosene was not discernible. However,

when the deceased was first taken to BJRM Hospital, the doctor did notice the smell of kerosene. Even PW-15 appears to have noticed it.

69. The presence of the matchbox with two burnt matchsticks further corroborates the dying declaration to the effect that the Appellant first poured the kerosene oil and then set the deceased on fire by using a matchstick.

70. No doubt PW-11 was not present inside the jhuggi at the time the fire started, but he came back soon thereafter. His presence at BJRM Hospital is spoken to even by PW-19. There is nothing to doubt that PW-11 was present soon after the fire started and joined the others in dousing the fire. PW-11 has spoken of the quarrel between the accused and the deceased shortly prior to the deceased being found ablaze. The Court does not find him to be an CrI.A. 497/2018 Page 28 of 31 untrustworthy witness. PW-11 did not stand to gain by falsely deposing against the Appellant. The children of the Appellant and the deceased are now being looked after by the relatives of the deceased.

71. There is sufficient corroboration therefore, of the dying declaration made by the deceased. It can safely form the basis for the conviction of the Appellant and the trial Court was right in this regard. Motive 72. That brings up the question of the motive for the commission of the crime. The question that arises is whether the Appellant, even if he had a quarrel with his wife, would go to the extent of dousing her with kerosene and setting her on fire with the door locked from inside and then risking his own safety by trying to appear that he was saving her and in that process, suffering severe burns himself. In other words, would a person who has intent of killing his wife actually suffer burn injuries himself?

73. It appears plausible to the Court that having set the deceased on fire after his quarrel with her, the Appellant panicked when he realised the fire was spreading and could harm his infant daughter as well. In that panic, when he attempted to rescue his daughter he suffered burn injuries himself. It is entirely possible that he realised his mistake too late and in the process, injured himself as well.

74. The fact of the matter is that the evidence overwhelmingly points to the guilt of the Appellant in pouring kerosene oil on his wife and setting her on fire and letting

her burn to such an extent that there was no hope of her CrI.A. 497/2018 Page 29 of 31 survival whatsoever. This is also, therefore, not a case where the Appellant can take advantage of the fact that it was in the heat of passion as a result of a sudden quarrel that he momentarily lost his senses and decided to kill his wife. Clearly his reaction was vastly disproportionate to the alleged provocation, if any, by his wife. In any event, there is no evidence at all that he was provoked by his wife. If her objection to his constant drinking was at all a provocation, then his reaction thereto was far too excessive to bring it within the realm of any of the Exceptions to Section 300 IPC.

75. Learned counsel for the Appellant pointed out how the prosecution was unable to bring home the charges against the Appellant for the offences punishable under Sections 498A and 304B IPC and that what has been spoken to in this regard by PW-11 must be disbelieved. While this may be the case, it should also be noticed that to that extent, the dying declaration to this extent was not disbelieved by the trial Court.

76. In the present case, the death due to unnatural circumstances was clearly proved to be one of homicide. There was, therefore, no occasion to resort to Section 304B IPC as regards the presumption of dowry death. The dying declaration per se was sufficient to bring home the guilt of the Appellant for the offence under Section 302 IPC.

77. The Court, therefore, does not see any advantage accruing to the Appellant on account of his acquittal for the offences under Sections 304B and 498A IPC. The prosecution has been able to prove beyond reasonable doubt the guilt of the Appellant for the offence punishable under Section 302 IPC, as far as the murder of his wife is concerned. CrI.A. 497/2018 Page 30 of 31 78. However, as far as the injury caused to his daughter is concerned, the Court is not satisfied that the prosecution has been able to prove the Appellants guilt for the offence punishable under Section 324 IPC. As noticed earlier, the injuries on the Appellant possibly occurred when he tried to save his daughter from the fire. He is accordingly acquitted of that offence. Conclusion 79. For the aforementioned reasons, the Court affirms the conviction of the Appellant and the corresponding sentence

awarded to him by the trial Court for the offence punishable under Section 302 IPC. The conviction of the Appellant for the offence under Section 324 IPC and the corresponding sentence awarded to him are set aside. The impugned judgment of the trial and the order on sentence of the trial Court shall stand modified accordingly. The appeal and the pending application, if any, are disposed of. The trial Court record be returned forthwith together with a certified copy of this judgment. S. MURALIDHAR, J.

VINOD GOEL, J.

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