

Diwan Singh. Vs State.

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Court : Delhi

Decided On : Sep-14-2010

Judge : Mr. Anil Kumar. ; Mr. Suresh Kait. J J.

Acts : Indian Penal Code (IPC) - Section 302, 498A ; CrPC - section 161

Appeal No. : CRL.A. 797/2001.

Appellant : Diwan Singh.

Respondent : State.

Advocate for Def. : Mr. Jaideep Malik,

Advocate for Pet/Ap. : Mr. S. Khan, Adv.

Judgement :

1. Whether reporters of Local papers may be YES allowed to see the judgment?
2. To be referred to the reporter or not? NO
3. Whether the judgment should be reported NO in the Digest?

ORDER

1. The appellant, Diwan Singh, husband of deceased Smt. Mansa has challenged his conviction under Section 498A and Section 302 of Indian Penal Code by order dated 6th June, 2001 and his sentence under Section 302 of IPC for imprisonment

for life and a fine of Rs. 50/- and in default to undergo rigorous imprisonment for seven days and under Section 498A of IPC for three years and a fine of Rs. 100/- and in default to undergo a further rigorous imprisonment for seven days by order dated 11th June, 2001. Both the sentences were ordered to run concurrently and benefit of Section 428 of Crl. Procedure Code was given to him.

2. The present appeal was admitted on 5th November, 2001 and on 16th September, 2005, after undergoing incarceration for about seven years, the appellant's sentence was suspended and he was released on bail on furnishing a personal bond in the sum of Rs. 10,000/- with one surety of like amount. The appellant was also directed to report to the SHO of the concerned Police Station on 7th day of every alternative month by the said order.

3. The appellant was married to deceased Smt. Mansa in February, 1992 and on 20th September, 1992 she was admitted to Safdarjung Hospital by her sister-in-law Urmila, DW-1 after she was taken there in the police van. The intimation about the burning of the deceased Smt. Mansa was given by the husband of the owner of the house, Smt. Vani Anand, PW-1 in whose house on the 5th Floor, the deceased was residing with her husband and Smt. Urmila, her sister-in-law (wife of the elder brother of the appellant) who was the maid in the house.

4. On the intimation of the incident, a DD entry No.4A dated 20th September, 1992 was recorded at 10:27 AM which has been proved as Ex. PW 2/A stipulating that ASI Amar Singh, PCR has been intimated that at Manikshaw Road in House No. 11/97, a stove had burst and one person had died on the spot. The DD Entry also incorporated that after recording the report in "Roz Namcha" the investigation was handed over to SI Surjan Singh, (Pw 13) who had gone to the spot on motorcycle with another constable Virender Singh, PW-11.

5. In the Safdarjung Hospital, a Medico Legal Report was recorded, which was exhibited as Ex. PW 7/1 dated 20th September, 1992, at 11:00 AM incorporating the time of arrival as 11:00 AM, the name of sister-in-law Urmila, DW-1 and ASI Sohan Lal 5133 PCR, Police Station, Delhi Cantt. and further stipulating "alleged history given by the patient that her husband locked her up in the room, put kerosene oil on her and set her ablaze and ran away".

6. The IO Surjan Singh, PW-13 allegedly recorded a dying declaration of the deceased Smt. Mansa at 11:30 a.m. after seeking permission to record the statement which was exhibited as Ex. PW 13/1, which is signed by IO Surjan Singh, PW-13 with the endorsement of Dr. Savita, PW-7 stipulating Smt. Mansa fit for statement, however, attestation by Dr. Savita is of 11.30 PM. It also has another endorsement of another Doctor declaring Smt. Mansa as fit for statement, however, the other Doctor had not been examined.

7. The dying declaration is not only in the hand writing of the Investigating Officer but it is also in his language and allegedly bears the right thumb impression of the deceased at Ex. 13/2. The alleged dying declaration is not in the question answer form nor appears to be in the language of deceased but is in the language of the Police Officer, PW-13 and states that the deceased stated that she was living at 11/97, Manikshaw Marg, Delhi Cantt. and her age is 21 years. She allegedly stated that she had no child from the marriage which took place six months back. It is further stated that her husband harassed her and had asked her to bring Rs.5000/- from her parents. Since she could not bring the said amount, therefore, her husband poured kerosene oil and burned her and thereafter ran from the house. She stated that her sister-in-law brought her in the burned condition in the police van to the hospital and she was burned by her husband after pouring kerosene oil and therefore, legal action should be taken against him. The said dying declaration recorded by the Investigating Officer, PW-13 though has a fitness certificate by doctor at 11:30 AM who was not examined, however, on a separate application, another fitness had been endorsed by Dr. Savita, PW-7 at 11.30 AM which was exhibited as Pw 13/1. The attestation by Dr. Savita on the alleged dying declaration Ex. PW-13/2 is, however, of 11:30 PM and there is an over writing in the numeral 11.

8. The prosecution case before the Trial Court was that on 20th September, 1992, a wireless message was received at 10:27 AM that a stove had burst at House No. 11/97, Manikshaw Marg, Delhi Cantt. and one person had died and the information was recorded in DD Entry No. 4A (Ex. PW-2/A) and its copy was handed over to SI Surjan Singh (PW-13) who along with constable Virender Singh (PW-11) reached the place of occurrence. At the place of occurrence, the police personnel

came to know that the injured had been removed to Safdarjung Hospital and therefore, constable Om Prakash was left on the spot and SI Surjan Singh went to Safdarjung Hospital. He ascertained the condition of the injured and also obtained the fitness certificate of the injured for making the statement. Her statement (Ex. PW-13/2) was recorded by PW-13, SI Surjan Singh in his own language and it also allegedly bears the thumb impression of the deceased. Endorsement (Ex. PW-13/3) was made by the Investigating Officer and the statement was sent to Police Station where FIR (Ex. PW 2/B) was registered. Rough site plan was also prepared (Ex. PW 13/4) and MLC (Ex. PW-7/1) had also been collected.

9. The injured, however, did not survive and died of burn injuries at 4:00 PM on the same date, 20th September, 1992 and the information was communicated to Police Station, Delhi Cantt. and was recorded in DD-10A. SI Surjan Singh, PW-13 intimated the SDM Sh. H.C. Gaur, PW-8, who conducted inquest proceeding Ex. PW-8/1 and recorded the statements of Shyam Lal, PW 4/A and Smt. Rukmani Devi, PW 5/A, father and mother of the deceased. Post mortem was conducted and the report is Ex. PW 1/A. The husband Diwan Singh was arrested and the mother of Diwan Singh, Smt. Harpyari had surrendered later on. Both the accused were charged under Section 498A/34 of IPC and the appellant was charged under Section 302 of IPC. Both the accused had pleaded not guilty. The prosecution had examined 14 witnesses to substantiate the charges and the accused had examined one witness Smt. Urmila Devi, sister-in-law (wife of the appellant's brother) as DW-1 who had taken the deceased to the Hospital but whose statement under section 161 of Cr.P.C was not recorded. The Trial Court acquitted Smt. Harpyari of charge under section 498A of IPC giving the benefit of doubt, however, the appellant has been convicted under Section 498A and 302 of IPC.

10. The Trial Court relied on dying declaration Ex. PW 13/2, though it noted the cuttings/overwriting in the dying declaration and also observed that the cuttings and over writing has not been explained by the prosecution, however, considering that the fitness certificate was granted by the Doctor, still relied on the same.

11. During trial the statement of the father of the deceased, PW-4 was recorded on 5th September, 1994 and was deferred to 6th September, 1994 on which date

cross-examination was partly recorded and was deferred on account of time. On 6th September, 1994, the case was adjourned to 4th October, 1994 and 5th October, 1994, however, the cross-examination could not be recorded as presiding officer was on leave and thereafter the father (PW-4) expired on 28th January, 1995 and so his cross examination could not be concluded. The Trial Court ignored the statement of PW-4 as he had admitted in the cross- examination that the demand was not communicated to him by his deceased daughter but that his wife had told him about the demand of Rs. 5,000/- by the in laws of her deceased daughter and he had not told anyone about the alleged demand, i.e., the persons who got his daughter married or any other person. Regarding the statement of Rukmini Devi, PW-5, the Trial Court held that her examination-in-chief was recorded on 5th September, 1994 and the cross-examination was deferred as a prayer was made to cross-examine both the father and the mother on the same date. PW-5 thereafter appeared on 13th February, 1998 but on that date, she was not cross-examined and later on the cross-examination was again prayed pursuant to an application for recalling PW-5 on 31st October, 2000 which application was declined. However, it was allowed by the High Court by order dated 3rd January, 2001, but later on it had transpired that PW-5, mother of the deceased had also died on 31st December, 1999. Before the date on which the application for recalling PW-5 was filed the witness had died and the Trial Court had held that it was inconceivable that the appellant was not aware about the death of his mother-in-law and therefore, the application to recall PW-5 was malafide and therefore, the statement of PW-5 was not ignored and considered though she was not cross examined.

12. Regarding the fitness of the deceased to make a dying declaration, the Trial Court held that occurrence had taken place at 10:10 AM and the deceased was admitted to hospital at 11:00 AM and since the fitness was given at 11:30 AM, therefore, she was fit to make a statement. The Trial Court also noticed the Medico Legal Report (Ex. PW-7/1) which was proved by PW-7, Dr. Savita but no question was put to her in the cross-examination and consequently, no benefit could be given to the appellant. The Trial Court had however, noted that the endorsement that the deceased was fit for statement made on Ex. PW13/2, the alleged dying declaration, has not been proved. However as the fitness of the

deceased was endorsed on an application which was filed by the IO Surjan Singh, which was exhibited as Ex. PW-13/1, therefore the dying declaration has been relied on.

13. According to the Trial Judge, endorsement on the Rukka, which is the statement of Mansa was made at 11:45 a.m. and the FIR (Ex. PW- 2/B) was registered at 12:50 pm and Devinder Kumar(PW-2) has not been cross-examined with regard to the registration of the FIR and therefore, it could not be said that FIR was not registered on the basis of the statement of deceased Mansa or that it was not recorded at the time on which it purports to have been recorded. The statements of PW-7 Dr. Savita and IO Surjan Singh (PW-13) have been believed on the ground that there was no reason for them to frame the appellant as they were not having any enmity with the accused.

14. The hypothesis propounded on behalf of the appellant about the accidental death by bursting of a stove has been negated on the ground that marriage had taken place just six months before and the death of the deceased was not natural. Reliance was also placed on the testimony of Dr. G.K. Choubey (Pw2) deposing that the smell of kerosene oil was present in the scalp hair. It was assumed by the Trial Court that unless the kerosene has been poured over her or the stove had been at such a place so as to fall on the head of the deceased, kerosene could not be in her scalp hair. According to the learned Trial Judge, there was no injury on the head of the deceased and had the stove fallen on the head of Mansa, there should have been at least some scratches, abrasion and haematoma on her head.

15. DD No. 4A (Ex. PW 2/A) incorporating that at the concerned address one stove had burst and one person has died has not been relied on the ground that it is not a substantive piece of evidence and the person who informed the police control room had not been examined and it is not clear as who had intimated the police control room about the bursting of stove and death of one person.

16. The Trial Court also held that investigating officer did not find bursting of any stove at the place of occurrence and no one had died on the spot and therefore, this information cannot be connected with the occurrence in question. Referring to Plan Ex. PW 13/4, it has been held that no suggestions were given to the IO that

the kerosene oil had been kept on the shelves and the testimony of Urmila, DW-1, sister-in-law of the appellant has been disbelieved on account of the fact that she is the sister-in-law (wife of the appellant's brother) and will be an interested witness.

17. The Trial Court also took the CFSL report as admissible under Section 293 of Crl. Procedure Code though it was not tendered by the public prosecutor but since the document was admissible, therefore, it was exhibited as Ex. C-1 and relied on it to infer that scalp hairs and clothes were found to have the presence of kerosene residual. In the circumstances, dying declaration of Mansa, deceased was held to be reliable and it has been held that possibility of accidental death can be ruled out.

18. The learned counsel for the appellant has contended that the dying declaration exhibited Pw 13/2 cannot be relied on and could not be the basis of conviction of the appellant. According to him the dying declaration is in the language of the Investigating Officer and not the language of the deceased; it is not in question answer form; it has an endorsement by another doctor which was also given at 11:30 AM which doctor has not been examined, rather an attestation of Dr. Savita, PW-7 has been obtained on the alleged dying declaration at the 11.30 PM. Time of attestation as 11:30 PM also has an over writing which has not been explained nor it has been explained as to how attestation could be at 11.30 PM when the deceased had died at 4.00 PM. The learned counsel has further contended that if the fitness was given on the alleged application Ex.PW 13/1 at 11.30 AM by Dr. Savita why the fitness of another doctor was taken on the alleged dying declaration Ex. Pw 13/2 at 11.30 AM and why that doctor has not been examined nor any explanation given as to why that doctor could not be examined. He has submitted that if the fitness had been given by Dr. Savita on the application and fitness on the alleged dying declaration Ex Pw 13/2 by another doctor, then why the attestation was to be made by Dr. Savita at 11.30 PM.

19. The learned counsel for the appellant has asserted that though Trial Court has noted that the fitness on the alleged dying declaration has not been proved, however, on the basis of fitness on the application Ex. Pw 13/1, the alleged dying

declaration has been believed holding that the Investigating Officer and doctor did not have any enmity with the appellant. It is submitted that the Investigating Officer is interested in the success of case investigated by him and in view of apparent lacunas it could not be inferred that he did not have any interest so as to implicate the appellant and therefore alleged dying declaration allegedly recorded by him could not be relied on. The learned counsel relied on (1976) 3 SCC 104, Munnu Raja & Anr. Vs State of M.P.

20. The learned counsel for the appellant has contended that the hypothesis of bursting of stove which is recorded in DD entry Ex.PW 2/A has been deliberately undermined by the prosecution by not examining the husband of PW1, Smt. Vani Anant who had categorically stated that her husband had rung up the police. The statement of Pw1 in this regard is as under: " Mansa was living in my servant quarter with my maid servant. On 20.9.1992 my servant Urmila finished her morning chores by 10.AM and thereafter she went to servant quarter, as father of the Urmila had come. Within 10 minutes Urmila came back rushing and told me that her sister in law Mansa was dead. I along with my husband rushed to the servant quarter and there we saw Mansa lying badly burnt. Immediately my husband rang up to the Police. After some time Police came there and removed Mansa to hospital and sealed servant quarter.

21. It is contended on behalf of the appellant that the said DD entry could not be ignored on the ground that it is not a substantive piece of evidence and that the person who informed the police control room van has not been examined and it is not clear as to who had intimated the police control room. It is contended that the observation of the Trial Court is contrary to the evidence on the record and in the circumstances the observation and inferences of the Trial Court are unsubstantiated and cannot be sustained.

22. On behalf of the appellant it is further asserted that the facts established against the accused should be consistent only with the hypothesis of the guilt of the accused and should not be explainable on any other hypothesis nor should it be susceptible of any other rational explanation. It is submitted that just after the incident the owner of the house had intimated the police, the deceased was

removed to hospital by the maid servant Urmila, DW-1 wife of the brother of the appellant, husband of the deceased and the room was sealed. The photographs of the place of incident were taken which are exhibited PW 10/2 to PW 10/7 which show clearly that the stove had burst which photographs have not been taken into consideration and ignored by the Trial Court. Rather the Trial Court on its own assumptions has held that unless stove had been at such a place so as to fall on the head of the deceased, kerosene could not be in her scalp hair. It has been assumed that since there was no injury on the head of the deceased, had the stove fallen on the head of Mansa, there should have been at least some scratches, abrasion and haematoma on her head. According to the learned counsel Mr.S.Khan the hypothesis of bursting of stove could not be ruled out on such assumptions as have been drawn by the Trial Court. Relying on Photographs PW 10/2 and PW 10/6 it is submitted that the stove was lying on the floor of the room and the kerosene had leaked from it. The burner of the stove was bent which fact was also noticed by the Trial Judge and noted in the proceedings. Reliance has also been placed on the statement of Urmila Devi (DW-1) whose testimony, according to the learned counsel for the appellant, could not be ignored as it remained unimpeachable, regardless of the ground that she is related to the appellant. It is asserted that no cogent reason has been given for not recording her statement under section 161 of the Crl. Procedure Code. This relevant evidence has not been taken into consideration to completely rule out the hypothesis of bursting of stove and in the circumstances, the findings of the Trial Court are based on surmises and ignoring relevant evidence, hence conviction of the appellant cannot be sustained.

23. According to Mr. Khan, learned counsel for the appellant, if the stove was lying on the floor with the burner of the stove bent, the kerosene must have escaped from the stove with force on account of pressure in it and must have sprayed the deceased from head to toe in front. This according to him explains, as to why the small area of the back remained un-burnt which has been established from the testimony of PW-7 Dr. Savita. Relying on the photographs the learned counsel for the appellant has contended that from Ex. PW 10/2, it is clear that the washer of the burner which controlled the flame of the stove, can be seen lying at a distance from the stove which could be only on account of bursting of stove at the base of

burner which tilted or bent the burner and in the process the washer of the burner would have flown away. The Photographs relied on by the Learned counsel are as under: Exhibit Pw 10/2 shows the tilted burner and the flame washer which is ordinarily on the top of the burner of the stove to control the flame and localize it, lying on the left near the wall away from the stove. According to the learned counsel for appellant this important piece of evidence has not been considered by the Trial Court nor any rational explanation for ignoring these factors have been given by the prosecution so as to negate completely the possibility of bursting of stove and the deceased getting burnt on account of kerosene bursting out from the stove at great pressure in case the burner of the stove was found bent. According to him the kerosene leaking from the stove has not been explained by the prosecution which is apparent from the photographs. The leaking kerosene is bluish in color which is the color added to kerosene to prevent adulteration of kerosene. According to him CrI.A. 797/2001 Page 15 of 30 ruling out bursting of stove by the Trial Court on the ground that it had not fallen from the shelf as no injury was on the head of the deceased is based on assumption of the Trial Court that the stove must be on the shelves in the kitchen and that had there been bursting of stove it would have flown from the shelf and would have fallen on the head of the deceased, which is nothing but assumption and on the basis of such assumption, the appellant cannot be convicted. Ex. Pw 10/6 showing leaking kerosene having blue color.

24. On behalf of the appellant it is also contended that the post mortem report and other documents do not show that despite 98% burns on the deceased, her hands especially her fingers and thumb were not burnt and therefore, she could have put her thumb impression on her alleged dying declaration Ex PW 13/2 which was allegedly recorded by the Investigating Officer, PW 13. It is stated that only a portion of the back of the deceased remained unburnt and if the thumb and fingers had remained un-burnt, the post mortem report would have indicated so. In the circumstances it is contended that no reliance can be placed on the alleged dying declaration and the appellant could not have been convicted on the basis of the same. The learned counsel for the appellant has also relied on 1977 CrI.L.J 4404, State of Orissa Vs Parasuram Naik in which dying declaration recorded by the Doctor was disbelieved despite the fact that the Doctor allegedly had no enmity

with the accused and would not have implicated the accused ordinarily.

25. Per contra the learned Additional Public Prosecutor has defended the judgment convicting the appellant on the same grounds which have been noted by the Trial Court. He has submitted that the judgment convicting the appellant is neither unsustainable nor perverse nor has any such illegality which is liable to be corrected or on the basis of which the judgment convicting the appellant is liable to be set aside.

26. It is no more res integra that if some material is on record consistent with the innocence of the accused which may reasonably be true, even though it is not positively proved to be true, the accused would be entitled to acquittal. It also cannot be disputed that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favorable to the accused should be adopted. Reliance for this can be made on Shivaji Sahabrao Bobade Vs State of Maharashtra, (1973) 2 SCC 793 where the Supreme Court had held so.

27. The probability of bursting of stove has been disbelieved by the Trial Court on the assumption that unless the stove had been on a shelf located in the kitchen at a higher level and hit the deceased on bursting, she would not have had kerosene on her head. Absence of any head injury or scratches or abrasion has also been factored to rule out the bursting of stove. The view is based on misconception that on bursting, the stove would move from its position. The bursting of stove also connotes spilling of contents, fuel of the stove with force. This is apparent from the photographs proved by the prosecution that the stove was not an ordinary stove with a wick only but it had the facility of pumping of air in the device which forces the fuel to escape from the narrow nozzle in the burner at a great force and as the top of the burner is very hot, the fuel coming out from narrow nozzle with a great force burns in a controlled manner. The flame is also localized, with a round washer which is placed on the top of the burner. This cannot be disputed that in the device, stove, if there is any other opening other than the nozzle of the burner, the fuel would escape with great force and jet of the escaping fuel will drench any object which would come in front of it. The trial Court had noticed during the trial

and had also incorporated on record when the stove was produced in evidence that its burner was bent. From the photographs proved by the prosecution, two of which have also been produced hereinabove, it is visible that the burner of the stove had been bent. The bent burner of the stove is demonstrative of the situation in which the fuel would have come out from the stove with a great force from the base of the burner from where it had bent. In the circumstances, any person in front of the stove would be sprayed with the fuel or would be drenched with fuel except at the back of the person. In contradistinction if the fuel is poured over the head of a person, it will flow down in front and at the back of such a person. To rule out the spraying of fuel as the consequences of bent burner of the stove, the prosecution should have got it examined from an appropriate expert, which has not been done nor there is any rational and cogent explanation for the same. In case the deceased was indeed doused with kerosene by the accused; the pattern of fallen kerosene from the body of the deceased would have been different from stream of kerosene flowing out from the stove with a bent burner through which the kerosene must have flowed out. The photographs clearly show that the kerosene had flowed out of the stove. These factors have not been satisfactorily answered by the prosecution.

28. From the evidence on record it is clear that the husband of Smt. Vani Anant, owner of the house immediately after the incident on getting the information from their maid Urmila, DW-1 had visited the site with her husband and after coming from there to their rooms, husband of Smt. Vani Anant had called the police on the basis of which DD entry no.4A dated 20th September, 2002 must have been recorded stipulating that at the relevant address a stove has burst and one person has died. This important evidence in the facts and circumstances could not be ignored on the ground that it is only a DD entry and the informant of this DD entry is not known. The prosecution has failed to explain as to why the husband of Smt. Vani Anant was not examined in the facts and circumstances. The prosecution has also failed to explain the ramification of bent burner and the kerosene flowing out of it. These circumstances are susceptible of rational explanation of bursting of stove and the deceased catching fire and are consistent with the innocence of the appellant. If the circumstances are capable of any other hypothesis, then the appellant is entitled for benefit and cannot be convicted of murdering his wife. If

the evidence on record is reasonably capable of two inferences, the one in favor of the accused must be accepted. The inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation, upon any other reasonable hypothesis with that of the guilt of the accused as had been held by the Supreme Court in *State of U.P Vs Ashok Kumar Srivastava*, (1992) 2 SCC 86.

29. Next is the alleged dying declaration of the deceased allegedly recorded by the Investigation Officer. The prosecution has not even tried to give any explanation as to why it wasn't recorded by the Magistrate and what were the circumstances, that the alleged dying declaration had to be recorded by the Investigating Officer. In *Balak Ram v. State of U.P.*(1975) 3 SCC 219 the Apex Court had held that though the dying declaration was alleged to have been recorded by Investigation Officer but in absence of any explanation as to why it was not recorded by a Magistrate in the usual course, High Court treated the statement of the deceased to be one recorded under section 161 of Cr. P.C and not a dying declaration. Though in the referred case the dying declaration was not signed by the deceased, however, even in the present case it has not been fully established that the dying declaration was thumb marked by the deceased. PW 7 Dr. Savita who had allegedly attested the dying declaration at 11.30 PM though it was allegedly recorded at 11.30 AM did not depose that in her presence the dying declaration was thumb marked by the deceased after it was read over to her by the Investigating Officer. Rather she deposed that fresh burns involved the entire body except the small area on back. She did not state that the thumb of the deceased was burnt to the extent that the mark could not be given from it. The post mortem report Ex. PW 8/1 also does not show that the thumbs of the deceased were not burnt or despite burns on the thumb, impression could be obtained from the thumb. In *Mannu Raja Vs State of M.P*, (1976) 3 SCC 104 in para 11 at page 108 the Supreme Court had held that the Investigating Officers are interested in the success of investigation and the Investigation Officer himself recording a dying declaration during the course of investigation ought not to be encouraged. The prosecution has failed to divulge any details as to why the Magistrate could not record the alleged dying declaration. Admittedly the deceased was admitted at 11.00 a.m and was alive for couple of hours before succumbing to burns. There is no explanation as to why the dying declaration could not be recorded in question

answer form, in order to reflect as to what was asked and what was answered by the deceased. This is also to be noticed that the dying declaration which is copiously worded or neatly structured excites suspicion for the reason that it bears the traces of tutoring or incorporating such facts which may not have been told by the deceased. From the dying declaration Ex PW 13/2 it is apparent that it is the language of the Investigating Officer and not the language of the deceased.

30. Though it is not necessary that the fitness of the person giving the dying declaration should be recorded on the dying declaration itself and it can be given separately on any application filed by the CrI.A. 797/2001 Page 22 of 30 Investigating Officer or any other concerned person, however, in this case a fitness certificate has been given on the dying declaration by one doctor at 11.30 AM which doctor has not been examined. Another Doctor has attested the dying declaration at 11.30 PM though the deceased had died at 04.00 PM. If the fitness certificate had been given on the alleged dying declaration by some other doctor why at the same time, 11.30 AM, an application seeking fitness of the deceased was requested by the Investigation Officer from Dr. Savita, who has also given the fitness certificate at 11.30 AM on the alleged application Ex PW 13/1. If two Doctors have given fitness certificate at the same time they must be present with the patient and must have examined her, then why they would give fitness certificate on two separate documents at the same time. These anomalies had to be explained by the prosecution. It was for the prosecution to establish that the alleged dying declaration was thumb marked by the deceased in the presence of Dr. Savita or another Doctor who had given the fitness certificate, as two fitness certificates and an alleged dying declaration were signed at 11.30 AM. If one doctor has not been examined and even his name or his where abouts are not disclosed and no explanation given as to why he could not be examined and if Dr. Savita as PW 7 has not deposed that the deceased had thumb marked the alleged dying declaration in her presence, not cross examining Dr. Savita by the appellant will not help prosecution in establishing the veracity of the alleged dying declaration so as to rely on the same.

31. For the reasons, the alleged dying declaration, Ex. PW-13/2 allegedly recorded by the Investigating Officer cannot be relied on, for the similar reasons the alleged

dying declaration, Ex. PW-7/1 incorporated in the Medico Legal Report also cannot be considered to be credible and cannot be relied for convicting the appellant for allegedly murdering his wife, Mansa by allegedly pouring kerosene over her and running away from the house. From the facts and circumstances, it has been inferred that the deceased got the burns from bursting of stove which must have led to Kerosene oil spurting out from the stove and drenching the deceased and burning her and not on account of pouring of kerosene by the appellant on his deceased wife.

32. The learned counsel for the appellant has relied on (1997) CrL. Law Journal, 4404, State of Orissa v. Parshuram Naik, where the dying declaration recorded by the doctor was not relied on. In Parshuram Naik (supra) though the doctor had certified that the deceased was conscious, however, it was not certified that she was in her full sense and having regard to the facts and circumstances, the Supreme Court had not relied on such dying declaration. In the present case at 11.00 a.m. the Medico Legal Report was recorded, where it was also incorporated that the patient was locked up in a room and kerosene oil was poured on her and she was set ablaze. The same doctor has attested another alleged dying declaration Ex PW 13/2 at 11.30 PM which was allegedly recorded by the Investigating Officer at 11.30 a.m. Why she had attested the alleged dying declaration at 11.30 PM has not been explained by her and her testimony has not been relied on. From the other facts and circumstances, also it is apparent that it has not been established that the kerosene oil was poured on the head of the deceased and thereafter she was set ablaze. From the evidence on record including the photographs it has to be inferred that stove in the room of the deceased had burst which had led to bending of the burner which fact was also intimated to police resulting into recording of DD entry 4A dated 20.9.1992 that the stove has burst in the concerned house and one person has died. From the testimony of owner of the house, it is apparent that this information must have been given by the husband of PW 1 Smt. Vani Anant, however, for the reasons best known to the prosecution this important witness had not been examined by the prosecution.

33. In *Laxman v. State of Maharashtra*, (1993) 9, SCC 562, it was held that a dying 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 more powerful consideration to speak only the truth. However, it was further held that notwithstanding these circumstances great caution must be exercised in considering the weight to be given to the dying declaration on account of existence of many circumstances which may affect the truthfulness of a dying declaration. In *Dalip Singh and others v. State of Punjab*, (1979) 4 SCC 332, it was held by the Supreme Court that although a dying declaration recorded by a police officer during course of the investigation is admissible under Section 32 of the Indian Evidence Act in view of the exception provided in Sub Section (2) of Section 162 of the Code of Criminal Procedure, 1973, it is better to leave such dying declaration out of consideration until and unless the prosecution satisfies the Court as to why it was not recorded by a Magistrate. In the present case, there is no attempt by the prosecution to disclose any facts as to why dying declaration could not be recorded by a Magistrate though after admission of the deceased at 11.00 a.m., the deceased was in the hospital till 4.00 p.m. when she had succumbed to her burn injuries. This has not been established as to when deceased had become medically unfit or unconscious to give her statement after at 11.30 a.m. when the alleged dying declaration was recorded by the investigating officer which has not been found to be credible. In the present facts and circumstances, the alleged dying declaration in the Medico Legal Report also has to be considered with circumspection. In these facts and circumstances, the appellant is not liable to be convicted on the basis of alleged dying declarations which are not consistent with the other facts and circumstances, and cannot be considered to be credible.

34. Regarding the alleged demand of Rs.5,000/- by the appellant, the trial court has not relied on the statement of PW-4, Sh.Shyam Lal, father, as he did not have any personal knowledge about the demand being made by the appellant through his deceased daughter as this fact was disclosed to him by his wife, Smt.Rukmini Devi, PW-5 and he had no personal knowledge about it. The cross-examination of this witness also could not be concluded as the dates for which the matter was adjourned, either the Court was on leave, or for some other reasons. The matter

had also been adjourned subsequently for which the appellant cannot be blamed. Thereafter before the cross-examination could be concluded, the father of the deceased, Sh.Shyam Lal, PW-4 had died. In the circumstances on such a statement the appellant cannot be implicated for the alleged demand of Rs.5000/- which has not been established. The mother, Smt.Rukmini Devi, PW-5 also could not be cross-examined as on the date her examination-in-chief was recorded, the cross-examination was adjourned on the ground that the remaining cross-examination of the father, Sh.Shyam Lal, PW-4 and mother, Smt.Rukmini Devi, PW-5 was to be conducted on the same date. The trial court found the request for cross-examining the father and the mother on the same day justifiable and therefore had adjourned the matter on 5th September, 1994. There after the Court proceedings on 13th February, 1998 reflects that Smt.Rukmini Devi, PW-5 was present but she was not cross-examined. However, from the proceedings, it is not clear whether the husband, PW-4 was present on that date or not, as the trial court by order dated 5th September, 1994 had allowed the request on behalf of the appellant to cross-examine PW-5, the mother of the deceased and the remaining cross examination of PW-4, the father of the deceased on the same date. Since despite the order permitting the appellant to cross-examine the father and mother of the deceased on the same day, the mother was not cross-examined, an application was filed on 31st October, 2000 for the cross-examination of PW-5, mother of the deceased.

35. The application was, however, dismissed by the trial court. A petition was filed on 31.10.2000 in the High Court challenging the order of the dismissal of the application for recalling PW-5, mother of the deceased. The High Court had allowed the application of the appellant by order dated 3rd January, 2001. Before the High Court, it was not disclosed that PW-5 had already died on 31st December, 1999, and therefore, the application to cross-examine PW-5 was allowed by the High Court by order dated 3rd January, 2001. If it was not disclosed by the prosecution before the High Court that PW-5, Smt. Rukmini Devi had already died on 31st December, 1999, the trial court could not impute anything adverse or malafide intentions on the part of the appellant on the assumption that he must have been aware about the death of his mother-in-law. The inference of the trial court that the act of the appellant is malafide and PW-5, Smt.Rukmini Devi

could not be cross-examined on account of malafide intentions on the part of the appellant cannot be sustained, nor on the basis of same, it can be held that the appellant had demanded Rs.5,000/- for the purchase of Scooter from his deceased wife, which amount the deceased wife had to obtain from her parent. The finding of the trial court in the facts and circumstances are unsustainable. If the statement of father, Sh.Shyam Lal, PW-4 and mother, Smt.Rukmini Devi, PW-5 cannot be considered as they could not be cross-examined, the charge against the appellant under Section 498A of the Indian Penal Code cannot be established. In the circumstances the charge under section 498A of IPC is liable to be set aside and the appellant is not liable for conviction for the said charge. In any case the appellant has already undergone imprisonment for 5 years 11 months and 19 days and he had become entitled for remission of 11 months and 15 days as in October, 2004 and his sentence had been suspended by order dated 16th September, 2005 and he had been ordered to be released on bail on furnishing a personal bond of Rs.10,000/- with one surety of like amount.

36. For the foregoing reasons, the order of conviction dated 6th June, 2001 convicting the appellant under Section 498A of the Indian Penal Code cannot be sustained and the order of sentence dated 11th June, 2001 awarding rigorous imprisonment for 3 years under Section 498A of Indian Penal Code and a fine of Rs. 100/- and in default to undergo a further rigorous imprisonment for 7 days and rigorous imprisonment for life under Section 302 of Indian Penal Code and to pay a fine of Rs.50/- and in default to undergo further rigorous imprisonment for 7 days cannot be sustained. Therefore for the forgoing reasons the order of conviction dated 6th June, 2001 and order of sentence dated 11th June, 2001 are liable to be set aside.

37. Consequently, the order of conviction dated 6th June, 2001 and order of sentence dated 11th June, 2001 are set aside and the appellant is acquitted of the charges under Section 498A and 302 of the Indian Penal Code. The appellant is on bail pursuant to order dated 16th September, 2005 on his furnishing a bond of Rs.10,000/- and one surety of the like amount. Since the appellant has been acquitted of charges against him the bail bond of the appellant is discharged and the surety of the appellant is also discharged in the facts and circumstances.

