IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Criminal Appeal No. 430 of 2010

Judgment reserved on : 11.07.2016

Date of Decision : August 24, 2016

State of Himachal Pradesh …Appellant

Versus

Sanjeev Kumar …Respondent

Coram:

The Hon'ble Mr. Justice Sanjay Karol, Judge

The Hon'ble Mr. Justice, Ajay Mohan Goel, Judge.

Whether approved for reporting?[1] *Yes.*

For the appellant : Mr. V. S. Chauhan, Addl. Advocate General with Mr. Vikram Thakur and Mr. Puneet Rajta, Dy.A.Gs. for the appellant/State.

For the respondent : Mr. Rajesh Mandhotra and Ms. Kanta Thakur, Advocates, for the respondent.

Sanjay Karol, J.

Assailing the judgment dated 29.04.2010, passed by learned Addl. Sessions Judge (II), Kangra at

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[1] Whether reporters of Local Papers may be allowed to see the judgment?

Dharamshala, Distt. Kangra, H.P., in Sessions Case No. 1-J/VII/2009, titled as *State of Himachal Pradesh vs. Sanjeev Kumar,* whereby respondent-accused stands acquitted, State has filed the present appeal under the provisions of Section 378 of the Code of Criminal Procedure, 1973.

2. It is the case of prosecution that on 17.7.2008, Smt. Jeevna Devi consumed poison in her matrimonial house. She was taken to the Community Health Centre, Fatehpur by her husband i.e. accused Sanjeev Kumar where she was examined by Dr. Satnam Singh (PW-4). The matter came to be reported to the police and ASI Mohinder Paul (PW-10) rushed to the hospital, who after obtaining certificate of fitness (Ext. PW-4/B) recorded statement (Ext. PW-7/A) of Jeevna Devi, which was sent through Const. Mohinder Singh and accordingly F.I.R. No. 144/2008, dated 18.7.2008 (Ext. PW-11/A) came to be registered at police station Jawali, Distt. Kangra, H.P. against the accused under the provisions of Sections 498-A of the Indian Penal Code. Though the victim was further referred to the Civil Hospital Nurpur, but instead taken to a private hospital, at Pathankot where she expired. Post mortem of the dead body was

conducted by Dr. Anju Lath (PW-1) and Dr. Ashutosh Joshi (PW-3) who issued reports (Ext. PW-1/B and Ext. PW-1/C). Investigation revealed that since inception of their marriage, in the year 2003, accused had been subjecting the deceased to mental and physical cruelty, which eventually prompted her to take away her life. As such, challan was presented in the Court for trial.

3. Accused was charged for having committed offences punishable under the provisions of Sections 498-A and 306 of the Indian Penal Code, to which he did not plead guilty and claimed trial.

4. In order to prove its case, in all, prosecution examined eleven witnesses and statement of the accused, under Section 313 Cr. P.C. recorded, wherein he took a plea of innocence and false implication. No evidence in defence was led by the accused.

5. Based on the testimonies of the witnesses and the material on record, trial Court acquitted the accused of all the charged offences, for the reason that: (a) Prosecution failed to establish the cause, prompting the deceased to take away her life; (b) There was no evidence of

cruelty/harassment caused “soon before” the commission of suicide; (c) Dying declaration (Ext. PW-7/A) was a weak piece of evidence as there was (i) discrepancy about the time when it came to be recorded, (ii) doubt with regard to the mental condition of the victim, (iii) places of signatures are different in the original and carbon copy (Mark-D1), (iv) In view of the fact that the MLC (Ext.PW-4/A) bore her thumb impression, her having signed the statement is rendered doubtful; (d) Baldev Singh (PW-8) father of the deceased, materially contradicted the prosecution case. Absence of any prior complaint made to the panchayat/police only fortified his version.

6. Hence, the present appeal by the State.

7. Having heard learned counsel for the parties as also perused the record, we are of the considered view that the trial Court seriously erred in not correctly and completely appreciating the testimonies of the prosecution witnesses. It further erred in ignoring the relevant statutory provisions and the law laid down by the apex Court. Findings are, thus, perverse and illegal. It has resulted into travesty of justice.

8. A Constitution Bench of the Hon'ble Supreme Court of India in *M.G. Agarwal v. State of Maharashtra,* AIR 1963 SC 200, has held that in dealing with an appeal against judgment of acquittal, the appellate Court should normally be slow in disturbing the findings of fact recorded by the trial Court. However, there is a caveat. Such findings have to be based on proper and complete appreciation of evidence. Jurisdiction and the power of the appellate Court is also to reappreciate the evidence but with caution. The Court is not to substitute its own opinion with that of the trial Court.

9. In *Madan Gopal Makkad v. Naval Dubey and another,* (1992) 3 SCC 204, the Apex Court held the scope of the Court in an appeal against acquittal in the following manner:

> "26. In *Wilayat Khan v. State of U.P.,* AIR 1953 SC 122; this court while examining the scope of S. 417 and 423 of the old Code pointed out that even in appeals against acquittal, the powers of the High court are as wide as in appeals from convictions. See also (1) *Surajpal Singh v. State,* AIR 1952 SC 52, (2) *Tulsiram Kanu v. State,* AIR 1954 SC 1, *(3) Aher Raja Khima v. State of Saurashtra,* AIR 1956 SC 217, (*4) Radha Kishan v. State of U.P.*, AIR 1963 SC 822, holding that an appeal from acquittal need not be treated different from an appeal from conviction; (5)

> *Jadunath Singh v. State of U.P.*, (1971) 3 SCC 577, (6) *Dharam Das v. State of U.P.,* (1973) 2 SCC 216, (7) *Barati v. State of U.P.*, (1974) 4 SCC 258, and (8) *Sethu Madhavan Nair v. State of Kerala,* (1975) 3 SCC 150."

10. It is not a case of murder and the accused stands charged for having committed offences, punishable under the provisions of Sections 498-A & 306 of the Indian Penal Code. To establish the same, prosecution has to prove that the accused, being the husband, subjected the deceased to cruelty or harassment and further as a result thereof abetted her to commit suicide.

11. Certain facts are not in dispute: (i) the deceased was married to the accused four – five years prior to the incident; (ii) on 17.7.2008 she consumed poison when accused took her to the hospital at Fatehpur. Such fact in any case stands proved by Dr. Satnam Singh (PW-4) and ASI Mohinder Paul (PW-10); and (iii) deceased consumed poison in the matrimonial house. It also stands established by ASI Mohinder Paul (PW-10).

12. On the record there is a dying declaration (Ext.PW-7/A) which reads that the accused would physically assault the deceased and even on the date of the incident

he had physically assaulted her for the reason that she was elder in age and not to his liking. All this prompted her to consume poison.

13. Authenticity of such statement is a fact in issue. To establish the same, prosecution seeks reliance upon the testimonies of Dr.Satnam Singh (PW.4), Kuldeep (PW.7), Baldev Singh (PW-8) and ASI Mohinder Paul (PW-10). Before we deal with the same, it would be prudent to discuss the law on the issue.

14. In *Jaishree Anant Khandekar vs. State of Maharashtra,* (2009) 11 SCC 647, a comparative study of laws of various countries on the point of dying declaration was done by the Apex Court. It was held that:

> "17. The law relating to dying declaration is an exception to the hearsay rule. The rationale behind admissibility of a dying declaration was best expressed, not in any judgment, but in one of the soliloquies in Shakespeare's King John, when fatally wounded Melun wails:
>
> 'Have I met hideous
> death within my view,
> Retaining but a quantity of life,
> Which bleeds away
> even as a form of wax,
> Resolveth from his figure

'gainst the fire?
What in the world should
make me now deceive,
Since I must lose the use of all deceit?
Why should I then be false
since it is true
That I must die here
and live hence by truth?'
(See King John, Act V, Scene IV.)

18. Both Taylor and Wigmore in their treatise on Evidence took refuge to the magic of Shakespeare to illustrate the principles behind admissibility of dying declaration by quoting the above passage.

19. Among the judicial fraternity this has been best expressed, possibly by Lord Chief Justice Baron Eyre (See. R. Vs. Woodcock, (1789) 1 Lea.502, and which I quote (ER p.353): -

> "...That such declarations are 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 mind is induced by the most powerful considerations to speak the truth; a situation so solemn and so awful is considered by the law as creating an obligation, equal to that which is imposed by a positive oath in a court of justice."

20. The test of admissibility of dying declaration is stricter in English Law than in Indian Law. Sir James Fitzjames Stephen in 1876 brought out a 'Digest of the Law of

Evidence' and its introduction is of considerable interest even today. The author wrote that English Code of Evidence is modelled on the Indian Evidence Act of 1872. In the words of the author:

> "In the autumn of 1872 Lord Coleridge (then Attorney General) employed me to draw a similar code for England. I did so in the course of the winter, and we settled it in frequent consultations. It was ready to be introduced early in the Session of 1873. Lord Coleridge made various attempts to bring it forward, but he could not succeed till the very last day of the Session. He said a few words on the subject on the 5th August, 1873, just before Parliament was prorogued. The Bill was thus never made public, though I believe it was ordered to be printed.
>
> It was drawn on the model of the Indian Evidence Act and contained a complete system of law upon the subject of evidence."

21. In that book, Article 26 sums up the English law relating to dying declaration as under:-

> "Article 26. Dying Declaration as to Cause of Death . - A declaration made by the declarant as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, is deemed to be relevant only in trials for the murder or manslaughter of the declarant; and only *when the declarant is shown, to the satisfaction of the judge,*

to have been in actual danger of death, and to have given up all hope of recovery at the time when his declaration was made.

Such a declaration is not irrelevant merely because it was intended to be made as a deposition before a magistrate, but is irregular."

(emphasis supplied)

22. In Section 32(1) of the Indian Evidence Act the underlined portion is not there. Instead Section 32 (1) is worded differently and which is set out:

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

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

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be he nature of the proceeding in

which the cause of his death comes into question." (emphasis supplied)

23. The Privy Council in the case of Nembhard Vs. The Queen, 1982 (1) The All England Law Reports 183 (Privy Council), while hearing an appeal from the Court of Appeal of Jamaica, made a comparison of the English Law and Indian Law by referring to the underlined portions of Section 32(1) of the Indian Evidence Act at page 187 of the report. Sir Owen Woodhouse, speaking for the Privy Council, pointed out the different statutory dispensation in Indian Law prescribing a test of admissibility of dying declaration which is distinct from a common law test in English Law.

24. Apart from an implicit faith in the intrinsic truthfulness of human character at the dying moments of one's life, admissibility of dying declaration is also based on the doctrine of necessity. In many cases victim is the only eye witness to a crime on him/her and in such situations exclusion of the dying declaration, on hearsay principle, would tend to defeat the ends of justice. American Law on dying declaration also proceeds on the twin postulates of certainty of death leading to an intrinsic faith in truthfulness of human character and the necessity principle.

25. On certainty of death, the same strict test of English Law has been applied in American Jurisprudence. The test has been variously expressed as ‘no hope of recovery', ‘a settled expectation of death'. The core concept is that the expectation of death must be absolute and not susceptible to doubts and there should be no chance of operation of worldly motives. (See Wigmore on Evidence page 233-234).

> 26. This Court in Kishan Lal Vs. State of Rajasthan, AIR 1999 SC 3062, held that under English Law the credence and the relevance of the dying declaration is admissible only when the person making such statement is in hopeless condition and expecting imminent death. Justice Willes coined it as a "settled hopeless expectation of death" (R Vs. Peel, (1860) 2 F. & F. 21, which was approved by the Court of Criminal Appeal in R Vs. Perry, (1909) 2 KB 697). Under our Law, the declaration is relevant even if it is made by a person, who may or may not be under expectation of death, at the time of declaration. (See para 18,page 3066). However, the declaration must relate to any of the circumstances of the transaction which resulted in his death."

15. The apex Court in *Tapinder Singh vs. State of Punjab & another,* AIR 1970 S.C. 1566 has held that if the dying declaration is acceptable as truthful, in the absence of other corroborative evidence, the Court can act upon it and convict the accused.

16. In *Khushal Rao vs. State of Bombay,* AIR 1958 SC 22, the Apex Court has further held that:-

> "Sometimes, attempts have been made to equate a dying declaration with the evidence of an accomplice or the evidence furnished by a confession as against the maker, if it is retracted, and as against others, even though not retracted. But in our opinion, it is not right in principle to do so. Though under S. 133 of the Evidence Act, it is not illegal to convict a person on the uncorroborated testimony of an

accomplice, illustration (b) to S. 114 of the Act, lays down as a rule of produce based on experience, that an accomplice is unworthy of credit unless his evidence is corroborated in material particulars and this has now been accepted as a rule of law. The same cannot be said of a dying declaration because a dying declaration may not, unlike a confession, or the testimony of an approver, come from a tainted source. If a dying declaration has *been made by a person whose antecedents are as doubtful as in the other cases that may be a ground for looking upon it with suspicion, but generally speaking, the maker of a dying declaration cannot be tarnished with the same brush as the maker of a confession or an approver*."

"*It cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated; each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made*; it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence that other pieces of evidence; a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence; a dying declaration which has been recorded by a competent magistrate in the proper manner, that is to say, in the form of questions and answers, and, as for as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character, and in order to test the reliability of a dying declaration, the Court has to keep in view, the circumstances like the opportunity of the

lying man for observation, for example, whether there was sufficient light if the crime was committed at night; *whether the capacity of the man to remember the facts stated, had not been impaired at the time he was making the statement, by circumstances beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties*."

"In order to pass the test of reliability, a dying declaration has to be *subjected to a very close scrutiny*, keeping in view the fact that the statement has been made in the absence of the accused who had no opportunity of testing the veracity of the statement by cross-examination. But once, the Court has come to the conclusion that the dying declaration was the truthful version as to the circumstances of the death and the assailants of the victim, there is no question of further corroboration. *If, on the other hand, the Court, after examining the dying declaration in all its aspects, and testing its veracity, has come to the conclusion that it is not reliable by itself, and that it suffers from an infirmity, then without corroboration it cannot form the basis of a conviction*. Thus, the necessity for corroboration arises not from any inherent weakness of a dying declaration as a piece of evidence, as held in some of the reported cases, but from the fact that the Court, in a given case, has come to the conclusion that particular dying declaration was not free from the infirmities."

(Emphasis supplied)

17. The aforesaid decision came up for consideration before the Constitution Bench of the Apex Court in *Harbans*

Singh and another vs. The State of Punjab, AIR 1962 SC 439 and after taking into account its earlier decision in *Ram Nath vs. State of Madhya Pradesh,* AIR 1953 SC 420, affirmed the aforesaid view.

18. In *Paniben (Smt.) vs. State of Gujarat,* (1992) 2 SCC 474, the Court has further reiterated and laid down the following principles:-

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

> "However, since the accused has no power of cross-examination, which is essential for eliciting the truth, the dying declaration should be of such a nature as to inspire full confidence of the Court in its correctness. The Court has to be on guard that the statement of deceased was not as a result of either tutoring, prompting or a product of imagination. The Court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailants. Normally the court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eye witness has said that the deceased was in a fit and conscious state to make

this dying declaration, the medical opinion cannot prevail".

"Merely because a dying declaration does not contain the details as to occurrence, it is not to be rejected. Equally, merely because it is a brief statement, it is not be discarded. On the contrary, the shortness of the statement itself guarantees truth. But a dying declaration which suffers from infirmity cannot form the basis of conviction. Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon."

"(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. (Mannu Raja v. State of U.P. (1976) 2 SCR 764) (AIR 1976 SC 2199).

(ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration (State of U.P. v. Ram Sagar Yadav, AIR 1985 SC 416; Ramavati Devi v. State of Bihar, AIR 1983 SC 164).

(iii) This Court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had opportunity to observe and identify the assailants and was in a fit state to make the declaration. (Rama Chandra Reddy v. Public Prosecutor, AIR 1976 SC 1994).

(iv) Where dying declaration is suspicious it should not be acted upon without corroborative evidence. (Rasheed Beg v.

State of Madhya Pradesh, (1974) 4 SCC 264 : (AIR 1974 SC 332).

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. (Kake Singh v. State of M.P., AIR 1982 SC 1021).

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. (Ram Manorath v. State of U.P., 1981 SCC (Crl) 581).

(vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected. (State of Maharashtra v. Krishnamurthi Laxmipati Naidu, AIR 1981 SC 617).

(viii) Equally, merely because it is a brief statement it is not be discarded. On the contrary, the shortness of the statement itself guarantees truth. (Surajdeo Oza v. State of Bihar, AIR 1979 SC 1505).

(ix) Normally the Court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eyewitness has said that the deceased was in a fit and conscious state to make this dying declaration, the medical opinion cannot prevail. (Nanahau Ram v. State, AIR 1988 SC 912).

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. (State of U.P. v. Madan Mohan, AIR 1989 SC 1519).

> 19. In the light of the above principles, we will consider the three dying declarations in the instant case and we will ascertain the truth with reference to all dying declarations made by the deceased Bai Kanta. This Court in Mohan Lal v. State of Maharashtra, AIR 1982 SC 839 held:
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> "where there are more than one statement in the nature of dying declaration, one first in point of time must be preferred."
>
> Of course, if the plurality of dying declarations could be held to be trust-worthy and reliable, they have to be accepted."

19. In *Jayabalan vs. Union Territory of Pondicherry,* (2010) 1 SCC 199, the Apex Court was dealing with the case of an accused who after pouring kerosene oil had set his wife on fire. The husband was held guilty of having committed an offence punishable under Section 302, IPC. The accused assailed the findings of conviction on the ground that prosecution had examined only interested witnesses and also dying declaration was tutored, promoted and product of the imagination of deceased. In the proven facts of that case repelling the contention, it was held as under:-

> "We are of the considered view that in case where the court is called upon to deal with the evidence of the interested witnesses, the approach of the court, while appreciating the evidence of such witnesses must not be pedantic. The court must be cautious in appreciating and accepting the evidence given by the interested witnesses but the court must not be suspicious of such evidence. The primary endeavour of the court must be to look for consistency. The evidence of a witness cannot be ignored or thrown out solely because it comes from the mouth of a person who is closely related to the victim." (Emphasis supplied)

20. In *Krishan vs. State of Haryana,* (2013) 3 SCC 280, even where the witnesses had turned hostile, solely on the basis of dying declaration, the Court convicted the accused.

21. In *Sukanti Moharana vs. State of Orissa,* (2009) 9 SCC 163, the Court was dealing with a case where the dying declaration was challenged on the ground that it did not contain thumb impression or signatures of the deceased. The challenge was repelled on the ground that medical evidence proved that the deceased was having 90% burn injuries on the thumb and therefore was in no position to sign the dying declaration. The Apex Court

further reiterated its decision in Nallapati Sivaiah vs. SDO, (2007) 15 SCC 465, in the following terms:-

> "18. ...This Court in more than one decision cautioned that the courts have always to be on guard to see that the dying declaration was not the result of either tutoring or prompting or a product of imagination. It is the duty of the courts to find that the deceased was in a fit state of mind to make the dying declaration. In order to satisfy itself that the deceased was in a fit mental condition to make the dying declaration, the courts have to look for the medical opinion."

22. This view stands reiterated in *Ongole Ravikanth vs. State of Andhra Pradesh,* (2009) 13 SCC 647.

23. Dying declaration can be made any time, in the presence of anyone. It need not to be a Doctor, a Government Officer or an Executive Magistrate. So long as the victim is aware and fully conscious of what is being done and said, any statement made by her can be treated as an evidence, it being a different matter, as to whether it requires corroboration or not. (See: *Munnu Raja and another v. The State of Madhya Pradesh,* (1976) 3 SCC 104; *Ramawati Devi v. State of Bihar,* (1983) 1 SCC 211).

24. Dying declaration need not be in the form of question and answer. Principles required to be adopted for

recording the statement of deceased stand reiterated in *Ram Bihari Yadav Vs. State of Bihar and others,* (1998) 4 SCC 517, *State of Karnataka vs. Shariff* (2003) 2 SCC 473 and *K.Ramachandra Reddy and another vs. The Public prosecutor,* (1976) 3 SCC 618.

25. Facts of each case have to be considered in the attending circumstances.

26. Now what happened in the hospital is narrated by Dr. Satnam Singh (PW-4). He is categorical that on 18.7.2008 at about 3 a.m., Jeevna Devi (deceased) with an alleged history of consumption of some poisonous substance, after quarrel with her husband was brought to the hospital whom he examined. At that time, victim was complaining of vomiting, sweating and giddiness. He is categorical that the patient was cooperative and well oriented to time and place. Her pulse was 80 per minute; BP 80/60; and pupils constricted and reactive to light. She was administered emergency treatment. After some time, when police moved an application, victim was checked and thereafter he certified her fit to make a statement which she did by stating that “before taking poison her husband

quarreled with her and as a result of which she was compelled to take poison". Thus Doctor does not state anything about the physical assaults or the reason of quarrel, but is certain about the quarrel which compelled for taking poison. Most significantly he has testified that the victim appended her signatures at Circle-A of the statement contents whereof he does not deny to be false or incorrect. We see no reason as to why this witness would depose falsely. Our attention is invited to that part of his testimony (in cross examination) wherein he admits that the victim had put her thumb impression on the MLC (Ext. PW-4/A) for the reason that she was unable to sign. But then this would not in any manner, render the prosecution case or the dying declaration to be doubtful. This we say so for the reason that the victim remained under his examination for about an hour i.e. between 3.00 a.m. to 4.00 a.m. It has not come in the testimony of this witness that from the time of his first examination, health of the victim had deteriorated. At the time of her first examination victim may not have been in a position to sign the papers but then the Doctor is categorical that the victim herself had thumb marked the

document (Ext. PW-4/A), which only mean, that even at that time, she was conscious. It is not that on this document impression of her thumb was taken by the Doctor by lifting her hand. Also Doctor is categorical that when police moved the application, victim was fully conscious, aware and oriented to time and place. Doctor had given her treatment and possibly by that time, her condition had improved. He is categorical that at the time of recording of such statement, both the accused and relatives of the deceased were present. Significantly none objected to or protested against the recording of such statement. Also none tutored or influenced anyone.

27. We find that statement (Ext. PW-7/A) came to be recorded by ASI Mohinder Paul (PW-10). Our attention is invited to that part of his testimony, which according to the accused, renders the prosecution case to be doubtful. This witness does admit that the said statement came to be recorded in the presence of the brother of the victim; not in the question & answer form; the place of signature on the duplicate copy (Mark-D1) is different than the original (Ext. PW-7/A). But then how would it make any difference,

rendering his testimony to be doubtful. After all it bears the signature of the victim so appended in the presence of Dr. Satnam Singh (PW-4). If in the duplicate copy signatures are at a different place it would not make any difference, for it is nobody's case that such signatures are not that of the victim or came to be appended later on.

28. Also Kuldeep (PW-7) who is the brother of the deceased is categorical that the said statement came to be recorded at the time when the victim was conscious and alert. According to him, deceased had made a statement to the police that the accused used to beat her under the influence of liquor and that on account of mental torture she consumed poison. The first part of such statement is an improvement, but certainly would not render him to be an unreliable witness. No doubt this witness in his cross examination admits that the police had put questions to the victim for about 10 to 15 minutes, but then, it remains explained that answers were not being dictated by the police officer who was only asking the questions. Questions were being asked and answers given by the deceased.

29. We notice that there is variation with regard to the time when the matter came to be reported to the police; statement (Ext. PW-7/A) came to be recorded; and the witnesses reached the hospital.

30. As per MLC (Ext. PW-4/A) patient was brought to the hospital on 18.7.2008 at 3.00 a.m. when she was examined and report sent to the police at 4.00 a.m. But ASI Mohinder Paul (PW-10) states that the Doctor informed him of the incident at 3.05 a.m. where after he rushed to the hospital and after obtaining the certificate of fitness (Ext. PW-4/B) recorded the statement (Ext. PW-7/A). This document reveals the statement to have been recorded at 4.15 a.m. and the police informed about the incident at 3.05 a.m. Further Doctor (PW-4) states that he examined the victim, at 3.00 a.m., but according to Kuldeep (PW-7) he reached the hospital simultaneously with the police between midnight and 1.00 a.m.

31. These contradictions with regard to the timings have heavily weighed with the trial Court in disbelieving the evidence of dying declaration (Ext. PW-7/A).

32. We do not find the difference in timing and the variation in the testimonies of the witnesses and the documentary evidence to be so significant or material so as to render the prosecution case to be doubtful or the testimonies of the witnesses to be unbelievable or unworthy of credence. After all, one cannot lose sight of the fact that we are dealing with the witnesses who hail from a rural background and their statements came to be recorded in the Court after a gap of more than one year. Kuldeep was not residing in the same village. On telephone, parents of the victim received information of the incident. They travelled all the way to Fatehpur. It has not come in the testimony of the police officials that by 1.00 a.m. itself, they had received the information. In fact ASI Mohinder Paul (PW-10) is categorical that he received the information at 3.05 a.m. Whether the police was informed at 3.00 a.m. or 4. 00 a.m. becomes absolutely immaterial for what is required to be examined is as to whether, genesis of the prosecution story of the victim having consumed poison and made a dying declaration, in the presence of prosecution witnesses, is inspiring in confidence or not. Significantly

both Dr. Satnam Singh (PW-4) and ASI Mohinder Paul (PW-10) had no reason to falsely depose either which way, in favour of the parties. Some leeway is required to be given to the witnesses who have deposed after certain period of time.

33. The witnesses are categorical that when application came to be moved, certificate of soundness and mental state came to be issued. In the presence of the Doctor, when questioned, victim stated that only on account of physical harassment and torture, she consumed poison. She was subjected to physical assaults by her husband who did not have any liking towards her, for she was elder in age. What is relevant is the fact that at the time of making statement, she was in a sound disposing state of mind. None influenced, tutored or coerced her to make such a statement. It was voluntary in nature. No doubt, brother of the victim (PW-7) was present at that time, but then so was the accused. The Doctor (PW-4), an independent person, has categorically deposed the victim to have consumed poison after her husband quarreled with her. What is that quarrel, and who was responsible for the same, no doubt is

not so stated by him but then it is so clearly recorded in the statement (Ext. PW-7/A) which is not only signed but also testified to be the true and correct version of the victim.

34. Significantly there is nothing on record to establish the time when the victim came to be discharged from this hospital. It is not the case of the parties that parents of the accused hail from the same village or that Police Post Fatehpur was close by. After all, it would have taken time for the relatives of the victim and the police to have reached the hospital. Variation in the timings, is also explainable, for in these moments, none bothers to record the exact time.

35. Further it is nobody's case that relatives of the victim brought the police. They may have reached the hospital at the same time. It is not that police was acting on their dictates. Independently they came to discharge their duties in accordance with law.

36. Yes, Kuldeep (PW-7) does state that the victim answered the questions put by the police, but then it is nobody's case that the statement came to be recorded in a question & answer form. It stands specifically denied by the

witness that police officer had dictated the answers. What was so stated by the victim came to be recorded in the statement. Witnesses admit to have signed the same. Also victim signed the same. Whether in the carbon copy such signatures are at a different place would not make any difference for even these signatures are in original and not traces of the original.

37. We find that though father Baldev Singh (PW-8) has not supported the prosecution but then even he admits the statement of deceased Jeevna to have been recorded by the police. In fact, he goes to admit that at that time, deceased was fully conscious and had signed the same. He further states “it is correct that my daughter gave statement to the police that in the night the accused had beaten her and said that she was elder to him and was also not to his liking and as a result thereof she had taken some poisonous substance. At that time Medical Officer was also there”. No doubt in his statement he does state that in the hospital at Fatehpur condition of his daughter was “not good” and that she had spoken only three – four words with him. But then he only narrates about his conversation with

the deceased and qualifies that the police had informed him that “they have taken the statement of Jeevna Devi”.

38. Hence record does establish, beyond reasonable doubt, the fact that the victim had made a dying declaration (Ext. PW-7/A), authenticity whereof, to our mind, is beyond the reach of ambiguity or doubt. To our mind, statement (Ext. PW-7/A) is a perfect piece of evidence falling within the ambit and scope of Section 32 of the Indian Evidence Act establishing the guilt of the accused in relation to the charged offences. Presumption, statutory in nature, under the Evidence Act is clearly invokable in the instant case.

39. Trial Court in para – 17 of the impugned judgment did notice the principles governing ‘dying declaration’, as laid down by the apex Court. However, we are of the view that the same have not been correctly applied in the given facts and circumstances.

40. “Cruelty” for the purpose of the crime in question would mean, willful conduct of the accused, which is of such a nature as is likely to drive the deceased to commit suicide or harassment with a view to coerce her to meet any unlawful demand of property or valuable security.

Also, harassment on account of failure to meet such demand would also amount to cruelty. If the prosecution is able to show that suicide was committed within a period of seven years from the date of marriage, as a result of cruelty, the law by virtue of Section 113A of the Evidence Act, mandates the Court to presume that such act of suicide came to be abetted by her husband or his relatives. Also, for proving the charge of abetment to suicide, it has to be proved that the accused treated the deceased with cruelty and drove her to commit suicide.

41. In *Ramesh Kumar vs. State of Chhattisgarh, (2001) 9 SCC 618,* the Apex Court has also held that "Sections 498-A and 306 IPC are independent and constitute different offences. Though, depending on the facts and circumstances of an individual case, subjecting a woman to cruelty may amount to an offence under section 498-A and may also, if a course of conduct, amounting to cruelty is established leaving no other option for the woman except to commit suicide, amount to abetment to commit suicide. However, merely because an accused has been held liable to be punished under section 498-A IPC it does

not follow that on the same evidence he must also and necessarily be held guilty of having abetted the commission of suicide by the woman concerned."

42. In *State of West Bengal Vs. Orilal Jaiswal (1994) 1 SCC 73*, the Apex Court has held as under:

> "In a criminal trial the degree of proof is stricter than what is required in a civil proceedings. In a criminal trial however intriguing may be facts and circumstances of the case, the charges made against the accused must be proved beyond all reasonable doubts and the requirement of proof cannot lie in the realm of surmises and conjectures. The requirement of proof beyond reasonable doubt does not stand altered even after the introduction of S. 498A, I.P.C and S. 113A of Indian Evidence Act. Although, the court's conscience must be satisfied that the accused is not held guilty when there are reasonable doubts about the complicity of the accused in respect of the offences alleged, it should be borne in mind that there is no absolute standard for proof in a criminal trial and the question whether the charges made against the accused have been proved beyond all reasonable doubts must depend upon the facts and circumstances of the case and the quality of the evidences adduced in the case and the materials placed on record. The doubt must be of a reasonable man and the standard adopted must be a standard adopted by a reasonable and just man for coming to a conclusion considering the particular subject matter.
>
> The conscience of the court can never be bound by any rule but that is coming itself dictates the consciousness and prudent exercise of the judgment. Reasonable doubt is simply that degree of doubt which would permit a reasonable and just man to come to a conclusion. Reasonableness of the doubt must be commensurate with the nature

> of the offence to be investigated. Exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicions and thereby destroy social defence. Justice cannot be made sterile on the plea that it is better to let hundred guilty escape than punish an innocent. Letting guilty escape is not doing justice, according to law."
>
> (Emphasis supplied)

43. The Apex Court further cautioned that the court should be extremely careful in assessing the facts and circumstances of each case and the evidence adduced in the trial for the purpose of finding whether the cruelty meted out to the victim had in fact induced her to end the life by committing suicide. If it transpires to the court that a victim committing suicide was hypersensitive to ordinary petulance, discord and differences in domestic life quite common to the society to which the victim belonged and such petulance, discord and differences were not expected to induce a similarly circumstanced individual in a given society to commit suicide, the conscience of the court should not be satisfied for basing a finding that the accused charged of abetting the offence of suicide should be found guilty.

44. In *Arun Vyas & anr. Vs. Anita Vyas (1999) 4 SCC 690*, the Apex Court has held that the essence of offence in Section 498-A is cruelty. It is a continuing offence and on each occasion on which the wife is subjected to cruelty, she would have a new starting point of limitation.

45. In *Kundula Bala Subrahmanyam and Anr. Vs. State of Andhra Pradesh (1993) 2 SCC 684*, the Apex Court has held as under:-

> "The role of courts, under the circumstances assumes greater importance and it is expected that the courts would deal with such cases in a more realistic manner and not allow the criminals to escape on account of procedural technicalities or insignificant lacune in the evidence as otherwise the criminals would receive encouragement and the victims of crime would be totally discouraged by the crime going unpunished. The courts are expected to be sensitive in cases involving crime against women."

46. Whether one spouse has been guilty of cruelty to the other is essentially a question of fact. The impact of complaints, accusations or taunts on a person amounting to cruelty depends on various factors like the sensitivity of the individual victim concerned, the social background, the environment, education etc. Further, mental cruelty varies from person to person depending on the intensity of sensitivity and the degree of courage or endurance to

withstand such mental cruelty. In other words, each case has to be decided on its own facts to decide whether the mental cruelty was established or not. [*Mohd. Hoshan A.P. & Anrs. Vs. State of A.P. (2002) 7 SCC 414*].

47. Instigation is to goad, urge forward, provoke, incite or encourage to do "an act". To satisfy the requirement of instigation though it is not necessary that actual words must be used to that effect or what constitutes instigation must necessarily and specifically be suggestive of the consequence. Yet a reasonable certainty to incite the consequence must be capable of being spelt out. The accused must by his acts or omission or by a continued course of conduct create such circumstances that the deceased is left with no other option except to commit suicide in which case an instigation may have been inferred. A word uttered in the fit of anger or emotion without intending the consequences to actually follow cannot be said to be instigation. [*Ramesh Kumar vs. State of Chhatisgarh, (2001) 9 SCC 618*]

48. The Apex Court in *Naresh Kumar v. State of Haryana and others,* (2015) 1 SCC 797, has observed that

"as regards the claim for parity of the case of the Appellant with his mother and brother who have been acquitted, the High Court has rightly found his case to be distinguishable from the case of his mother and brother. The husband is not only primarily responsible for safety of his wife, he is expected to be conversant with her state of mind more than any other relative. If the wife commits suicide by setting herself on fire, proceeded by dissatisfaction of the husband and his family from the dowry, the interference of harassment against the husband may be patent. Responsibility of the husband towards his wife is qualitatively different and higher as against his other relatives".

49. With regard to dowry death, the Apex Court in *Baljinder Kaur v. State of Punjab*, (2015) 2 SCC 629, held that:

> "21. In our view, there is force in the submission of the learned counsel for the appellant. In cases related to dowry death, the circumstances showing the cruelty or harassment are not restricted to a particular instance, but normally refer to a course of conduct. Such conduct of cruelty or dowry harassment must be "soon before death". There should be a perceptible nexus between her death and the dowry related harassment or cruelty inflicted on her."

50. The Apex Court in *Rajinder Singh v. State of Punjab,* (2015) 6 SCC 477, in the following words, explained the meaning of “dowry”, as under:

> “8. A perusal of this Section shows that this definition can be broken into six distinct parts:
>
> (1) Dowry must first consist of any property or valuable security - the word "any" is a word of width and would, therefore, include within it property and valuable security of any kind whatsoever.
>
> (2) Such property or security can be given or even agreed to be given. The actual giving of such property or security is, therefore, not necessary.
>
> (3) Such property or security can be given or agreed to be given either directly or indirectly.
>
> (4) Such giving or agreeing to give can again be not only by one party to a marriage to the other but also by the parents of either party or by any other person to either party to the marriage or to any other person. It will be noticed that this clause again widens the reach of the Act insofar as those guilty of committing the offence of giving or receiving dowry is concerned.
>
> (5) Such giving or agreeing to give can be at any time. It can be at, before, or at any time after the marriage. Thus, it can be many years after a marriage is solemnised.
>
> (6) Such giving or receiving must be in connection with the marriage of the parties. Obviously, the expression "in connection with" would in the context of the social evil sought to be tackled by the Dowry Prohibition Act mean "in relation with" or "relating to".”

51. In the very same decision, after examining the intent of the Legislators for enacting the special enactment, by applying the principle of “force and life”, the Court held that any money or property or valuable security demanded by any of the persons mentioned in Section 2 of the Dowry Prohibition Act, at or before or at any time after the marriage which is reasonably connected to the death of a married woman, would necessarily be in connection with or in relation to the marriage unless, the facts of a given case clearly and unequivocally point otherwise. Also, that the word “soon” would not mean immediate and each case had to be judged on the given facts. There has to be proximity and link between the impact of dowry demand and the consequential death and there cannot be any straitjacket formula for determining such factor. “Soon before” was held not to be synonymous with “immediately before”.

52. The guilt or innocence of the accused has to be deduced from the material on record. And, what is required to be kept in mind by the court, while appreciating the evidence, stands reiterated by the Apex Court in *Bhim Singh*

and another v. State of Uttarakhand, (2015) 4 SCC 281, as under:

> "22. In the present case, the guilt or innocence of the accused has to be adduced from the circumstantial evidence. The law regarding circumstantial evidence is more or less well settled. This Court in a plethora of judgments has held that when the conviction is based on circumstantial evidence solely, then there should not be any snap in the chain of circumstances. If there is a snap in the chain, the accused is entitled to benefit of doubt. *Gurpreet Singh v. State of Haryana*, (2002) 8 SCC 18 is one of such cases. On the question of any reasonable hypothesis, this Court has held that if some of the circumstances in the chain can be explained by any other reasonable hypothesis, then the accused is entitled to benefit of doubt. But in assessing the evidence, imaginary possibilities have no place. The Court considers ordinary human probabilities."

53. In the backdrop of narration of facts and the principle of law, one now proceeds to discuss the testimony of the prosecution witnesses on the issue of cruelty and harassment.

54. We find Kuldeep (PW-7) to have disclosed that the deceased used to complain against the accused for she was not to his liking and that she was elder in age. Also the accused used to physically assault her. Despite efforts of reconciliation and counselling, accused refused to improve his conduct and continued with such physical assaults.

Though the accused was counseled but only for protecting the reputation of the family, matter never came to be reported to the panchayat. We do not find credit of this witness to have been impeached by the accused. His testimony is clear, cogent and convincing.

55. On the issue of previous cruelty, we find even Baldev Singh (PW-8), father of the deceased, who was declared hostile but cross examined by the Public Prosecutor, to have deposed and corroborated the version of his son. He admits to have informed the police that the accused used to harass the deceased on account of insufficient dowry and that she was elder in age. He admits to have disclosed to the police about the harassment and maltreatment which prompted the deceased to take away her life. Illiteracy and old age being factors for initially not supporting the prosecution stand explained. The witness admits to have deposed truthfully on recollection of facts after having read his statement. Well the fact that the accused did not demand any dowry from this witness or that the deceased gave birth to her children in the matrimonial house or that the parties were on visiting terms

would not in any manner either make any difference or render the prosecution case to be doubtful. Thus in our considered view these witnesses unequivocally have deposed about the factum of cruelty.

56. Both the brother and the father of the deceased do state that in order to save the honour of the family, matter never came to be reported to anyone. Perhaps they were waiting for the time to pass by and better sense prevailing upon the accused. Also they wanted the relationship to continue. We do find Raghav Singh (PW-9), pradhan of the panchayat, to have stated that once Baldev Singh had orally informed him about some dispute pertaining to the deceased. Even he had advised not to bring the matter to the notice of the panchayat.

57. Hence, Court below, seriously erred in correctly and completely appreciating the testimonies of the prosecution witnesses as also the law as aforesaid.

58. In our considered view, prosecution has been able to establish the guilt of the accused, beyond reasonable doubt, by leading clear, cogent, convincing and reliable piece of evidence.

59. From the material placed on record, it stands established by the prosecution witnesses that the accused is guilty of having committed the offences charged for. There is sufficient, convincing, cogent and reliable evidence on record to this effect. The guilt of the accused stands proved beyond reasonable doubt to the hilt. It cannot be said that accused is innocent or not guilty or that he has been falsely implicated or that his defence is probable or that the evidence led by the prosecution is inconsistent, unreliable, untrustworthy and unbelievable. It cannot be said that the version narrated by the witnesses in Court is in a parrot-like manner and hence is to be disbelieved.

60. Thus, in our considered view, findings returned by the trial Court cannot be said to be based on correct and complete appreciation of material on record, which are reversed. The appeal is allowed and we hold the accused guilty of having committed offences, punishable under the provisions of Section 498-A and 306 of the Indian Penal Code, for treating deceased Jeevna Devi with cruelty and thereby abetting her to commit suicide.

61. Bail bonds furnished by the accused-convict stand cancelled. For the purpose of hearing him on the quantum of sentence, the appeal be listed on 13/9/2016. He be produced in the Court on the said date. Copy of the judgment be supplied to the accused, free of cost.

Appeal stands disposed of, so also pending application(s), if any.

(Sanjay Karol),
Judge.

(Ajay Mohan Goel),
Judge.

August 24, 2016 **(PK)**