IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH AT JAMMU

Reserved on: 02.06.2023
Pronounced on:20.07.2023

Cr. Appeal No.88/2012
c/w
CONF No.12/2013

RAKESH KUMAR ... APPELLANT(S)

Through: - Mr. Mohd. Latif Malik, Advocate.

Vs.

STATE OF J&K …RESPONDENT(S)

Through: - Mr. Amit Gupta, AAG.

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE
HON'BLE MR. JUSTICE RAJESH SEKHRI, JUDGE

JUDGMENT

Sanjay Dhar, J

1) The instant appeal is directed against the judgment dated 26.10.2012 passed by learned 1st Additional Sessions Judge, Jammu, whereby the appellant has been convicted of offences under Section 302 and 498-A RPC. The appellant has also challenged order dated 03.11.2012, whereby, in proof of offence under Section 302 of RPC, he has been awarded death sentence.

2) Briefly stated, case of the prosecution is that the appellant, who happens to be the husband of deceased Nina Devi, was harassing her and treating her with cruelty in connection with demands of dowry. It is alleged that on 14.03.2007, in the morning at about 10 O'clock, when the deceased had an altercation with the appellant, he dragged her by

putting dupatta around her neck, whereafter he set her ablaze after sprinkling petrol over her. The father and aunt of the appellant, who were present in the house at the relevant time, doused the fire and shifted the deceased to the hospital but the appellant fled away from the spot. In the hospital, while the deceased was undergoing treatment, she made a dying declaration that was recorded by PW Constable Fazal who had been deputed to the hospital by SHO, P/S R. S. Pura, for the said purpose. The aforenamed Constable recoded the dying declaration of the deceased in presence of the Magistrate after seeking permission from the concerned doctor. The deceased in her statement disclosed that she had entered into wedlock with the appellant about one and a half years back and out of their wedlock, a male child was born. She further stated that the appellant was harassing her in connection with demands of dowry and on the fateful day i.e., on 14.03.2007, she was done to death by the appellant in the manner as indicated hereinbefore.

3) On the basis of the statement made by the deceased, FIR No.17/2007 for offences under Section 498-A and 307 RPC was registered and investigation of the case was set into motion. However, in the evening of 14.03.2007, the deceased succumbed to the injuries, as such, in place of offence under Section 307 RPC, offence under Section 302 RPC was substituted. After investigation of the case, charge sheet was laid before the competent court. The trial court vide order dated 1st June, 2007, framed charges for offences under Section 302/498-A RPC against the appellant and his plea was recorded. The appellant denied the charges and claimed to be tried. Accordingly, the prosecution was

directed to lead evidence in support of the charges. Out of 14 witnesses cited by the prosecution, 13 witnesses have been examined during trial of the case. After the completion of prosecution evidence, incriminating circumstances appearing in the prosecution evidence were put to the appellant/accused to seek his explanation and his statement under Section 342 of J&K Cr. P. C was recorded on 29th August, 2012. In his statement, the appellant claimed that he never made any demand of dowry from the deceased and that the prosecution witnesses have deposed falsehood. The appellant further claimed that he has been falsely implicated and at the time of the occurrence, he was not present in the house. He has further stated that at the relevant time, he was in the house of his neighbourer which is located at a distance of 200 meters from his house. He went on to state that a person called him and he went to his house where he found his wife in a burnt condition. He further stated that he carried his wife to the hospital at R. S. Pura and thereafter to GMC, Jammu. He has also stated that he informed his in-laws on telephone and that his wife was not in a condition to make any statement.

4) The learned trial court, relying upon dying declaration of the deceased and the other circumstances established on record, came to the conclusion that charges against the appellant stand proved and, accordingly, vide the impugned judgment, he has been convicted of offences under Section 302/498-A of RPC.

5) The appellant has challenged the impugned judgment on the grounds that the same is contrary to the facts and that he has been framed in the case. It has been submitted that the deceased wife of the appellant

was suspecting his fidelity and she had suspicion that the appellant was having relationship with her younger sister. It has been claimed that on account of this unfounded suspicion, relations between appellant and the deceased deteriorated, as a result of which the deceased committed suicide when the appellant was not at home. According to the appellant, he carried the deceased to the hospital and informed his in-laws but he has been falsely implicated in the case. It has been further contended that investigation of the case has not been conducted in a fair manner and that the trial court's approach in passing the impugned judgment has been emotional and not based upon appreciation of evidence in accordance with law. It has been further contended that the deceased had suffered 91% burn injuries and her brain matter was congested, therefore, it is out of question that she would have been in a position to make a statement relating to the circumstances of her death. It has also been contended that the doctor, who had certified that the deceased was fit to make a statement, has not been examined as a witness and that the statement of the deceased has been recorded by the Constable and not by the Executive Magistrate. It is further contended that there is no evidence on record to prove that the appellant had made any demands of dowry from the deceased or her parents. It has been contended that there are stark contradictions in the statements of prosecution witnesses on essential aspects of the case which have been ignored by the learned trial court while passing the impugned judgment.

6) We have heard learned counsel for the parties and perused the evidence on record, the grounds of appeal and the impugned judgment.

7) The major thrust of the arguments of learned counsel for the appellant was upon the admissibility and reliability of the dying declaration, EXP-2, stated to have been made by the deceased. In this regard, the main grounds of challenge that have been urged by learned counsel for the appellant are that the deceased was suffering from 91% burn injuries and her brain matter had been congested, as such, it was impossible for her to make a statement. It has been contended that the doctor who had certified that the deceased was fit to make a statement has not been examined as a witness by the prosecution. It has been further contended that the Executive Magistrate has only attested the dying declaration and it has not been recorded by him. Lastly, it has been contended that the dying declaration has been recorded by the police constable in a technical language and not in the words of the deceased. According to the learned counsel, all these factors make the dying declaration highly unreliable. In support of his contentions, the learned counsel has placed reliance upon the judgments of the Supreme Court in the cases of **Sampat Babso Kale & anr. vs. State of Maharashtra,** (2019) 4 SCC 739, **Darshan Singh and others vs. State of Punjab,** (1983) 2 SCC 411, **Paparambaka Rosamma vs. State of Andhra Pradesh,** (1999) 7 SCC 695, **K. Ramachandra Reddy and another vs. The Public Prosecutor,** (1976) 3 SCC 618, **Maniram vs. State of M.P,** 1994 Supp. (2) SCC 539, **Surinder Kumar vs. State of Haryana,** (2011) 10 SCC 173, judgment of Bombay High Court in **Deepak Baliram Bajaj vs. State of Maharashtra,** 1993 Crl. J. 3269 and the

judgment of Madhya Pradesh High Court in **Amar Singh vs. State of MP,** 1996 Crl.J 1582.

8) In order to test the merits of the submissions made by learned counsel for the appellant as regards the reliability and admissibility of the dying declaration, EXP-2, made by the deceased, it would be apt to notice the law on the subject.

9) Section 32(1) of the Evidence Act makes relevant, the statement of a relevant fact by a person who is dead or cannot be find out. It reads as under:

> ***Section 32. Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant. When it relates to cause of death; or is made in course of business; or against interest of maker; or gives opinion as to public right or custom, or matters of general interest; or relates to existence of relationship; or is made in will or deed relating to family affairs; or in document relating to transaction mentioned in section 13, clause (a); or is made by several persons, and expresses feelings relevant to matter in question****.*
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> *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:*
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> *(1) When it relates to cause of death. -- When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.*

10) From a perusal of the afore-quoted provision, it is clear that when a statement is made by a person as to the cause of his death or as to the circumstances which resulted in his death in cases in which cause of that person's death comes into question, the said statement becomes relevant. The logic behind reliability of a dying declaration is that no man would like to meet his maker with falsehood in his mouth. It is on account of this logic that statement made by a person who is about to die as regards the cause or circumstances of his death has been given the status of an independent piece of evidence which can be acted upon even without corroboration if it is found to be true and reliable. The reliability of a dying declaration has been a subject matter of discussion in a number of cases before the Supreme Court and before various High Courts of the Country and it would be apt to refer to some of these judgments in order to understand the concept in this regard.

11) A Constitution Bench of the Supreme Court has, in the case of **Laxman vs. state of Maharashtra**, (2002) 6 SCC 710, more or less settled the law on the admissibility of the dying declaration. Para (3) of the said judgment is relevant to the context and the same is reproduced as under:

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

of his statement. It is for this reason the requirements of oath and cross-examination are dispensed with. Since the accused has no power of cross-examination, the court insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The court, however has to always be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. The court also must further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Normally, therefore, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eyewitnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and in any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a magistrate or a doctor or a police officer. When it is recorded, no oath is necessary nor is the presence of a magistrate is absolutely necessary, although to assure authenticity it is usual to call a magistrate, if available for recording the statement of a man about to die. There is no requirement of law that a dying declaration must necessarily be made to a magistrate and when such statement is recorded by a magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise.

12) Again, in the case of **Ramesh and others vs. State of Haryana,** (2017) 1 SCC 529, the Supreme Court has discussed the law on the admissibility of dying declarations in the following manner:

31. *Law on the admissibility of the dying declarations is well settled. In Jai Karan v. State (NCT of Delhi), this Court explained that a dying declaration is admissible in evidence on the principle of necessity and can form the basis of conviction if it is found to be reliable. In order that a dying declaration may form the sole basis for conviction without the need for independent corroboration it must be shown that the person making it had the opportunity of identifying the person implicated and is thoroughly reliable and free from blemish. If, in the facts and circumstances of the case, it is found that the maker of the statement was in a fit state of mind and had voluntarily made the statement on the basis of personal knowledge without being influenced by others and the court on strict scrutiny finds it to be reliable, there is no rule of law or even of prudence that such a reliable piece of evidence cannot be acted upon unless it is corroborated. A dying declaration is an independent piece of evidence like any other piece of evidence, neither extra strong or weak, and can be acted upon without corroboration if it is found to be otherwise true and reliable. There is no hard-and-fast rule of universal application as to whether percentage of burns suffered is determinative factor to affect credibility of dying declaration and improbability of its recording. Much depends upon the nature of the burn, part of the body affected by the burn, impact of the burn on the faculties to think and convey the idea or facts coming to mind and other relevant factors. Percentage of burns alone would not determine the probability or otherwise of making dying declaration. Physical state or injuries on the declarant do not by themselves become determinative of mental fitness of the declarant to make the statement (see Rambai v. State of Chhattisgarh [Rambai v. State of Chhattisgarh).*

32. *It is immaterial to whom the declaration is made. The declaration may be made to a Magistrate, to a police officer, a public servant or a private person. It may be made before the doctor; indeed, he would be the best person to opine about the fitness of the dying man to make the statement, and to record the statement, where he found that life was fast ebbing out of the dying man and there was no time to call the*

> *police or the Magistrate. In such a situation the doctor would be justified, rather duty-bound, to record the dying declaration of the dying man. At the same time, it also needs to be emphasised that in the instant case, dying declaration is recorded by a competent Magistrate who was having no animus with the accused persons. As held in Khushal Rao v. State of Bombay, this kind of dying declaration would stand on a much higher footing. After all, a competent Magistrate has no axe to grind against the person named in the dying declaration of the victim and in the absence of circumstances showing anything to the contrary, he should not be disbelieved by the court (see Vikas v. State of Maharashtra).*
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> ***33.*** *No doubt, the victim has been brought with 100% burn injuries. Notwithstanding, the doctor found that she was in a conscious state of mind and was competent to give her statement. Thus, the Magistrate had taken due precautions and, in fact, the medical officer remained present when the dying declaration was being recorded. Therefore, this dying declaration cannot be discarded merely going by the extent of burns with which she was suffering, particularly, when the defence has not been able to elicit anything from the cross-examination of the doctor that her mental faculties had totally impaired rendering her incapable of giving a statement.*

13) From the foregoing enunciation of law on the subject, it is clear that the dying declaration is a substantive piece of evidence and can be made basis of conviction provided the Court is satisfied that the dying declaration has been made voluntarily and that the same inspires confidence of the Court. Before placing reliance upon the dying declaration, it has to be shown that the maker of the dying declaration was in a fit state of mind and that he has made the said statement voluntarily without any tutoring or any external influence.

14) In the light of aforesaid legal position, let us now examine the facts that have been established in the instant case. The deceased has made a statement relating to the circumstances of her death in the presence of a Magistrate, PW Anil Magotra (Naib Tehsildar), PW Jeeto Devi, the mother of the deceased and PW Raman Kumar, the brother of the deceased. Her statement has been recorded by PW Constable Fazal.

15) PW Jeeto Devi has stated that when she reached the hospital, the deceased talked to her and told her that her husband put dupatta around her neck and dragged her, whereafter he sprinkled petrol over her and set her on fire. In her cross-examination she has, however, stated that when she reached the hospital, the deceased was unconscious.

16) PW Raman Kumar has stated that when he reached the hospital, they asked the deceased as to how she had suffered burn injuries and she disclosed that the appellant tied dupatta around her neck and dragged her. He has further stated that the deceased made a statement in their presence and in presence of doctor and the Naib Tehsildar. The said statement was recorded by a policeman. He admitted his signatures on EXP-2. In his cross-examination he has stated that the deceased died after two hours of making her statement and that prior to making her statement, the deceased conveyed that she was in a position to make the statement. He has further stated that the statement of the deceased was recorded by a police officer with stars on his uniform. He has also stated that the deceased was brought to the hospital by accused/appellant and his family members.

17) PW Anil Magotra, Naib Tehsildar, has stated that under the directions of Deputy Commissioner, he went to GMC Hospital, Jammu, in the emergency ward and found the deceased lying over there in a pitiable condition. He has further stated that besides him, one doctor and one constable was present over there. He also stated that he directed recording of statement of the deceased. He has further stated that two more witnesses were present on spot at the relevant time. Prior to recording the statement of the deceased, he asked certain questions to the deceased and asked her the cause of burn injuries, to which she replied that she had been set on fire by her husband. He has further stated that whatever questions were asked by him, the same were answered by the deceased and the constable reduced them into writing. The statement, EXP-2, was attested by him. In his cross-examination, he has stated that he does not know as to whether the statement of the deceased was to be recorded in accordance with Rule 609 of the Police Rules. He has further stated that he did not obtain any certificate from the doctor as regards the fitness of the deceased; that he conducted the proceedings in the manner in which he was asked by the SHO; that he has not certified that the statement of the deceased was recorded under his supervision but he has only attested the statement; that at the relevant time, the face and neck of the deceased were having burin injuries; that a number of persons were present in the emergency ward at the relevant time and that PWs Jeeto Devi and Raman Kumar also signed the statement, EXP-2. He denied the suggestion that statement, EXP-2, had already been prepared when he reached the hospital. He has stated that he asked the deceased the cause

for burn injuries; that the statement, EXP-2, has not been recorded in question answer form and that he has not recorded any certificate to indicate that the deceased was fit to make a statement. He denied the suggestion that he has signed the statement, EXP-2, only as a witness.

18) The most important witness to the statement, EXP-2, is its scribe PW Constable Mohammad Fazal. He has stated that when he reached the hospital to record the statement of the deceased, the doctor, the Executive Magistrate and the relatives of the deceased were present over there. He has further stated that after recording the statement of the deceased, the same was attested by the Executive Magistrate; that he recorded the statement, EXP-2, on 14.03.2007 in the evening hours and that the docket bears the endorsement of the doctor that the patient is fit for making statement. In his cross-examination he stated that he went to the hospital all alone at about 5.00 p.m.; that he handed over the application to Dr. Neesha; that at the time when he recorded statement of the deceased, she was full of burn injuries and as per his assessment, she was not fully fit to make a statement; that there were other civil persons present in the hospital but he did not ask them to be witnesses to the dying declaration. He was sent by the SHO to record statement of the deceased.

19) Another piece of evidence which is required to be considered while determining the reliability of the dying declaration of the deceased, is her postmortem report, EXPKB, and the statement of the doctor, Kiran Bhat. As per the statement of the doctor, the deceased had suffered

epidermal burns involving whole body except back of right thigh and circular portion of lower abdomen. She had suffered 91% burn injuries. The doctor has further stated that the brain substance of the deceased was congested and the soot particles were present in upper respiratory track and her lungs were congested. He has also stated that all internal visceras of the deceased were congested. In her cross-examination, the doctor has stated that burn injuries would have caused severe pain to the deceased. She has further stated that for relieving pain, the doctors prescribe certain medicines which cause sedation effect upon the patients and induce sleep and drowsiness. She has further stated that if dosage of these drugs is high, the patient may not be able to communicate or answer questions or give response. She stated that because she did not meet the deceased when she was alive, as such, she cannot state whether or not she was fit to make statement before her death.

20) In the light of aforesaid evidence on record and the legal position discussed hereinbefore, let us now determine as to whether reliance can be placed upon the dying declaration of the deceased. In the instant case, it is to be noted that the statement of the deceased was recorded while she was admitted in the hospital. Had it been a case where statement of the deceased was recorded at any place other than the hospital, the requirement of fitness certificate before recording her statement could have been obviated, because in such cases if the police finds that it is not possible to requisition the services of a doctor without delay, which may ultimately lead to loss of vital evidence in the shape of dying declaration

of the deceased, the investigating agency may have a valid reason for not obtaining a fitness certificate prior to recording of dying declaration of a deceased. However, in the instant case, the statement of the deceased was recorded while she was admitted in the GMC Hospital, Jammu where at a given time scores of doctors are on duty. Therefore, it would not have been difficult for the investigating agency to requisition the services of a doctor for examining the deceased as to her fitness to make a statement prior to recording of her dying declaration. In fact, it appears that the investigating agency has requisitioned the services of a doctor who appears to have endorsed on the police docket that the deceased was fit to make a statement. The endorsement, it appears, bears the signatures of Dr. Juhi. However, the said doctor has neither been cited as a witness to the challan nor has she been examined by the prosecution during trial of the case. Therefore, the endorsement regarding fitness of the deceased to make statement has not been proved. The scribe of the dying declaration, PW Constable Fazal, has, in his cross-examination, stated that as per his assessment the deceased was not fully fit to make a statement. Besides this, even the mother of the deceased, PW Jeeto Devi, has, in her cross-examination, stated that when she reached the hospital, the deceased was unconscious. As per the postmortem report, the deceased had suffered 91% burn injuries, her brain matter was congested, her lungs were also congested and soot particles were present in her upper respiratory track.

21) All the aforesaid circumstances established from the evidence on record creates a grave suspicion regarding the fitness of the deceased to make a statement before her death. This air of suspicion could have been cleared by examination of the doctor who had given the certificate of fitness, but the prosecution has not examined the said doctor. Therefore, Illustration (g) to Section 114 of the Evidence Act comes into play and it has to be presumed that if the prosecution would have examined the doctor who has given the fitness certificate, her evidence would have been unfavourable to the prosecution. The burden to prove that the deceased was in a fit state of mind at the time of making dying declaration, EXP-2, was upon the prosecution which, in the instant case, it has failed to discharge.

22) There are other inherent defects and infirmities in the dying declaration, EXP-2, which make it unreliable. The dying declaration, EXP-2, has been recorded by PW Constable Fazal and not by PW Anil Magotra, the Executive Magistrate. It is surprising that instead of recording the statement himself, PW Anil Magotra has entrusted the job to a police constable. According to PW Anil Magotra, the questions were asked by him to the deceased who answered the same, whereafter the statement was reduced into writing by PW Constable Fazal. A perusal of the statement, EXP-2, reveals that it has been recorded in a highly technical police language as if it was an FIR. It certainly does not appear to be in the language and words of the deceased. According to PW Anil Magotra, the Executive Magistrate, the statement, EXP-2, was recorded on the basis of questions asked by him and the answers given by the

deceased, but it is not in a question answer form. This makes the statement of the Executive Magistrate unreliable. PW Anil Magotra, the Executive Magistrate, has only attested the statement, EXP-2, and he has not even recorded a certificate that the statement was recorded under his supervision. The dying declaration, EXP-2, in these circumstances becomes extremely doubtful.

23) Another aspect of the matter which is required to be noticed and which makes the dying declaration, EXP-2, unreliable, is that the same has been recorded in presence of mother and brother of the deceased, meaning thereby they were present on spot at the time of recording of the dying declaration. Therefore, having regard to the pitiable condition of the deceased, as has been stated even by the Executive Magistrate in his statement, tutoring of the deceased by her mother and brother, given the acrimonious relationship between the deceased and her husband, cannot be ruled out.

24) Learned counsel for the respondent-State has contended that there is no requirement of law that dying declaration should be recorded by a Magistrate or that there should be a certificate of fitness from the doctor before recording a dying declaration. He has further contended that percentage of burns suffered by a person making dying declaration is also irrelevant if it is shown that the deceased was fit to make a statement.

25) There can be no quarrel with the propositions of law propounded by learned AAG appearing for the respondent-State but then in a case where the statement of the deceased is recorded inside the hospital, the

non-examination of the doctor to prove the fitness of the deceased to make a statement makes the dying declaration highly vulnerable. Similarly, the percentage of burns suffered by the deceased may not be a relevant factor for ascertaining as to whether he or she was fit to make a statement but then in a case where the scribe of the dying declaration himself says that according to his assessment, the deceased was not fully fit to make a statement and there was evidence on record to show that the brain matter and lungs of the deceased were congested and there were soot particles present in her trachea, the dying declaration of the deceased becomes highly doubtful.

26) There is yet another aspect of the matter which dents the prosecution version. It has come in the evidence on record that when the deceased was set on fire, her father-in-law and aunt of her husband were present on spot and they doused the flames, whereafter these persons took her to hospital. Neither father-in-law of the deceased nor aunt of the appellant has been examined as witnesses by the prosecution. The Investigating Officer, PW Kuldeep Khajuria, during his cross-examination was asked a specific question by the defence on this aspect of the matter. He has stated that he did not record the statements of these two witnesses as they were related to the appellant and he did not expect them to support the prosecution version. He has further stated that he did not even question these two persons during the investigation of the case. Non-examination of these two important witnesses has led to non-corroboration of the dying declaration. The best witnesses in the instant case would have been the persons who had reached the spot of

occurrence immediately or who were present on the spot of occurrence. They would have been the best persons to state as to whether or not the deceased told them anything about the occurrence. The Investigating Officer has presumed that these persons will not support the prosecution version and has thereby abdicated his duty to investigate the case in a fair and transparent manner, which is the primary duty of an Investigating Officer. The job of an Investigating Officer is not somehow to collect material only in support of the theory of crime which he has conceived but his real duty is to unearth the truth and ensure that no criminal is let-off. At the same time the Investigating Officer has to make sure that no innocent is falsely implicated. He has to keep his mind open and consider the material that may even be produced by the suspect/accused. The Investigating Officer cannot refuse to question the relatives of the accused simply because they are expected to favour the accused. The manner in which the Investigating Officer has investigated the instant case leaves much to be desired. In a heinous crime of the present nature, the Investigating Officer by not examining the persons who would have been acquainted with the circumstances of the case and by not citing the doctor who has issued the fitness certificate of the deceased, as a witness to the challan has caused a severe dent to the theory of crime propounded by him in the challan.

27) In view of the foregoing discussion, it would be highly unsafe to rely upon the dying declaration of EXP-2 and record conviction of the appellant on its basis. The leaned trial court has unfortunately ignored all these aspects of the case and has simply brushed aside these

inconsistencies and inherent defects in the dying declaration, by terming the same as insignificant. These inherent defects in the statement, EXP-2, go to the root of the matter and can, by no stretch of imagination, be termed as insignificant.

28) Similarly, the observations of the learned trial court that it is purely within the domain of the Investigating Officer to choose as to whom he wishes to cite as a witness, is also *dehors* the sanction of law. The Investigation Officer is expected to question all those persons who are acquainted with the facts of the case and he is not expected to ignore and leave out those witnesses who may not be toeing the line of the prosecution theory. The observation of the learned trial court that it was open to the defense to produce these left out witnesses in defense which he failed to do, is also without any substance because the prosecution has to stand on its own legs in order to prove its case beyond any reasonable doubt against the accused. When an accused finds that the prosecution has not been able to prove its case beyond reasonable doubt against him, he is not expected to lead evidence in defense by producing those witnesses who have been left out by the prosecution just for the sake of it. No adverse inference can be drawn against the accused for not producing those witnesses.

29) For the foregoing analysis, it is clear that the dying declaration, EXP-2, on the basis of which the learned trial court has based the conviction of the appellant, has been found to be absolutely unreliable and full of infirmities and doubts. Such a type of dying declaration

cannot be relied upon for recording conviction of an accused. The learned trial court has grossly erred in placing reliance upon the aforesaid dying declaration. The appellant cannot be convicted of offence under Section 302 RPC on the basis of dying declaration, EXP-2.

30) Another circumstance that has been relied upon by the prosecution is the recovery of bottle of petrol, burnt pieces of cloth and the match box from the house of the accused/appellant. It is true that these articles are established to have been recovered from the house of the appellant. As per the report of the FSL, EXPW-RK, traces of petrol were found in the seized pieces of cloth. When this circumstance is read in conjunction with the postmortem report, EXPW-KB, it gets established that the deceased has died due to burn injuries.

31) Yet another circumstance that has been relied upon by the prosecution is continuous demands of dowry by the appellant from his deceased wife and his in-laws. PW Prem Chand, the uncle of the deceased, has in clear terms stated that the appellant used to harass his wife in connection with demands of dowry and he would even beat her up for the said purpose. He has stated that he himself saw the appellant quarrelling with the deceased and he even advised the appellant not to do so. PW Karam Chand, the father of the deceased, has stated that the appellant used to demand money from him and he would harass his wife. He has stated that he has paid an amount of Rs. 20,000/- on two occasions to the appellant and that the appellant also demanded motorcycle from him. In his cross-examination he has given the details as to when he paid this amount of Rs. 20,000/- on two occasions to the appellant. PW

Raman Kumar, the brother of the deceased, has stated that 4/5 days prior to the occurrence, he had gone to the in-law's house of the deceased and in his presence, appellant quarreled with the deceased and demanded motorcycle from her. He has further stated that he and his mother tried to intervene in the matter and things were resolved but after 4/5 days, the occurrence took place. There is nothing in the cross-examination of the witness to discredit his statement on this aspect of the matter.

32) PW Jeeto Devi, the mother of the deceased has corroborated the statement of her son PW Raman Kumar and stated that on two occasions the appellant demanded Rs. 20,000/- from her husband and the same was paid to him. She has further stated that the appellant was making demand of motorcycle. She also stated that she along with PW Raman Kumar went to the house of the appellant where she found appellant quarrelling with his wife. She and her son tried to resolve the matter.

33) From the foregoing statements of the witnesses, it is clear that the appellant was inflicting acts of cruelty upon the deceased prior to her death in connection with demands of dowry. There is evidence on record to show that he was paid Rs. 20,000/- on two occasions when he demanded the same from his wife. There is also evidence on record to show that the appellant was making demand of a motorcycle from his deceased wife. The evidence on record also shows that the appellant would often pick up quarrel with the deceased in connection with demands of dowry. Thus, the charge for offence under Section 498-A RPC stands established against the appellant.

34) Learned AAG appearing for the respondent-State has submitted that the appellant has been unable to explain as to in what circumstances the death of the deceased had taken place, which, admittedly, has taken place inside the house of the appellant. According to learned AAG as per Section 106 of the Evidence Act, the burden of proving the fact especially within the knowledge of a person lies upon him. It has been contended that since the death of the deceased had taken placed inside the house of the appellant, who happens to be her husband, therefore, it was for him to explain the circumstances under which she died and in the absence of any such explanation, it has to be presumed that he is the author of the crime.

35) Once it is found that the theory of murder of the deceased which is based upon the dying declaration, EXP-2,has not been established by the prosecution beyond reasonable doubt, the question arises as to what is the explanation for death of the deceased put forward by the appellant, as her death has taken place inside his house. In his statement recorded under Section 342 of J&K Cr. P. C, the appellant has stated that he had gone to his neighbourer's house when the occurrence took place and when he was called, he found the deceased lying in burnt condition. He has stated that he carried the deceased to the hospital. His presence in the hospital is deposed to by none else than PW Raman Kumar, the brother of the deceased. The fact that the deceased was carried to the hospital by the appellant further rules out the theory of murder.

36) In the memo of appeal, the appellant has taken a defence that the deceased committed suicide as she was suspicious about his character.

He has also taken a defence that he was not present on the spot at the time of the occurrence and it has come in evidence on record that he was present in the hospital when the deceased was taken to the hospital. The conduct of the appellant shows that he had not set the deceased on fire but then her death has taken place within a period of seven years from the date of her marriage and it has also been shown that the appellant had subjected her to cruelty in connection with demands of dowry. The death of the deceased is unnatural in nature, inasmuch as she has been found to have received extensive burn injuries, while in her matrimonial home. The appellant has, though in his statement under Section 342 of J&K Cr. P. C, not explained the cause of death of the deceased but in the appeal, he has submitted that the deceased had committed suicide, though for a different reason which has not been established from the evidence on record. The provisions contained in Section 114-C of the J&K Evidence Act, which provides that once it is shown that a married woman has committed suicide within a period of seven years from the date of her marriage and her husband had subjected her to cruelty, the Court has to presume that such suicide had been abetted by her husband. When the aforesaid circumstances established on record are considered in the light of Section 114-C of the Evidence Act, the charge for offence under Section 306 of the RPC is proved against the appellant.

37) It may be argued that since the charge was for offence under Section 302 RPC, the appellant was not put to notice to meet a charge under Section 306 RPC, therefore, he is prejudiced by not framing a charge under Section 306 of RPC. But then in the instant case, all the

prosecution evidence has been put to the appellant while recording his statement under Section 342 of J&K Cr.P.C. This evidence includes the evidence relating to the offence under Section 498-A of RPC. Therefore, the appellant had enough of notice of the allegations that attract Section 306 of RPC as well. Since there is no clinching evidence regarding setting on fire of the deceased by the appellant and it is nobody's case that it was an accidental death, as such, the only course left is to hold that the prosecution has proved suicide of the deceased that has been abetted by the act of cruelty perpetrated by the appellant upon her in connection with demands of dowry. In our aforesaid view, we are supported by the ratio laid down by the Supreme Court in the case of **Lakhjit Singh vs. State of Punjab,** 1994 SCC Supl. (1) 173**.**

38) For the foregoing reasons, the conviction of the appellant under Section 302 RPC and sentence of death awarded against him are set aside. Instead, the appellant is convicted of offence under Section 306 RPC. His conviction for offence under Section 498-A RPC is upheld.

39) Having regard to the crude and barbaric manner in which the appellant has instigated the deceased to commit suicide on account of persistent demands of dowry coupled with the fact that the incident has resulted in death of not only the deceased but it has also resulted in death of the unborn child inside her womb, the appellant deserves to be given the maximum punishment. Accordingly, in proof of offence under Section 306 RPC, the appellant is sentenced to rigorous imprisonment for a term of ten years and to pay a fine of Rs.10,000/. In proof of offence under Section 498-A of RPC, the appellant is sentenced to rigorous

imprisonment for a term of three years and to pay a fine of Rs.5,000/. Both the sentences shall run consecutively. In default of payment of fine, the appellant shall undergo further imprisonment of one year in each of the offence. The period of custody undergone by the appellant during the investigation and trial of the case before the trial court and during the pendency of this appeal shall be set-off against the sentence awarded by this Court.

40) The recommendation for imposing death sentence upon the appellant made vide the reference submitted by the trial court is declined.

41) As per the nominal roll, the appellant has been in custody for more than sixteen years, as such, he has served the sentence. He is, therefore, directed to be released from the custody, if not required in connection with any other case.

42) The trial court record along with a copy of this judgment be sent back to the learned trial court.

(Rajesh Sekhri)
Judge

(Sanjay Dhar)
Judge

Jammu,
20.07.2023
"Bhat Altaf, PS"

Whether the order is speaking: ***Yes/No***
Whether the order is reportable: ***Yes/No***