

(2017) 06 KAR CK 0034
In the Karnataka High Court
Case No : 100089 of 2014

Basavaraj and Others

APPELLANT

Vs

State of Karnataka and another

RESPONDENT

Date of Decision : 05-06-2017

Acts Referred:

Indian Penal Code, 1860, Section 302, Section 323, Section 498-A, Section 304-B - Punishment for murder - Punishment for voluntarily causing hurt<

Citation : (2017) 06 KAR CK 0034

Hon'ble Judges : B. S. Patil, K. Somashekar

Bench : DIVISION BENCH

Advocate : S.S. Patil, Sunitha P. Kalsoor, V.M. Banakar

Judgement

1. Appellant Basavaraj S/o. Kampuguddayya alias Annayya has been convicted for offences punishable under Sections 323, 498-A, 304-B and 302 of the Indian Penal Code, 1908, (for brevity "the IPC") and Sections 3 and 4 of the Dowry Prohibition Act, (for brevity "the D.P Act"). He has been sentenced to undergo life imprisonment for the offence punishable u/S. 302 of IPC, apart from directing him to undergo sentences in respect of commission of other offences for different period and all the sentences are ordered to run concurrently. 2. Facts involved in the case, stated in nutshell are that:- Appellant Basavaraj (hereinafter referred to as "the accused" for short), married Ratnawwa on 11.03.2007, initially they lived together at Bangalore later, as the accused was appointed as lineman in KEB, at Lakshmeshwar they shifted their house to Lakshmeshwar. On 26.07.2010 at about 11.00 p.m in the night, Ratnawwa suffered burn injuries and was admitted to Government Hospital at Lakshmesh-wara, thereafter to KIMS, Hubli; after receiving treatment, she was shifted to Victoria Hospital at Bangalore, where she succumbed to burn injuries on 30.07.2010 at about 01.30 hours (midnight). 3. Based on the complaint lodged by Sri.Ganganarasayya, father of deceased Ratnawwa on 29.07.2010 at about 12.00 p.m, Lakshmeshwara Police,

initially, registered a case in crime No. 67/2010 for the offences punishable u/Ss. 323, 504, 498-A, 307, IPC and Sections 3 and 4 of the D.P. Act. In the complaint, Ganganarasayya stated that four years prior to the incident, his daughter Ratnawwa married the accused. At the time of marriage, a sum of Rs. 2,00,000/- had been given as dowry apart from jewellery worth Rs. 3,00,000/-; three months after marriage, accused secured a job in KEB as lineman and in that connection, he had demanded Rs. 2,00,000/- from Ratnawwa. He alleged that Ratnawwa was being harassed and was sent to her matrimonial home to bring the said amount of Rs. 2,00,000/-. The complainant claims to have given Rs. 1,00,000/- to his daughter and sent her back to her husband's house. Thereafter, the accused started harassing Ratnawwa, stating that complainant did not pay remaining amount of Rs. 1,00,000/-. It was further alleged that accused insisted his daughter to terminate her pregnancy and told her to pour kerosene oil on herself and end her life; on 26.07.2010, when he was in his house, he received phone call from his eldest daughter Lakshmaawwa who informed him that Ratnawwa had suffered burn injuries and had been admitted to KIMS Hospital, this information was given to Lakshmaawwa by the friend of Ratnawwa's husband at 11.00 a.m on 26.07.2010, thereafter, he reached KIMS Hospital along with his eldest daughter Lakshmaawwa and others at Hubli, he saw his daughter Ratnawwa who had sustained burn injuries all over her body, on enquiry, she narrated to him that on 26.07.2010 at about 9.00 p.m, when she was in kitchen, her husband stated that she did not bring money from her father and told her to die by pouring kerosene on herself and by setting herself on fire, when she refused to heed to his suggestion, the accused himself poured kerosene oil and set her ablaze, she started screaming, neighbours arrived and shifted her to the Hospital, as, her husband was present in the Hospital at the time when the police came to record her statement, out of fear, she had stated before the police that she had suffered burn injuries accidentally, but the truth was that her husband had poured kerosene on her and set her ablaze. 4. The said complaint is marked during the course of evidence as Ex.P.1. On 26.07.2010, while Ratnawwa was under treatment in the Government Hospital at Lakshmeshwara, her statement was recorded by the Head Constable (PW.26) as per Ex.P.22. In the said statement, she has stated that on 26.07.2010, at about 9.30 p.m, her husband wanted to take bath and asked her to boil water, when she tried to light the stove by pumping it, accidentally fire broke out and her clothes caught fire causing burn injuries to her, she came out of the house screaming, her husband and the neighbours came and shifted her to the Hospital. 5. Subsequently, on 27.07.2010 between 6.40 to 7.00 p.m, the Taluka Executive Magistrate, Hubli, in the presence of Doctor Vijay V. Kamath recorded the dying declaration as per Ex.P.26 wherein, she has stated that on 26.07.2010 at about 11.00 p.m. her husband had quarrelled with her and as a result, she went inside the kitchen and bolted the door from inside, her husband shouted at her stating that she should die by pouring kerosene on herself. At that time, she opened the door of the kitchen, came out and told her husband to pour kerosene himself and set her on fire; therefore, her husband poured kerosene on her;

however, she did not see her husband setting her ablaze; she did not know how she caught fire; she herself extinguished the fire and thereafter, the neighbours had come there and at their instance her husband secured an ambulance and admitted her to the Hospital; as she had a small child and as there was nobody to look after her child except her husband, no action shall be taken against her husband and that she does not have any complaint against her husband. 6. The said dying declaration, which was recorded in question and answer format, has been extracted hereunder. Its translation into English is also done in the course of this judgment. VERNACULAR MATTER 7. Ratnawwa succumbed to the burn injuries on 30.07.2010 at 1.35 a.m. After her death, the jurisdictional police added offence under Section 302 of the IPC, and after completion of investigation, filed charge sheet against the accused for the offences punishable under Sections 323, 498-A, 304-B, 302 of IPC and Sections 3 and 4 of the D.P. Act. The accused was arrested on 28.08.2010. He is in custody. 8. The learned Sessions Judge framed charges against the accused for the aforesaid offences. The prosecution examined PWs.1 to 36 and got marked Exhibits P.1 to P.40 and produced M.Os.1 to 5. For the defence, no evidence was let in. The learned Sessions Judge framed the following points for his consideration: "1. Whether the prosecution proves beyond reasonable doubt that the marriage of Ratnawwa was performed with the accused on 11.03.2007 and at the time of marriage, the accused received dowry, in terms of cash, jewellery and thereafter, he subjected the deceased Ratnawwa physical and mental harassment and cruelty to get additional dowry? 2. Whether the prosecution proves beyond reasonable doubt that apart from causing physical and mental harassment by demanding additional dowry and thereby met out cruelty against her and on 26.07.2010 at about 11.00 p.m in the night, he poured kerosene on her and set her ablaze resulting her death on 30.07.2010 and thereby committed her murder within 7 years from the date of her marriage?" 9. On appreciation of oral and documentary evidence, the learned Sessions Judge has held that prosecution proved beyond reasonable doubt commission of the offences by the accused and therefore convicted him for the same. The accused has been sentenced to undergo imprisonment for life and to pay fine of Rs. 10,000/- for the offence punishable u/S. 302, IPC and in default, to undergo simple imprisonment for a period of one year. He has been sentenced to undergo rigorous imprisonment for a period of five years for the offence punishable u/S. 3 of D.P Act, 1961 and to pay fine of Rs. 15,000/- and in default to undergo simple imprisonment for one year and for the offence punishable under Section 4 of D.P. Act, he is sentenced to undergo rigorous imprisonment for a period of six months and to pay fine of Rs. 2,000/-, in default, to undergo simple imprisonment for a period of one month. Similarly different sentence for lesser period has been imposed for other offences under Section 323 and 498 of IPC. All the sentences were ordered to run concurrently. 10. Learned counsel for the appellant Shri. S. M. Kalwad and Smt.Sunitha P. Kalsoor along with Sri. S. S. Patil have vehemently contended that the incident had occurred on 26.07.2010, but the complaint was lodged belatedly on 29.07.2010 although admittedly, the complainant-father of

the deceased (PW.1) had come to know about the incident on the same day i.e., 26.07.2010 through his eldest daughter Lakshma. It is urged by them that evidence of P.W.1 the complainant and father of the deceased is not trustworthy, inasmuch as, according to him, his eldest daughter informed him about the burn injuries suffered by deceased Ratnawwa on 27.07.2010 and when he visited KIMS Hospital where Ratnawwa was taking treatment, his daughter narrated the incident stating that her husband poured kerosene on her and set fire; if that were so, the natural conduct would have been to immediately lodge complaint and not to wait for three days till 29.07.2010. 11. It is next contended that there are serious discrepancies in the version of the complainant (PW.1) as to his statement given at the time of inquest vide Ex.P.2, the facts narrated in his complaint Ex.P.1 and evidence given by him before the Court. 12. Strong reliance is placed by the defence on the statement of the victim recorded on 26.07.2010 vide Ex.P.22, wherein she has stated that she accidentally caught fire, while she was lighting the stove. It is also contended by the learned counsel for the appellant that even in the dying declaration Ex.P.26, on which much reliance was placed by the prosecution, the deceased did not state that her husband set fire to her; on the other hand, she has categorically stated that she had no complaint against her husband. It is also pointed out and strongly urged by the counsel for the appellant that no credence could be attached to Ex.P.26, dying declaration because there was no endorsement made by the Doctor on Ex.P.26, certifying her health condition and the victim's mental fitness to give her statement. 13. As regards the allegation of demand and payment of dowry of Rs. 2,00,000/- at the time of marriage and jewellery worth Rs. 3,00,000/- and subsequent demand of additional dowry of Rs. 2,00,000/- and acceptance of Rs. 1,00,000/- for securing job in the KEB by the accused, it has been urged that admittedly, PW.1/ complainant and father of the deceased owned only 2 acres of land and there was no other source of income; there was no material placed on record as to how such huge money had been mobilized and paid and where exactly the alleged jewellery was purchased let alone producing any receipt. With regard to the assault allegedly attempted by the accused on the complainant and his friend PW.14 with chopper and club, when PW.1 along with his friend had visited the house of the accused, it is urged that such a vague and un-substantiated assertion made by PW.1 cannot be made basis to record a finding that accused had demanded dowry and received the same at the time of marriage and had demanded additional dowry; that he used to harass and subject the deceased to cruelty in that regard. 14. Taking us through the evidence of PW.10- Revanasiddayya, who is none other than the maternal uncle of the victim, it is pointed out that he has categorically stated in his cross-examination that he was not aware about the jewellery shop from where such jewellery worth Rs. 3,00,000/- was purchased. His evidence, as regards the alleged harassment by the accused in connection with demand for additional dowry is only hearsay evidence. So far as the evidence of PW.14- Majidsherif Karimsab, though, in his examination-in-chief he has stated that he was present at the time when marriage talks took place, in his cross-examination he admits that he was not

present at that time and therefore, it is urged that his evidence is absolutely not helpful to the prosecution. Similarly, as regards the evidence of PW.15-Rajanna who is a friend of the complainant (PW.1), it is stated that according to him, an amount of Rs. 1,00,000/- was given to the deceased when she came back to the house of PW.1. Whereas, PW.14 and PW.1 state that the sum of Rs. 1,00,000/- was given to the accused in the house of the accused. Taking us through the evidence of PW.15, it is urged that there is serious contradiction in the version of PW.1, PW.14 & PW.15. It is further pointed that as per the version of PW.1, a sum of Rs. 1,00,000/- was given to Ratnawwa, when she had come to his house (her father PW.1), whereas, as per the version of PWs.14 & 15, the said amount of Rs. 1,00,000/- was given to the accused when all of them (PWs.1, 14 & 15) visited the house of the accused. 15. Insofar as PW.16-A. L. Bairegouda, who is none other than the cousin of the deceased, his evidence is only hearsay, as he did not speak from his personal knowledge. PWs. 17 to 19 are all residents of the village of the accused and none of them have supported the case of prosecution. They have turned hostile. PW.20 is the landlady of the house wherein the accused and the deceased were residing. She did not support the case of the prosecution. It is pointed out by the learned counsel for the appellant that the landlady was not residing in any portion of the same house where the deceased and the accused were residing. It is pointed out by the learned counsel that in her evidence, she has not stated anything with regard to the victim giving any information to her about the role of the accused in the incident. PWs. 21 to 25 have also not supported the case of the prosecution and have turned hostile. 16. PW.26-Veerabhadra Parappa Beleri, is the Head Constable who has recorded the statement of the victim Ratnawwa as per Ex.P.22. It is urged by the learned counsel for the appellant that during the investigation, the case sheet maintained in Government Hospital at Lakshmeshwar, KIMS Hospital, Hubli and Victoria Hospital at Bengaluru, have not been produced by the prosecution to establish the nature of injury, nature of treatment given and as regards the mental condition of the victim. The said important documents were not secured so as to establish whether the victim was in a fit condition to speak and was fully conscious to give her statement. 17. It is further pointed out that the Doctor at Victoria Hospital who conducted post-mortem over the dead body of deceased Ratnawwa has not been examined, though the post-mortem report was produced and marked as at Ex.P.37. As per the opinion of the Doctor found in Ex.P.37, death was due to "septicaemia, as a result of burns injuries sustained". 18. The learned counsel for the appellant has placed reliance on the judgment of the Division Bench of this Court, in the case of State by D. J. Halli Police Station, Bangalore v. Mohammed Thoufiq (2016 (2) Kar LJ 169);; the judgments of the Apex Court in the case of State of Gujarat v. Jayrajbhai Punjabhai Varu (AIR 2016 SC 3218); Kans Raj v. State of Punjab (2000) 5 SCC 207 : (AIR 2000 SC 2324) and Baijnath and others v. State of Madhya Pradesh (AIR 2016 SC 5313) to support his arguments. 19. The learned Additional State Public Prosecutor has strongly supported the findings recorded. He has urged that the matter does not merit interference by this Court. Upon hearing the learned counsel for both

parties following points arise for our consideration:- (i) Whether the prosecution has indeed established beyond reasonable doubt that the accused used to harass the deceased demanding dowry, soon before the incident that took place on 26.07.2010 resulting in the death of Ratnawwa due to burn injuries to her and thereby committed offences under Sections 323, 498-A, 304-B and 302 of IPC? (ii) Whether the prosecution has proved beyond reasonable doubt that on 26.07.2010 accused poured kerosene on Ratnawwa and set fire to her and caused burn injuries thereby causing her death and thus committed the offence punishable under Section 302 of IPC? (iii) Whether the judgment of conviction and order sentencing the accused for the offences punishable under Sections 323, 498-A, 302 of IPC and Sections 3 and 4 of Dowry Prohibition Act suffers from illegality warranting interference in exercise of appellate jurisdiction of this Court? (iv) What order? 20. The learned trial Judge has not dealt with the ingredients of Section 304-B of IPC and whether it was a case of dowry death. He has also not examined the effect of Section 113-B of the Indian Evidence Act. However, in the light of the undisputed fact that marriage of the deceased with the accused had taken place on 11.03.2007 and the incident occurred on 26.07.2010 within a period of seven years from the date of marriage resulting in the death of the wife of the accused not under normal circumstances, the matter has to be examined keeping in mind the essential ingredients contained in Section 304-B of IPC r/w Section 113-B of the Indian Evidence Act. It is useful to extract both these provisions; 304-B. Dowry death.- (1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death. Explanation.- For the purpose of this sub-section, "dowry" shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961 (28 of 1961). (2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life. 113-B. Presumption as to dowry death-When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death. Explanation.- For the purposes of this Section," dowry death" shall have the same meaning as in Section 304-B of the Indian Penal Code. 21. A careful perusal of the provision contained in Section 304-B of IPC makes it clear that certain essential ingredients have to be satisfied before it could be said that the case falls within the ambit of the provision and the death occurred was a dowry death. The essential features are; (i) Death of a woman must have occurred within seven years of her marriage. (ii) The death must have occurred otherwise than under normal circumstances. (iii) Soon before her death she must have been subjected to cruelty or harassment by her husband or any

relative of her husband. (iv) The said harassment and cruelty must have been in connection with any demand for dowry. Then such death shall be called as dowry death and such husband or relative shall be deemed to have caused the death of the woman. As per Section 113-B of the Indian Evidence Act, when a question arises as to whether a person has committed dowry death of a woman and it is shown that soon before her marriage the woman was subjected by such person to cruelty or harassment for or in connection with any demand for dowry, the Court shall have to presume that such person had caused the dowry death. 22. In the present case, fact that Ratnawwa died of burns and her death was not under normal circumstances is borne out from the record; that the death occurred on 30.07.2010 well within seven years from the date of her marriage with the accused that took place on 11.03.2007 is also established. The question that has to be addressed is whether soon before the death of Ratnawwa, she was subjected to cruelty or harassment by her husband or any other relative of her husband for or in connection with any demand for dowry? It is in this area considerable arguments have been addressed by the learned counsel for the appellant and as also the learned Additional State Public Prosecutor. 23. The material evidence in this connection is that of PW.1 who is none other than the father of the deceased, PW.10- Revansidd-ayya, maternal uncle of the deceased, PW.14-Majid Sharif, friend of PW.1 residing in the same village and PW.15-Rajanna who is also a friend of PW.1 and resident of the same village. 24. We have carefully scrutinized the evidence of PW.1- Ganganarasayya-father of the deceased, PW.10- Revanasiddayya-maternal uncle of the deceased, PW.14- Majid Sharif, friend of PW.1 and resident of the neighboring village Annekaranahalli and PW.15-Rajanna, friend of PW.1, who is also resident of Annekaranahalli village. These witnesses have been examined by the prosecution mainly to establish that, there was payment of dowry in the form of jewellery worth Rs. 3,00,000/- and cash of Rs. 2,00,000/- at the time of marriage and that subsequently a sum of Rs. 2,00,000/- was demanded in connection with the accused securing a job in KEB, out of which a sum of Rs. 1,00,000/-was allegedly paid by PW.1. 25. It has been very seriously contended by the learned counsel for appellant that, the version of these witnesses cannot be accepted as they are not trustworthy in view of several material inconsistencies in their version. It is in this background, we have carefully scrutinized the evidence of these witnesses. PW.1-Ganganarasayya-father of the deceased admittedly owns two acres of dry land. Though he asserts in the examination-in-chief that he had purchased jewellery worth Rs. 3,00,000/- at the time of marriage from a shop in Bengaluru, he does not disclose the name of said jewellery shop. He has not produced any receipt for having purchased jewellery worth Rs. 3,00,000/-. There is nothing to show that, such jewellery was indeed worn by the victim at the time of marriage. No marriage photographs are produced in this regard. He admits that nothing was recorded by way of a written slip (Yadi) in connection with handing over jewellery or any other valuables including cash at the time of or before the marriage. He has also stated in the cross-examination that, he could not remember the weight of gold ornaments given to the accused. He has also specifically stated that, he

could not remember from which jewellery shop he had purchased gold ingots to have the jewellery prepared. 26. Insofar as payment of Rs. 2,00,000/- by the accused at the time when he secured job in KEB, his version in the complaint and in his evidence is that, accused was harassing his daughter and indeed had sent her to his house to get the sum of Rs. 2,00,000/- and as he did not have so much money, he was able to arrange Rs. 1,00,000/- and gave the same to his daughter. He has further stated that, he convinced his daughter and sent her back to the matrimonial home with the said amount of Rs. 1,00,000/-; but, even thereafter the accused was torturing her stating that she had failed to bring remaining amount of Rs. 1,00,000/-. This version of PW.1 is not corroborated by the evidence of PWs.14 and 15 who have been examined by the prosecution to establish the so-called demand and payment of dowry and the ill-treatment meted out in that connection by the accused against the victim. In the evidence of PW.14-Majid Sharif, in the examination-in-chief he has stated that, he was present when the talks were held prior to the marriage of the accused and deceased Ratnawwa and that he was present during their marriage. He has stated that, the accused was paid jewellery worth of Rs. 3,00,000/- and cash worth of Rs. 2,00,000/- as dowry at the time of marriage. He has further stated that, as accused tortured the victim by beating her, she had come down to her parental house. At that time himself and one Rajanna of his village accompanied PW.1-Ganganarasayya to the house of accused, at the instance of Ganganarasayya to suitably advise the accused. At that time the accused was paid Rs. 1,00,000/- in cash by Ganganarasayya; the accused became angry as he was not given the sum of Rs. 2,00,000/- demanded by him; the accused caught hold of a chopper and his father a club and advanced to assault the complainant and the victim; at that time PW.14 snatched the chopper from his hands and advised the accused suitably. 27. If this part of evidence is examined, in the light of evidence of PW.1 one thing becomes very clear that PW.1 states that he gave the sum of Rs. 1,00,000/- out of Rs. 2,00,000/- demanded by the accused towards securing the job when his daughter had been sent back to her parental house. PW.1 specifically states that having given the said amount of Rs. 1,00,000/- he sent her back to her matrimonial house. Whereas, PW.14 comes up with a different version stating that the said sum of Rs. 1,00,000/- was paid to the accused when he along with PWs.1 and 15 went to the house of the accused to advise him not to harass the victim. This inconsistency with regard to the payment of Rs. 1,00,000/- towards dowry to the accused therefore becomes very crucial as it creates serious doubt. 28. Even with regard to the credibility and veracity of the evidence of PW.14, as can be seen from his cross-examination contrary to what he has asserted in the chief-examination he states that, he was not present at the time when the marriage talks were held. If the version of PW.1, who is none other than the father of the victim is to be believed then it would mean that when the accused harassed the victim and sent her to his matrimonial home to bring Rs. 2,00,000/-, PW.1 (her father) arranged for Rs. 1,00,000/- and consoled her and sent her back to the matrimonial home. However, quite contrary to this, both PWs.14 and 15 have said that they

accompanied PW.1 and took the victim to her matrimonial house so as to advise the accused not to harass the victim and it was at that time a sum of Rs. 1,00,000/- was paid, whereupon, the accused got enraged and tried to attack PW.1. PW.1 has not said in his evidence about this incident of attempted assault with chopper and club which allegedly took place in the house of accused in the presence of PWs.14 and 15. 29. Therefore, the material evidence with regard to the demand and payment of Rs. 1,00,000/- towards dowry by the accused is beset with serious doubt. It is also necessary to notice that admittedly marriage took place on 11.03.2007. It is borne out from the evidence that, within few months thereafter he has secured job as a lineman in KEB at Laxmeshwar in Gadag district. If that is so, the alleged incident pertaining to the so-called demand of dowry has taken place, particularly in connection with Rs. 2,00,000/- towards securing job during the year 2007. The incident leading to burn injuries and the death of Ratnawwa has taken place on 26th of July, 2010 nearly after three years. 30. It is in this context, learned counsel contends that, it cannot be said that soon before the death of Ratnawwa there was any demand and payment of dowry or harassment in connection with dowry and therefore the prosecution had failed to prove the essential ingredients contained in Section 304-B of IPC. 31. As regards PW.10, who is none other than the maternal uncle of the deceased, in his version he has stated that jewellery and cash was given to the accused prior to the marriage at his house. However, PW.1 in his evidence states that, the jewellery and cash of Rs. 2,00,000/- was given to the accused at the time of marriage. 32. Therefore, it emerges from the discussion of the evidence made above that the prosecution has failed to establish the factum of demand of dowry by the accused and payment of the same either before the marriage or at the time of marriage or subsequent to the marriage. The alleged harassment said to have been meted out to the victim in connection with the dowry has also not been established. Serious inconsistencies in the version of the witnesses-PWs.1, 10, 14 and 15, who are material witnesses in this regard do not lend credence to their version. Therefore, question of pressing into service the deeming fiction enacted under Section 304-B regarding such death having been caused by the husband in connection with the dowry does not arise and therefore describing the death of Ratnawwa as dowry death in terms of Section 304-B also does not arise. 33. Thus, by analysing the whole facts of the case and the evidence on record in the context of the provision contained in Section 304-B of IPC and Section 113-B of the Indian Evidence Act, we are clearly of the view that ingredients of these provisions have not been established by the prosecution by adducing cogent evidence. 34. Ex.P.22 is the statement of the victim recorded by the Head Constable Irabadrappa, who is examined as PW.26. It was recorded in the night hours between 26.07.2010 and 27.07.2010 at about 00:40 hours. The said statement bears the signature of the victim. In the said statement, it is stated that since four years, herself and her husband had been leading happy married life. At about 9:30 p.m. on 26.07.2010, while she was in the house, her husband Basavaraj, who had returned from his work asked for hot water to take bath. When she was lighting the stove to boil water, accidentally she caught fire

from the stove; She stepped inside the water tank screaming and with a view to extinguish the fire; her husband and the neighbours brought her to the hospital for treatment; in the incident, she sustained burn injuries to hands, legs, face, neck and stomach etc.; that the incident was accidental and there was no suspicion regarding the same. It is based on this statement of the victim, Laxmeshwar Police registered Misc.No.19/2010. 35. Ex.P.26 is the dying declaration recorded by PW.36, Taluka Executive Magistrate, Hubballi. The same is recorded between 6:40 to 7:00 p.m. on 27.07.2010 and the dying declaration has been recorded in the form of questions and answers. Its translation would be as under: (1) Whether you are conscious and in sound state of mind? Ans: Yes. (2) Whether you are in a position to speak? Ans: Yes. (3) Where are you at present? Ans: KIMS Hospital, Hubballi. (4) Who brought you here and how? Ans: My husband Basavaraj brought me in the Government Ambulance. (5) Who is the assailant? Ans: Basavaraj (my husband). (6) Name and address of the assailant? Ans: Basavaraj G.K., R/o.Guddolli, Tq: Magadi. (7) How you identify them? Ans: I will identify in case I see him. (8) How you sustained injuries and in what manner? Ans: On 26.07.2010 at about 11:00 p.m., while myself and my husband were preparing to sleep after having food, as there was some quarrel between us, being upset, I went inside the kitchen and closed the door from inside. At that time, my husband said that as she was causing trouble, she could set herself on fire with kerosene oil, which was there inside the kitchen. I opened the door, came out asked my husband himself to pour kerosene and set me on fire. Thereafter, my husband poured kerosene on me and I could not see how the fire engulfed me. Thereafter, I myself extinguished the fire. When the door was opened, neighbours came and told my husband to call ambulance to shift me to the hospital. I have a small child and there is nobody to look after except my husband. Hence, no action shall be taken against my husband and I don't have any complaint against my husband. 36. We have perused Ex.P.26, though it bears the signature of the Medical Officer, KIMS Hospital, Hubballi; there is nothing to show that the patient was in a fit condition to give her statement. There is also nothing to show that her physical and mental condition was assessed and certified to be fit for the purpose of recording her dying declaration. Whether she was fully conscious and how her physical parameters were functioning including the pulse rate, B.P. etc., is not forthcoming. There is also no separate medical certificate issued by the Medical Officer in whose presence the dying declaration was recorded to substantiate her fitness both physical and mental. There is one document in the form of a letter, dated 27.07.2010 Ex.P.40, which is addressed by the Tahsildar/Taluka Executive Magistrate, Hubballi to the Medical Officer, KIMS, Hubballi. It is contended by the learned Additional Public Prosecutor that this document bears the endorsement of the doctor under his signature to show that the patient was in a fit condition to give her dying declaration. We have perused this document. It does not bear the signature of the Tahsildar/Taluka Executive Magistrate, Hubballi, and it does not contain any details regarding physical and mental condition of the victim. It is not known whether the signature put under the endorsement "patient is in a fit

condition to give her dying declaration" is that of the Doctor. The said Doctor has not been examined. There was no opportunity for the defence to cross-examine him and elicit the true fact regarding the state of mind and physical condition of the victim at the time when the dying declaration was recorded. 37. It has to be noticed at this stage that Ex.P.22 is marked in the evidence of Head Constable Irabadrappa PW-26. He has stated in his evidence that he recorded the statement of the victim as per Ex.P.22. He has identified the signature of the victim and the same is marked as Ex.P.22(a). He has further stated in unequivocal terms that after recording the said statement, he gave a report to the CPI, Shirahatti as per Ex.P.23 and he has identified his signature on the said statement as per Ex.P.23(a). His evidence also makes it clear that based on the said statement of the victim, case was registered in Misc.No.19/2010. It is thus evident that even as per the case of the prosecution at the earliest point of time when the statement of the victim was recorded by the Head Constable under the signature of the victim, she did not state anything with regard to the harassment, demand of dowry or any other cruel treatment in connection therewith meted out to her by her husband. She has not stated that her husband had any role in she catching fire on the fateful night. On the other hand, she has stated that she caught fire accidentally while pumping the kerosene stove for heating the water. 38. In the dying declaration recorded by the Taluka Executive Magistrate, Hubballi as per Ex.P.26 also, there is nothing to show that there was any demand of dowry and cruelty met out against her by her husband in connection therewith. Indeed in the said dying declaration, though victim states that it was her husband who poured kerosene on her, she clearly points out that she was unaware how she caught fire. She has further stated that her husband was not responsible and that she has no complaint against him. In such circumstance, Ex.P.26 dying declaration cannot be made basis for holding that the accused set her ablaze in connection with the dispute regarding demand and payment of dowry. 39. In addition, the most important factor in this case is that the Doctor who was present and has signed the dying declaration has not certified that the victim was in a fit condition to give her statement and whether he had examined her regarding her physical and mental condition at the relevant point of time. The said doctor is not examined before the Court. Therefore, as rightly contended by the learned counsel for the appellant/accused, Ex.P.26 cannot be made basis to hold that the accused was guilty of committing offence by setting his wife on fire and thereby causing her death. We may usefully refer to the decisions of the Apex Court in connection with the dying declaration. In the case of Paparambaka Rosamma and others v. State of A.P. (1999) 7 Supreme Court Cases 695 : (AIR 1999 SC 3455), it is held that Doctor's certificate regarding not only of the victim being conscious but also fit in his/her state of mind, was essential. In the case of Koli Chunilal Savji and another v. State of Gujarat (1999) 9 Supreme Court Cases 562 : (AIR 1999 SC 3695), the Apex Court has held that where both the dying declarations given before the Police and another recorded by the Magistrate, were consistent and corroborated with each other coupled with the version of the Magistrate that victim was fit to give the

dying declaration as informed by the Doctor which fact was entered in the Police Yadi, such dying declaration could be accepted. However, in the facts of the present case, the two dying declarations are inconsistent with each other, while the first one states that victim caught fire accidentally, the second one shows that accused poured kerosene on her, but she did not see how she caught fire. She also states that she had no complaint against her husband. In such circumstance, the dying declaration could not have been made the basis for convicting the accused. 40. It is evident from the materials on record and the judgment under challenge that the learned Sessions Judge has not analysed the matter in proper perspective by keeping in mind the relevant provisions of Section 304-B of the Indian Penal Code and Section 113-B of the Indian Evidence Act, 1872. It is borne out from the materials and the charge framed that the marriage between the accused and the deceased had taken place on 11.03.2007 and that the incident regarding burn injuries suffered by the victim resulting in her death was on 30.07.2010 and therefore death was within seven years from the date of her marriage. It was incumbent upon the prosecution to establish that soon before her death she was subjected to cruelty or harassment by her husband or in connection thereof regarding demand for dowry and it was a case of dowry death so as to raise the deeming fiction that the death was caused by her husband. 41. In the instant case, though the learned trial Judge has not examined the matter in the said perspective, we have reconsidered the entire matter by re-appreciating the evidence keeping in mind the provisions of Section 304-B of the Indian Penal Code and Section 113-B of the Indian Evidence Act. 42. Indeed as rightly pointed out by the learned counsel for the appellant by placing reliance on the judgment of the Apex Court in the case of *Bajinath & others v. State of Madhya Pradesh*, reported in 2017 SAR (Criminal) 440 : (AIR 2016 SC 5313), in case of an offence of dowry death as defined under Section 304-B of the Indian Penal Code, the ingredients to be established are (i) death of the woman concerned by any burns or bodily injury or by any cause other than in normal circumstances (ii) the same was within seven years of her marriage and (iii) that soon before her death, she was subjected to cruelty or harassment by her husband or any relative of the husband for, or in connection with, any demand for dowry. In such event, the offence under Section 498-A of the Code is attracted qua the husband or his relative if she is subjected to cruelty. The explanation appended to Section 304-B of the Indian Penal Code dealing with cruelty states as under: (i) Any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) or (ii) Harassment of the woman, where such harassment is with a view to coercing her or any persons related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any persons related to her to meet such demand. 43. Therefore, patently thus cruelty or harassment of the victim by her husband or his relative for or in connection with any demand for any property or valuable security as a demand for dowry or in connection therewith is the common constituent of both the offences. The statutory presumption to the

dowry death in terms of Section 113-B of the Indian Evidence Act would arise on proof of cruelty or harassment of a woman dead for or in connection with any demand for dowry by the person charged with the offence. Therefore, the presumption as to dowry death thus would get activated only upon the proof of the fact that the deceased lady had been subjected to cruelty or harassment for or in connection with any demand for dowry by the accused and that too soon before the death. 44. The Hon'ble Apex Court in the aforesaid judgment in paragraph 33 by examining the provisions of Section 304-B of IPC, Section 113-B of the Indian Evidence Act and Section 498-A of IPC has held as under: (33) A conjoint reading of these three provisions, thus predicate the burden of the prosecution to unassailably substantiate the ingredients of the two offences by direct and convincing evidence so as to avail the presumption engrafted in Section 113-B of the Act against the accused. Proof of cruelty or harassment by the husband or her relative or the person charged is thus the sine qua non to inspire the statutory presumption, to draw the person charged within the coils thereof. If the prosecution fails to demonstrate by cogent coherent and persuasive evidence to prove such fact, the person accused of either of the above referred offences cannot be held guilty by taking refuge only of the presumption to cover up the shortfall in proof. 45. Therefore, the prosecution ought to establish by cogent and coherent evidence that the accused was guilty of cruelty or harassment against his wife, deceased Ratnawwa in connection with the demand for dowry. It is only thereafter the presumption under Section 113-B of the Indian Evidence Act against the accused would arise regarding dowry death. 46. Insofar as the approach of the learned trial Sessions Judge in coming to the conclusion that commission of offences punishable under Section 302 had been established by the prosecution, we find from the discussion made by him that the learned Judge has deduced from the dying declaration given by the victim making an inference that in order to protect her husband, as a very courageous woman she has not made any allegation against her husband that too keeping in mind the interest of the child. Considerable discussion is made by the learned Sessions Judge in this regard by referring to the character and valour of the victim. We are of the view that commission of offences by the accused has to be proved by adducing cogent evidence. It cannot be a matter of inference. At the risk of repetition, we may again reiterate that in the dying declaration the victim has not stated anything with regard to harassment by her husband in connection with dowry. She has not stated that her husband set fire to her. She has specifically stated that she had no complaint against her husband. 47. In addition, at an earliest point of time in the statement duly signed by her recorded by PW.26, the victim has categorically stated that, she caught fire accidentally when she was trying to light the kerosene stove. In the face of such evidence it is not possible to draw any legal inference and connect the incident to involve the accused by attributing him harassment and cruel treatment against his wife in connection with demand for dowry. 48. In addition, we have to also notice here that there is no certificate issued by the doctor, who was allegedly present at the time when dying declaration of the victim was recorded as per

Ex.P.26, certifying her fitness and that she was physically and mentally fit to give the statement. Non-examination of the doctor in this context also goes against the prosecution. Ex.P.40-letter produced by the prosecution stating that the same disclosed the physical and mental fitness of the victim as certified by the doctor does not bear the signature of the Executive Magistrate who claims to have addressed that letter to the CMO, KIMS Hospital, Hubli. Though he claims in his examination-in-chief that his signature on Ex.P.40 has been marked as Ex.P.40(a), on examination of this document, we find that the same is not signed by the Executive Magistrate-PW.36. He has sought to mark the so-called signature of the medical officer as Ex.P.40(a). 49. When the author of the letter, who claims to have addressed the letter to the CMO has not signed the same, the contents found therein cannot be said to have been proved in the absence of examining the person who had noted the contents regarding fitness of the victim. 50. Evidence of the Investigating Officer cannot throw any light with regard to the allegation of dowry, harassment and the medical condition of the deceased at the time when her dying declaration was recorded. Therefore, to establish the guilt of the accused his evidence and the evidence of the other witnesses will not be of much consequence. 51. Thus, on re-appreciation of the entire materials on record, we are of the clear view that, the prosecution has failed to establish the guilt of the accused as alleged. The judgment of conviction and the order sentencing the accused for the offences alleged cannot be sustained. 52. Hence, the appeal is allowed. The judgment and order under challenge are set aside. The accused is acquitted of the offences alleged against him. The accused/appellant is ordered to be set at liberty forthwith, if, he is not required in any other case. The registry is directed to intimate the same to the concerned jail authorities for compliance. The fine amount if any paid/deposited shall be returned to the appellant. Appeal allowed.