(2008) 05 GAU CK 0031

Gauhati High Court

Case No: None

Anser Ali		APPELLANT
	Vs	
State of Assam		RESPONDENT

Date of Decision: May 29, 2008

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 313, 374
- Evidence Act, 1872 - Section 113B, 32
- Penal Code, 1860 (IPC) - Section 304B

Citation: (2009) 3 GLR 800 : (2008) 3 GLT 914

Hon'ble Judges: H. Baruah, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

H. Baruah, J.

Challenging the legality and correctness of the judgment and order of conviction dated 17.11.2005 passed by learned Sessions Judge, Morigaon in Sessions Case No. 75 of 2005 corresponding G.R. Case No. 348 of 2005, the appellant has preferred this appeal u/s 374 of the Code of Criminal Procedure by which the appellant was convicted u/s 304B, IPC and sentenced to undergo RI for ten years with fine of Rs. 5,000/- in default RI for two years.

2. Mr. A. Ahmed, learned Counsel for the appellant and Mr. B.S. Sinha, learned Addl. P.P. for the State of Assam were heard at length.

3. Brief facts necessary for the purpose of appeal are as follows:

Deceased Sabjan Begum, daughter of Abdul Khalek (PW 1) was given marriage with appellant Md. Anser All of Village Dandua Majgaon, P.S. - Morigaon, District - Morigaon. During subsistence of the marriage, on 9.5.2005 at about 10p.m. deceased Sabjan Begum received burn injuries on her person allegedly set on fire by

the accused-appellant, her husband by sprinkling kerosene oil. PW 1 the father accordingly lodged an FIR (Ext. 1) with the Officer-in-Charge of Morigaon Police Station which was registered as Morigaon P.S. Case No. 69 of 2005 u/s 304B, IPC. It was alleged in the First Information Report that along with the accused-appellant one Bogi Begum and his sister Anima Khatun were there. Sabjan Begum was immediately sifted to civil hospital and he, found her under going treatment. Being interrogated by him, his daughter Sabjan Begum told him that a quarrel ensued in between herself and the accused-appellant in the matter of demand of unlawful dowry, the appellant being enraged confining herself in the house by sprinkling kerosene on her burnt her alive. While under going treatment in the hospital at about 2 a.m. Sabjan Begum died. It was further contended in his First Information Report, Ext. 1 that on several occasions quarrel arose in between the deceased and the husband, the appellant herein for dowry. He (PW 1) considering welfare of his daughter and two minor sons he took his daughter unto his resident and kept her for about a month. In the midst, PW 1 purchased a tube well and handed over to appellant so as to subside his demand for dowry. But despite delivery of such tube well and other belongings as demanded by the appellant, he (appellant) resorted to an extreme step. Having been received the First Information Report (Ext. 1) police rushed to the place of occurrence and conducted investigation accordingly. On the death of Sabjan Begum at the hospital police conducted inquest on the dead body and sent her dead body for postmortem examination. Investigating Officer arrested appellant and forwarded him to custody. Investigation having been completed, a charge-sheet was laid against the appellant Anser Ali u/s 304B, IPC.

4. The case being committed, the trial begun and at the conclusion of the trial the learned Sessions Judge, Morigaon convicted the appellant u/s 304B, IPC as aforesaid. Being aggrieved thereby this appeal has been preferred.

5. Before the Session Court as many as 9 witnesses including one CW were produced and examined. Accused-appellant, however, refused to examine any witness or produced any document whatsoever. When examined u/s 313 of the Cr. PC the appellant denied all the allegations brought against him and pleaded his innocence.

6. Now it will be appropriate for this Court to see the legality and correctness of the impugned judgment and order of conviction in view of the facts and circumstances of the case and evidence on record both oral and documentary.

7. While challenging the judgment and order of conviction appellant raised two pertinent questions as follows: (1) that the evidence available on record are not sufficient at all to show complicity of the accused, in other words, to draw the inference/presumption u/s 113B ofthe Evidence Act that it was he and he alone who is responsible for the death of his wife and (2) that the condition precedent for establishing the offence u/s 304B, IPC have not been complied with.

8. The learned trial Court while deciding the case against the appellant is found to have put all the evidence available on record in order to draw a presumption as against the accused appellant. The learned trial Court after scrupulously screening all the facts and circumstances of the case and on evidence on record, both oral and documentary, came to a finding that presumption u/s 113B could be well drawn as against the appellant and accordingly the learned trial Court held him guilty u/s 304B and sentenced as stated herein before.

9. For the purpose of establishing an offence u/s 304B, IPC the following conditions are required to be proved by the prosecution: (1) that a married woman had diedotherwise than under normal circumstances; (2) such death was within seven years of her marriage; and (3) that there was cruelty and harassment in connection with demand for dowry soon before her death.

10. For the purpose of arriving at a conclusion each of the conditions as described herein before, it would be appropriate for this Court to make a survey of all the evidence on record more particularly the evidence of the father PW1, the informant of this case and PW 2 his nephew Md. Sharif Thakuria. Section 113B of the Evidence Act permits apre-sumption to be drawn against the accused in regards to dowry death provided a presumption establishes that soon before her death the woman was subjected to cruelty or harassment.

11. From a conjoint reading of the evidence of all the witnesses it would be apparent that Sabjan Begum the deceased died as a result ofbum injuries sustained by her. There is no evidence appearing in the face of the record that she died otherwise than burning. All the witnesses assembled in the courtyard, hearing hue and cry, saw the burning of the deceased alive who was subsequently shifted to civil hospital for her treatment. But she succumbed to her burn injuries so sustained. So the first condition is found to have been complied with by the prosecution by producing acceptable and cogent evidence. None of the witnesses so examined by the prosecution came and asserted that deceased Sabjan Begum did not die as a result of burn injuries. PW 1 and PW 2, of course, were not present in the house of the appellant while the deceased was a blazing. Both after shifting of the deceased to hospital had been to there where they found the deceased in a burnt condition. So all the witnesses who were brought unto the witness box supported the case of the prosecution that the decreased died as a result ofburn injuries.

12. Now at this stage, it would be relevant for this Court to look at the evidence of the Dr. ATM Eusuf, PW 9 who conducted postmortem examination on the dead body of Sabjan Begum on 10.5.2005. Before adhering to the evidence of PW 9 it would further to be appropriate for this Court to examine the evidence of PW 6 Mr. Hari Prasad Bora, the Circle Officer who performed inquest on the dead body of Sabjan Begum on police requisition. While he in the witness box successfully proved the inquest report Ext. 2 prepared by S.I. of police at his instance. Ext. 2, the inquest report goes to show that the deceased received burn injuries almost on every part

of her body and he did not notice any mark of injury. The PW 9, the doctor while conducting the post-mortem examination on the dead body of Sabjan Begum found severe burn injuries all over her body but he did not notice any mark of injury. Brain and spinal cord were found congested, thorax-wall, ribs and cartilages were found healthy, partially burnt. He also found congestion in larynx, right lung, left lung pericardium and heart. Heart was found full of blood. The doctor stated that the bum inj uries were ante-mortem and the percentage ofburn stood at 100%. Having found thus and noticed the abnormalities, the doctor opined that the cause of death due to shock, collapse leading to cardio respiratory failure resulting from 100% burn. This piece of evidence is found to have lent support to the evidence of other witnesses who confirmed that the deceased was found ablazing in her courtyard while arriving at the place of occurrence after hearing hue and cry. Death was not apparently occurred due to other reasons otherwise than on burn. Therefore, the first condition is found to have been fulfilled by the prosecution.

13. The second condition is whether such death occurred within seven years of her marriage. In this regard the learned trial Court is found to have carefully scrutinized the evidence of the witnesses more particularly evidence of PW1 and PW 2 and having scrupulously examined it came to a finding that death occurred to Sabjan Begum within a period of seven years ofher marriage with the appellant. Minor discrepancies appearing here and there in the evidence of the witnesses in regard to the date of marriage with the appellant and found to have answered by the learned trial Court in a conclusive way, this Court, therefore, does not see any error and illegality in assessing the evidence of the witnesses in respect of proof of the second condition i.e. death within seven years of the marriage. The learned Counsel for the appellant although put much emphasis that this condition was not proved by the prosecution up to its hilt and, therefore, the appellant cannot be convicted u/s 304B, IPC, however, failed to impress me in view of the evidence available and the reasons forwarded by the learned trial Court while arriving in affirmative. Learned trial Court while answering this condition in affirmative much relied on the evidence of PW 2, Sharif Thakuria, who is a nephew of the PW 1. PW 1, the father of the deceased is apparently an illiterate man and, therefore, it would not be possible on his part to give an exact date of marriage of the appellant and the deceased. But the evidence of PW 2 is found substantial in this context since he stated the date of his marriage and the marriage of the deceased and the appellant. PW 2 in his evidence stated that his marriage was contracted on 26th day of February, 1999 and after four months of his marriage in the month of June 1999 the deceased was given in marriage with Anser Ali and thereafter Sabjan become a mother of two sons until her death. Occurrence admittedly took place on 9.5.2005 so, in, that calculation deceased died apparently within seven years ofher marriage. The learned trial Court, therefore, rightly held that death occurred to Sabjan Begum within seven years of her marriage. The second condition is also found to have been complied with, in other words proved by the prosecution.

14. Now the most important condition is the Condition No. 3. For the purpose of proof of this condition, prosecution is required to prove that before the death of the deceased Sabjan Begum there was cruelty and harassment meted to her by the husband for demand of dowry soon before her death. P W1 the father in his context would be the appropriate person to say about the demand of dowry by the appellant. The mother of the deceased was apparently not examined by the prosecution in this case, therefore, we are to concentrate ourselves to the evidence of PW 1, the father together with the other evidence available on record. In the First Information Report Ext. 1 it is specifically alleged that on being asked the deceased while under going treatment in the hospital about her burn injuries, he had been told that the appellant, her husband ensued quarrel with her for non-payment of dowry, resultantly he set fire by sprinkling kerosene on her after confining her in the room. So the first informant at the very initiation of setting the criminal law in motion divulged some discord arose in between the appellant, the husband and the deceased, the wife in regard to dowry. The suspicion gets more cemented from his evidence recorded on oath during trial. PW1 categorically stated in his evidence that after one year of their marriage the appellant tortured the deceased, his wife both mentally and physically for not providing adequate dowry. He also stated in his evidence that failing to tolerate such atrocities meted to his daughter, she had to leave the abode of the appellant time and again. For the purpose of living peacefully it is deposed that he delivered Rs. 500/- to his daughter and day after he also supplied a sofa set, wooden almirah and many other things with a view to spend her life in peace in the house of the appellant. He also deposed that before some days of her death he also purchased a tube well and sent the same to the house of the appellant so that no further atrocities meted to her. Thus, from the evidence of PW 1 it has become apparent that the deceased was tortured both mentally and physically by the appellant for non-payment/supply of adequate dowry as per his desire for which the appellant had ablazed his wife, the deceased by sprinkling kerosene on her body. The evidence of PW 1 is also fortified by the evidence of PW 2, Sharif Thakuria. He in his evidence categorically stated that he had the knowledge about the demand of dowry by the appellant to his deceased wife since he and PW 1, his paternal uncle during the relevant period of time were living at the same mess. PW 2 while deposing before the trial Court clearly without any traces of ambiguity deposed that appellant resorted atrocities on Sabjan Begum demanding money and other articles. So there appears a total corroboration in between the evidence of PW 1 and PW 2 in respect of demand of dowry and cruelty and harassment meted to deceased for non-fulfillment of the demand by the deceased wife. Both the witnesses have stated that for running a peaceful life seldom the father, the PW 1 paid some amount of money and supplied other articles too but despite such payment and supply of articles, appellant did not resist himself from torturing his deceased wife and ultimately he resorted to the extreme step which caused the hope and aspiration of the deceased wife nip in the bud. Other non-official witnesses who were examined in this context in support of the

prosecution of course remained mum in the context of torture, ill treatment etc. on the deceased by the appellant demanding dowry.

15. Now the another aspect to be decided is whether in absence of evidence from independent witnesses in regard to torture, ill treatment for dowry, evidence of PW 1 and PW 2 can be said to be acceptable, both being the members of the same family on the ground that the both are interested. There is no rule of law that the evidence of interested witnesses is to be discarded out right in ascertaining a fact in issue. However, law requires, for acceptance of the testimony of an interested witness Courts should adopt extreme care and caution in accepting his/their evidence. PW 1 and PW 2 apparently lived in the same mess but the evidence while scrutinized properly it would find that there is no space of interestedness in the evidence of either witness. Both categorically stated that for non-payment of dowry and other valuable articles appellant seldom ill treated his deceased wife both mentally and physically.

16. Learned trial Court while discussing the evidence on record on the particular issue also afforded reasons adequately why their evidence should not be discared. PW 9, who conducted post-mortem examination on the dead body of Sabj an Begum deposed that all the burn injuries found on the dead body were ante-mortem in nature and there was 100% burn, so for the third condition, the onus of proof which is squarely on the prosecution is found to have been discharged by it

17. When in a case u/s 304B these three conditions precedent are found to have been established by the prosecution a presumption can be drawn against the husband or any other relative facing the trial that soon before her death she was subjected to cruelty or harassment for fulfillment of dowry demand. It is according to the counsel for the State respondent that when these three conditions are adequately established, a presumption can be well drawn u/s 113B of the Evidence Act that death occurred to the deceased as result of such torture and harassment.

18. It is the case of the prosecution that for non-payment of dowry the appellant, the husband on the relevant night set fire on to the person of the deceased after sprinkling kerosene on her. The fact of ablazement is found to have been proved by the prosecution from the evidence of other witnesses who were said to have assembled in the house of the accused-appellant after hearing hue and cry.

19. Learned Counsel for the appellant, however, refuted the claim of the prosecution and contended that she got ablazed from a stove. Investigating Officer admittedly ceased a stove and a jurican from the place of occurrence in which not a single drop of kerosene was found available. It is also found in the evidence on record that kerosene stove did not receive any damage whatsoever. Learned trial Court discussed at length why it refused to accept the argument advanced for and on behalf of the accused-appellant. The learned trial Court held that fire could not catch

the deceased without blast of the stove. The learned trial Court also supplied emphasis that when there was no single drop of kerosene inside the stove found, it would be unfair to hold that the stove was ever used for cooking purpose. Learned trial Court after careful scrutiny of the evidence on record rejected the submission advanced by the counsel for the defence. Now, the question arises at this stage how the deceased received burn injuries. Two hypothesis can be possible--(i) either it was the appellant who set on fire on the deceased after sprinkling kerosene or (ii) the deceased herself set on fire by pouring kerosene on her body. To arrive at a conclusion in this context we are to read evidence available on record more particularly the conduct of the appellant at the time of occurrence. One of the witness deposed on oath that when he arrived at the place of occurrence hearing hue and cry, the people who gathered there tried to put out the fire by pouring water etc., but the appellant was found standing in the courtyard with their little child in his lap. There is no evidence on record to show while the deceased was ablazing, he did make any attempt to put out the fire rather stood cum and quite with the child in his lap when others who assembled there tried to put out the fire. This conduct of the appellant necessarily infers that the deceased wife did never commit suicide by pouring kerosene on her body. Had this been the fact she would have certainly dissuaded herself from saying that it was her husband who ablazed her by pouring kerosene on her body. The receipt of burn injuries, therefore, can be very well attributed to the appellant. The learned trial Court having considered the facts situation and evidence on record rightly refused to accept the argument advanced by the learned defence counsel.

20. It is in the evidence on record that PW 1 and PW 2 were not present at the time of occurrence. They got information of the fateful happening and accordingly proceeded to hospital to see the deceased. Both PW 1 and PW 2 stated that after getting information about the burning of Sabjan Begum they came together to the hospital and at that time Sabjan was in a condition of speaking. On being asked she told that Anser, the appellant set her ablazed by pouring kerosene on her body for an altercation that took place in between her and appellant for non- payment of dowry. It is also in their evidence that after divulging the fact of setting her into fire, she succumbed to her burn injuries. Taking aid of this statement of PW 1 and PW 2, it was argued by the learned Addl. P.P. for the respondent that the fact so divulged can be treated as dying declaration u/s 32 of the Evidence Act. It was argued by the learned Addl. P.P. that there was no reason why such statement should be disbelieved.

21. Per contra to the submission advanced by the learned Addl. P.P. for the State respondent, it was argued by the learned Counsel for the appellant that dying declaration (oral) made to PW 1 and PW 2 by the deceased cannot be taken into consideration since such declaration was made to her father and brother who are most interested in the prosecution of the accused. That apart when the doctor opined that the deceased received 100% burn injury, she could never be in a mental

state, sufficient to make such a statement to PW 1 and PW 2. Further it was argued that when in the civil hospital there were attending physicians, such a statement allegedly made to PW 1 and PW 2, according to the learned Counsel for the appellant is not acceptable. Admittedly, there is no evidence available on record to show that the deceased made such a declaration before her death to the attending physician that it was the appellant who set her ablaze by pouring kerosene for non-payment of dowry. It was also argued by the learned Counsel for the appellant that there is no corroboration in this regard and, therefore, it would not be prudent on the part of the Court to exercise acceptance of such dying declaration. Rule of law does not provide that a dying declaration requires any corroboration. In other words corroboration is not essential but expedient while assessing the dying declaration by the Courts. Care and caution must always be exercised in accepting a dying declaration as trust worthy evidence. Herein in this case I find that such dying declaration was made not only to her father but to PW 2 her brother. So when we speaks of corroboration we must not be shy enough to look at the evidence of PW 2. Both have categorically stated that the deceased made such a dying declaration before them. Though both the witnesses are of the same family, the fact by its does not discredit their testimony. Though the attending physician of the civil hospital did not record the dying declaration, making of dying declaration to PW 1 and PW 2 by the deceased cannot be branded as unworthy of trust. Learned Counsel for the appellant in support of his argument in respect of acceptance of dying declaration relied on the decision in the case Arvind Singh Vs. State of Bihar, , wherein their lordships ofthe Apex Court in paras 14, 15, 16,17 and 18 held as under:

14. Turning attention on to the dying declaration, be it noticed at this juncture that the deceased was supposed to have spoken to the mother that there was a conjoint effort of all the accused to pour kerosene on all her body and lit the fire--the burn injury resulting therefrom has caused her life to death. The prosecution thus treated the same as a dying declaration.

15. Though the earlier view of this Court in Ram Nath case (Ram Nath Madhoprasad v. State of M.P.) stands overruled by a five-Judge judgment in the case of Tarachand Damu Sutar v. State of Maharashtra, but there is no denial of the fact that a dying declaration ought to be treated with care and caution since the maker of the statement cannot be subjected to any cross-examination. The same is the view taken in the case of Munnu Raja v. State of M.P. wherein this Court stated : (AIR Headnote)

It is well settled that though a dying declaration must be approached with caution for the reason that the maker ofthe statement cannot be subjected to cross-examination, there is neither a rule of law nor a rule of prudence which was hardened into a rule of law that a dying declaration cannot be acted upon unless it is corroborated. Thus Court must not look out for corroboration unless it comes to the conclusion that the dying declaration suffered from any infirmity by reason of

which it was necessary to look out for corroboration.

16. In the same year this Court in the case of K. Ramachandra Reddy v. Public Prosecutor observed AIR Headnote

The dying declaration is undoubtedly admissible u/s 32 and not being a statement on oath so that its truth could be tested by cross-examination, the Courts have to apply the strictest scrutiny and the closest circumspection to the statement before acting upon it. While great solemnity and sanctity is attached to the words of a dying man because a person on the verge of death is not likely to tell lies or to concoct a case so as to implicate an innocent person, yet the Court has to be on guard against the statement of the deceased being a result of either tutoring, prompting or a product of his imagination. The Court must be satisfied that the deceased was in a fit state of mind to make the statement after the deceased had a clear opportunity to observe and identify his assailants and that he was making the statement without any influence or rancour. Once the Court is satisfied that the dying declaration is true and voluntary it can be sufficient to found the conviction even without any further corroboration.

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 far 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. In order to test the reliability of a dying declaration, the Court has to keep in view the circumstances like the opportunity of the dying 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; the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties. Khushal Rao v. State of Bombay, relied on.

17. Be it noted that the dying declaration herein has not been effected before any doctor or any independent witness but to the mother who is said to have arrived at the place only in the morning--the mother admittedly is an interested witness; though that by itself would not discredit the evidence tendered in Court but the fact remains that the doctor''s evidence considering the nature of the burns posed a considerable doubt as to whether such a statement could be made half-an-hour before the death of the accused. It is not that the statement of the unfortunate girl was otherwise not clear or there was existing some doubt as to the exact words, on the contrary the definite evidence tendered is that there is clear unequivocal statement from the daughter of the family that the conjoint efforts of putting kerosene thereafter with a lighted matchstick has resulted in the burn injury. The

severity of the burn injury and its impact on the body speaks volumes by reason of the death of the deceased. It is the reliance on such a dying declaration by the High Court which shall thus have to be scrutinized with a certain degree of caution.

18. The dying declaration in the instant matter, thus we must confess, raised a certain amount of eyebrows and Mr. Verma also with his usual eloquence did put a strong protest in regard thereto. The evidence of this declaration depicts that just before a few minutes of her death, the deceased would make a declaration quietly to the mother naming therein all the three relations along with the husband who poured kerosene to burn her alive. This is not acceptable, more so having regard to the declaration being made to the mother only. In any event, is it conceivable that the husband along with the father-in-law, mother-in-law, brother-in-law would start pouring kerosene together on to the girl--as if each was prepared with a can of kerosene to pour simultaneously--this not only would lead to an absurdity but reliance on such a vague statement would be opposed to the basic tenets of law. Further, it is in evidence that the deceased had extensive burns including on her mouth, nose and lips--if any credence is to be allowed to the same, then and in that event, the evidence of the mother about the confession stands belied by itself. Significantly, the doctor''s evidence as is available on record would also go a long way in the unacceptability of the evidence of the mother as regards confession. In no uncertain terms the doctor PW 8 stated that the death may have taken place at once and within ten seconds by reason of the extensive nature of the burns and the deceased could not have survived beyond 10 minutes. Another redeeming feature that the declaration of the deceased was made only to the mother but before the arrival of the mother, the incident was made known to the police authorities and, in fact, the police was present when the mother and the brother arrived. It is highly unlikely that the police will not make any attempt to have a statement by the deceased but if it was otherwise possible, immediately on its arrival rather than wait for the mother to arrive. Two recent decisions of this Court may be of some assistance--the first in point of time is the decision of a three-Judge Bench of this Court in the case of Paparambaka Rosamma v. State of A.P., wherein this Court in no uncertain terms observed that there ought not to be any hesitancy in the mind of the Court in regard to the truthfulness and voluntary nature of disclosure of the incident. In Rosamma case one Dr. K. Vishnupriya Devi had stated in the Court that the injured was conscious but she had not deposed that the injured was in a fit state of mind to make a statement. It did come on record that the girl had sustained 90% burn injuries and it is in that perspective, this Court held (at SCC p. 701, para 8) that

> in the absence of a medical certification that the injured was in a fit state of mind at the time of making the declaration, it would be very much risky to accept the subjective satisfaction of a Magistrate who opined that the injured was in a fit state of mind at the time of making a declaration

--the medical certification, therefore, was felt to be a primary element in the matter of a dying declaration--unfortunately we do not have any certification of whatsoever nature, it is only the uncorroborated testimony of the mother to whom the deceased was supposed to have made the declaration as noticed above. In para 9 of the Report in Rosamma case however, this Court had the following to state: (SCC pp. 701-702)

9. It is true that the medical officer Dr. K. Vishnupriya Devi (PW 10) at the end of the dying declaration had certified ''patient is conscious while recording the statement''. It has come on record that the injured Smt. Venkata Ramana had sustained extensive burn injuries on her person. Dr. P. Koteswara Rao (PW 9) who performed the post-mortem stated that the injured had sustained 90% burn injuries. In this case as stated earlier, the prosecution case solely rested on the dying declaration. It was, therefore, necessary for the prosecution to prove the dying declaration as being genuine, true and free from all doubts and it was recorded when the injured was in a fit state of mind. In our opinion, the certificate appended to the dying declaration at the end by Dr. Smt. K. Vishnupriya Devi (PW 10) did not comply with the requirement inasmuch as she has failed to certify that the injured was in a fit state of mind at the time of recording the dying declaration. The certificate of the said expert at the end only says that ''patient is conscious while recording the statement''. In view of these material omissions, it would not be safe to accept the dying declaration (Ex. P-14) as true and genuine and as made when the injured was in a fit state of mind. From the judgments of the Courts below, it appears that this aspect was not kept in mind and resultantly they erred in accepting the said dying declaration (Ex. P-14) as true, genuine and as made when the injured was in a fit state . of mind. In medical science two stages, namely, conscious and a fit state of mind are distinct and are not synonymous. One may be conscious but not necessarily in a fit state of mind. This distinction was overlooked by the Courts below.

22. Admittedly, there is no certification in respect of condition of deceased immediately before making such declaration. The learned Addl. P.P. for the respondent State though conceded appearance of some lacunae in regard to making of dying declaration, he emphatically submitted that there is no reason why the evidence of PW 1 and PW 2 should be discarded when the evidence do not receive any deviation from each other. In this context to acceptance of dying declaration this Court finds no force in the argument so advanced by learned Counsel for the appellant in the context of non-certification of mental condition of the deceased wife in view of receipt of 100% burn injuries. There is no evidence on record to show that investigating officer also made an attempt to record such dying declaration either through Doctor or an Executive Magistrate. It in the evidence of PW 1 that the first information was lodged after the death of the deceased on 10.5.2005. Per- haps no opportunity on the part of the investigating officer came to make an attempt for recording such declaration either through an Executive

Magistrate or a Doctor.

23. The next question that has come in the forefront in the facts situation and evidence on record is whether minus the dying declaration allegedly made by the deceased, conviction of the appellant can be sustained on the basis of the other facts and circumstances of the case and the evidence on record. I have already discussed and arrived at findings in respect of satisfaction of the conditions required for the purpose of proving of charge u/s 304B, IPC. The facts and evidence on record give a clear picture that presumption can be drawn as against the appellant Anser Ali, the husband of the deceased. Had the dying declaration been recorded in a proper manner; it would have more beneficial effect in ascertaining the guilt of the accused. Even without the assistance of the dying declaration, in the humble opinion of this Court the facts and circumstances and evidence appearing on record are sufficient to receive a presumption as against the appellant.

Having thus scrupulously scrutinized all the matters in its entirety, this Court of the view that the learned trial Court did not commit any error or illegality in holding the appellant guilty u/s 304B, IPC. This Court does not find any cogent and sufficient ground to interfere with the impugned judgment and order for conviction. It is accordingly affirmed.

24. The Appeal stands dismissed.