Neutral Citation No. - 2024:AHC:152205-DB

Court No. - 43

Case :- CRIMINAL APPEAL No. - 6151 of 2022
Appellant :- Shahrukh Khan And Another
Respondent :- State of U.P.
Counsel for Appellant :- Araf Khan,Lihazur Rahman Khan,Manoj Singh
Counsel for Respondent :- G.A.

Hon'ble Ashwani Kumar Mishra,J.
Hon'ble Dr. Gautam Chowdhary,J.

(Per : Hon'ble Ashwani Kumar Mishra, J.)

1. This appeal is directed against the judgment and order of conviction dated 16.07.2022 passed by learned Additional District and Session Judge, Court No. 10, Aligarh in Session Trial No. 257 of 2019 (State Vs. Shahrukh Khan and another), arising out of Case Crime No. 403 of 2018, under Sections 498A, 304-B I.P.C., in alternative under Sections 302, 323, 307 I.P.C. read with Section 3/4 of Dowry Prohibition Act, Police Station Chandaus, District Aligarh, whereby both the accused-appellants, Shahrukh Khan and Anjum, who are husband and mother-in-law of the deceased respectively, have been convicted and sentenced to life imprisonment under Section 302 I.P.C. along with a fine of Rs. 10,000/- and on failure to deposit the fine to undergo additional simple imprisonment of six months, and six months simple imprisonment along with a fine of Rs. 1,000/- and on failure to deposit the fine to undergo additional simple imprisonment for one month.

2. The father of the deceased, Yaseen Khan lodged a written report on 21.12.2018, stating that his daughter Ruksar got married to the accused-Shahrukh Khan on 17.05.2018 as per Muslim traditions and customs. He had given dowry of rupees

one lakh alongwith the motorcycle, gold chain and ring, etc., apart from five hundred grams silver jewellary. The daughter (deceased) was harassed for dowry by the family members. She was also ill treated and physically beaten for getting less dowry. On 21.12.2018 at about 9:00 a.m. while the informant's daughter was cooking food, the accused-Shahrukh Khan, allegedly assaulted her with an iron rod and, thereafter, her mother-in-law, sister-in-law and brother-in-law, poured kerosene on her, whereafter, the accused-Shahrukh Khan lighted the matchstick and the informant's daughter was dragged inside. On raising of alarm by the deceased the neighbours arrived, whereafter, the fire was doused. Nazakat, S/o Fakeer Mohammad, intimated the informant about the incident, thereafter, he called police helpline number 100. On receiving of information the police took the informant's daughter to the hospital. On the basis of aforesaid report the F.I.R. came to be lodged on 21.12.2018 at 22:25 hours in respect of the incident of the same day occurred at 9:00 a.m. The victim was apparently taken to the Community Health Clinic, Chandaus, whereafter, she was referred to the District Hospital, where the victim was taken by the police personnel. As per the medical records, the victim was got admitted at the District Hospital by the father of the victim. The victim remained admitted in the hospital and she ultimately died in the night of 04/05 of January, 2019 at 12:30 a.m.

3. Although the investigation proceeded in the matter, but neither the spot was inspected on the date of incident nor any recovery, etc., was made till the date of death of the deceased. The spot has been inspected by the Investigating Officer after 15 days. After the death of the victim the inquest was conducted at 2:00 p.m. on 05.01.2019. The postmortem has been conducted

on the same day and the following condition of the victim has been mentioned in the postmortem report:

> "Superficial to deep thermal burn injuries present all over body. Except some parts of legs."

Cause of death was septicaemia and shock as a result of ante mortem thermal burn injuries.

4. A dying declaration was made by the injured on 21.12.2018, as per which she was 19 years old and on the date of incident her mother-in-law had made a complaint against the victim in respect of non cleaning of toilet. The husband of the victim, thereafter, beat her. Demand of quilt, bed, etc., was also made towards dowry. The victim had gone to her paternal house and returned to her in-laws house only a week back. The mother-in-law was insisting her husband to beat her more. It is, thereafter, that the victim was locked inside the room and two accused-appellants poured kerosene on her and the husband lighted the matchstick, as a result of which the victim sustained burn injuries. Husband and mother-in-law both fled from the spot. The victim was saved by one Afsana, who placed bed sheet around her. The mother-in-law, husband and sister-in-law of the victim were present in the house. The victim, further stated that there is no role of the sister-in-law in the incident. She also alleged that the marriage was solemnized eight months back and she was carrying pregnancy of eight months and in the event of any untoward incident happening to her, it is the husband and mother-in-law, who would be responsible. The dying declaration is Ex.Ka.-18. At the top of it the doctor has mentioned, *"This is to certify that patient Ruksar, w/o Shahrukh is conscious, oriented and fit for statement"*. At the bottom of the dying declaration there is again a certificate of the doctor that, *"This*

is to certify that above mentioned patient remained conscious and oriented during dying declaration". The dying declaration has been recorded by the Naib Tehsildar.

5. Relying upon the aforesaid dying declaration as well as statements of witnesses, charge sheet was submitted against the accused-appellants under Sections 498-A, 304-B 323, 307 I.P.C. and Section 3/4 of Dowry Prohibition Act. The charge was also framed under Section 302 I.P.C.

6. Cognizance was taken on the chargesheet and the case was committed to the Court of Session, where it got registered as Session Trial No. 257 of 2019. The accused persons denied the charges and demanded trial.

7. The prosecution, in addition to the written report (Ex.Ka.-1); site plan (Ex.Ka.-2); postmortem report (Ex.Ka.-3); charge sheet (Ex.Ka.-13); inquest report (Ex.Ka.-15); dying declaration (Ex.Ka.-18); F.I.R. (Ex.Ka.-19); have also produced oral testimony of various witnesses. Yaseen Khan is the father of the deceased, who is produced as P.W.1. Shakeel Khan (P.W.2) is the maternal nephew (Bhanja) of P.W.1. P.W.3 is Raju, who is nephew of P.W.1. P.W.4 is Afsana, who is neighbourer and has asserted about a distinct dying declaration, as per which the deceased accidentally caught fire. She was also present and had saved the victim. P.W.5-Bhurey Khan is the uncle of the deceased. P.W.6-Iliyas is the nephew of P.W.1. P.W.7-Babu is the uncle of the deceased. These are the only seven witnesses, who are the witnesses of fact and are close relatives of the deceased. All these witnesses, i.e., P.W.1 to P.W.7 have turned hostile and have not supported the prosecution case.

8. P.W.8-Dr. Neeraj Kumar is the first Investigating Officer of the case. P.W.9 is Dr. J. M. Sharma, who conducted postmortem of the deceased. P.W.10 is Dr. Tushar Patil who was the emergency doctor and had treated the victim at J. N. Medical College, Aligarh. P.W.11-Surendra Singh is the third Investigating Officer and P..W.12-Sanjeev Dixit is the second Investigating Officer. P.W.13-Ranjit Singh is the Additional City Magistrate, who conducted inquest proceedings. P.W.14-Rajkumar Gupta is the Tehsildar, who had scribed the dying declaration of the deceased. P.W.15-Prempal Singh is the Head Constable, who has proved the chik report.

9. From the evidence adduced before the trial court, it is apparent that the entire prosecution case is based upon the dying declaration of the deceased.

10. In the facts of the case, we deem it appropriate to reproduce the contents of the dying declaration of the deceased, which is as under:

> "बयान श्रीमती रुखसार w/o शाहरुख़ उम्र 19 वर्ष महिला नि० ग्राम रामपुर जिला - अलीगढ पेशा - गृहणी ने बहलफ बयान किया कि आज दिनांक 21.12.18 को लैट्रीन रूम कि सफाई को लेकर मेरी सास मेरे पति से शिकायत कर रही थी। इसके बाद मेरा पति आकर मुझे मरने-पीटने लगा। इसके अतिरिक्त ये लोग रजाई, बिस्तर की दहेज में मांग भी कर रहे थे कि तुम घर से लेकर क्यों नहीं आयी। अभी एक सप्ताह पहले ही मैं अपने पीहर से आयी थी। मुझे मरने-पीटने के दौरान मेरी सास मुझे और भी मरने को कह रही थी। मुझे पीटने के बाद इन लोगों ने मुझे कमरे में बंद कर दिया तथा मेरे ऊपर इन दोनों ने मिलकर मिटटी का तेल छिड़का तथा मेरे पति ने माचिस जलाकर मुझे आग लगा दी जिससे मैं जल गई हूँ। मुझे आग लगाने के बाद मेरे पति व सास दोनों कमरा खोलकर घर से बाहर भाग गए मैं भी कमरे से चीखती चिल्लाती निकली तथा पानी के पास आकर अपने ऊपर पानी डाला। इस दौरान मेरे पड़ोस की एक लड़की अफसाना (उम्र-20 वर्ष से ऊपर होगी) ने मुझे बचाया तथा मेरे ऊपर चादर लपेटा। घटना के समय

> घर में मेरी सास, पति शाहरुख़ व नन्द मंतसा उम्र-16 वर्ष उपस्थित रहे। आग लगाने में नन्द की को भूमिका नहीं रही। मेरी शादी अभी लगभग 08 महीने पहले हुई थी। मैं लगभग 08 माह से गर्भवती भी हूँ। अगर मुझे कुछ हो जाता है तो इसके लिए मेरी सास व पति शाहरुख़ पूरी तरह ज़िम्मेदार हैं। बयान सुनकर, समझकर तस्दीक किया।"

11. The trial court on the basis of evidence referred to above, has convicted the accused-appellants and sentenced as per above.

12. Learned counsel for the accused-appellants argues that the dying declaration is not reliable and has erroneously been treated to be a valid piece of evidence by the trial court. In support of his submission, learned counsel has primarily urged that there is no satisfaction recorded by the doctor with regard to the fit mental state of the victim and, therefore, it is alleged, that in absence of any certification by the doctor with regard to fit mental state of the victim, the dying declaration cannot be relied upon. Learned counsel also argues that the dying declaration was tutored as the prosecution witnesses clearly admitted that the victim was seen being tutored by her father, i.e., P.W.1. It is also submitted that the doctor, who had certified the fitness of the victim, has not been produced before the trial court. The treating doctor has otherwise admitted that the dying declaration was not recorded in his presence. It is further argued that the dying declaration uses typical words which are expected from a literary person, and the deceased, since was an illiterate person, it can be easily inferred that she was tutored. It is also submitted that the Tehsildar, who had scribed the dying declaration, has not been able to explain as to when and where the dying declaration was recorded. It is lastly urged that the dying declaration cannot be otherwise looked into as the contents of dying declaration was not put to the accused

for recording of their statements under Section 313 Cr.P.C. In support of its case the learned counsel placed reliance upon following judgments:-

(i) **Lokesh and Ors. Vs. State of U.P. (Criminal Appeal No. 1371 of 2015, decided on 28.01.2023), reported in 2023 (3) ADJ 47;**

(ii) **Paparambaka Rosamma and others Vs. State of A.P. reported in (1999) 7 SCC 695**;

(iii) **Naresh Kumar Vs. Kalawati and others, reported in (2021) 166 SCC 158**;

(iv) **Rameshwar Lal Chauhan Vs. State of U.P. : 2023 SCC OnLine All 1127**;

(v) **Radhey Jaiswal and others Vs. State of U.P. : 2024 SCC OnLine All 2649**;

(vi) **Dilawar Singh Vs. State of U.P. (Criminal Appeal No. 5591 of 2019, decided on 09.08.2024)**; and

(vii) **Samsul Haque Vs. State of Assam : (2019) 18 SCC 161.**

13. Shri Umesh Dubey, the learned A.G.A. for the State, on the other hand submits that the act of the victim in clearly excluding her sister-in-law in the incident shows that she was mentally alert and the satisfaction of doctor about fitness would include her mental fitness. Learned State Counsel further argues that the treating doctor has been produced in evidence who has clearly stated that the patient was fit to make her voluntary statement, and, therefore, the dying declaration cannot be questioned.

14. We have heard Shri L. R. Khan and Shri Araf Khan, the learned counsels for the accused-appellants and Shri Umesh Dubey, the learned A.G.A. for the State and perused the material available on records.

15. We have already noticed that the prosecution case rests primarily upon the dying declaration of the deceased and,

therefore, it is to be seen as to whether dying declaration can be relied upon in support of the prosecution case on the specific contentions urged by the appellants questioning it.

16. The dying declaration has already been extracted above. We find that in the certification made by the doctor on it, the limited recital is that the patient is conscious, oriented and fit for statement. At the foot of the dying declaration also the satisfaction is with regard to patient remaining conscious and oriented during dying declaration. This certification has been made by the doctor, who admittedly has not been produced in evidence. The specific recording of satisfaction is with regard to the consciousness on the part of the victim and her orientation and fitness for giving statement. We find that there is no conscious satisfaction recorded by the doctor with regard to the fit mental state of the victim, wherein alone she could have made a valid dying declaration. The reason for it is apparent. In the facts of the case, the victim had sustained 90% burn injuries. In such physical state the victim would be traumatized and the doctors usually administered various medication to relieve the pain, etc. What would be the effect of such medication would have to be examined. Some medications may cause drowsiness or the traumatized condition of he victim may cause hallucinations, etc. Doubt would arise with regard to the mental state of the victim and unless the doctor certifies the mental fitness of the victim the Court usually would be reluctant in relying upon such dying declaration. It is in this context that we find substance in the argument of learned counsel for the appellants that, that in absence of there being any recording of satisfaction with regard to mental fitness of the victim factually at the time of making dying declaration, it does not appear to

be entirely safe to rely upon such dying declaration. In this regard the learned counsel for the accused-appellants has placed reliance upon a judgment of this Court in **Lokesh and Ors. (supra)**, wherein this Court has made following observations in para-45 to 50:

> **45.** It has therefore to be seen as to whether the victim was in a position to make her dying declaration and whether necessary precaution had been taken by the prosecution to ensure that victim was in a proper mental shape to make a declaration.
>
> **46.** The primary evidence that the victim was in a fit mental state to make a dying declaration is of the attending doctor who has been produced as P.W.-13. We have noticed that this witness in his statement has mentioned the critical situation of the victim. There is no satisfaction recorded by the doctor on the dying declaration that victim was in a fit mental state to give a voluntary statement. P.W.1 has otherwise admitted that the victim was unconscious when she was brought to the S.N. Medical College at around 6:00 pm. He has also admitted that only after administering of first aid, the condition of the victim improved and she became conscious. It is not clear as to what kind of first aid was given to the injured victim but considering her serious condition, it is logical to expect that some short of pain killer may have been given to her. In such circumstances, mere recording of satisfaction by the doctor that patient was conscious, was not sufficient. A specific satisfaction was warranted regarding fit metal state of the victim. No such satisfaction has been recorded by the doctor. Merely stating that the patient is clinically fit does not amount to a satisfaction with regard to fit mental state of the patient. The ability of the victim to speak was severely compromised as per the prosecution evidence itself.
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> **47.** We are therefore doubtful of the victim being in a proper mental shape to have given a conscious voluntarily statement which could qualify to be a dying declaration. The Magistrate/Deputy Collector who has recorded the dying declaration of the victim has also admitted that no questions were put to the victim regarding her fit mental state.
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> **48.** At this juncture, we would like to refer to the observation of the Supreme Court in **Paparambaka Rosamma & Others Vs State of Andhra Pradesh** reported in *(1999) 7 SC 695*, wherein the Court while referring to the dying declaration observed that mere statement that patient is conscious while recording the statement is not sufficient. In a case where injured had sustained 90 % burn injuries, it was necessary to ascertain the

fit mental state of the injured before accepting the dying declaration. Paragraph- 9 of the judgment is reproduced hereunder:-

> *"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 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 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 was 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 erred in accepting the said dying declaration (Ex.P-14) as a true, genuine and was 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.****"*
>
> (Emphasis supplied by us)

49. The observation made in the case of **Paparambaka Rosamma** (supra) has been reiterated in a subsequent decision of the Supreme Court in the case of **Naresh Kumar Vs. Kalawati & Others** reported in *2021 SCC OnLine SC 260*, wherein the Supreme Court after referring to the above quoted paragraph no. 9 observed as under in para-13:-

> *"13. In the facts and circumstances of the present case, considering that the statements of the deceased have vacillated, there is no evidence about the fitness of mind of the deceased to make the dying declaration*

> *including the presence of the Doctor, the veracity and truthfulness of the dying declaration remains suspect. It would not be safe to simply reject the probable defence of suicide, to reverse the acquittal and convict the respondents."*
>
> (Emphasis supplied by us)

50. The statement of the Magistrate/Deputy Collector is categorical that the contents of the dying declaration were not read out to the victim and no satisfaction in that regard is otherwise recorded in the dying declaration. In **Suriender Kumar Vs. State of Haryana** reported in *(2011) 10 SCC 173*, the Supreme Court questioned the dying declaration also on the ground that such a satisfaction about the contents of the dying declaration having read out to the victim was missing. In paragraph no. 25 of the judgment, the Supreme Court observed as under:-

> *"25. As per the prosecution, the incident took place at 2 a.m. on 26.06.1991 and as per her statement, the occurrence of burning was in the evening of 25.06.1991, that is, the previous day. The dying declaration did not carry a certificate by the Executive Magistrate to the effect that it was a voluntary statement made by the deceased and that he had read over the statement to her. The dying declaration was not even attested by the doctor. As stated earlier, though the Magistrate had stated that the statement had been made in mixed dialect of Hindi and Punjabi and the statement was recorded only in Hindi. Another important aspect is that there was evidence that Kamlesh Rani was under the influence of Fortwin and Pethidine injections and was not supposed to be having normal alertness. In our view, the trial Court rightly rejected the dying declaration altogether shrouded by suspicious circumstances and contrary to the story of prosecution and acquitted the appellant."*
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> (Emphasis supplied by us)

17. In **Paparambaka Rosamma and others (supra)**, the Hon'ble Supreme Court has observed as under in para-9, which is reproduced herein:

> **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 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 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 was 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 erred in accepting the said dying declaration (Ex.P-14) as a true, genuine and was 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.

18. In **Naresh Kumar (supra)**, the Hon'ble Supreme Court has observed as under in para-13 & 14, which is reproduced herein:

> **13.** In *Paparambaka Rosamma and others vs. State of Andhra Pradesh*, (1999) 7 SCC 695, distinguishing between consciousness and fitness of state of mind to make a statement, it was observed:
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> > *"9. It is true that the medical officer Dr K. Vishnupriya Devi (P.W. 10) at the end of the dying declaration had certified "patient is conscious while recording the state– ment". It has come on record that the injured Smt Venkata Ramana had sustained extensive burn injuries on her person. Dr P. Koteswara Rao (P.W. 9) who per– formed the post–mortem stated that the injured had sustained 90% burn injuries. In this case as stated ear– lier, the prosecution case solely rested on the dying declaration. It was, therefore, necessary for the prose– cution 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 (P.W.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. 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."*
>
> **14.** In the facts and circumstances of the present case, considering that the statements of the deceased have vacillated, there is no evidence about the fitness of mind of the deceased to make the dying declaration including the presence of the Doctor, the veracity and truthfulness of the dying declaration remains suspect. It would not be safe to simply reject the probable defence of suicide, to reverse the acquittal and convict the respondents.

19. The above view has been followed consistently by the coordinate Benches of this Court in **Rameshwar Lal Chauhan (supra)**, **Radhey Jaiswal and others (supra)** and **Dilawar Singh (supra)**.

20. In addition to above, we also find substance in the argument of learned counsel for the appellant, questioning the dying declaration. The following circumstances, in this regard are noticeable.

21. The victim in her dying declaration has stated that she is carrying pregnancy of eight months, but no such pregnancy was found in the medical evidence. What has happened to the fetus is not known. No explanation has been put forth by the prosecution as to what happened to the fetus if at all it was in existence. It is also a circumstance which would create some doubts on the dying declaration. The argument that chaste Hindi words are used in the dying declaration which are not expected of an illiterate lady also has to be kept in mind while evaluating the entire circumstances. The emergency doctor who treated the

victim was not the doctor who certified the fitness of the victim for recording her dying declaration and the doctor who certified the fitness was otherwise not produced in evidence. These circumstances also create difficulties in accepting the dying declaration of the deceased.

22. Moreover, the contents of the dying declaration have not been put to the accused for recording their statements under Section 313 Cr.P.C. The question posed to be the accused under Section 313 Cr.P.C. have been extensively placed before us and we find that in none of the questions the contents of dying declaration have been specifically confronted to the accused for recording of their statements under Section 313 Cr.P.C. Law is settled that unless the contents of such dying declaration are confronted to the accused the prosecution cannot be allowed to place reliance upon the contents of such dying declaration. In that regard, the learned counsel for the appellant has placed reliance upon a judgment of the Supreme Court in the case of **Samsul Haque (supra)**, wherein the Court has observed in para-21 and 22 as under:

> **21.** The most vital aspect, in our view, and what drives the nail in the coffin in the case of the prosecution is the manner in which the court put the case to Accused 9, and the statement recorded under Section 313 of the Cr.P.C. To say the least it is perfunctory.
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> **22.** It is trite to say that, in view of the judgments referred to by the learned Senior Counsel, aforesaid, the incriminating material is to be put to the accused so that the accused gets a fair chance to defend himself. This is in recognition of the principles of audi alteram partem. Apart from the judgments referred to aforesaid by the learned Senior Counsel, we may usefully refer to the judgment of this Court in *Asraf Ali v. State of Assam : (2008) 16 SCC 328*. The relevant observations are in the following paragraphs:
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> > *"21. Section 313 of the Code casts a duty on the Court to put in an enquiry or trial questions to the accused for the purpose of enabling him to explain*

> *any of the circumstances appearing in the evidence against him. It follows as necessary corollary therefrom 7 (2008) 16 SCC 328 that each material circumstance appearing in the evidence against the accused is required to be put to him specifically, distinctly and separately and failure to do so amounts to a serious irregularity vitiating trial, if it is shown that the accused was prejudiced.*
>
> *22. The object of Section 313 of the Code is to establish a direct dialogue between the Court and the accused. If a point in the evidence is important against the accused, and the conviction is intended to be based upon it, it is right and proper that the accused should be questioned about the matter and be given an opportunity of explaining it. Where no specific question has been put by the trial Court on an inculpatory material in the prosecution evidence, it would vitiate the trial. Of course, all these are subject to rider whether they have caused miscarriage of justice or prejudice. This Court also expressed similar view in S. Harnam Singh v. The State (AIR 1976 SC 2140), while dealing with Section 342 of the Criminal Procedure Code, 1898 (corresponding to Section 313 of the Code). Non-indication of inculpatory material in its relevant facets by the trial Court to the accused adds to vulnerability of the prosecution case. Recording of a statement of the accused under Section 313 is not a purposeless exercise."*
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> **23.** While making the aforesaid observations, this Court also referred to its earlier judgment of the three Judge Bench in *Shivaji Sahabrao Bobade v. State of Maharashtra : (1973) 2 SCC 793*, which considered the fall out of the omission to put to the accused a question on a vital circumstance appearing against him in the prosecution evidence, and the requirement that the accused's attention should be drawn to every inculpatory material so as to enable him to explain it. Ordinarily, in such a situation, such material as not put to the accused must be eschewed. No doubt, it is recognised, that where there is a perfunctory examination under Section 313 Cr.P.C., the matter is capable of being remitted to the trial court, with the direction to retry from the stage at which the prosecution was closed [(1973) 2 SCC 793].

23. Reliance is also placed upon a judgment of Division Bench of this Court in **Rameshwar Lal Chauhan (supra)**, wherein a coordinate Bench of this Court in para-74 has observed as under:

> **73.** Learned AGA also referred to the judgment of Apex Court in case of *Shivaji Sahabrao Bobade Vs. State of Maharashtra*, (1973) 2 SCC 793, which considered the fall out of the omission to put the accused, a question on a vital circumstance appearing against him in the prosecution evidence, and the requirement that the accused's attention should be drawn to every inculpatory material so as to enable him to explain it. Ordinarily, in such a situation, such material as not put to the accused must be eschewed. No doubt, it is recognized, that where there is a perfunctory examination under Section 313 of the Cr.P.C., 1973, the matter is capable of being remitted to the trail court, with the direction to retry from the stage at which the prosecution was closed.
>
> **74.** The trial court, though recorded the statement under Section 313 of Cr.P.C., omitted to put questions regarding a vital circumstance to the accused during his statement. The trial court, while convicting the accused mainly relied upon the written dying declaration Ex.Ka.-8. However, the contents of written dying declaration were not put to the accused during his statement. It is really a matter of concern that the trial court did not frame the question specifically putting the incriminating material stated by deceased in her statement. Thereby, a very important circumstance was lost. The deceased in her statement (dying declaration) stated that the accused had poured Kerosene on her person and set her on fire. Particularly, this incriminating part of dying declaration has not been put to the accused to get his explanation. Although, the dying declaration Ex.Ka-8 was treated as the basis to convict the accused, the same was not put to the accused in her statement recorded under Section 313 Cr.P.C. Apparently, the accused was not given opportunity to explain this vital circumstance. Recording of statement under Section 313 of the Cr.P.C. is not an empty formality during trial. Section 313 Cr.P.C. prescribes the procedure to safeguard the interest of the accused. Obviously, in the absence of seeking explanation on this vital point, prejudice is caused to the accused.

24. Reliance is also placed upon yet another judgment of this Court in **Radhey Lal Jaiswal and others (supra)**, wherein a Division Bench of this Court has observed in para-72 to 74 as under:

> **72.** The sessions court, though recorded the statement under Section 313 of Cr.P.C., omitted to put questions regarding a vital circumstance to the accused during his statement. The sessions court, while convicting the accused mainly relied upon the written dying declaration Ex.Ka.-7 and Ex. Ka.6/16.

> However, the contents of written dying declaration were not put to the accused during his statement. It is really a matter of concern that the sessions court did not frame the question specifically putting the incriminating material stated by deceased in her statement. Thereby, a very important circumstance was lost. The deceased in her statement (dying declaration) stated that the appellants had poured Kerosene on her person and set her on fire. Particularly, this incriminating part of dying declaration was not put to the accused to get his explanation. Although, the dying declaration Ex.Ka-6/16 and Ex. Ka.7 were treated as the basis to convict the accused, the same was not put to the accused in her statement recorded under Section 313 Cr.P.C. Apparently, the accused was not given opportunity to explain this vital circumstance. Recording of statement under Section 313 of the Cr.P.C. is not an empty formality during trial.
>
> **73.** We may note that considering the importance of statement under Section 313 of Cr.P.C., Sub-clause (5) has been added in Section 313 by amendment which permits the court to take help of prosecution and defence in preparing relevant questions which are put to the accused. One of the reasons for such amendment was to see that Court should not miss putting any incriminating circumstance to the accused while recording his statement.
>
> **74.** In the result, the finding of guilt based on the written dying declaration for this reason alone would not sustain apart from the other reasons which we have recorded above. In the result, we hold that the dying declaration was not trustworthy and reliable.

25. Having given our anxious consideration to the material on record as also the submissions advanced by the learned counsel for the appellants, we do not find it safe to rely upon the dying declaration alone in the facts of the case to sustain the finding of guilt recorded by the court below against the accused-appellants. We have perused the judgment of conviction and sentenced, wherein facts have been mentioned but the consideration highlighted on behalf of appellants to question the dying declaration have not been adverted to, nor the legal authority on the points have been applied in the facts of the present case. We, therefore, cannot agree with the reasoning

assigned by the Court of Session to hold that the prosecution has succeeded in establishing its case beyond reasonable doubt.

26. In that view of the matter, this appeal succeeds and is **allowed**. The judgment and order of conviction dated 16.07.2022 passed by learned Additional District and Session Judge, Court No. 10, Aligarh in Session Trial No. 257 of 2019 (State Vs. Shahrukh Khan and another), arising out of Case Crime No. 403 of 2018, under Sections 498A, 304-B I.P.C., in alternative under Sections 302, 323, 307 I.P.C. read with Section 3/4 of Dowry Prohibition Act, Police Station Chandaus, District Aligarh, is set aside. The appellants are acquitted from the charges of offence by granting them benefit of doubt.

27. The accused-appellants, namely, Shahrukh Khan and Anjum, would be released, forthwith, unless they are wanted in any other case, subject to compliance of Section 437-A Cr.P.C.

28. The trial court record along with the copy of this judgement and order be transmitted to the court concerned forthwith.

29. Let a copy of this judgment be sent to the Jail Authorities concerned and the court concerned for compliance.

(Dr. Gautam Chowdhary, J.) (Ashwani Kumar Mishra, J.)

Order Date :- 18.9.2024
Mustaqeem.