

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CRL. A. NO.361/2004

DATE OF DECISION : 20.03.2008

SURYA

..... Appellant

Through: Mr.Manoj Sharma, Amicus Curiae

versus

STATE

..... Respondent

Through: Dr. M.P. Singh, APP for the State

CORAM:

HON'BLE MR. JUSTICE MUKUL MUDGAL

HON'BLE MS. JUSTICE REVA KHETRAPAL

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether judgment should be reported in Digest?

: **REVA KHETRAPAL, J.**

1. The appellant seeks to challenge the judgment dated 7th February, 2004 passed by the learned Additional Sessions Judge convicting and sentencing him to life imprisonment for the offence punishable under Section 302 IPC.
2. The case of the prosecution in a nutshell is that Sumiti (hereinafter referred to as 'the deceased'), aged 27 years was married for the last 4-5 years with a Nepalese boy named Surya (the appellant herein) after her first marriage with one Lal Bahadur had broken up. She had two sons aged 11 years and 7 years from her first marriage, who were living with her, but had no progeny from her marriage with the appellant. The deceased was living in the same jhuggi with her parents. On the ill-fated night intervening 16th February, 2000 and 17th February, 2000, at about 12 midnight, when the deceased was sleeping with her two children,

allegedly the appellant in a drunken state woke her up and demanded that his food be heated up by her. On her refusal to do so, he, in a fit of anger, caught hold of a kerosene lamp burning in a bottle nearby, sprinkled kerosene oil on her and applied a match stick to her clothes. On her raising a hue and cry, one Devi Singh (PW-4) from an adjoining jhuggi came to their jhuggi to find the appellant pouring water on his burning wife. PW-4 Devi Singh thereupon descended the stairs to inform the parents of the deceased and the deceased was taken to the hospital by her mother Smt.Shanti (PW-6) and her two brothers-in-law (PW-10 & PW-13).

3. The further case of the prosecution is that on receipt of the information of the burning of Smt. Sumiti and her having been admitted in the Safdarjung Hospital vide DD No.35A, at about 6.40 a.m. by Duty Constable Mahesh, Sub-Inspector Jagdish Prasad alongwith Constable Rakesh Kumar, reached the said hospital, obtained the MLC of Smt. Sumiti, moved an application for recording of her statement Ex.PW-19/A and recorded her statement Ex.PW19/B.

4. The Sub-Divisional Magistrate was summoned, who reached the hospital at 12:30 p.m., but on account of the insertion of an endo-tracheal tube in the throat of the patient, the SDM was unable to record the statement of the deceased. As per the prosecution version, however, the deceased at that time was fully conscious and able to give her answers in the form of nods signifying 'Yes' or 'No' and accordingly the SDM got affirmed from the deceased the statement made by her to the Investigating Officer by putting questions to her, to which she replied by nodding in the affirmative.

5. On the basis of the statement of the deceased Ex.PW-19/B, upon which the SDM made his endorsement, a rukka was prepared by the Investigating Officer

being Ex.PW-19/C and despatched to the Police Station Lajpat Nagar for the registration of the First Information Report. On the basis of the aforesaid rukka, case FIR No.123/2000 under Section 307 IPC was registered against the appellant herein.

6. According to the prosecution version, subsequently, on 21.02.2000, the SDM recorded the statement of the deceased in question-answer form in which the deceased affirmed that she had been set ablaze by the appellant. On 02.03.2000 the deceased eventually succumbed to her burns. The postmortem of her body was conducted and the FIR registered against the appellant under Section 307 IPC was converted into one Section 302 IPC. The investigation of the case was, thereafter, handed-over to PW-17 Inspector Jai Singh, who got prepared the scaled site plan of the place of occurrence (Ex.PW-11/A) from Sub-Inspector Madan Pal (PW-11). The special report of the case was delivered by PW-12 Ct. Bhagwat Prasad to the Ilaqa Magistrate, the SDM, the ACP and the DCP. The Investigating Officer recorded the statements of the witnesses, sent the exhibits to the CFSL for chemical analysis and on completion of the investigation prepared and filed the challan in the Court.

7. As stated above, on the completion of the trial of the case, the learned Addl. Sessions Judge convicted the appellant for the murder of his wife and sentenced him to imprisonment for life. The learned Addl. Sessions Judge noted that the mainstay of the prosecution case were the three alleged dying declarations of the deceased, Smt.Sumiti, i.e., the dying declaration firstly recorded by PW-2 Dr.Devesh in the form of alleged history given by the patient and noted on the MLC of the injured (Ex.PW-2/A) prepared by this doctor; secondly, the statement of the deceased recorded by the Investigating Officer of the case PW-19, Sub-

Inspector Jagdish on 17.2.2000 (Ex.PW-19/B) before the arrival of the S.D.M which was also endorsed after verification by PW-9 Rajesh Kumar, the SDM after his arrival, and thirdly the statement of the deceased recorded by PW-9 Rajesh Kumar, the SDM (Ex.PW-9/A) on 21.2.2000 in question-answer form.

8. The learned Addl. Sessions Judge relying upon the Constitution Bench judgment of the Hon'ble Supreme Court in **Laxman Vs. State of Maharashtra** reported in **2002 Vo.III AD (Crl.) S.C. 765** and the aforesaid dying declarations, held as follows:

“27. No doubt the material public prosecution witnesses have turned hostile and have not supported the prosecution case despite best efforts made by the ld. APP for the State but alleged history recorded by Dr. Devesh at the instance of patient herself in MLC of the deceased and statement of injured/deceased recorded by the IO of the case and dying declaration recorded by the SDM are in the same vein and form dying declarations and go to show that the accused himself poured kerosene on his wife from kerosene oil lamp and set her on fire as a result of which she sustained burn injuries which ultimately resulted in her death.

Neither to PW-2, Doctor Devesh who recorded alleged history in MLC of the deceased nor to the first IO of the case PW-19, SI Jagdish, who recorded statement/dying declaration of the deceased before arrival of the SDM, duly supported by the observation of the SDM with respect to the correctness and nor to PW-9 Shri Rajesh Kumar, SDM, who recorded the statement of the deceased any hostility or ulterior motive is alleged and therefore the said dying declaration referred to herein above fully corroborate each other and are found fully trustworthy, voluntary and reliable.

The above dying declarations clearly go to show that the accused had himself poured kerosene oil on his wife Smt. Sumiti and had set her on fire with an intention to kill her as a result of which she sustained burn injuries and ultimately succumbed to death.

28. In view of the above discussion I have no hesitation in holding that accused Surya has committed the murder of his wife as defined in Section 300 of IPC punishable under Section 302 of IPC and the prosecution has fully proved charge against the accused beyond reasonable doubt and accordingly the accused is held guilty for offence punishable under section 302 IPC.”

9. The three alleged dying declarations being the basis of the conviction of the

appellant, in our view, a close scrutiny of the three statements attributed to the deceased is imperative so as to enable us to ascertain and weigh their credibility. We say so on account of the fact that the oral testimony of the prosecution witnesses, to which we shall presently advert, is directly at variance with the statements attributed to the deceased prior to her death. Before adverting to the dying declarations, however, it deserves to be mentioned that the claim of the prosecution that the alleged history recorded in the MLC of the deceased was the first dying declaration of the deceased is belied by the testimony of PW-4, Devi Singh @ Kale, who, it is not in dispute was the first person to visit the spot after the occurrence and who according to the defence version was the person to whom the deceased gave her sole dying declaration.

10. According to PW-4 Devi Singh @ Kale, on the day in question, he had heard some noise coming from the 'jhuggi' of the appellant and on his reaching there, he saw that the wife of the appellant was sitting on the floor and the appellant was pouring water on her. When he asked Sumiti, the wife of the appellant as to how she had sustained burns, she informed him **that a quarrel had taken place between her and the accused and she had set herself on fire**. He, Devi Singh, thereafter went to the room of the parents of Smt.Sumiti, who used to reside on the ground floor, to apprise them of the occurrence.

11. Thus, if the version of Devi Singh (PW-4) is to be believed, the first dying declaration was made by the deceased to him. Though this witness was subjected to extensive cross-examination by the learned Addl. Public Prosecutor, but to no avail. He stuck to the stand adopted by him in his examination-in-chief and in the course of his cross-examination, he, in fact, on a suggestion put to him by the learned defence counsel stated that Smt. Sumiti used to drink and fight with her

husband daily, and that Smt. Sumiti was drunk on that day as well. He also admitted the suggestion put to him by the learned defence counsel that it was on account of her temperament that the deceased had withdrawn from the company of her earlier husband and had come to Delhi, where she had married the appellant.

12. It is in the backdrop of the testimony of PW-4 Devi Singh @ Kale that MLC (Ex.PW-2/A) must be examined. This MLC bearing No.265947, which was prepared at 1:15 a.m. on 17.02.2000, records the alleged history of the patient as given by the patient herself of sustaining burn injuries when her husband in a drunken state poured kerosene oil on her and set her on fire. It further records that fire was extinguished when her husband poured water on her and she was directly brought by her mother to the Safdarjung Hospital. It purports to bear the right toe impression of Smt. Sumiti, presumably on account of the fact that the MLC reflects that her upper limbs had been burnt.

13. Dr. Devesh (PW-2), who recorded this MLC, in the course of his cross-examination, candidly admitted that he had not conducted any test for consumption of liquor by the patient Sumiti and so he could not tell whether she was drunk or not. He also admitted the suggestion put to him by the learned defence counsel that the deceased had told him that her husband had poured water on her to extinguish the fire. It strikes us as a bit odd and indeed it does not stand to reason that the appellant would set fire to the deceased and thereafter instead of immediately absconding, he would stay to pour water on her burns.

14. Coming next to the alleged statement made by the deceased before the Investigating Officer, (PW-19) Sub-Inspector Jagdish Prasad., it deserves to be noticed at the outset that the said statement (Ex.PW-19/B) purports to bear the

RTI of the deceased. The right toe impression or the right thumb impression is not mentioned, though the right thumb having sustained burns, the right toe impression should have been mentioned. The contents of the statement are in an auto-biographical form in which the deceased narrates that she lives in the same premises as her father and mother and other members of her family, her mother and father being the residents of the ground floor of the said premises. She further states that her husband Lal Bahadur had left her and gone to Nepal from whom she had two boys, namely, Manoj aged 11 years and Rajesh aged 7-8 years, that her first husband had contracted a second marriage in Nepal and so about five years ago, of her own volition she had married Surya (the appellant herein), who resided in Gandhi Camp, Lajpat Nagar. She, however, had no progeny from Surya. She worked in '*kothis*' (bungalows) and was doing the work of '*safai*' (cleaning). Yesterday, on 16.2.2000 at about 8-8:30 p.m. after she returned home from work, she had filled the water, prepared the meals, fed the children and watched T.V. before going to sleep. At about 12 midnight her husband, the appellant asked her to warm up the food for him, to which she replied that she was tired. He immediately flared up and there was an exchange of hot words between the two of them. He picked up a lamp and sprinkled kerosene oil upon her clothes and set fire to her clothes. Her salwar suit and her body caught fire. He then poured water upon her before the neighbours, her father, mother and others came to the spot and her mother brought her to the Safdarjung Hospital and got her admitted there.

15. A number of glaring circumstances have been brought to our notice which persuade us to hold that the above statement attributed to the deceased is not worthy of credence as the deceased was mentally and physically unfit for

statement, which, inter alia, are as follows:

(i) The admission made by the Investigating Officer PW-19 Sub-Inspector Jagdish Prasad in his cross-examination that he could not tell the name of the doctor who had certified: "Patient is fit for statement" on his application for recording of the statement of the deceased (Ex.PW-19/A); and the further admission that the said endorsement does not even bear the stamp of the concerned doctor.

(ii) The fact that though information of the occurrence was communicated to Police Station Lajpat Nagar vide DD No.35A (Ex.PW-14/A) at 6:40 a.m. on 17.2.2000, and the Investigating Officer has stated in his cross-examination that he received DD No.35A at 6:45 p.m. and reached the hospital at 7:45 p.m., it is not in dispute that at the point of time when the Investigating Officer recorded her statement, the endotracheal tube had been put in the mouth of the deceased, who was in respiratory distress and was not in a position to speak, as is evident from the endorsement made by PW-3 Dr. Aditya Aggarwal on the statement of the deceased (PW-19/B), which reads as follows:

"17.2.2000

12:45 p.m.

At present the patient has been put on endo tracheal tube so cannot speak, but is fully conscious and can understand whatever is told to her verbally and gave her answers in the form of nod signifying 'yes' or 'no'."

(iii) Even assuming that the statement was recorded prior to the insertion of the tube in the mouth of the deceased, it is difficult to imagine that the deceased, who must have been in considerable agony and completely traumatized by the burn injuries was in a position to narrate

the aforementioned elaborate story of her life, replete with intricate details, to the Investigating Officer. Equally, unbelievable is the version given by the prosecution that the SDM, who arrived in the hospital after the Investigating Officer, “after confirming the nodding pattern of the patient”, read out to her the statement recorded by the I.O. to which she nodded in the affirmative.

(iv) Yet another circumstance which persuades us to disbelieve the statement recorded by the Investigating Officer (Ex.PW-19/B) and supposedly got verified by the SDM as the statement of the deceased is that PW-9 Shri Rajesh Kumar, the SDM Defence Colony unequivocally stated in the witness box that when he reached the hospital, **the patient was not fit for making a statement.**

(v) Then again, PW-3 Dr. Aditya Aggarwal who appeared in the witness box to depose that he had observed at 12:45 p.m. that the patient was on endotracheal tube, so, could not speak, but was fully conscious, candidly admitted in his cross-examination that **he could not tell whether she was in a position to speak before that or not.** He further stated that the SDM had asked certain questions to the patient in Hindi language, but admitted that he did not know whether the patient knew Hindi or not, nor he knew whether the patient was a Nepalese or not. He was not sure whether the SDM had been writing himself or some police official had written on his dictation, nor he remembered as to whether the SDM had signed on the statement of the patient.

(vi) Further, PW-16 Ct. Rakesh Kumar, who according to the prosecution accompanied the Investigating Officer to the Safdarjung

Hospital, is also not able to throw any light on the matter, as he stated that he was standing outside the room when the Investigating Officer recorded the statement of Smt. Sumiti, as also when the SDM recorded the statement of Smt. Sumiti. The I.O., on the other hand, categorically asserted that Ct. Rakesh Kumar was present in the room with him when he recorded the statement Ex.PW-19/B.

(vii) It is also borne out from the document Ex.PW-19/F dated 18.2.2000 whereby permission was sought by the Investigating Officer for recording of the statement of the patient that on the following day, i.e., on 18.02.2000 also the patient was declared unfit for statement by Dr.Swain, CMO, Safdarjung Hospital. Had the statement of the patient been recorded by the I.O. and the S.D.M. on 17.02.2000, there was no occasion for again recording her statement on the very next day.

16. In such circumstances, in our view, it was incumbent upon the prosecution to prove beyond a shadow of doubt that the statement Ex.PW-19/B was recorded when the deceased was mentally and physically fit for statement. This, the prosecution, in our view, has miserably failed to prove. PW-9, the SDM on the other hand, has categorically stated that when he reached the hospital, the patient was not fit for statement while PW-19, the Investigating Officer is unable to name the doctor who declared the patient fit for statement before 12.45 p.m. on the day in question when the tube was inserted in her mouth.

17. Adverting next to the statement recorded by PW-9, the SDM on 21.2.2000, PW-9 Shri Rajesh Kumar deposed that on 21.2.2000 at 6 p.m., the Investigating Officer again informed him that Smt. Sumiti was fit for statement, whereupon he immediately reached the hospital and recorded the statement of Smt. Sumiti, in

which she alleged that her husband was responsible for the act of burning her, though she did not allege any harassment or any demand for dowry. The said statement of Smt.Sumiti (Ex.PW-9/A) purports to be recorded at 7 p.m. and contains the endorsement that Smt.Sumiti was declared fit for statement by the doctor at 6:45 p.m. In the course of cross-examination, however, the SDM (PW-9) candidly admitted that he could not tell the name of the doctor who had declared Smt. Sumiti fit for statement. Not only this, the Investigating officer PW-19 Sub Inspector Jagdish Prasad in his cross-examination went so far as to admit that he had not even move an application to know about the condition of the patient on 21.2.2000. On further cross-examination, he stated that he could not tell the name of the doctor who had written portion 'X' to 'X', i.e., "Patient fit for statement" on Ex.PW-9/A and admitted that the said portion did not bear the stamp of the concerned doctor.

18. Matters are worst confounded by the testimonies of PW-5 Dil Bahadur and PW-6 Smt.Shanti, the parents of the deceased. PW-5 Dil Bahadur deposed that Sumiti was his daughter, who was married to the appellant. He deposed that he was told by his wife that she had poured kerosene oil on herself and set herself on fire. He asserted that she was of a stubborn (*ziddi*) nature and categorically stated that the appellant had not burnt his daughter. On a query put to him in cross-examination, he stated that he was unaware whether the police or the SDM had recorded his statement as he was illiterate, but he remembered having affixed his thumb impression on document Ex.PW-5/A in token of identifying the dead body of his daughter Sumiti.

19. The testimony of PW-6 Smt.Shanti is on the same lines. She stated that her daughter Sumiti was under the influence of liquor and had refused to warm the

food of the appellant despite the appellant telling her that he was hungry. She (PW-6) was hearing this conversation between the appellant and her daughter as she was in the staircase. Thereafter, she (PW-6) came down, but in the meantime, Devi Singh @ Kale also came down and told her that her daughter had got burnt. She immediately rushed to the jhuggi of her daughter and saw that the accused was extinguishing the fire. She stated that her daughter Sumiti had told her that accused Surya had burnt her, but she had given a wrong statement and had stated so under the influence of liquor. PW-6 also categorically denied having made any statement before the police or the SDM that the appellant had tried to kill her daughter by burning her. She further stated that her daughter had told her 3/ 4 days prior to her death that she had burnt herself and that the appellant had done nothing.

20. PW-10 Raju son of Ram Prasad and PW-13 Ram Singh son of Man Singh, the two brothers-in-laws of the deceased, though appeared in the witness box to depose that Sumiti had died of burns and they had taken her to the Safdarjung Hospital, also categorically stated that she had not told them as to how she had received the burn injuries. Thus, not only the neighbour (PW-4 Devi Singh) but the father, mother and two brothers-in-law of the deceased refused to inculcate the appellant. PW-6 Smt. Shanti, the mother of the deceased even went so far as to state that the appellant used to keep the two sons of the deceased, who were the offspring of her first marriage, affectionately.

21. The above facts and circumstances taken cumulatively, in our view, cast a grave doubt on the veracity of the dying declarations on which implicit reliance has been placed by the learned Addl. Sessions Judge. This apart, in the instant case it cannot be lost sight of that the deceased was discharged from the hospital

on 23.02.2000 and again re-admitted on 29.02.2000. She ultimately succumbed to her burn injuries on 2.3.2000, and immediately prior to her death no dying declaration was given by her as she was stated to be in a critical condition on account of septicaemia having set in. Whether the statements attributed to her which were made much prior to her death, would qualify for the epithet of “dying declarations” is again a moot question, which assumes significance for the reason that the statement of an injured person and a dying declaration have altogether different probative value. While a certain degree of sanctity is attributed to a dying declaration, the statement of an injured person may or may not be given credence having regard to all the attendant facts and circumstances. We, however, do not propose to dwell upon this aspect in view of the fact that we are satisfied from the testimonies of the Investigating Officer and the SDM, that no attempt was made by either the I.O. or the S.D.M. to ascertain whether the deceased was mentally and physically fit for making the statement/s recorded by them. While the SDM's testimony shows that he placed implicit reliance on the word of the Investigating officer that the deceased was fit to make statement, the Investigating Officer admits that he made no attempt to even move an application to ascertain the medical condition of the patient on 21.2.2000, when the statement of the deceased (Ex PW9/A) was recorded by the SDM. As regards the statement (Ex.PW-19/B) recorded by the I.O. on 17.2.2000, as stated above, it is not in dispute that the endotracheal tube had been inserted into the mouth of the deceased at that point of time as she was suffering from respiratory problems and, therefore, presumably she was not in a fit condition to make any statement, let alone the lengthy narrative placed on record, which is to say the least nothing short of a piece of oration.

22. The Hon'ble Supreme Court has laid down the guidelines as how a dying declaration be scrutinized in ***K. Ramachandra Reddy vs. Public Prosecutor (1976) 3 SCC 618***. In paragraph 6 of the judgment, it was observed as follows: (SCC, p.627)

“6.....The dying declaration is undoubtedly admissible under Section 32 of the Evidence Act 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.....”

23. In the aforesaid case, a large number of discrepancies were found in the evidence of the doctor vis-a-vis the Magistrate who had recorded the dying declaration. Rejecting the prosecution case as not reliable at all, the Supreme Court noticed:

*“11.....The magistrate PW 11 who recorded the dying declaration has admitted that the injured was suffering from pain and he was not in a position to sign and so his thumb impression was taken. The magistrate further admitted that the injured was taking time to answer the questions. The magistrate further admitted that the injured was very much suffering with pain. In spite of these facts the magistrate appears to have committed a serious irregularity in not putting a direct question to the injured whether he was capable mentally to make any statement. In the case of **Lallubhai Devchand Shah** referred to by us (supra) the omission of the person who recorded the dying declaration to question the deceased regarding his state of mind to make the statement was considered to be a very serious one and in our opinion in the instant case the omission of the Judicial Magistrate who knew the law well throws a good deal of doubt on the fact whether the deceased was really in a fit state of*

mind to make a statement.....”

24. In the case of **Laxman (supra)**, a Constitution Bench of the Supreme Court observed as follows:

“3. The juristic theory regarding acceptability of a dying declaration is that such declaration is made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the man is induced by the most powerful consideration to speak only the truth. Notwithstanding the same, great caution must be exercised in considering the weight to be given to this species of evidence on account of the existence of many circumstances which may affect their truth. The situation in which a man is on the deathbed is so solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason the requirements of oath and cross-examination are dispensed with. Since the accused has no power of cross-examination, the courts insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The court, however, has always to be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. The court also must further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Normally, therefore, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration looks up to the medical opinion. But where the eyewitnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable.....”

25. The Supreme Court in the cases of **Ramilaben Hasmukhbhai Khristi & Anr. vs. State of Gujarat (2002) 7 SCC 56**, **Laxmi (Smt.) vs. Om Prakash (2001) 6 SCC 118** and **Nallapati Sivaiah vs. Sub-Division Officer, Guntur, A.P. JT 2007 (11) SC 313** observed that dying declaration can form the sole basis of conviction only if it is free from any kind of doubt and it has been recorded in the manner as provided under the law. The Court, however, has to scrutinize the dying declarations carefully and must ensure that the dying declaration is not the

result of torturing, prompting or imagination and the deceased was in a fit state of mind to make the declaration.

26. In the case of **Nallapati Sivaiah** (supra), it was held thus:

“20. The Court has to consider each case in the circumstances of the case. What value should be given to a dying declaration is left to Court, which on assessment of the circumstances and the evidence and materials on record, will come to a conclusion about the truth or otherwise of the version, be it written, oral, verbal or by sign or by gestures. It is also a settled principle of law that dying declaration is a substantive evidence and an order of conviction can be safely recorded on the basis of dying declaration provided the Court is fully satisfied that the dying declaration made by the deceased was voluntary and reliable and the author recorded the dying declaration as stated by the deceased. This Court laid down the principle that for relying upon the dying declaration the Court must be conscious that the dying declaration was voluntary and further it was recorded correctly and above all the maker was in a fit condition – mentally and physically – to make such statement.”

27. In the case of **Laxmi (Smt.)** (supra), it was observed as follows:

“One of the important tests of the reliability of the dying declaration is a finding arrived at by the court as to satisfaction that the deceased was in a fit state of mind and capable of making a statement at the point of time when the dying declaration purports to have been made and/or recorded. The statement may be brief or longish. It is not the length of the statement but the fit state of mind of the victim to narrate the facts of occurrence which has relevance. If the court finds that the capacity of the maker of the statement to narrate the facts was impaired or the court entertains grave doubts whether the deceased was in a fit physical and mental state to make the statement the court may in the absence of corroborating evidence lending assurance to the contents of the declaration refuse to act on it.”

28. The minute details delineated in the statement, in our view, entirely take away from the statement any probative value it may have otherwise possessed. Thus, for instance, the statement purports to record that the ex-husband of the deceased had re-married and that he was residing in Nepal, that she had got remarried about 4/5 years ago, that she had two sons, namely, Manoj aged 11

years and Rajesh aged 7/8 years from her first husband and from her second husband, she had no issue. To say the least, such kind of intricate and extraneous matter interwoven into the statement purporting to be the dying declaration of a critically injured person casts serious doubt on the veracity of the statement, which, as already stated, in any case has very little evidentiary value having been recorded at a time when, according to the SDM himself, the patient was not fit for making statement.

29. Another circumstance which we cannot help but notice in the instant case is that admittedly the Investigating Officer took no steps to produce the children of the deceased in the witness box to depose about the occurrence. The children of the deceased who were sleeping in the same room as the deceased must undoubtedly have been the first to witness the quarrel and what ensued thereafter. Since, even according to the prosecution, the deceased was burnt after a verbal battle had taken place between the appellant and the deceased, and the cries of the deceased had attracted even the neighbour PW-4 Devi Singh, the best evidence would have been the children. The best evidence having been suppressed by the prosecution from this Court for reasons best known to the prosecution, we feel impelled to conjecture that had the children been produced in the witness box, they would have shattered the prosecution story by betraying the truth and, therefore, the elder son who was 11 years of age and younger son who was 7/8 years have been carefully kept out of the witness box. On this score also, we feel compelled to draw adverse inference against the prosecution.

30. Accordingly, we are of the view that it would be highly unsafe to rely upon the alleged statements of the deceased recorded by the investigating agencies in the face of the other telling circumstances of the case coupled with the oral

testimonies of the eye-witnesses, who though were related to the deceased and not the appellant, yet have chosen to exonerate the appellant and declare him free from blame. There does not appear to us any cogent reason why the father, the mother, the husbands of the two sisters of the deceased and even the neighbour would refuse to support the prosecution case if the appellant had cruelly cut short the life span of the deceased on account of a sudden bout of temper, and, have chosen instead to certify that the deceased herself was a stubborn (ziddi) lady, given to drink, who in a fit of obduracy had chosen to ignite herself rather than bend to the wishes of her husband on so a petty a matter as warming up of his food.

31. We accordingly set aside the judgment of the learned Additional Sessions Judge convicting the appellant and acquit him of the charge of murder of his wife. His bail bond and surety bond shall stand discharged. Though the appellant had been granted bail by the modified order of this Court dated 17th September, 2007 but if he has not been able to avail of the said order and is still in jail, he shall be released forthwith.

32. We record our appreciation for the efforts put in by the learned Amicus Curiae Shri Manoj Sharma in the appeal.

Crl. A. No.361/2004 stands disposed of accordingly.

REVA KHETRAPAL, J

MUKUL MUDGAL, J

March 20, 2008
km/dc