

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

Date of Hearing : 8th April, 2011
Date of Decision : 25th April, 2011

+ **CRL.A No.311/2011**

PARMANAND & ORS. ... APPELLANT
Through: Mr.Shailesh Kumar, Advocate.

Versus

STATE ... RESPONDENT
Through: Mr.Jaideep Malik, APP for the State

AND

+ **CRL.A No.309/2011**

MITHILESH ... APPELLANT
Through: Mr.Shailesh Kumar, Advocate.

Versus

STATE ... RESPONDENT
Through: Mr.Jaideep Malik, APP for the State

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE G.P.MITTAL

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

J U D G M E N T

G.P. MITTAL, J.

Crl. A. Nos. 311/2011 & 309/2011

1. The appellants Parmanand and Mithilesh are the parents-in-law of Bobby (the deceased). They impugn the judgment and order dated 18.12.2010 whereby the appellants were convicted for the offence punishable under

Section 302/34 of the Indian Penal Code (IPC) and were sentenced to undergo imprisonment for life and to pay a fine of Rs.10,000/- each. In default of payment of fine they were sentenced to undergo rigorous imprisonment for a further period of six months each.

2. Facts of the case leading to the filing of charge sheet under Section 173 Code of Criminal Procedure against the appellants and two others namely Kamlesh (husband of the deceased) and Santosh (Kamlesh's brother) can be extracted from the opening para of the judgment:-

“On 28.03.08 at about 11:50 pm, DD No.47 was registered at PP Vijay Vihar, PS Rohini. As per such DD, one lady had set herself on fire. Such information was received from Police Control Room and SI Mahabir Singh and Ct.Rajesh were rushed to the spot. They both reached the spot i.e. House NO.J-42, Vijay Vihar. HC Ravidutt and Ct. Satpal were already present there. They found smell of kerosene, some burnt clothes, one empty bottle, few match-sticks and water on the floor of room where the occurrence had taken place and learnt that PCR Van had already removed the victim to BSA Hospital. Executive Magistrate Sh.Sukhbir Singh was telephonically intimated and HC Ravidutt and Ct.Satpal were left at the spot for preservation of the spot and SI Mahabir Singh and Ct. Rajesh reached at BSA Hospital. Name of injured was found to be Bobby (wife of accused Kamlesh). As per MLC, victim had told the doctor that kerosene oil was poured on her by her father-in-law and mother-in-law and then she was put on fire and her husband was not present at home during the incident. Bobby was declared fit for statement. Executive Magistrate reached the hospital and dying declaration of Bobby was recorded in which she claimed that she was married two years back and her parents-in-law wanted her husband Kamlesh to marry someone else. She claimed that at about 5 pm that evening, her husband left the house and before such departure, her husband and her parents-in-law had quarreled with her. She then stated that between 11:15 pm and 11:30 pm, she was in her room and was about to go to sleep, when her parents-in-law entered her room and her mother-in-law poured kerosene oil on her and her father-in-law set her ablaze with a match-stick. She also stated that she shouted for help and some neighbours collected and tried to douse the fire by pouring water on her and police

reached there and took her to the hospital. She, however, succumbed to her injuries. Case was registered u/s 498A/302/120B IPC.”

3. All appellants pleaded not guilty to the charge. The prosecution to prove the guilt of the accused persons examined 23 witnesses.
4. PW- 4 Raja Ram, PW-6 Sadanand (father of the deceased Bobby), PW-9 Dr. Sarvesh Tandon, PW-10 Dr. Raj Mohan Trivedi, PW-11 Dr. Nitin Lashkary, PW-15 Dr. Jatinder, PW-16 SDM Sukhbir Singh, PW-22 Inspector Raj Singh, Investigating Officer (IO) and PW-23 SI Mahabir Singh (initial IO) are important witnesses for the purpose of this appeal.
5. PW-4 Raja Ram is a neighbour of PW-6 Sadanand (father of the deceased). He deposed that on 16.03.2008 (the date has been wrongly given by this witness) at about 11:45 p.m. he was on his way back to his house after selling vegetables. When he reached near the street he saw a crowd. On inquiry he was informed by public persons that Bobby (daughter of Sadanand) was burnt by her in-laws and was removed to the hospital. He gave this information to Sadanand.
6. PW-6 Sadanand, apart from deposing about the demands of dowry and the harassment meted out to Bobby by her husband and the appellants stated that on 28.03.2008 at 12/12:30 a.m. in the night while he was on his way back to his house from weekly bazaar, he met Raja Ram (PW-4). Raja Ram informed him that his daughter had been set ablaze. He (PW-6) immediately left his rickshaw at his house and went to the matrimonial home of Bobby. He found a crowd around the house. On inquiry he was informed that his daughter had already been removed to the hospital by a PCR van. He went to PP Vijay Vihar and was informed that his daughter had been taken to Baba Saheb Ambedkar (BSA) hospital.

7. On reaching the hospital he met the SDM. The SDM informed him that he had already recorded her (the deceased) statement and that he could meet her. His daughter told him that “ *Ye Sab Milkari Mujhe Jala Diyan Hai*”. The deceased was shifted to Safdarjung hospital where she succumbed to her burn injuries on the next morning. He proved statement Ex.PW-6/A made by him to the SDM.
8. PW-9 Dr. Sarvesh Tandon, Associate Professor, Forensic Medicine, Safdarjung hospital, conducted autopsy on the dead body of Bobby on 30.03.2001 and proved his report Ex.PW-9/A. On external examination he found superficial to deep burns all over the body except lower abdomen and external genital area. The extent of burns was given as 90 per cent. When cross examined, the witness deposed that if the pulse is not palpable, the chances of survival of the patient are very less but such patient may regain consciousness in some cases.
9. PW-10 Dr. Raj Mohan Trivedi, Chief Medical Officer, BSA hospital is the doctor who initially attended to the deceased on 29.03.2008 at 12:15 a.m. He testified that the patient had disclosed that her father-in-law and mother-in-law had poured kerosene oil on her and then put her on fire with a match-stick. She also informed the doctor that her husband was not present at home at the time of the incident. PW-10 testified that on examination, the patient (deceased) was found to be conscious, oriented and crying. Her blood pressure could not be recorded due to burns present all over the body. Her pulse was found not palpable. Smell of kerosene oil was present on the body. He gave the percentage of burns to be about 95 per cent. He proved the MLC Ex.PW-10/A.
10. PW-11 Dr. Nitin Lashkary, Senior Resident, General Surgery, BSA hospital was summoned by PW-10. He gave the details of the treatment given to the deceased. He gave the area of burns to be about 90 per cent. Pulse of the patient was found by him to be feeble. He deposed about the

various injections i.e TT, IM Stat, Tramadol, I.V. etc. administered to the deceased. He deposed that the patient was cleaned and dressed with an ointment, silver sulpha diazin. The patient was then referred to Safdarjung hospital for further management. He proved his endorsement at point Y to Y on MLC marked as Ex.PW-10/A.

11. PW-15 Dr. Jatinder was working as Junior Resident in Safdarjung hospital. He treated the patient when she was admitted in Safdarjung hospital. He deposed that the deceased was declared dead at about 7.45 a.m. He proved the death report as Ex.PW-15/B.
12. PW-16 Mr.Sukhbir Singh Executive Magistrate of the area deposed that on receipt of the message regarding the admission of a lady with burn injuries in BSA hospital, he reached there. He obtained the fitness certificate from Dr.Raj Mohan Trivedi and recorded statement Ex.PW16/A of the deceased. He obtained endorsement on Ex.PW-10/B of Dr.Raj Mohan Trivedi. He then deposed about recording of the statement of Sadanand after the death of Bobby and after registration of this case.
13. PW-23 SI Mahabir Singh deposed that on 28.03.2008 on receipt of DD No.47, (Ex.PW-14/A) he reached the spot i.e. J-42 Vijay Vihar, Phase-I along with constable Rajesh. Head constable Ravidutt and constable Satpal were already present there. He was informed that the injured had already been removed to BSA hospital. He testified that there was a smell of kerosene coming from the room of the deceased on the ground floor, burnt match sticks, match box and some burnt pieces of cloth were also lying in the room. Some water was found on the floor. He deputed HC Ravidutt and Ct. Satpal to remain present at the spot. He informed the Executive Magistrate Mr.Sukhbir Singh (PW-16) about it and requested him to reach the hospital. He also reached BSA hospital and collected the MLC of Bobby. PW-16 also reached the hospital who consulted the doctor about the fitness of the injured to make a statement. The statement

recorded by the Executive Magistrate was marked to him (PW-23) for further inquiry by the SHO. He made an endorsement on Ex.PW-23/A on the basis of which the present case was registered. He got the spot inspected by the crime team; photographs Ex. PW2/1 to 6 were taken. He prepared the site plan Ex.PW-23/C, seized various articles from the spot and sealed them with a seal of MS. He deposed that on receipt of the information of death of Bobby in the morning of 29.03.2008, vide DD No. 13, further investigation of the case was entrusted to Inspector Raj Singh. Inspector Raj Singh PW-22, second IO of the case corroborated the testimony of PW-23 SI Mahabir Singh. He deposed about the arrest of the appellants and recorded statement of Parmanand, Raj Kumar and other family members.

14. On close of prosecution evidence, the appellants were examined under Section 313 of the Code of Criminal Procedure to enable them to explain the incriminating evidence which has appeared against them.
15. The appellants were completely silent as to where they were at the time of the incident. Admittedly immediately after the incident they did not accompany the deceased to BSA hospital. The appellants took up the plea that the deceased was under depression as she was not able to conceive any child and, therefore, committed suicide. They denied that there was any demand of dowry, harassment or cruelty meted out to the deceased. They denied that they set Bobby on fire. They took up the plea that the dying declaration is false. She (Bobby) never made any dying declaration to Dr. Raj Mohan Trivedi. They, however, showed their ignorance if the statement (dying declaration Ex.PW-16/A) was recorded by PW-16 Executive Magistrate Sh. Sukhbir Singh (PW-16). They showed their willingness to produce defence evidence but did not produce any.
16. Along with appellants, Kamlesh (deceased's husband) and Santosh (Kamlesh's brother) were also challaned by the police. Santosh was,

however, discharged by order dated 01.06.2009 passed by the learned ASJ. Accused Kamlesh was acquitted by the impugned judgment on the ground that the deceased was completely silent about the allegation of harassment or cruelty for not meeting dowry demands. The learned ASJ held that had there been any such demand or harassment, the deceased would have spoken about the same. Thus the evidence of Sadanand PW-6 (father of the deceased) with regard to harassment and demand of dowry without corroboration from the dying declaration or any other evidence was disbelieved.

17. The dying declaration recorded on the MLC Ex.PW-10/A by PW-10 Dr. Raj Mohan Trivedi and Ex.PW-16/A by PW-16 Executive Magistrate Sukhbir Singh were held to be consistent, voluntarily, true and reliable by the learned ASJ. Thus relying upon the same the learned ASJ convicted the appellants under Section 302 read with Section 34 IPC and sentenced them as aforesaid.
18. We have heard Mr. Shailesh Kumar learned counsel for the appellants and Mr. Jaideep Malik learned APP for the State and have perused the record.
19. The prosecution case rests on the two dying declarations purported to have been made by the deceased. Statement of a person (who has died) in respect of the circumstances on the cause of his death is admitted in evidence as an exception to the rule of hearsay evidence. It is believed that a dying person would not tell a lie. ***Khushal Rao v. State of Bombay***, AIR 1958 SC 22 is the basic judgment of the Supreme Court on dying declaration where it was laid down that it was neither a rule of law nor of credence that a dying declaration without corroboration cannot form a basis for conviction of an accused. It was observed that the dying declaration stands on the same footing as any other piece of evidence. If the dying declaration is found to be true and voluntary, the same can be

taken into consideration to base the conviction of an accused without any corroboration.

20. In ***Paniben (Smt.) v. State of Gujarat***, (1992) 2 SCC 474, the Supreme Court while relying on a dozen earlier decisions analyzed and summed up the law on the subject under:

- (i) *There is neither a rule of law nor of prudence that dying declaration cannot be acted upon without corroboration.*
- (ii) *If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration.*
- (iii) *The Court has to scrutinize the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had opportunity to observe and identify the assailants and was in a fit state to make the declaration.*
- (iv) *Where dying declaration is suspicious it should not be acted upon without corroborative evidence.*
- (v) *Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected.*
- (vi) *A dying declaration which suffers from infirmity cannot form the basis of conviction.*
- (vii) *Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected.*
- (viii) *Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth.*
- (ix) *Normally the court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eyewitness has said that the deceased*

was in a fit and conscious state to make this dying declaration, the medical opinion cannot prevail.

(x) *Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. Paniben (Smt.) v. State of Gujarat, (1992) 2 SCC 474.*”

21. It is argued by Mr. Shailesh Kumar learned counsel for the appellants that the alleged dying declarations have failed to pass the test of reliability because the facts of the case would show that the father of the deceased was in the hospital by the side of the deceased at the time of recording dying declaration Ex.PW-16/A by Executive Magistrate (PW-10) and thus there was a great possibility of tutoring the deceased to make a statement falsely implicating the appellants. It is submitted that the circumstances indicate that the dying declaration was not true as the room in which the incident took place was not the bed room of the deceased and thus there was no question of the deceased retiring to the room to go to sleep. It is submitted that the evidence brought on record by the prosecution to show that the deceased was fit to make the statement is a suspect. It is thus urged that it would be highly unsafe to rely upon such dying declaration.
22. Learned counsel for the appellant contends that the deceased was unable to conceive a child and on account of being depressed the deceased took the extreme step to end her life.
23. The first statement of the deceased is on the MLC Ex. PW-10/A. A perusal of the same would show that the deceased was brought to BSA hospital by SI Vijay Kumar at 12:15 a.m. on 29.03.2008. She was attended to by Dr. Raj Mohan Trivedi, Chief Medical Officer on duty, BSA hospital. He recorded the history of the patient (the deceased) as under:

“Allegedly father-in-law and mother-in-law of Bobby poured kerosene oil on her and then put her on fire with

match stick. Husband of Bobby was allegedly not present at home during the incident. (Told by herself). ”

24. Learned counsel for the appellants criticized the testimony of PW-10 on the ground that as per the MLC, the deceased's BP was not recordable and her pulse was not palpable and thus it could not be said that the patient was fit to make the statement. It is submitted that PW-10 (Dr. Raj Mohan Trivedi) admitted that the patient was managed by Senior Resident Surgery and, therefore, the alleged history could not have been recorded by PW-10.
25. We do not agree. Both PW-10 and PW-11 were cross-examined at length as to the treatment given to the deceased after she was brought to the casualty in BSA hospital. In cross-examination, PW-10 deposed that the treatment of a patient is started immediately when he/she is brought in Casualty. He deposed that treatment of Bobby was given by a team of doctors consisting of two JRs and one SR Surgeon present in the Casualty. He added that the pulse and blood pressure were checked by him (PW-10) as well as by JRs. PW-10 stated that he was a coordinator in the emergency. He stated that when the patient was brought, she was examined by him and simultaneously the surgeon had also come and examined the patient. When cross examined, he deposed that he wanted to see the opinion of the surgeon before the patient could be referred to Safdarjung hospital.
26. To the same effect is the testimony of PW-11 Dr. Nitin Lashkary. He deposed that initially the patient was examined by Dr. Raj Mohan Trivedi (PW-10). The pulse of the deceased, by the time he examined her and made a note on the MLC, had become feeble from 'not palpable'. Thus it is clear that the patient was examined and managed by a team of doctors and not examined by any particular doctor.

27. It has been urged by the learned counsel for the appellants that PW-6 Sadanand (father of the deceased) got the information about the incident from PW- 4 Raja Ram. It is apparent that he reached the hospital almost simultaneously with the deceased and thus in all probability the history as to how Bobby got burnt was given by PW-6 Sadanand. In any case Sadanand must have reached the hospital before 1:00 am in the night and there is every possibility of tutoring the deceased by PW-6 before her statement could be recorded by Executive Magistrate PW-16.
28. We have perused the statements of PW-4 and PW-6 and the other evidence brought on record. Of course PW-4 gave information to PW-6 about the deceased sustaining burn injuries and her removal to the hospital. Neither PW-4 was aware of the name of the hospital nor could he give the same to PW-6. Therefore, after leaving his rickshaw at his house PW-6 proceeded to PP Vijay Vihar through the place of incident. He came to know only at the police post that Bobby was removed to BSA hospital by the PCR van. Thus even if PW-6 had hurried and made his best efforts it would have been difficult for him to have reached BSA hospital before 1:30 a.m.
29. It is argued by the learned counsel for the appellants that PW-23 SI Mahabir has stated in his cross-examination that he reached the hospital at about 12:30 a.m. and collected the MLC within ten minutes which was retained by him. The MLC contains signatures of PW-6 regarding the receipt of articles (Jewellery) by Sadanand which shows that Sadanand was present in the hospital by 12:40 a.m.
30. This contention raised on behalf of the appellants is misconceived. As per the endorsement made at the top of the MLC Ex.PW-10/A by PW-10, Dr. Raj Mohan Trivedi small articles of jewellery were removed by PW-10 from the body of Bobby and handed over to the IO. These articles were not handed over by PW-10 to PW-6 Sadanand.

31. The alleged history of Bobby, the fitness certificate and removal of jewellery articles are all in the hand writing of PW-10 Dr. Raj Mohan Trivedi. Of course a suggestion was put to PW-10, PW-11, PW-9 and PW-16 that if the pulse is not palpable the patient cannot make any statement. This suggestion was refuted by each of the doctors.
32. The certificate of fitness has been given by PW-10 Dr Raj Mohan Trivedi initially on the MLC Ex.PW-10/A and then on the statement Ex.PW-16/A at point Ex.PW-10/B.
33. Though the pulse was initially recorded as *not palpable* but later it had improved to be feeble as per endorsement Y to Y on Ex.PW-10/A by the senior resident. Dr. Raj Mohan Trivedi had no animosity against the appellants nor any friendship with PW-6 Sadanand. Otherwise also there is no reason as to why PW-10 would falsely record that a patient is fit for statement if she was really not fit to make a statement.
34. A reference can be made to a five judges decision of the Supreme Court in ***Laxman v.State of Maharashtra***, AIR 2002 SC 2973. It has been observed therein as under:

The juristic theory regarding acceptability of a dying declaration is that such declaration is made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the man is induced by the most powerful consideration to speak only the truth. Notwithstanding the same, great caution must be exercised in considering the weight to be given to this species of evidence on account of the existence of many circumstances which may affect their truth. The situation in which a man is on death bed is so solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason the requirements of oath and cross-examination are dispensed with. Since the accused has no power of cross-examination, the court insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The court, however has to

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

35. Thus in the instant case it is not only that Dr. Raj Mohan Trivedi gave a medical certificate Ex.PW-10/A declaring the deceased to be fit for making statement but he has also given reasons as to how the deceased was fit to make the statement. Thus we see no reason to disbelieve the testimony of PW-10 in this regard. Thus the dying declaration recorded

by PW-10 shows that the deceased had informed PW-10 that she was set ablaze by her father-in-law and mother-in-law after pouring kerosene oil on her.

36. As stated above, the condition of the patient improved a little after she was administered certain injections etc. as senior resident recorded that the patient was oriented/obeying to verbal commands and the pulse was feeble. PW-16 Executive Magistrate Sukhbir Singh reached hospital at 1:00 a.m. on 29.03.2008 and recorded the statement Ex.PW-16/A of the deceased.
37. It is urged by the learned counsel for the appellants that the statement Ex.PW-16 purports to be recorded from 1:00 a.m. to 1:30 a.m. It was not possible that with such serious burn injuries, the deceased would make such a detailed statement for 30 minutes. It is submitted that the dying declaration being improbable has to be discarded. Reliance is placed on *State of Maharashtra v. Sanjay*, 2004 13 SCC 314.
38. It is canvassed before us that a patient of burn injuries is in acute pain and discomfort therefore large doses of pain relief and tranquilisers are administered for management and treatment of the patient. This results in extreme sedation and drowsiness. Therefore, it is the duty of the prosecution to establish that the patient was mentally fit to make the statement which has not been done in this case. The learned counsel for the appellants placed heavy reliance on a division bench judgment of Karnataka High Court in the case of *State of Karnataka v. Sri. Balu Rama Kalligaddi*, 2004 (3) RCr (Crl) 569.
39. There is no dispute about the proposition of law that to rely on a dying declaration it is essential that the maker of the statement has to be in a fit mental state. It is also true that pain killers and sometimes sedative are administered to a patient who has suffered severe burn injuries. It has come on record that the deceased suffered approximately 90 per cent burn

injuries. We have gone through the MLC Ex.PW-10/A as also the case sheet Ex.PW-11/DA of the deceased. It was admitted by PW-11 that injection tramadol is a pain killer. PW-10 Dr. Raj Mohan Trivedi was cross-examined at length with regard to the condition of the patient. As stated earlier it is recorded on the MLC that the patient was conscious, oriented and crying. We have mentioned earlier that the condition of the patient slightly improved as it is recorded in the endorsement Y to Y of Ex.PW-10/A by the Senior Resident PW-11 that the patient was obeying verbal commands and the pulse had become feeble (from not palpable). PW-10 Dr. Raj Mohan Trivedi stated in his examination-in-chief that he had declared the patient fit for statement by his endorsement (Ex.PW10/B). On the statement Ex.PW-16/A Dr. Raj Mohan Trivedi was subjected to a very lengthy cross-examination regarding the condition of the patient. PW-10 denied the suggestion that the deceased died due to cardiac arrest because at the time of her admission in BSA hospital her pulse was not palpable. PW-10 stated that if it was so, the deceased would have died in BSA hospital itself. He added that the final cause of death in every case is ultimately cardiac arrest as death occurs when heart stops functioning. PW-10 denied the suggestion that in case of 95 per cent burns when pulse is not palpable a person is not in a position to utter a single word PW-19 stated that “fit for statement” means physically and mentally fit.

40. On the statement Ex.16/A , PW-10 made an endorsement that “patient was conscious and oriented all the time during the time above statement was taken”. This shows that the deceased was physically and mentally fit to make the statement. In *State of Karnataka v. Sri.Balu Rama Kalligaddi (supra)*, the division bench of Karnataka High Court held that the court has to assess from the material before it as to whether the victim was in fact in a position to rationally understand questions that have been put and give cogent and correct answers to those questions. It was observed that if the victim is under excruciating pain or if as a result of shock and pain

the victim is hovering between a totally conscious and semi conscious condition or if pain killers and tranquilisers which have been administered are causing drowsiness, the court has to see if the victim is in a fit state to make the statement. In this particular case Dr. Raj Mohan Trivedi was present throughout while the statement of the deceased Ex.PW-16/A was recorded. Nothing was brought in the cross-examination of PW-10 which could show that the deceased was drowsy or had become semi-conscious in between while the statement was being recorded. ***Sri.Balu Rama Kalligaddi (supra)*** is, therefore, not attracted to the facts of the present case.

41. ***State of Maharashtra v. Sanjay (supra)*** is not applicable to this case. In the said case there were three dying declarations including one of two typed pages giving minute details. Of course it had taken about 30 minutes to record the statement of Ex.PW-16/A of the deceased but the statement just runs into a half hand written page and is a brief statement. In ***State of Maharashtra v. Sanjay (supra)*** apart from the third dying declaration running into two typed pages, there were also variations in the three dying declarations and the third one giving minute details appeared to be manipulated. Here the two dying declarations are consistent. The first one made to Dr. Raj Mohan Trivedi is just a two line statement whereas the second statement made to the Executive Magistrate runs into ½ hand written page. Both are consistent and the second one corroborates the first statement.
42. It is pleaded on behalf of the appellants that it is doubtful as to who recorded the declaration Ex.PW-16/A. The learned counsel for the appellants has taken us through the cross-examination of PW-10 where the witness stated “Statement as per Ex.PW-10/B was recorded in the language and wording given by patient. It is wrong to suggest that at the time of such statement I was neither present nor any such person was present to whom any such alleged statement was made by patient. That

statement was recorded by a person who was in police uniform. (Vol. I am not sure.Vol. again said, he was a government official).”

43. It has come in the evidence of PW-16 that the statement was recorded by a police officer on his dictation. PW-23 SI Mahabir Singh stated that he recorded the statement Ex.PW-16/A on the dictation of PW-16. Thus PW-10 was right when he stated that it was recorded by a person who was in police uniform. Of course a suggestion was given to PW-16 as also to PW-23 that the endorsement at point B of Ex.PW16/A was obtained from the Executive Magistrate later on but we are not inclined to believe the same. By endorsement at point B the statement was marked to SHO who immediately marked it to PW-23 SI Mahabir Singh for necessary action. The FIR was recorded on that very night at 2.00 a.m. It is not believable that without obtaining the endorsement of the Executive Magistrate PW-23 SI Mahabir Singh would make a mention thereof in the rukka for recording the FIR. Otherwise also we do not find any reason to disbelieve the document Ex.PW-16/A, the endorsement by the Executive Magistrate, the endorsement by SHO and then writing of the rukka by PW-23 SI Mahabir Singh.
44. It is, therefore, established that the statement Ex.PW-16/A was recorded by Executive Magistrate after obtaining the fitness certificate from PW-10 Dr. Raj Mohan Trivedi who was present throughout the recording of the statement of the deceased. Thus the statement Ex.PW-16/A is not only consistent and corroborative to the first statement given to the doctor at the time of admission and recorded on the MLC Ex.PW-10/A but it meets all the tests of it being properly recorded after the Magistrate was satisfied that the patient was fit to make the statement. The statement is not very long but it contains all the details as to how the appellants had poured kerosene oil on her and appellant Parmanand had lit the match stick and set her on fire.

45. It is pleaded by the learned counsel for the appellants that the deceased had suffered 95 per cent burns still the thumb impression obtained on the statement Ex.PW-16/A shows the ridges on the right thumb impression. Such a statement, argues the learned counsel, is unbelievable in view of a division bench judgment of Punjab and Haryana High Court in ***Ram Piari & Anr. v. State of Haryana***, 2005 CrL J 3251. We have perused the statement Ex.PW-16/A and are of the view that only 10/20 per cent ridges are seen in the thumb impression. Nothing could be brought in the cross-examination of PW-10 or PW-16 to show that the thumb impression did not belong to the deceased. Otherwise also there is no legal requirement to take a thumb impression of the deceased where her thumbs/fingers are burnt. ***Ram Piari & Anr.*** (*supra*) again does not apply to the facts of this case.
46. It is urged by the learned counsel for the appellants that the incident had taken place in the outer room of the house. Relying on ***Ashok Kumar & Anr .v. State of NCT of Delhi***, 167 (2010) DLT 72 a division bench judgment of this Court, it is submitted that though the site plan is not a substantive piece of evidence but evidentially its value cannot be slighted. There is no dispute that defence can very well refer to a site plan prepared by the IO or by the draftsman. There is no doubt that the room in which the incident had taken place is a outer room in the house still there is no universal rule that outer room cannot be given to the son/daughter-in-law. We see no reason to doubt the dying declaration made by the deceased to Dr. Raj Mohan Trivedi, recorded on the MLC Ex.PW-10/A and made to the Executive Magistrate Sh.Sukhbir Singh (PW-16). In our view the two dying declarations are true and voluntary. The first dying declaration was very spontaneous and was made to the doctor immediately at the time of admission by the deceased herself. The deceased could not even know the purpose of the doctor recording the history and, therefore, there was nothing which could have impelled the deceased to make a false statement. As stated earlier the first statement is corroborated by the

second statement Ex.PW-16/A recorded by the Executive Magistrate. Under these circumstances we see no reason to reject the dying declaration recorded by PW-10 Dr. Raj Mohan Trivedi, on MLC marked as PW-10/A and second dying declaration Ex.PW-16/A recorded by PW-16 Executive Magistrate Sh.Sukhbir Singh.

47. The learned Additional Sessions Judge rightly convicted the appellants relying on the two dying declarations. We do not find any error or infirmity in the impugned judgment. There is no merit in the appeal and therefore it has to fail. The same is accordingly dismissed.

(G.P. MITTAL)
JUDGE

(S. RAVINDRA BHAT)
JUDGE

APRIL 25th, 2011

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