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IN THE HIGH COURT OF DELHI AT NEW DELHI

+ CRL.A.No.5/2002

Date of judgment: 1st June, 2012

PRABHASH SHARMA & ANR. Appellant

Through: Mr. Padam Singh and
Mr. Bhanupratap Singh, Advs.

versus

STATE Respondent

Through: Ms. Ritu Gauba, APP for the state

CORAM:

HON'BLE MS. JUSTICE GITA MITTAL

HON'BLE MR. JUSTICE V.K. SHALI

GITA MITTAL, J

1. The appellants have assailed the judgment dated 5th December, 2001 finding them guilty of commission of offences under Section 302 read with Section 34 of the IPC and the order of sentence dated 6th December, 2001 whereby they have been sentenced to imprisonment for life as well as fine.

2. The instant case relates to an alleged incident on the 19th of July, 1997 in which one Mohd Rustam (since deceased) was allegedly beaten and burns inflicted by pouring acid on his person resulting in his death on 28th July, 1997.

3. It was the case of the prosecution that deceased Mohd Rustam, a resident of WZ 85, D-273, Amar Park, Zakhira, Delhi, was a conductor of Truck No.RG 14-A-5518 belonging to Prabhash Sharma - owner of Prabhash Road Lines, Amar Park, Zakhira, Delhi. At about 9.00 clock on 19th July, 1997, he is alleged to have gone to Shri Prabhash Sharma at his residence in the Karan Memorial Public School, Zakhira (near Ram Kanta) to take his wages for two months. When Mohd Rustam reached the spot, Shri Prabhash Sharma, his brother Manoj and a truck driver Jaibir were present there. Mohd Rustam asked his employer ('maalik') Prabhash Sharma for the wages for two months at which Prabhash Sharma asked him to sit and that he would be given the money. He was compelled to drink liquor despite refusal and thereafter all three (Prabhash Sharma, Manoj & Jaibir) started beating him. Then Manoj is alleged to have picked up a two litre plastic can containing acid and, while Prabhash Sharma as well as Jaibir are alleged to have held Mohd Rustam, Manoj poured the acid over him. As a result Mohd Rustam started having burning sensation on his body, so much so that he became unconscious and fell down. He regained consciousness in the morning and found that he was lying naked near his jhuggi in an injured condition.

His brother Mohd Humayun thereafter took him to the Ram Manohar Lohia Hospital.

4. The incident as placed by the prosecution comes to an end in the courtyard of the Karan Memorial Public School where, after, the prosecution alleges, that Manoj ran away from the spot, throwing the can on the roof of Janta Dharam Kanta while fleeing.

5. The other two accused persons Prabhash Sharma and Jaibir are also alleged to have also run away from the spot.

6. The prosecution examined Mohd Humayun as PW 1 (brother of the injured Mohd. Rustam) who stated that he was residing at WZ 194, Madipur, Delhi in the premises of his employer which he had taken on rent. He has stated that on 20th July, 1997 while he was in his export factory in village Madipur, Delhi, he had received a telephonic message that his brother Mohd Rustam was lying in an injured condition at Amar Park, Zakhira and someone had caused hurt to him by pouring acid on his person. He had gone to the spot where he saw his brother lying unconscious in an injured condition. A crowd of 10-15 people were gathered around him. Mohd Humayun removed his brother to the RML Hospital in a three wheeler vehicle and got him admitted there. After about half an hour

of the injured having been admitted to the hospital, the police of the police station Moti Nagar reached there.

7. At the Ram Manohar Lohia Hospital the injured was examined by Dr. Vasanthi Ramesh-PW 6 at 9.15 a.m. and his Medical Legal Case (‘MLC’ for short) prepared, which has been proved on record as Exh.PW 6/A.

8. The police intervention commenced upon telephonic information at 9.30 a.m. given by the Duty Constable Rajinder Singh at the RML Hospital to Ct. Nirmala at the police station Moti Nagar upon which DD No.4A [Exhibit PW 8/A has been recorded by her. DD No. 4A records that information was received that Mohd Humayun had got his brother Mohd Rustam admitted in the hospital with injuries from pouring of acid on him; and that Ct. Rajinder Singh had requested that the police officer be sent to the hospital.

9. DD 4A records that the information was recorded on the roznamacha and copy was handed over to Head Constable Ramphal Singh (PW 8) at about 9.30 a.m. by the duty officer. He thereafter proceeded to RML Hospital accompanied by Ct. Vinod Kumar (PW5).

10. PW 5 has stated that he left the hospital for the police station with the Tehrir at about 11.30 a.m. and reached the police station at about 12.10 a.m.

11. At the police station, it appears that based on Exh.PW 8/B, DD No.7A was recorded by police station Moti Nagar at 12.10 p.m. on 28th July, 1997 and FIR No.387/1997 was registered under Section 324 of the Indian Penal Code. The witness states that he remained in the police station for about 15 minutes; that thereafter at about 12.30 p.m., he joined PW 8 at the alleged place of occurrence at Karan Memorial Public School and handed over the rukka and the copy of the FIR No.387/97 to HC Ramphal who was already at the spot.

12. While PW 5-Ct. Vinod Kumar went to the police station, PW 8-HC Ram Phal Singh states that he recorded the statement of Mohd Humayun at the RML Hospital, joined him (Mohd Humayun) in his investigation and went with him to the Karan Memorial School. PW 8 has stated that he prepared the site plan (Exh.PW 8/E) of the spot at the instance of Mohd Humayun.

13. PW 5 Ct. Vinod Kumar, however, does not mention that Mohd Humayun was present at the Karan Memorial School. PW5 has corroborated HC Ramphal so far as the location and the existence of the various schools and firms at and near the site in question is concerned.

14. PW 5 and 8 have stated that thereafter a secret informer met them on 20th July, 1997 on the main road in front of the

Karan Memorial School and informed them that one of the three persons who had thrown acid on Mohd Rustam was taking tea at the tea shop near the Ram Dharam Kanta. PW 5 has further stated that Prabhash Sharma was apprehended on being pointed out by the informer. Sh. Prabhash Sharma gave a disclosure statement (Exhibit PW 5/B) and on his pointing out, a memo (Exhibit 5/C) was prepared. The other accused persons could not be located. Shri Prabhash Sharma was enlarged on bail in the police station.

15. Another piece of evidence brought on record is a second statement attributed to the deceased (Exhibit PW 8/G as having been made to HC Ramphal Singh at about 3 p.m. on 20th July 1997 itself. We find that in the trial court record, a photocopy of the page of the case diary wherein HC Ramhal Singh has written this second statement attributed to Mohd Rustam has been exhibited as Exhibit PW 8/G.

16. PW 8 HC Ramphal Singh states that he undertook further investigation in the case only on 24th July, 1997 for which purpose he left the police station at about 4 p.m. accompanied by PW 5 Ct. Vinod Kumar when efforts to apprehend the other accused were made. On 24th of July, 1997, these police officers found the accused Prabhash Sharma at a tea shop alongwith two other persons whose identity was disclosed as Manoj

Kumar and Jaibir. The tea shop was proximate to the place of occurrence. These persons were interrogated and disclosure statements (Exhibit PW 5/K and G) were recorded; they were arrested and personal searches effected.

17. PW 8-HC Ramphal Singh has deposed that after his arrest on 24th July, 1997, Manoj Kumar had made a disclosure statement (Exhibit PW-5/J) pointed out to the roof of Janta Dharam Kanta and got recovered a plastic can of 2 ltr capacity which had a handle with a print of Sundrop/Sunflower and a picture of a child. He states that the same was giving smell of acid, that the can was sealed with the seal of RPS and taken into possession vide recovery memo Exhibit PW 5/K.

18. It is in evidence that after nine days of hospitalisation, Mohd Rustam unfortunately expired in the RML hospital at about 8.50 a.m. on 28th July, 1997. His death was reported vide DD 9A at 10.15 a.m. to the police station. The case was then converted into a case under section 302 of the Indian Penal Code. The investigation was thereafter handed over to PW-10 Insp. P.P. Singh, the Additional SHO who recorded brief facts of the case as Exhibit PW 10/A. A request for autopsy was made by the police on 29th July, 1997.

19. The post-mortem on the body of the deceased was conducted by PW 7-Dr. K.L. Sharma, the then head of the

Department of Forensic Medicine, Civil Hospital, Delhi who has proved his report as Exhibit PW-7/A which has recorded the burns which were noticed on the dead body by him and a bruise of ¼ cm on the outer part of the left ankle. He had recorded that there was no deformity of the ankle joint.

So far as the cause of death is concerned, the doctor has opined thus :-

"Cause of death was pneumonia and septicaemia consequent to burn injuries. The burns were ante-mortem in nature and were caused by corrosive chemical. The post-mortem findings were consistent of pouring the sulphuric acid over the deceased in supine position by other party as was evident by corroded distribution of burn injuries over his body, injury over ankle joint was caused by hard blunt object."

The forensic examination was undertaken in September, 1997 on which a report Exhibit PW10/F was obtained from the laboratory.

20. On this material, by an order dated 20th April, 1998, Prabhash Sharma, Manoj Kumar and Jaibir were charged *"that on 19th July, 1997 at 9 p.m. in Karan Memorial Public School, Jakhira, near Ram Kanta within the jurisdiction of PS Moti Nagar you all, in furtherance of your common intention to cause death, poured acid on the person of Mohd Rustam as a consequence of which he died on 28th July, 1997 and thereby committed offence of murder punishable U/s 302/34 IPC and within cognizance of this court"*.

21. The prosecution examined ten witnesses in support of its case. On the evidence led during the trial, the trial judge passed the impugned judgment dated 5th December, 2001 holding that the prosecution had successfully proved charged against Prabhash Sharma and Manoj Kumar under Section 302 read with Section 34 of the IPC and convicted them for the same. It was further held that the prosecution had failed to establish involvement of accused Jaibir beyond the shadow of any reasonable doubt and that he was entitled to benefit of doubt. Accused Jaibir was accordingly acquitted of the charges under Section 302/34 of the IPC and directed to be released, if in custody.

22. Prabhash Sharma and Manoj Kumar were heard on the point of sentence and by the order dated 6th December, 2001, they were sentenced to imprisonment for life and also to pay fine of Rs.10,000/- each. It was directed that in default of payment of fine, they would undergo further rigorous imprisonment for a period of one year each. The judgment dated 5th December, 2001 and the order on sentence dated 6th December, 2001 have been assailed by way of the present appeal.

23. We have heard Mr. Padam Singh and Mr. Bhanu Pratap Singh, learned counsels for the appellants as well as Ms. Ritu Gauba, learned APP for the state at length.

24. The above narration would show that the case rested on circumstantial evidence. Apart from the multiple dying declarations attributed to the deceased, the prosecution has attempted to establish guilt of the appellants by alleging recovery of can based on disclosure statement. The statements and the recovery required to be considered in seriatum. However learned counsels for the appellants have vehemently challenged not only the statements attributed to the deceased but also the place of recovery of the deceased; making of a disclosure statement; recovery of the can. The appellants have also challenged that they were ever arrested in the manner or in the place on the date when alleged by the prosecution. It has been urged that the prosecution has failed to establish any motive on the part of the appellants for the crime. So far as the incident is concerned, it is pointed out that as per the evidence brought on record by the prosecution, the incident could never have taken place in the manner as alleged. Prolonged submissions have been made to point out several missing links in the chain of circumstances which the

prosecution was required to establish in order to bring home the guilt of the appellants.

The question thus which has to be answered in the present case thus is whether the statements attributed to the deceased were made by the deceased in a fit state of mind and can be held to be true and voluntary, admissible under Section 32 of the Indian Evidence Act and can be relied upon to base a conviction of the appellants?

25. We may now consider the primary submission urged by Mr. Padam Singh, learned counsel for the appellant that the statements attributed to the deceased were never made by him. It is contended that even if they were, they are unworthy of credence as they fail to satisfy the essential tests which are required to be satisfied before a statement by a person deceased is admissible as a dying declaration and a conviction can be based on it.

26. So far as the opposition to the present appeal is concerned, Ms. Ritu Gauba, learned APP has urged that Exhibit PW8/B is not the only statement attributed to the deceased; that the MLC-Exhibit PW6/A also contains a dying declaration by the deceased. Learned APP has drawn our attention to Exhibit PW8/G, a second statement attributed to Mohd Rustam

as having been made on the 20th of July, 1997 to PW-8 HC Ramphal Singh. It is urged that each of these was a truthful and voluntary statement given in full consciousness by the deceased which, coupled with the recovery of the can upon the disclosure statement by Manoj Kumar, and the statement of PW1 Mohd Humayun that the deceased was an employee of Shri Prabhash Sharma, are sufficient to sustain the impugned judgment of conviction of the appellant.

27. Before dealing with this contention, we may touch upon the well settled principles on the issue. The tests which a statement attributed to a dead person has to satisfy before it is admissible in evidence as a dying declaration under Section 32 of Evidence Act are laid down in the landmark judgment of the Supreme Court in **AIR 1958 SC 22 Khushal Rao vs. State of Bombay** which holds the field. In this binding judicial pronouncement, the Supreme Court conducted a review of the relevant provisions of the Evidence Act as well as judicial precedents of the Supreme Court as well as High Courts in India and laid down the principles thus :-

“16. On a review of the relevant provisions of the Evidence Act and of the decided cases in the different High Courts in India and in this Court, we have come to the conclusion, in agreement with the opinion of the Full Bench of the Madras High Court, aforesaid, (1) that it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated; (2) that each case must be

determined on its own facts keeping in view the circumstances in which the dying declaration was made; (3) that it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other piece of evidence; (4) that a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence; (5) that a dying declaration which has been recorded by a competent magistrate in the proper manner, that is to say, in the form of questions and answers, and, as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character, and (6) that in order to test the reliability of a dying declaration, the Court has to keep in view the circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the facts stated had not been impaired at the time he was making the statement, by circumstances beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties.

(Underlining by us)

28. So far as the scrutiny which the court has to conduct and the conclusion which could be drawn, based on a dying declaration is concerned, in para 17, the court had observed as follows :-

"17. Hence, in order to pass the test of reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused who had no opportunity of testing the veracity of the statement by cross-examination. But once the court has come to the conclusion that the dying declaration was the truthful

version as to the circumstances of the death and the assailants of the victim, there is no question of further corroboration. If, on the other hand, the court, after examining the dying declaration in all its aspects, and testing its veracity, has come to the conclusion that it is not reliable by itself, and that it suffers from an infirmity, then, without corroboration it cannot form the basis of a conviction. Thus, the necessity for corroboration arises not from any inherent weakness of a dying declaration as a piece of evidence, as held in some of the reported cases, but from the fact that the court, in a given case, has come to the conclusion that that particular dying declaration was not free from the infirmities referred to above or from such other infirmities as may be disclosed in evidence in that case."

(Underlining by us)

29. The issue of reliability of a dying declaration arose for consideration before the Supreme Court in **AIR 2007 SC 2020 State of Rajasthan vs. Wakteng**. In this case, the dying declaration was recorded two days after the occurrence. The doctor's certificate about the mental state of the deceased was absent. There was also no evidence as to why the magistrate could not be called for recording the statement. The court held that such a declaration would be unreliable. In para 15 of this pronouncement, the Supreme Court observed that "*though 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 lie or to concoct a case so as to implicate an innocent person however it cannot be sufficiently emphasized that the court has to be careful to ensure that the statement was not the result of either tutoring, prompting or a product of the*

imagination. It is, therefore, essential that the court must be satisfied that the deceased was in a fit state of mind to make a statement, had clear capacity to observe and identify the assailant and that he was making the statement without any influence or rancor. Once, the court is satisfied that the dying declaration is true and voluntary, it is sufficient for the purpose of conviction".

30. As noticed above, upon being satisfied with regard to the admissibility of a statement attributed to a deceased, the court must satisfy that the person making the declaration was conscious and fit to make the statement. It is well settled that upon being so satisfied, even an uncorroborated dying declaration can be the basis for finding a conviction for murder. This proposition is unassailable.

31. The Supreme Court had occasion to consider the entire gamut of law relating to dying declarations; their admissibility and relevance in the pronouncement reported at **(2001) AIR SCW 2481 Smt. Laxmi vs. Om Praksh & Ors.** In this case, the prosecution was relying upon five dying declarations which included, firstly, a statement alleged to have been made by the deceased to the ASI on way from the residence of accused persons to the hospital; secondly, a statement of the deceased to the attending doctor; a third dying declaration alleged to

have been made to the magistrate; a fourth dying declaration made to the investigating officer and the fifth declaration, alleged to have been made to her brother. These five statements attributed to the deceased coming from the mouths of different witnesses were not found worthy of being accepted or acted upon as such dying declarations to base a conviction thereon. It was held by the Supreme Court that none of these statements could form the basis for conviction of the accused persons, inter alia, for the reason that there was no medical evidence to show that the deceased was in a fit state of mind and physical condition to have made the statement at the relevant time when it was recorded.

32. In ***Laxmi vs. Om Prakash & Ors.(supra)***, the Supreme Court has pointed out that the admissibility of the dying declaration rests on the principle of necessity. The principles thereof have been culled out in the following terms in paras 28 and 29 of the pronouncement which shed valuable light on the issue under examination in the present case and read as follows:-

“28. A dying-declaration not being a deposition in Court, neither made on oath nor in the presence of the accused and therefore not tested by cross-examination is yet admissible in evidence as an exception to the general rule against the admissibility of hearsay. The admissibility is founded on the principle of necessity. The weak points of a dying declaration serve to put the court on its guard while testing its reliability and impose on the court an

obligation to closely scrutinise all the relevant attendant circumstances. [see **Tapinder Singh Vs : State of Punjab** 1970CriLJ1415. 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 corroborate evidence lending assurance to the contents of the declaration refuse to act on it. In **Bhagwan Das vs State of Rajasthan** - [1957]1SCR854 the learned Sessions Judge found inter alia that it was improbable if the maker of the dying declaration was able to talk so as to make a statement. This Court while upholding the finding of the learned Sessions Judge held the dying-declaration by itself insufficient for sustaining a (SIC)con charge of murder. In **Kako Singh @ Surendra Singh Vs State of M.P.** 1982CriLJ986 : 1982CriLJ986 the dying declaration was refused to be acted upon when there was no specific statement by the doctor that the deceased after being burnt was conscious or could have made coherent statement. In **Darshan Singh Vs . State of Punjab** : 1983CriLJ985 this Court found that the deceased could not possibly have been in a position to make any kind of intelligible statement and therefore said that the dying declaration could not be relied on for any purpose and had to be excluded from consideration. In **Mohar Singh and Ors. etc. vs. State of Punjab**: 1981CriLJ998 the dying declaration was recorded by the investigating officer. This Court excluded the same from consideration for failure of the investigating officer to get the dying declaration attested by the doctor who was alleged to be present in the hospital or any one else present".

(Emphasis supplied)

33. In the background of the legal principles would be appropriate to consider each of the aforesaid statements attributed to the deceased Mohd. Rustam in seriatum.

MLC-Exhibit PW 6/A

34. We may begin by examining the MLC made by Dr. Vasanthi Ramesh who deposed before the court as PW6, being the first statement attributed to the deceased Mohd Rustam in the order of chronology.

35. As per the MLC Exhibit PW6/A, Mohd Rustam was brought to the hospital by his brother Mohd Humayun at about 9.15 a.m. on 20th July, 1997. Dr. Vasanthi Ramesh-PW 6 who has recorded the Medical Legal Case, has noted that Mohd Rustam was “conscious, oriented and ambulant”. His pulse was 90 per minute. So far as the history of the injuries is concerned, the doctor has noted *“alleged h/o acid burn yesterday at about 4.00 p.m. when his employer poured acid on him. H/o being beaten on the lt foot with a cane”*. The MLC records that Mohd Rustam had burns involving the trunk, back and patchy areas of the left arm and fore arm as well as small area of the right fore arm and medial side of both thighs. The doctor has also noted a swelling on the left feet associated with tenderness. The patient was advised an injection TT IV and x-ray of left foot.

36. On the MLC (Exhibit PW6/A), Dr. Vasanthi Ramesh noted the address of Mohd Rustam as W-85 D 273, Amar Park, Zakhira, New Delhi and mentioned that his brother Mohd Humayun had the same address. The MLC notes the presence of Duty Constable Rajinder Singh in the hospital at the time of recording of MLC.

37. In **1999 CriLJ 4529 Jai Karan vs. State of NCT**, the court had disbelieved the statement of the deceased allegedly recorded by the doctor observing that the doctor had recorded the alleged statement in English and had not read over and explained the contents of the documents to the deceased; no other person had attested the statement allegedly made by the deceased before the witness; the doctor who has recorded the statement had made no endorsement nor was there evidence of any other witness that the deceased was in a fit condition for making the statement.

38. In the decision dated **14th September, 2010** of the Division Bench in **Crl.Appeal No. 797/2001 Diwan Singh**, it may be noted that this court has also rejected the reliability of the statement attributed to the deceased in the medico legal report as not being credible having regard to the facts and circumstances of the case. In this regard, the court relied on the pronouncement of the Supreme Court in **(1997) CriLJ**

4404 State of Orissa vs. Parasuram Naik wherein the doctor had certified that the deceased was conscious. However, it was not certified that she was in her full senses. In this background, the dying declaration recorded by the doctor was not relied on.

39. In **(2004) 10 SCC 113 : 2004 SCC (Cri) 1760 Kanti Lal vs. State of Rajasthan**, the court was concerned with the fact that the condition of the deceased to make the statement was not satisfactorily recorded by the person concerned. The court held that the physical as well as mental fitness of the maker has to be proved by the prosecution to the satisfaction of the court. In this case, the doctor had neither made any endorsement nor had issued any certificate that the deceased was fit to make a statement.

40. In the present case, Dr. Vasanthi Ramesh has not made any endorsement nor endorsed any certificate on the MLC that the deceased was fit to make a statement. The certificate appearing on the left side of the MLC has not been scribed by her nor is it signed by her. The prosecution has failed to give even the particulars of the author of the endorsement on the left side of MLC Exhibit PW6/A and has not produced any such person before the court.

41. In **(2011) 1 SCC (Cri) 114 Sunder Singh vs. State of Uttarakhand**, the court found that the dying declaration of the deceased was credible, properly recorded, corroborated her oral evidence and correctly depicted events. The appellant was named in the FIR which was lodged immediately after the occurrence and the medical evidence corroborated the prosecution version.

In this case, PW-1 had survived the same incident and had named the appellant as one of the assailants. In the facts of the case, the court was of the view that despite failure to obtain the certification by the doctor, the declaration by the deceased passed all tests of voluntariness, fit condition of mind of the maker; truthfulness of declaration and that the same was uninfluenced by any other factors.

42. It is normally to be found that if the history is given by a patient, the doctor normally records so. It is then referred to as 'Pt informant' (patient informant) or 'c/o' ('complained of'). Sometimes after recording the history, if given by the patient, the doctor may record 'as stated by the patient'. In the instant case, there is nothing in Exh. PW 6/A that even remotely suggests that the history was given by the patient.

43. The history of the patient was given in the morning of 20th July, 1979 when the MLC was recorded. Surprisingly in her

oral testimony almost two years later on the 8th April, 1999, Dr. Vasanthi Ramesh in her examination-in-chief as PW6 stated that the history was given by the injured. She clarifies in her cross-examination, that she has so stated in her examination in chief because he was conscious and oriented. Clearly a deduction from the MLC on the part of PW 6 – Dr. Vasanthi Ramesh in her evidence as these find recorded thereon.

We may now examine the information endorsed by Dr. Vasanthi Ramesh on the MLC.

44. Essential parameters which are normally noticed and observed by a doctor, especially while recording a MLC upon examining the patient who is so seriously burnt, have not been mentioned in the MLC-Exh.PW-6/C. As noticed above, the MLC only notes that the pulse of the injured was 90 stroke per minute. The doctor has not cared to notice the temperature, blood pressure and the respiratory rate of the deceased which are basic features of a medical examination. From the examination conducted by the doctor, the chest examination, anemia, cyanosis, jaundice are missing. The orientation that is noted by a doctor, relates merely to date, time and place. 'Ambulant' condition as noted by Dr. Vasanthi Ramesh refers to the ability of the person being examined to move about. The fitness to give a statement in the nature of a dying

declaration to form the basis of the conviction for murder is certainly more than bare consciousness.

45. It is evident that the examination by the doctor was perfunctory. PW 6 Dr. Vasanthi Ramesh has recorded the Medical Legal Case (Exh.PW6/A) very casually. The same is explicit from the fact that not only the essentials of a basic medical examination are missing from Exhibit PW 6/A but also the manner in which she has filled details. While the address of the deceased is correctly recorded, it is nobody's case that Mohd Humayun, brother of the patient was residing at the same address. However, the MLC Exh. PW 6/A records that Mohd Humayun's address was the same as that of the deceased Mohd Rustam.

46. In **2004 (3) RCR (Cri) 569 State of Karnataka vs. Sri Balu Ram Kalligaddi**, it was opined that even if the doctor certifies that victim was in a fit state of mind, total faith cannot be put on the certificate of the doctor. The court can make inquiry from supporting medical record to find out the mental state of mind.

It would not be safe to rely on the statement made by a doctor relying on memory not supported by anything on the document recorded by her that it was the deceased who had given the history.

47. It is perhaps conscious of these aspects of the matter that even the prosecution before the learned trial judge did not contend that the MLC Exhibit PW6/A contained a statement made by the deceased which could have been treated as a dying declaration. As noted by the learned trial judge in para 22 of his judgment, there was no reliance by the prosecution at all upon the MLC (Exhibit PW6/A) as containing a dying declaration. We are unable to hold that Exh. PW 6/A is a statement admissible in evidence as a dying declaration under Section 32 of the Evidence Act.

Exhibit PW 8/B

48. We may now examine the statement attributed to Mohd Rustam as recorded by PW 8-HC. Ramphal Singh in the forenoon of 20th of July, 1997 exhibited on record as Exhibit PW8/B. In as much as extensive reliance is placed on Exhibit PW 8/B, the same deserves to be considered in extenso and reads as follows :-

“Main pata uprokt par rehta hoon tatha Truck No. RG 14 3518 par conductary karta hoon.

Yeh truck Prabhash Roadlines, Zakhira, R-Park ke maleek Praabhash Sharma ka hai. Main kal dinaank 19.07.1997 ko samay kareeb 9 baje raat apni do mahine ki tankhwa lene apne truck maalik Prabhash Sharma ke paas Karan Memorial Public School, Zakhira (najd Ram Kaanta) gaya tha jahaan mera maalik Prabhash Sharma rehta hai. Jab main wahaan par pahuncha, toh mere maalik Prabhash

Sharma va uska bhai Manoj va ek truck driver Jaiveer wahan maujood the. Maine apne maalik Prabhash Sharma se apni do mahine ki tankhwa ke painse maange toh usne mere se kaha ki baithh abhi deta hoon. Iske baad mere ko mana karte karte sharaab pilayi va iske baad inn teeno (Prabhash Sharma, Manoj, Jaiveer) ne mere ko maarna peetna shuru kar diya va wahin par rakhi plastic ki can jisme koi taral padarth tha ko Manoj ne uthaya va Prabhat Sharma va Jaiveer ne mere ko pakad liya va Manoj ne uss can mein bhara taral padarth mere upar udhel diya jisse mere shareer me bahut tej jalan hone lagi va main behosh ho karr gir gaya. Iske baad mujhe jab mujhe subah hosh aaya toh main apni jhuggi ke paas ghayal avastha me pada tha. Iske baad mera bhai Mohd Humayun mere ko lekar RML Hospital laya. Mere ko Prabhash Sharma, Manoj va Jaiveer ne bina baat par maara peeta va mere upar tezaab daal karr jala kar ghayal kiya hai. Inn teeno uprokt vyaktiyon ke khilaaf kanooni kaarvahi ki jaave byaan sun liya theek hai."

49. In the instant case, the learned trial judge in para 22 of the judgment dated 5th December, 2001 has noticed that there is no direct evidence at all led by the prosecution to prove the guilt of the accused persons and that the dying declaration Exhibit PW8/B is the only evidence being relied upon by the prosecution to prove the guilt of the accused person. Based on this submission, the learned trial judge framed the question which was required to be answered as "whether such statement was made by the deceased Md Rustam to HC

Ramphal Singh and if the answer to that question is an affirmative, then what is the effect of that dying declaration?"

50. We find that the learned trial court has rejected the contentions of the appellants that the Exhibit PW 8/B, which was the sole evidence before it relied upon by the prosecution, was unworthy of credence. The learned trial court also rejected the objection of the appellants to Exhibit PW8/B on the ground that Exhibit PW 8/B did non-comply with the Delhi High Court Rules and therefore ought not to be relied upon.

51. The learned trial judge has placed reliance on the pronouncement of the Supreme Court in ***JT 1998 (5) SC 308 Jai Prakash vs. State of Haryana*** wherein at the time of recording of the statement by the police officer, it was held that the deceased was only a complainant and the presence of the doctor was found not necessary. The learned trial judge has also placed reliance on the pronouncements of the Supreme Court in ***JT 2000 (8) SC 466 Gulam Hussain & Anr. Vs. State of Delhi*** and ***JT 1988 (3) SC 537 State of Punjab vs. Amarjeet Singh***. The trial court has held that at the time when Exhibit PW 8/B was recorded, no FIR had been registered and PW 8 HC Ramphal Singh was not the investigating officer. It has been concluded that Exhibit PW 8/B was only in the nature of a complaint and hence there was

no necessity for signatures of the doctor or the nurse or compliance of the Delhi High Court Rules noticed hereinabove was unnecessary. The sole basis thus for rejecting the contentions of the defence is the finding that at the time of recording the statement Exhibit PW 8/B, Mohd Rustam was only a complainant and the presence of a doctor or endorsement by the doctor was not required.

52. So far as fitness at the time of recording of Exhibit PW 8/B is concerned, the trial judge has relied on the endorsement in the MLC Exhibit PW 6/A to the effect that the deceased was conscious, oriented and moving his limbs when the MLC was recorded.

53. In ***AIR 2008 SC 19 Nallapati Sivaiah vs. Sub-Divisional Officer, Guntur, A.P.*** the principles on the manner in which a dying declaration has to be scrutinized by the court and its evidentiary value evaluated have been laid down. In this case, there were two dying declarations, the first recorded by the Inspector of Police and a second recorded by the Additional Magistrate. The court has observed that an objective and critical assessment discloses that the treatment administered to the victim immediately after he was brought to the hospital was not known and there was no explanation forthcoming as to why the doctor at the casualty was not

examined. The record contained only the routine and mechanical endorsement that the patient was conscious and coherent and fit to give statement. In para 16, it has been held that while opining upon the admissibility of an alleged dying declaration, *"all attendant circumstances should be considered, including weapon which injured the victim; nature and extent of injuries, victim's physical condition, his conduct, and what was said to and by him."* The court ruled that it is where a proper and sufficient predicate has been established which would meet for admission of a statement under such a dying declaration which could form the sole basis of a conviction. In para 20, while laying down principles for evaluation of a statement, the court reiterated principles laid down in earlier precedents in the following terms :-

"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."

54. On a detailed analysis of its previous judgments, the Supreme Court has culled out the guidelines which would bind adjudication as follows :-

"38. In our considered opinion, the **medical evidence and surrounding circumstances altogether cannot be ignored and kept out of consideration by placing exclusive reliance upon the testimony of person recording a dying declaration.**

39. The Dying Declaration must inspire confidence so as to make it safe to act upon. **Whether it is safe to act upon a Dying Declaration depends upon not only the testimony of the person recording Dying Declaration - be it even a Magistrate but also all the material available on record and the circumstances including the medical evidence.** The evidence and the material available on record must be properly weighed in each case to arrive at proper conclusion. **The court must satisfy to itself** that the person making the Dying Declaration was **conscious and fit to make statement for which purposes not only the evidence of persons recording dying declaration but also cumulative effect of the other evidence including the medical evidence and the circumstances must be taken into consideration.**

CONCLUSION:

40. It is unsafe to record conviction on the basis of a dying declaration alone in cases where suspicion is raised as regards the correctness of the dying declaration. In such cases, the court may have to look for some corroborative evidence by treating dying declaration only as a piece of evidence."

(Emphasis supplied)

55. In ***Nallapatti Sevaiah (supra)***, the court has emphasized the requirement of establishing that the deceased was conscious in the strict sense of the term and that “*there must be reliable evidence to show, in view of his intense suffering and serious injuries, that he was in a fit state of mind to make the statement regarding the occurrence*”. In this regard, reference was made to observations of the Supreme Court in ***(1976) 3 SCC 618 K. Ramchandra Reddy & Anr. vs. The Public Prosecutor; 1980 Supp.SCC 434 Padman Meher vs. State of Orissa ; (1983) 2 SCC 411 Darshan Singh alias Bhasuri & Ors. vs. State of Punjab; AIR 1972 SC 1776 Lallubhai Devchand Shah & Ors. Vs. The State of Gujarat***) on this aspect.

56. On the issue of fitness to make the statement, the observations of the Supreme Court in ***(1995) 4 SCC 118 Kanchy Komuramma vs. State of A.P.*** are also relevant and deserve to be considered. The court considered the evidentiary value of a dying declaration recorded by a Judicial Magistrate and noted that the prosecution for reasons best known to it, did not examine the doctor who had made the endorsement “*the patient was in a fit state of mind to depose*”, on the dying declaration certifying that and having further noticed that no other witness was examined to prove the

certificate of the doctor. It was held that the same creates a doubt as to whether the patient was actually in a proper and mental condition to make a conscious truthful statement. The observations of the court shed valuable light on the questions raised in the present case and read as follows:-

"This infirmity renders it unsafe to rely on the dying declaration. As a matter of fact, the failure of the prosecution to establish that the deceased, before she made the dying declaration, was in proper mental condition to make the dying declaration detracts materially from the reliability of the dying declaration and it would not be safe to rely upon it. That the dying declaration has been recorded by Judicial Magistrate, by itself is not a proof of truthfulness of the dying declaration, which in order to earn acceptability has still to pass the test of scrutiny of the court. There are certain safeguards which must be observed by a magistrate when requested to record a dying declaration. He must record the dying declaration satisfying himself that the declarant is in a proper mental state to make the statement. He must also obtain the opinion of the doctor, if one is available, about the fitness of the patient to make a statement and the prosecution must prove that opinion at the trial in the manner known to law."

(Emphasis supplied)

This judgment has correctly been relied upon by the Supreme Court in **Nallapatti Sivaiah (supra)**.

PW-8 HC Ramphal Singh stated that in the hospital, he obtained the MLC of Mohd Rustam; that the concerned doctor declared him fit for making statement; that he went to the bed of the injured in the hospital; and at the dictation of Mohd Rustam, he recorded his statement (Exh.PW 8/B). He has

further claimed to have recorded a statement of the deceased as Exh. PW 8/B which was in the presence of PW-5. PW 8 has stated that they had reached the hospital at about 10.00/10.30 am. PW 8 further categorically states that the enquiry as to the fitness of the injured Rustam to make statement was made when the MLC was collected from the doctor in the emergency. PW 8 has further stated that upon enquiry from the doctor in the emergency, "he had replied in the affirmative".

. PW 8 has deposed that thereafter they went to the emergency ward; that there were two beds in the room, one occupied by Mohd Rustam while the other was vacant; that one doctor and one nurse were on duty; that he did not mention the name of the doctor or nurse even in his case diary; that he does not remember their names; that no glucose or blood was being given to Mohd Rustam and that it took 10-15 minutes to record his statement.

57. PW 8's explanation for not getting the statement of Mohd Rustam attested by any person is that generally the police only write the statements. PW 8 states that signatures of Mohd Rustam were obtained on the statement; and that he did not ask the educational qualifications of the injured from him. PW-8 denies that he was illiterate.

58. After recording the statement, PW 8 – HC Ramphal states that he attested the same; made his endorsement (Exh.PW 8/C) thereon and sent the rukka to the police station Moti Nagar for registration of the case.

59. PW 5-Ct. Vinod Kumar who had accompanied PW-8 HC Ram Phal to the Ram Manohar Lohia Hospital, corroborates him so far as leaving the police station for hospital on the basis of DD 4A at 9.30 am on 20th July, 1997 is concerned. PW 5, however, states that after collecting the MLC, they had gone to the burns ward. PW 5 states that one doctor and one compounder was present in the room where Mohd Rustam was kept and that he also does not know their names. In contradiction to PW 8, Constable Vinod Kumar asserts that glucose was being administered to the patient and that he did not talk to the doctor or compounder.

60. So far as recording of the statement is concerned, PW-5 Ct. Vinod Kumar deposed that in the ward, HC Ram Phal had stated that he wanted to record the statement of the patient in the burns ward; that the doctor said that he could record the statement and that the doctor was very much there when the statement of Mohd Rustam was recorded by Head Constable Ram Phal.

PW 5 also denied the suggestion that no statement was made by Mohd Rustam or that it was recorded by constable Ram Phal on his own. He asserted that the statement was read over to Mohd Rustam and that he had put his signatures on the said statement. The witness, however, stated that he did not know whether Mohd Rustam was illiterate or not.

61. PW 5 Ct. Vinod Kumar also stated that none of the family members entered the room while the statement was recorded. This witness corroborated PW 8 in that the Mohd Humayun was present in the verandah outside the room.

62. There are other curious aspects to Exhibit PW8/B. If the deceased knew that acid had been poured on him, where was the occasion to refer to a liquid substance (“taral padarth”) in Exhibit PW 8/B.

63. The above statement uses words as “uprokt”; “maujood”; repeatedly uses “va” (which translates into ‘and’); “taral padarth”; “ghayal awastha”; “uprokt vyaktiyon”; “kanooni karyawahi”, amongst others. The language in which Exhibit PW 8/B has been recorded also casts a doubt as to whether this statement is at the dictation of the deceased.

64. So far as the fitness to make the statement is concerned, the learned trial Judge has relied upon the endorsement in the MLC Exhibit PW 6/A to conclude that there was nothing on

record that Mohd Rustam was critical at the time of recording Exhibit PW 8/B. It is the case of the prosecution that the MLC Exhibit PW 6/A was recorded at about 9.15 to 9.30 a.m., whereas Exhibit PW 8/B was recorded after 11.30 a.m. The Judge has noticed that there was no evidence that the deceased was under sedation or any kind of medicines and has disbelieved PW 1 Mohd Humayun that his brother Mohd Rustam gained consciousness only on 21st July, 1997. The fact that the deceased survived for eight days has also influenced the learned trial Judge to hold that his condition was not so serious.

65. The scenario that has been projected by the prosecution is that after the pouring of the acid the injured was suffering such unbearable pain ('burning sensation') that he was rendered unconscious. He remained unconscious not for few minutes, but from when the incident occurred at 4.00 p.m. (as per the MLC Exhibit PW 6/A) or 9.00 p.m. (as per the statement recorded by HC Ramphal Singh-Exhibit PW 8/B), till after 7.00 a.m. in the morning when his brother discovered him. Thus the deceased was in so much pain that he had been rendered unconscious for about ten hours. If such was the nature of the agony which the injured Mohd Rustam was suffering, the same could not have been mitigated by 9.30 a.m. when the doctor

examined him or between 9.30 am and 11.30 am when HC Ramphal and Ct. Vinod Kumar made inquiries and recorded the statement (Exh. PW 8/B) attributed to the deceased.

The standard of fitness of the deceased to give statements which were admissible in evidence as dying declarations which the prosecution had to meet is certainly rendered high in the given facts.

Yet another aspect of the matter needs consideration.

66. The prosecution has carefully shrouded the treatment given to the injured Mohd Rustam in complete secrecy. His treatment chart has not been placed before this court. The patient had admittedly been shifted from the emergency from where he was brought by his brother Mohd Humayun to the Burns Ward where his statements were recorded. It can reasonably be expected that in the hospital, some kind of treatment would have been administered to the injured. It is left to speculation as to the manner in which pain would have been mitigated, whether any medication was administered for this purpose.

67. In the endorsement by PW 8-HC Ramphal Singh (Exhibit PW 8/C), he has written that upon reaching the RML Hospital, he had obtained MLC No.8/E/33/97 with regard to Mohd Rustam on which Dr. Sahib had stated "acid/chemical burns

with blunt injuries” and “fit for statement” whereupon a statement of Mohd Rustam was recorded.

68. A perusal of the MLC (Exhibit PW6/A) shows that on the right side of the document, the nature of injuries etc has been recorded in the hand writing of PW 6 Dr. Vasanthi Ramesh whereas on the left side of this document, the words “fit for statement” Sd/- 20/7/1997” are endorsed. These words (the alleged fitness for statement) are admittedly not in the hand writing of Dr. Vasanthi Ramesh or signed by her. In fact the same is in the portion of the MLC which is not recorded by Dr. Vasanthi Ramesh. Again no name or identity of the person who has endorsed this fitness on Exhibit PW8/B has been brought on record nor has any such doctor been examined. It is important to note that even this endorsement does not mention any time. There is thus no evidence of fitness of the deceased when Exhibit PW8/B was scribed by HC Ramphal Singh.

69. As noticed above, PW-8 HC Ramphal Singh has claimed to have made the inquiry in the emergency which has been replied by a “he” and therefore, the inquiry, if at all, was clearly made from a male doctor and not from Dr. Vasanthi Ramesh (who recorded the MLC).

70. Neither the name nor the identity of any other doctor in the emergency ward has been revealed on record. No such doctor has been examined to establish either the fact that PW 8 actually made any enquiry or fitness of the injured to make any statement.

71. PW 5-Ct. Vinod Kumar states that he does not know the name of the doctor in the emergency from whom the MLC was collected. He makes no reference to any enquiry by PW 8 from any doctor in the emergency about the fitness of Mohd Rustam to make a statement. The reading of the deposition of PW 5 shows that no inquiry with regard to the fitness of the patient to give a statement was made from any doctor by PW 8-HC Ramphal before recording the statement of the deceased.

72. Both PW 5 & 8 have stated that one doctor and one nurse were working on the deceased Mohd Rustam in the Burns Ward when they reached there. Both are unable to give even their names. No such doctor or nurse has been produced in the witness box.

73. PW 5 Ct. Vinod Kumar had stated that glucose was being administered to Mohd Rustam while PW 8-HC Ramphal Singh has categorically denied that anything was administered to him.

74. The above narration would show that PW-5 completely contradicts PW-8 about certification of the fitness of the patient to make the statement. They contradict each other even about the place where the fitness was ascertained. Neither of them is able to give even the identity of the doctor from whom the fitness was determined. The document Exh.PW-8/B also contains no certification of fitness.

75. The prosecution has placed reliance on Exhibit PW 8/B alone before the trial court as a dying declaration. Even if it could be held that the statement when made was in the nature of a complaint or that the same was not required to be attested or be in question and answer form, the question which was required to be posed and answered was whether Mohd Rustam was conscious and in a fit state of mind to make the statement at the actual time when the same is attributed to him.

76. The learned trial judge has correctly noticed that there is no absolute proposition of law that a dying declaration should be in question and answer form or that it must have corroboration so as to support a conviction. This observation cannot be faulted.

77. Merely because Mohd Rustam expired eight days after the incident would not by itself lead to a conclusion that he

was not critical or that he had not been administered any medication or that he was in a fit and conscious state of mind to make the statement.

78. We find that the reliance by the learned trial judge on the evidence of PW 6 Dr. Vasanthi Ramesh for the purposes of determining his fitness much later when the deceased is alleged to have given the statement Exhibit PW 8/B is clearly erroneous and improper. There is no evidence therefore of the fitness of the deceased to make a statement when PW-5 & 8 visited him in the hospital. Exhibit PW-8/B does not satisfy the prescribed tests noticed above and cannot be relied upon as a dying declaration worthy of credence to base a conviction thereon.

Exhibit PW8/G

79. The second statement attributed to the deceased made to HC Ramphal Singh (Exhibit PW8/G) pressed by learned APP before us as another dying declaration reads as follows:-

“Main apne sabka bayano ki tareek karta hu. Jab apne mera bayan liya main ghabraya hua tha. Mera bhai Mohd Humayun mujhe zakhmi halat me lekar aspataal aaya tha. Maine apne bhai ko wo jagah, Karan Memorial Public School, Chara Mandi, Zakhira, najd. Ram Kanta, jahan par mere upar can me rakha acid/chemical teeno ne milkar daala tha, wo jagah mene apne bhai ko aspataal aane se pehle dikha di thi. Us can ka rang peela tha aur ek bachche ki tasveer bani thi. In teeno aadmiyon, Prabhash Sharma, Manoj Kumar, Jaibir ne ek rai hokar mujhe jaan se marne ki niyat se mere upar

acid, chemical fenka tha. Bayan sun liya, theek hai."

The above, when translated, reads as follows:-

"I acknowledge ('tareek') my statement. When you had taken my statement, I was in a worried state. My brother Mohd Humayun brought me in an injured condition to hospital. I had shown my brother the place Karan Memorial Public School, Chara Mandi, Zakhira, Nazd Near Ram Kanta where all three had poured acid/chemical kept in a can over me. Before coming to the hospital, I had shown my brother that place. That can was of yellow colour and there was a picture of one child on it. These three men Prabhash Sharma, Manoj, Jaibir had formed one view ('ek rai') and with the intention of killing me had thrown acid/chemical on me. Heard the statement. It is correct."

80. The use of words which include the reference to 'acid/chemical' 'ek rai' reflects that the statement is not in the words of the deceased.

81. Exhibit PW 8/G does not bear the signatures or thumb impression of Mohd Rustam or of his brother or any relative. It does not bear attestation by any doctor.

82. It is important to note that even on Exhibit PW 8/G (the second statement attributed to the deceased), there is no certification at all of fitness of the deceased to make this statement. So far as the ability of the deceased to make the statement is concerned, PW 8 merely states that a doctor and a nurse were sitting in that room examining a patient. However PW 8 does not give their names or particulars. It is

not even clear as to which patient was being examined. In his cross examination, PW 8 states that he did not even know if this doctor and nurse were the same as the ones who were present when the first statement (Exhibit PW 8/B) was recorded by him. PW 8 is categorical that he is unable to even recollect these persons by face. This statement casts grave suspicion on the presence of a doctor or a nurse on either of the occasions.

83. Interestingly, realizing the gap in the events as have been unfolded by the prosecution, PW 8 has attempted to fill up the deficiency by claiming that the deceased made a second statement Exhibit PW8/G. In this statement, an additional statement has been attributed to the deceased. It is alleged that in his severely burnt condition, the deceased first took his brother PW1 Mohd Humayun to the place of occurrence before proceeding to the hospital. PW1 has not supported the prosecution in his depositions before the court. Given the intense burning which the deceased had suffered, so much so that he was rendered unconscious (for over nine hours or so) and the condition in which he found himself, also having regard to the normal course of conduct of an injured person, it is implausible that the injured would have taken his brother first to the place of occurrence.

84. Importantly PW 8 does not give a whit of an explanation as to where was the need or occasion for recording another statement of the deceased on the 20th of July, 1997. It is not even PW 8 HC Ramphal's submission that Mohd Rustam requested him to visit the hospital and to record a further statement. The treatment administered to Mohd Rustam and the case sheet from the hospital has been completely concealed from the court. There is not an iota of evidence as to what was the treatment administered to him; what was the nature of the medication given to him? Whether any pain relief medication was prescribed and administered? No doctor's certificate is appended to show that the deceased was fit to make a statement. No doctor has been examined to establish the fitness of the deceased when Exh.PW-8/G was scribed.

85. The statement does not bear the thumb imprint or signatures of the deceased or his relatives. There is considerable doubt about its genuineness and Exh. PW-8/G is unworthy of credence.

Statements recorded by the police officials

86. Apart from the above contentions on behalf of the appellants, yet another circumstance to challenge the credibility of the statements Exhibit PW8/B and 8/G has been

pointed out. In the instant case Exhibit PW8/B and Exhibit PW8/G have been recorded by PW8-HC Ram Phal Singh, a police officer which is urged to be inappropriate and unacceptable. Both Mr. Padam Singh and Mr. Bhanu Pratap Singh, learned counsels for the appellants have placed reliance upon the Rules and Orders of the Punjab High Court (Vol. III) as are applicable to the courts in Delhi regarding recording of dying declarations. It is urged that the statement of the injured person ought to have been recorded by the SDM. The same not having been so recorded and/or attested by doctors is rendered suspect and deserves to be rejected.

87. Ms. Ritu Gauba, learned APP has placed reliance on the pronouncement of the Supreme Court reported at **(2011) 1 SCC (Cri) 352 Dhan Singh vs. State of Haryana** in support of her contention that the police had no opportunity to get the statement recorded by the SDM and that the dying declarations recorded by HC Ramphal Singh deserve to be relied upon to maintain the conviction of the appellants. It is urged that given the testimony of the prosecution witnesses, the non-recording of the fitness or certification by the doctor as well as that the failure to obtain signatures of doctor was not fatal to the case of the prosecution. A perusal of these judgments would show that the court made a collective

examination and analysis of the evidence on record and arrived at a finding that the dying declaration was recorded by the Head Constable after the victim was declared fit to make the statement. The court has held that there was no doubt that the statement of the deceased was recorded only after he was declared fit to make the statement by the doctor concerned. The dying declaration was endorsed by the closest relation of the deceased person present at the time.

88. The appellants have urged that given the nature of the statements attributed to the deceased as having been made to PW 8, it was appropriate that his statement be recorded by the Magistrate.

89. An explanation has been suggested by Ms. Ritu Gauba, learned APP that on the 20th of December, 1997 the deceased was not in such serious condition or in expectation of death when Exhibit PW 8/B or Exhibit PW8/G was recorded. It is contended that the deceased survived in hospital for nine days and therefore on 20th July, 1997 he was not in expectation of death. For this reason, the prosecution contends, the statement Exhibit PW 8/B was in the nature of a complaint to the police while Exhibit PW8/G was in the nature of a statement under Section 161 of the CrPC. It is urged that the statements must be considered in this background. It is urged

that only because the condition of the deceased worsened and he expired that the statements attributed to him disclosing the cause of his death are being pressed as dying declarations. Therefore, he cannot be faulted for not getting the statement recorded by the SDM.

90. In **(2003) 2 SCC 571 : 2003 SCC (Cri) 659 Cherlopalli Cheliminabi Saheb vs. State of Andhra Pradesh**, the court held that it was not absolutely mandatory that in every case, the dying declaration to be recorded only by a magistrate and that it would depend on the facts and circumstances of the case. This was reiterated by the Supreme Court in **(2011) 1 SCC (Cri) 352 Dhan Singh vs State of Haryana** wherein in para 17, the court observed that neither Section 32 of the Evidence Act nor Section 162(2) of the CrPC mandate that the dying declaration has to be recorded by a designated or particular person. It was observed that it is by virtue of the development of law and the guidelines settled by the judicial pronouncements that it is normally accepted that such declaration would be recorded by a magistrate or by a doctor to eliminate the chances of any doubt or false implication by the prosecution during investigation.

91. The learned trial judge has ruled in the above terms. The observations of the learned trial judge are based on the fact

that FIR No. 387/1997 was registered after Exhibit PW8/B was written down.

92. It needs no elaboration that in view of the exception provided in sub-section (2) of Section 162 of the Code of Criminal Procedure, 1973, a dying declaration recorded by a police officer during the course of investigation is rendered admissible in evidence. However, the Supreme Court has repeatedly cautioned that the investigating officers are interested in the success of the investigation and that the investigation officer himself recording a dying declaration during the course of investigation ought not to be encouraged. In fact, the courts have rejected such declarations upon the failure of the police to explain as to why the dying declaration could not be recorded by the magistrate or why such declaration could not be recorded in question-answer form so as to reflect correctly what was asked and what was answered by the deceased. A copiously worded or neatly structured dying declaration also incites suspicion for the reason that it may suggest tutoring or incorporation of facts which may not have taken place as the investigating officer is interested in success of investigation. (Ref: **(1976) 3 SCC 104 Munnu Raja vs. State of M.P. (para 1 at 108); (1979) 4 SCC 332 Dalip Singh & Os. Vs. State of Punjab.**)

93. Learned counsel for the appellants has also emphasised that it would be improper to place reliance on the statements attributed to the deceased in the instant case as having been made to or recorded by the police officer. In this regard, learned counsel has strongly placed reliance on **Chapter 13-A** of the **Rules & Orders** of the **Punjab High Court (Vol III)** as applicable to Delhi—which relate to recording of dying declarations. The relevant extract of these rules reads as follows:-

“2. Dying declarations to be recorded by Judicial Magistrates—(i) Where a person whose evidence is essential to the prosecution of a criminal charge or to the proper investigation of an alleged crime, is in danger of dying before the enquiry proceedings or the trial of the case commences, his statement, if possible, be got recorded by a Judicial Magistrate. When the police officer concerned with the investigation of the case or the medical officer attending upon such person apprehends that such person is in the danger of dying before the case is put in Court, he may apply to the Chief Judicial Magistrate, and, in his absence, to the senior most Judicial Magistrate present at the headquarters, for recording the dying declaration.

(ii) On receiving such application, the Judicial Magistrate shall at once either himself proceed, or depute some other stipendiary Judicial Magistrate to record the dying declaration.

3. Fitness of the declarant to make the statement should be got examined—Before proceeding to record the dying declaration, the Judicial Magistrate shall satisfy himself that the declarant is in a fit condition to make a statement, and if the medical officer is present, or his attendance can be secured without loss of time, his certificate as to the fitness of the declarant to make a statement should be obtained. If, however, the circumstances do not permit waiting or the attendance of the Medical Officer, the Judicial Magistrate may in such

cases proceed forthwith to record the dying declaration but he should note down why he considered it impracticable or inadvisable to wait for a doctor's attendance.

4. The statement of the declarant should be in the form of a simple narrative—The statement, whether made on oath or otherwise, shall be taken down by the Judicial Magistrate in the form of a simple narrative. This, however, will not prevent the Judicial Magistrate from clearing up any ambiguity, or asking the declarant to disclose the cause of his apprehended death or the circumstances of the transaction in which he sustained the injuries. If any occasion arises for putting questions to the dying man, the Judicial Magistrate should record the question also the answers which he receives. The actual words of the declarant should be taken down and not merely their substance. As far as possible the statement should be recorded in the language of the declarant or the Court language.

5. Signatures or thumb impression of the declarant to be obtained to token of the correctness of the statement—At the conclusion of the statement, the Judicial Magistrate shall read out the same to the declarant and obtain his signature or thumb-impression in token of its correctness unless it is not possible to do so. The dying declaration shall be placed in a sealed cover and transmitted to the Judicial Magistrate having jurisdiction to deal with the case to which it relates.

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7. Recording of a Dying declaration by a Police Officer or Medical Officer—Where a dying declaration is recorded by a Police Officer or a Medical Officer, it shall, so far as possible, be got attested by one or more of the persons who happen to be present at the time.

8. Fitness of the declarant to make a statement to be certified by the Judicial Magistrate or other officer concerned—The Judicial Magistrate or other officer recording a dying declaration shall at the conclusion of the dying declaration certify that the declarant was fit to make a statement and it contained a correct and faithful record of the statement made by him as well as of the questions, if any, that were put to him by the justice recording the statement. If the accused or his counsel happens to be present at the time the dying declaration is recorded, his presence and objection, if any, raised by him shall be noted by the Judicial

Magistrate or the officer recording the dying declaration, but the accused or his counsel shall not be entitled to cross-examine the declarant.

9. Dying Declaration should be a free and spontaneous—*It is the duty of the person recording a dying declaration to take every possible question to ensure the making of a free and spontaneous statement by the declarant without any prompting, suggestion or aid from any other justice."*

(Emphasis supplied)

94. Placing reliance on the above rules, it is contended that in the instant case, the prosecution has completely failed to abide by the above guidelines. It is urged that on the examination of the evidence placed before the trial judge, the statements attributed to the deceased are completely unworthy of credence for this reason as well.

95. So far as these rules are concerned they have come up for consideration before the Supreme Court in **AIR 1986 SC 250 Luxman Kumar vs. State** as well as before this court in the judgment reported at **40 (1990) DLT 238 (DB) Surender Singh vs. State.**

96. The above narration of the facts and the evidence in the present case would show that neither the doctor nor the police officers have complied with the safeguards prescribed under the Rules. The non-compliance of the Rules was one of the circumstances which weighed with the Division Bench of this court in the judgment reported at **40(1990) DLT 238**

Surender Singh vs. State to hold that it was unsafe to act solely on the dying declaration recorded by a doctor on the MLC.

97. In **(2001) AIR SCW 2481 Laxmi vs. Om Prakash & Ors.**, the Supreme Court has deprecated the practice of the investigating officer recording dying declarations in the following terms:-

*"29. A dying declaration made to a police officer is admissible in evidence, however, the practice of dying declaration being recorded by investigating officer has been discouraged and this Court has urged the investigating officers availing the services of Magistrate for recording dying declaration if it was possible to do so and the only exception is when the deceased was in such a precarious condition that there was no other alternative left except the statement being recorded by the investigating officer or the police officer later on relied on as dying declaration. In **Munnu Raja and Anr. Vs The State of Madhya Pradesh** - 1976CriLJ1718, this Court observed - "investigating officers are naturally interested in the success of the investigation and the practice of the investigating officer himself recording a dying declaration during the course of an investigation ought not to be encouraged". The dying declaration recorded by the investigating officer in the presence of the doctor and some of the friends and relations of the deceased was excluded from consideration as failure to requisition the services of a Magistrate for recording the dying declaration was not explained. In **Dalip Singh Vs. State of Punjab** [1954]1SCR145 : [1954]1SCR145 this Court has permitted dying declaration recorded by investigating officer being admitted in evidence and considered on proof 'that better and more reliable methods of recording dying declaration of injured person' were not feasible for want of time or facility available. It was held that a dying declaration in a murder case, though could not be rejected on the ground that it was recorded by a police officer as the deceased was in a*

critical condition and no other person could be available in the village to record the dying declaration yet the dying declaration was left out of consideration as it contained a statement which was a bit doubtful."

(Underlining by us)

98. In the decision dated **14th September, 2010** of the Division Bench in **Crl.Appeal No. 797/2001 Diwan Singh vs. State**, this court did not accept a dying declaration recorded by the investigating officer inter alia for the reason that cuttings and over-writings therein were not explained by the prosecution to base a conviction thereon; it was also observed that the same was not in the language of the deceased nor in question and answer form. The attestation by the doctor was not contemporaneous in time. Furthermore, the doctor who had given the attestation was not examined. The content of the declaration as well as the failure to give an explanation as to why it was not recorded by the Magistrate were circumstances which weighed with the court in rejecting the statement attributed to the deceased. In this regard, the court observed as follows :-

*"29. Next is the alleged dying declaration of the deceased allegedly recorded by the Investigation Officer. The prosecution has not even tried to give any explanation as to why it wasn't recorded by the Magistrate and what were the circumstances, that the alleged dying declaration had to be recorded by the Investigating Officer. In **Balak Ram v. State of U.P.(1975) 3 SCC 219** the Apex Court had held that though the dying declaration was alleged to have been*

recorded by Investigation Officer but in absence of any explanation as to why it was not recorded by a Magistrate in the usual course, High Court treated the statement of the deceased to be one recorded under section 161 of Cr. P.C and not a dying declaration. Though in the referred case the dying declaration was not signed by the deceased, however, even in the present case it has not been fully established that the dying declaration was thumb marked by the deceased. PW 7 Dr. Savita who had allegedly attested the dying declaration at 11.30 PM though it was allegedly recorded at 11.30 AM did not depose that in her presence the dying declaration was thumb marked by the deceased after it was read over to her by the Investigating Officer. Rather she deposed that fresh burns involved the entire body except the small area on back. She did not state that the thumb of the deceased was burnt to the extent that the mark could not be given from it. The post mortem report Ex. PW 8/1 also does not show that the thumbs of the deceased were not burnt or despite burns on the thumb, impression could be obtained from the thumb. In **Mannu Raja Vs State of M.P., (1976) 3 SCC 104** in para 11 at page 108 the Supreme Court had held that the Investigating Officers are interested in the success of investigation and the Investigation Officer himself recording a dying declaration during the course of investigation ought not to be encouraged. The prosecution has failed to divulge any details as to why the Magistrate could not record the alleged dying declaration. Admittedly the deceased was admitted at 11.00 a.m and was alive for couple of hours before succumbing to burns. There is no explanation as to why the dying declaration could not be recorded in question answer form, in order to reflect as to what was asked and what was answered by the deceased. This is also to be noticed that the dying declaration which is copiously worded or neatly structured excites suspicion for the reason that it bears the traces of tutoring or incorporating such facts which may not have been told by the deceased. From the dying declaration Ex PW 13/2 it is apparent that it is the language of the Investigating Officer and not the language of the deceased.”

99. At this stage, a reference can usefully be made to two Division Bench pronouncements of this court reported at **1987**

3 Crimes 747 Kaushalya & Ors. vs. State and (1984) 1 Crimes 1 Jagdish Lal Malhotra vs. The State relied upon by the appellants.

100. In **(1987) 3 Crimes 747 Kaushalya & Ors. vs. State**, the appellant had been convicted for offence under section 302/34 only on the basis of the dying declaration recorded by the investigating officer. The same was disbelieved inter alia for the reason that the same had not been recorded in question and answer form; it had not been attested by any doctor or nurse or any of the relatives of the deceased although they were available when the statement was recorded; the doctor was not asked to record the statement and the deceased had been given a pathedine injection as part of the treatment.

It is noteworthy that the court had referred to the pronouncements of the aforenoticed rules which are applicable to the Delhi area with regard to recording of the dying declaration.

101. In **(1984) 1 SCC 1 Jagdish Lal Malhotra vs. The State**, the appellant was convicted for murder of his wife by the Sessions Judge solely on the basis of his wife's dying declarations. The appellant had challenged the dying declaration including the one recorded by the investigating

officer. The court had ruled that if the statement made or facts stated in the dying declaration is at variance with the other evidence of the prosecution in such matters, the dying declaration will be considered untrustworthy and suspicious.

102. In **(1999) 2 SCC 126 Paras Yadav & Ors. vs. State of Bihar**, it has been ruled that the statement of a deceased recorded by a police officer in a routine manner as a complaint can be taken as a dying declaration after the death of the injured if he was found to be in a fit state of health to make a statement.

103. We are unable to appreciate as to how the safeguards postulated by law and judicial pronouncements would stand diluted because the FIR had not been registered and formal investigation had not commenced on 20th of July, 1997 when Exhibit PW8/B was recorded or that PW 8 was only enquiring into an offence under Section 324 IPC when Exhibit PW8/G was recorded. The Rules pressed by the appellants actually incorporate the various safeguards laid down by the Supreme Court in the several judgments. The judicial precedents noticed above would show that the Supreme Court has repeatedly emphasised the scrutiny which a statement by a dead person with regard to the cause of his death, has to be subjected to. Such scrutiny is prescribed not only in respect

of a statement to the SDM, but even in respect of statements to relatives; chance witnesses; investigating officers; doctors; medical attendants etc.

104. In view of the above, merely because HC Ramphal Singh was making the inquiry pursuant to DD 4A and recorded Exhibit PW8/B or Exh. PW-8/G during investigation, would not impact the scrutiny which it has to undergo before being rendered admissible in evidence under Section 32 of the Indian Evidence Act or dilute the standards it has to meet, especially with regard to the fitness and voluntariness of the statements.

105. The question which the trial court in the instant case was thus required to consider is not as to whether Exhibit PW 8/B, when recorded, was in the nature of a dying declaration or a statement under Section 161 of the CrPC or in the nature of a complaint. Before this court, the statements have been pressed as dying declarations under Section 32(1) of the Evidence Act and that it fell within the exception of Section 162(2) of the Code of Criminal Procedure. The trial court was required to be satisfied that the statements satisfied the tests applicable to dying declaration which render it admissible in evidence on which it was safe to base the conviction of the accused.

106. Perusal of the trial court record shows that in an unexhibited undated death summary, it has been stated that the patient was admitted on 20th July, 1997 and was shifted to Ward-II on 21st July, 1997. It is further recorded that on 27th July, 1997, the patient suddenly developed complications and expired on 8.50 a.m. on 28th July, 1997.

107. The above discussion would show that the investigating officer had nine days while the deceased was in hospital to get the statement of Mohd Rustam recorded by the Magistrate. As per the death report given by the doctor, his condition had worsened only on 27th July, 1997. Even then, the police unreasonably made no effort at all to secure a magistrate for recording the statement of the deceased.

The investigating officer thus had enough time had he tried even on 27th July, 1997 to ensure that the statement of the deceased was got recorded from the Magistrate.

108. In **(1975) 3 SCC 219 Balak Ram vs. State of U.P.**, the dying declaration was alleged to have been recorded by the investigating officer. In the absence of any explanation as to why it was not recorded by the Magistrate in the usual course, the High Court treated the statement of the deceased to be one recorded under Section 161 of the CrPC and not as a dying declaration. On the same issue, in **(1979) 4 SCC 332 Dalip**

Singh & Ors. Vs. State of Punjab, the Supreme Court observed that although dying declaration recorded by a police officer during the course of investigation is admissible under Section 32 of the Indian Evidence Act in view of the explanation provided in Sub-section (2) of Section 162 of the Code of Criminal Procedure, it is better to leave such dying declarations out of consideration until and unless the prosecution satisfies the court as to why it was not recorded by a Magistrate or by a Doctor.

109. In **(2008) 3 SCC 691 Shaikh Rafiq & Anr. Vs. State of Maharashtra** also the court observed that the dying declaration and the manner in which it was recorded by the Asstt. Sub-Inspector could not be relied upon. The police officer had failed to call the executive magistrate though available and also did not take certificate of fitness.

110. The position in the instant case is similar. In the present case as well, the prosecution does not even venture to suggest as to why the SDM could not be called.

It is not the case of prosecution that the executive magistrate was not available.

111. PW 8 HC Ramphal Singh has made no enquiries even from the RML Hospital after 20th of July, 1997 where the deceased was lying admitted. He categorically states that he

did not even go to the hospital, even to enquire about the health of Mohd Rustam after 20th July, 1997; that he did not conduct any investigation of the case after 24th July, 1997 till the death of Mohd Rustam on 28th July, 1997. HC Ramphal Singh has further stated that he handed over investigation to Insp P.P. Singh- PW 10 after 12 noon on 28th July, 1997.

The conduct of the police officials casts considerable doubt on the statements allegedly recorded by them.

Even if it could be held that the deceased had made the alleged dying declarations attributed to him in a fit state of mind, they suffered from other such serious infirmities as would mandate/require their exclusion from consideration?

112. The evidence of PW 1 Mohd Humayun does not disclose any statement at all made by the deceased nor does the evidence of PW 9 Ct. Rajinder Singh, the Duty Officer who would be amongst the first persons to whom the deceased would have related the occurrence and details of his assailants.

113. In the instant case, the record does not show that the deceased disclosed the names of his assailants at the first opportunity. So far as the statement recorded on the MLC Exhibit PW 6/A is concerned, there is no reliable evidence at all

with regard to the fitness of the deceased person. There is reasonable doubt that the same records information disclosed by the deceased.

114. We find that there is material contradiction with regard to the time of the occurrence; the identity of the assailants; the manner in which the deceased was attacked between the statements attributed to him.

115. As noticed above, so far as the statements recorded by HC Ramphal Singh are concerned, neither Exhibit PW 8/B nor Exhibit PW 8/G reflect that the fitness of the deceased person was ascertained before these have been recorded.

116. Exhibit PW 8/B was recorded apparently between 11.30 am and 12 noon i.e. more than fourteen hours after the occurrence, while Exhibit PW8/G was recorded at about 3.00 p.m. which is more than seventeen hours after the occurrence.

117. There is no evidence at all before this court that despite such burn injuries and the resultant pain, which rendered the deceased unconscious between either 4.00 p.m. or 9/9.30 p.m. on 19th July, 1997 to 7 a.m. on 20th July, 1997, he was in a proper state of mind and capable of making any of the statement attributed to him.

118. It has been held that a statement cannot be rejected straightway merely because it is recorded by a police

personnel and the thumb impression of the deceased was affixed. (Ref : **(1999) 3 SCC 507 State of Rajasthan vs. Teja Ram; AIR 1975 SC 667 Rajik Ram vs. Jaswant Singh Chauhan ; AIR 1959 SC 1012 Tahsildar Singh & Anr. Vs State of Uttar Pradesh**).

In the instant case, the brother of the deceased has stated that he was illiterate. The statement attributed to the deceased Exhibit PW8/B are allegedly claimed to have been signed by him while Exhibit PW8/G is neither signed nor bears an identified thumb impression. In the given facts, the prosecution's claim that the same was in the nature of a statement under Section 161 of the CrPC therefore does not inspire confidence.

119. It is important to note that in Exhibit PW 8/B, the deceased has stated that he was forcibly compelled to imbibe liquor. PW 6 Dr. Vasanthi Ramesh does not refer to any observation that would indicate or suggest that Mohd Rustam had consumed alcohol.

120. Learned counsel for the appellant has urged at great length that if Mohd Rustam had told Mohd Humayun or the doctor that his employers had poured acid on him, DD 4A would have been recorded very differently.

121. It is noteworthy that Mohd Rustam had several opportunities to disclose the occurrence. It is the case of the prosecution that Mohd Humayun, the brother of the deceased had received telephonic information that his brother was lying at the spot in an injured state. Therefore, the deceased had opportunity to disclose the manner in which he was injured and the particulars of the assailants to the persons who had met him at the spot. Mohd Rustam had an opportunity to disclose the details of the occurrence to his brother Mohd Humayun. The deceased also had contact with the TSR driver who transported the brothers to the hospital and thereafter, at the RML Hospital, they would have met Duty Constable Ct. Daya Nand. The deceased then had opportunity to disclose the incident to the doctor who met them in the casualty and again to the hospital personnel including doctors, nurses and compounders in the emergency ward where he was treated for almost nine days. The deceased or his brother made no such disclosures.

122. DD No.4A which is the earliest information given by the duty constable. It says that Mohd Humayun had got his brother Mohd Rustam admitted in the hospital with injuries from pouring of acid. But there is no mention in DD 4A of the manner in which the injuries were sustained or the name(s) of

the assailant(s) in this important piece of evidence. In case the deceased had disclosed how he secured the injuries to Mohd Humayun while in transit to the hospital or at any time, the same would have been disclosed to PW9 Ct. Rajinder Singh who would have reported the same to the police station. DD No.4A makes no reference to any aspect of the statements attributed to Mohd Rustam.

123. In **1976 CriLJ 1548 K. Ramachandra Reddy & Anr. vs. The Public Prosecutor**, the court had an opportunity to construe alleged declarations attributed to the deceased in similar circumstances. The court observed that the strictest scrutiny and closest circumspection has to be applied to a statement attributed to a dead person as a dying declaration which is not a statement on oath nor in the presence of the accused and cannot be subjected to cross examination. In this case also, the court commented upon the conduct of the deceased in not disclosing or not making the disclosure statement on previous occasions if he had the opportunity. It was held that this was either for the reason that the deceased was not conscious at all and was not in a position to talk to anybody or that even though he was conscious, he did not disclose the occurrence to anybody because of the stress and essence of the assault which took place at a time of darkness

and he was not able to identify the assailants. The court placed reliance on the earlier judicial precedent of the Supreme Court in ***Khushal Rao vs. State of Bombay (supra)*** and observed that the case falls within principles 5 and 6 laid down therein.

The submission of learned counsel for the appellant in the given facts is therefore not without substance.

Whether the incident was possible in the manner alleged?

124. An examination of the contents of the statement attributed to the deceased in the MLC (Exhibit PW6/A); Exhibit PW8/B and Exhibit PW8/G is also necessary.

125. The events as projected in the MLC (Exhibit PW6/A) juxtaposed against Exhibit PW 8/B as well as Exhibit PW8/G suffer from material variations, even contradictions. They do not find mention in the statement of any of the witnesses and are unsupported by the investigation on the spot of occurrence as well as where the deceased was discovered.

126. Dr. Vasanthi Ramesh has also noted in Exhibit PW6/A that the incident occurred on 4.00 p.m. on 19th July, 1997. The prosecution which has led evidence of Exhibit PW8/B which states that the incident was at 9.00 p.m. on the 19th July, 1997. There is no explanation at all for this.

127. It is noteworthy that Exhibit PW6/A categorically refers to beating by a cane. The deceased however has not alluded to any beating by a cane in Exhibit PW 8/B. There is no reference to a cane in any other statement attributed in the deceased. Even the inadmissible disclosure statements attributed to the accused persons (which are wrongly exhibited on record) make no reference to any cane. No cane is mentioned by any of the witnesses. No recovery thereof has been effected.

128. In the MLC (Exhibit PW 6/A) Dr. Vasanthi Ramesh has categorically referred to a singular employer. No name of the employer is mentioned. In ExhibitPW8/B the number of assailants has become multiple. The prosecution has not even attempted to suggest an explanation.

129. The trial court has found that Mohd Rustam was not sure about the identity of the third appellant and therefore Exhibit PW 8/B cannot be relied upon to convict Jaibir.

130. At the same time, the prosecution has attempted to prove that Jaibir was a driver of the truck in which the deceased was a conductor and charged him with having held the deceased with Prabhash Sharma to enable Manoj Kumar to pour acid over him. The prosecution does not even suggest an explanation for the cuttings in the name and has filed no appeal against the acquittal of Jaibir.

131. It is trite that the dying declaration could be believed in part. Therefore, the court could rely upon Exhibit PW8/B even in part. However, the issue which has been raised before this court is whether such statements attributed to deceased Mohd Rustam could be treated as dying declaration and conviction of the appellants could be based solely on them or whether other admissible evidence was required.

132. In ***AIR 2008 SC 19 (para 23) Nallapati Sivaiah vs. Sub-Divisional Officer, Guntur***, the court rejected the reliability of the dying declaration recorded by the magistrate for the reason that before the actual recording, he did not seek and obtain any opinion and certificate or endorsement from the duty doctor as to the physical and medical condition of the declarant to give the statement. The magistrate did not put any question as to whether the declarant was making a voluntary statement and whether he was in a fit condition to make the statement and whether any sedatives have been administered.

133. Learned counsels for the appellants has also assailed the relevance and reliance on statements attributed to the deceased in the impugned judgment also on the ground that the post-mortem report Exhibit PW 7/A and the opinion of the forensic expert does not support the prosecution at all or the

occurrence as alleged in the dying declarations. It is essential to therefore consider the **post mortem report** as well as the opinion of PW7 Dr. K.L. Sharma who conducted the post-mortem therein.

134. In his cross examination PW 7-Dr. Sharma has answered a specific question and stated that the sulphuric acid alleged to be thrown over the body of the deceased was not in sufficient quantity to cause immediate death.

135. The doctor PW-7, Dr. K.L. Sharma has been cross examined extensively with regard to the position of the body viz-a-viz the mode of throwing of the acid and which would result in the burns as resulted on the body of the deceased. One of the suggestions put to him was answered thus :-

"It is correct that if the person is carrying the acid of bottle and accidentally falls by breaking the same the similar type of injuries as mentioned in post-mortem report are possible. If the deceased was caught hold by other party and in the erect position if the acid is poured that the injuries mentioned in post-mortem report are no possible."

136. Two other questions put to the doctor and the doctor's answers thereto deserve to be considered in extenso and read as follows :-

"Q. If the can of 2 litre full of sulphuric acid is held by one person and a person is caught hold by two other persons and the third person holding the can poured the acid over the person over the body including head

while the persons on whom the acid is poured, then these injuries are possible or not?

A. *It is correct that under these circumstances the injuries mentioned in post-mortem report will not be possible to be caused in this position and in this circumstances all the four people using holding the other party and pouring the acid shall sustain the burn injuries including all the four persons. Volunteered If under this position the person is caught hold in **supine position** and the acid containing 2 ltr. is poured upon him such injuries mentioned in post-mortem are possible. In this position (**supine**) if 2 ltr. qty of sulphuric acid is poured shall cause immediate death.*

Q. *If a person is in supine position and 2 litre sulphuric acid is poured on his body while two persons were holding him then will it cause injuries on his forehead, head, both sides chick, neck and all the lower part of the body including chest not in patches?*

A. *It is incorrect to suggest that the 2 litres of acid is poured in supine position shall cause all such burn injuries over the forehead, head, chicks, neck, front of chest and abdomen and the lower extremities. It will depend only on the method of throwing the acid by other party at which part of the body.*

If the person is sitting and is caught hold by two persons and acid is thrown over him these injuries are not possible."

137. The doctor who has conducted the post mortem has thus categorically recorded on Exhibit PW 7/A that "PM findings are consistent of pouring the sulphuric acid over the deceased in supine position by other party as suggestive by corroded distribution over his body."

138. As per Exhibit PW8/B, Mohd Rustam had categorically stated that Prabhash Sharma had told him to sit down, whereafter alcohol was forced on him; he was beaten and acid was thrown over him whereafter because of the burning sensation he had turned unconscious and fallen down. Therefore, according to the deceased, when the acid was poured over him, he was not in a supine position.

139. There is also no evidence that the appellants had suffered any burn injuries which, as per PW-10 Dr. K.L. Shrama, was inevitable because as per Exhibit PW8/B the acid was poured while the deceased was sitting, that is not in supine position.

140. An examination of Exhibit PW 8/B as well as Exhibit PW8/G against the testimony of the forensic expert PW 7 Dr. K.L. Sharma as well as the post-mortem report and opinion Exhibit PW 7/A given by him thus shows that the deceased could not have received the injuries in the manner alleged to have been stated by him as recorded in Exhibit PW 8/B.

141. Upon examination of Exhibit PW6/A juxtaposed against the other statements attributed to the deceased. There appears to be substance also in the contention on behalf of the appellants that the incident as alleged by the prosecution in the MLC (Exhibit PW6/A), Exhibit PW8/B or Exhibit PW8/G could

not have so occurred and there is doubt on the correctness and authenticity of Exhibit PW 8/B as well as Exhibit PW8/G.

Non-proximity of the statements attributed to the deceased and his death

142. An alternate plea is urged on behalf of the appellants. It is urged that even if this court could accept that the attributed statements were actually made by the deceased, there is no evidence that there was any intention of the appellants to cause the death of the deceased; that the post-mortem report and the long period of hospitalisation of Mohd Rustam clearly show that the appellants could not be held guilty for commission of the offence of murder.

143. It is trite that merely because death of the deceased occurred some days after the offence, would not convert the offence, if held proved, into culpable homicide not amounting to murder. In the pronouncement reported at **(2002) 1 SCC 22 Patel Hiralal Joitaram vs. State of Gujarat**, the deceased expired 14 days after being burnt. The Supreme Court held that it was inconceivable that the appellant would not have known that setting the deceased ablaze would cause her death. Also discussing the scope and ambit of statements, which would be admissible under Section 32 of the Evidence Act in the context of the same being treated as dying declarations, the Supreme Court observed as follows :-

"29. The above provision relates to the statement made by a person before his death. Two categories of statement are made admissible in evidence and further made them as substantive evidence. They are: (1) His statement as to the cause of his death; (2) His statement as to any of the circumstances of the transaction which resulted in his death. The second category can envelope a far wider amplitude than the first category. The words "statement as any of the circumstances" are by themselves capable of expanding the width and contours of the scope of admissibility. When the word "circumstances" is linked to "transaction which resulted in his death" the sub-section casts the net in a very wide dimension. Anything which has a nexus with his death, proximate or distant, direct or indirect, can also fall within the purview of the sub-section. As the possibility of getting the maker of the statement in flesh and blood has been closed once and for all the endeavour should be how to include the statement of a dead person within the sweep of the sub-section and not how to exclude it therefrom. Admissibility is the first step and once it is admitted the court has to consider how far it is reliable. Once that test of reliability is found positive the court has to consider the utility of that statement in the particular case."

144. The court placed reliance on the pronouncements in **1984 CriLJ 1738 Sharad Birdhichand Sarda vs State of Maharashtra** wherein it has been held as follows :-

"The test of proximity cannot be too literally construed and practically reduced to a cut-and-dried formula of universal application so as to be confined in a straitjacket. Distance to time would depend or vary with the circumstances of each case. ... Sometimes statements relevant to or furnishing an immediate motive may also be admissible as being part of the transaction of death. It is manifest that all these statement come to light only after the death of the deceased who speaks from death."

145. In **(1997) CriLJ 833 (SC) Rattan Singh vs. State of H.P.**, the Supreme Court held that there need not necessarily

be a direct nexus between “circumstances” and “death”. It is enough if the words spoken by the deceased refer to any circumstance which has connection with any of the transactions which ended up in the victim’s death.

146. Injuries suffered by the deceased by the gunshot at the hands of the accused developed to toxaemia which caused his death in ***AIR 1997 SC 234 Bhagirath vs. State of Haryana.***

The Supreme Court held that the trial court erred in holding that, as the death was not due to injuries caused by the accused, the dying declaration was inadmissible in evidence.

147. In the pronouncement reported at ***(2000) 6 SCC 671 Sudhakar & Anr. Vs. State of Maharashtra***, the Supreme Court had held that the statement in question was not in the nature of the dying declaration. However, the court had pointed out the difference between the Indian law and the English law. It was noticed that under English law, the declaration should have been made under the sense of impending death, whereas under the Indian law, it was not necessary for the admissibility of the dying declaration that the deceased at the time of making it should have been under the expectation of death. The court cited with approval, the following observations of the pronouncements in ***1959 (1) MLJ***

246 Chinnavalayan vs. State of Madras wherein the pithily

put legal position was culled out in the following terms :-

"Thus, from a review of the authorities mentioned above and the clear language of Section [32\(1\)](#) of the Evidence Act, the following propositions emerge:

(1) Section [32](#) is an exception of the rule of hearsay and makes admissible the statement of a person who dies, whether the death is a homicide or a suicide, provided the statement relates to the cause of death, or exhibits circumstances leading to the death. In this respect, as Indicated above, the Indian Evidence Act, in view of the peculiar conditions of our society and the diverse nature and character of our people, has thought it necessary to widen the sphere of Section [32](#) to avoid injustice.

(2) The test of proximity cannot be too literally construed and practically reduced to a cut-and-dried formula of universal application so as to be confined in a strait-jacket. Distance of time would depend or vary with the circumstances of each case. For instance, where death is a logical culmination of a continuous drama long in process and is, as it were a finale of the story, the statement regarding each step directly connected with the end of the drama would be admissible because the entire statement would have to be read as an organic whole and not torn from the context. Sometimes statements relevant to or furnishing an immediate motive may also be admissible as being a part of the transaction of death. It is manifest that all these statements come to light only after the death of the deceased who speaks from death. For instance, where the death takes place within a very short time of the marriage or the distance of time is not spread over more than 3-4 months the statement may be admissible under Section [32](#).

(3) The second part of Clause (1) of Section [32](#) is yet another exception to the rule that in criminal law the evidence of a person who was not being subjected to or given an opportunity of being cross-examined by the accused, would be valueless because the place of cross-examination is taken by the solemnity and sanctity of oath for the simple reason that a person on the verge of

death is not likely to make a false statement unless there is strong evidence to show that the statement was secured either by prompting or tutoring.

(4) It may be important to note that Section [32](#) does not speak of homicide alone but includes suicide also, hence all the circumstances which may be relevant to prove a case of homicide would be equally relevant to prove a case of suicide.

(5) Where the main evidence consists of statements and letters written by the deceased which are directly connected with or related to her death and which reveal a telltale story, the said statement would clearly fall within the four corners of Section [32](#) and, therefore, admissible. The distance of time alone in such cases would not make the statement irrelevant."

148. Anything which has a nexus with his death, proximate or distant, direct or indirect can also fall within the purview of sub-section 1 of Section 32 of the Indian Evidence Act. It is the impossibility of getting the maker of the statement in flesh and blood that makes such a statement admissible in evidence by virtue of sub-section 1 of Section 32 of the Indian Evidence Act. Admissibility of course is the first step. Once admitted, the court is duty bound to consider how reliable the statement is. Only thereafter, the court would be considering the utility of the statement in the particular case.

149. In this background, it would be improper to exclude the statements attributed to the deceased Mohd Rustam which relate to the cause of his death, or as to any of the circumstances of the transaction which resulted into his death

for the sole reason that there is a gap between date of making of the statement and the date of the death. However, in the light of the other circumstances notice above, it would be unsafe to rely on the alleged statements to base a finding of guilt of the appellants thereon.

In this case resting on circumstantial evidence, the matter does not end on an examination of only the dying declarations attributed to the deceased. It is necessary to consider the other circumstances as well, we proceed to examine in seriatum hereafter.

Place of discovery of the deceased

150. At this stage, we may also refer to the evidence with regard to the place where the injured had been discovered. It is in the evidence of Mohd Humayun PW 1 that the deceased was living in Zakhira.

151. The most important links in the chain of events are completely missing.

152. PW 1-Mohd Humayun had stated that jhuggies in Amar Park were occupied by labourers who drink at night. He categorically stated that his brother used to heavily drink everyday.

153. This statement is corroborated by PW 1 Mohd Humayun who has further stated that 15-20 persons sleep on the terrace

of Karan Memorial Public School and that trucks come and go throughout the day and night near that school. It is further in the evidence that public persons in these places are present all 24 hours in the area.

154. PW 8 HC Ramphal Singh also stated that there was always a large number of persons/public including truck drivers on places around the Najafgarh road, Rama Road, Chambery all 24 hours and that a large number of public persons were present in those place during the morning.

155. So far as the discovery of the injured is concerned, apart from the statement in Exh.PW 8/B attributed to the deceased, the only evidence on record is that of Exh.PW 1 Mohd Humayun who had stated that Mohd Rustam was found by him in an injured lying in naked condition by the roadside of Amar Park, Zakhira which was near the fly over of New Rohtak Road near the gate of BD Credit Private Limited Motors & General Finance, Zakhira. He has further stated that Mohd Rustam was residing in a jhuggi near the place where he was discovered and that there were 250 jhuggies at that place. The location of the jhuggi was at a distance of ten steps from the road; that the BD Credit Private Limited Motors & General Finance was at a distance of 500 to 600 yards from Karan Memorial Public

School (the sites of the offence). The police witness refers to thousands of jhuggies.

156. Apart from a bald oral statement by PW 8-HC Rampal Singh, he has made no efforts to ascertain the alleged location of the occurrence. He has made no efforts to make inquiries from this spot. Material evidence with regard to the manner in which Mohd Rustam reached the spot of his discovery, if had been unravelled, would have shed valuable light on the persons involved in the offence and provided the link as to the manner as well as persons who caused the injury and transported the injured Mohd Rustam from the alleged place of his offence to where he was discovered. It cannot at all be contended that this was not a material fact.

157. PW 8 has further stated that he had inspected the place in front of the jhuggi referred to by Mohd Rustam but did not inspect the jhuggi number WZ 85, D-273, Amar Park, Zakhira where the injured Mohd Rustam used to reside. He also stated that there was a shop near the spot where Mohd Rustam had found himself which spot was one and a half kilometre from Karan Memorial Public School.

158. PW 8 stated that in the morning of the 20th of July, 1997 the injured (deceased Mohd Rustam) had found himself lying injured in front of his jhuggi near the tea shop.

159. The deceased is stated to have discovered by his brother PW 1 Mohd Humayun in nude condition. There is no recovery of the clothes of the deceased from the spot. There is no explanation at all by the prosecution as to the fate of the clothes of the deceased which he was wearing at the time of the occurrence. It, therefore, remains a mystery as to what happened to the clothes worn by the injured person and how he was transported from the place of occurrence to the site of his recovery.

160. HC Ram Phal PW 8 has stated that the Bharti Public School was also adjacent to the Karan Memorial Public School and that at the time of his visit in the forenoon of the 20th of July, 1997, both the schools were closed. PW 8 does not appear to have found anything unusual in the same and has stated that he felt no need to make inquiry from any person as to how and why these schools had closed before 12.00 noon when he visited the spot.

161. The witness further deposed that apart from these two schools, Janta Dharam Kanta, Ram Dharam Kanta, Zakhira Chara Mandi, Janta Transport Company were in the same vicinity. It is in the evidence of PW 5 & 8 that Janta Dharam Kanta and Ram Dharam Kanta are just opposite to the Bharti Public School, Janta Transport Company & Chaudhary Road

Lines and Karan Memorial Public School. Yet no investigation at all has been undertaken. No public witness has been examined.

162. In para 35, the trial judge has dealt with the failure of the prosecution to explain how the deceased was transported from the place of occurrence to outside his hut and has observed that *"the only inference is that after the injured became unconscious he was shifted from the spot to the place near his jhuggi by the culprits in order to shift the place of occurrence"*. There is thus no evidence at all to support such conclusion.

Recovery of can

163. PW 8 has stated that Manoj Kumar had made another disclosure statement on the 24th of July, 1997 and had got a plastic can of 2 litre capacity with a handle recovered from the roof of Janta Dharam Kanta. The can was having a 'Sundrop/Sunflower' print and a picture of child printed on it. According to PW 8, the recovered can, smelling of acid, was sealed and taken into possession.

164. Learned counsel has urged that there was no recovery at all based on any disclosure statement made by the accused persons. Learned counsel for the appellants have strongly challenged the alleged recovery not only on the ground that the exhibit produced before the court did not relate to its

description either in the recovery memo or in the testimony of the witnesses but also on the ground that the same was not supported by any public witnesses.

165. PW 8 HC Ramphal Singh has stated that a large number of public persons were present at the place during the morning of the 20th of July, 1997. The owners of Janta Transport Company, Janta Dharam Kanta, Ram Dharam Kanta as well as their employees were present in their respective premises; that there were thousands of jhuggies behind Karan Memorial Public School; that the owners and servants in the Dharam Kanta & Janta Transport Company, did not disclose their names when he had tried to find out. It has been pointed out that both PW 5-Ct. Vinod Kumar and PW 8-HC Ramphal Singh have stated that owners and employees of the Janta Dharam Kanta and also passersby were available at the time the recovery proceedings were conducted. PW 5-Ct. Vinod Kumar has stated that no public person from the Janta Dharam Kanta, nearby Dharam Kantas or passersby were asked to join the recovery proceedings.

166. One of the circumstances to fault the recovery by the appellants is premised on the statement by PW 8 HC Ramphal Singh that he did not fill up the CFSL form. It has also been pointed out that there are unexplained contradictions in the

deposition of the witnesses with regard to the deposit of the alleged recoveries in the malkhana as well as the samples which were sent for forensic examination.

167. In this regard, learned counsel has drawn our attention to the extract of the malkhana register Exhibit PW 3/A recording the deposit of the can in the malkhana wherein a reference to the case number as well as the statutory provisions under which it was registered is made. The contention of learned counsel for the appellant is that Section 302 of the IPC was added to the FIR only after the death of Mohd Rustam on 28th July, 1997; that the reference to Section 302 of the IPC in the malkhana register shows that the entry was made only after the death of Mohd Rustam and has been ante-dated to read as 24th July, 1997. The submission is that this entry casts doubt on the correctness of the recovery.

168. It is in the evidence of PW-8 that Manoj Kumar had got the can recovered from the roof of the Janta Dharam Kanta which was adjacent to the Ram Dharam Kanta; its office was in a room of about 8 ft x 6 ft and the roof was at a height of 8-9 ft. PW 8 has also explained that there was no staircase to go to the roof of the Janta Dharam Kanta and that the accused Manoj Kumar alone had climbed to the roof with the help of the protruding bricks in the external wall of the Janta Dharam

Kanta office. PW 8 HC Ramphal Singh categorically states that none else had climbed the roof. The witness has also categorically stated that the recovery was effected in the presence of PW 5 Ct. Vinod Kumar and that no member of the public had been joined in the recovery.

169. It is essential to advert to the deposition of PW 5 Ct. Vinod Kumar on this recovery, as there is material contradiction between the deposition of PW8 HC Ramphal Singh and PW5 Ct. Vinod Kumar on important aspects of the recovery. PW-5 explains that the two police men had reached the Janta Dharam Kanta at about 5/5.30 p.m. PW 5 further categorically states that HC Ramphal also climbed to the roof of the Janta Dharam Kanta alongwith Manoj Kumar and recovered the plastic can from the roof. He states that the height of the roof was not too much; that he could see the roof standing below and that accused Manoj picked up the plastic can on the roof and handed it over to HC Ramphal. PW 5-Ct. Vinod Kumar categorically states that it was PW 8-HC Ramphal Singh who brought the can down from the roof. Interestingly, the testimonies of these two police officers, the only two witnesses to the recovery, cannot be reconciled at all or stand together.

170. In his cross examination, PW 8 HC Ramphal Singh has categorically stated that there was no cap on the mouth of the plastic can. He further clarifies that the "mouth of the plastic can was found opened as there was no cap" and that the cap was in "perfect condition and was not broken".

In the cross examination of PW 8, it is pointed out that the mouth portion of the can (Exhibit P-1) produced in court was in a broken condition and it also had an inner lid. PW 8 has volunteered that "there was no such inner lid in the mouth of the plastic can when he had recovered and sealed the same". The witness however has denied the suggestion that the plastic can produced in the court is not the one which was recovered on 24th July, 1997.

171. On the aspect of the can being open, PW 5-Vinod Kumar corroborates the statement of PW 8. He has also stated that the can which was got recovered as per the disclosure statement of Manoj Kumar was without "lid" and that the can when got recovered was not broken. He has unequivocally stated that there was no inner lid in the mouth of the plastic can which was recovered on the disclosure statement of Manoj Kumar.

172. In this regard, reference can be made to the statement attributed to the accused Manoj Kumar as the disclosure

statement claimed to have been recorded by PW 8 HC Ramphal Singh in the presence of PW 5, which has been exhibited on record as Exhibit PW 5/K. It is noteworthy that the Exhibit 5/K carefully records that on the can, “pakadne ke liye handle hai” (reads as ‘there is a handle affixed on the can for holding it, when translated’). The witnesses to the recovery have also stated so. A perusal of Exhibit PW 5/K shows that in the description of the can, the accused is alleged to have described the can stating that “jiske muh par dhakkan nahi hai” (which translates as a can which had no covering on its mouth).

173. The learned trial judge has also missed the noting in the CFSL report dated 28th December, 1998 (Exhibit 10/F) wherein the article examined has been described as the exhibit which was received for examination by it as “one empty plastic can with a plastic cap”.

174. Even though the learned trial judge has attempted to draw a distinction between “inner lid” and a “cap like lid” on the mouth of the can, however PW 8-HC Ramphal Singh has categorically stated that on the mouth of the can (Exh P-1) produced before the court, there was a plastic inner lid and has volunteered in court that there was no such inner lid in the mouth of the plastic can when recovered and sealed. The

recovery memo Exhibit PW 5/K categorically records that there was no “dhakkan” on the mouth of the yellow plastic can which was recovered.

175. At every place, when the witnesses make reference to the can, it is categorically stated that the can was of two litre capacity. They have carefully noted and stated that there was a handle on the can to hold it. The witnesses have carefully mentioned not only the colour of the can but also the picture on it. Therefore, there can be no doubt that if the reference in their statement was to an inner lid in contradistinction to a cap, it would have been noted.

176. It is in the deposition of PW 5-Ct. Vinod Kumar and PW 8 HC Ramphal Singh that there were several public persons and passers-by at and near the Janta Dharam Kanta. PW 8 had stated that he had seen the owner and employees of Janta Dharam Kanta sitting inside the office and that he did not ask any of them to put their signatures on the said seizure memo. HC Ramphal Singh and Ct. Vinod Kumar thus calls upon the court to believe that the owners of the premises would not be concerned as to why the accused Manoj Kumar, with or without HC Ramphal Singh, was climbing on to the roof of their premises or that no member of the public would have become curious in such an eventuality. They would expect the court to

accept the narration of events as if such an event was a daily occurrence in the crowded locality.

177. The appellants have placed reliance on the pronouncement of the Supreme Court reported at **(1998) 1 JCC (SC) 57 State of Punjab vs. Sarup Singh** to urge that the recovery not being in the presence of independent persons must be disbelieved.

178. Reliance has also been placed on the pronouncement of this court in **(1998) 1 JCC Delhi 94 Preetam Singh vs. The State** wherein this court has observed as follows :-

“11. Further the alleged recovery of blood stained clothes, shoes and titan watch from the house of Pritam Singh had taken place on 26th July, 1989 which would mean that for period about two and half months shoes and clothes remained in same condition without being washed. It has also come in evidence that house from where the recovery was made was open and not in the exclusive possession of Pritam Singh. There is no independent witness to the alleged recovery. Even this recovery becomes doubtful. The same is the position in respect of the recovery of clothes etc., from the house of Lal Singh on 26th July, 1989. The house of Lal Singh was known to the police earlier then even the arrest of Lal Singh on 24th July 1989. The police had earlier raided the house. It has not been explained why no search was conducted earlier. The keys of the lock of the room from which the goods were allegedly recovered had been kept nearby under a brick. Neither the sketch of the said house nor that of the room was prepared nor the keys and lock were seized. Again there was no independent witness to the recovery. The recovery from the house of Lal Singh, which is one of the circumstance relied upon

for convicting Lal Singh itself become doubtful. From the manner of the recovery of the goods from the house of both the accused and also the manner of the recovery of the gold jewellery, we cannot rule out the possibility of the planting of the recovered articles."

179. Recoveries effected by the prosecution have been disbelieved by the Supreme Court for the reason that the recoveries were allegedly made from a place accessible to all and also for the reason that the accused persons had made no effort to conceal the recovered item in the pronouncement reported at **(1979) CriLJ 1075 : AIR 1979 SC 1262 Bahadul vs. State of Orissa.**

180. PW 8 has tried to explain this deficiency stating that he had asked the owner and employees of the Janta Dharam Kanta to sign the seizure memo but they had declined and that they did not disclose their names and other particulars. PW 8-HC Ramphal Singh does not give any details. No action was taken by him.

181. Coming to the malkhana register, it is not possible to discern as to whether Section 302 of the IPC has been added later in the register inasmuch as the original of the register is not before the court. It is not possible to make out variation, if any, in the writings out from the photocopy exhibited on record.

182. Even if we were to ignore this contention, certain statements by the witnesses in this regard are noteworthy. PW 3 HC Ajab Singh was working as the MHCM in the police station Malviya Nagar who has deposed that on 24th July, 1997, HC-Ramphal Singh has deposited a parcel containing a plastic can which has been sealed with the seal of PPS which was recorded in the malkhana register as serial no.2602, extract whereof has been proved as Exhibit PW 3/A. He further submits that on 29th July, 1997, PW 10 Addl. SHO P.P. Singh has deposited a sealed parcel with the seal of KLS containing a blood sample as well as the sample seal (Exhibit PW 3/B).

183. PW 3 HC Ajab Singh is categorical that on 11th September, 1997, he had sent both the parcels which were deposited with him on 24th and 29th July, 1997 to the CFSL, Chandigarh vide RC No.78/21 through Ct. Virsa Singh which fact has been recorded against the aforesaid entries. Learned counsel for the appellants has emphasised that the time of deposit of the parcels and samples is not shown in the register.

184. Reliance is placed by Ms. Ritu Gauba, learned APP on the pronouncement of the Supreme Court reported at **(2011) 1 SCC (Cri) 1191 Jarnail Singh vs. State of Punjab** to urge that mere delay in sending a narcotic sample to the office of the chemical examiner was not sufficient to conclude that the

sample was tampered with. The court observed that in this case, there was sufficient evidence to indicate that the delay, if any, was wholly unintentional. The recovery of the narcotic substance was also found clearly established.

In this case, there is disputes of the date as well as the laboratory to which the sample was sent.

185. As against this categorical statement of PW 3-HC Ajab Singh, PW 4-Ct. Virsa Singh has stepped into the witness box and stated that he has collected two parcels from MHCM on 25th September, 1997 with form CFSL vide RC No.71/21 and has deposited the same in FSL, Malviya Nagar, New Delhi on that very day. He has also stated that he had handed over the receipt of the FSL to the MHCM. PW 5-Ct. Virsa Singh even gives the time of about 10.15 a.m. when he departed for the FSL, Malviya Nagar from the malkhana.

186. The prosecution has proved a report dated 28th December, 1998 of the CFSL, Chandigarh as Exhibit PW 10/F. The CFSL report refers to only one sealed parcel which was sealed with seals of RPS containing Exhibit 1 which was the plastic can.

There is no reference to any other parcel or sample at all.

187. No explanation was placed before the learned trial judge as to explain the contradictions between the statements of PW

3 and PW 4. There is not even a whit of an explanation with regard to the variation even in the numbers of samples sent for forensic examination or the report. Both PW 3 and PW 4 referred to two parcels whereas there is complete silence in the testimonies with regard to the second sample.

188. There are material contradictions in the depositions of the two police officials, the only witnesses to the recovery.

189. In the instant case, the can allegedly recovered is in dispute. We find there is a categorical statement in the evidence of PW 8 to the effect that Exhibit PW 2 produced in court is not the can which was recovered. There is thus no confusion at all that the can produced in court was not the can which was recovered on 24th July, 1997.

As per PW 5, it is a commonly available article and the above narration, all these circumstances, put the entire controversy at rest render its recovery on the disclosure by the appellant doubtful.

190. There is doubt with regard to the date and time of the recovered item being deposited in the malkhana as well as the laboratory to which it was sent for investigation.

191. Learned counsel for the appellants have placed reliance on the pronouncement reported at **2000 CriLJ 2083 Des Raj @ Dass vs. The State** in support of the contention that non-

filling of the CFSL form was a circumstance that went against the prosecution. The appellants place reliance on the judgment reported at **1998 II AD (Del.) 451 Afsar Hussain vs. NCT of Delhi** to urge that the police had tampered with the alleged recovery as manifested from the testimony of PW-5 and PW-8.

192. The learned trial judge has relied on the FSL report which has found kerosene on the can which was sent to it for testing. Given the controversy with regard to the identity of the can and the delay in sending the same for the forensic examination, the trial judge has attached unwarranted weight to the report of the laboratory.

193. Even if the contradictions in the statements of the witnesses as well as the documents even with regard to the date on or the laboratory to which it was sent is ignored, the prosecution fails to explain as to why a recovery effected on 24th July, 1997 was sent to the Forensic Science Laboratory only in September, 1997. The recovery of the can based on an alleged disclosure is certainly doubtful. The prosecution has failed to prove either the disclosure or the recovery beyond reasonable doubt.

Arrests of the appellants

194. Learned counsel for the appellants has strongly urged that the investigating officer has prepared no arrest memos of the accused persons. Inasmuch as the accused persons were enlarged on police bail and later by the court, the failure to place arrest memos on record by itself may be of no real value. However, when examined against the entire sequence of events and the evidence placed on record, the time of arrest may be of importance. Inasmuch as there is no evidence at all with regard to the incident other than statements attributed to the deceased and the accused persons. Even more unusual is the information attributed to a secret informer who is stated to have told PW 5 Constable Vinod Kumar and 8 HC Ramphal Singh on 20th July, 1997 at the Ram Dharam Kanta that one of the culprits, namely Prabhash, involved in the incident which had occurred the previous day was present at a tea shop near that place. Prabhash Sharma is stated to have been arrested and made a disclosure statement.

195. No further steps appeared to have been taken till 24th of July, 1997 for three days after the occurrence.

196. No timing of the sequence of events on 24th July, 1997 is available anywhere on record. No arrest memo has been produced before this court. But it is doubtful that any person

involved in such a heinous occurrence and offence, who are alleged to have run away from the spot after the incident, would loiter around at the scene of occurrence, more so when the police had earlier visited the spot and they would be aware that the accused persons were being searched for.

197. Learned counsel has placed reliance on the pronouncement of the Supreme Court reported at **1997 CriLJ 743 D.K. Basu vs. State of West Bengal** in support of his contention that there is a huge cloud over the alleged arrests and, therefore, over the disclosures, in the absence of the arrests memos. It is submitted that the date and time of the arrest deserves to be disbelieved and that the disclosures are completely unreliable and ought not to be believed.

Missing links

198. The trial judge has dealt with each of the circumstances with regard to the recovery of the plastic can; the failure to fill the CFSL form; the delay in sending the exhibits to the CFSL; non-existence of the arrest memos and the doubt with regard to the can produced in court, as individual pieces of evidence and for each of the above, held that they would not be sufficient to acquit the appellants.

199. What was required to be undertaken was a holistic examination of the circumstances and a view taken on the

totality of the material which was placed before the trial court which has not been undertaken in the present case.

200. In ***AIR 2008 SC 19 Nallapati Sivaiah vs. Sub-Divisional Officer, Guntur***, the court observed that the cumulative factors and surrounding circumstances make it impossible to rely upon the dying declarations. It was observed that the circumstances rendered it impossible to ignore the evidence of the doctor and professor of forensic medicine. It was not a question of choosing between the eye-witness account as regards the condition of the victim to make a statement on the one hand and the evidence of the Professor and Doctor of Forensic Medicine. It was the conflict and inconsistency between the two dying declarations and the evidence of the Forensic Expert which remained unimpeached which raised a great suspicion in the mind of the court. The court held that it was the duty of the prosecution to establish the charge against the accused beyond reasonable doubt and that the benefit of doubt would always go in favour of the accused.

201. The Supreme Court reiterated the well settled principle that the dying declaration was a substantive piece of evidence to be relied on, provided it was proved that the same was voluntary and truthful and the victim was in a fit state of mind.

In the facts of that case, the court observed that the evidence of Professor of Forensic Medicine casts considerable doubt with regard to the condition of the deceased to make a voluntary and truthful statement. The court observed that it was not because it was the requirement in law that the doctor who certified about the condition of the victim to make the dying declaration is required to be examined in every case. But it was the obligation of the prosecution to lead corroborative evidence available in the peculiar circumstances of the case. The medical evidence and surrounding circumstances altogether cannot be ignored and kept out of consideration by placing exclusive reliance upon the testimony of person recording a dying declaration.

202. In the instant case, if the statements attributed to the deceased are kept aside, the only piece of evidence sought to be proved on record is the alleged recovery which too rests on a disclosure statement attributed to the accused. The prosecution has produced no evidence to show that the accused was at the place of the incident. There is then also no material, let alone proof of the accused persons being last seen with the deceased. The circumstances on record do not exclude every hypothesis other than guilt of the accused. In similar circumstances, in **AIR 2008 SC 1558 Vinay D. Nagar**

vs. State of Rajasthan, it was held that the accused was not liable to be convicted.

203. The unfolding of the events or the offence as suggested by the prosecution is not supported by even the spot inspection. PW 8 HC Ramphal Singh has stated that he visited the site on 20th July, 1997. He does not state that he found any signs of the occurrence at the site. The prosecution case is that the deceased Mohd Rustam was beaten before acid was poured over him. If the incident occurred as claimed by the prosecution, then two persons were required to hold him so that the acid could be poured clearly suggesting resistance by the deceased. There is no sign of any violence or resistance or any evidence of the occurrence to be found in the depositions of any of the witnesses or in any of the documents.

204. While HC Ramphal Singh (PW 8) states that he prepared the site plan on the pointing out of PW-5 Mohd Humayun.

Constable Vinod Kumar who reached the site makes no mention of the presence of Mohd Humayun on the site.

205. A perusal of Exh.PW 8/E would show that it makes no reference at all to Mohd Humayun or that the same has been prepared on his pointing out. It does not even contain Mohd Humayun's signatures or thumb impression. It is important to note that the site plan, if it had been prepared on the pointing

out of Mohd Humayun would have reflected the location of the jhuggies, especially the spot where he had found his brother in the injured condition as alleged, an important fact, which is missing.

206. PW 1 Mohd Humayun did not reside with his brother. He does not remotely suggest that he visited the spot with PW 8 or pointed out any spot to him. There is a clear shadow of doubt as to whether the site plan Exhibit PW8/E was prepared by the PW 8-HC Ramphal Singh on the pointing out of Mohd Humayun.

207. The learned trial judge has erred in holding that the offence was committed inside the premises or at odd hours. The judge has also fallen into error in observing that the case did not involve any eye witnesses. The evidence before this court reflects the failure of the investigating officer to join any persons in the investigation. Even the site plan Exhibit PW 8/E reflects that the incident occurred in the open area outside the rooms. The incident as per Exhibit PW 6/A occurred at 4 p.m. while Exhibit PW 9/B suggests that it was at 9 p.m on 19th July, 1997 which was in the summer months. Be it 4 p.m. or 9 p.m., in the month of July in Delhi in summer the same is certainly not an odd hour under any stretch of imagination when people would be indoors. This is more so when the spot has been

shown as located in the middle of the transport offices and there is evidence of the same being operational for 24 hours. It is a hard reality in summer heat, as has been proved in evidence, there are more people outside than inside jhuggies, apart from the hustle and bustle of transporters, operators, drivers, conductors, labours etc. Both the area where the incident occurred as well as the place where the deceased found himself were densely populated and in the open area.

208. The prosecution has made no effort at all to investigate or find out as to whether there were any witnesses to any aspect of the matter. Not a single public witness has been examined, either from the place of the occurrence or the spot from which injured found himself on the next morning or any effort as to how the deceased was transported.

209. There is no justification for the casual investigation. Merely because initially the FIR was registered under Section 324 of the IPC and not under section 302 of the IPC. It is also no reason for diluting the investigation or the responsibilities of the police officers. There is no evidence at all of any follow up in the matter by the investigating officer or the gaps in the investigation between 20th till 4.00 p.m. on 24th July, 1997. The police has again not proceeded in the matter at all after 24th

July till 28th July, 1997, not even to make a query from the hospital with regard to the condition of the injured person.

210. What in any case is the investigation and the evidence on record in this case? Only collection of the MLC; statements attributed to the deceased; the accused persons, and police officers; an alleged disclosure leading to recovery of a can which was not produced in court, a forensic report and nothing else.

211. The instant case manifests not only an inept investigation but also of the failure to even prove certain essential and basic facts before the trial court.

212. Ms. Ritu Gauba has relied on ***Sunder Singh vs. State of Uttaranchal (supra)*** in support of her submission that casual and careless and incompetent investigation would not result in the accused getting unfair advantage. There can be no dispute at all with this principle. However this very principle cannot be brought into play by the prosecution to overcome the material deficiencies in the case of the prosecution in discharging the onus and burden of proof on it.

Motive

213. So far as motive is concerned, the learned trial judge has held that there was no apparent reason for the deceased to attribute injuries to the appellant. If the case of the

prosecution was to be accepted, it has been alleged that Prabhash Sharma was the employer of the deceased and was owing him salary. The very reason which has been asserted as a motive for the appellants to cause the injuries to the deceased would be a reason for the deceased who would be agonised over the denial of his wages for him to name them.

214. It is submitted that there was no evidence of any mark of violence between the deceased and the accused. No motive for the crime has been suggested or identified by the prosecution. The submission is that no incriminating evidence linking the appellants to the offence has been brought on record. The finding of guilt cannot be based on presumption. It is pointed out that the accused persons were found near the place of occurrence. Learned counsels would urge that all these circumstances point towards the innocence of the appellants. Reliance is placed on the precedent reported at **(2008) 5 SC 697 Dinesh Borthakur vs. State of Assam.**

215. In **2010 AIR SCW 5105 Babu vs. State of Kerala**, no direct evidence was available regarding taking or administering poison; material witnesses not examined; no motive was established on the part of the accused; recovery of the poison (which allegedly caused the demise of the deceased). The court observed that in a case of circumstantial

evidence, the burden on the prosecution is always greater. The acquittal of the accused by the trial court on evaluation of the credibility of the witnesses was held justified.

Given the challenge to every piece of evidence on record, the present case is similar to ***Babu vs. State of Kerala (supra)***.

216. So far as corroboration of the allegation of beating in Exhibit PW 8/B is concerned, the trial court has relied on the injury noticed on the 'It foot' noticed in the MLC Exhibit PW 6/A. The MLC refers to a singular employer without naming any assailant. However, while Exhibit PW 6/A refers to "beating by a cane", Exhibit PW 8/B refers to "beating by three persons" without adverting to any cane.

217. In ***AIR 1997 SC 1526 Rehmat vs. State of Haryana***, the conviction of the appellant was set aside inter alia for the reason that the medical papers of the complainant in the primary health centre where he had gone for treatment not mentioning the name of the assailant though it was a medico legal case.

218. Placing reliance on ***AIR 1975 SC 1962 Balaka Singh & Ors. vs. The State of Punjab***, it is contended that the omission to name the accused in the inquest report which was

not explained by the prosecution also throw doubt on the complicity of the accused.

219. Learned APP has placed reliance on the pronouncement of the Supreme Court reported at **(2011) 1 SCC (Cri) 923 State of Uttarakhand vs. Krishna Master** to urge that failure to mention the name of the accused in the inquest is not fatal.

220. In support of the submission that the evidence of PW1 Mohd Humayun can be relied upon, even though he has been declared hostile by the prosecution, reliance is placed by Ms. Ritu Gauba, learned APP on **AIR 2011 SC 3753 Mrinal Das & Ors. vs. State of Tripura**. This well settled principle also does not take the case of the prosecution very far. Ms. Gauba, learned APP has urged that the testimony of PW1 proves that the deceased was an employee of Sh. Prabhash Sharma. This fact also does not carry the prosecution case very far. As per Exhibit PW8/B, the deceased was claiming that he had gone to seek two months wages from his employer whereas PW1 Mohd Humayun has deposed that the deceased was employed for merely a period of fifteen days with Prabhash Sharma. In **Mrinal Das (supra)**, there was eye witness evidence apart from the testimony of the hostile witness. In this case, apart from the hostile witness, there

were five eye witnesses who identified the accused persons (**para 42 to 44**). There can be no dispute that in a criminal trial, credible evidence of even hostile witnesses can form the basis of a conviction. The evidence of a hostile witness can be relied upon at least up to the extent, he supports the case of the prosecution. The testimony of the witness has been considered at length herein and commented upon.

Conclusion

221. We find that there is no discussion at all in the judgment with regard to commonality of intention to cause the death of Md Rustam. No evidence at all on this aspect is available. In the light of the above discussion, we find that the prosecution has miserably failed to establish the unbroken chain of circumstances which it was required to do so in law in order to bring home the charge of guilt of the appellants in the case resting on circumstantial evidence.

222. It is trite that inculpatory facts proved on record must be incompatible with the innocence of the accused and incapable of explanation, other reasonable hypothesis with that of guilt of the accused as was reiterated by the Supreme Court in **(1992) 2 SCC 86 State of U.P. vs. Ashok Kumar Srivastava**.

223. It is settled law that if there is some material on record which is consistent with the innocence of the accused which may be reasonably true, even though it is not positively proved to be true, the accused would be entitled to acquittal. In **(1973) 2 SCC 793 Shivaji Sahabrao Bobade vs. State of Maharashtra (Check)**, the Supreme Court had stated that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted.

224. In the light of the above discussion, we have no hesitation in holding that the impugned judgment dated 5th December, 2001 and the order on sentence dated 6th December, 2001 are not sustainable in law. The same are hereby set aside and both the appellants are acquitted. Since the sentence of appellants No.1 and 2 was suspended vide orders dated 1st March, 2002 and 3rd February, 2003 respectively, the said orders stand vacated. The surety bonds of both the appellants stand cancelled and sureties discharged.

(GITA MITTAL)
JUDGE

JUNE 01, 2012
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(V.K. SHALI)
JUDGE