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

+ CRL.A. 859/2012

% *Judgment dated 2nd March, 2015*

UMESH KUMAR Appellant

Through: Mr.Vivek Sood, Mr.Prek Prakash and Mr.S.
Kukreja, Advocates

versus

STATE Respondent

Through: Mr.Sunil Sharma, APP for the State

CORAM :

HON'BLE MR. JUSTICE G. S. SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G.S. SISTANI, J. (ORAL)

The principle on which the dying declarations are admitted in evidence is indicated in the legal maxim "*Nemo moriturus praesumitur mentire*" i.e. a man will not meet his Maker with a lie in his mouth"

1. Present appeal has been filed by the appellant under Section 374(2) of the Code of Criminal Procedure, 1973, assailing the judgment dated 9.11.2011 and order on sentence dated 15.11.2011, passed by learned Additional Sessions Judge, in Sessions Case No.110/10, whereby the appellant was sentenced to undergo life imprisonment for the offence punishable under Section 302 of the Indian Penal Code. In addition to the above, the appellant was also directed to pay fine of Rs.5000/- and in default of payment of fine, further simple imprisonment for six months.
2. The case of the prosecution, as noticed by the learned trial court, is as under:

“.....under Section 173 Cr.P.C is that on 15.11.2006 on receipt of DD No. 24A, ASI Mahender Singh along with Constable Mukesh went to the spot at Gol Chakkar, East Punjabi Bagh near road no.4 in front of Kothi No.2 where in the park inside the gol chakkar, one empty plastic bottle with acid smell was found and near it the acid was spread. On inquiry they were told that one woman in injured condition was taken to the Sanjay Gandhi Memorial Hospital by PCR vehicle. ASI Mahender Singh left constable Mukesh at the spot to take care of the spot and went to Sanjay Gandhi Memorial Hospital where he received MLC of patient Suman wife of Nagender in which it was recorded that the patient had expired at 11.10 a.m and the dead body was sent to mortuary. In the hospital ASI Mahender Singh recorded the statement of husband of the deceased Suman, Nagender Kumar Gupta in which he has stated that he along with his family was living at L-456 Shakurpur, J.J. Colony, Delhi and he used to do the work of hawker and junk dealer. He got married with deceased Suman in 1988 as per Hindu rites and customs. Out of the wedlock, two sons and one daughter were born. About 2 years ago, his wife went with a TSR driver Umesh from Badaun, U.P and his wife informed her that she has got married with Umesh. She remained with Umesh for about 1 ½ years at Gurgaon and thereafter she returned to him about 3 months ago and started living with his family. Umesh used to make telephone calls at his house to call Suman and used to threaten if she did not come to him, he would kidnap her children. He (Nagender) asked his wife not to listen to the telephone calls of Umesh. On 15.11.2006 at about 8.00 a.m when he went with his rehri for his work and children had left for school, at about 10.55 a.m, he received a telephone call on his mobile phone number 9350227716 from a public person that his wife was made to drink acid by one Umesh and he has also poured acid on her body. From the same telephone, his wife Suman informed him by stopping in between that Umesh with whom she had lived for 1½ year had made her drink acid and has poured acid on her body. The person who made telephone call also informed him that the police vehicle was taking Suman to Sanjay Gandhi Memorial Hospital. At about 11.00 a.m, he went to Sanjay Gandhi Memorial Hospital where doctor

informed him that Suman had died. On this statement of the husband of the deceased Suman, the endorsement was made by ASI Mahender Singh and the rukka was sent through Constable Mukesh Kumar to P.S Punjabi Bagh for registration of the case and the FIR was lodged. Thereafter the investigation was handed over to Inspector Nakhinder Singh, Additional SHO who went to the spot and prepared site plan, called the crime team at the spot, lifted exhibits vide seizure memos from the spot and deposited in the malkhana. He recorded statement of witnesses and tried to trace accused Umesh. On 16.11.2006, accused Umesh was arrested from a house belonging to Soni in village Carter, Gurgaon who admitted commission of crime before police and made disclosure statement. The postmortem on the dead body of deceased Suman was got done and the dead body after identification was given to the legal heirs of the deceased. The scaled site plan of the spot was got prepared, postmortem report no. 928/2006 was received. The call details of the complainant Nagender Gupta, mobile no.9350227716 was received which showed that witness Sunil Mehra has made telephone call to him from phone no. 32543964 at 10.40 a.m and 10.42 a.m. On completion of investigation, the accused was challaned, as referred above.”

3. Mr.Vivek Sood, learned counsel for the appellant-Umesh, submits the judgment and order on sentence passed by learned trial court are bad in law, the same are based on surmises, conjectures and perverse in nature. It is further submitted that the learned trial court has not based the judgment on credible and unimpeachable evidence. Counsel contends that there was no ocular witness in this incident and the prosecution has completely relied upon the dying declarations and circumstantial evidence. It is next contended that the dying declarations are highly doubtful and not recorded in the presence of any magistrate. The trial court has not taken into account the judgment passed by the Apex Court that dying declaration ought to be carefully evaluated to find out its authenticity. Mr.Sood contends that it is unclear from the evidence as to whether the deceased

had at all named the appellant or not. It is also urged that the Apex Court has laid down that where there is no eye witness, all the circumstances made out against the accused should unerringly point towards the guilt of the accused and the same ought to be consistent with the hypothesis that the accused is the person, who is guilty of the offence.

4. Learned counsel for the appellant also submits that in the present case the evidence does not point out towards the guilt of the appellant. It is further submitted that all the links of the chain have not been proved. The prosecution has not been able to discharge the onus of proving the case beyond all reasonable doubt. Mr.Sood further submits that the trial court has erred in relying upon the statements of the witnesses, PW-4, PW-5 and PW-7 to show that the deceased had made a dying declaration declaring as it is improbable that the deceased would have spoken to her husband and informed him the name of the person, who had thrown acid over her. Counsel contends that call records have not been proved by the prosecution and, thus, the benefit should accrue to the appellant.
5. Mr.Sood further contends that PW-5 had made a call to PCR. As per the PCR record the appellant was not named, which is evident on examination of the PCR Control Room Form, which has recorded the date as 15th November and time as 10.44 a.m; the name of the informant as Sunil Mehra; his phone number; and in the column of information what has been recorded is that someone has made a lady drink tezaab and also spilled it over her. In the same form, at 10.48 a.m. it is only recorded that the lady has been found but no name has been mentioned. It is, thus, contended that the dying declaration before PW-5, which is sought to be relied upon by the prosecution, is not trustworthy. It is also submitted that the second dying declaration, which is made by the deceased to her husband over telephone cannot be relied upon for the reason that Sh.Sunil

Mehra, PW-5, did not inform the Police Control Room and, thus, the lady in such condition could not have conveyed name of the assailant to her husband, neither it was conveyed as Sh.Sunil Mehra did not inform the control room after hearing the name of the appellant. Mr.Sood further submits that the dying declaration, relied upon by the prosecution before PW-1 is not admissible. It is further submitted that the dying declaration was not recorded before a Magistrate, it is fake, cryptic and it would be highly unsafe to convict the appellant based on this dying declaration recorded by PW-7, SI Raj Pal, in the PCR Form itself. It is also submitted that the alleged plastic bottle containing Tezab (Acid), relied upon by the prosecution, would show that no acid was found as per the report of the CFSL. Thus, in the absence of any acid on the bottle, the appellant cannot be linked to the incident.

6. Mr.Sood further submits that the CFSL report is at variance with the post-mortem report as no acid was found in the stomach of the deceased. Further the disclosure statements, sought to be relied upon by the prosecution, are a very weak form of evidence, as there was no reason as to why the appellant would remove the purse of a lady when there are no money in it and it only contained the keys of her house. Mr.Sood has also contended that the conduct of the appellant is such that he did not abscond or run away after the alleged incident and was found at his tenanted premises in Gurgaon.
7. Mr.Sharma, learned counsel for the State, submits that the prosecution has proved its case beyond any shadow of doubt and simply to say that PW-5 did not inform the Police at No.100 about the name of the person can be of no help to the appellant, as on careful examination of the PCR Form would show that it is PW-5, Sh.Sunil Mehra, who made a call to No.100 at 10.44 a.m.; the telephone number from which call was made i.e.

No.32543964 has also been recorded in Part-1 of the Form. Part 2 of the form shows that PCR van reached the spot of the incident at 10.48 a.m. In the report, it has been stated that a lady has been found, which is being removed to Sanjay Gandhi Hospital, for rest of the information they should wait, her mouth was smelling of acid. Mr.Sharma contends that Part 4 of the form would show that Umesh had been named. By this time, i.e. at around 11.22 a.m., the lady was removed to the hospital and PW-7 was present with her. Mr.Sharma further submits that the dying declaration so recorded fulfils all the necessary ingredients, which shows that the lady has rightly given her name, her husband's name, her age, the phone number of her husband and that she had joined the company of Umesh for about 1 ½ years. It is, thus, contended that three dying declarations have been rightly relied upon by learned trial court.

8. Mr.Sharma has also submitted that the forensic examination report is not at variance with the post-mortem report as the time and date of death of the deceased have been established and proved. The cause of the death has also been proved and merely because acid was not found in the stomach of the deceased cannot benefit the appellant as other factors in the report would show that acid was forced down, her throat including effect of acid on her teeth and other parts of her body and the effects thereof. It is further submitted by Mr.Sharma that PW-4, PW-5 and PW-7 are reliable and truthful witnesses and despite cross-examination their testimonies have not been dented by the defence. Mr.Sharma also submits that pursue was found upon disclosure made by the appellant containing keys and it has been proved on record that the husband of the deceased had to break open the lock of the main gate.
9. We have heard learned counsel for the parties, who have taken us through the entire evidence recorded in the case. We have also considered the rival

submissions of counsel for the parties and gone through the judgment passed by learned trial court.

10. In this case, PW-5, Mr.Sunil Mehra, had informed on No.100 on 15.11.2006 at 10:44 a.m. that a lady had been administered teazab and teazab was also thrown on her body. As per the testimony of this witness on 15.11.2006, he was present at his house. At about 10.35 a.m., he had heard the cries of a lady. He immediately came out and saw that a lady of about 30 years of age was crying outside his house. On his asking, she said that she had been administered teazab by appellant Umesh. She gave her name as Suman and the name of her husband as Nagender. She also provided the mobile no.9350227716 of her husband. This witness has further testified that he gave a call to the husband of the lady from phone number 32543964 and informed him about the happening. Suman also talked to her husband on phone and told him that she had been administered teazab and teazab was also thrown on her body by appellant Umesh. PW-5 made a call to the Police. A PCR van rushed the lady to the hospital. Statement of PW-5 was recorded by the Police. The Police also took a copy of the bill of Reliance mobile phone form PW-5 which was in the name of his wife.
11. During cross-examination, PW-5 denied the suggestion that at the time of making call to the PCR he did not know the name of the victim. He also denied the suggestion that he had not informed the husband of the victim. He also denied the suggestion that Suman was not in a position to talk.
12. Another important witness is PW-4, Nagender Kumar Gupta, husband of the deceased. This witness has testified that he was doing work of Kabari on a rehri. He got married with Suman in the year 1988 and out of their wedlock two sons and a daughter were borne. Two years prior to the incident his wife had left him and was staying with Umesh, a TSR driver

living in Shakurpur, whom he identified in the Court. He further testified that his wife had resided with Umesh for about 1 ½ years. She came back to the house three months ago. It has also been testified that Umesh used to telephone his wife to return and threatened her that in case she did not return she would kidnap his child. He had told his wife not to attend the phone call of Umesh. On 15.11.2006 he had left the house on 8.00 a.m. with his rehri for work. On 10.55 a.m. he received a call on his mobile no.9350227716 from a public person that a person by the name of Umesh had administered te zab to his wife and also thrown te zab on her body. He also informed him that he was speaking from 2/4, East Punjabi Bagh, and the name of Umesh was given to him by Suman. Suman had also talked to him on telephone and informed him that Umesh, with whom she stayed for one and a half years, had administered te zab and also thrown te zab on her body. The public person had told him that PCR van was rushing his wife to Sanjay Gandhi Hospital, where he reached at about 11.45 a.m. He was informed by the Doctor at the hospital that his wife Suman had expired. His statement (Ex.PW-4/4) was recorded by the Police. He identified his signatures at point A. On the next date he along with the Police went in search of the appellant. They were informed by the landlord that Umesh was his tenant and he was not present since morning. The appellant came to the house at 11.00 a.m. - 12.00 p.m. He was apprehended. On his pointing out a pursue, containing keys of the house, was recovered. This witness also testified that on account of the non-availability of the keys, he had broken the lock of the house. This witness also produced the iron lock, which he had broken and also identified the pursue.

13. During cross-examination, he denied the suggestion as incorrect that Suman had left with some Bihari person two years before residing with

the appellant, Umesh. He has also testified that he had never made any report to the Police when his wife had left him. He denied the suggestion that he did not talk to Sh.Sunil Mehra.

14. We deem it appropriate to reproduce the evidence of PW-7, SI Raj Pal:

“PW-7: SI Rajpal, 1367-D, Delhi High Court Security, New Delhi

On S.A.

On 15-11-2006 I was posted as In-charge PCR Van P/87. On that day at about 10:44 am information was received from the Control Room about the administration of acid to a woman at Road no.4, Kothi No.2, by someone. I immediately reached there and found one woman was lying ahead of Kohti no.2, Road no.4 and immediately shifted the aforesaid woman to SGM hospital. In the way to the hospital, I inquired from the women who told her name as Suman and she further told me that one person by the name Umesh had administered the acid to her and also poured that acid on her. The doctor had declared her dead in the hospital. My statement was recorded.

XXXXXX By Sh. S. P. Upadhyay, advocate for accused

I have not brought the PCR record. It is correct that I had shifted the woman by the name Suman from the spot to the hospital at about 10:49 am. It is not correct to suggest that Suman gave no statement to me. It is incorrect to suggest that Suman was not in a position to speak. It is incorrect to suggest that I have deliberately not produced the PCR record because it is stated therein that Suman was not in a position to speak.”

15. We also deem it appropriate to reproduce the evidence of PW-12, Dr.V.K. Jha, who conducted post-mortem on the dead body of Suman.

“PW-12 Dr.V.K. Jha M.O. BJRM Hospital Jahangir Puri
Delhi

On S.A.

On 16/11/06 I was posted in the mortuary of SGM Hospital as medical officer. On that day I conducted the postmortem on the dead body of Suman aged 35 years wife of Nagender Gupta which was sent by Insp Lakhwinder Singh Addl SHO PS Punjabi Bagh through Ct.Mukesh under present case FIR with the alleged history of being ingested acid and poured over her by Umesh as per brief facts of the case.

General Description:

Clothes worned by the deceased saree, peticot and blouse. Built of the body was moderate, rigor mortis was present on all over body. Postmortem staining was present at back. Eyes were closed. Conjunctivae was normal and cornea was hazy. Mouth was partially opened. Tongue was inside. I observed following external injuries on the body of deceased.

1. Eishers with staining of yellowish discolouration are present on both angles of mouth, chin running downwards from the angle of mouth via bilateral mandibular region. The eishers of yellowish discolouration present with partial skin thickness chemical burn present on the back of chest, on the back of abdomen upto sacrum. Similar chemical burn were observed on front of chest trickling down upto breast at places.

On internal examination of head no abnormality detected but the brain was congested. On internal examination of neck there was yellowish discolouration of mucuous membrane of lips, mouth and tongue upper surface was present. Haemorrhagic spots with intact oedema present over tonsillar, peritonsillar and epiglottis and posterior pharynx and larynx was present. The swelling and oedema was almost covering the mouth of wind pipe. No further chemical burn was beyond the voice box.

In my opinion cause of death is asphyxia consequent to severe laryngeal oedema as a result of chemical burn which was antemortem in nature. The PM findings were consistent with attempt to forcibly pouring the acid drink in the mouth cavity of victim and spilling over the acid in the attempt over the body surface mentioned. The possibility of more than one person cannot be ruled out. Time since death consistent with the hospital timing of death i.e. 11.10 am on 15.11.06.

The clothes were sealed with the hospital seal and blood, viscera of deceased were preserved in common salt under hospital seal was preserved and handed over to the investigating officer. Total number of inquest papers were in 09. I prepared detailed PM report no.908/06 which is in my handwriting and is Ex. PW 12/A which bears my signature at point A. I put my initials on the inquest papers at point A and at point A on Ex PW4/A and Ex. PW1/A.

At this stage CFSL report is shown to the witness and the witness reply that opinion expressed by me in postmortem report Ex WP12/A is consistent and relevant. CFSL report is tender and is Ex PW12/B.”

16. The first submission of learned counsel for the appellant is that the dying declarations, sought to be relied upon, by the prosecution, are extremely weak, cryptic, fake and unreliable.
17. It has been repeatedly held by the Apex Court that a dying declaration is admissible in evidence yet the Courts must scrutinize the dying declaration with care and caution as a person, who has made such a statement is not available for cross-examination.
18. Since the main thrust of the arguments of counsel for the appellant is that the dying declarations are not trustworthy, we deem it appropriate to discuss the law with regard to the dying declaration. The Apex Court in the case of **Ramilaben Hasmukhbhai Khristi And Ors. V. State of Gujarat**, reported at AIR 2002 SC 2996 has held as under:

“Under the law, dying declaration can form the sole basis of conviction, if it is free from any kind of doubt and it has been recorded in the manner as provided under the law. It may not be necessary to look for corroboration of such a dying declaration. As envisaged, a dying declaration is generally to be recorded by an Executive Magistrate with the certificate of a medical doctor about the mental fitness of the declarant to make the statement. It may be in the form of question and answer and the answers be written in the words of the person making the declaration. But the court cannot be too technical and in substance if it feels convinced about the trustworthiness of the statement which may inspire confidence such a dying declaration can be acted upon without any corroboration.”

19. The Apex Court in the case of *Shakuntala V. State of Haryana*, AIR 2007 SC 2709, has taken into consideration its various decisions and culled out the principles governing dying declarations. It would be useful to reproduce para 9 of the judgment:

“9. Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross-examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the Court also insists that the dying declaration should be of such a nature as to inspire full confidence of the Court in its correctness. The Court has to be on guard that the statement of deceased was not as a result of either tutoring, or prompting or a product of imagination. The Court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailant. Once the Court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule

requiring corroboration is merely a rule of prudence. This Court has laid down in several judgments the principles governing dying declaration, which could be summed up as under as indicated in *Smt. Paniben V. State of Gujarat* (AIR 1992 SC 1817):

- i. There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. [See *Munnu Raja & Anr. V. The State of Madhya Pradesh* (1976) 2 SCR 764]
- ii. If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. [See *State of Uttar Pradesh V. Ram Sagar Yadav & Ors.* (AIR 1985 SC 416) and *Ramavati Devi V. State of Bihar* (AIR 1983 SC 1640)]
- iii. The Court has to scrutinize the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had an opportunity to observe and identify the assailants and was in a fit state to make the declaration. [See *K. Ramachandra Reddy and Anr. V. The Public Prosecutor* (AIR 1976 SC 1994)].
- iv. Where dying declaration is suspicious, it should not be acted upon without corroborative evidence. [See *Rasheed Beg V. State of Madhya Pradesh* (1974 (4) SCC 264)].
- v. Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. [See *Kaka Singh V. State of M.P.* (AIR 1982 SC 1021)]
- vi. A dying declaration which suffers from infirmity cannot form the basis of conviction. [See *Ram Manorath and Ors. V. State of U.P.* (1981 (2) SCC 654)].
- vii. Merely because a dying declaration does contain the details as to the occurrence. It is not to be rejected. [See

State of Maharashtra V. Krishnamurthi Laxmipati Naidu (AIR 1981 SC 617)]

- viii. Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth. [See ***Surajdeo Oza and Ors. V. State of Bihar*** (AIR 1979 SC 1505)]
 - ix. Normally the Court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eye witness said that the deceased was in a fit and conscious state to make the dying declaration, the medical opinion cannot prevail. [See ***Nanahau Ram and Anr. V. State of Madhya Pradesh*** (AIR 1988 SC 912)].
 - x. Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. {See ***State of U.P. V. Madan Mohan and Ors.*** (AIR 1989 SC 1519)]
 - xi. Where there are more than one statement in the nature of dying declaration, one first in point of time must be preferred. Of course, if the plurality of dying declaration could be held to be trustworthy and reliable, it has to be accepted. {See ***Mohanlal Gangaram Gehani V. State of Maharashtra*** (AIR 1982 SC 839)].”
20. In the case of ***Paparambaka Rosamma v. State of A.P.***, reported at (1999) 7 SCC 695, the Apex Court has taken a view that since the certificate of the Doctor was not to the effect that the patient was in a fit statement of mind to make the statement the dying declaration cannot be accepted by the Court to form the sole basis for conviction. Another three Judge Bench in the case of ***Koli Chunilal Savji v. State of Gujarat***, reported at (1999) 9 SCC 562, has held that if the materials on record indicate that the deceased was fully conscious and was capable of making a statement, the dying declaration of the deceased could not be ignored merely because the Doctor had not made the endorsement that the deceased was in a fit

statement of mind to make the statement. Since the decisions in the aforesaid two matters were somewhat contrary, the matter was referred to the Constitution Bench. In the case of *Laxman v. State of Maharashtra*, reported at (2002) 6 Supreme Court Cases 710. Paras 3 and 5 read as under:

“3. The juristic theory regarding acceptability of a dying declaration is that such declaration is made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the man is induced by the most powerful consideration to speak only the truth. Notwithstanding the same, great caution must be exercised in considering the weight to be given to this species of evidence on account of the existence of many circumstances which may affect their truth. The situation in which a man is on the death bed is so solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason the requirements of oath and cross-examination are dispensed with. Since the accused has no power of cross-examination, the courts insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The court, however has always to be on guard to see that the statement of the deceased was not as a result of either tutoring or promoting or a product of imagination. The court also must further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Normally, therefore, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration looks up to the medical opinion. But where the eyewitnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and in any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a magistrate or a doctor or a police officer. When it is recorded, no oath is necessary nor is the presence of a magistrate is absolutely necessary, although to assure authenticity it is usual to call a

magistrate, if available for recording the statement of a man about to die. There is no requirement of law that a dying declaration must necessarily be made to a magistrate and when such statement is recorded by a magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise.

5. The court also in the aforesaid case relied upon the decision of this court in *Harjeet Kaur v. State of Punjab* case wherein the magistrate in his evidence had stated that he had ascertained from the doctor whether she was in a fit condition to make a statement and obtained an endorsement to that effect and merely because an endorsement was made not on the declaration but on the application would not render the dying declaration suspicious in any manner. For the reasons already indicated earlier, we have no hesitation in coming to the conclusion that the observations of this court in ***Paparambaka Rosamma and Ors. v. State of A.P.*** (at SCC P. 701, para 8) to the effect that

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

has been too broadly stated and is not the correct enunciation of law. It is indeed a hyper-technical view that the certification of the doctor was to the effect that the patient is conscious and there was no certification that the patient was in a fit state of mind specially when the magistrate categorically stated in his evidence indicating the questions he had put to the patient and from the answers

elicited was satisfied that the patient was in a fit state of mind whereafter he recorded the dying declaration. Therefore, the judgment of this court in Paparambaka Rosamma and Ors. v. State of A.P. must be held to be not correctly decided and we affirm the law laid down by this court in Koli Chunilal Savji and Anr. v. State of Gujarat case.”

21. In the present case there are three dying declarations. All the three dying declarations have been closely examined by this court. The three dying declarations have been made to three different persons individually. The first dying declaration is sought to have been made by the deceased before PW-5 (Sunil Mehra). According to the counsel for the appellant this dying declaration is to be discarded for the reason that in case the deceased had named the appellant as the person who poured *tezab* on her, this witness would have communicated the name to the police when he called up 100 number. The testimony of PW-5 in our view is truthful and reliable and as there is nothing to suggest as to why PW-5 would falsely implicate the appellant herein. As per the testimony of PW-5, it is he who informed the husband of the deceased and made the deceased talk to her husband. Since the name and mobile number of the husband were provided by the deceased to PW-5, who in turn called up her husband, it can safely be concluded that she was in a fit state of mind to make a statement. The court cannot lose track of the fact that PW-5 is a public witness and his calling the police was primarily to inform them about the incident. Merely because PW-5 did not inform the Police about the name of the appellant cannot be a ground to discredit the statement of this witness more particularly when his statement has been corroborated by the testimony of PW-4, the husband of the deceased and PW-7, S.I Rajpal. The second dying declaration has also been relied upon by the prosecution. PW-4 has testified that he has received a phone call at 10:55 a.m. on his mobile from a public person that a person by the name Umesh

has administered te zab to his wife and also thrown *te zab* on her body. This witness has also testified that his wife spoke to him and informed him that Umesh with whom she had stayed for one and a half years had administered her *te zab* and also thrown *te zab* on her body. Based on this conversation PW-4 husband of the deceased reached Sanjay Gandhi Hospital at about 11:45 a.m. when his statement PW-4/A was recorded by the Police at the hospital. The third dying declaration, which was exhibited as Ex.2/A, was made to PW-7 and forms part of police control room phone record. We have examined the PCR form in Part-I which contains the date i.e. 15.11.2000, the time i.e. 10:44 a.m., the phone number from which the call was received and the place of incident have been recorded. At about 10:48 a.m. message had been transmitted to the PCR van and in part -4 the following endorsement has been made:

“The Doctor at SGH has declared the lady as brought dead. On telephone Sunil Mehra has named the lady as Suman w/o. Nagender Gupta, R/o.10, Shakurpur, aged 35 years and informed her husband’s telephone number as 9350227716. On making phone call, he told that he would be reaching the hospital. Other information would be known after he reaches here. Some persons named Umesh has made her consumed Acid.”

22. On careful examination of the aforesaid form would show information was received at about 10:44 a.m.; message was transmitted to the PCR van at 10:48 a.m. and the deceased was put in PCR van when at about 11:22 a.m.. The dying declaration which was recorded would show that PW-7 had no other means to learn about the name of the appellant except from the lips of the deceased. This dying declaration in our view is also admissible, reliable and trustworthy.

23. On careful analysis of the testimony of PW-5, we find his evidence to be reliable and trustworthy. He has clearly described sequence of events and merely because he did not name the appellant when he dialed no.100, it cannot be a ground by itself to discredit this witness for it seems that looking into the condition of the victim he made her talk to her husband and called the Police. PW-7, in our view, could not have had any other source to record the name of Umesh, appellant herein, but for the information supplied to him either by PW-5, Sh.Sunil Mehra, or the victim herself at the time when he was taking her to the hospital.
24. Another argument raised by counsel for the appellant is that PW-5, Dr.V.K. Jha, whose evidence we have extracted hereinabove has opined that the cause of death is asphyxia consequent to severe laryngeal oedema as a result of chemical burn which was antemortem in nature. He has also opined that post-mortem findings were consistent with attempt to forcibly pouring the acid drink in the mouth cavity of victim and spilling over the acid in the attempt over the body surface mentioned. Merely because the acid was not found in the stomach of the deceased cannot lead to the conclusion that in fact the deceased was not made to drink acid or that the death is not on account of her being forced to drink acid. The trial court in our view has taken into account the entire evidence and the relevant provisions of law laid.
25. We also find that in this case the prosecution has been able to establish the motive. The case of the prosecution is that the marriage between the victim and PW-4 Nagender Kumar Gupta was solemnised in the year 1988 and out of their wedlock two sons and one daughter were born. The respondent was a TSR driver prior to two years of the date of the incident with the victim. The victim, Suman, told her husband, PW-4, Nagender Kumar, that she got married with the respondent and they resided together

for one and a half years. Thereafter, she came back about three months prior to the incident and started living with PW-4, Nagender Kumar Gupta, due to which the respondent got annoyed. The respondent, by way of telephonic conversation, by persuasion and by threats tried that the victim may live with him, but all in vain. Thus, the respondent became annoyed and committed murder of the victim on account of her refusal to live with him. This motive of crime was proved by PW-4 Nagender Kumar Gupta, who has stated about the above facts in his statement. PW-4 has denied the suggestion in the cross-examination that his wife, Suman, had not gone away with respondent, Umesh, or that the respondent had not threatened his wife and, thus, the motive of crime was also proved by the prosecution in this case. PW-4, Nagender Kumar Gupta, has also handed over a marriage-cum-agreement document, marked as A, showing that the respondent and Suman were living together and they got married. A copy of the said document was seized by the IO from PW-4 vide Memo Exhibit PW-4/H.

26. In addition to the motive based on the disclosure statement made by the appellant a lady's purse, Exhibit P-1, belonging to the victim was recovered vide memo Exhibit PW-4/B. As per the disclosure statement after pouring acid on the victim she started running and her purse fell down, which was picked up by the respondent. From the purse, three keys of the house of the victim and PW-4 were got recovered. The recovery of the keys also gains importance as the husband of the victim, PW-4, got recovered a broken lock with the name Panther, Seven Lever, No.5060 MM, written on it. The lock had marks to show that it was broken and according to PW-4 since the keys were not available, he had to break open the lock to enter into the house. The fact that the lock had to be open and the recovery of keys from the purse of the victim which were recovered

from the respondent would strengthen the case of the prosecution that the purse, containing the keys of the house of the victim, were taken by the appellant.

27. In the light of the above, we find that there is no merit in the appeal and the same is accordingly dismissed.
28. We may notice that in a study conducted by Cornell University in January, 2011, 153 acid attacks were reported in the media from the year 1999 to 2010.
29. Taking note of the recent trend, the Supreme Court of India in the case of *Laxmi v. Union of India and Others*, [2013(9) scale 291] (Decided on 18.7.2013) was forced to issue following directions with regard to over the counter sale of acid. Relevant paras read as under:

“7. In the States/Union Territories, where rules to regulate sale of acid and other corrosive substances are not operational, until such rules are framed and made operational, the Chief Secretaries of the concerned States/Administrators of the Union Territories shall ensure the compliance of the following directions with immediate effect:

- (i) Over the counter, sale of acid is completely prohibited unless the seller maintains a log/register recording the sale of acid which will contain the details of the person(s) to whom acid(s) is/are sold and the quantity sold. The log/register shall contain the address of the person to whom it is sold.
- (ii) All sellers shall sell acid only after the buyer has shown:
 - a) a photo ID issued by the Government which also has the address of the person.
 - b) specifies the reason/purpose for procuring acid.
- (iii) All stocks of acid must be declared by the seller with the concerned Sub-Divisional Magistrate (SDM) within 15 days.

(iv) No acid shall be sold to any person who is below 18 years of age.

(v) In case of undeclared stock of acid, it will be open to the concerned SDM to confiscate the stock and suitably impose fine on such seller up to Rs.50,000/-

(vi) The concerned SDM may impose fine up to Rs.50,000/- on any person who commits breach of any of the above directions.

8. The educational institutions, research laboratories, hospitals, Government Departments and the departments of Public Sector Undertakings, who are required to keep and store acid, shall follow the following guidelines:

(i) A register of usage of acid shall be maintained and the same shall be filed with the concerned SDM.

(ii) A person shall be made accountable for possession and safe keeping of acid in their premises.

(iii) The acid shall be stored under the supervision of this person and there shall be compulsory checking of the students/personnel leaving the laboratories/place of storage where acid is used.

9. The concerned SDM shall be vested with the responsibility of taking appropriate action for the breach/default/violation of the above directions.”

30. Throwing of acid on helpless victims, mostly women, is on the rise, which is a dastardly and cowardly act and the same is to be controlled with an iron hand. It sometimes leaves them disfigured, blind and, as in this case, even death.

31. We find in the entire evidence that no effort has been made during investigation to investigate the source from where the acid was procured by the appellant. We find the investigating officer has not performed his duty with sincerity as efforts should have been made to ascertain the source of acid and to take necessary steps against the sale of acid illegally.

32. Accordingly, we deem it appropriate that a copy of this order be brought to the notice of Commissioner of Police, who will ensure that strong action is taken against the persons, who sell acid illegally and a circular be issued to the Department to ensure that every effort should be made to curb sale of acid illegally and, those found guilty should be punished with a heavy hand.

G. S. SISTANI, J

SANGITA DHINGRA SEHGAL, J

March 02, 2015

msr