

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

Judgment reserved on: 28.10.2017

Judgment pronounced on: 25.11.2017

+ CRL.A. No. 607/2013

SAMMI

.... Appellant

Through: Mr.K. Singhal, Adv.

Versus

STATE

.....Respondent

Through: Ms.Aashaa Tiwari, APP for
State with Inspector Rajender
Singh, PS Chandni Mahal.

+ CRL.A. No. 1093/2013

ASHRAF

.... Appellant

Through: Mr.Azhar Qayum, Adv.

Versus

STATE

.....Respondent

Through: Ms.Aashaa Tiwari, APP for
State with Inspector Rajender
Singh, PS Chandni Mahal.

+ CRL.A. No. 650/2015

ASLAM

.... Appellant

Through: Mr.M.L. Yadav, Adv.

Versus

STATE

.....Respondent

Through: Ms.Aashaa Tiwari, APP for
State with Inspector Rajender
Singh, PS Chandni Mahal.

CORAM:-

HON'BLE MR. JUSTICE S.P. GARG

HON'BLE MR. JUSTICE C. HARI SHANKAR

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(JUDGMENT)

C. HARI SHANKAR, J.

1. On 16th October 2010, at 11:24 PM, a young lady Arti, 35 years of age, was brought, in a severely burnt condition, by her husband Javed, to the JPN hospital, where her case was registered as MLC No. 172578. Constable Ajay communicated the said fact telephonically, which was further transmitted to PS Chandni Mahal and reduced into writing vide DD No. 24A.

2. On receipt of the said DD, (Ex.PW-5/A) ASI Pritam Singh reached the emergency ward of the hospital and conducted inquiries, which revealed that the marriage of Arti with Javed had taken about 4½ years earlier. ASI Pritam Singh telephonically informed the Sub Divisional Magistrate (SDM) that the statement of Arti was required to be recorded. On 17th October 2010 at about 2 AM, the doctor declared Arti fit for recording of her statement whereafter at about 3.30 AM, her statement was recorded by the SDM. This statement forms the fulcrum of the case of the prosecution, against the accused-appellants Aslam, Ashraf and Sammi.

3. Arti stated in the said statement, recorded at 3.30 AM on 17th October, 2010 in vernacular, that, (i) She was residing at H.No. 1182, Gali Hamim Naem Beg Wali, Kala Mahal, Delhi with her husband, mother-in-law and brother-in-law (ii) her father in law had expired, (iii) She had no child, (iv) her husband ran a meat shop, (v) on the upper floors of the premises where she resided, uncle of her husband

(Aslam) resided with his sons Ashraf and Sammi and his daughter Humma (all four of whom are accused in the present case), (vi) Aslam and his children did not like her as she was Hindu and they were Muslims, (vii) her marriage with Javed had taken place about 4 years earlier, (viii) she was well treated by her husband Javed, his mother and brother and had no complaint against them, (ix) however, Aslam and his children used to quarrel with her on the pretext that she had humiliated them in society, (x) on 16th October, 2010, at about 9.45 PM, Humma picked up a quarrel with her whereafter Aslam asked her and his sons Ashraf and Sammi to set her (Arti) on fire, (xi) consequent thereupon, Sammi sprinkled kerosene oil on her and Ashraf set her on fire using a match stick, (xii) she ran outside in an attempt to escape, and poured milk from a drum lying nearby on herself, in an effort to douse the fire, (xiii) her husband, brother-in-law and mother-in-law were not at home at the time and (xiv) in the meantime, her husband returned and took her to the hospital. She reiterated, at the conclusion of her statement to the SDM that she had been set on fire by the four accused herein i.e., Aslam, his sons (Ashraf and Sammi) and his daughter Humma.

4. In view of the said statement of Arti, a case was registered against the accused under Section 307 of the Indian Penal Code (IPC) and an FIR was, consequently drawn up. The team reached the spot of occurrence of the alleged crime, where they met Javed and took photographs. Exhibits were lifted, seized and sealed. No chance prints, or kerosene oil residue was found. However, a burnt burkha of

black colour, as well as one open plastic can containing a small quantity of kerosene, with its cap lying nearby, along with one match box of 'SHIP' brand with some unburnt sticks were found, which were seized and sealed.

5. On 18th October 2010, information regarding the demise of Arti was received vide DD No. 5A whereafter her dead body was handed over to her relatives after conducting postmortem. Consequently, Section 302 of the IPC was also added in the FIR.

6. On 21st October 2010, Aslam was arrested.

7. The exhibits seized from the place of incident were sent to the Forensic Science Laboratory (FSL), Rohini for opinion.

8. Postmortem report was also obtained from the hospital, to the effect that Arti's body carried 95% burns. The report read thus:

"Dermoepidermal burn injuries present all over the body except some part of front of chest *and right palm*. Burnt skin peeled off at places showing reddened firm base. Body hairs are burnt and singed off at places.

Approximate area of burn was 95% of the total body surface area." (Emphasis supplied)

The cause of her death was opined to be "death due to shock consequent upon *antemortem* flame burns".

9. Scaled site plan was prepared by the draftsman, and his statement was recorded.

10. After completion of requisite formalities, charge-sheet against Aslam was submitted in Court; the other accused, however, absconded.

11. On the basis of the material on record, the accused Aslam was charged under Sections 302/34-IPC *vide* order dated 22nd March 2011. He pleaded not guilty, and claimed trial.

12. Efforts were made to arrest the remaining three accused i.e. Ashraf, Sammi and Humma who had been declared proclaimed offenders vide order dated 28th March 2011, passed by the learned Metropolitan Magistrate (MM). Ashraf and Sammi surrendered consequent whereupon supplementary charge-sheet was submitted before the learned MM on 19th May 2011 against therein.

13. They were charged separately, under Sections 302/34 and 174A IPC and *vide* order dated 20th July 2011 to which, they pleaded not guilty and sought trial.

14. The prosecution examined 20 witnesses (PWs). To the extent their depositions are relevant, a brief reference thereto may be made as under:

(i) PW-1 HC Kunwar Pal, registered the FIR, on the basis of the *rukka* brought by PW-9 Ct. Pradeep Balyan. HC Kunwar Pal was again examined as CW-5, and deposed, as such, that, on the basis of information received from the hospital by PW-13 Ct. Ajay Chaudhary, regarding the death of Arti, he had recorded DD No 5A (Ex PW-5/A).

(ii) PW-3, Dr Jatin Bodwal, who conducted the post-mortem on the body of Arti, on 18th October 2010, and whose report was exhibited as Ex PW-3/A, deposed that *dermoepidermal burn injuries were present all over the body of Arti, except some part of her chest and her right palm, and that the burns covered 95% of her total body surface area.*

(iii) PW-6, Shri N. K. Sharma, the SDM who recorded the dying declaration of Arti at 3:30 A.M. on 17th October 2010, deposed that he had reached the hospital, on the said date, and found Arti admitted therein. *He further deposed that she had been declared fit for giving statement, by the doctor, on her MLC at about 2 AM, whereupon he recorded her statement Ex PW-6/A, which was duly attested and signed by him, and on which Arti also affixed her thumb impression, in his presence.*

(iv) PW-7 SI Mahesh Kumar had prepared the scaled site plan of the place of occurrence, exhibited as Ex PW-7/A.

(v) PW-8, Ct. Dinesh Kumar, was the photographer who reached the place of incident, and took photographs of the scene of crime, exhibited as Ex PW-8/A-1 to Ex PW-8/A-12.

(vi) PW-10, Dr Sanjay Kumar, CMO at the hospital, deposed that, Arti had been brought to the hospital on 16th October 2010, at about 10:42 PM, while he was on duty. He further deposed that he examined her, vide MLC No 172578 (Ex PW-10/A), and that, as per the alleged history stated by her husband Javed, she had sustained burn injuries at home at about 10 PM. He stated that she had suffered burn injuries of 60-70%, *but was conscious and oriented*. Consequent to recording of her statement, Arti, he stated, was referred to the Emergency wing of the Burns and Plastic Surgery department.

(vii) PW-11, ASI Pritam Singh, deposed that (a) on the night intervening 16th and 17th October 2010, at about 11:15 PM, on receipt of DD No 24A, he reached the hospital along with PW-9 Ct Pradeep, and collected the MLC of Arti (Ex PW-10/8), (b) he informed the SDM Darya Ganj regarding the incident, after making enquiries from Javed, (c) at about 2 AM, the doctor had declared Arti fit for recording of her statement, (d) consequently, at about 3:30 AM, the SDM reached the hospital and recorded the statement of Arti (Ex PW-6/A), (e) pursuant thereto, on directions of the SDM, and on the basis of the said statement of Arti, he prepared the *rukka* (Ex PW-11/A), and got

the case registered through Ct. Pradeep, (f) he, thereafter, reached the place of occurrence along with Javed, husband of Arti, (g) PW-18 Inspector Satish Malik and PW-9 Ct Pradeep also reached the said spot, (h) the place of occurrence was inspected by the crime team, and site plan thereof was prepared by PW-18 Inspector Satish Malik at the instance of Javed, (i) photographs were also taken and exhibits lifted, which included a burnt black *burqa*, an open plastic can containing a small quantity of kerosene, which was lying over turned, with the cap of the can lying separately nearby and one “SHIP” brand matchbox with some unburned sticks, (j) some burnt clothes of a lady were also found in the *gali*, which were also taken into possession *vide* seizure memo Ex PW-2/A, and (k) on 20 of October 2010, he, along with SHO Satish, HC Parkash Chand and Ct. Surinder, apprehended Aslam, at the instance of Javed, (l) Aslam was, thereafter, interrogated, and, after recording of his disclosure statement (Ex PW-11/B), was arrested *vide* arrest memo Ex PW-11/C. He also correctly identified the case property and the seized articles, which were recovered from the place of occurrence shown to him before the court.

(viii) PW-12, Dr Siddharth Chowdhury, Resident at the Burns and Plastic Surgery Department in the Hospital, deposed that, on the night intervening 16th and 17th October 2010, Arti had been brought to the hospital *and he examined her, vide Ex PW-*

10/A. He further deposed that, *vide* declaration (Ex PW-12/A), he had declared Arti fit for giving a statement, at about 2 AM.

(ix) PW-14, HC Kanwar Sain, deposed that he had taken 6 *pulandas*, including the sample seal from the MHC (M), on 14th December 2010, and deposited the same at FSL, Rohini.

(x) PW-15, Omkar, Constable at PS Chandni Mahal, deposed that, on 16 October 2010, while so posted, he had handed over DD No 24A to ASI Pritam Singh, at about 11:15 PM, on instructions of the Duty Officer.

(xi) PW-16 Ct. Praveen deposed that, on 18 October 2010, while posted at PS Chandni Mahal, he joined investigation with Inspector Satish Malik, and reached the MAMC Mortuary, from where he collected an envelope duly sealed with the seal of “MAMC-JB-10”, and handed over the same to the I/O, *vide* seizure memo Ex PW-16/A. He further deposed regarding the arrest of Ashraf and Sammi, who surrendered before the learned Metropolitan Magistrate on 25th April 2011, and proved their arrest memos, as Ex PW-16/B and Ex PW-16/C respectively.

(xii) PW-18, Inspector Satish Malik deposed that (a) he had conducted investigations on the night intervening 16th and 17th October 2010, (b) on 18 October 2010, on receipt of information *vide* DD No 5A (Ex PW-18/A), regarding death of Arti, he reached the hospital and moved an application (Ex PW-

18/C) for conducting her *post-mortem*, and prepared the inquest papers, (c) the exhibits were sent to FSL, Rohini, (d) Aslam was arrested, but as the other accused were absconding, he initiated proceedings, against them, under Section 82 of the Cr.P.C., whereafter, on 28 March 2011, all the three remaining accused were declared Proclaimed Offenders (POs), (e) however, on 25th of April 2011, Sammi and Ashraf surrendered before the court, whereafter they were arrested *vide* Arrest Memos Ex PW-16/B and Ex PW-16/C, which were submitted *vide* supplementary charge-sheet, and their statements recorded.

(xiii) PW-19, HC Kishan Chand deposed that, on the basis of information regarding the admission of Arti with burn injuries, he recorded DD No 24A (Ex PW-19/A).

(xiv) PW-20 ASI Harender Parkash deposed, regarding proceedings under Section 82 of the Cr.P.C., against the accused, and exhibited his reports, thereon, as Ex PW-20/A to Ex PW-20/C.

15. On the basis of the aforementioned evidence, particularly the dying declarations of Arti, the prosecution contended, before the learned ASJ, that the allegations against the accused stood duly proved.

16. As against this, counsel appearing for the accused before the Ld. ASJ sought to contend that (i) there were multiple dying declarations of Arti, mutually at variance with one another, (ii) the

MLC of Arti (Ex PW-10/A) recorded that she was conscious and oriented; despite this, Arti failed to disclose, to the examining doctor, that she had been set on fire by the accused, and (iii) the carbon copy of the MLC, which was also on record, was incomplete and did not contain the endorsement of the patient's fitness (Ex PW-12/A), indicating, thereby, that the report, regarding fitness of Arti, was manipulated and procured later on.

17. The Ld. ASJ, even after recording the above three submissions advanced, on behalf of the accused by the Id. Counsel, proceeded to reject the submission that the non-existence of the endorsement, regarding Arti's fitness, on the carbon copy of the MLC, indicated that the said endorsement, on the original copy of the MLC, had been entered later, by noting the fact that the MLC (Ex PW-10/A) had been initially prepared at 10:42 PM, at which time Arti had been admitted in the hospital and examined, whereafter the said original MLC was sent to the Department of Burns and Plastic surgery, where PW-12 Dr Siddharth Chowdhury gave his opinion regarding fitness of Arti, at 2 AM, which endorsement obviously could not exist on the carbon copy of the MLC, forming part of the record. This finding is, quite clearly, factually unassailable, and we express our entire concurrence therewith.

18. The second dying declaration, in the submission of the defence, was contained in the attested copy of the medical record of Arti (Ex.PW12/DA) which was summoned from the hospital at the time of

recording of the deposition PW12 Dr. Siddharth Chaudhary. Ex. PW12/DA contained a description of the incident, which reads thus:

“Alleged history of 95% TBSA flame burns at home at around 9.30 PM on 16.10.2010 as told by the patient herself. According to the patient, she was watching TV at home when her father-in-law’s elder brother came home in a drunken state and manhandled her and enclosed her in a room at home. Then her sister-in-law and sister-in-law’s husband came and then both of them put kerosene oil on her and set her on fire. She was screaming from the house being burnt when patient’s husband (Javed) saw her and immediately tried to help her by putting milk (from the nearby shop) on her burning body to stop the fire. Then he brought her to this hospital (LNJP) ASAP. She also recalls of verbal abuse with her sister-in-law 3-4 days back, before the incidence.”

19. This, according to the defence, was the second dying declaration of Arti, in which she stated that she had been set on fire by her father in law’s elder brother, sister-in-law and sister-in-law’s husband.

20. The third dying declaration, asserted the learned counsel for the defence before the learned ASJ, was the statement of Arti as recorded by the SDM (Ex. PW6/A). In the said statement, Arti alleged that she had been set on fire by the “Tau” of her husband, i.e. Aslam and his sons Ashraf, Sammi and daughter Humma. In the said statement, Arti ascribed specific roles to each of the accused, stating that, at about 9.45 P.M. on 16th October 2010, Humma had quarreled with her, whereupon Aslam exhorted that she be set on fire. Thereafter, as per

the said statement, Sammi poured kerosene oil on her and Ashraf set her ablaze, using the match stick.

21. It was sought to be contended, by learned counsel for the defence before the learned ASJ, that the aforementioned three dying declarations were at variance with each other with each improving upon the last. In the first dying declaration (Ex.PW1/10A), Arti had not named any of the accused as the assailant, in the second dying declaration (Ex. PW12/DA), she sought to implicate her father-in-law's elder brother, her sister-in-law and her sister-in-law's husband while in the third dying declaration (Ex. PW6/A), she named all the four accused i.e. Aslam, Ashraf, Sammi and Humma, as the persons who set her on fire. This contradiction, as per the defence, was fatal to the credibility of the said dying declarations and, consequently, to the case sought to be set up by the prosecution.

22. Reliance was also placed, by the defence, on Ex.PW12/DA, (the diagram showing injuries sustained by Arti), which, it was sought to be pointed out, included Arti's right palm, showing that she could not affix her thumb impression on Ex. PW6/A, the dying declaration on which the prosecution was heavily relying.

23. The credibility of the dying declaration of Arti was also sought to be eroded, by learned counsel for the defence appearing before the learned ASJ on the ground that it had not been recorded by following procedure prescribed, in Chapter XIII-A of Volume III, Delhi High

Court Rules & Orders. Reliance, for this proposition, was placed on the judgment of this Court in *Asharfi Devi Vs. State of Delhi (7) LRC 235 DEL.*

24. It was sought to be pointed out that the aforementioned Rules and Orders prescribed by this Court required that, before recording a dying declaration, the Judicial Magistrate should satisfy himself that the declarant was in a fit condition to make the statement and, if the Medical Officer was present, or his attendance could be secured, his certificate, as to the fitness of the declarant to make statement, had to be obtained. If this was not possible, while the Judicial Magistrate could proceed to record the dying declaration, he was required to note down why he considered it impracticable and inadvisable to wait for the doctor to arrive.

25. In the same context, emphasis was also placed, by learned counsel for the defence, on the requirement, in the aforementioned Rules & Orders of this Court, for the Judicial Magistrate to certify, at the conclusion of the dying declaration, that the declarant was fit to make a statement, and that it contained a correct and faithful record of the statement made by him.

26. For default in following these rules, it was contended by the defence, the dying declaration exhibited as Ex. PW6/A was not reliable. In this context, it was further pointed out that the learned

SDM did not record the dying declaration in question-answer form and, hence, it could not be read in evidence.

27. The above submissions, it was contended, were sufficient to acquit the accused.

28. The learned ASJ, after examining the above contentions advanced by both sides, rejected, at the outset, the suggestion that Arti had given three dying declarations. She held that, in fact, it was only the statement of Arti, recorded before the SDM and exhibited as Ex PW-6/A, which could be regarded as a “dying declaration”. The extract from the MLC (Ex PW-10/A), referred to by learned counsel for the accused was, in her opinion, only a recording of the history of the case, as recorded by the examining doctor immediately upon the arrival of Arti in the hospital. At that time, the examining doctor was obviously more concerned about administering treatment to Arti, and it was for this limited purpose that he recorded the alleged history of burning, which the learned ASJ holds, could certainly not be regarded as a “dying declaration” on the part of Arti. The supposed second dying declaration, as recorded in Ex PW-12/DA, too, it was held, cannot be regarded as a “dying declaration”, *inter alia* for the reason that Arti’s sister-in-law Humma was unmarried, so Arti could not, have referred to Humma and her husband as having participated in her being set afire. Again, Dr. Siddharth Chowdhury, too, being the examining doctor in the Burns Ward, would naturally be more concerned about administering treatment to Arti, and the recording of

her case history by him could not, therefore, be termed as recording of a dying declaration, such as that recorded by the SDM (PW-6), who was especially deputed for this task. Neither could the recording of the statement of Arti, by Dr. Siddharth Chowdhury, be regarded as absolutely accurate, so as to be elevated to the status of a dying declaration, with all its attendant evidentiary acknowledgments. Reliance was placed, for these findings, on a judgement of this court in ***Durga Prasad @ Bablu v State, (2010) DLT 401 (DB)***.

29. Having thus held that there was, in fact, only one dying declaration of Arti, the learned ASJ proceeded to hold the said declaration entirely worthy of credence, for the following reasons:

(i) PW-6 Shri N.K. Sharma, SDM, in his deposition, clarified that he had put questions to Arti to confirm whether she was in a fit state of mind before proceeding to record her statement, and only upon being satisfied (as voluntarily stated during cross-examination) that Arti was responding to his queries, did he proceed to record her statement.

(ii) The SDM had nothing to gain by falsely implicating the accused.

(iii) In such circumstances, the dying declaration, recorded by a competent Magistrate, had been held, by the Supreme Court, in ***Khushal Rao v State of Gujarat, AIR 1958 SC 22*** and ***Vikas v State of Maharashtra, (2008) 2 SCC 516***, to be of much

greater evidentiary value, especially as the Magistrate had no axe to grind against the person named in the dying declaration. In the absence of any circumstance indicating contrariwise, therefore, such a dying declaration, it had been held, should not be disbelieved by the Court. Further reliance was placed, in this context, on *Kamalayya v State of Karnataka, IV (2009) DLT (Crl) 458 (SC)*.

(iv) Regarding the contention, advanced by learned counsel for the defence, to the effect that the dying declaration of Arti did not contain any endorsement, regarding her fitness to make such a statement, at the time of the making of the dying declaration, the learned ASJ relied on *Rama Krishna Roy v State of Orissa, 2012 Cri LJ 3351*, to hold that, as the doctor who had recorded the dying declaration had recorded that Arti was conscious and in a fit state of mind, there was no reason to disbelieve his evidence, as he was an independent and disinterested witness. Though there was a gap of 1 ½ hours between the endorsement of fitness being recorded by the doctor (at 2 AM), and Arti's dying declaration being recorded by the SDM (at 3:30 AM), the SDM had, in his deposition, confirmed that, before recording the statement of Arti, he had satisfied that she was able to respond to his queries. He further deposed that it was only because she was so responding to his queries, that he did not deem it necessary to ascertain the condition of Arti by calling the doctor. He further clarified that

he had, in fact, recorded the responses, given by Arti, to the questions put by him.

(v) The argument, of the defence, that Arti's dying declaration ought to have been recorded in question-answer form, had also been negated by the Supreme Court in *Amar Singh Munna Singh Suryawanshi v state of Maharashtra*, AIR 2008 SC 479.

(vi) Non-recording, thereof, in the manner prescribed by the Rules, was also not a reason to reject the dying declaration, as held by this court in *Abhishek Sharma (supra)*.

(vii) As Arti had been taken to the hospital by her husband Javed, who was also closely related to the accused, there was no occasion for her to be tutored or prompted; neither was there any evidence to that effect – rather, the extant evidence showed that she was fit and competent to make a statement.

(viii) The final submission, on behalf of the accused, to the effect that, as Arti had suffered 95% burns, she could not have affixed her thumb impression on the dying declaration, was also found to be without substance, as the post-mortem report (Ex PW-3/A), as well as the diagram on page 3 thereof, made it clear that the right-hand thumb of Arti was unburnt. No medical evidence, to the effect that Arti was not in a position to affix the

thumb impression of her right hand, had been cited by the accused. Reliance was also placed, in this context, on the judgement of the Supreme Court in *Harjit Kaur v state of Punjab*, AIR 1999 SC 2571.

30. In the above circumstances, the learned ASJ held that the dying declaration of Arti (Ex PW-6/A) was completely trustworthy, and could form the sole basis for the conviction of the accused i.e. Aslam, Ashraf and Sammi. The motive of commission of the crime was also forthcoming from the dying declaration of Arti, where she had categorically stated that the aforementioned accused, along with Humma, were inimically disposed towards her, and used to state that she had humiliated them, having married Javed, who was a Muslim, whereas she was a Hindu. She had also deposed that the said accused used to quarrel with her and that, at about 9:45 PM on 16th October 2010, Humma started a quarrel with her, whereafter the remaining accused, Aslam, Ashraf and Sammi set her alight by pouring kerosene oil on her.

31. Resultantly, the learned ASJ has, *vide* the impugned judgement dated 5th October 2012, found the accused-appellants guilty of having committed the offences under Section 302/34 IPC.

32. The appellant-accused were also convicted, by the learned ASJ, under Section 174A of the IPC. In this regard, it was found that PW-20, ASI Harindra Parkash, had proved the execution of process under

Section 82 of the Cr.P.C. upon accused Ashraf and Sammi, and had also got published a proclamation in the “Navbharat Times” newspaper dated 11th February 2011 (Ex PW-20/E). Inasmuch as the accused had failed to establish why they defaulted in appearing before the court, on the date and time as required by the said proclamation, they were convicted under Section 174 A IPC.

33. *Vide* separate order, dated 9th of October 2012, the learned ASJ has, keeping in mind the fact that Aslam is 65 years old, and a father of two marriageable daughters, besides Ashraf and Sammi, who are his sons, as also the fact that there was no previous record of any conviction against any of the accused, sentenced all the three accused to undergo rigorous imprisonment for life, for the offence punishable under Section 302/34 IPC, in addition to payment of fine of Rs.10,000/- each, with default sentence of 6 months’ simple imprisonment. Besides, Aslam and Ashraf have been sentenced to undergo RI for 5 years for the offence punishable under Section 174 A IPC, in addition to fine of Rs. 2500/- each, with default sentence of 2 months SI. The sentences have been directed to run concurrently, and the accused have been held entitled to the benefit of Section 428 Cr PC.

34. The accused Aslam, Ashraf and Sammi are in appeal, before this court, thereagainst.

Analysis and Findings

35. Perhaps as a sad reflection of the age we live in, a precedent, eerily parallelizing the present case on facts and in law, is to be found in ***Ramesh v State of Haryana, (2017) 1 SCC 529***. Though it is well-settled that precedents have, on facts, little or no value in criminal cases, it merits mention that, in that case, too, the deceased was set ablaze, albeit by her husband, his younger brother, his sister-in-law, and his mother. She was taken to the hospital by her husband, his younger brother and his mother, where, on medical examination, she was found to be suffering *from 100% burns*. Information was sent, by the doctor, to the police, intimating the fact of admission of the deceased in the hospital, whereupon the SI reached the hospital and collected the MLC of the victim. The opinion of the medical officer, regarding fitness of the victim, to give a statement, was obtained, and, consequent to endorsement being made by the doctor, declaring her fit to do so, the SI moved an application for deputation of an officer to record her statement. The learned Judicial Magistrate was deputed the said task. The statement of the victim was recorded by the learned Judicial Magistrate, and the said statement incriminated the accused husband, his younger brother, his sister-in-law, and his mother. Initially, an FIR was registered under Sections 307 and 498-A, read with Section 34 of the IPC; however, on the victim succumbing to her injuries a few hours later, Section 302 IPC was substituted, in the FIR, in place of Section 307 IPC. Post mortem was conducted, spot inspection done, site plan of the place of occurrence prepared, evidence taken into possession and the accused arrested and subjected to custodial interrogation.

36. The accused, in that case, pleaded not guilty, and were, therefore, subjected to trial. As in the present case, the case of the prosecution rested, in that case too, solely on the dying declaration of the victim (Roshni). Significantly, there, though the doctor had certified the victim to be in a fit state to give her statement, prior to the recording of her deposition by the Judicial Magistrate, the Judicial Magistrate himself had stated, that during cross-examination, he could not say if the deceased was semiconscious when he had recorded her statement, and that he had proceeded to do so only because of the opinion given by the doctor. Further, unlike the present case, some of the PWs had subsequently turned hostile. Still more significantly, the accused, in that case, had been acquitted by the trial court, and the said acquittal had been reversed by the High Court, whereagainst the accused had moved the Supreme Court in appeal. These factors are significant, in that they indicate that, on facts, the case of the prosecution, in the present appeals rests, on a much sounder footing than in **Ramesh** (*supra*).

37. Paras 31 to 37 of the report may almost be stated to be of conclusive significance, insofar as the dispute in the present case is concerned, and deserve, therefore, to be reproduced, *in extenso*, as under:

“31. Law on the admissibility of the dying declarations is well settled. In **Jai Karan v. State (NCT of Delhi)**, (1999) 8 SCC 161, this Court explained that a dying declaration is admissible in evidence on the principle of necessity and *can form the basis of conviction if it is found to be reliable. In order that a dying declaration may form the sole basis for*

conviction without the need for independent corroboration it must be shown that the person making it had the opportunity of identifying the person implicated and is thoroughly reliable and free from blemish. If, in the facts and circumstances of the case, it is found that the maker of the statement was in a fit state of mind and had voluntarily made the statement on the basis of personal knowledge without being influenced by others and the court on strict scrutiny finds it to be reliable, there is no rule of law or even of prudence that such a reliable piece of evidence cannot be acted upon unless it is corroborated. A dying declaration is an independent piece of evidence like any other piece of evidence, neither extra strong or weak, and *can be acted upon without corroboration if it is found to be otherwise true and reliable. There is no hard-and-fast rule of universal application as to whether percentage of burns suffered is determinative factor to affect credibility of dying declaration and improbability of its recording. Much depends upon the nature of the burn, part of the body affected by the burn, impact of the burn on the faculties to think and convey the idea or facts coming to mind and other relevant factors. Percentage of burns alone would not determine the probability or otherwise of making dying declaration. Physical state or injuries on the declarant do not by themselves become determinative of mental fitness of the declarant to make the statement (see **Rambai v. State of Chhattisgarh**, (2002) 8 SCC 83 : 2003 SCC (Cri) 219).*

32. *It is immaterial to whom the declaration is made. The declaration may be made to a Magistrate, to a police officer, a public servant or a private person. It may be made before the doctor; indeed, he would be the best person to opine about the fitness of the dying man to make the statement, and to record the statement, where he found that life was fast ebbing out of the dying man and there was no time to call the police or the Magistrate. In such a situation the doctor would be justified, rather duty-bound, to record the dying declaration of the dying man. At the same time, it also needs to be emphasised that in the instant case, dying declaration is recorded by a competent Magistrate who was having no animus with the accused persons.* As held in **Khushal Rao v. State of Bombay**, 1958 SCR 552 : AIR 1958 SC 22 :

1958 Cri LJ 106, this kind of dying declaration would stand on a much higher footing. After all, a competent Magistrate has no axe to grind against the person named in the dying declaration of the victim and in the absence of circumstances showing anything to the contrary, he should not be disbelieved by the court (see **Vikas v. State of Maharashtra, (2008) 2 SCC 516 : (2008) 1 SCC (Cri) 486**).

33. No doubt, the victim has been brought with 100% burn injuries. Notwithstanding, the doctor found that she was in a conscious state of mind and was competent to give her statement. Thus, the Magistrate had taken due precautions and, in fact, the medical officer remained present when the dying declaration was being recorded. Therefore, this dying declaration cannot be discarded merely going by the extent of burns with which she was suffering, particularly, when the defence has not been able to elicit anything from the cross-examination of the doctor that her mental faculties had totally impaired rendering her incapable of giving a statement.

34. Keeping in view the aforesaid considerations, we feel that the High Court rightly observed that the manner in which the trial court proceeded with the matter was legally unsustainable. It was necessary for the trial court, in the first instance, to see as to whether due precautions were taken before recording the statement of the deceased, which became dying declaration as she died within few hours thereafter. In this context, what is relevant is that the moment the deceased was admitted in PGIMS, Rohtak, without any loss of time and immediately thereafter the doctor at the said hospital sent the information to the police post about her admission in the hospital with burns. On receipt of that information, Sub-Inspector visited the hospital and collected medical report of the deceased. He immediately moved an application before the medical officer concerned seeking his opinion with regard to the fitness of the patient. On that application itself (Ext. PG), the doctor made an endorsement (Ext. PG-1) that she was fit to make statement. The Sub-Inspector did not record the statement of the deceased himself. Rather, he took due precaution by approaching the Chief Judicial Magistrate, Rohtak with an application (Ext. PH) requesting him to

depute an officer to record the statement of the deceased. On this application, orders were passed (Ext. PH-1) directing Bhupinder Nath, Judicial Magistrate, First Class, Rohtak to go to the hospital and record the statement. Armed with this order, the Magistrate reached the hospital and recorded the statement of the deceased. This recording was done in the presence of the doctor who again certified that she had given the statement in a fit state of mind.

35. The aforesaid narration stating the manner in which statement of the deceased was recorded clearly brings out that all possible precautions were taken by the authorities concerned before and while recording her statement. The trial court in its judgment has not even discussed the aforesaid aspects. The recording of statement by the Judicial Magistrate is sought to be discredited on the specious ground that in his cross-examination he has stated that he could not say whether the deceased was semi-conscious. The High Court has rightly recorded that this statement of PW 11 is read out of context. The aforesaid answer by PW 11 was in reply to the question put to him as to whether the deceased was semi-conscious when her statement was recorded by him. It is in reply to this question he stated that he cannot say if she was semi-conscious when her statement was recorded. He also clarified that since the doctor had given his opinion, he proceeded to record her statement. It may be noticed that PW 11 nowhere stated that the deceased was semi-conscious when her statement was recorded. The statement of PW 11 was to be taken into consideration as a whole. *It has come on record, and we repeat, that after the completion of her statement, the doctor made an endorsement (Ext. PH-4) to the effect that the deceased remained fit during the recording of her statement and it is only thereafter the learned Magistrate (PW 11) appended his signature (Ext. PH-5) categorically stating that the statement recorded by him was true version of what the deceased had spoken and he had stated in unambiguous terms that she was fit to make statement and remained fit till her statement was recorded.*

36. *In view of the specific certification by the doctor about the fitness of the deceased that she remained fit while recording the statement, the mere effect that she had suffered*

100% burns would not, ipso facto, lead to the conclusion that the deceased was unconscious or that she was not in a proper state of mind to make a statement. At this stage, it would also be relevant to point out that no challenge was made by the defence to the aforesaid statement of the deceased on the ground that it was not made voluntarily or it was made by any extraneous circumstances or was the result of tutoring. In fact, even as per the appellants, it is they who had taken the deceased to the hospital and no other person known to her had come in her contact before the statement was recorded. On the contrary, PW 3 and PW 4 (father and brother of the deceased respectively) have not supported the prosecution version, which aspect shall be dealt with later at the appropriate stage and, therefore, the question of tutoring does not arise at all.

37. On examination and analysis of the dying declaration in the aforesaid perspective, we do not find any reason to discard it having regard to the legal position on the subject already noticed above by referring to relevant case law. It is trite that dying declaration is a substantive piece of evidence and can be made the basis of conviction once the court is convinced that dying declaration is made voluntarily and is not influenced by any extraneous circumstances.”

(Emphasis supplied)

38. The above decision clearly elucidates the following principles, regarding dying declaration:

(i) dying declaration may be acted upon even without corroboration of the case, if it is found that (a) the declarant was in a fit state of mind, (b) the declarant had voluntarily made the statement (c) the statement was made on the basis of personal knowledge, (d) the declarant was not being influenced by any other person/persons and (e) The statement itself was found to be reliable.

- (ii) percentage of burns suffered (in cases of the declarant being a victim of burn injuries) was not necessarily a determinative factor, effecting the credibility of dying declaration, or the probability of its recording.
- (iii) much depended on the nature of the burns, part of the body effected and impact of the burns on the cognitive faculties and ability to convey facts of the case coming to the mind.
- (iv) The factum of dying declaration having been recorded by a competent Magistrate, having no animus with the accused, lends additional credibility to the declaration. Such a declaration is ordinarily to be believed by the Court.
- (v) The fact of the doctor finding the victim to be in a conscious state of mind and competent to give her statement, is also relevant in this regard.
- (vi) Further, the dying declaration would also command respect on account of due precautions having been taken by the magistrate before recording the declaration. Where the deceased had been seen by the doctor immediately on admission in the hospital, information was forthwith sent to the police post regarding her admission with burns, on receipt thereof, the SI visited the hospital and collected the MLC of the deceased, the statement was recorded by a magistrate instead of the SI himself, and the deceased was certified by a doctor, as having been competent to give the said statement, the declaration was, *ex facie*, acceptable and believable.

39. A reading of the deposition of the various PWs, recorded during the course of evidence, reveals that they are cohesive, congruent and coherent, and have remained unshaken in cross-examination. On the basis thereof, a recounting the factual narration, in the present case, in the light of the principles and the law laid down in the aforementioned decision in **Ramesh** (*supra*), proceeds thus (to the extent relevant):

(i) On the 16th of October 2010:

(a) Assault, on Arti, took place at 9:45 PM.

(b) At 10 PM, Javed (PW-2) returned, and found Arti in flames. He tried to douse the fire. Thereafter, he took her to PS Chandni Mahal, where he was advised to take her to hospital.

(c) At about 10:42 PM, Arti was brought to the hospital. She was examined by the CMO, Dr. Sanjay Kumar (PW-10), who prepared an MLC No.172578.

(d) Between 11:15 and 11:30 PM, Ct. Ajay (PW-13) informed ASI Pritam Singh (PW-11) and Ct. Pradeep Balyan (PW-9) regarding the bringing of Arti to the hospital in burnt condition.

(e) Between 11:50 and 11:55 PM, ASI Pritam Singh reached the hospital, where he conversed with Arti.

(ii) On 17th October 2010:

(a) At 2 AM, Dr. Siddharth Chowdhary (PW-12) declared Arti fit for recording of her statement.

(b) ASI Pritam Singh, thereupon, informed the SDM (NK Sharma-PW-6) that the statement of Arti was required to be recorded.

(c) At 3 AM, the SDM reached the hospital and, at 3:30 AM, the statement of Arti was recorded by him.

(d) At 4 AM, *rukka* was prepared by ASI Pritam Singh, which was delivered, through Ct. Pradeep Bulyan, to HC Kunwar Pal (PW-1), at PS Chandni Mahal, at about 4:15 AM.

(e) A case, of commission of offence under section 307 of the IPC was, thereupon, registered against Aslam, Ashraf, Sammi and Humma.

40. As in the case of ***Ramesh (supra)***, it would be seen that, in the present case, too, the sequence of events is unbroken and perfectly consonant throughout. Barring minor differences of a few minutes here and there, between statements (which were recorded nearly two years after the incident in the present case took place), not a single occurrence, or happening, is out of place. Again, as in the case of ***Ramesh (supra)***, all due precautions were taken, and procedures followed, medical as well as non-medical, before recording of the statement of Arti. Arti was certified as fit, for recording of her statement, by PW12 Dr. Siddharth Chowdhary, Jr. Resident in the Department of Burns and Plastic Surgery and, though the statement was recorded 1½ hours thereafter, it has clearly come out, in the deposition of the SDM NK Sharma (PW-6) that, at the time of

recording of the said statement, Arti was coherent and answering questions properly. The exact words used by the SDM, in his cross-examination by the accused, read thus:

“I did not try to ascertain the condition of the patient by calling the doctor at the time of recording the statement. (Vol. Because the patient was responding to my queries properly). I had recorded the queries made by me to the injured. It is correct that it is not recorded in question-answer form. But, I used to put the question to the injured to which she used to reply and I have recorded the answers given by her in the statement Ex PW-6/A. It is correct that I have not recorded the specific questions put by me.”

In this view of the matter, there is not an iota of material, cited or relied upon by the accused, as could go to discredit the aforementioned statement of the SDM. That apart, the fact that the statement of Arti was recorded by the SDM, who is the competent official to do so, and who had no ill will, enmity or animosity with any of the accused, is also significant, as it adds credibility thereto.

41. As regards the medical condition of Arti, and her competence to give the statement, there is no reason to disbelieve the certification, by Dr. Siddharth Chowdhary, who is a specialist working in that particular branch (Burns and Plastic Surgery), to the effect that Arti was in a fit condition to give her statement. As has been held in ***Ramesh (supra)***, the percentage of burns suffered by the victim cannot be an indicia to decide whether the victim was, or was not, in a fit condition to give a statement. The nature, site and effect of the injury on the ability to give the statement, are relevant factors to the issue. It is quite possible that burn injuries, even of much lesser

severity, could incapacitate the victim from giving a statement if, for example, they irreparably damaged the vocal cords or cognitive faculties of the victim. On the other hand, burn injuries of much greater severity may have little, or no effect on the ability to give a statement. In the present case, though the burn injuries were stated to be 95%, they were, as per the post-mortem report, “dermoepidermal” in nature. “Dermoepidermal” burn injuries, as explained by PW-9 Dr. Siddharth Chowdhary, in cross examination, referred to instances where the outer, as well as inner *skin*, were burnt. Though the said evidence emerged in cross-examination, there is nothing to indicate that such skin injury, howsoever severe, necessarily incapacitated Arti from being able to give her statement. Incapacity, in such situations, cannot be presumed, merely on surmises and conjectures. In the absence of any evidence to indicate such incapacity, this court – as also the learned ASJ below – are, in law, bound to accept the certificate, of Dr. Siddharth Chowdhary, which remains untarnished even as on date.

42. That apart, the dying declaration, apart from being recorded before the SDM, and by him, also bore the thumb impression of Arti. The faint contention, urged by the defence before the learned ASJ, to the effect that, having suffered 95% burns, it was difficult to believe that Arti was in a position to affix her thumb impression, stands belied even by the post-mortem report, which indicates that the burn injuries had not affected part of the front of her chest *and her right thumb*. That apart, the Supreme Court has also held, categorically, in **Ramesh**

(*supra*), as well as in *Harjit Kaur (supra)* – rightly relied upon by the learned ASJ – that, where the medical evidence did not disclose that the deceased could not have put her thumb mark on the dying declaration, existence of burn injuries could not result in creating any doubt regarding the evidence of the SDM, or the veracity of the dying declaration. Further, the SDM has himself deposed that Arti affixed her thumb impression, on her statement, in his presence, and the said deposition, besides being *ex facie* believable, remains unshaken.

43. Adverting, now, to Ex. PW-10/A and Ex. PW-12/A, being the extract from the MLC drawn up by the examining doctor immediately on arrival of Arti at the hospital and the recording of her case history by Dr. Siddharth Chowdhury, Jr Resident in the Department of Burns and Plastic Surgery, when her case was referred to the said Department, the learned ASJ, as already noted in para 29 hereinabove, rejected the suggestion, made by learned defence counsel, that these were also “dying declarations” and that, therefore, there were material inconsistencies amongst the three dying declarations of Arti, with each improving on the immediately preceding one. The learned ASJ holds – and, in our opinion, correctly – that Ex PW-10/A and Ex PW-12/A were merely the recording of the history of the case, by the two doctors who examined Arti and administered treatment to her, and could not, therefore, be regarded as dying declarations made by Arti herself. We concur with this finding. Ex PW-10/A merely reads “A/H/O Burns injury at home address at around 10 PM as told by B/B and patient”. This, in our opinion, quite clearly cannot be regarded as

a “dying declaration” within the meaning of Section 31 (1) of the Indian Evidence Act, 1872, as it is the mere recording of the history of the patient who had been brought into the hospital, by the doctor who in was immediately entrusted charge of the case. As rightly held by the learned ASJ, such a recital, at the time of its being made on the body of the MLC, could not even be regarded as having been intended to be a recording of the declaration of Arti. Therefore, there could be no question of elevating it to the status of a “dying declaration”. Having said that, there is no inconsistency, between the said recital, and the dying declaration of Arti (Ex PW-6/A); if at all, the said recital merely reiterates the fact that Arti suffered assault, at her home, at around 10 PM on 16th October 2010. So far as Ex PW-12/DA is concerned, this again, was the recording of Arti’s case history, by Dr. Siddharth Chaudhary, when her case was referred to the Department of Burns and Plastic Surgery, the learned ASJ holds that this recital, too, was basically by nature of a case history drawn up by Dr. Siddharth Chowdhury, and could not be regarded as a “dying declaration” of Arti. While we substantially agree with this finding, there is, again, no essential inconsistency, so far as the specifics of the incident is concerned, between this recital and Ex PW-6/A, i.e. the “formal” dying declaration of Arti. That apart, it is obvious that Arti could not have referred to her “sister-in-law’s husband”, her sister-in-law, Humma admittedly being unmarried. As rightly held by the learned ASJ, therefore, this recital cannot, quite obviously be relied upon, or be used as a basis to discredit the later dying declaration actually given by Arti herself before the SDM, which was entirely

coherent and specific in material particulars. The reference, in Ex PW-12/DA, to the husband of Javed's sister – a non-existent entity – as, in our opinion, has been rightly held, by the learned ASJ, as being insufficient to discredit Ex PW-6/A, i.e. the dying declaration of Arti.

44. We also find the reliance by the learned ASJ, on the decision of the Division Bench of this Court in **Durga Prasad (supra)** to be apposite. The said decision pointedly examined the value to be attached to the recital regarding the version of the occurrence of the victim and recorded by the doctor in the case history before administering treatment. The following extract, from para 20 of the said decision, merit reproduction:

“The doctor is not concerned about the details of the incident or names of the assailants. His job is to ensure that immediate medical aid is given to the injured and not to start interrogating the injured or the person bringing him to the hospital. In this regard we may refer to two judgments of the Supreme Court wherein also the same view was taken. In “Bhargavan vs. State of Kerala”, AIR 2004 sc 1058, which was cited by the learned Additional Public Prosecutor it was observed by the Supreme Court that:-

*“20. So far as non-disclosure of names to the doctor, same is really of no consequence. As rightly noted by the Courts below, his primary duty is to treat the patient and not to find out by whom the injury was caused. The plea in this regard is clearly unacceptable. The question was examined by this court in **Pattipati Venkalah v. State of Andhra Pradesh.** (1985) 4 SCC 80 and similar view was taken.” (emphasis laid)*

And this is what the Supreme Court had observed in “ Pattipati Venkalah vs. State of Andhra Pradesh”, 1985 (4) SCC 80:-

“16. Another argument advanced before us was that although PWs1 and 2 were supposed to be eye-witnesses, they never cared to disclose the name of the assailant to the doctor when the body of the deceased was taken to the hospital. This argument is only stated to be rejected. A doctor is not at all concerned as to who committed the offence or whether the person brought to him is a criminal or an ordinary person, his primary effort is to save the life of the person brought to him and inform the police in medico legal cases. In this state of confusion, PWs 1 and 2 may not have chosen to give details of the murder to the Doctor. It is well settled that Doctors before whom dead bodies are produced or injured persons are brought, either themselves take the dying declaration or hold the post-mortem immediately and if they start examining the informants they are likely to become witnesses of the occurrence which is not permissible.”

(emphasis supplied).

45. In view of the legal position, as enunciated in the above extracted para, the deposition by Arti in her dying declaration (Ex.PW6/A), to the effect that she had been assaulted and set on fire by her father-in-law, his two sons and his daughter, could not be wished away or whittled down merely because, in the recording of her case history by Dr. Siddharth Chaudhary, the assault was stated as having been effected by her father-in-law, his son, daughter and her daughter's husband. To reiterate, this was especially so as Humma was admittedly unmarried.

46. We, therefore, endorse the finding of the learned ASJ that dying declaration of Arti recorded before the SDM (Ex.PW6/A) was credible and acceptable in evidence and wholly believable.

47. We also entirely concur with the remaining findings of the learned ASJ, and are of the opinion that she has, quite rightly, held the charges of commission of offences, under Sections 302/34, as well as 174A of the IPC, as having been brought home to the accused.

48. The present case being one of a calculated murderous assault, by other members of the family of the husband, on his hapless wife, by overpowering her and setting her on fire, apparently fuelled only by religious hatred, we are of the view that the sentences awarded, to the accused, by the learned ASJ, do not call for any interference at our hands.

49. For all the above reasons, the appeals filed by the appellants are dismissed.

50. Trial Court record be sent back. Intimation be sent to the Superintendent, Tihar Jail.

**C. HARI SHANKAR
(JUDGE)**

**S.P. GARG
(JUDGE)**

NOVEMBER 25, 2017/neelam