

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

+ **CRL.APPL. No.860/2012**

Reserved on: 16th September, 2017
Date of decision : 28th October, 2017

BIRJU YADAVAppellant

Through Ms.Rakhi Dubey, Advocate
(DHCLSC)

Versus

STATE ... Respondent

Through Mr.Amit Gupta, APP for the
State.

CORAM:

HON'BLE MR. JUSTICE MUKTA GUPTA

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J.

The appellant, Briju Yadav, by way of present appeal impugns the order dated 23.12.2011 passed by the learned Additional Sessions Judge-02 (South East) holding him guilty for the offence punishable under Section 302 of Indian Penal Code (in short IPC) and also order of sentence dated 24.12.2011 sentencing him to rigorous imprisonment for life and further to pay a fine of Rs.10,000/- and in default to suffer simple imprisonment for the further period of six months.

2. The case of the prosecution is that on 26.10.2009 an information was received from PCR on Police Post, Sri Niwas Puri,

PS Amar Colony that a woman has burnt herself in jhuggi No.S-52/53, Indira Camp in front of Okhla Reservation Centre. SI Ram Niwas (PW-21) along with HC Anil Kumar (PW-6) reached at the spot and found that the injured had been taken to the hospital. HC Anil Kumar was left to protect the scene of crime while SI Ram Niwas went to the Burn Ward, Safdarjung Hospital and found that deceased, Ms.Seema Yadav, was under treatment vide MLC No.04271 (Ex.PW-17/A). It is the case of the prosecution that the deceased was declared fit to make a statement by Dr.Thakur Tussu, Sr.Resident, Department of Burn and Plastic Surgery, Safderjung Hospital (PW-1). SI Ram Niwas recorded the statement of the deceased. In her statement, the deceased had stated that the appellant had put kerosene oil on her and had burnt her. On the basis of this statement, SI Ram Niwas recommended for registration of FIR under Section 307 IPC and sent the rukka (Ex.PW-21/A) at 2.40 p.m., which led to the registration of the FIR (Ex.PW-7/A). Since the deceased later succumbed to her burn injury on 27.10.2009, Section 302 IPC was accordingly added. Certain items like match box, one plastic can having kerosene oil, one empty half bottle of liquor (make Halchul), ashes of burnt cloth and earth control were seized from the jhuggi. Statement of children of the deceased, namely Master Sunny and Vishal were also recorded before Metropolitan Magistrate under Section 164 Cr. P.C.

3. Prosecution examined 21 witnesses in support of its case.

(a) PW-1 Dr. Thakur Tussu, Sr.Resident, Department of Burn and Plastic Surgery, Safderjung Hospital, New Delhi had,

on an application made by SI Ram Niwas asking for his opinion, declared the deceased fit for making the statement. He proved the endorsement as to fitness of the deceased as Ex.PW-1/A). In his cross examination he denied the suggestion that he had given the opinion of fitness at the instance of SI Ram Niwas.

(b) PW-2 Vishal Yadav is the son of the deceased from her previous marriage. In his statement he did not support the case of the prosecution and therefore, upon permission from the Court, was cross examined by learned APP for the State. He admitted having made the statement under Section 164 Cr. P.C. (Ex.PW-2/B), however, stated that the same was made at the instance of his maternal grand-mother (Nani)

(c) PW-3, Smt.Arati who is neighbour of the deceased and the appellant, as per prosecution, had reached the spot immediately after the incident and had been told by the deceased that the Appellant had lit her on fire, however, she also did not support the case of the prosecution.

(d) PW-4, Dr.Manish, Assistant Professor, Department of Forensic Medicine, Safderjung Hospital, New Delhi had conducted the post-mortem of the deceased. He stated that the death was due to shock as a result of antemortem burns sustained by flame and the burn injuries were sufficient to cause death in ordinary course of nature. As far as the opinion, whether the burns were suicidal or homicidal, he stated that it was a matter of investigation.

(e) PW-5 Sonu is the cousin brother of the appellant. He is supposed to have intervened in the quarrel between the appellant and the deceased that had taken place in the morning of the day of incident. However, in his statement he did not support the case of the prosecution and denied his presence.

(f) PW-6 HC Anil Kumar states that he was posted at police post, Sri Niwas Puri, P.S. Amar Colony on 26.10.2009 and on receipt of DD No.8 at about 12 noon, he reached at the spot at Jhuggi No.52/53, Gandhi Camp, Sri Niwas Puri where he met SI Ram Niwas. He states that he joined the investigation with SI Ram Niwas and was a witness to the seizure of various items, including the clothes of Vishal and Sunny as also the arrest of the appellant.

(g) PW-7 W/HC Fukeria recorded the FIR No.531/2009 at about 2.50 p.m. on 26.10.2009 on the basis of rukka sent by SI Ram Niwas through HC Anil Kumar.

(h) PW-8 Ct. Anand is a member of the Mobile Crime Team who had taken 17 photographs (Ex.PW-8/A-1 to A-17) of the scene of the crime.

(i) PW-9 Master Sunny Yadav is the son of the deceased and the appellant. As per the prosecution, the incident had taken place in his presence and he is the eye witness of the incident. His statement was also recorded under Section 164 Cr. P.C. (Ex.PW-9/A). He was 12 years old when his statement was recorded by the Trial Court. Trial Court observed that he was changing his version on each questions being put by the learned

defence counsel. His statement, however, is very crucial to the prosecution.

(j) PW-10 SI Mahesh Kumar has prepared the scaled site plan (Ex.PW-10/A).

(k) PW-11 HC Yoginder had taken the exhibits pertaining to the case to FSL, Rohini.

(l) PW-12 HC Madan Lal, on 26.10.2009, was posted in PCR Van, South East Zone, New Delhi and stated that at about 12 noon an information was received on the PCR that one lady has been set on fire in front of Reservation Centre, Okhla Railway Station. He along with driver and Gunman on duty on PCR reached Jhuggi No.S-52/53, Gandhi Camp where he found the deceased with burn injuries. He took the deceased to the Safderjung Hospital in the PCR van along with son of the deceased, Vishal. He states that on the way, the deceased had told him that her husband had set her on fire after pouring kerosene oil on her. He further states that appellant was also found on the spot when he reached the spot of incident on receiving the information on the PCR.

(m) PW-13 HC Naresh Kumar was working as MHC(M) at P.S. Amar Colony. He testified about the safe keeping of the seized items.

(n) PW-14 Lady Ct. Sheetal was on duty at Channel 129, Control Room, P.S. Headquarter, New Delhi on 26.10.2009. She states that at around 11.58 a.m. an information was received that in front of S-52/20, Indira Camp, in front of Okhla

Reservation Centre, New Delhi a female has been burnt. She recorded the information in the prescribed form and passed the information to the Kite Network. She further states that official of the PCR van who had attended the call gave feedback to the control room that the deceased had been put on fire by her husband and had been admitted in Safdarjung Hospital. She produced the form in which the information and feedback given by the PCR van were recorded (Ex.PW-14/A).

(o) PW-15 Sh.D.K. Jangala, the then Metropolitan Magistrate had recorded the statement of Vishal and Sunny, Ex.PW-2/B and Ex.PW-9/A respectively on 16.11.2009.

(p) PW-16 SI Jitender Kumar was the incharge of the crime team who had reached the spot upon receiving information regarding burning of a female from SI Ram Niwas.

(q) PW-17 Dr.Anil Bengari was working as Sr. Resident in Burnt Plastic Department, Safdarjung Hospital on 26.10.2009. He was on emergency duty in the Burnt Plastic Ward when the deceased was brought by Vishal in a PCR van. He states that on his asking, the deceased told him that her husband had poured kerosene oil on her and lit her on fire. He prepared the MLC (Ex.PW-17/A).

(r) PW-18 Dr.Manish Kumar Pandey, Sr. Resident in Burn and Plastic Surgery Department had prepared the death summary of the deceased (Ex.PW-18/A).

(s) PW-19 ACP S.P. Gupta was posted as SHO, PS. Amar Colony on 27.10.2009.

(t) PW-20 Ct. Kajor Mal had recorded the DD No.8 (Ex.PW-20/A) on 26.10.2009.

(u) PW-21 SI Ram Niwas had moved an application Ex.PW-1/A seeking opinion whether the deceased is fit for making a statement. He recorded the statement of the deceased (Ex.PW-2/A). He prepared the rukka (Ex.PW-21/A), seized various items from the spot, prepared a site plan (Ex.PW-21/B) and also arrested the appellant.

The appellant in his statement under Section 313 Cr. P.C. stated that Sonu had come to his house at about 9 a.m. on the day of incident. He denied his presence at the time of the incident.

4. Additional Sessions Judge, vide its impugned order has convicted the appellant under Section 302 IPC and sentenced him to undergo rigorous imprisonment for life. Trial Court found that the dying declaration of the deceased was not only reliable but was also corroborated by the statement of PW-9 Sunny. Based on the statement of PW-12, HC Madan Pal, learned Trial Court held that the appellant was present in the jhuggi at the time of incident and had committed the murder of the deceased by pouring kerosene oil on her and putting her on fire.

5. Learned counsel for the appellant has contended that the purported eye witnesses i.e. sons of the deceased, Vishal Yadav (PW-2) and Sunny Yadav (PW-9) did not support the case of the prosecution in their evidence.

6. PW-2, Vishal Yadav is the son of the deceased from her previous marriage. In his statement he claims that the deceased had picked up the kerosene oil and poured the same on herself and had lit herself up using one of the match box which was lying near the stove. He was cross examined by learned Additional Public Prosecutor wherein he admitted to having made the statement before the learned Metropolitan Magistrate under Section 164 Cr. P.C. (Ex.PW-2/B), however, claimed that the same was given at the insistence of his maternal grand-mother (Nani). At the initial stage, learned counsel for the appellant did not cross examine him, however, later on an application under Section 311 Cr.P.C. being filed by the appellant, he was recalled and cross examined by the appellant. In his further cross examination by the learned counsel for the appellant, PW-2 claimed that the deceased was unconscious when she was taken to the hospital and remained so till she reached the hospital. He claimed that the deceased did not speak to any PCR official or police personnel during the time when she was taken to the hospital from the spot.

7. PW-9, Sunny Yadav was 12 years old when his statement was recorded in the trial. He was born from the wedlock between the appellant and the deceased. Learned Additional Sessions Judge has recorded an observation that he was changing his versions with each question being put by the learned defence counsel and whenever being confronted with his earlier version, he stated that the Court may not have heard the answer correctly.

8. It is further contended by the learned counsel for the appellant that the dying declarations are not trustworthy. As far as the statement being made by the deceased to PW-12, HC Madan Pal, who had taken her to the hospital, it is submitted that as PW-2 Vishal has stated that the deceased was unconscious while being taken to the hospital, this statement made to HC Madan Pal cannot be relied upon. The second dying declaration, which is contained in the MLC, Ex.PW-17/A also cannot be relied upon as it shows manipulation. Earlier, the name of the appellant had been written against the “name of relative or friend” but was later cut off and name of PW-2 Vishal was written in his place. Even “I/B-self” has been added later. It is further claimed that as the MLC itself records that the deceased was suffering from “95% deep thermal burn and facial and respiratory burn” it would not have been possible for the deceased to make any statement especially the one recorded in the MLC. At this stage, it is relevant to point out that the said MLC records “A/H/O deep burn when pti husband poured kerosene on her and lit fire when pt brought to SJH for treatment”.

9. As far as the third dying declaration recorded by HC Ram Niwas i.e. Ex.PW-2/A, it is submitted that the same does not have the endorsement of the Doctor stating that the deceased was fit for making the statement. Further, PW-2 Vishal has been claimed to be a witness to the recording of the said statement, however, in his deposition he had denied any statement of the deceased being recorded in his presence by the police.

10. With regard to the statement of PW-14 Lady Ct. Sheetal and the recording Exh. PW 14/A, it is submitted that the same is not trustworthy as Vishal Yadav has deposed that the deceased did not make any statement to HC Madan Pal.

11. Learned counsel for the appellant has placed reliance on the judgment of this Court dated 18.05.2011 passed in Criminal Appeal No.371/1997, *Akbari Begum & Ors. v. State* that holds that where there are infirmities which surround the dying declaration and the same does not inspire confidence, no reliance can be placed on such dying declaration and be made sole basis for conviction.

12. It has further been submitted that as per the dying declaration, the incident took place in the jhuggi, however, the site plans, which are exhibited as Ex.PW-10/A and Ex.PW-21/B, the incidence took place in the veranda and not the jhuggi.

13. Lastly, it is submitted that as per FSL report no petrol/kerosene/diesel or its residue could be detected on the match boxes or the clothes of Master Sunny and Vishal seized during investigation. Learned counsel for the appellant contends that this disproves the prosecution version of the Appellant pouring kerosene oil on the deceased, Vishal and Sunny Yadav in the morning of the day of the incident.

14. We, however, are not persuaded by the submissions made by the learned counsel for the appellant.

15. In the present case, there are more than one dying declaration.

16. The first one is made to the Head Constable Madan Pal (PW12). He was the first to reach the spot upon receipt of information on the PCR regarding the deceased having been set on fire. He had taken the deceased to the Safardjung Hospital in the PCR van along with Vishal (PW-2), son of the deceased. He states that on the way, the deceased had told him that her husband had set her on fire after pouring kerosene oil on her. Further, he identified the appellant and stated that the appellant was present at the spot when he along with the driver and the gunman on duty on PCR van had reached the spot on receipt of information. His statement is corroborated with the statement of PW-14 Lady Ct. Sheetal, who states that that she was on duty on channel No.129 at Control Room, Police Headquarters, New Delhi on 26th October, 2009 (i.e. the date of the incident) from 8.00 to 2.00 pm and had received an information on the police control room at around 11.58 am that in front of Jhuggi no.S-52/20, Gandhi Camp; a female has been burnt. She further states that the official of the PCR van who had attended the call gave feed back to the Control Room that one lady namely Seema Yadav, wife of Birju who was put on fire by her husband has been admitted in Safdarjung Hospital. She further produced the form in which the information and feedback given by the PCR van was recorded. The same was exhibited as Ex.PW-14/A.

17. The second dying declaration, and perhaps the most vital one, is recorded in the MLC (Ex.PW-17/A). The MLC is made at 12.45 pm and records that the deceased had suffered the burn when her husband poured kerosene over her and lit fire on her. It also records 'I/B-

self”, which Dr.Amit Bengani in his statement explains to mean ‘informed by self’. Though in the said report, it is recorded that the deceased had suffered 95% deep thermal burn and facial and respiratory burn, the above recording of history at the time of admission cannot be disbelieved on that ground alone.

18. Dr.Amit Bengani, Sr. Resident, Burn and Plastic Department, Safdarjung Hospital (PW-17) has stated that he was on emergency duty in the Burn and Plastic Ward on 26th October, 2009. He further states that the deceased was brought to the Emergency Ward by her son Vishal in a PCR van and it was the deceased who told him that her husband had poured kerosene oil on her and lit fire on her. He further proves the MLC (Ex.PW-7/A). He further states that the remark ‘I/B self’ on the MLC means ‘informed by self’. In his cross examination by the counsel for the appellant, though he admitted that the deceased had respiratory problem and her condition was critical as she suffered 95% burn injury, he was categorical in stating that the deceased was in a condition to speak. Though, he was extensively cross examined, his testimony regarding the above dying declaration could not be shaken. As far as cutting of the name of the Appellant and instead writing of name of Vishal against the name of “relative or friend”, it is not even the case of the Appellant that he had accompanied the deceased while she was being taken to the hospital. In fact, Vishal admits that he had accompanied the deceased when she was taken to the hospital. This cutting, therefore, in no way shakes the veracity of the MLC. On the other hand, in our opinion, it, infact, adds to the same.

19. The third and the last dying declaration is contained in Ex.PW2/A i.e. the statement of the deceased recorded by SI Ram Niwas (PW-21). It is preceded by a certificate of fitness to make statement issued by Dr. Thussu, Sr. Resident, Department of Burn and Plastic Surgery, Safdarjung Hospital, New Delhi. The said certificate is exhibited as Ex.PW1/A-1.

20. Dr. Thussu was examined as PW-1 and duly proved the certificate of fitness issued by him. His examination and cross examination is rather short, however, of much relevance and is, therefore, reproduced hereunder below:-

PW1: Dr. Thakur Thussu, Sr. Resident, Department of Burn and Plastic Surgery, Safdarjung Hospital, New Delhi.

ON SA

On 26.10.2009, I was posted at Safdarjung Hospital in the Dept. of Burn and Plastic Surgery. On the said date, my duty was in the Burn Ward when in the afternoon, SI Ram Niwas had moved the application for the opinion as to the fitness of the patient Seema, w/o Birju Yadav to give the statement.

After examining the patient, I had declared Seema fit for statement. The application of SI Ram Niwas is Ex. PW-1/A and my endorsement as to the fitness of the patient Seema is Ex.PW-1/A-1 in circled portion with my signature at point X.

XXXXX by Ld. Counsel for the accused.

It is wrong to suggest that I did not examine the patient Seema before declaring her fit for statement. It is further wrong to suggest that I had given the opinion as to the fitness of Smt. Seema to give statement at the instance of SI Ram Niwas. I had seen the admission paper of Seema and other documents in her file. MLC Book is kept separate from the file of the patient which is kept in the ward. I cannot say whether I had seen the MLC of Seema or not.”

21. In view of the above statement, the certificate of fitness, in our opinion, stands fully proved, as far as the last dying declaration contained in Ex.PW2/A is concerned.

22. The Dying Declaration (Ex. PW 2/A) is recorded by SI Ram Niwas (PW 21). It clearly, records that around 12.00 pm, on 26th October, 2009, the appellant had poured kerosene oil on the deceased and had burn her by lighting the matchstick. Based on this dying declaration DD Entry no.12A dated 26th October, 2009 was recorded at 2.40 pm (Exh. PW 7/B). If one is to see the sequence of events, the incident occurred at around 12.00 pm; the deceased was admitted at Safdarjung Hospital at 12.45 pm; MLC was made; Dr.Amit Bengani issued the certificate of fitness to make statement at 1.45 pm and thereafter, on recoding of the above statement, the FIR was registered at 2.50 pm. The entire sequence, we feel is so well connected with each other leaving no scope of manipulation at any stage.

23. Supreme Court in the case of *State of Madhya Pradesh vs. Dal Singh & Ors.* (2013) 14 SCC 159 has extensively discussed the issue

whether a person with 100% burn can make a dying declaration or put a thumb impression. It summarized the law on the issue as under:-

“20) The law on the issue can be summarized to the effect that law does not provide who can record a dying declaration, nor is there any prescribed form, format, or procedure for the same. The person who records a dying declaration must be satisfied that the maker is in a fit state of mind and is capable of making such a statement. Moreover, the requirement of a certificate provided by a doctor in respect of such state of the deceased, is not essential in every case.

21) Undoubtedly, the subject of the evidentiary value and acceptability of a dying declaration, must be approached with caution for the reason that the maker of such a statement cannot be subjected to cross-examination. However, the court may not look for corroboration of a dying declaration, unless the declaration suffers from any infirmity.

22) So far as the question of thumb impression is concerned, the same depends upon facts, as regards whether the skin of the thumb that was placed upon the dying declaration was also burnt. Even in case of such burns in the body, the skin of a small part of the body i.e. of the thumb, may remain intact. Therefore, it is a question of fact regarding whether the skin of the thumb had in fact been completely burnt, and if not, whether the ridges and curves had remained intact.

24. In the case of *Ramesh & Ors. Vs. State of Haryana* (2017) 1 SCC 529, Supreme Court reiterated the law with respect to the dying declarations as under:-

“31) Law on the admissibility of the dying declarations is well settled. In Jai Karan v. State (NCT of Delhi) [Jai Karan v. State (NCT of Delhi), (1999) 8 SCC 161 : 1999 SCC (Cri) 1385] , 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).

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, 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 [Vikas v. State of Maharashtra]).

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) xxxxxxxx

35) xxxxxxxx

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.”

25. In the present case, as we have discussed above, there are more than one dying declaration of the deceased made to three different persons and at different time, however, with a common consistency. On examination and analysis of the dying declarations in the aforesaid circumstances and the legal position, we do not find any reason to disregard them and find them sufficient to sustain the conviction of the Appellant.

26. Coming to the question of the statement of the witnesses namely Vishal Yadav (PW-2) and Master Sonu (PW-5) not supporting the case of the prosecution, we feel that their statements read with other circumstances clearly prove the case against the appellant.

27. Vishal Yadav (PW-2) in a way corroborates the incident that happened on 26th October, 2009 in the morning at around 9.00 am. It is the case of the prosecution that around 9.00 am, there was a fight between the appellant and the deceased upon which the appellant had poured kerosene oil on the deceased as also the children namely Vishal and Sunny. PW-2 also states that at about 9.00 am when he returned back home from Subzi Mandi, his mother i.e. the deceased picked up the kerosene cane and poured kerosene oil on herself. He further states that at that time, the deceased was able to ignite the

match box herself and burn herself. He claims that he called at 100 number PCR. The call, however, was made at around 12.00 pm. He denies the presence of his uncle Sonu in the morning, however, the Appellant in his statement under Section 313 Cr.P.C. admits to the presence of Sonu in the morning. PW-2 also admits having made a statement under section 164 Cr.P.C., though, he tries to impute that the same was made at the instance of his maternal grandmother (Nani).

28. Master Sunny Yadav (PW-9) states that on the date of the incident, his father, the appellant, had demanded money from his brother upon which there was a quarrel between the deceased and the appellant. After sometime, he saw the deceased coming out of the Jhuggi and was burning at that time. This corroborates the story of the prosecution inasmuch as there was a fight before the incident of burning and also the presence of the appellant at the time of the incident on the spot. He further goes on to corroborate the prosecution regarding the incident in the morning when he states that the appellant had sprinkled kerosene oil on the deceased as also himself and his brother.

29. Supreme Court in the case of *Gura Singh vs. State of Rajasthan* (2001) 2 SCC 205 summarised the law of so-called hostile witness as under:-

“11) There appears to be a misconception regarding the effect on the testimony of a witness declared hostile. It is a misconceived notion that merely because a witness is declared hostile his entire evidence should be excluded or rendered unworthy of consideration. This Court in Bhagwan Singh v.

State of Haryana held that merely because the Court gave permission to the Public Prosecutor to cross-examine his own witness describing him as hostile witness does not completely efface his evidence. The evidence remains admissible in the trial and there is no legal bar to base the conviction upon the testimony of such witness. In Rabindra Kumar Dey v. State of Orissa, it was observed that by giving permission to cross-examine nothing adverse to the credit of the witness is decided and the witness does not become unreliable only by his declaration as hostile. Merely on this ground his whole testimony cannot be excluded from consideration. In a criminal trial where a prosecution witness is cross-examined and contradicted with the leave of the court by the party calling him for evidence cannot, as a matter of general rule, be treated as washed off the record altogether. It is for the court of fact to consider in each case whether as a result of such cross-examination and contradiction the witness stands discredited or can still be believed in regard to any part of his testimony. In appropriate cases the court can rely upon the part of testimony of such witness if that part of the deposition is found to be creditworthy.

12) The terms “hostile”, “adverse” or “unfavourable” witnesses are alien to the Indian Evidence Act. The terms “hostile witness”, “adverse witness”, “unfavourable witness”, “unwilling witness” are all terms of English law. The rule of not permitting a party calling the witness to cross-examine are relaxed under the common law by evolving the terms “hostile witness and unfavourable witness”. Under the common law a hostile witness is described as one who is not desirous of telling the truth at the instance of the party calling him and an unfavourable witness is one called by a party to prove a particular fact in issue or relevant to the issue who fails to prove such fact, or proves the opposite test. In India the right to cross-examine the witnesses by the party calling him is governed by the provisions of the Indian Evidence Act, 1872. Section 142 requires that leading question cannot be put to the witness in examination-in-chief or in re-examination except with the permission of the court. The court can, however, permit

leading question as to the matters which are introductory or undisputed or which have, in its opinion, already been sufficiently proved. Section 154 authorises the court in its discretion to permit the person who calls a witness to put any question to him which might be put in cross-examination by the adverse party. The courts are, therefore, under a legal obligation to exercise the discretion vesting in them in a judicious manner by proper application of mind and keeping in view the attending circumstances. Permission for cross-examination in terms of Section 154 of the Evidence Act cannot and should not be granted at the mere asking of the party calling the witness. Extensively dealing with the terms “hostile, adverse and unfavourable witnesses” and the object of the provisions of the Evidence Act this Court in Sat Paul v. Delhi Admn. held: (SCC pp. 741-43 & 745-46, paras 38-40 & 52)

“38. To steer clear of the controversy over the meaning of the terms ‘hostile’ witness, ‘adverse’ witness, ‘unfavourable’ witness which had given rise to considerable difficulty and conflict of opinion in England, the authors of the Indian Evidence Act, 1872 seem to have advisedly avoided the use of any of those terms so that, in India, the grant of permission to cross-examine his own witness by a party is not conditional on the witness being declared ‘adverse’ or ‘hostile’. Whether it be the grant of permission under Section 142 to put leading questions, or the leave under Section 154 to ask questions which might be put in cross-examination by the adverse party, the Indian Evidence Act leaves the matter entirely to the discretion of the court (see the observations of Sir Lawrence Jenkins in Baikuntha Nath Chatterji v. Prasannamoyi Debya. The discretion conferred by Section 154 on the court is unqualified and untrammelled, and is apart from any question of ‘hostility’. It is to be liberally exercised whenever the court from the witnesses’ demeanour, temper, attitude, bearing, or the tenor and tendency of his answers, or from a perusal of his previous inconsistent statement, or otherwise, thinks that the grant of such permission is expedient to extract the truth and to do justice. The grant of such permission does not amount to an adjudication by the court as to the veracity of the witness.

Therefore, in the order granting such permission, it is preferable to avoid the use of such expressions, such as 'declared hostile', 'declared unfavourable', the significance of which is still not free from the historical cobwebs which, in their wake bring a misleading legacy of confusion, and conflict that had so long vexed the English courts.

39. It is important to note that the English statute differs materially from the law contained in the Indian Evidence Act in regard to cross-examination and contradiction of his own witness by a party. Under the English law, a party is not permitted to impeach the credit of his own witness by general evidence of his bad character, shady antecedents or previous conviction. In India, this can be done with the consent of the court under Section 155. Under the English Act of 1865, a party calling the witness can 'cross-examine' and contradict a witness in respect of his previous inconsistent statements with the leave of the court, only when the court considers the witness to be 'adverse'. As already noticed, no such condition has been laid down in Sections 154 or 155 of the Indian Act and the grant of such leave has been left completely to the discretion of the court, the exercise of which is not fettered by or dependent upon the 'hostility' or 'adverseness' of the witness. In this respect, the Indian Evidence Act is in advance of the English law. The Criminal Law Revision Committee of England in its Eleventh Report, made recently, has recommended the adoption of a modernised version of Section 3 of the Criminal Procedure Act, 1865, allowing contradiction of both unfavourable and hostile witnesses by other evidence without leave of the court. The Report is, however, still in favour of retention of the prohibition on a party's impeaching his own witness by evidence of bad character.

40. The danger of importing, without due discernment, the principles enunciated in ancient English decisions, for interpreting and applying the Indian Evidence Act, has been pointed out in several authoritative pronouncements. In Praphullakumar Sarkar v. Emperor an eminent Chief Justice, Sir George Rankin cautioned, that

‘when we are invited to hark back to dicta delivered by English Judges, however eminent, in the first half of the nineteenth century, it is necessary to be careful lest principles be introduced which the Indian Legislature did not see fit to enact’.

It was emphasised that these departures from English law ‘were taken either to be improvements in themselves or calculated to work better under Indian conditions’.

* * *

52) From the above conspectus, it emerges clear that even in a criminal prosecution when a witness is cross-examined and contradicted with the leave of the court, by the party calling him, his evidence cannot, as a matter of law, be treated as washed off the record altogether. It is for the Judge of fact to consider in each case whether as a result of such cross-examination and contradiction, the witness stand thoroughly discredited or can still be believed in regard to a part of his testimony. If the Judge finds that in the process, the credit of the witness has not been completely shaken, he may, after reading and considering the evidence of the witness, as a whole, with due caution and care, accept, in the light of the other evidence on the record, that part of his testimony which he finds to be creditworthy and act upon it. If in a given case, the whole of the testimony of the witness is impugned, and in the process, the witness stands squarely and totally discredited, the Judge should, as a matter of prudence, discard his evidence in toto.”

30. In the case of **Ramesh & Ors.** (*Supra*), Supreme Court observed that there are many reasons which make witnesses retract their statements before the Court and turning hostile. One such reason is ‘culture of compromise’. In the present case, both Vishal and Sunny seem to have been stung by this reason. However, in their endeavour to save the Appellant, they have left enough support for the prosecution. As observed above, evidence of hostile witness cannot be

totally rejected. If a court finds that, in the process, the credit of the witness has not been completely shaken, it may after reading and considering the evidence of the witness as a whole with due caution, accept, in the light of the evidence on the record that part of his testimony which it finds to be creditworthy and act upon it. In the present case, we find that both Vishal and Sunny do support the case of the prosecution with respect to the fight between the appellant and the deceased in the morning; appellant pouring kerosene oil on the deceased in the morning and thereafter leaving the jhuggi to return back in the afternoon; thereafter, fight again starting between the deceased and the appellant; presence of the appellant in the jhuggi at the time of the incident; and Vishal taking the deceased to the hospital along with HC Madan Pal.

31. As far as the plea of the Appellant with respect to alleged discrepancy in the place of the incident, i.e. in the jhuggi to the verandah, we find no such discrepancy. A bare perusal of the site plan (Exh. PW10/A and PW 21/B) and the photographs of the site (Exh. PW8/A1 to A17) would show that the verandah is a mere extension of the jhuggi.

32. Equally, the plea of the Learned Counsel for the Appellant with regard to no trace of kerosene being found on the clothes of Vishal and/or Sunny by the FSL, is only stated to be rejected. It is nobody's case that the Appellant had poured kerosene on Vishal and Sunny even in the second incident which happened at 12 pm and resulted in the burning of the deceased. The first incident, when kerosene was

poured on them, took place at around 9am. There is sufficient gap between the two incidents for Vishal and Sunny to have changed their clothes and the same being washed. In any case, this is not a circumstance enough to doubt the prosecution.

33. In our opinion, taking into account, the dying declarations referred by us above and the other surrounding circumstances, the prosecution has been able to prove its case against the appellant. Therefore, we find no merit in the present appeal and the same is accordingly, dismissed.

34. Trial Court record be sent back.

35. Copy of the order be sent to the Superintendent of Tihar Jail for updation of the records and information to the appellant.

NAVIN CHAWLA, J

MUKTA GUPTA, J

OCTOBER 28, 2017

vp/RN