

**IN THE HIGH COURT OF PUNJAB & HARYANA AT
CHANDIGARH**

**Crl. Appeal D-896-DB of 2002 and
Crl. Revision 2398 of 2002**

Date of Decision: 21.12.2018

1. Crl. Appeal D-896-DB of 2002

Mahinder Singh and anotherAppellants

Versus

State of HaryanaRespondent

2. Crl. Revision 2398 of 2002

Mangat RamPetitioner

Versus

Mahinder Singh and othersRespondents

**CORAM: HON'BLE MR. JUSTICE T.P.S. MANN
HON'BLE MR. JUSTICE ARUN KUMAR TYAGI**

Present: Mr. Vinod Ghai, Senior Advocate with
Mr. Simrandeep Singh Sandhu, Advocate
for convict-Mahinder Singh.

Mr. Atul Lakhanpal, Senior Advocate with
Mr. R. S. Chahal, Advocate
for convict-Kamlesh.

Mr. Vikrant Pamboo, Deputy A.G. Haryana.

Mr. B.S. Saroha, Advocate
for complainant-Mangat Ram.

ARUN KUMAR TYAGI, J.

1. The present appeal filed by the convicts challenging
their conviction and sentence and the revision for enhancement

of sentence and award of compensation filed by Mangat Ram brother of the deceased-Phoola Ram have arisen out of judgment of conviction and order of sentence both dated 31.10.2012 passed by learned Additional Sessions Judge, Hisar in Criminal Case No.128 S.C. of 2000/2002 titled as "State Vs. Mahinder Singh and another" whereby the accused were convicted under Section 302 read with Section 34 of the Indian Penal Code, 1860 (for short 'the IPC') and sentenced to undergo imprisonment for life and to pay fine of Rs.500/- each and in default of payment of fine to undergo rigorous imprisonment of 6 months.

2. Briefly stated, the case of prosecution is that on 29.10.2009, A.S.I. Satyapal, Police Station, Uklana received wireless message from Police Station, City Hisar regarding admission of Phoola Ram in Civil Hospital, Hisar with burn injuries. A.S.I. Satyapal alongwith other police officials reached Civil Hospital, Hisar and collected the 'Ruqa' (information received from the Medical Officer, Civil Hospital, Hisar) and the Medico Legal Report from the Police Post, Civil Hospital, Hisar and thereafter submitted an application to Sh. Sanjeev Arya, learned Judicial Magistrate, Ist Class, Hisar, who accordingly went to Civil Hospital, Hisar and after obtaining medical opinion as to fitness of Phoola Ram to make statement, recorded his statement. Phoola Ram stated that he is aged about 32 years and doing labour work. He has three children, two daughters aged nine years and

three years and one son aged six years. Mahinder Singh s/o Jot Ram is having illicit relations with his wife. He had filed applications against him at the Police Station, Uklana and entered into compromise with him many times. His wife after staying for two or three days in the house would run away from the house and return after 4 or 5 days. Mahinder Singh used to send message to his wife through his children that they should send their mother for taking medicine. On 28.10.1999, at about 4:00/5:00 p.m. in the evening, he had gone for labour work and came back at about 6:00 p.m. He asked his wife to arrange for the water and set down and started smoking Biri with face towards the machine. Mahinder Singh was also present in his house but he had not seen him there. Mahinder Singh threw kerosene oil on him from a 'papi' (iron container) of five litres and ran away out of the house. At that moment, his wife Kamlesh threw a lighted matchstick on him and set him on fire. He started running hither and thither and tore his clothes. His children raised alarm that Kaka had got fire and they threw water on him. His brother was living in the room which is in front of his room. During the time of the fire many persons from the village also gathered but he did not remember who were those persons because he had become unconscious. His wife and Mahinder Singh set him ablaze in order to kill him for the reasons that his wife was having illicit relations with Mahinder Singh. His wife ran

away from the spot. Phoola Ram accordingly requested that action be taken against the culprits. Since, the victim was unable to put his thumb-impression due to burn injuries, after obtaining comments of the Medical Officer in this regard, toe impression was taken by the learned Judicial Magistrate, 1st Class, Hisar on the statement. A.S.I. Satyapal obtained the copy of the statement and sent the same to the Police Station, Uklana with his endorsement for registration of FIR. Accordingly, FIR No.138 dated 29.10.1999 was registered under Section 307 read with Section 34 of the I.P.C. A.S.I. Satyapal investigated the case, seized the kerosene iron container and burnt clothes, got the site plan of the place of occurrence prepared, recorded statements of witnesses and arrested accused-Kamlesh on 31.10.1999 and accused-Mahinder Singh on 01.11.1999. On death of Phoola Ram on 05.11.1999, Section 302 of the IPC was added and the investigation was taken over by Jai Singh, S.I. Police Station Uklana who recorded statements of witnesses including Saroj, nine years' old daughter of the deceased and on completion of investigation, in view of her statement, finding the evidence to be sufficient as to commission of offence punishable under Section 306 read with Section 34 of the IPC by the accused filed report under Section 173(2) of the Code of Criminal Procedure, 1973 (for short 'the Cr.P.C.') against them.

3. After supplying copies of report and documents to the

accused, case was committed for trial to the Court of Sessions by learned Judicial Magistrate, 1st Class, Hisar. On finding prima facie case, charge under Section 302 read with Section 34 of the IPC was framed against the accused by learned Additional Sessions Judge, Hisar to which both the accused pleaded not guilty and claimed trial.

4. To prove its case, the prosecution examined PW-1-Sanjeev Arya, learned Judicial Magistrate, 1st Class, Hisar; PW-2-A.S.I. Rajpal; PW-3-Subhash, Draftsman; PW-4-Dr. Arun Gupta; PW-5-Dr. Rajpal; PW-6-H.C. Deep Kumar; PW-7-C. Kailash Chander; PW-8-Dr. Gopal Bhardwaj; PW-9-Mangat Ram and PW-10-A.S.I. Satyapal and produced documents application for recording of dying declaration-Ex.P-1; application for medical opinion of Doctor-Ex.P-2; medical opinion Ex.P-3; statement of Phoola Ram s/o Chandu Ram-Ex.P-4; Note recorded by learned J.M.I.C-Ex.P-5; comments of the Doctor-Ex.P-6; order dated 29.10.1999-Ex.P-7; application for supply of copy of statement of injured Phoola Ram-Ex.P-8; statement of Phoola and police proceedings-Ex.P-9 and Ex.P-9/A; F.I.R.-Ex.P-10; Site Plan-Ex.P-11; application for post mortem examination-Ex.P-12; Inquest Report-Ex.P-13; Post Mortem Report-Ex.P-14 & P-15; affidavit of H.C. Deep Kumar-Ex.P-16; affidavit of Kailash Chander-Ex.P-17; MLR-Ex.P-18; Ruqa-Ex.P-19 and Ex.P-20; application dated 21.01.2000 of Sh. Mangat Ram to S.S.P., Hisar-Ex.P-21; receipt

of Post Office-Ex.P-22; V.T. message-Ex.P-23; seizure memo of burnt clothes, ash and iron container of oil-Ex.P-24; rough site plan of place of occurrence-Ex.P-25; V.T. message-Ex.P-28; FSL Report-Ex.P-29 and application regarding opinion of Doctor-Ex.D-1 and DA-1.

5. Statements of the accused under Section 313 of the Cr.P.C. were recorded. In their statements, the accused denied the commission of alleged offence and pleaded false implication in this case. In their defence evidence, the accused examined S.I. Jai Singh as DW-1, Dharampal as DW-2 and Munshi Ram, Head Clerk as DW-3.

6. On consideration of the evidence on record and submissions made by the learned Public Prosecutor for the State and learned Defence Counsel for the accused, learned Additional Sessions Judge, Hisar held that the accused had murdered Phoola Ram by setting him ablaze and accordingly convicted and sentenced them under Section 302 read with Section 34 of the I.P.C. as mentioned above.

7. Feeling aggrieved, the accused have filed the present appeal and Mangat Ram, brother of the victim has filed present revision petition.

8. Assailing the impugned judgment of conviction and order of sentence, learned Counsel for the appellants have argued that the occurrence allegedly took place on 28.10.1999 at

about 6:00 p.m. but FIR was lodged on 29.10.1999 at about 7:15 p.m. PW-1-Sh. Sanjeev Arya, learned Judicial Magistrate, 1st Class, Hisar has stated that he received the application for recording of dying declaration on 29.10.1999 at 07:00 a.m. There is undue, unreasonable and unexplained delay of more than 24 hours in lodging of the FIR which inevitably gives to the inference as to the FIR being a result of deliberation, concoction and manipulation and makes the case of the prosecution doubtful.

9. The learned Counsel for the appellants have further argued that the prosecution had alleged that the accused had the motive of murdering Phoola Ram due to the deceased being hindrance in their illicit relations. The deceased is alleged to have made complaints to the police and to have entered into compromise with accused No.1-Mahinder Singh many times but none of such alleged complaints and compromises have been produced by the prosecution. The accused were never seen by anyone in compromising position and the prosecution has miserably failed to prove its case as to illicit relations between the accused being the motive for commission of the crime. Absence of motive also makes the case of the prosecution doubtful.

10. The learned Counsel for the accused have further argued that the dying declaration of Phoola Ram suffers from serious infirmities affecting the voluntary and true nature thereof. Firstly, Dr. Arun Gupta merely recorded in certificate Ex.P3 that

patient was fit for giving statement and did not mention that the patient was conscious, mentally alert and capable of understanding and answering the questions put to him. Further the Dr. Arun Gupta did not remain present throughout the recording of the statement of Phoola Ram. There is no certificate of the Doctor that Phoola Ram remained conscious and fit to make statement throughout the recording of the statement. The learned Judicial Magistrate, 1st Class, Hisar also did not give requisite certificate at the end of the statement. Phoola Ram suffered 90% burns and being in pain could not be said to be mentally alert, conscious and fit to make statement. Further the fact that the dying declaration bears impression of toe of the deceased and not his signature or thumb-impression also goes to show that the deceased was not conscious and in fit state of mind at the time of making of alleged dying declaration. In the absence of evidence as to the deceased being in fit state of mind during the recording of his dying declaration, the same is liable to be discarded and conviction of the accused on the basis thereof is liable to be set aside.

11. The learned Counsel for the appellants have further argued that Bhim Sain and Mangat Ram were present with the deceased in Burn Ward of the hospital at the time when Sh. Sanjeev Arya, learned Judicial Magistrate, 1st Class, Hisar reached at Civil Hospital, Hisar for recording statement of Phoola

Ram. Deceased-Phoola Ram remained under the influence of Bhim Sain and Mangat Ram and the dying declaration made by him was the result of their tutoring and prompting and was liable to be discarded on this ground.

12. The learned Counsel for the appellants have further argued that the deceased's version of the occurrence given in his dying declaration is also highly improbable. If it all had happened in such a manner as alleged that accused-Mahinder Singh had splashed kerosene oil on the deceased then the deceased would not wait for his wife to come and throw lighted matchstick on him. He surely would have made an escape before throwing of the lighted matchstick on him. This prosecution version of the occurrence is highly improbable and being a flight of imagination and product of deliberation and concoction to convert the case of suicide into that of murder, is liable to be discarded on this ground also.

13. The learned Counsel for the accused have further argued that the conduct of PW-9-Mangat Ram, who played the lead role in concocting a story for falsely implicating the accused, is wholly unnatural. He admittedly reached the spot on coming to know about the occurrence but remained on the spot for about five minutes and then went to his house and did not take the deceased to hospital by arranging private vehicle despite availability of private vehicles in the village and taxi on the Taxi

Stand. He also did not inform the police despite Police Station at a distance of 3-4 km. from the village. Further, admittedly Ran Singh, brother and Chandu Ram, father of the deceased-Phoola Ram reached the spot and other neighbours also gathered on the spot. Children of the deceased, including his daughter namely Saroj aged about 9 years, were also present at the time of occurrence. The prosecution did not examine Ran Singh, brother and Chandu Ram, father of the deceased. A.S.I. Satyapal, first investigating officer of the case, did not deliberately record the statement of Saroj, daughter of the deceased-Phoola Ram. Jai Singh, S.I., S.H.O. Police Station, Uklana, who investigated the case after death of Phoola Ram, recorded the statement of his daughter Saroj. In her statement, Saroj disclosed that the deceased had committed suicide. The prosecution did not examine Saroj, daughter of the deceased-Phoola Ram and S.I. Jai Singh and their non-examination caused serious prejudice to the accused and goes to shatter the credibility of the prosecution version and makes the same liable to be discarded. The learned Additional Sessions Judge, Hisar did not appreciate the evidence in the right perspective and wrongly convicted the accused solely on the basis of the dying declaration of Phoola Ram. The impugned judgment of conviction and order of sentence suffer from material illegality. Therefore, the appeal may be allowed, the impugned judgment of conviction and order of sentence may

be set aside and the accused may be acquitted.

14. On the other hand, learned Deputy A.G., Haryana has vehemently controverted these submissions of the learned Counsel for the accused by arguing that there is no undue, unreasonable and unexplained delay in the lodging of the FIR as deceased-Phoola Ram could not be taken to the hospital and the matter could not be immediately reported to the police due to the occurrence having taken place at about 6:00 p.m. and no mode of conveyance being available in the village after sunset as testified by PW-9-Mangat Ram. Immediately, after the deceased was brought to Civil Hospital, Hisar he was medico legally examined and Ruqa (Ex.P-19) was sent to the In-charge, Police Post, Civil Hospital, Hisar. On police request made vide application submitted by A.S.I. Satyapal, statement of the deceased-Phoola Ram was recorded by Sh. Sanjeev Arya, learned Judicial Magistrate, 1st Class, Hisar. On the basis of the copy of statement supplied by him to A.S.I. Satyapal, FIR was got registered. The prosecution has satisfactorily explained the delay in lodging of the FIR.

15. The learned Deputy A.G. for the State of Haryana has further argued that Phoola Ram was declared to be conscious and fit to make statement by PW-8-Dr. Gopal Bhardwaj and PW-4-Dr. Arun Gupta. PW-1-Sh. Sanjeev Arya, learned Judicial Magistrate, 1st Class, Hisar has also stated that Phoola Ram

remained conscious and in a healthy state of mind at the time of making dying declaration. The learned Additional Sessions Judge found that the dying declaration was not a result of tutoring and prompting by anyone or the product of imagination and was true and voluntary.

16. The learned Deputy A.G. has further argued that the accused had the motive to murder the deceased as he was a hindrance in their illicit relations. The accused have failed to prove their alibi and defence that deceased Phoola Ram committed suicide. The accused have been rightly convicted and sentenced on the basis of dying declaration and the impugned judgment of conviction and order of sentence do not suffer from any illegality. Therefore, the appeal may be dismissed.

17. The learned Counsel for the revisionist has argued that the accused murdered Phoola Ram in a spine chilling manner and the sentence awarded to them may be enhanced to death sentence. The learned Additional Sessions Judge, Hisar erred in not awarding any compensation to the legal heirs of the deceased. Therefore, the accused may be directed to pay adequate compensation to legal heirs of the deceased.

18. Before dwelling upon the arguments of the learned Counsel for the appellants, learned Deputy A.G. for the State and learned counsel for the revisionist, the evidence as to nature of injuries found on the person of Phoola Ram and cause of his

death may be noticed first. PW-8-Dr. Gopal Bhardwaj, the then Medical Officer, Civil Hospital, Hisar, who medico legally examined Phoola Ram on 29.10.1999 at 11:50 a.m. vide MLR Ex.P-18, found superficial to deep burns on front and back of chest, arms partially and legs, thighs in front and back. Burns were present all over the body except face and scalp partially, soles and back of the chest partially. Approximately 90% skin was peeled of at places, blisters were present at places, underlying sub cutaneous tissues were reddish and congested. The injuries were caused within 24 hours.

19. PW-5-Dr. Rajpal Singh, the then Medical Officer, Civil Hospital, Hisar, who conducted post mortem examination on the dead body of Phoola Ram, vide post mortem report-Ex.P-14 on police request-Ex.P-12 accompanied by inquest proceedings-Ex.P-13, found that there were superficial to deep burns on all over the body except face, scalp, soles and lateral aspect at the right shoulder. Line of demarcation was present between the burnt and healthy area. Skin was peeled of at places. Reddish area was present where skin was peeled of. In his opinion, the cause of death was shock as a result of extensive burns which were ante-mortem in nature and were sufficient to cause death in ordinary course of nature.

20. The accused have been convicted and sentenced by learned Additional Sessions Judge, Hisar on the basis of dying

declaration of Phoola Ram and for proper appreciation of the material on record and adjudication of the questions of facts and law involved, it would be appropriate to reproduce English translation of the statement-Ex.P4 of Phoola Ram treated as dying declaration which reads as under:-

Q: What is your name?

Ans: My name is Phoola Ram.

Q: What Profession do you profess?

Ans: I carry on the work of a labourer.

Q: What is your age?

Ans: I am 32 years old.

Q: Where do you live?

Ans: I live in village Madanpura. But there is no number of the house.

Q: Who live at your house?

Ans: I have got three children, out of which one is 9 years old, and one daughter is aged 3 years, and one son is aged six years.

Q: How did you catch the fire?

Ans: On the evening of 28.10.99, at about 4/5 P.M., I went for labour work and had returned to my house at 6:00 P.M. Thereafter, I asked my wife to put the water, and thereafter I started smoking Bidi, and my face had turned towards the Machine, Mohinder son of Jot Ram, who is carrying on illicit relations with my wife, about which fact I had also lodged complaints several times at the Police Station, Uklana, and at several occasions, we had also entered into compromise, but my wife after staying for two-three days at the house, again used to abscond, and return back to the house,

after a lapse of 4 or 5 days. Mohinder used to send message through my children, to the effect that they (children) should send their mother to take medicine. On 28.10.99, when I was busy in smoking Bidi, at that time Mohinder too, was present at my house, but I did not notice him, and in that interval, after sprinkling oil (Kerosene Oil), from a five-litre container (Pipi), he fled away towards outside the house, and at that very juncture my wife while igniting the match-stick threw it towards me, as a consequence I caught the fire, and was in the process of running hither and thither, and also I had torn my clothes. My children raised an alarm, to the effect that Kaka (father) had caught the fire, and they also threw (Pour) water upon me. My brother, who used to live in the room, in front of my room, whose daughter is aged two years, and in the intervening period of catching of fire by me, a number of village people, had gathered, but I do not remember as to who were those persons, since I had become unconscious. In order to murder me, my wife and Mohinder had set me to fire, the motive for this is that there were illicit relations between my wife Kamlesh and Mohinder. My wife had slipped away from the spot. Action may be taken against the accused-persons.

Q: Do you want to say anything more?

Ans: No Sir.

21. In **Muthu Kutty Vs. State, 2005 (1) R.C.R. (Criminal)** 639 vide para 15 the Hon'ble Apex Court observed as under:-

“Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power

of cross-examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the court also insists that the dying declaration should be of such a nature as to inspire full confidence of the court in its correctness. The court has to be on guard that the statement of the deceased was not as a result of either tutoring, or prompting or a product of imagination. The court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailant. Once the court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence. This Court has laid down in several judgments the principles governing dying declaration, which could be summed up as under as indicated in ***Paniben Vs. State of Gujarat, 1992(3) R.C.R. (Criminal) 552 : (1992) 2 SCC 474 : SCC pp. 480-81, paras 18-19*** (emphasis supplied).

(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. (***See Mannu Raja v. State of M.P., (1976) 3 SCC 104***).

(ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. (***See State of U.P. v. Ram Sagar Yadav, 1985(1) R.C.R. (Criminal) 600 : (1985)***

1 SCC 552 and Ramawati Devi v. State of Bihar, (1983) 1 SCC 211.

(iii) The court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had an opportunity to observe and identify the assailants and was in a fit state to make the declaration. **(See K. Ramachandra Reddy v. Public Prosecutor, (1976) 3 SCC 618.)**

(iv) Where dying declaration is suspicious, it should not be acted upon without corroborative evidence. **(See Rasheed Beg v. State of M.P., (1974) 4 SCC 264).**

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. **(See Kake Singh v. State of M.P., (1981) Supp. SCC 25).**

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. **(See Ram Manorath v. State of U.P., (1981) 2 SCC 654).**

(vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected. **(See State of Maharashtra v. Krishnamurti Laxmipati Naidu, (1980) Supp. SCC 455).**

(viii) Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth. **(See Surajdeo Ojha v. State of Bihar, (1980) Supp. SCC 769).**

(ix) Normally the court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eyewitness said that the deceased was in a fit and conscious state to make the dying declaration, the medical opinion cannot prevail. (**See Nanhau Ram v. State of M.P., (1988) Supp. SCC 152**).

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. (**See State of U.P. v. Madan Mohan, (1989) 3 SCC 390**).

(xi) Where there are more than one statement in the nature of dying declaration, one first in point of time must be preferred. Of course, if the plurality of dying declaration could be held to be trustworthy and reliable, it has to be accepted. (**See Mohanlal Gangaram Gehani v. State of Maharashtra, (1982) 1 SCC 700**)."

22. In the light of the above legal position that governs the consideration of a dying declaration, the factual matrix has to be scrutinised.

23. The delay in lodging of FIR on 29.10.1999 at 07:15 p.m. regarding the occurrence which, as stated by Phoola Ram in his statement-Ex.P-4 and corroborated by PW-9-Mangat Ram, took place on 28.10.1999 at about 6:00 p.m. is the first ground of challenge to the credibility of the prosecution version and reliability of the dying declaration of Phoola Ram.

24. It may be observed that PW-9-Mangat Ram has

stated that on 28.10.1999, they could not bring Phoola Ram to the Hospital having no mode of conveyance. No doubt, in his cross-examination, PW-9-Mangat Ram admitted that two residents of their village had motorcycles and some residents had Bullock Carts but due to Phoola Ram being unconscious and also due to the hospital/police station being at distance, he could not possibly be carried on motorcycle/Bullock Carts. PW-9-Mangat Ram admitted that two residents had Jeeps but he explained that they had gone to Ramesh s/o Tara Chand to take his Jeep but it was already booked and was not available. PW-9-Mangat Ram has also explained that vehicles did not ply from their village after sunset and no taxi was plying from bus stand Uklana. The veracity of the testimony of PW-9-Mangat Ram could not be shattered during his cross-examination. The accused examined Dharambir as DW-2 who testified that there is a taxi stand at Uklana where 20 taxis operate but DW-2-Dharambir admitted that taxi stand was not approved and even the car of Shamsher on which he was driver did not have permit to drive on hire and therefore his testimony could not be relied upon to disbelieve PW-9-Mangat Ram. In any case, testimony of DW-2-Dharambir falls short of proving availability of vehicle at the material time. Since no appropriate mode of conveyance was available for transporting deceased-Phoola Ram to Civil Hospital, Hisar or to inform the police, there could not be any option but to wait for the

next day till appropriate arrangement of the vehicle was made.

25. As testified by PW-8-Dr. Gopal Bhardwaj, Phoola Ram was brought to the Civil Hospital, Hisar, by Bhim Sain and PW-9-Mangat Ram and was medico legally examined by him on 29.10.1999 at about 11:50 a.m. PW-8-Dr. Gopal Bhardwaj sent Ruqa-Ex.P-19 to In-charge, Police Station, Hisar and on receipt of wireless information, PW-10-A.S.I. Satyapal after collecting Ruqa-Ex.P-19 and MLR-Ex.P-18 went to the Court of Sh. Sanjeev Arya, learned Judicial Magistrate, 1st Class, Hisar and submitted application-Ex.P-1. Even though PW-I-Sh. Sanjeev Arya, learned Judicial Magistrate, 1st Class, Hisar stated that he received the application on 29.10.1999 at 7:00 a.m. but his statement as to time of receipt of the application appears to be due to some inadvertent mistake, firstly, because PW-10-A.S.I. Satyapal submitted the application-Ex.P-1 after collecting Ruqa-Ex.P-19 and Medico Legal Report-Ex.P-18 which could be possible only after medico legal examination of Phoola Ram on 29.10.1999 at 11:50 a.m. and, secondly, because PW-10-A.S.I. Satyapal has stated that he went to the Court of Sh. Sanjeev Arya, learned Judicial Magistrate, 1st Class, Hisar and submitted application-Ex.P-1 in his Court and not at his residence. Due to the Court timings on 29.10.1999 being 10:00 a.m. to 04:00 p.m., A.S.I. could reach the Court and submit application after opening of the Court at 10:00 a.m. and not before. On receipt of the application

Sh. Sanjeev Arya, learned Judicial Magistrate, 1st Class, Hisar reached Civil Hospital, Hisar at 4:15 p.m. and after obtaining medical opinion-Ex.P-3 as to fitness of Phoola Ram to make statement by moving application-Ex.P-2, recorded statement of Phoola Ram, which, as testified by him as PW-1, ended at 4:50 p.m. Thereafter, he supplied copy of statement Ex.P-9 to PW-10-A.S.I. Satyapal on his application Ex.P-8. PW-10-A.S.I. Satyapal made endorsement Ex.P-9/A on copy of statement-Ex.P-9 at 05:25 p.m. and sent the same to Police Station, Uklana where PW-2-A.S.I. Rajpal recorded FIR which according to him ended at 7:15 p.m. The time from 11:50 a.m. to 7:15 p.m. was taken by the public authorities in performing their duties and completing procedural formalities.

26. The delay which occurred in the lodging of FIR has been satisfactorily explained by the prosecution. Therefore, we do not find any substance in the arguments of learned Counsel for the accused that there was undue, un-explained, unreasonable delay in the lodging of FIR giving rise to the inference of concoction and manipulation of the prosecution story by deliberation and after thought. Consequently, the case of the prosecution is not liable to be viewed with suspicion on that count.

27. The dying declaration of Phoola Ram is next challenged on the grounds of Phoola Ram, who had suffered 90%

burns, not being conscious, mentally alert and fit to make statement at the time of making of dying declaration and absence of medical certificate and certificate of the learned Judicial Magistrate, 1st Class, Hisar in this regard.

28. In the present case, PW-8-Dr. Gopal Bhardwaj sent Ruqa-Ex.P-19 to the Incharge, Police Post, Civil Hospital, Hisar specifically mentioning that Phoola Ram was fit to make statement. In his cross-examination PW-8-Dr. Gopal Bhardwaj, Medical Officer has also stated that Phoola Ram was conscious and fit to make statement. Before recording statement of Phoola Ram, PW-1-Sh. Sanjeev Arya, learned Judicial Magistrate, 1st Class, Hisar vide application Ex.P-2 sought medical opinion whether Phoola Ram is fit to make statement. PW-4-Dr. Arun Gupta recorded his medical opinion-Ex.P3 on the application that the patient is fit for making statement. Even though, in his opinion-Ex.P-3, PW-4-Dr. Arun Gupta did not mention that the patient was conscious, mentally alert and in fit state of mind but the opinion recorded by the doctor that the deceased was fit to make a statement is sufficient to establish that the deceased was in a fit state of mind and capable of understanding the questions and answering the same. PW-1-Sh. Sanjeev Arya, learned Judicial Magistrate, 1st Class, Hisar has stated that he was all alone when he recorded statement of Phoola Ram. As per his deposition, PW-4-Dr. Arun Gupta was not present with him during

the recording of statement of Phoola Ram. However, due to inability of Phoola Ram to put his thumb-impression on the statement due to burn injuries, PW-1-Sh. Sanjeev Arya, learned Judicial Magistrate, 1st Class, Hisar vide endorsement-Ex-P5 sought comments of PW-4-Dr. Arun Gupta who vide comments-Ex.P6 opined that both thumbs are burnt so toe impression be taken on the statement. Had there been any change in condition of Phoola Ram, PW-4-Dr. Arun Gupta would have mentioned the same in this comments.

29. No doubt, in the present case there is no certificate of PW-4-Dr. Arun Gupta that Phoola Ram remained conscious and fit to make statement throughout recording of his statement. PW-1-Sh. Sanjeev Arya, learned Judicial Magistrate, 1st Class, Hisar has also not recorded any certificate at the end of the statement. However, there is no statutory prescription as to the manner of recording of a dying declaration and the procedure to be followed for the same and the procedural requirements as to presence of Magistrate; certification of the doctor as to the mental or the physical status of the person making the declaration etc. were all developed by judicial pronouncements. The Courts look into these aspects in order to satisfy whether deceased was in a fit mental condition to make a dying declaration and where it is established by testimony of eye-witnesses that the deceased was in a fit mental condition to make the dying declaration absence of

Magistrate or medical opinion will not prevail. (See **Nanhau Ram Vs. State of M.P., (1998) Supp. SCC 152 and Prempal Vs. State of Haryana 2014(4) R.C.R. (Criminal) 99**). It may be observed that in his cross-examination, PW-1-Sh. Sanjeev Arya, learned Judicial Magistrate, 1st Class, Hisar has explained that he had not given certificate that till the time he recorded statement of Phoola Ram remained in good state of mind and he did not seek any opinion to the Medical Officer to this effect because he did not feel any necessity. PW-1-Sh. Sanjeev Arya, learned Judicial Magistrate, 1st Class, Hisar has stated that Phoola Ram was throughout conscious and remained in healthy state of mind and that statement was read over to Phoola Ram which was admitted by him to be correct and his left toe impression was taken on the statement-Ex.P-4. These depositions prove that Phoola Ram remained conscious and fit to make statement before, throughout and even after recording of the statement.

30. PW-8-Dr.Gopal Bhardwaj has admitted that Phoola Ram was brought to the Civil Hospital by Bhim Sain and Mangat Ram. PW-1-Sh. Sanjeev Arya, learned Judicial Magistrate, 1st Class, Hisar has also admitted that there were two attendants with Phoola Ram. However, PW-1-Sh. Sanjeev Arya, learned Judicial Magistrate, 1st Class, Hisar has stated that he had given his identification to Phoola Ram before recording his statement

and he was all alone when he recorded the statement. The statement of Phoola Ram was recorded in question and answer form. The questions put to Phoola Ram and answers given by him also show that Phoola Ram was conscious, mentally alert, capable of understanding the questions and giving rational answers to them and narrating the occurrence in which he suffered burn injuries resulting in his death with all requisite details. We find no reason to hold that the narrative of facts recorded in the statement on dictation of the deceased are a fictional account of a delusioned mind or product of tutoring and prompting by his attendants or any of his other relatives.

31. So far as the motive on the part of the accused for commission of the subject offence is concerned, in his statement-Ex.P-4, Phoola Ram-deceased has mentioned that the accused Mahinder Singh has illicit relations with his wife regarding which he had lodged complaints at the Police Station, Uklana and entered into compromise many times but his wife after staying for two to three days at the house again used to flee and return after four or five days and accused-Mahinder Singh used to send message through his children that they should send their mother to him for taking medicines. Phoola Ram further stated that his wife and accused-Mahinder Singh had set him on fire due to illicit relations between them.

32. No doubt, in statement of Phoola Ram name of father

of Mahinder Singh was mentioned as Jot Ram instead of Devat Ram but it appears that due to his condition, lack of clarity in pronunciation, partial similarity of names and also pronunciation thereof and consequent misunderstanding thereof by learned Judicial Magistrate, 1st Class inadvertent mistake regarding the same occurred. In any case there is no evidence whatsoever to prove that there was some other person of the name of Mahinder Singh s/o Jot Ram in the acquaintance of the deceased. Therefore, the identity of accused-Mahinder Singh referred to by Phoola Ram in his statement is established and cannot be said to be in doubt.

33. As pointed out by the learned Counsel for the accused, the prosecution has not produced copies of the complaints lodged by Phoola Ram at Police Station Uklana and compromises entered into by him with accused Mahinder Singh but as also observed by learned Additional Sessions Judge, Hisar, no person of sound mind even under great pain and suffering would, even on exercise of influence and tutoring by closest relative, make any imputation against character of his wife of having illicit relations with any person unless any such state of affairs actually existed. Further, at the time of cross-examination of PW-9-Mangat Ram a suggestion was put to him by learned Counsel for accused-Mahinder Singh that Phoola Ram was sick man sexually for the last four to five years and as a result thereof

he was unfit to have sexual intercourse with his wife which suggestion supports the case of the prosecution by furnishing the cause and justification for accused-Kamlesh having illicit relations with accused-Mahinder Singh and also his knowledge thereof. Resultantly, the prosecution has produced cogent and reliable oral evidence and thereby proved that the accused had the motive to murder the deceased as being a hindrance to their illicit relations.

34. The learned Counsel for the accused have dubbed the reaction of Phoola Ram to be unnatural and occurrence to be highly improbable. Phoola Ram had the opportunity to observe and identify the assailants and accordingly in his narration of events implicated the accused. Since, the sequence of events would have occurred within seconds without giving sufficient time for reaction and lighted matchstick, even if thrown from some distance, would have ignited fire on kerosene oil drenched clothes and person of deceased-Phoola Ram, he would hardly have any time to react and effect his escape. Therefore, the version given by deceased-Phoola Ram in his dying declaration cannot be doubted, on the ground of being improbable, as a product of tutoring or imagination.

35. The learned Counsel for the accused have also stressed on the prejudice caused to them due to non-examination of S.I. Jai Singh and Saroj. No doubt, PW-10-A.S.I. Satyapal has

admitted that during investigation he had come to know that Saroj was present at the time of occurrence and Ran Singh was called by Saroj. However, he has explained his failure to record her statement by stating that he tried to locate Saroj in Village Madanpura but she was not available there as she had gone with her mother somewhere. The accused have examined Jai Singh as DW-1. The accused could but did not examine Saroj in their defence for reasons best known to them. In the facts and circumstances of the case non-examination of Saroj and S.I. Jai Singh by the prosecution could not be said to have caused any prejudice to the accused.

36. In their statements under Section 313 of the Cr.P.C., the accused merely denied commission of alleged offence and pleaded fake implication and did not take any specific defence. However, the accused have produced defence evidence to prove (i) that they were not present at the time of occurrence and (ii) that Phoola Ram committed suicide.

37. To prove his alibi accused-Mahinder Singh has examined DW-3 Munshi Ram, Head Clerk, Station Engineer Uklana. DW-3-Munshi Ram has merely stated that the record pertaining to 28.10.1999 had been sent to the Office of Senior Accounts Officer, Northern Railway Division, Ambala. Accused-Mahinder Singh did not summon any person from the office of Senior Accounts Officer, Northern Railway Division, Ambala to

prove that at the time of alleged occurrence he was present on duty. The onus of proving alibi was on accused-Mahinder Singh who has miserably failed to discharge the same and has failed to prove that at the time of occurrence he was present on duty and was not present in the house of Phoola Ram. Consequently, the accused-Mahinder Singh has failed to prove his alibi. In her statement under Section 313 Cr.P.C., accused-Kamlesh has also denied her presence in her house but accused-Kamlesh has not asserted and justified her absence from the house at the material time and has not produced any evidence to prove her alibi.

38. To prove that Phoola Ram Committed suicide, the accused have examined S.I. Jai Singh as DW-1 who has deposed that on 05.11.1999 he had recorded the statement of Saroj daughter of Phoola Ram and in view of her statement he converted the offence under Section 306 and filed report under Section 173(2) of the Cr.P.C. instead of Section 302 of the I.P.C. It is pertinent to observe here that PW-9-Mangat Ram had submitted a complaint regarding tainted investigation by S.I. Jai Singh. In his cross-examination, DW-1-S.I. Jai Singh admitted that he did not inquire from Saroj as to where she remained from 29.10.1999 to 05.11.1999. By testimony of PW-10-A.S.I Satyapal, Saroj is proved to have gone with her mother accused-Kamlesh. It appears that Saroj made alleged statement to S.I. Jai Singh under tutoring and prompting by her mother accused-

Kamlesh. Statement of Saroj allegedly recorded by S.I. Jai Singh under Section 161 Cr.P.C. will not be admissible in evidence and is not of any evidentially value. Reference in this regard may be made to ***Ramprasad Vs. State of Maharashtra, A.I.R. 1999 Supreme Court 1969***. The accused have not examined Saroj in their defence to prove their version that Phoola Ram committed suicide.

39. Further in this context the conduct of accused-Kamlesh at the time of and immediately after the occurrence is also relevant. Accused-Kamlesh was, as stated by Phoola Ram, present in the house and participated in the commission of crime and fled therefrom immediately thereafter. If Phoola Ram had committed suicide, then accused-Kamlesh, if present in her house, would have tried to save him and if not present in her house, then on return accused-Kamlesh would have taken him to hospital to save his life and would have also informed the police. The wholly unnatural conduct of accused-Kamlesh in not making any attempt to prevent Phoola Ram from committing alleged suicide, not extinguishing the fire and saving his life by immediately moving him to the hospital, not informing the police and fleeing from the house immediately after the occurrence also corroborates and lends credence to the case of the prosecution.

40. The prosecution has proved that Phoola Ram being in fit state of mind, made his statement to learned Judicial

Magistrate, 1st Class, Hisar and identified the assailants. The dying-declaration is proved not to be a result of tutoring or prompting by any of his attendants/relatives or a product of imagination. The dying declaration is proved to be voluntary and true. In burn injuries cases two possible hypothesis arise in the judicial mind: was it suicide or was it homicide. In the present case, the dying declaration produced by the prosecution being reliable and trustworthy, the alternative hypothesis of suicide stands justifiably eliminated. Since, the deceased was in a fit state of mind to make statement and the dying declaration made by him is true, voluntary and is not a result of either tutoring or prompting or a product of imagination, the dying declaration could be and was rightly made the sole basis of conviction of the accused by learned Additional Sessions Judge, Hisar without corroboration.

41. In the present case, the State has not filed any appeal under Section 377 of the Cr.P.C. for enhancement of the sentence. The relief of enhancement of sentence sought in the revision petition filed by Mangat Ram, brother of the victim-Phoola Ram cannot be granted. Even otherwise, death sentence can be awarded only in rarest of the rare cases. The present case of murder of Phoola Ram by throwing of kerosene oil on him by accused-Mahinder Singh and throwing of lighted matchstick by his wife accused-Kamlesh due to their illicit relations does not fall

in the category of rarest of the rare cases. Therefore, no interference is warranted in the sentence of life imprisonment awarded by learned Additional Sessions Judge, Hisar.

42. In **Ankush Shivaji Gaikwad Vs. State of Maharashtra 2013(2) R.C.R. (Criminal) 1036** Hon'ble Apex Court observed that while the award or refusal of compensation in a particular case may be within the Court's discretion, there exists a mandatory duty on the Court to apply its mind to the question in every criminal case. The Hon'ble Apex Court further observed that capacity of the accused to pay constitutes an important aspect of any order under Section 357 of the Cr.P.C. which would involve a certain inquiry albeit summary unless of course the facts as emerging in course of trial are so clear that Court considers it unnecessary to do so. In the present case, the learned Additional Sessions Judge, Hisar did not award any compensation to the legal heirs of the victim apparently due to poverty and financial inability of the accused to pay the same. In the facts and circumstances of the case particularly poverty and consequent financial inability of the accused, we find no reason to interfere and direct payment of compensation by the accused to the legal heirs of the deceased.

43. In view of what has been observed hereinbefore we find no infirmity or illegality in the judgment of conviction and order of sentence recorded by learned Additional Sessions

Judge, Hisar. Consequently, the appeal and the criminal revision are dismissed. The bail bonds produced by the appellants shall stand cancelled. The appellants shall be taken into custody forthwith to undergo remainder of their sentence.

(T.P.S. MANN)
JUDGE

(ARUN KUMAR TYAGI)
JUDGE

21.12.2018
Kothiyal

Whether Speaking/reasoned	Yes/No
Whether Reportable	Yes/No