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

+ **CRL.A. 434/2002**

PASHUPATI NATH SHAH (Deceased by LR) Appellant
Through: Mr. D.K.Mathur, Advocate.

versus

STATE Respondent
Through: Mr. Amit Chadha, APP for State

CORAM:
JUSTICE S. MURALIDHAR
JUSTICE I.S. MEHTA

ORDER

04.04.2018

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Dr. S. Muralidhar, J.:

Introduction

1. This is an appeal against the judgment dated 2nd March 2002 passed by the learned Additional Sessions Judge, New Delhi in Sessions Case No.175/1996 arising from FIR No.107/1995, registered at Police Station ('PS') Dabri, convicting the Appellant for the offences under Sections 376 and 302 IPC. The appeal is also against the order on sentence dated 10th April 2002 whereby for the offence under Section 376 IPC, the Appellant was sentenced to undergo rigorous imprisonment for 10 years and to pay a fine of Rs.1,000/- and in default of payment of fine, to undergo simple imprisonment (SI) for one month; and for the offence under Section 302 IPC, the Appellant was sentenced to undergo imprisonment for life and to pay a fine of Rs.1,000/- and in default of payment of fine, to undergo SI for one month.

2. The Appellant was charged with having raped his sister-in-law on 7th April 1993 at about 12.15 pm at his house in West Sagarpur, New Delhi and thereafter, having committed her murder by pouring kerosene oil on her and then setting her afire. She suffered 100 % burn injuries and succumbed to the injuries on the same day.

3. During the pendency of the present appeal, the Appellant expired on 3rd April 2016. This was brought to the notice of this Court when the appeal was listed for final hearing on 11th January 2018. Since none appeared for the Appellant on that date, the appeal was disposed of as having abated.

4. Subsequently, the Appellant's son and legal representative (LR) Krishan Kumar Sah filed an application seeking restoration of the appeal. In this application (Crl. M. A. No. 2726 of 2018) it was stated that as a result of his conviction by the trial Court, the Appellant was removed from service at the Engineers India Ltd. (EIL) where he was working at the relevant time. It was further stated that the Appellant had four daughters and two sons including the Applicant. The Appellants' wife was stated to be an old lady who was mentally disturbed. It was averred that if the appeal were to be allowed then the family would have the benefit of the emoluments and pension that would have accrued to the Appellant.

5. By its order dated 19th February 2018, the Court allowed the above application, brought on record by the LR of the deceased Appellant and restored the appeal to file. The appeal was then set down for final hearing.

The incident

6. The criminal law process was set in motion when DD No.12A was recorded at 1.20 pm on 7th April 1993 pursuant to a wireless message received at PS Dabri from one Rattan Singh that a lady had died on account of burn injuries near the Masjid at Sagarpur. Sub-inspector (SI) Abdul Razak (PW-5) along with Constable (Ct.) Gajpal reached the spot only to be informed that the victim had already been removed to the Safdarjung Hospital, New Delhi by her husband.

7. The MLC of the deceased (Ex.PW-2/A) drawn up at the Safdarjung Hospital Burns Ward reveals that the deceased was brought there at 2:15 pm on 7th April 1993 by her husband Ramji Shah (PW-7) who informed the doctor at the burns ward, Dr. R.K. Srivastava (PW-2), that she had been raped by her brother-in-law, i.e. the Appellant herein, who then doused her in kerosene and set her afire. The doctor noted that there were 100% burn injuries all over the body. The vaginal swabs were then taken, sealed, and handed over to the Constable on duty. An endorsement to this effect was made on the MLC.

Recording of the dying declaration

8. According to the prosecution, PW-5 made an application (Ex.PW-5/B) to PW-2 for recording the dying declaration of the victim in case she was fit to give a statement. On the said application, PW-2 purportedly endorsed “patient is fit to give her statement” and signed it with the date and time as 7th April 1993 and 2:35 pm respectively.

9. According to the prosecution, on the basis of the above certification by

PW-2, PW-5 proceeded to record the purported dying declaration of the deceased. In the said dying declaration the deceased stated that she was residing at her residence at West Sagarpur on rent for the past 6-7 years with her husband. She was undertaking tasks as a domestic helper. Her husband, Ramji Shah (PW-7) was working with the Railway Mail Services ('RMS'). That day i.e. 7th April 1993, he was on night duty and was sleeping at home during the day. She stated that at around 12:15 pm, her *nandoi* (the Appellant herein), who lived in the neighbourhood, and who was working with EIL came to her house and stated that his son was unwell and that she should come and take a look. She then went over to the Appellant's house but found that the Appellant's son was not present. The Appellant then bolted the entrance door from inside, pushed her on the cot and raped her. When she tried to scream in protest, he closed her mouth with her *odhni*. Thereafter, when she tried to get up, he took out a kerosene oil can from beneath the bed, poured the kerosene on her, set her on fire and then opened the door and ran away. The neighbours and her husband on hearing her screams came there. Her husband then brought her to the hospital.

10. The left toe impression of the deceased was taken on the dying declaration. It bore the endorsement of PW-5 but not of PW-2. On the basis of the above dying declaration, a *rukka* was drawn up and an FIR registered.

Investigation

11. Thereafter, PW-5 returned to the place of occurrence and prepared a rough site plan (Ex.PW-5/D). It must be noted at this stage that there does not appear to be any scaled site plan prepared in the matter. There are five

alphabets indicated in the rough site plan. 'A' was the single room of the Appellant which was shown to have a double bed, a main gate and a window, and a gate in the rear side of the room indicated as B gate. 'B' to 'E' were rooms given on rent but it is not indicated if anyone was occupying them. The rough site plan does not enable the Court to appreciate whether PW-5, when he went to the spot, found the B gate of the room locked from inside or not.

12. As far as the visit to the spot is concerned, PW-5 took into possession the burnt clothes, the plastic *chappals*, and a plastic can containing some kerosene oil (Ex.PW-5/E). It appears that a crime team was also called to the spot. The crime team report (Ex.PW-5/DC) was prepared at around 6:30 pm. The articles found included a burnt cloth and a can of kerosene oil (white). The in-charge of the Crime Team one Gopal Singh (not examined) noted as under:

- “(1) I inspected the S.O.C. and found that half of the cot is burnt and parts of bedding were also burnt. Water is spread all over. Neighbour says she was alone when this incident occurred.
- (2) Take the statement of the husband and of children and neighbours.
- (3) Take the statement of the victim if she is still alive.
- (4) Inform the parents of the victim.”

13. It appears that the Appellant was arrested on 7th April 1993 although it is not clear where he was arrested from. According to the Appellant, he was arrested from his office at EIL where he was on duty.

Post mortem examination

14. The post-mortem of the deceased was conducted by Dr. Chander Kant (PW-6). He noticed that there were 100% superficial and deep ante-mortem burns covering the whole body. He did not find any smell of kerosene oil on the scalp and hair. The skin was peeled off at places. There appeared to be a ligature injury on the neck. The other injuries noted were as under:

- “(3) Contusion and variable size laceration two in number under surface of upper lip right side in the mucosa size right to left 1cm.x 0.8cm. and 0.9cm. x 0.5cm.
- (4) Multiple linear abrasions six in numbers on pubic region superior (upper aspect) in an area of 3 cm. x 1.8cms
- (5) Two linear abrasions on left breast below left nipple in an area of 2.1cms. x 0.9 cm.”

15. An examination of the victim's private parts revealed that “old healed torn hymen orifice was wide and easily admitting vaginal scope, vaginal rugosity reduced in sharpness”.

16. The cause of death was opined as shock as a result of 100% superficial and deep, first, second, third and fourth degrees (Dupuytren's Classification) or type I, II (Wilson's Classifications) burn injuries which were ante-mortem and caused by flames. Ante-mortem ligature injury No.2 was stated to have been caused by some soft cloth and injury No.3 by application of blunt force and injury Nos. 4 and 5 by sharp edge weapons like nails.

17. Three vaginal swabs were sealed in a glass bottle. In his cross-examination, PW-6 stated that there was no cloth around the neck at the time of the post-mortem. He further stated: “IO was specifically requested to seal the cloth removed from the neck and mouth of deceased in Burn and Plastic

Surgery unit”.

18. It must be noted at this stage that the vaginal swab was sent to the Forensic Sciences Laboratory (‘FSL’) but no semen stain was detected on the said swab.

19. At the end of the investigation, a charge sheet was filed against the Appellant and charges framed by the trial Court by an order dated 7th January 1997 for the offences under Sections 376 and 302 IPC.

20. Seven witnesses were examined by the prosecution. The case of the prosecution rested essentially on the dying declaration of the deceased purportedly made to the IO of the case (PW-5). The trial Court has based the conviction of the Appellant on the aforementioned dying declaration.

Law relating to recording of dying declarations

21. In the present case there are two aspects to the dying declaration. The first is the actual recording of the dying declaration, which raises the question whether the deceased was fit to make the statement. The further issue is whether the IO who recorded the statement took the necessary permission and precaution and whether it was under the supervision of a medical practitioner. In this regard the following observations of the Constitution Bench of the Supreme Court in ***Laxman v. State of Maharashtra (2002) 6 SCC 710*** are relevant:

“Normally, therefore, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eyewitnesses state that

the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and in any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a magistrate or a doctor or a police officer. When it is recorded, no oath is necessary nor is the presence of a magistrate is absolutely necessary, although to assure authenticity it is usual to call a magistrate, if available for recording the statement of a man about to die. There is no requirement of law that a dying declaration must necessarily be made to a magistrate and when such statement is recorded by a magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise.”

22. In the above decision the Supreme Court reaffirmed its earlier decision in *Koli Chunilal Savji v. State of Gujarat 1999(9) SCC 562* where it was held that the ultimate test is whether the dying declaration can be held to be a truthful one and voluntarily given. It was further held that before recording the declaration the officer concerned must find that the declarant was in a fit condition to make the statement in question.

Evidence of PW-7

23. In light of the above legal position, the Court proceeds to examine if in the present case there is any eye witness evidence as regards the fitness of the victim to make a statement. It is significant that the husband of the deceased, Ramji Shah (PW-7), did not support the prosecution. According to him, on 7th April 1993, he was present at home and the deceased was sick. He had quarrelled with her since she was not taking medicines while he was insisting that she should. He then gave her two or three slaps. He then stated that at around 12 noon, he came to know that his wife had died due to burning at the house of the Appellant, who was his brother-in-law. The house of the Appellant was about 3-4 houses away from the house of the deceased. PW-7 then stated as under:

“I went the house of the accused after there was a noise. The door of the house of the accused was closed from inside. I saw that people were pouring water inside the room through a ventilator. The door was broken open. I took my wife to the hospital in police ambulance. My wife died in the hospital after 1 ½ hour.”

24. At this stage the Additional PP got PW-7 declared hostile and proceeded to cross examine him. He was confronted with his previous statement under Section 161 Cr.P.C where he had stated that the Appellant had come to the house of the deceased at 12:15 pm, told the deceased that his son Krishna (who would later be examined as DW-5) was not well and she should come to look him up. PW-7 stated that it was incorrect that he did not tell the police about breaking open the door and pouring water through the ventilator.

25. In his cross-examination by the counsel for the accused, PW-7 again

maintained as under:

“When I reached the house of accused, I found that people were trying to break open the main gate of the house of accused. It is correct that there was another door of the room in which the accused was residing. It is also correct that the door of the room of the house was also bolted from inside. There was no way to come out of the room except the door which was bolted from inside. The ventilator was of a very small size and one could not come out of it. The size of ventilator was 1 feet x 1 feet. Many people had collected there. My wife was already burnt when we entered the room after breaking open the door. I did not see any can of kerosene oil inside the room. I did not see *chappals* of my wife there – my wife was gasping for breath when she was taken out from the room. My wife was not able to speak. It is correct that the thumb of left foot of my wife was totally burnt. I remained with my wife throughout from the time she was taken from the house to the hospital and till her death and during this period police did not record her statement because she was not able to speak, or make a statement. My wife was not able to speak even then the doctor prepared the MLC at that time of admission. There was no Odhni (cover) on my wife when she was taken from the house to hospital. I did not smell any kerosene oil from the body of my wife when she was taken to the hospital. It is correct that on that day the accused was present in his office. I do not suspect the accused to be involved in the death of my wife.”

26. In other words, PW-7 gave the Appellant a clean chit and also stated that the deceased was not in a position to even speak, much less make a statement.

Evidence of PW-2

27. Dr. R.K. Srivastava (PW-2), who attended to the deceased as soon as she was brought to the Safdarjung Hospital, maintained that her history of being raped by her brother-in-law was given by the patient herself. In his cross-

examination, he was specifically asked about the IO having made an application to him for recording the dying declaration of the deceased. He replied “the IO had not given any application to me for recording the dying declaration of the patient”.

28. For some reason, the application (Ex.PW-5/B) which contained an endorsement of PW-2 about the victim's fitness to make a statement, was produced by the IO and not put to PW-2. This was a lapse on the part of the Additional PP. Therefore, on this very important aspect of the IO having applied to PW-2 for permission to record the statement of the deceased subject to PW-2 certifying her fitness to make a statement, there is a major contradiction in the evidence of PWs 2 and 5.

Evidence of PW-5

29. The IO (PW-5) was also confronted on this aspect in his cross-examination. He maintained that PW-2 had certified the deceased to be fit to make a statement at around 2:35 pm and that he recorded her statement ‘immediately thereafter’. He then stated as under:

“The doctor was present at the time I recorded the statement Ex.PW-5/A. I did not obtain the signatures of the doctor on Ex.PW-5/A in token of the statement having been recorded in his presence. Vol. In fact, I requested the doctor to put his signatures on the same, but he refused to do so, without permission from a senior doctor and I mentioned this fact in the case diary. It is correct that this fact is not mentioned in end or semen Ex.PW-5/C.”

30. The question of Dr. R.K. Srivastava seeking the permission of a senior doctor in order to make an endorsement did not arise because Dr. R.K.

Srivastava was himself the Head of the Burns Ward of Safdarjung Hospital. If indeed he had made an endorsement on the application (Ex.PW-5/B) that the deceased was fit to make a statement, there was no reason why he would not make an endorsement again thereon after she made such statement. This, therefore, raise serious doubts as to whether:

- (i) There was in fact any application made by PW-5 to PW-2;
- (ii) Whether PW-2 made an endorsement thereon about the deceased being fit to make a statement;
- (iii) Whether in the presence of PW-2 the dying declaration of the deceased was recorded by PW-5; and
- (iv) Whether PW-2, despite being present, declined to sign on the said dying declaration.

31. Therefore, the manner of recording of the dying declaration is itself shrouded in grave doubts. The depositions of PWs 2 and 5 do not help the prosecution one bit in this regard. This important aspect of the matter has not been taken note of by the trial Court and it has, in the impugned judgment, proceeded to rely on the dying declaration to convict the Appellant for the aforementioned offences.

The Appellant's alibi

32. At this stage, it is necessary to refer to the defence of the Appellant when the incriminating circumstances were put to him in his statement under Section 313 Cr PC. The Appellant maintained that he did not know anything about the quarrel that took place between PW-7 and the deceased on 7th April 1993. According to the Appellant, he remained in his office, i.e. the

EIL at Bhikaji Cama Place. Only later he came to know that the deceased had come to his residence in his absence. When asked whether he had anything else to say, the Appellant stated as under:

“On the alleged date and time I was present in my office i.e. Engineers India Limited, Bhikaji Cama Place, New Delhi. The deceased was my salyaz, and I came to know later on that in my absence she came to my residence after having quarrel with her husband pertaining to consuming of medicine and she committed suicide by bolting the main gate as well as the gate of room from inside and this information was also stated by Sh. Ramji Shah (PW-7) before the Hon’ble Court.”

33. The Appellant did not stop with taking the above defence. He also examined as many as five defence witnesses. As far as the plea of *alibi* is concerned, the Appellant examined Mr. U.G. Shetty (DW-3) who was the senior officer of EIL, New Delhi. DW-3 brought to the Court the computer printout of the attendance sheet of EIL for the period 1st April 1993 to 15th April 1993. In terms thereof on 7th April 1993, the Appellant was on duty at EIL from 8:26 am till 5:04 pm.

34. In his cross examination by the learned Additional PP, DW-3 stated that he had no personal knowledge as to whether the Appellant left the office after marking his attendance at 8:26 am. Nevertheless, as far as the Appellant is concerned, he did place on record evidence to show that he was present at his office at EIL at Bhikaji Cama Place between 8:26 am and 5:04 pm. This coupled with the fact that there is no clarity about the place where the Appellant was arrested, and that too on 7th April 1993 itself, poses a serious problem for the prosecution. In other words, the prosecution has not been able to conclusively prove the presence of the Appellant at the scene of

crime at the relevant time, i.e. between 12 noon and 1 pm.

The other defence evidence

35. The Appellant also examined the neighbours as defence witnesses. Aisa Begum (DW-1) was one such neighbour. In her deposition, she stated that it was morning time and her children were getting ready to go to school when they raised an alarm about the fire in the house of the Appellant. She stated:

“I went to that side and saw smoke coming out of the house of accused and both the doors were closed from inside along with windows. There was no way to go inside the house. The neighbours gathered there. The house of Kapoor Chand was under construction, people brought the pipe for throwing water, they broke the window and threw the water. Police came in my presence. I had not made any statement to the police. The door was broken by children and the neighbours”.

36. The above statement has to be seen in the context of the observation made by the crime team in its report to the effect that at the scene of crime “water is spread all over”. The crime team report also noted that the neighbours said “she was alone when the incident occurred”. If the neighbours were already speaking to the police team when it arrived at the spot, it is a mystery why the IO did not record the statement of such neighbour. In fact, DW-1 should have been spoken to by the IO. Be that as it may, although DW-1 was subjected to cross examination by the learned Addl PP, there was nothing to discredit her deposition. She maintained that she had not tried to extinguish the fire but “water was thrown by the neighbours”. Importantly, her statement that she found that the doors of the room where the deceased was found in a burnt condition were “closed from inside along with windows” was not contradicted in her cross examination.

37. As already noted hereinbefore, the rough site plan also does not help the Court to appreciate whether the door was found opened or had been broken into by the neighbours in order to retrieve the deceased from inside the room. This contradicts the dying declaration of the deceased, where she states after committing the rape and setting her on fire by pouring kerosene and lighting a matchstick, the Appellant un-bolted the door and ran away.

38. Another neighbour, Kamla Devi, was examined as DW-2. She also was clear that both the gates were bolted from inside at that time. The two gates she refers to are the ones shown in the rough site plan. Again, the cross examination of this witness by the learned APP could not shake the above assertion that both gates were bolted from inside. This witness also states that water was thrown into the house in order to extinguish the fire.

39. Krishna Singh, the son of the Appellant, was examined as DW-5. He confirmed that the deceased had come to their house at 12:00 noon, dressed his hair and sent him to school. He stated that, at that time, his father was not present.

The dying declaration in the present case

40. Although the trial Court has based the conviction of the Appellant on the dying declaration, this Court is unable to come to the conclusion that in the present case the dying declaration can be believed. On the aspect of basing the conviction of the accused on the dying declaration, the legal position requires to be recapitulated.

41. In *Paniben v. State of Gujarat (1992) 2 SCC 474* the Supreme Court summarized the legal principles governing dying declaration as under:

“(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. (See *Munnu 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 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 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 the deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eyewitness has 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)

42. Subsequently, in *Sham Shankar Kankaria v. State of Maharashtra* (2006) 13 SCC 165, the Supreme Court held as under:

“10. This is a case where the basis of conviction of the accused is the dying declaration. The situation in which a person is on deathbed is so solemn and serene when he is dying that the grave position in which he is placed, is the reason in law to accept veracity of his statement. It is for this reason the requirements of oath and cross-examination are dispensed with. Besides, should the dying declaration be excluded it will result in miscarriage of justice because the victim being generally the only eyewitness in a serious crime, the exclusion of the statement would leave the court without a scrap of evidence.

11. Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross-

examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the court also insists that the dying declaration should be of such a nature as to inspire full confidence of the court in its correctness. The court has to be on guard that the statement of deceased was not as a result of either tutoring or prompting or a product of imagination. The court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailant. Once the court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence.”

43. In *Puran Chand v. State of Haryana* (2010) 6 SCC 566, the Supreme Court reiterated the above principles.

44. In the present case, since the dying declaration is not free from doubt as to the manner of its recording and its contents, this Court has examined the entire trial Court record to seek corroboration of the important aspects of the dying declaration. The Court finds that far from corroborating the dying declaration, the materials on record contradict it on the material particulars. This is apart from the fact that there are serious doubts about the manner of recording the dying declaration and whether the deceased was at all in a state fit to make a dying declaration. This has already been adverted to.

45. To briefly summarise the uncorroborated portions of the dying declaration, it should be noted first that in her dying declaration, the deceased is supposed to have stated that the Appellant bolted the door of the room from inside and then threw her on a cot and committed rape on her. The vaginal swabs were taken at the earliest point in time as spoken by PW-

2. The vaginal swabs were sent to the FSL. As already noted hereinbefore, the FSL report states that semen could not be detected on the vaginal swabs. In other words, the forensic evidence has failed to corroborate the important aspect of the dying declaration, viz., the commission of rape on the deceased by the Appellant prior to her being burnt alive.

46. The second aspect is about the burning of the deceased by the accused by pouring kerosene oil on her and then setting her on fire. Although the crime team found a can of kerosene oil, which was seized, when the post-mortem of the deceased was conducted, PW-6 found no smell of kerosene on the scalp hair.

47. Thirdly, the most serious contradiction is about the unbolting of the door of the room by the accused before escaping. Although this is spoken to by the deceased in her dying declaration, there appears to be overwhelming evidence to show that the door remained bolted from inside when the deceased was burning inside the room. Apart from PW-7, we have the evidence of DW-1 and DW-2, who maintained that both the doors of the room were bolted from inside. The prosecution has been unable to explain how it was possible for the doors to remain bolted from inside if the Appellant had indeed escaped from the room after unbolting it soon after setting the deceased on fire. DW-2 goes to the extent of saying that both the doors, i.e. the 'B' gate and the main door were bolted from inside. The burden was on the prosecution to explain how the Appellant could have possibly escaped from that room after committing the crime. It has failed to do so. This is a serious lapse in the investigation. The trial Court too failed

to discuss the defence evidence in light of the rough site plan.

48. Lastly, although in her dying declaration, the deceased purportedly referred to her mouth being stuffed with the *odhini* she was wearing in order to prevent her from screaming, no such *odhini* appears to have been found on her body or seized from the place of crime.

Conclusion

49. The Court is not satisfied that the dying declaration of the deceased was correctly recorded. According to PW-7 and even PW-2 she had suffered 100% burns all over her body. It was doubtful that even her left toe could have been used to sign the dying declaration. PW-2 states that no application was made to him for recording her statement, thereby contradicting PW-5. The substantive portions of the dying declaration have not been corroborated by the other evidence that has been gathered by the prosecution. As already mentioned, the forensic evidence in fact negates the charge of rape having been committed on the deceased shortly prior to her death.

50. In a case of this nature, the prosecution had to make an effort to rule out the possibility that the deceased may have committed suicide. This is particularly because of the neighbour pointing out that the room in which she was found in a burnt condition was locked from inside. The crime team noticed no signs of any forcible exit by anyone from that room. The fact that PW-7 stated that soon prior to the incident he and the deceased had a quarrel in which he slapped her two or three times adds another dimension, which was not fully investigated by the IO. The failure of the prosecution to record

the statements of the neighbours and produce them as prosecution witnesses has further considerably weakened the case of the prosecution.

51. For all of the aforementioned reasons, the Court is of the view that it is not safe to base the conviction of the Appellant on the dying declaration of the deceased. The Appellant is entitled to the benefit of doubt. He is, accordingly, acquitted of the offences under Sections 376 and 302 IPC. The impugned judgment dated 2nd March 2002 of the trial Court and the order on sentence dated 10th April 2002 are hereby set aside.

52. As noted earlier, the Appellant died during the pendency of the present appeal. However, it would be open to his family members/LRs to produce the certified copy of this judgment before EIL to persuade it to reverse its decision to dismiss him from service on account of his conviction which now stands reversed, and to release his emoluments and other service dues to them in accordance with law.

53. The appeal is allowed in the above terms. The trial Court record be returned with a certified copy of this judgment.

S. MURALIDHAR, J.

I.S. MEHTA, J.

APRIL 04, 2018/sr