A.F.R.

Reserved on 14.01.2020

Delivered on 12.06.2020

Court No.7

Case :- JAIL APPEAL No. - 28 of 2019
Appellant :- Munni Devi
Respondent :- State of U.P.
Counsel for Appellant :- From Jail,Arvind Kumar Singh,Gaurav Kakkar
Counsel for Respondent :- A.G.A.

With

Case :- JAIL APPEAL No. - 29 of 2019
Appellant :- Mohini
Respondent :- State of U.P.
Counsel for Appellant :- From Jail,Arvind Kumar Singh,Gaurav Kakkar
Counsel for Respondent :- A.G.A.

With

Case :- JAIL APPEAL No. - 30 of 2019
Appellant :- Ashish @ Bauva
Respondent :- State of U.P.
Counsel for Appellant :- From Jail,Arvind Kumar Singh,Gaurav Kakkar
Counsel for Respondent :- A.G.A.

Hon'ble Pritinker Diwaker, J.

Hon'ble Dinesh Pathak, J.

(Per Hon'ble Dinesh Pathak, J.)

1. Heard Shri Gaurav Kakkar, learned Amicus for the appellants and Shri J. K. Upadhyay, learned A.G.A. for the State.

2. There are three connected Jail appeals arising out of judgment dated 29.10.2018 passed by the IIIrd Additional Sessions Judge, Kanpur Nagar in Sessions Trial No. 559 of 2012 convicting three accused/appellants namely Munni Devi w/o Shankar Gupta, Mohini d/o Shankar Gupta and Ashish @ Bauva s/o Shankar Gupta, for committing homicidal death of Rinki (deceased), under Sections 302 & 34 I.P.C. and sentencing them to undergo life imprisonment with fine to the tune of Rs.20,000/- each, in default thereof, they shall undergo six months additional imprisonment.

3. These three Jail Appeals registered as Jail Appeal No. 28 of 2019 (Munni Devi vs. State of U.P.), Jail Appeal 29 of 2019 (Mohini vs. State of U.P.) & Jail Appeal No. 30 of 2019 (Ashish @ Bauva vs. State of U.P.) preferred by the appellants arise out of common judgment dated 29.10.2018 and are being decided by this common judgment and order.

4. Factual matrix of the case are that deceased Rinki was residing with her husband, Kripa Shankar Gupta, i.e. informant (PW-1) in a separate portion of House No. 2/390, Nawabganj, Kanpur Nagar which was allocated to their share and in another portion of the said house, Shankar Gupta (brother of Kripa Shankar Gupta) was residing with his family. On 24.03.2019 at about 9:30 p.m. Rinki was dragged from her room by Munni Devi (w/o Shankar Gupta), Mohini (d/o Shankar Gupta) and Ashish @ Bauva (s/o Shankar Gupta), with intention to kill her and they set her ablaze by pouring kerosene oil. Shri Kripa Shankar Gupta (husband of the victim) had also sustained burn injury, while rescuing her. In a serious condition, she was admitted to Hallete Hospital. Due to her serious condition, first information report could not be lodged immediately.

5. In the backdrop of said incident, Kripa Shankar Gupta (PW-1) had filed a written report dated 25.03.2012 (Ext. Ka-1) at the Police Station Nawabganj, Kanpur and on the basis thereof F.I.R. dated 25.03.2012 was lodged at about 10:00 a.m. (Ext. Ka-12), which was registered as Case Crime No. 95 of 2012 under Section 307 I.P.C., against all the three accused persons.

6. During treatment, Rinki died on 31.08.2012 in hospital. Before death, she had made three dying declarations. First dying declaration was given to her husband orally. Second dying declaration dated 26.03.2012 under Section 161 Cr.P.C. (Ext. Ka-9) was made before the Investigating Officer, Sri Ram Prasad Chaudhary (PW-4). On the same day, third dying declaration was made before the Magistrate, Sri Rakesh Kumar (PW-9). Dr. S.B.Mishra (PW-10) had given Fitness Certificate with respect to her medical condition and state of mind for recording dying declaration. It is relevant to mention here that in original Lower Court record, Page no.6A1 which contains dying

declarations and Medical Certificate, is exhibited as Ext. Ka-6, whereas Sri Rakesh Kumar (PW-9) had proved the dying declaration made before him as Ext. Ka-14. In original record at Page no.6A, Ext.Ka-6 has been endorsed over the recovery memo of dead body. Learned Trial Court has mentioned the said dying declaration as Ext. Ka-14. Therefore, to avoid any confusion, this Court is treating the dying declaration as Ext. Ka-14.

7. After death, Inquest Report (Ext. Ka-2) was submitted on 01.04.2012 and Post Mortem Examination was conducted on the same day i.e. 01.04.2012 by Dr. S.N. Bajpai (PW-5). In Post Mortem Examination Report (Ext. Ka-10), Autopsy Surgeon has shown the following injuries on the body of the deceased:-

> *"Superficial to deep burn all over body except lower part of left side of abdomen, perineum front of both legs below knee joint both ankle joint foot and sole.*
>
> *Pus present at places all over body."*

8. Cause of death has been shown due to shock and septicemia as a result of ante mortem burn injury.

9. Charge-sheet dated 28.04.2012 (Ext. Ka-11) had been submitted against all the three accused under Section 302 I.P.C. Learned Trial Court had framed charges on 27.07.2012 against all the aforesaid three accused under Sections 302 & 34 I.P.C.

10. So as to hold the accused/appellants guilty, prosecution had examined ten witnesses. Accused have made statements under Section 313 of Cr.P.C. denying their involvement in the gruesome incident, pleaded their innocence, false implication and claimed trial.

11. Kripa Shankar s/o Ganga Prasad, PW-1, (husband of the victim) stated that on 24.03.2012 between 9:00 to 9:30 p.m, he went outside of his house to purchase 'Mortein'. When he returned after getting the desired product he saw that his wife was enveloped in flames. He rushed inside his house to grab a blanket and tried to subdue the fire with it. In the process of saving her, his

hand and face were burnt. It was also stated by PW-1 that his wife was in conscious state and told him that Munni Devi with her daughter Mohini and son Ashish @ Bauva have collectively poured kerosene oil on her and set her ablaze. She was screaming loudly when she conveyed this to him. Next day he moved written report in police station, which he proved as Ext Ka 1. After seven days his wife died on 31.03.2012 at about 11.00 p.m. Inquest was made before him and after recovery I.O. had prepared recovery memo.

12. Manoj Kumar s/o Ganga Prasad, PW-2, brother of Kripa Shankar (PW-1) had stated that her mother told him that Munni Devi, Mohini and Ashish @ Bauva have poured kerosene oil on Rinki and set her ablaze due to dispute of house in which they were residing. It is stated that on the next date Investigating Officer enquired from the victim. In burnt condition she had stated that Munni Devi, Mohini & Ashish @ Bauva had set her ablaze by pouring kerosene oil due to dispute of house and Kripa Shanker (PW-1) had sustained burn injury on his hand.

13. Sri Pappu Gupta, PW-3, the then A.C.M. IV, Kanpur Nagar, stated that Inquest Report (Ext Ka 2) was prepared by Sri Ram Prasad Chowdhary (Sub Inspector) and he had signed over it.

14. Sub Inspector, Sri Ram Prasad Chowdhary, PW-4, First Investigating Officer, stated that he went on the spot on 25.03.2012 and arrested accused persons; made relevant endorsement in the case diary and went to Hallete Hospital to enquire about medical condition of the victim. On the same day, he had recovered half burnt clothes, five litre plastic can containing 300 gms. of kerosene oil and prepared Recovery Memo (Ext. Ka-3). He further stated that on 26.03.2012 during the course of investigation victim had made statement under Section 161 Cr.P.C. (Ext. Ka-9) that Munni Devi, Mohini and Ashish @ Bauva dragged her from her room and set her ablaze by pouring kerosene oil. He further stated that on the indication of Kripa Shankar Gupta (PW-1), he had conducted spot inspection and prepared the Site Map (Ext. Ka-8). Distance between the room of informant and place of incident is ten (10) steps.

15. Dr. S.N.Bajpai, PW-5, had conducted the Post Mortem Examination on the dead body of the deceased and proved the Post Mortem Examination Report (Ext. Ka-10).

16. Sub Inspector, Sri Mahendra Singh Yadav, PW-6, third Investigating Officer had submitted charge-sheet against accused persons under Section 302 IPC (Ext. Ka 11) and proved it.

17. Sub Inspector, Sri Brij Mohan Singh, PW-7, the then Station House Officer, Nawabganj, was the Second Investigating Officer.

18. Sri Bhagwati Prasad Sharma (C-1285), PW-8, proved the F.I.R. (Ext. Ka-12). and G.D. (Ext. Ka-13).

19. Sri Rakesh Kumar, PW-9, the then Additional City Magistrate-II, before whom dying declaration was made by the victim on 26.03.2012 at about 11:05 a.m. He stated that the aforesaid dying declaration was made after obtaining Medical Certificate by the doctor on duty. It is deposed by him that in her dying declaration, the victim had stated that day before yesterday her sister-in-law (Jethani), her son and daughter, had caught hold of her and set her ablaze. He proved dying declaration (Ext. Ka 14).

20. Dr. S.B.Mishra, PW-10, who had given Medical Certificate dated 26.03.2012 at about 11:00 a.m. with respect to medical condition of the victim, stated that the victim was mentally fit while making dying declaration and after Medical Certificate furnished by him, the Magistrate had recorded her dying declaration on the same day i.e. 26.03.2012 from 11:05 a.m. to 11:10 a.m.

21. Learned Trial Court had found the accused/appellants guilty of committing gruesome murder of Rinki (deceased) by setting her ablaze and passed the impugned judgment and order dated 29.10.2018 convicting them under Section 302 read with Section 34 I.P.C. and sentencing them as mentioned in the preceding paragraph of this judgment, which is challenged by all the three accused in these three different jail appeals.

22. Learned counsel for the appellants submitted :-

(1) that prosecution had failed to establish its accusation.

(2) that neither the blanket alleged to have been used for extinguishing the fire had been recovered, nor any medical report of injured PW-1 had been filed, who allegedly sustained burn injuries while rescuing the deceased.

(3) that there is contradiction with respect to the place of recovery, as shown by the Investigating Officer in his memo of recovery and the statement made by PW-1.

(4) that no motive has been proved by the prosecution to set the victim ablaze, inasmuch as, relationship of PW-1 with his brothers was cordial, which is evident from his statement.

(5) that there is no eye-witness account to the incident so as to support the prosecution case that kerosene oil was allegedly poured by the accused persons on the victim to set her ablaze.

(6) that no independent witness was examined to authenticate the truthfulness of the incident. Chronology of the incident was not clear as to who caught hold the victim, who has poured kerosene oil on her and who has set her ablaze.

(7) that Manoj Kumar, PW-2 was informed about the incident by his mother, who had narrated the incident as to how victim was burnt alive, but his mother never came into the witness box and was never cross-examined to support the truthfulness of the incident.

(8) Oral dying declaration alleged to have been made before the husband and subsequent dying declaration made before the Executive Magistrate appear to be doubtful, inasmuch as, at the relevant time, the deceased was not in a fit state of mind to make such statement which is evident from the statement of Sri Ram Prasad Chaudhary, PW-4 who himself has stated that condition of the deceased (Rinki) was not good

on 25.03.2012, whereas the alleged statement was recorded on 26.03.2012.

23. Per contra, learned counsel for the State supported the judgment passed by the Trial Court and submitted as under :-

(1) Dying declaration made by the deceased was recorded when deceased was absolutely in a fit state of mind and same cannot be doubted, inasmuch as, her husband (PW-1), her brother-in-law (PW-2), Investigating Officer (PW-4) and the concerned doctor have clearly stated that she had categorically narrated the incident. Medical Certificate issued by the doctor itself is sufficient to prove the fit state of mind of the victim at the time, when her dying declaration was being recorded.

(2) The Trial Court had rightly convicted the accused on the basis of circumstantial evidence after careful consideration of all the evidence led by the prosecution. The judgment passed by the Trial Court is strictly in accordance with law and there is no infirmity in the same.

(3) It is also submitted that no second opinion can be formed, in light of the evidence available on record, as concluded by the learned Trial Court.

(4) There is no material contradiction in the evidence to create any doubt qua the gruesome incident took place on ill fated day.

24. We have carefully considered the chronological events of the case, the rival submissions made by the learned counsel for the parties and the evidence available on the record.

25. The case in hand is of circumstantial evidence in which conviction has been solely based on the dying declaration, inasmuch as, no eye-witness had been examined by the prosecution in support of accusation.

26. Primarily, it is clearly evident from the Inquest Report (Ext. Ka-2) and Post Mortem Examination Report (Ext. Ka-10) that victim (Rinki) succumbed

to the burn injuries. Nothing has been emerged in the cross-examinations of Pappu Gupta, Executive Magistrate (PW-3) who has proved the Inquest Report, Ram Prakash Chowdhary, S.I. (PW-4) and Dr. S.N.Bajpayee (PW-5), who has proved Post Mortem Examination Report, to disbelieve their statements given in examination-in-chief. Therefore, it can rationally be held beyond doubt that because of burn injury the deceased victim was admitted by her husband in Hallete Hospital on 24.03.2012 at about 9:30 p.m., who ultimately could not survive and breathed her last on 31.03.2012 at about 11:00 p.m.

27. Now moot issue would be as to whether the appellants/accused persons have committed the crime of homicidal death of Rinki by pouring kerosene oil and setting her ablaze. To prove the commission of crime of homicidal death, learned Court below had based its finding solitary on the dying declarations made by the deceased thrice at different stages.

28. In our opinion, in the facts and circumstances of the present case, relevancy and admissibility of dying declaration in evidence should be discussed first. Concept of dying declaration is enshrined under Section 32(1) of the Indian Evidence Act. Admissibility of dying declaration in evidence is an exception to the general rule as contained under Section 60 of the Indian Evidence Act that hearsay is not admissible in evidence. In accepting the dying declaration as an evidence, it is required that it should be with conscious, coherent and fit state of mind and the same should not be result of tutoring, prompting and imagination. That apart, it should inspire confidence in the mind of the Court that it is free from any form of tutoring. Dying declaration should not suffer from any infirmity and suspicious circumstances.

29. Concept of dying declaration is based on Maxim i.e. *'Nemo Moriturus Praesumitus Mentire'* meaning thereby 'no one, at the time of death, is presumed to tell lie and he will not meet his maker with lie in his mouth'. Sanctity attached to the dying declaration springs up from rational that a

person genuinely under the sense of imminent death would speak only the truth.

30. Dying declaration is in fact a statement of person who cannot be called as witness and, therefore, cannot be cross-examined. Such statements are made relevant in certain cases under Section 32(1) of the Indian Evidence Act. The risk while admitting the statement falling within the domain of Section 32(1) runs higher in contrast to other several evidences and to this involves a huge bearing on their admissibility and credibility. Such statements are neither made on oath nor are they made under the influence of the supremacy and the solemnity of the court room. However, once a dying declaration is held to be authentic inspiring full confidence beyond doubt, voluntary, consistent and credible; in such sanctitude it can even be the exclusive and can be made the solitary basis for conviction without seeking any corroboration.

31. The Hon'ble Supreme Court in many cases has expounded the relevancy of dying declaration and also given the guidelines as to how it can be relied upon. Some relevant case laws are as follows :-

32. In **Lakhan v. State of MP** reported in **(2010) 8 SCC 514**, the Hon'ble Supreme Court, after discussing number of judgments on the point of dying declarations, summarized the law in this regard, as under, relevant paragraph nos.9 & 21 are quoted hereunder:-

> ***"9.*** *The doctrine of dying declaration is enshrined in the legal maxim "Nemo moriturus praesumitur mentire", which means "a man will not meet his maker with a lie in his mouth". The doctrine of Dying Declaration is enshrined in Section 32 of the Indian Evidence Act, 1872 (hereinafter called as, "Evidence Act") as an exception to the general rule contained in Section 60 of the Evidence Act, which provides that oral evidence in all cases must be direct i.e. it must be the evidence of a witness, who says he saw it. The dying declaration is, in fact, the statement of a person, who cannot be called as witness and, therefore, cannot be cross-examined. Such statements themselves are relevant facts in certain cases.*

> ***21.*** *In view of the above, the law on the issue of dying declaration can be summarized to the effect that in case, the Court comes to the conclusion that the dying declaration is true and reliable, has been recorded by a person at a time when the deceased was fit physically and mentally to make the declaration and it has not been made under any tutoring/duress/prompting; it can be the sole basis for recording conviction. In such an eventuality no corroboration is required. In case, there are multiple dying declarations and there are inconsistencies between them, generally, the dying declaration recorded by the higher officer like a Magistrate can be relied upon, provided that there is no circumstance giving rise to any suspicion about its truthfulness. In case, there are circumstances wherein the declaration had been made, not voluntarily and even otherwise, it is not supported by the other evidence, the Court has to scrutinize the facts of an individual case very carefully and take a decision as to which of the declarations is worth reliance."*

33. In **Umakant and Another vs. State of Chattisgarh** reported in **(2014) 7 SCC 405,** the Hon'ble Supreme Court has expounded definition of the dying declaration and its conditions which are required at the time of accepting it as an evidence. Relevant paragraph nos. 20, 21 & 22 are quoted below :-

> ***20.*** *The philosophy of law which signifies the importance of a dying declaration is based on the maxim "nemo moritusus prasumitus mennre", which means, "no one at the time of death is presumed to lie and he will not meet his maker with a lie in his mouth". Though a dying declaration is not recorded in the Court in the presence of accused nor it is put to strict proof of cross-examination by the accused, still it is admitted in evidence against the general rule that hearsay evidence is not admissible in evidence. The dying declaration does not even require any corroboration as long as it inspires confidence in the mind of the Court and that it is free from any form of tutoring. At the same time, dying declaration has to be judged and appreciated in the light of surrounding circumstances. The whole point in giving lot of credence and importance to the piece of dying declaration, deviating from the rule of evidence is that such declaration is made by the victim when he/she is on the verge of death.*
>
> ***21.*** *In spite of all the importance attached and the sanctity given to*

the piece of dying declaration, Courts have to be very careful while analyzing the truthfulness, genuineness of the dying declaration and should come to a proper conclusion that the dying declaration is not a product of prompting or tutoring.

22. *The legal position about the admissibility of a dying declaration is settled by this Court in several judgments. This Court in Atbir v. Government of NCT of Delhi - 2010 (9) SCC 1, taking into consideration the earlier judgments of this Court in Paniben v. State of Gujarat - 1992 (2) SCC 474 and another judgment of this Court in Panneerselvam v. State of Tamilnadu - 2008 (17) SCC 190 has given certain guidelines while considering a dying declaration:*

1. Dying declaration can be the sole basis of conviction if it inspires full confidence of the Court.

2. The Court should be satisfied that the deceased was in a fit state of mind at the time of making the statement and that it was not the result of tutoring, prompting or imagination.

3. Where the Court is satisfied that the declaration is true and voluntary, it can base its conviction without any further corroboration.

4. 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 corroborative. The rule requiring corroboration is merely a rule of prudence.

5. Where the dying declaration is suspicious, it should not be acted upon without corroborative evidence.

6. A dying declaration which suffers from infirmities, such as the deceased was unconscious and could never make any statement cannot form the basis of conviction.

7. Merely because a dying declaration does not contain all the details as to the occurrence, it is not to be rejected.

8. Even if it is a brief statement, it is not to be discarded.

9. When the eye-witness affirms that the deceased was not in a fit and conscious state to make the dying declaration, medical opinion cannot prevail.

10. If after careful scrutiny the Court is satisfied that it is free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal impediment to make it basis of conviction, even if there is no corroboration.

34. Evidential value of dying declaration has been discussed by the Supreme Court in the case of **Sudhakar vs. State of M.P.** reported in **(2012) 7 SCC 569.** Paragraph 16 which is relevant is quoted herein below :-

> ***"16.*** *We may, now, refer to some of the judgments of this Court in regard to the admissibility and evidentiary value of a dying declaration. In the case of Bhajju @ Karan v. State of M.P. [(2012) 4 SCC 327], this Court clearly stated that Section 32 of the Evidence Act was an exception to the general rule against admissibility of hearsay evidence. Clause (1) of Section 32 makes statement of the deceased admissible, which has been generally described as dying declaration. The court, in no uncertain terms, held that it cannot be laid down as an absolute rule of law that dying declaration cannot form the sole basis of conviction unless it is corroborated by other evidence. The dying declaration, if found reliable, could form the basis of conviction. This principle has also earlier been stated by this Court in the case of Surinder Kumar v. State of Haryana (2011) 10 SCC 173 wherein the Court, while stating the above principle, on facts and because of the fact that the dying declaration in the said case was found to be shrouded by suspicious circumstances and no witness in support thereof had been examined, acquitted the accused. However, the Court observed that when a dying declaration is true and voluntary, there is no impediment in basing the conviction on such a declaration, without corroboration.*

35. Furthermore, in the aforesaid judgment of Sudhakar (Supra), the Hon'ble Supreme Court has discussed the case of **Chirra Shivraj vs. State of Andhra Pradesh** reported in **(2010) 14 SCC 444** and observed that mechanical approach in relying upon the dying declaration just because it is there is extremely dangerous. Emphasis has been made by the Hon'ble Supreme Court that the Court has to examine a dying declaration scrupulously with a microscopic eye to find out whether the dying declaration is voluntary, truthful, made in conscious state of mind and without being influenced by other persons and where these ingredients are satisfied, it cannot be said that on the sole basis of dying declaration, the order of conviction cannot be passed.

36. In the aforesaid judgment of **Sudhakar (Supra),** the Hon'ble Supreme Court has discussed the concept of dying declaration in detail in paragraph 18 by considering the case of **Laxman vs. State of Maharashtra reported in (2002) 6 SCC 710** which is quoted below :-

> *"18. In the case of Laxman (supra), the Court while dealing with the argument that the dying declaration must be recorded by a Magistrate and the certificate of fitness was an essential feature, made the following observations. The court answered both these questions as follows:*
>
> > *"3. The juristic theory regarding acceptability of a dying declaration is that such declaration is made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the man is induced by the most powerful consideration to speak only the truth. Notwithstanding the same, great caution must be exercised in considering the weight to be given to this species of evidence on account of the existence of many circumstances which may affect their truth. The situation in which a man is on the deathbed is so solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason the requirements of oath and cross-examination are dispensed with. Since the accused has no power of cross-examination, the courts insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The court, however, has always to be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. The court also must further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Normally, therefore, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration looks up to the medical opinion. But where the eyewitnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and 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 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."

37. In **Ramakant Mishra vs. State of U.P.** reported in **(2015) 8 SCC 299**, the Hon'ble Supreme Court has explained as to how to decide the authenticity of dying declaration and legal responsibility of the Executive Magistrate and the doctor. Paragraph **9, 10 & 12** of the said judgment are quoted below :-

"9. *The definition of this legal concept found in Black's Law Dictionary (5th Edition) justifies reproduction:*

"Dying Declarations - Statements made by a person who is lying at the point of death, and is conscious of his approaching death, in reference to the manner in which he received the injuries of which he is dying, or other immediate cause of his death, and in reference to the person who inflicted such injuries or the connection with such injuries of a person who is charged or suspected of having committed them; which statements are admissible in evidence in a trial for homicide (and

> *occasionally, at least in some jurisdictions, in other cases) where the killing of the declarant is the crime charged to the defendant. Shepard v. U.S., Kan., 290 U.S. 96, 54 S.Ct. 22, 78 L.Ed. 196. Generally, the admissibility of such declarations is limited to use in prosecutions for homicide; but is admissible on behalf of accused as well as for prosecution. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death is not excluded by the hearsay rule. [the Federal Rules of Evidence, Rule 804(b)(2).*

10. *When a person makes a statement while being aware of the prospect that his death is imminent and proximate, such a statement assumes a probative value which is almost unassailable, unlike other statements which he may have made earlier, when death was not lurking around, indicating the cause of his death. That is to say that a person might be quite willing to implicate an innocent person but would not do so when death is knocking at his door. That is why a Dying Declaration, to conform to this unique specie, should have been made when death was in the contemplation of the person making the statement/declaration. In the case before us, the statement, if made by the deceased, would qualify to be treated as a Dying Declaration because she was admitted in the hospital, having sustained 90-95 per cent burn injuries, and because of this grave burn injuries, she would be expecting to shortly breathe her last.*

12. *Since the burden of proving innocence beyond reasonable doubt shifts to the Accused in the case of a dowry death, as it has in the present case, it was imperative for the defence to prove the sequence of events which lead to the recording of the alleged Dying Declaration by the Tehsildar DW1. This burden has not even been faintly addressed. It appears that at the time of seeking bail the accused had requested the Sessions Court to call for the alleged Dying Declaration. Keeping in perspective that none of the Accused was present when the deceased was receiving medical treatment in the hospital, or when the Dying Declaration was allegedly recorded, or at the time of death, or even at the time of cremation, the manner in which the Accused learnt of the existence of the Dying Declaration has not been disclosed. The statement of the I.O. also does not clarify the position; he has stated that he learnt of the existence of the Dying Declaration from the relatives of the deceased. On the application of Sher Singh, the burden*

and necessity of proving this sequence of events stood transferred to the shoulders of the Accused since Section 304B of the IPC had been attracted. The I.O. has deposed that all the Accused, including the late father-in-law, Gorakh Nath, had absconded after the incident. In fact, in the cross-examination, the I.O. states that - "there is no reliable information about the Dying Declaration... On keeping this information that the Dying Declaration of Vijay Lakshmi was recorded by the Magistrate I did not consider any need of this thing". Neither the Doctor DW2 who had allegedly certified that the deceased was in a fit condition to make a statement nor the Tehsildar who had allegedly written down the alleged Dying Declaration has stated the manner in which the Tehsildar had been conscripted or located to perform this important recording. The Dying Declaration appears to have mysteriously popped up and referred to at the time of praying for bail. The chain or sequence of events which lead to its recording remains undisclosed. In his statement, the Tehsildar has not clarified the manner in which he happened to record the Dying Declaration and the timing of its transmission to the Court. Since the onus of proof had shifted to the Accused, this alleged sequence of events should have been proved beyond reasonable doubt by them. We may emphasise that the Tehsildar as well as the Doctor who allegedly certified that the deceased was in a fit state to make the Dying Declaration has been produced by the defence. The Doctor should have spoken of the sequence of events in which the Tehsildar came to record the Dying Declaration. The alleged exculpating Dying Declaration is, therefore, shrouded in suspicion and we have not been persuaded to accept that it is a genuine document. The defence has failed to comply with Section 113B of the Evidence Act. The Accused being charged of the commission of a dowry death ought to have entered the witness box themselves. The Accused were present on the scene at the time of the occurrence, which turned out to be fatal, and that added to their responsibility to give a credible version of their innocence in the dowry death.

38. In the present case, there are three dying declarations made by deceased Rinki. First oral dying declaration was made by the victim before her husband while she was going to hospital. PW-1 deposed that his wife had loudly narrated the incident, accusing Munni Devi, her daughter Mohini and son Ashish @ Bauva that they had poured kerosene oil and set her ablaze. Aforesaid narration of incident by the deceased was repeated without any

deviation before the Investigating Officer who had recorded the statement of victim under Section 161 Cr.P.C. PW-4 Ram Prasad Chowdhary (I.O.) had recorded the said statement (dying declaration) of victim while she was in hospital under medical treatment. At the time of investigation being conducted by the I.O., she was surrounded by her family members, including her husband (PW-1) and brother-in-law (PW-2) who have corroborated the event of said dying declaration in their statement. Third dying declaration was made before the Executive Magistrate (PW-9) Rakesh Kumar who had proved the dying declaration as Ext. Ka-14. Statement of PW-10 Dr. S. B. Mishra corroborated the third dying declaration made by the victim and proved the Medical Certificate to the effect that at the time of making statement she was conscious, coherent and in a fit state of mind. In this view of the matter, it is a case of multiple dying declaration with consistency and coherence.

39. For accepting the dying declaration, the Hon'ble Supreme Court has expounded the conditions which are necessarily to be followed. In **State of Gujarat v. Jayrajbhai Punjabhai Varu** reported in **(2016) 14 SCC 152,** the Supreme Court held in paragraph nos. 15, 17, 19 & 20 as under :

> ***"15.*** *The courts below have to be extremely careful when they deal with a dying declaration as the maker thereof is not available for the cross- examination which poses a great difficulty to the accused person. A mechanical approach in relying upon a dying declaration just because it is there is extremely dangerous. The court has to examine a dying declaration scrupulously with a microscopic eye to find out whether the dying declaration is voluntary, truthful, made in a conscious state of mind and without being influenced by the relatives present or by the investigating agency who may be interested in the success of investigation or which may be negligent while recording the dying declaration.*
>
> ***17.*** *A number of times the relatives influence the investigating agency and bring about a dying declaration. The dying declarations recorded by the investigating agencies have to be very scrupulously examined and the court must remain alive to all the attendant circumstances at the time when the dying declaration comes into being. In case of more than one dying declaration, the intrinsic*

contradictions in those dying declarations are extremely important. It cannot be that a dying declaration which supports the prosecution alone can be accepted while the other innocent dying declarations have to be rejected. Such a trend will be extremely dangerous. However, the courts below are fully entitled to act on the dying declarations and make them the basis of conviction, where the dying declarations pass all the above tests.

19. *…..... A dying declaration is entitled to great weight. The conviction basing reliance upon the oral dying declaration made to the father of the deceased is not reliable and such a declaration can be a result of afterthought. 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 tutoring, 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 assailants. 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.*

20. The burden of proof in criminal law is beyond all reasonable doubt. The prosecution has to prove the guilt of the accused beyond all reasonable doubt and it is also the rule of justice in criminal law that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other towards his innocence, the view which is favourable to the accused should be adopted."

40. In **P. Mani v State of Tamilnadu** reported in **2006 (3) SCC 161**, while considering the suspicious dying declaration, it has been held by the Apex Court that the conviction can be based solely on the basis of dying declaration alone, but the same must be wholly reliable and trustworthy. Para 14 of the said judgment reads thus:

"14. *Indisputably conviction can be recorded on the basis of dying declaration alone but therefore the same must be wholly reliable. In a case where suspicion can be raised as regard the correctness of the dying declaration, the court before convicting an accused on the basis thereof*

would look for some corroborative evidence. Suspicion, it is trite, is no substitute for proof. If evidence brought on records suggests that such dying declaration does not reveal the entire truth, it may be considered only as a piece of evidence in which event conviction may not be rested only on the basis thereof. The question as to whether a dying declaration is of impeccable character would depend upon several factors; physical and mental condition of the deceased is one of them. In this case the circumstances which have been brought on records clearly point out that what might have been stated in the dying declaration may not be correct. If the deceased had been nurturing a grudge against her husband for a long time, she while committing suicide herself may try to implicate him so as to make his life miserable. In the present case where the Appellant has been charged under Section 302 of the Indian Penal Code, the presumption in terms of Section 113A of the Evidence Act is not available. In absence of such a presumption, the conviction and sentence of the accused must be based on cogent and reliable evidence brought on record by the prosecution. In this case, we find that the evidences are not such which point out only to the guilt of the accused."

41. In the case of **Lakhan (Supra)** the Supreme Court has observed in paragraph 10 of the judgment that in case, the Court is satisfied that dying declaration is true and made voluntarily by the deceased, conviction can be based solely on it without any further corroboration. It has further been observed that the Court has to scrutinize the dying declaration carefully and must ensure that declaration is not the result of tutoring, prompting or imagination. The deceased must be in a fit state of mind and must identify the assailant.

42. In **Harish Kumar vs. State of Haryana** reported in **(2015) 2 SCC 601,** the Supreme Court in paragraph 24 & 25 has held as follows :-

24. *Considering the above facts and circumstances, we find that the dying declaration dated 14.9.1993, made by the deceased, before Naib Tehsildar in the presence of Medical Officer, is voluntary and truthful. In Surender Kumar v. State of Punjab[2], this Court has observed, in para 20, as under: -*

"It is also not obligatory that either an Executive Magistrate or a Judicial Magistrate should be present for recording a dying declaration. It is enough that there is evidence available to

show that the dying declaration is voluntary and truthful. There could be occasions when persons from the family of the accused are present and in such a situation, the victim may be under some pressure while making a dying declaration. In such a case, the court has to carefully weigh the evidence and may need to take into consideration the surrounding facts to arrive at the correct factual position."

25. *In Nallam Veera Stayanandam and others v. Public Prosecutor, High Court of A.P.[3], in the similar facts and circumstances of the case, this Court, at the end of para 6, has observed as under: -*

"In cases where there is more than one dying declaration, it is the duty of the court to consider each of them in its correct perspective and satisfy itself which one of them reflects the true state of affairs."

43. In the matter of circumstantial evidence, once the dying declaration inspires confidence in the mind of the court about its genuineness the burden lies upon the accused because those facts are especially within his knowledge which were available at or about the time of the incident, as embodied under Section 106 of the Evidence Act, to meet certain exceptional circumstances wherein it would be impossible for the prosecution to establish certain facts, which are particularly within the knowledge of the accused. Procedure regarding shifting onus of proving the offence in certain circumstances, as enshrined under Section 106 of the Evidence Act, is an exception to the general rule of proving the fact, as embodied under Section 101 of the Evidence Act, that burden of proving a fact rests on the party substantially asserted the affirmative of the issue. Substance of the section has been discussed by the Hon'ble Apex Court in the case of ***Shambhu Nath Mehra v. The State of Ajmer, AIR 1956 SC 404***. In the aforesaid case, the word "especially' as mentioned under Section 106 has been explained by the Hon'ble Apex Court in paragraph 11 & 13 which are quoted below :

"(11) This lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be

impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are "especially" within the knowledge of the accused and which he could prove without difficulty or inconvenience.

The word "especially" stresses that – It means facts that are pre-eminently or exceptionally within his knowledge. If the section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than be whether he did not did not.

It is evident that cannot be the intention & the Privy Council has twice refused to construe this section, as reproduced in certain other Acts outside India, to mean that the burden lies on an accused person to show that he did not commit the crime for which he is tried. These cases are Attygalle v. The King, 1986 PC 169 (AIR V 23) (A) and Seneviratne v. R, 1986-3 All ER 86 at p. 49(B).

(13) We recognise that an illustration does not exhaust the full content of the section which it illustrates but equally it can neither curtail nor expand its ambit; and if knowledge of certain facts is as much available to the prosecution, should it choose to exercise due diligence, as to the accused, the facts cannot be said to be "especially" within the knowledge of the accused.

This a section which must be considered in a commonsense way; and the balance of convenience and the disproportion of the labour that would be involved in finding out and proving certain facts balanced against the triviality of the issue at stake and the ease with which the accused could prove them, are all matters that must be taken into consideration. The section cannot be used to undermine the well established rule of law that, save in a very exceptional class of case, the burden is on the prosecution and never shifts."

44. In the matter of **Trimukh Maroti Kirkan v. State of Maharashtra** reported in **(2006) SCC 681**, Hon'ble Apex Court discussed the circumstances where the crime was commissioned within the premises wherein the accused was present at the time of incident and had all the opportunity to plan and commit the offence at the time and in circumstances

of his choice, in that condition it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused. Hon'ble Apex Court expounded thus in paragraphs 14 & 15 which are quoted below :

> *"14. If an offence takes place inside the privacy of a house and in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the courts. A judge does not preside over a criminal trial merely to see that no innocent man is punished. A judge also presides to see that a guilty man does not escape. Both are public duties. (See Stirland v. Director of Public Prosectuion, 1944 AC 315 : (1944) 2 All ER 13 (HL) – quoted with approval by Arijit Pasayat, J. in State of Punjab v. Karnail Singh (2003) 11 SCC 271 : 2004 SCC (Cri) 135). The law does not enjoin a duty on the prosecution to lead evidence of such character which is almost impossible to be led or at any rate extremely difficult to be led. The duty on the prosecution is to lead such evidence which it is capable of leading, having regard to the facts and circumstances of the case. Here it is necessary to keep in kind Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustration (b) appended to this section throws some light on the content and scope of the provision and it reads :*
>
> *"(b) A is charged with travelling on a railway without ticket. The burden of proving that he had a ticket is on him."*
>
> *15. Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation."*

45. In the instant case, offence of homicidal death took place within the premises of the house wherein room of the victim and the room of the accused are situated nearby, which is evident from the site map (Ext. Ka-8) and the statement made by the Investigating Officer (P.W. 4) who had stated that the distance between the room of the victim and room of the accused is hardly 10 steps. P.W. 1 in his cross-examination, clearly stated that he went outside the house to purchase 'Mortein' at the time of incident and his wife, Munni Devi, son and daughter of Munni Devi were present in the house. When he returned home he saw his wife enveloped in flames and his wife stated loudly that Munni, with her daughter and son poured kerosene oil on her and set her ablaze. Applying the analogy, as embodied under Section 106 of the Evidence Act, a gruesome incident took place in presence of all accused who were inside the premises of the house and they failed to offer any explanation as to what they were doing at the time of incident. Even no plea of *alibi* had been offered by the accused. In the facts and circumstances of the case, it can easily be held that crime was committed by the accused who had failed to offer any rationale defence. In their statement under Section 313 Cr.P.C. the accused had simply denied the question no. (1), in their reply, which was put before them with respect to the incident of pouring kerosene oil and set the victim ablaze. Apart from that, they had shown their lack of knowledge in reply to question no. (2) which was in respect of the statement made by the P.W. 1.

46. In the aforesaid facts and circumstances, it is very much clear that the factum of gruesome incident in which the victim Rinki was burnt alive was well within the knowledge of the appellants/accused who had full opportunity to plan and commit the offence in question at that particular span of time, while her husband went outside to purchase 'Mortein. In absence of any explanation on behalf of the appellants/accused, the only plausible inference can be drawn against them that all the inmates present at that moment had participated in the crime.

47. Learned counsel for the appellants had emphasized about the non

recovery of blanket which was allegedly used by PW-1 and also absence of injury report of PW-1 (husband of deceased), who extinguished fire and allegedly sustained burn injury while rescuing his wife. He has also submitted that PW-4, in his deposition, had not corroborated burn injury of PW-1 (Kripa Shankar-husband of the victim). In this respect we have examined the record. The relevant portion of the deposition of PW-4 is reproduced below :-

> *"विवेचना में सबसे पहले मैने कृपा शंकर गुप्ता का बयान अंकित किया। वादी कृपा शंकर हाथ, गर्दन व चेहरे पर झुलसा था। वादी लगभग 10% प्रतिशत जला था। मैने वादी का जलने का डाक्टरी मुआयना (का०फ०) कराया था। उसने अपना ट्रीटमेंट स्वयं कराया था क्योंकि मजरूवा की देखभाल भी कर रहा था।"*

48. PW-2 Manoj Kumar (brother of PW-1) had also deposed that in his presence Rinki (victim) has given her statement under Section 161 Cr.P.C. before the Investigating Officer that Munni Devi, Mohini and Ashish have poured kerosene oil and set her ablaze and her husband had sustained burn injury while rescuing her. The statement of deceased Rinki, being a part of dying declaration, cannot be disbelieved. Apart from that, PW-2 has also stated that his mother informed to him that while extinguishing the fire Kripa Shanker has sustained burn injury on his hand.

49. So far as the recovery of blanket is concerned, I.O. PW-4 has stated in his cross-examination that blanket was not shown to him by the informant. For the sake of argument, even assuming that blanket was not used in extinguishing fire, though it was used as per statement of PW-1, the factum of homicidal death of victim due to burn injury cannot be denied. Therefore, absence of recovery of blanket and absence of medical certificate of PW-1 are not even remotely going to affect the merit of the case and cannot falsify the gruesome incident of burn injury which resulted into homicidal death of victim (Rinki). Inquest Report (Ext. Ka-2), Post Mortem Examination Report (Ex Ka-10) and dying declarations evince the cause of death owing to burn injury. Cross-examination of witnesses do not create even any indication of doubt with respect to the incident in question. As such, we find no substance

in the submission made by the learned counsel for the appellants in this respect.

50. Learned counsel for the appellants had tried to make out a contradiction with respect to the place of recovery as stated in the memo of recovery as well as in the statement of PW-1.

51. We have carefully perused the statement of PW-1 (husband) and the memo of recovery wherein, expressly, we do not find any contradiction as argued by the learned counsel for the appellants. PW-1 in his deposition has stated that half burnt clothes and 5 litre plastic can of kerosene oil was found from his house. The statement of PW-1 in this regard is being quoted below :-

> *"रिपोर्ट लिखना के बाद उसी दिन दरोगा जी ने मेरे घर से अधजले कपड़े, एक किरोसिन का पाँच लीटर का जरिकेन पुलिस कब्जे में लेकर अधजले कपड़े को सर्वमोहर कर उसकी फर्द तैयार की। फर्द पर मेरे हस्ताक्षर हैं।"*

52. Whereas, in the memo of recovery (Ext. Ka-7) it is stated that recovery was made from a place near the room of Munni Devi. The relevant portion of recovery memo is as under :-

> *"घटना स्थल मकान नं० 2/390 कानपुर नगर के प्रतिवादी श्रीमती मुन्नी देवी w/o शंकर गुप्ता निवासी 2/390 नि० नवाव गंज के कमरे के पास अन्दर से एक मिट्टी के तेल की प्लास्टिक की सफेद जरिकेन जिसमें करीब 300 ग्राम मिट्टी का तेल तथा मजरूवा के अधजले कपडे जिसमें से मिट्टी के तेल की बू आ रही है, कब्जे पुलिस में लिया गया।"*

53. It is evident that the victim and accused/appellants were residing in separate portions of same house. As per statement of PW-4 (I.O.) and the Site Map (Ext. Ka-8), it is quite clear that distance between rooms of the victim and the accused, is hardly ten steps. Burnt body of the victim was found at point 'A' which is situated nearby the room of accused in the blind alley which ends at the door step of victim's room. It appears that PW-1 was intended to show the house wherein accused and victim are inmates in different portions. Apart from that, recovery memo was signed by PW-1 himself. In these circumstances, no contradiction can be inferred with respect

to the place of recovery as mentioned in the memo of recovery and in the deposition of PW-1. There is no apparent contradiction as argued by the learned counsel for the appellants.

54. Learned counsel for the appellants had submitted that no motive has been proved by the prosecution for commission of offence. In support of his submission, learned counsel for the appellants has drawn the attention of the Court towards the partial statement made by PW-1 which is quoted below :-

"मकान की टैक्स की आदायगी को लेकर मेरा भाईयों से झगडा नहीं होता था। परिवार में झगडे घर की औरतों के बीच में होते थे।"

55. In our opinion, learned counsel for the appellants had misinterpreted the statement of PW-1 by placing it in piecemeal whereas statement of a witness should always be read as a whole. Deposition of PW-1 and PW-2 clearly reveals that there is dispute between the families of the parties with respect to the residential house wherein parties are inmates in their respective portions. Apart from this, in their statements under Section 313 Cr.P.C., appellants/accused themselves have admitted the dispute with regard to the possession of house in question. Specific query no.12 and its reply is quoted below :-

"प्रश्न सं० 12. आप के विरूद्ध मुकदमा क्यों चला?

उत्तर– मकान को खाली करने व कब्जे के लिये रंजिशन मुकदमा चला।"

56. Statement under Section 313 Cr.P.C. evinces the motive of offence committed by the accused persons.

57. Learned counsel for the appellants had also submitted that neither any eye-witness nor any independent witness were produced to authenticate the truthfulness of the incident. Apart from that, it is submitted that the chronology of the incident is also not made clear. We find no substance in the submissions made by the learned counsel for the appellants in this regard. We have already discussed the proposition of law with regard to the

circumstantial evidence, that too in those conditions where maker of the statement could not be called upon for cross-examination under Section 32 (1) of the Indian Evidence Act and onus of proving the offence was shifted upon the accused who had special knowledge of the incident. In the present case, accused persons are the inmates of the premises and distance between two rooms, belonged to the victim and accused respectively, is hardly ten steps and burnt body of the victim was found nearby the doorsteps of the accused. It is also proved from the evidence available on record that at the time of incident, accused persons were present in the premises. Details of occurrence is not required to be explained in the dying declaration. Mere statement with respect to the incident is more sufficient than to prove the incident. Dealing with this point, the Hon'ble Supreme Court in paragraph 10 of the **Lakhan's case (Supra)** had observed as follows :-

> *"**10.** .....Merely because a dying declaration does not contain the details of the occurrence, it cannot be rejected and in case there is merely a brief statement, it is more reliable for the reason that the shortness of the statement is itself a guarantee of its veracity. If the dying declaration suffers from some infirmity, it cannot alone form the basis of conviction. Where the prosecution's version differs from the version given in the dying declaration, the said declaration cannot be acted upon."*

58. Learned counsel for the appellants has given much emphasis on the fact that mother of PW-2, had not been produced in the witness box who is the source of information for PW-2 narrating the incident. Under Section 207(iii) Cr.P.C. statement of all the witnesses were given to the accused persons who have gone through the statements and had never raised any objection to the effect that mother should also be produced in the witness box. Apart from that, under Section 311 Cr.P.C., accused had an opportunity to move an application before the Court, so that mother of PW-1 could be cross-examined in the witness box. But unfortunately, accused had neither raised any objection under Section 207 (iii) Cr.P.C. nor availed opportunity under Section 311 Cr.P.C., which amounts to closure of their evidence. At this juncture, they cannot argue such point to which they have deliberately

ignored being satisfied with their performance at trial stage. Even otherwise, non-producing the mother in witness box is not going to affect the merit of the case. Gruesome incident of homicidal death of victim is fully proved by sundry evidences beyond all reasonable doubt.

59. Fit state of mind of the victim had also been questioned by the learned counsel for the appellants and raised doubt with respect to the third dying declaration, which was made before the Executive Magistrate. In support of his submission, learned counsel for the appellants has emphasized the statement of PW-4 who had stated that the condition of the victim was not good on 25.03.2012 whereas the alleged statement was recorded on 26.03.2012, i.e. just next day. We have perused the statement of witnesses and the dying declaration made before the Executive Magistrate. We find no inconsistency in all the three dying declarations made by the victim. On 24.03.2012, she was admitted in the hospital due to burn injury, on 25.03.2012 PW-4 (I.O.) visited the hospital but had not recorded the statement of victim and on 26.03.2012, he had recorded the statement of victim who had categorically stated that the accused had poured kerosene oil and set her ablaze. Without any deviation, on the same day i.e. 26.03.2012 she had narrated the incident before the Executive Magistrate from 11:05 a.m. to 11:10 a.m. Before recording the statement, Dr. S.B.Mishra (PW-10), who was on duty, had given the Medical Certificate with respect to her fit mental condition to give statement. After recording statement, her right hand thumb impression had been put on the statement which was properly verified by Dr. Mishra. Executive Magistrate, who is the competent authority had legally and perfectly discharged his duty in recording the statement of the victim. Before Executive Magistrate she had categorically stated that day before yesterday I was set on fire by sister-in-law (Jethani) with her son and daughter. My sister-in-law's (Jethani) name is Munni w/o Shanker. I don't want to say any further.

60. In several cases, Hon'ble Supreme Court had already observed that dying declaration recorded by the competent Magistrate would stand on much

higher footing than the declaration recorded by the Officer in lower rank. For the reason that competent Magistrate has no axe to grind against the person named in dying declaration of the victim, however, circumstances showing anything to the contrary, should not be there in the facts of the present case. The Hon'ble Supreme Court in the case of **Munnawar vs. State of U.P.** reported in **(2010) 5 SCC 451** has held that dying declaration can be relied upon if the deceased remained alive for long period of time and died after recording of the dying declaration. There may be evidence to show that his condition was not overtly critical or precarious when the dying declaration was recorded.

61. In the present case incident took place on 24.03.2012 at about 9.30 p.m. and the victim had died on 31.03.2012 at about 11:00 p.m. The victim survived for one week and during this period she had made three dying declarations, which are consistent and coherent. In the facts and circumstances of the present case, it cannot be said that the victim was not in a fit state of mind to make statement before the Officer concerned.

62. Applying the above principles of law to the facts of the case and on appreciation of evidence on record, we have no hesitation to hold that the dying declaration was recorded in accordance with law and there is no infirmity in the same. Further there is no inconsistency in the dying declaration and the same inspires confidence of this Court to be relied upon.

63. In this view of the matter, as discussed above, it is evident from the record that deceased Rinki met to homicidal death because of brutal act committed by appellants who were inmates of the premises in question and were very well present there at the time of incident. It can reasonably be concluded beyond any doubt that the appellants were involved in the commission of crime inasmuch as they had personal grudge with the victim qua possession of portion of the house in question wherein the victim and his family resides. The trial court scrupulously examined all the documentary and oral evidence available on record and very consciously came to the

conclusion that the appellants/accused are involved in the commission of crime which resulted in brutal death of the victim who had been burnt alive. All the evidence clearly indicate beyond reasonable doubt that all the accused had poured kerosene oil and set the victim ablaze. There is consistency in the dying declaration given thrice by the victim, which are voluntary, truthful and without being influenced by any person and made in a conscious state of mind, which raises confidence in the mind of the court.

64. After considering the facts and circumstances of the present case and appreciation of evidence on record, we are of the considered opinion that the dying declaration made by victim Rinki was voluntary, truthful and without any tutoring, prompting and the same had rightly been relied upon by the trial court and made it solitary basis to convict the accused. No second opinion/view is possible in the present case except to hold that the present accused/appellants are guilty of committing homicidal death of victim Rinki.

65. We find no merit in the present jail appeals preferred by the accused appellants. Accordingly, all the three appeals are hereby **dismissed.** Judgment and order dated 29.10.2018 passed in Sessions Trial No. 559 of 2012 convicting and sentencing accused-appellants, is hereby affirmed.

66. Let a copy of this judgment along with lower court record be sent to concerned Trial Court forthwith, for compliance. Copy of this judgment be also supplied to accused-appellants through concerned Superintendent of Jail.

67. Shri Gaurav Kakkar, learned Amicus be paid Rs.10,000/- as his remuneration. Consequently, State Government is directed to ensure payment of aforesaid fee through Additional Legal Remembrancer posted in the office of Advocate General at Allahabad to Shri Gaurav Kakkar, Amicus, without any delay and, in any case, within one month from the date of receipt of copy of this judgment.

(Dinesh Pathak, J.) **(Pritinker Diwaker, J.)**

Order Date :- 12.06.2020
VR/