

(CRA-1401-2016 & CRA-389-2017)

**NAFR**

**HIGH COURT OF CHHATTISGARH, BILASPUR**

**Criminal Appeal No. 1401 of 2016**

Rajkumari, Wife of Moolchand Rathor, aged about 40 years,  
Resident of Patgaonwan, Police Station Pendra, District Bilaspur  
(Chhattisgarh)

---- **Appellant**  
**(In Jail)**

**Versus**

State of Chhattisgarh, through Station House Officer, Police  
Station Pendra, District Bilaspur, (Chhattisgarh)

---- **Respondent**

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For Appellant : Mr. Yogendra Chaturvedi, Advocate  
For Respondent-State: Mr. Afroz Khan, Panel Lawyer  
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**AND**

**Criminal Appeal No. 389 of 2017**

Moolchand Rathore, Son of Ram Jiyawan Rathore, aged about 43  
years, Resident of Village Pathgawan, Police Station Pendra,  
District Bilaspur (Chhattisgarh)

---- **Appellant**  
**(In Jail)**

**Versus**

State of Chhattisgarh, through Station House Officer, Police  
Station Pendra, District Bilaspur, (Chhattisgarh)

---- **Respondent**

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For Appellant : Mr. Yogendra Chaturvedi, Advocate  
For Respondent-State: Mr. Afroz Khan, Panel Lawyer  
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**Division Bench**

**Hon'ble Shri Justice Sanjay K. Agrawal and**

**Hon'ble Shri Justice Sanjay S. Agrawal**

**Judgment on Board**

**(14.12.2023)**

**Sanjay K. Agrawal, J**

**(1)** Regard being had to the similitude of the questions of fact  
and law involved and being arising out of a common impugned

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judgment dated 04.10.2016, on the joint request of learned counsel for the parties, these two appeals are clubbed together, heard together and are decided by this common judgment.

**(2)** In these two criminal appeals filed under Section 374(2) of Cr.P.C., the two appellants herein, namely, Rajkumari **(A-5)** and Moolchand **(A-1)** are calling in question the legality, validity and correctness of a common impugned judgment of conviction and order of sentence dated 04.10.2016, passed by Additional Sessions Judge, Pendra Road, District Bilaspur (Chhattisgarh), in Sessions Trial No.10 of 2013, whereby both the appellants herein have been convicted for offence under Section 302 read with Section 34 of IPC and sentenced to undergo imprisonment for life with fine of Rs.10,000/- each and, in default of payment of fine amount, additional rigorous imprisonment for 01 month each.

**(3)** The case of the prosecution, in short, is that on 29.10.2012, at about 08:00 AM, at Village Pathgawan within the ambit of Police Station Pendra, Bilaspur, the two accused-appellants herein alongwith 05 other co-accused (now stand acquitted by the trial Court) firstly constituted unlawful assembly, shared common intention and, in furtherance thereof, appellant- Moolchand (A-1) poured kerosene oil over the body of Smt. Sunita Rathore and appellant- Rajkumari (A-5) set her ablaze by lighting matchstick, due to which Smt. Sunita Rathore (hereinafter referred to as the “deceased”) suffered deep burn injuries and died later on during

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the course of treatment at hospital and, thereby, all the accused persons are said to have committed offences under Section 147, 342/149, 302/149 of IPC.

**(4)** After the aforesaid incident, the deceased was escorted to Sanatorium Hospital, Gaurela on the same day, at about 9:45 AM, where Dr. Subhadra Paikra (PW-03) medically examined her and opined that the deceased suffered burn injuries to the extent of 90%. Further, on the same day (i.e. on 29.10.2012) at about 11 AM, at Sanatorium Hospital, Gaurela, after having been certified by Dr. Subhadra Paikra (PW-03) to be in fit state of mind to give statement, the first dying declaration (Ex.P/07) of the deceased was recorded by Tehsildar-cum-Executive Magistrate, namely, Mithlesh Donde (PW-06). Thereafter, on 29.10.2012 itself, the deceased was referred to the Chhattisgarh Institute of Medical Sciences (for short "CIMS"), Bilaspur for better treatment, where she got admitted on the same day, at about 04:45 PM vide Ex.P/24. At CIMS, Bilaspur, on 30.10.2012, at about 10:30 AM, the second dying declaration (Ex.P/20) of the deceased was recorded by Sub-Divisional Magistrate, namely, Smt. Lata Uwarsha (PW-16), however, the certification with regard to fitness of the deceased to give dying declaration was given by Dr. A. Haripriya (not examined) on 29.10.2012 at about 10:55 PM.

**(5)** Thereafter, during the course of treatment at CIMS, Bilaspur, on 03.11.2012, the deceased succumbed to the injuries

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and died, pursuant to which, marg intimation (Ex.P/12) was registered by the police. Further, when the deceased was alive and undergoing treatment, she herself lodged complaint, upon which, dehati nalisi (Ex.P/18) and FIR (Ex.P/14) were registered by the police against the accused persons. During the course of investigation, inquest proceedings were conducted vide Ex.P/06. *Nazari Naksha* and *panchnama* were prepared vide Ex.P/08 & Ex.P/11 respectively. The dead-body of deceased was sent for postmortem examination and in the postmortem report (Ex.P/35), conducted by Dr. Dharmendra Kumar (PW-21), it was opined that the cause of death of deceased is cardio-respiratory failure, as a result of shock due to burn. The accused persons were arrested vide Ex.P/27 to Ex.P/29. Thereafter, statements of witnesses were recorded and, after due investigation, the police filed charge-sheet against all the accused persons in the competent court of criminal jurisdiction and, ultimately, the case was committed to the Court of Sessions for hearing and trial in accordance with law, in which the appellants/accused abjured their guilt and entered into defence by stating that they are innocent and have been falsely implicated.

**(6)** The prosecution in order to prove its case examined as many as 21 witnesses and exhibited 35 documents, whereas the appellants/accused persons have examined 09 witness and exhibited 15 documents in support of their defence.

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**(7)** The learned trial Court after appreciating the oral and documentary evidence available on record, though acquitted 05 co-accused persons, however, proceeded to convict the accused-appellants herein, namely, Rajkumari (A-5) and Moolchand (A-1) for offence under Sections 302/34 of IPC and sentenced them as mentioned herein-above, against which these two appeals have been preferred by the appellants-accused questioning the impugned judgment of conviction and order of sentence.

**(8)** Mr. Yogendra Chaturvedi, learned counsel appearing for both the appellants submits that the learned trial Court is absolutely unjustified in convicting the two appellants, namely, Rajkumari (A-5) and Moolchand (A-1) for offence under Section 302/34 of IPC, as the prosecution has failed to prove the offence beyond reasonable doubt. He further submits that the two dying declaration recorded vide Ex.P/07 & Ex.P/20 cannot be relied upon to premise the conviction of the appellants, as the same are not voluntary and trustworthy. In the first dying declaration recorded vide Ex.P/07, the deceased has not exactly named the two appellants herein, namely, Rajkumari (A-5) and Moolchand (A-1) to be the author of the crime, whereas in the second dying declaration recorded vide Ex.P/20, the doctor who has certified the deceased to be in fit physical and mental condition to give statement, has neither be cited as a witness nor she has been brought to the witness-box to be examined before the Court. As

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such, both the dying declaration are liable to be discarded, as in view of aforesaid infirmities, the same does not inspire confidence and cannot be relied upon to convict the appellants herein. Hence, the impugned judgment of conviction and order of sentence passed by the learned trial Court is liable to be set aside and the appellants deserve to be acquitted of the said charge.

**(9)** *Per-contra*, Mr. Afroz Khan, learned State counsel supported the impugned judgment of conviction and order of sentence and submits that the prosecution has proved the offence beyond reasonable doubt by leading evidence of clinching nature. He further submits that in view of two dying declarations coupled with other evidence available on record, the conviction and sentence passed by the learned trial Court against the appellants is well merited and, therefore, both the appeals deserve to be dismissed.

**(10)** We have heard learned counsel for the parties, considered their rival submissions made herein-above and went through the records with utmost circumspection.

**(11)** In the instant case, learned trial Court has convicted both the appellants on the basis of two dying declarations recorded vide Ex.P/07 and Ex.P/20 and there is no other piece of evidence, no legal evidence much less oral and circumstantial evidence to convict the appellants except the aforesaid dying declarations. Therefore, it would be appropriate to notice the principles

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governing the dying declaration and examination of the doctor while recording the dying declaration.

**(12)** At this stage, it is relevant to notice Section 32(1) of the Indian Evidence Act, 1872, which reads thus:

**“32. Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant.**—Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:—

**(1) when it relates to cause of death.**—When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.

xxx

xxx

xxx”

**(13)** The general ground of admissibility of the evidence mentioned in Section 32(1) is that in the matter in question, no better evidence is to be had. The provisions in Section 32(1) constitute further exceptions to the rule which exclude hearsay. As a general rule, oral evidence must be direct (Section 60). The eight clauses of Section 32 may be regarded as exceptions to it, which are mainly based on two conditions: a necessity for the

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evidence and a circumstantial guarantee of trustworthiness. Hearsay is excluded because it is considered not sufficiently trustworthy. It is rejected because it lacks the sanction of the tests applied to admissible evidence, namely, the oath and cross-examination. But where there are special circumstances which gives a guarantee of trustworthiness to the testimony, it is admitted even though it comes from a second-hand source. The Supreme Court emphasized on the principle enumerated in the famous legal maxim of the Law of Evidence, i.e., *nemo moriturus praesumitur mentire* which means a man will not meet his Maker with a lie in his mouth. Our Indian Law also recognizes this fact that “a dying man seldom lies” or in other words “truth sits upon the lips of a dying man”. The relevance of this very fact, is an exception to the rule of hearsay evidence.

**(14)** Section 32(1) of the Evidence Act is famously referred to as the “dying declaration” section, although the said phrase itself does not find mention under the Evidence Act. Their Lordships of the Supreme Court have considered the scope and ambit of Section 32 of the Evidence Act, particularly, Section 32(1) on various occasions including in the matter of **Sharad Birdhichand Sarda v. State of Maharashtra**<sup>1</sup> in which their Lordships have summarised the principles enumerated in Section 32(1) of the Evidence Act, including relating to “circumstances of the transaction”:

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<sup>1</sup> (1984) 4 SCC 116

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“21. Thus, from a review of the authorities mentioned above and the clear language of Section 32(1) of the Evidence Act, the following propositions emerge:-

(1) Section 32 is an exception to the rule of hearsay and makes admissible the statement of a person who dies, whether the death is a homicide or a suicide, provided the statement relates to the cause of death, or exhibits circumstances leading to the death. In this respect, as indicated above, the Indian Evidence Act, in view of the peculiar conditions of our society and the diverse nature and character of our people, has thought it necessary to widen the sphere of Section 32 to avoid injustice.

(2) The test of proximity cannot be too literally construed and practically reduced to a cut-and-dried formula of universal application so as to be confined in a straitjacket. Distance of time would depend or vary with the circumstances of each case. For instance, where death is a logical culmination of a continuous drama long in process and is, as it were, a finale of the story, the statement regarding each step directly connected with the end of the drama would be admissible because the entire statement would have to be read as an organic whole and not torn from the context. Sometimes statements relevant to or furnishing an immediate motive may also be admissible as being a part of the transaction of death. It is manifest that all these statements come to light only after the death of the deceased who speaks from death. For instance, where the death takes place within a very short time of the marriage or the distance of time is not spread over more than 3-4 months the statement may be admissible under Section 32.

(3) The second part of clause (1) of Section 32 is yet another exception to the rule that in criminal law the evidence of a person who was not being

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subjected to or given an opportunity of being cross-examined by the accused, would be valueless because the place of cross-examination is taken by the solemnity and sanctity of oath for the simple reason that a person on the verge of death is not likely to make a false statement unless there is strong evidence to show that the statement was secured either by prompting or tutoring.

(4) It may be important to note that Section 32 does not speak of homicide alone but includes suicide also, hence all the circumstances which may be relevant to prove a case of homicide would be equally relevant to prove a case of suicide.

(5) Where the main evidence consists of statements and letters written by the deceased which are directly connected with or related to her death and which reveal a tell-tale story, the said statement would clearly fall within the four corners of Section 32 and, therefore, admissible. The distance of time alone in such cases would not make the statement irrelevant.”

**(15)** Thereafter, in the matter of **Devinder alias Kala Ram and others v. State of Haryana**<sup>2</sup>, wherein the deceased, who sustained burn injuries while cooking meals on stove, had made a statement to the doctor, their Lordships of the Supreme Court held that statement of the deceased recorded by the doctor is relevant under Section 32 of the Evidence Act and observed as under: -

“14. In the facts of the present case, we find that PW 7, the Medical Officer of the Civil Hospital, examined the case of the deceased on 6-8-1992 at 6.30 a.m. and he has clearly stated in his evidence that on examination she was conscious and that there were superficial to deep burns all over the

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<sup>2</sup> (2012) 10 SCC 763

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body except some areas on feet, face and perineum and there was smell of kerosene on her body. He also stated in his evidence that the deceased was brought to the hospital by her husband Kala Ram (Appellant 1). He has proved the bed-head ticket pertaining to the deceased in the hospital (Ext. DD) as well as his endorsement at Point 'A' on Ext. DD, from which it is clear that he was told by the patient herself that she sustained burns while cooking meals on a stove. This statement of the deceased recorded by PW 7 is relevant under **Section 32** of the Evidence Act, 1872 which provides that statements, written or verbal, of relevant facts made by a person who is dead, are themselves relevant facts when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question."

**(16)** Recently, in the matter of **Purshottam Chopra and another v. State (Government of NCT of Delhi)**<sup>3</sup>, principles relating to recording of dying declaration and its admissibility and reliability were summed up in paragraph 21 as under: -

“21. For what has been noticed hereinabove, some of the principles relating to recording of dying declaration and its admissibility and reliability could be usefully summed up as under:-

21.1. A dying declaration could be the sole basis of conviction even without corroboration, if it inspires confidence of the court.

21.2. The court should be satisfied that the declarant was in a fit state of mind at the time of making the statement; and that it was a voluntary statement, which was not the result of tutoring, prompting or imagination.

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<sup>3</sup> (2020) 11 SCC 489

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21.3. Where a dying declaration is suspicious or is suffering from any infirmity such as want of fit state of mind of the declarant or of like nature, it should not be acted upon without corroborative evidence.

21.4. When the eyewitnesses affirm that the deceased was not in a fit and conscious state to make the statement, the medical opinion cannot prevail.

21.5. The law does not provide as to who could record dying declaration nor there is any prescribed format or procedure for the same but the person recording dying declaration must be satisfied that the maker is in a fit state of mind and is capable of making the statement.

21.6. Although presence of a Magistrate is not absolutely necessary for recording of a dying declaration but to ensure authenticity and credibility, it is expected that a Magistrate be requested to record such dying declaration and/or attestation be obtained from other persons present at the time of recording the dying declaration.

21.7. As regards a burns case, the percentage and degree of burns would not, by itself, be decisive of the credibility of dying declaration; and the decisive factor would be the quality of evidence about the fit and conscious state of the declarant to make the statement.

21.8. If after careful scrutiny, the court finds the statement placed as dying declaration to be voluntary and also finds it coherent and consistent, there is no legal impediment in recording conviction on its basis even without corroboration.”

**(17)** Recently, in the matter of **Irfan @ Naka v. State of Uttar**

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**Pradesh**<sup>4</sup> the Supreme Court has held that the dying declaration is a substantive piece of evidence to be relied on provided it is proved that the same was voluntary and truthful and the victim was in a fit state of mind and observed in Para-63 as under:

“**63.** It is the duty of the prosecution to establish the charge against the accused beyond the reasonable doubt. The benefit of doubt must always go in favour of the accused. It is true that dying declaration is a substantive piece of evidence to be relied on provided it is proved that the same was voluntary and truthful and the victim was in a fit state of mind. It is just not enough for the court to say that the dying declaration is reliable as the accused is named in the dying declaration as the assailant.”

**(18)** Looking to the evidence available on record in light of the aforesaid principles of law laid down by their Lordships of the Supreme Court in the above-mentioned judgments, in the instant case as the conviction of both the appellants is premised on two dying declarations recorded vide Ex.p/07 & Ex.P/20, we will consider the same one by one.

**First Dying Declaration (Ex.P/07):**

**(19)** The first dying declaration (Ex.P/07) of the deceased was recorded on 29.10.2012, at about 11 AM, at Sanatorium Hospital, Gaurela by Tehsildar-cum-Executive Magistrate, namely, Mithlesh Donde (PW-06). The said dying declaration was recorded after due certification with regard to fitness of the deceased to give statement by Dr. Subhadra Paikra (PW-03) and Dr. Subhadra

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Paikra (PW-03) in her statement before the Court has also clearly stated/certified the deceased to be in fit mental and physical state to give dying declaration (Ex.P/07). However, a careful perusal of aforesaid dying declaration (Ex.P/07) would show that deceased has only named Moolchand and Rajkumari, but the full name and address of both the appellants herein, namely, Rajkumari (A-5) and Moolchand (A-1) are completely missing in order to ascertain that they are the same person who have been named in the dying declaration (Ex.P/07), which was necessary to make the said dying declaration voluntary and trustworthy.

**(20)** The Supreme Court in the matter of **Gopal Singh another vs. The State of Madhya Pradesh and another**<sup>5</sup> has clearly held with reference to Section 32 of the Indian Evidence Act, 1872 that a dying declaration which does not contain complete names and addresses of the persons charged with the offence, even though may help to establish their identity, is not of such a nature on which conviction can be based and it cannot be accepted without corroboration and observed in Para-07 & 08 as under:

“7. We have already referred to the fact that the learned Sessions Judge was not prepared to accept the evidence of Umraodas, P.W. 1 and Chhotulal, P.W. 7, that deceased Modsingh had named the appellants as assailants when they met him in the morning at 8.00 a.m. on the roadside. Detailed reasons have been given by the learned Sessions Judge why he considered their evidence unsatisfactory. The High Court, however, in one sentence expressed its opinion that the evidence of

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<sup>5</sup> AIR 1972 SC 1557

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these two witnesses, amongst others, corroborated the dying declaration in respect of the identity of the appellants without giving any reasons why it differed on the point from the learned Sessions Judge. It is obvious that the High Court was so well satisfied by the written dying declaration as establishing the identity of the appellants that it ignored to consider the evidence of Umraodas, PW 1 and Chhotulal, PW 7 independently to see how far they were reliable. In an appeal against acquittal we think the High Court ought to have expressed itself more fully why it considered that the learned Sessions Judges' conclusion was unreasonable. In our opinion that conclusion is unexceptionable.

**8.** But even if we assume that the High Court was right in concluding that the dying declaration established the identity of the appellants, it was certainly not of that character as would warrant its acceptance without corroboration. It is settled law that a court is entitled to convict on the sole basis of a dying declaration if it is such that in the circumstances of the case it can be regarded as truthful. On the other hand if on account of an infirmity, it cannot be held to be entirely reliable, corroboration would be required. See: *Kushal Rao v. State of Bombay*<sup>6</sup>. In this case, it must be first remembered that though the names of the appellants' fathers were known to Modsingh and others who accompanied him to the Police Station, their fathers' names and present residence have not been mentioned. It is rather unusual for Police Officers not to enquire and record in the first information the full name and address of the persons complained against.....”

**(21)** As such, in view of aforesaid principle of law laid down by their Lordships of the Supreme Court in the matter of **Gopal Singh** (supra) coupled with the fact that the two appellants herein have not been fully named, it would be unsafe to rely upon the aforesaid dying declaration (Ex.P/07) to convict both the

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<sup>6</sup> AIR 1958 SC 22

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appellants herein, as the same is not voluntary and trustworthy.

We hereby hold accordingly.

**Second Dying Declaration (Ex.P/20):**

**(22)** The second dying declaration (Ex.P/20) of the deceased was recorded at CIMS, Bilaspur, on 30.10.2012, at about 10:30 AM, by Sub-Divisional Magistrate, namely, Smt. Lata Uwarsha (PW-16). However, the certification with regard to fitness of the deceased to give aforesaid dying declaration was given by Dr. A. Haripriya (not examined) on 29.10.2012, at about 10:55 PM. As such, there is a considerable time gap of 12 hours 25 minutes in recording dying declaration (Ex.P/20) after the certification with regard to fitness of the deceased to give aforesaid dying declaration was given and neither any plausible explanation nor any reason has been specified/assigned for the delay caused in recording the dying declaration (Ex.P/20). Furthermore, Dr. A. Haripriya, who has certified the deceased to be in fit state of mind to give dying declaration has neither been cited as a witness nor brought to the witness-box to be examined before the Court. Apart from aforesaid two infirmities, the dying declaration (Ex.P/20) suffers from one more infirmity i.e. the name of appellant- Moolchand (A-1) is missing and the deceased has only stated that her 'dever' (brother-in-law) has poured kerosene oil over her body and it has not been brought on record on behalf of the prosecution that appellant- Moolchand (A-1) is the only 'dever'

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of the deceased. Further, the name of only Rajkumari has been stated in the dying declaration (Ex.P/20) and her other particulars like father's name and address are completely missing. As such, in our considered opinion followed by the *dita* of the Supreme Court in the matter of **Gopal Singh** (supra), cannot be relied upon to base the conviction of the appellants herein. As such, in view of aforesaid three infirmities in the dying declaration (Ex.P/20) and in absence of any corroboration, the same cannot be relied upon to convict the two appellants herein, as the same is doubtful and does not inspire confidence. We hereby hold accordingly.

**(23)** In the instant case, in the shape of corroboration the testimonies of two so called eye-witnesses, namely, Ratna Rathore (PW-01) and Lakhanlal Rathore (PW-13) have been putforth by the prosecution, who are also witness to the first dying declaration recorded vide Ex.P/07. However, the learned trial Court has disbelieved the statements of both the aforesaid witnesses, therefore, their testimonies pales into insignificance and cannot be considered and relied upon at this stage. We hereby hold accordingly.

**(24)** In view of the foregoing analysis, we are of the considered opinion that the two appellants herein, namely, Rajkumari (A-5) and Moolchand (A-1) are entitled to get the benefit of doubt, as the learned trial Court is unjustified in convicting both the

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appellants for offence under Section 302/34 of IPC. Thus, the conviction of the two appellants herein, namely, Rajkumari (A-5) and Moolchand (A-1) for offence punishable under Section 302/34 of IPC as well as the sentence of life imprisonment imposed upon them by the learned trial Court are hereby set aside. They are acquitted of the said charge on the basis of benefit of doubt. Since the appellant- Rajkumari (A-5) is in jail from 08.10.2015 and appellant-Moolchand (A-1) is in jail from 05.11.2012, therefore, we direct that they be released from jail forthwith, if not required in any other matter/case.

**(25)** Both the criminal appeals are **allowed**.

**(26)** Let a certified copy of this order alongwith original record be transmitted to the trial Court concerned as well as to the Superintendent of Jail where the appellants are languishing for necessary information and action, if any.

Sd/-  
**(Sanjay K. Agrawal)**  
**Judge**

Sd/-  
**(Sanjay S. Agrawal)**  
**Judge**