

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.1271 of 2017

Arising Out of PS. Case No.-188 Year-2016 Thana- BANMANKHI District- Purnia

1. Saurav Sharma @ Saurav Kumar Sharma @ Saurabha Kumar Sharma @ Mukul Sharma Son of Late Sarangdhar Prasad Singh @ Sarangdhar Singh,
2. Soni Devi @ Swarnlata devi, Wife of Saurav Sharma @ Saurav Kumar Sharma @ Mukul Sharma, Both are resident of Jaiprakash Colony, P.S.-K. Hat, Madhubani, District-Purnea.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Ajay Kumar Thakur, Advocate Mr. Ritwik Thakur, Advocate Mrs. Vaishnavi Singh, Advocate Ms. Kiran Kumari, Advocate
For the State	:	Mr. Sujit Kumar Singh, APP
For the Informant	:	Mr. Ramakant Sharma, Sr. Advocate Mr. Sangeet Deokuliar, Advocate

CORAM: HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI
and
HONOURABLE MR. JUSTICE RAMESH CHAND MALVIYA
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI)

Date : 13-08-2024

The present appeal has been filed under Section- 374(2) of the Code of Criminal Procedure, 1973 (hereinafter referred as 'Cr.P.C.') challenging the judgment of conviction dated 16.08.2017 and order of sentence dated 22.08.2017 passed by learned Sessions Judge, Purnea in Sessions Trial No. 16 of 2017, C.I.S. No. 16 of 2017 (arising out of Banmankhi P.S. Case No. 188 of 2016) whereby the appellants have been convicted for the offences punishable under Sections- 436/34



and 302/34 of I.P.C. and sentenced to undergo imprisonment for life and to pay a fine of Rs. 10,000/- (Ten Thousand) each for the offence under Sections-436/34 of the I.P.C. and they have further been sentenced to undergo Imprisonment for life and to pay a fine of Rs. 10,000/- each for the offence under Sections-302/34 of the I.P.C. and, in default of payment of both fine, the convicts will have further to undergo further S.I. for 6 months. Both the sentences have been directed to run concurrently.

2. Heard Mr. Ajay Kumar Thakur, learned counsel, assisted by Mr. Ritwik Thakur, Mrs. Vaishnavi Singh and Ms. Kiran Kumari for the appellants, Mr. Ramakant Sharma, learned Senior Counsel for the informant assisted by Mr. Sangeet Deokuliar and Mr. Sujeet Kumar Singh, learned A.P.P. for the respondent-State.

3. The brief facts leading to the filing of the present appeal are as under:

“On 23.11.2016, deceased informant Kamala Devi gave her fardbeyan in injured condition that her two sons, namely Sanjay Kumar Sharma and Saurabh Kumar Sharma @ Mukul Sharma have been quarreling for ownership of the house and property at Purnea. Her husband Sarangdhar Singh tried to sort out the issue, but Saurabh Kumar Sharma @ Mukul Sharma



was adamant not to give possession of the house. Sanjay Sharma lives at Patna with his family and is engaged in a medical pharmacy. He looks after the informant and her husband. Her younger son Saurabh Sharma had driven the informant and her husband out of his house at Purnea due to which they were living at village Mahadeopur. Saurabh Sharma used to come there with his family Mona Devi and put pressure to transfer the property at the village through registered deed and, in the event of not doing the same, used to threaten to kill. A fortnight before the date of incident, Saurabh Sharma @ Mukul Sharma had come to village Mahadeopur, Banmankhi with his wife Soni Devi, stayed in the house of Lalo @ Lalou, son of Madan Mohan Sharma. Four days before the date of incident Saurabh Sharma came to her house with his wife Soni Devi and said to get the land registered in his name, otherwise he would kill both by setting them afire. They abused both, husband and wife, and also assaulted them. Again on 22-23/11/2016 at about 01:30 at night, Saurabh Sharma came to the house with his wife Soni Devi and unknown persons, abused them and with a view to kill them, set the house on fire in which her husband Sarangdhar Singh, son of Late Bal Govind Sharma was badly burnt and died due to burn injuries. During the course



of saving him, she also got severely injured by burn injuries. She was brought to Sadar Hospital, Purnea for treatment by villager- Najo Yadav, Vijay Kumar and others for treatment where she was under treatment. She claims that due to the property dispute, her younger son Saurabh Sharma, in connivance with his wife Soni Devi and unknown set the house on fire in which incident her husband died and she also received severe burn injuries.”

4. After filing of the F.I.R., the investigating agency carried out the investigation and, during the course of investigation, the Investigating Officer recorded the statement of the witnesses and collected the relevant documents and thereafter filed the charge-sheet against the accused. As the case was exclusively triable by the Court of Sessions, the case was committed to the Court of Sessions where it was registered as Sessions Trial No. 16 of 2017.

5. Learned advocate Mr. Ajay Kumar Thakur appearing for the appellants submits that none of the prosecution-witnesses are eye-witness to the incident in question and the case of the prosecution rests on so-called two dying declarations given by the deceased. It is submitted that the 1st dying declaration is in the form of *fardbeyan* of the



informant. However, there is no endorsement of the doctor that the patient was conscious and was in a fit state of mind to give her statement. Similarly, though the 2nd dying declaration was recorded by the Executive Magistrate, on the said dying declaration also no endorsement of the doctor was obtained. Learned counsel has referred to the deposition given by the prosecution-witnesses and thereafter contended that almost all the prosecution-witnesses, i.e. P.Ws. 1, 2, 3, 5 and 6, have each put forward a different story with regard to the manner in which the incident in question took place. Learned counsel also submitted that though it is the case of the prosecution that the Executive Magistrate has also recorded the dying declaration of the deceased, there is no endorsement of the doctor even in the said dying declaration that patient was conscious and was in a fit state of mind to give her declaration. It is further submitted that there are two versions with regard to recording of the dying declaration by the Executive Magistrate. P.W. 8, Executive Magistrate stated in his deposition that the dying declaration was written by the Investigating Officer and thereafter he has signed the same, whereas P.W. 7 the Investigating Officer, has stated that the dying declaration was written by the Executive Magistrate himself in his own handwriting. It is further



submitted that both the dying declarations are verbatim the same and in both the dying declarations the injured has given the entire history of disputes with regard to the property between her two sons and how one son is keeping them well. Minute details are given in the dying declarations, which is unusual.

6. Learned counsel would further submit that what was the medical condition of the injured/deceased at the time of giving the dying declaration before the concerned witnesses is not coming out from the record and which type of treatment has been given by the doctor is also not produced before the Court. The dying declaration recorded by the Executive Magistrate is also not in the question-answer form. At this stage, it is also pointed out from the record that, admittedly, the *fardbeyan* as well as the dying declaration before the Executive Magistrate were recorded in presence of the relatives. Thus, there are all chances of tutoring. Learned counsel, therefore, urged that this Court may not rely upon the so-called dying declaration given by the deceased.

7. Learned counsel further submitted that one of the prosecution-witnesses has stated that it was a foggy cold night and there was no source of identification of the accused outside or inside the house and therefore also it is difficult to believe the



story put forward by the deceased in the so-called dying declarations that she had seen the accused setting the house on fire. Even otherwise, admittedly, none of the prosecution-witnesses have seen the accused at the place of occurrence or fleeing away from the place of occurrence around 1-1:30 in the night.

8. Learned counsel, therefore, urged that the prosecution has failed to prove the case against the appellants beyond reasonable doubt and, therefore, they may be acquitted and the impugned judgment of conviction and order of sentence passed against them may be quashed and set aside.

9. On the other hand, learned senior counsel Mr. Ramakant Sharma, appearing for the informant mainly contended that the deceased was mother of the appellant No.1 and when she herself has narrated the incident in detail to the police, in the form of dying declaration, there is no reason to disbelieve the version given by the deceased. Ordinarily, a mother cannot falsely implicate her son. It is further submitted that the deceased thereafter gave her dying declaration before the independent authority i.e. the Executive Magistrate wherein also she has stated the same thing as stated by her in the *fardbeyan*. Thus, there are two dying declarations and in both



the dying declarations she had specifically narrated the role played by the present appellants. Thus, no error has been committed by the learned Trial Court while convicting the appellants relying upon the said dying declarations. It is further submitted that if the dying declarations are found to be reliable and trustworthy, the same may not be discarded on mere technicalities that there was no endorsement of the doctor on the said dying declarations and the same is not in question-answer form. It is further submitted that no corroboration is required when the Court is of the opinion that the dying declarations given by the deceased is trustworthy.

10. Learned senior counsel would further submit that the prosecution has also proved the motive on the part of the appellants to commit the alleged crime and, therefore also, no error has been committed by the learned Trial Court while passing the impugned judgment and order. Learned senior counsel, therefore, urged that the present appeal be dismissed.

11. Mr. Sujit Kumar Singh, learned APP, has adopted the submissions canvassed by the learned senior counsel for the informant and submitted that the prosecution has proved the case against the appellants beyond reasonable doubt on the basis of the two dying declarations given by the



deceased, who was none else but the mother of appellant No.1 and, therefore, no error has been committed by the learned Trial Court in convicting and sentencing the appellants. Learned APP has also urged that the present appeal be dismissed.

12. In support of their respective submissions, learned counsels for the parties have placed reliance upon the following decisions:

(i) **Abhishek Sharma Vs. State (Govt. of NCT of Delhi)**, reported in **AIR 2023 SC 5271**;

(ii) **Uttam Vs. The State of Maharashtra**, reported in **(2022) 8 SCC 576**;

(iii) **Naresh Kumar Vs. State of Delhi**, reported in **2024 SCC OnLine SC 1641**;

(iv) **Sardar Vs. State of Uttar Pradesh**, reported in **(1954) 2 SCC 214**;

(v) **Jan Mohammad and Another Vs. State of Bihar**, reported in **(1953) 1 SCC 5**;

(vi) **Laxman Vs. State of Maharashtra**, reported in **(2002) 6 SCC 710**;

(vii) **Koli Chunilal Savji & Anr. Vs. State of Gujarat**, reported in **(1999) 9 SCC 562**;

(viii) **P.V. Radhakrishna Vs. State of Karnataka**,



reported in **(2003) 6 SCC 443.**

13. We have considered the submissions canvassed by the learned counsels for the parties. We have also perused the evidence of prosecution witnesses and also perused the documentary evidence exhibited.

14. At this stage, we would like to appreciate the relevant extract of entire evidence led by the prosecution as well as defence before the Trial Court.

15. Before the Trial Court, prosecution examined 10 witnesses.

16. P.W. 1 Najo Yadav has stated in his examination-in-chief that the incident is of two months ago at 1-1:30 at night. He was at his house. Wife of Wido Yadav came to his house raising alarm. On such alarm, he went running to the house of Sarang Dhar and saw that the house had devastated due to firebreak and Sarang Dhar had died due to burn injuries. The wife of Sarang Dhar had also received burn injuries but was alive. He and others brought Kamala Devi to Sadar Hospital, Purnea. She disclosed that Soni Devi had poured boiling water upon her body and Saurav Sharma @ Mukul had set the house on fire. He has further stated that the statement of Kamala Devi was recorded by some officers from Purnea in his presence.



Darogaji had drafted the *fardbeyan* of Kamala Devi which bears his thumb impression as also the thump impression of Kamala Devi. Kamala Devi was treated at Sadar Hospital for 16-17 hours and thereafter she was referred to Patna for better treatment. He has further stated that the accused committed the incident because of the dispute regarding partition of the property. Police had also tried to convince Mukul not to do any illegal act. He identifies both the accused present in Court.

16.1. In his cross-examination, he has stated that at the time of incident, he was sleeping in his house but as soon as he heard about the incident, he rushed to the place of occurrence. Village people were trying to extinguish the fire. He took Kamala Devi to Sadar Hospital, Purnea. In paragraph-6, he has stated that he looked after the property of Sarang Dhar Singh. Sarang Dhar Singh's elder son Sanjay Sharma lived at Patna and was engaged in a medical pharmacy. Sarang Dhar Singh was closely attached with Sanjay Sharma as he looked after him. He has further stated that he reached at place of occurrence but had not seen Murlidhar Sharma, brother of Sarang Dhar Singh, there. He has also stated that at the time of incident it was very cold and foggy. He has further stated that people across the village were trying to extinguish fire such as



Pancha Babu, Ravin Kumar, Ajay Thakur etc. He, his brother Nirmal, Nirdhan Yadav and Ajay Yadav went to hospital. Face, hands and legs of Kamala Devi had received burn injuries. Kamala Devi was talking at that time. Her hair had not caught fire, but her skin of hands and feet was burnt. He has further stated that brothers of Sarang Dhar Singh had visited the hospital and stayed with Kamala Devi till evening. Police had recorded the statement of Kamala Devi 2-3 times. The message had spread in whole village that Mukul had set fire. Kamala Devi herself gave such statement. She has herself stated that it was her son who set the house on fire. He has further stated that except police none had recorded his statement. Besides police, the DSP had also taken the statement of Kamala Devi. He has stated that he had not seen Mukul fleeing away. Mukul was not on good terms with his parents. Mukul resided at Jaiprakash Colony, Purnea. The dispute was regarding the house at Madhubani. He has further stated that he has been cultivating five *bighas* of land of Sarang Dhar Singh for nine years. He has denied the suggestion that he was giving false evidence against the accused as they were creating hurdle in getting undue advantage from the property of Sarang Dhar Singh.

17. P.W.2 Vijay Kumar has stated in his



examination-in-chief that the incident is of November, 2016 at 1:30 at night. He has stated that on *hulla*, when he went to the house of Sarang Dhar Singh, the house was within flames. He heard the cries of Kamala Devi coming from within the house. Upon this, he, Ajay Kumar and Najo Yadav dragged out Kamala Devi from the house. Kamala Devi had suffered burns. Sarang Dhar Singh had died inside the house due to severe burns. Kamala Devi told them to save her husband from Mukul and his wife as they would kill him. The people present there sent Kamala Devi with Najo Yadav and Ajay Kumar in a tempo. Mukul always used to quarrel with his father for the land. He has further stated that assessing her condition to be critical, she was referred to Patna. Afterwards, he got information that Kamala Devi has died. He has identified the accused persons, present in court.

17.1. In his cross-examination, he has stated that he is nephew of Najo Yadav. He is separate from Najo Yadav. Najo Yadav was the caretaker of the property of Sarang Dhar Singh. Najo Yadav and others had once beaten Mukul on the instruction of Sarang Dhar Singh. Kamala Devi had also supported Najo Yadav. For the said incident, Mukul had filed a case against Najo Yadav in Banmankhi Police Station. He has



further stated that he is not aware whether Sanjay had separated from his family or not. He has also stated that hands of Kamala Devi were burnt, but not hair nor the clothes. He has further stated that he had not seen Mukul and his wife at the place of occurrence. He has stated that the house in which incident took place is a single room structure. Latrine is attached from outside. He has denied to have given false evidence to save his uncle Najo Yadav.

18. P.W. 3 Sanatan Yadav is also a hear-say witness. He has stated in his examination-in-chief that on hulla raised by the wife of Munnar Yadav's son, he came out and saw that the house of Sarang Dhar Singh had got fire. Sarang Dhar had died due to burn injuries. Kamala Devi had also burn marks on her skin. She was dragged out from the house by the villagers. Budhi Mata (Kamala Devi) disclosed that Mukul and his wife had ignited fire. To the court's query, he has clarified that he addresses Kamala Devi as Budhi Mata. He has also stated that Panchanand Babu sent Budhi Mata to Sadar Hospital in a tempo. Fire extinguisher extinguished the fire. He has identified both the accused present in Court. He has denied the suggestion that Najo Yadav had actually committed the offence in connivance with police. He has also denied the suggestion



that Najo Yadav, with a view to extract illegal commission in sale of lands spread the rumour that Mukul had committed this offence. He has also denied the suggestion that he had given false evidence as he was not on good terms with Mukul.

19. Evidence of P.W. 4 Naveen Kumar Sharma need not be gone into as he has not supported the prosecution-case and he has been declared hostile by the prosecution.

20. P.W. 5 Panchanand Sharma is another hear-say witness. He has stated in his examination-in-chief that deceased Sarang Dhar was his brother. The incident took place on 23.11.2016 at about 01:00 hours at night. He was sleeping in his house. On hearing *hulla*, he reached the house of Sarang Dhar and saw that the house had caught fire and Sarang Dhar was within flames. The wife of Sarang Dhar, namely Kamala Devi, came out of the said house with the help of villagers. Her body was also burnt. Kamala Devi said that Saurav @ Mukul and his wife had set the house on fire to kill her and her husband. He has further stated that the fire was extinguished with the help of villagers. Sarang Dhar had died due to burn injuries. He sent his Bhabhi (sister-in-law) to Purnea Sadar Hospital in a tempo. On court's query, he has stated that he could not go to hospital as the police had arrived at the scene. Police prepared the inquest



report on which he put his signature. He identifies his signature (Ext.-1/1). He has identified both the accused, present in Court.

20.1. In his cross-examination, he has stated that the police prepared the inquest report of Sarang Dhar on 24.11.2016. In reply to the court's query, he has stated that Mukul and Sarang Dhar were not on good terms for long, at least for 3-4 years. He has further stated that when he reached hospital, Kamala Devi was unconscious. At intervals, she gained consciousness. He has denied that Sanjay Sharma was selling lands with his help. He had neither friendship nor enmity with Mukul, but they were on talking terms. He is not aware of any altercation between Mukul and Najo Yadav nor about any case filed by Mukul against Najo Yadav. He has further stated that police had not recorded the statement of Kamala Devi in his presence. The doctor had applied ointments, but not bandage. He has denied the suggestion that Mukul obstructed to sell the land due to which he and Najo Yadav falsely implicated Mukul. He has also denied that he and Najo Yadav, by hatching conspiracy, set the house on fire so that they could get the land sold through Sanjay Sharma at desired rates.

21. P.W. 6 Sanjay Sharma is also a hear-say witness. He has stated in his examination-in-chief that the



incident took place on 23rd November, 2016 at 01:30 hours in the night. He was sleeping in his house at Patna. He was informed about the incident by Najo Yadav and others. At this, he informed Banmankhi P.S. about the incident. He reached Purnea Sadar Hospital with his wife and found the condition of his mother very bad. His mother told him that Mukul and Soni had done so and have killed his father. He took his mother to Max-7 hospital, Purnea and from there to Patna on doctor's advice. His mother was sent in Ambulance with his wife and Ajay. His wife had gone in another vehicle. Banmankhi Police had brought the dead body of his father to Purnea. On this information, he went to the *post mortem* house when his father was referred to Bhagalpur for *post mortem*. He and Panchanand went to Bhagalpur with the dead body. The *post mortem* of his father was done at Bhagalpur Medical College. When he reached Patna after performing funeral of his father, he got information that his mother has died. On such information, he went to P.M.C.H., Patna where his mother was lying dead. Patna Police came and recorded his *fardbeyan*, read over the same to him and finding the same to be true, he put his signature on the same which he identifies (Ext. 2). He had given the *fardbeyan* as informed on telephone. He has further stated that the inquest



report of his mother was prepared by Darogaji and he identifies his signature on the same (Ext. 3). He has identified certain burnt papers written by his father and mother (Exts. 4 to 10). He has stated that the bone of contention is the dispute regarding partition of land. He identifies both the accused, present in court.

21.1. In his cross-examination, he has stated that Najo Yadav, who is manager of his father, had informed him on 23.11.2016 at 01:30 a.m. about the incident. The witness came to his village 14-15 days after the incident. He had performed the funeral of his father on 24.11.2016 at Bhagalpur and that of his mother at Patna. He has further stated that Mukul Yadav used to brutally assault his father and wanted to grab the land. He has also stated that Soni Devi had filed a case u/S-107 Cr.P.C. against him, Anand Singh and Manoj Yadav. In reply to the court's query, he has stated that the inquest report of his father was prepared by the police in his presence and he had signed the same after going through the same. In his further cross-examination, he has denied the suggestion that he implicated Mukul with a view to grab his share in the ancestral property. He has denied the suggestion that when he met his mother at Sadar Hospital, Purnea, she was unconscious and was



not in a condition to talk. He has also denied that he had obtained signatures of his parents on the documents during their stay at Patna. He has also denied that for this reason his parents did not re-visit Patna. He has also denied that Najo Yadav, Panchanand Sharma and he himself had convinced his mother that Mukul had set the house on fire. He has further denied to have given different versions of the incident to Patna and Banmankhi Police. He has also denied that the fire broke out due to cylinder blast. He has also denied to have given false evidence.

22. P.W. 7 Santosh Kumar Mandal has stated in his examination-in-chief that on 23.11.2016 he was posted as Sub-Inspector of Police at Banmankhi Police Station. On that date at about 02:30 hours in the night an information was received on the official mobile of S.H.O. Vijay Kumar Singh that a house in Mahadeopur village had caught fire. To verify the veracity of that information, he, S.H.O. Vijay Kumar Singh and S.I. Uday Shankar Prasad reached the house of Sarang Dhar Singh in village Mahadeopur with armed police at 03:15 a.m. They also informed fire brigade and the fire was extinguished by them. It was the house of Sarang Dhar which had caught fire. The dead body of Sarang Dhar was lying between the gate and door in



burnt condition. The villagers had taken Kamala Devi to Sadar Hospital, Purnea for treatment before their arrival at the place of occurrence. He prepared the inquest report of Sarang Dhar Singh which he identifies to be in his pen and signature (Ext. 1/2). The dead body was sent for *post mortem* to Sadar Hospital. He reached Sadar Hospital, Purnea at 09:00 a.m. and recorded the *fardbeyan* of injured Kamala Devi. He identifies the *fardbeyan* to be in his pen and signature (Ext. 11). He had obtained the right thumb impression of Kamala Devi and left thumb impression of witness Najo Yadav. Kamala Devi was burnt so much that she was not able to write down. The treating doctor said that she may die any moment. He intimated his senior officer and on the instruction of the S.D.O., Raj Kumar Prabakar, B.D.O., East Purnea recorded the dying declaration of Kamala Devi in Burn Ward of Sadar Hospital. The Magistrate put his signature on the said dying declaration and he also put his signature on the same which he identifies (Ext. 12). Kamala Devi put her right thumb impression on the dying declaration. Thereafter, he visited the place of occurrence which is the two-room east facing thatched house of deceased Sarang Dhar Singh in the form of ashes. The dead body of Sarang Dhar Singh was lying at the door of northern side room and the injured Kamala



Devi was sent to Sadar Hospital for treatment. He recorded the statements of witnesses Sanatan Yadav and Naveen Kumar Sharma. Witness Naveen Kumar Sharma had stated in his statement that Kamala Devi was saying that Saurav Kumar Singh and Soni had set the house on fire and thereby killed Sarang Dhar Singh and she has somehow managed to save her life. He has further stated that he recorded the statement of witness Najo Yadav. He also arrested the accused persons and brought them to the police station. After this, the F.I.R. was lodged and he got the charge of investigation. He identifies the *fardbeyan* to be in the handwriting of literate constable Brahmdeo and bearing the signature of S.H.O. Vijay Kumar Singh (Ext. 13). He has stated that Chaukidar informed that looking to the condition of the dead body, the same was sent to Bhagalpur for *post mortem*. On 25.11.2016, an information was received on the official mobile of the S.H.O. about the death of injured Kamala Devi at P.M.C.H. He recorded the statement of witness Panchanand Sharma on 28.11.2016. On 29.11.2016 he received the *post mortem* report of Sarang Dhar Singh. On 30.11.2016 he recorded the statement of witness Sanjay Kumar Sharma. The *fardbeyan* of Sanjay Kumar Sharma recorded by the local police was received. On 02.12.2016 he recorded the



statement of witness Vijay Kumar. On 04.12.2016, he submitted charge-sheet against the accused persons. He identifies both the accused, present in Court.

22.1. In his cross-examination, he has stated that when he reached the place of occurrence, the house was totally burnt and Sarang Dhar Singh was lying inside the house in burnt condition. He waited till morning and the dead body was taken out after preparing the inquest report. He has stated that Najo Yadav had stated that he and other villagers had helped Kamala Devi in coming out of the house, but there is no finding in the investigation whether Najo Yadav had received any burn injuries or not. He has further stated that he had not recorded the statement of B.D.O. Raj Kumar Prabhakar. He did not mention the name of the B.D.O. in the witness column. He has not mentioned the name of the treating doctor of Kamala Devi at Purnea Sadar Hospital. He did not even record the statement of the doctor in the case diary. Kamala Devi was referred to Patna and sent in an Ambulance. It has not come in the investigation that Kamala Devi was taken to Max-7 Hospital for treatment. He has also not mentioned as to who was the doctor who referred Kamala Devi from the Sadar Hospital and with which documents. He did not record the re-statement of Kamala Devi.



He has further stated that most of the house-hold articles were almost burnt and, therefore, he did not collect the part-burnt articles. In para-21, he has denied to have conducted any investigation with regard to the property dispute between Sanjay Kumar Sharma and Mukul nor did he enquire about any case filed by Saurav Sharma against Najo Yadav. He denies the suggestion that he did not try to record the statement of independent witnesses and only recorded the statements of well-wishers of Sarang Dhar Singh. While recording the fardbeyan of Kamala Devi, witness Najo Yadav was present. He does not know as to who others were present there. He has admitted that the dying declaration is in his pen and signature on which the B.D.O. put his signature. He did not investigate from the angle whether Sanjay Sharma could also have any motive to get his parents killed. He has denied the suggestion that Sanjay Sharma, with a view to sell the land of his parents, hatched a conspiracy to get his parents killed. He had not collected the burnt clothes of Kamala Devi. *Fardbeyan* bears only the signature of Najo Yadav and not of all the persons present there. He had not got the dying declaration paginated by the Doctor. He has further stated that when he reached the hospital, ointment was being applied on the affected portion. In reply to the court's query, he



has stated that he had not obtained any certificate from the doctor about Kamala Devi being conscious before the *fardbeyan* of Kamala Devi was recorded by the B.D.O.

23. P.W. 8 Raj Kumar Prabhakar has stated in his examination-in-chief that on 23.11.2016 he was posted as Block Development Officer, Purnea East and on that date, on the direction of Sub-divisional Officer, went to Sadar Hospital, Purnea in Burn Ward to record the statement of Kamala Devi. Before recording her statement, he assessed the mental condition. She was yelling and talking. He recorded her statement. He identifies the dying declaration to be in his pen and signature (Ext. 12/1). He also obtained the signature of S.I. Santosh Kumar Mandal on the same. He has stated that Kamala Devi stated in her statement that four days before the incident Saurav Sharma came to the house with his wife Soni Devi, assaulted her husband Sarang Dhar Singh and also threatened to kill him. In the night of 22/23 November, 2016 at about 01:30 Saurav Sharma came with his wife and two unknown and set the non-residential house on fire, in which incident her husband Sarang Dhar Singh died of burn injuries. In course of saving him, she also got seriously injured. He has further stated that he obtained the right thumb impression of the injured after



recording her statement. On query, the lady doctor identified her to be Kamala Devi and stated that she is in a fit condition to give her statement. He did not obtain any certificate from the doctor with regard to her fitness.

23.1. In his cross-examination, he has stated that he had gone to the hospital alone and met S.I., Santosh Kumar in the hospital. He found that back portion of Kamala Devi, her thigh and part of her hand was burnt. Possibly, her face was also partly burnt. Some villagers were also present while recording the statement of Kamala Devi. He does not remember the name of the treating doctor. Almost 10-12 persons were present there. He does not identify them. He had told Kamala Devi that he is a Block Development Officer and has come as a Magistrate. He understood this but was yelling in pain. He recorded the statement as stated by Kamala Devi. While yelling, Kamala Devi was speaking clearly. He had not obtained signatures of any kinsman of Kamala Devi on her statement. He had not asked Kamala Devi to put her signature on the statement. He remained at hospital for about one hour. He had gathered information about the whole incident from Santosh Kumar Mandal. He had red over the statement to Santosh Kumar Mandal and the kinsmen of Kamala Devi. He had denied the



suggestion that he had written the statement as stated by Santosh Kumar Mandal and kinsmen of Kamala Devi and not as stated by Kamala Devi and had put his signature under the pressure of Police.

24. P.W. 9 Dr. Bibhuti Kumar has deposed that he was posted as Tutor Forensic Medicine and Toxicology at Jawaharlal Nehru Medical College, Bhagalpur on 24.11.2016. On the same date, he conducted the *post mortem* of the dead body of Sharandhar Singh and found following injuries:-

“There was *ante mortem* burn with line of redness involving almost whole body from head to toe, anteriorly and posteriorly. *Ante mortem* burn was 100%.”

On dissection, he found all internal organs were deeply congested. Respiratory passages, chiefly tracheal humen contained carbon soot. Stomach was empty. Brain and its meninges were congested. Both sides of heart was empty.

Above noted injuries, were *ante mortem* dangerous and grievous in nature in ordinary course of nature and caused by flames of fire.

In his opinion, death was caused due to *ante mortem* burn and its complications.

In his opinion, the time since death was within 36-48 hours of *post mortem* examination in the department.”



24.1. In his cross-examination, he has stated that on the basis of male and female, degree of injuries cannot be determined. On the basis genital organs, he had identified that this dead body belongs to male. Dead body was clear from physical feature. It cannot be said that the genital organs are more serious than other organs. Persons may die due to shock. To Court question, he has said that as per *post mortem* report, deceased may have died on spot.

25. P.W. 10 Dr. Anil Shandil has deposed that he was posted as Assistant Professor, Department of Forensic Medicine, Patna on 25.11.2016. On the same day, he conducted the *post mortem* examination on the dead body of Smt. Kamla Devi and found following injuries:-

“External Appearance:-

Bandage dressing abdomen upto both lower limb and both upper limb, right side face and neck.

Eyes closed. Mouth closed.

Rigor Mortis present over the body.

Head- Brain matter congested Edematous.

Chest- By lateral lungs congested Edematous with dark forthy blood on cut section.

Heart filled with dark fluidy blood.

Abdomen- Stomach clean coloured fluid. All abdominal visera congested.

Bladder- Half.

Rectum- Half.

Ante mortem injury:-

Epidermal to Dermo Epidermal burn injury over both lower



thigh and lower limb upto ankle, both upper limb, back of chest, abdomen, part of pelvis, right side face and neck with line redness, hyperemia and areas of hyper coagulated tissues and blister formation at place.”

He has opined that cause of death was burn injuries and its complication as mentioned above.

Time since death: consistent with hospital timing of death.

25.1. In his cross-examination, he has stated that he had not treated deceased Kamla Devi nor he has mentioned about the percentage of burn in his P.M. Report. He has further stated that the percentage of burn was approximately about 60 percentage. Percentage of burn relate to interpret for treatment/prognosis assess the severity of burn injury sustained which is detrimental for saving the life of burn patient for appropriate and requisite treatment. To Court query, he has stated that after perusal of the *post mortem* report, it reveals that there is possibility of mental faculties clear for providing information regarding incident. He has also stated that he had removed the bandage dressing present over the body at the time of *post mortem*. Injuries were present over the upper and lower limbs.

26. It would emerge from the evidence led by the



prosecution that there is no eye-witness to the incident in question and the case of the prosecution rests on two dying declarations given by the deceased. Before we consider the two dying declarations, it is relevant to consider the deposition given by the prosecution-witnesses. P.W. 1 has deposed that when he went running to the house of Sarang Dhar, he saw that Sarang Dhar had died due to burn injuries and his wife Kamala Devi (deceased) had also sustained burn injuries, but she was alive. It is further stated by the said witness that Kamala Devi (deceased) disclosed that Soni Devi (appellant No.2) had poured boiling water upon her body and Saurav Sharma @ Mukul (appellant No.1) had set the house on fire. P.W. 2 deposed, in examination-in-chief, that on hearing *hulla* he went to the house of Sarang Dhar and saw the house within flames. He heard the cries of Kamala Devi coming from inside the house. At that time, Ajay and Najo Yadav dragged out Kamala Devi from the house. Kamala Devi had suffered severe burns. Sarang Dhar had died inside the house due to severe burns. At that time, Kamala Devi told them to save her husband as the appellants Saurav Sharma and Soni Devi would kill him. P.W. 3 stated in examination-in-chief that Kamala Devi disclosed that Mukul and his wife had ignited the fire. P.W. 5 also stated that Kamala Devi told him



that Saurav Sharma @ Mukul and his wife set the house on fire to kill her and her husband.

27. Thus, from the aforesaid deposition of the prosecution-witnesses, it is revealed that Kamala Devi (deceased) told each of the witnesses a different story at the place of incident with regard to the manner of occurrence. It is pertinent to note that none of the prosecution-witnesses had seen the appellants at the place of occurrence or fleeing away from the place of occurrence.

28. It would further reveal from the deposition of the prosecution-witnesses that the incident took place at 1-1:30 a.m. during night hours and it was a foggy cold night and it is the specific contention of the defence that there was no source of light for identification of the accused outside or inside the house. There is no evidence led by the prosecution with regard to the presence of source of light at the place of occurrence during the said night. Therefore, it was difficult for the deceased to identify the appellants. It is also relevant to note that the house of deceased was set on fire which was 1-2 room house. As per the case of the prosecution, both the deceased were inside the house. It is the further case of the prosecution that Sarang Dhar died because of severe burn injuries on the spot



and, therefore, when Kamala Devi was in the very same house, she must have sustained severe burn injuries. The prosecution has failed to examine the doctor who had given the treatment to deceased Kamala Devi. The doctor, P.W. 10, who had conducted *post mortem* of Kamala Devi, has stated that when he examined the dead body of the deceased, he found bandage dressing abdomen upto both lower limb and both upper limb, right side face and neck. Thus, from the evidence led by the prosecution, it is not coming out on record whether the deceased was in a fit state of mind to make declaration or not.

29. Keeping in view the aforesaid aspect, now we would like to examine the dying declaration given by the deceased Kamala Devi in the form of her *fardbeyan* as well as the dying declaration given by her before the Executive Magistrate. From the *fardbeyan* given by the deceased, it is revealed that Kamala Devi narrated entire story in detail, including the dispute with regard to the land and house between her two sons. She had also stated about the incident which took place 15 days prior to the incident as well the incident which took place 4 days prior to the incident in question. It is pertinent to note here that the said statement was recorded by S.I. Santosh Kumar Mandal in presence of P.W. 1 Najo Yadav who is a



neighbour as well as manager and close person of deceased as well as one of the sons of the deceased. There is no endorsement of the doctor that the patient was conscious when her statement was being recorded by the police.

30. Similarly, from the deposition given by P.W. 8, Executive Magistrate, it is revealed that exactly similar type of statement was given by the deceased before him. The said witness stated that he had recorded the declaration given by the deceased. Same is produced vide Exhibit-12/1. The said witness, during cross-examination, has stated that before recording of the statement of Kamala Devi, he had taken instruction from Santosh Kumar (I.O.) with regard to the entire incident. He has also stated that one lady doctor was present. However, he did not obtain any certificate from the doctor. He has also stated that when he had recorded the statement of Kamala Devi, other village people were present.

30.1. At this stage, if the deposition given by the Investigating Officer, P.W. 7 Santosh Kumar Mandal, is carefully examined, it is revealed that the said witness has admitted that the dying declaration is in his pen and signature on which the B.D.O. (Executive Magistrate) put his signature. Thus, there are two different versions with regard to recording



of the dying declaration of Kamala Devi by the Executive Magistrate. P.W. 7 has also stated that endorsement of the doctor was not obtained on the dying declaration recorded by the Executive Magistrate. It is pertinent to note here that from the deposition of the prosecution-witnesses it is revealed that P.W. 1 Najo Yadav consistently remained present with Kamala Devi from the place of incident to the hospital and while recording *fardbeyan* of Kamala Devi by the police. It is also revealed from the deposition given by P.W. 2 that the accused Mukul had filed a case against Najo Yadav in Banmankhi Police Station. It is also revealed that the defence have also made suggestion to the concerned prosecution-witnesses that P.W. 1 Najo Yadav was not having good relation with the appellants herein. Further, the appellant No.1 has stated in his further statement under Section-313 of Cr.P.C. that he has been falsely implicated because of the dispute with regard to partition of land between him and his brother and, with a view to grab the land, he has been falsely implicated. He has also stated that after the death of his father and mother, his elder brother, uncle and manager of his father, i.e. Najo Yadav, have taken possession of the land. Thus, further it is revealed from the deposition of P.W. 7, I.O., that thumb impression of Najo Yadav was obtained on the *fardbeyan*.



31. Thus, in the aforesaid circumstances, when the doubt was raised with regard to the so called dying declaration given by the deceased Kamala Devi and more particularly when there is no endorsement of the doctor that patient was conscious or in a fit state of mind to make such declaration, only relying upon the said two dying declarations, conviction cannot be recorded. Further corroboration, therefore, is required. Further, from the evidence led by the prosecution, it appears that nobody has seen the appellants at the place of occurrence during night hours nor anybody has seen the appellants fleeing away from the said place. It is the specific case of the appellants that the story was concocted by Najo Yadav with the help of brother of appellant No.1 as well as uncle with a view to grab the land and, in fact, after the death of the parents of appellant No.1, the possession of the land was already taken over by the said persons. Hence, we are of the view that the trial court has committed an error while passing the impugned judgment and order.

32. In the case of **Abhishek Sharma (supra)**, Hon'ble Supreme Court has laid down certain principles which the Court has to consider when dealing with a case involving multiple dying declarations. Para-9 of the judgment reads as



under:-

“9. Having considered various pronouncements of this Court, the following principles emerge, for a Court to consider when dealing with a case involving multiple dying declarations;

9.1. The primary requirement for all dying declarations is that they should be voluntary and reliable and that such statements should be in a fit state of mind;

9.2. All dying declarations should be consistent. In other words, inconsistencies between such statements should be ‘material’ for its credibility to be shaken;

9.3. When inconsistencies are found between various dying declarations, other evidence available on record may be considered for the purposes of corroboration of the contents of dying declarations.

9.4. The statement treated as a dying declaration must be interpreted in light of surrounding facts and circumstances.

9.5. Each declaration must be scrutinized on its own merits. The court has to examine upon which of the statement reliance can be placed in order for the case to proceed further.

9.6. When there are inconsistencies, the statement that has been recorded by a Magistrate or like higher officer can be relied on, subject to the indispensable qualities of truthfulness and being free of suspicion.

9.7. In the presence of inconsistencies, the medical fitness of the person making such declaration, at the relevant time, assumes importance along with other factors such as the possibility of tutoring by relatives, etc.”

33. In the case of **Uttam (supra)** Hon’ble Supreme Court has observed in para-14 as under:-



“14. In *Paniben v. State of Gujarat* [*Paniben v. State of Gujarat*, (1992) 2 SCC 474 : 1992 SCC (Cri) 403] , on examining the entire conspectus of the law on the principles governing dying declaration, this Court had concluded thus : (SCC pp. 480-81, para 18)

“18. ... (i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. (*Munnu Raja v. State of M.P.* [*Munnu Raja v. State of M.P.*, (1976) 3 SCC 104 : 1976 SCC (Cri) 376])

(ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. (*State of U.P. v. Ram Sagar Yadav* [*State of U.P. v. Ram Sagar Yadav*, (1985) 1 SCC 552 : 1985 SCC (Cri) 127] ; *Ramawati Devi v. State of Bihar* [*Ramawati Devi v. State of Bihar*, (1983) 1 SCC 211 : 1983 SCC (Cri) 169] .)

(iii) This Court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had opportunity to observe and identify the assailants and was in a fit state to make the declaration. (*K. Ramachandra Reddy v. Public Prosecutor* [*K. Ramachandra Reddy v. Public Prosecutor*, (1976) 3 SCC 618 : 1976 SCC (Cri) 473] .)

(iv) Where dying declaration is suspicious it should not be acted upon without corroborative evidence. (*Rasheed Beg v. State of M.P.* [*Rasheed Beg v. State of M.P.*, (1974) 4 SCC 264 : 1974 SCC (Cri) 426])

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. (*Kake Singh v. State of M.P.* [*Kake Singh v. State of M.P.*, 1981 Supp SCC 25 : 1981 SCC (Cri) 645])

(vi) A dying declaration which suffers from



infirmity cannot form the basis of conviction. (*Ram Manorath v. State of U.P.* [*Ram Manorath v. State of U.P.*, (1981) 2 SCC 654 : 1981 SCC (Cri) 581])

(vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected. (*State of Maharashtra v. Krishnamurti Laxmipati Naidu* [*State of Maharashtra v. Krishnamurti Laxmipati Naidu*, 1980 Supp SCC 455 : 1981 SCC (Cri) 364] .)

(viii) Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth. (*Surajdeo Ojha v. State of Bihar* [*Surajdeo Ojha v. State of Bihar*, 1980 Supp SCC 769 : 1979 SCC (Cri) 519] .)

(ix) Normally the court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eyewitness has said that the deceased was in a fit and conscious state to make this dying declaration, the medical opinion cannot prevail. (*Nanhau Ram v. State of M.P.* [*Nanhau Ram v. State of M.P.*, 1988 Supp SCC 152 : 1988 SCC (Cri) 342])

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. (*State of U.P. v. Madan Mohan* [*State of U.P. v. Madan Mohan*, (1989) 3 SCC 390 : 1989 SCC (Cri) 585] .)”

34. In the case of **Naresh Kumar (supra)**, recently the Hon’ble Supreme Court has considered the aspect of statement recorded under Section-313 of Cr.P.C. and observed at para-24 as under:-

“24. It is evident from the afore-extracted paragraph from the judgment of the Trial Court that the said



conclusion that Appellant had shared the common intention to commit murder of the deceased Arun Kumar was based only on the aforesaid two incriminating circumstances which were not put to the Appellant while being questioned under Section 313, Code of Criminal Procedure. When the very charge framed against him, as referred as above, would reveal that there was no charge of commission of an offence under Section 300, Indian Penal Code, punishable under Section 302, Indian Penal Code, simplicitor against the Appellant whereas the said charge thereunder with the aid of Section 34, Indian Penal Code. In such circumstances, when the finding of common intention was based on the twin incriminating circumstances and when they were not put to the Appellant while he was being questioned under Section 313, Code of Criminal Procedure, and when they ultimately culminated in his conviction under Section 302, Indian Penal Code, with the aid of Section 34, Indian Penal Code, and when he was awarded with the life imprisonment consequently, it can only be held that the Appellant was materially prejudiced and it had resulted in blatant miscarriage of justice. The failure as above is not a curable defect and it is nothing but a patent illegality vitiating the trial qua the Appellant.”

35. In the case of **Sardar (supra)** Hon’ble Supreme Court has observed in para-9 as under:-

“9. The law in regard to the evidential value of statements as to death contained in dying declarations made by the deceased has been thus declared in a judgment of this Court in *Ram Nath Madhoprasad v. State of M.P.* [*Ram Nath Madhoprasad v. State of M.P.*, (1953) 1 SCC 178 at p. 184 : AIR 1953 SC 420 at p. 423] : (SCC p. 184, para 15)

“15. It is settled law that it is not



safe to convict an accused person merely on the evidence furnished by a dying declaration without further corroboration because such a statement is not made on oath and is not subject to cross-examination and because the maker of it might be mentally and physically in a state of confusion and might well be drawing upon his imagination while he was making the declaration.”

36. In the case of **Jan Mohammad & Anr.** (*supra*), Hon’ble Supreme Court has observed in para-11 as under:-

“11. The other statement was recorded by Sub-Inspector Bikram Singh. We do not agree with the appellants' counsel that it is not admissible in evidence, for, in our opinion, it clearly comes under Section 32(1) of the Evidence Act. But its value as a piece of evidence is a different matter altogether. While we are far from suggesting that a police officer is disqualified by any rules of law from recording a dying declaration in exceptional circumstances where resort to a Magistrate or other responsible officer would mean such delay as might prevent the declaration being taken down at all, we are not satisfied why in this case, if reasonable efforts had been made, a Magistrate in the town of Gaya could not have been secured to record the dying declaration. There are other infirmities besides. The declaration was not recorded in the language of the deceased, and apparently not taken down as it was given. It was elicited in answer to questions, but the questions put have not been noted. The learned Judges say that the Sub-Inspector might have been in a hurry to hear the full statement of Nizamuddin, who was nearing his end. But that is precisely the reason why he should have



immediately proceeded to write down to the dictation of Nizamuddin without lengthy interrogations. Indeed, it would have taken less time if the statement had been recorded verbatim. Nizamuddin, it must be remembered, did not die till an hour or so later. Gobind Singh, the only other witness to the declaration is not a man of any status. He was a nurse getting Rs 28, and he states that he arrived when Nizamuddin had already started making the statement.”

37. In the case of **Laxman (supra)**, Hon’ble Supreme Court has observed as under:-

“3.....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.

4.....The Magistrate being a disinterested witness and a responsible officer and there being no circumstances or material to suspect that the Magistrate had any animus against the accused or was in any way interested for fabricating a dying declaration, question of doubt on the declaration, recorded by the Magistrate does not arise.”

38. In the case of **Koli Chunilal Savji (supra)**,
Hon’ble Supreme Court has observed as under:

“8. In view of the aforesaid decisions of this Court, we are unable to accept the submission of Mr Keshwani that the two dying declarations cannot be relied upon as the doctor has not been examined and the doctor has not made any endorsement on the dying declaration. With regard to the condition of the deceased, the Magistrate who recorded the dying declaration has been examined as a witness. She has categorically stated in her evidence that as soon as she reached the hospital in the Surgical Ward of Dr Shukla, she told the doctor on duty that she was required to take the statement of Dhanuben and she showed the doctor the police yadi. The doctor then introduced her to Dhanuben and when she asked the doctor about the condition of



Dhanuben, the said doctor categorically stated that Dhanuben was in a conscious condition. It further appears from her evidence that though there has been no endorsement on the dying declaration recorded by the Magistrate with regard to the condition of the patient but there has been an endorsement on the police yadi, indicating that Dhanuben was fully conscious. In view of the aforesaid evidence of the Magistrate and in view of the endorsement of the doctor on the police yadi and no reason having been ascribed as to why the Magistrate would try to help the prosecution, we see no justification in the comments of Mr Keshwani that the dying declaration should not be relied upon in the absence of the endorsement of the doctor thereon. In this particular case, the police also took the statement of the deceased which was treated as FIR, and the same can be treated as dying declaration. The two dying declarations made by the deceased at two different points of time to two different persons, corroborate each other and there is no inconsistency in those two declarations made. In this view of the matter, we have no hesitation to come to the conclusion that the two dying declarations made are truthful and voluntary ones and can be relied upon by the prosecution in bringing home the charge against the accused persons and the prosecution case must be held to have been established beyond reasonable doubt. Consequently, we have no hesitation in rejecting the first submission of Mr Keshwani. In this connection, it may be appropriate for us to notice an ancillary argument of Mr Keshwani that there has been an inordinate delay on the part of the Magistrate to record the dying declaration and, therefore, the same should not be accepted. As we find from the records, the incident took place at 4 a.m. and the Magistrate recorded the dying declaration at 9 a.m., in our opinion, it cannot be said that there has been an inordinate delay in recording the statement of the deceased. Mr Keshwani had also urged that



when the Magistrate recorded the dying declaration, the deceased had been surrounded by her relations and, therefore, it can be assumed that the deceased had the opportunity of being tutored. But we fail to understand how this argument is advanced inasmuch as there is no iota of evidence that by the time the Executive Magistrate went, the deceased was surrounded by any of her relations. No doubt the Magistrate herself has said that three or four persons were there near the deceased whom she asked to go out but that they were the relations of the deceased, there is no material on record. We, therefore, have no hesitation to reject the said submission of Mr Keshwani.”

39. In the case of **P.V. Radhakrishna (supra)**, Hon’ble Supreme Court has observed as under:

“12.....(ix) Normally, 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 eyewitness said that the deceased was in a fit and conscious state to make the dying declaration, the medical opinion cannot prevail. (See *Nanhau Ram v. State of M.P.* [1988 Supp SCC 152 : 1988 SCC (Cri) 342 : AIR 1988 SC 912])

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. (See *State of U.P. v. Madan Mohan* [(1989) 3 SCC 390 : 1989 SCC (Cri) 585 : AIR 1989 SC 1519])......”

40. We have considered the aforesaid decisions upon which reliance has been placed by the learned counsels appearing for the concerned parties.



41. From the aforesaid decisions, broadly it can be said that:-

(1) Each dying declaration must be scrutinized on its own merits. The Court has to examine upon which of the statements reliance can be placed in order for the case to proceed further. Medical fitness of the person making such declaration, at the relevant time, assumes importance along with other factors such as possibility of tutoring by the relatives etc.;

(2) If the Court is satisfied that the dying declaration is true and trustworthy, it can base conviction upon it without corroboration.;

(3) The Court has to scrutinize the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination and the declarant was in a fit state to make the declaration.;

(4) Where the deceased was unconscious and could never make any dying declaration, the evidence with regard to it is to be rejected.;

(5) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon.;

(6) The Court, in order to satisfy whether deceased



was in a fit mental condition to make the dying declaration, look up to the medical opinion, but where eye-witnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail.

(7) The Magistrate being a disinterested witness and a responsible officer and there being no circumstances or material to suspect that the Magistrate had any animus against the accused or was in any way interested in fabricating a dying declaration, question of doubt in declaration recorded by the Magistrate does not arise.

41. Keeping in view the aforesaid decisions and the principles laid down by the Hon'ble Supreme Court in various decisions, if the facts as discussed hereinabove are examined, it would reveal that, in the present case, the prosecution-witnesses have deposed before the Court with regard to the version of Kamala Devi (deceased) stated before them immediately after the occurrence took place. One of the witnesses stated that appellant No.2 poured boiling water on Kamala Devi and thereafter appellant No.1 Mukul set the house on fire. There is no evidence from where appellant No.2 brought the boiling water. When it was a foggy cold night, at about 1-1:30 a.m., when the incident took place, what was the source of



light to identify the accused is also not brought on record. Further, the incident took place in the 1-2 room house and when Sarang Dhar died on the spot in the incident Kamala Devi also sustained serious burn injuries and, therefore, when she was taken to the hospital whether she was conscious or not. The dying declaration, in the form of *fardbeyan* contains minute details, including the dispute with regard to land as well as the incident which took place 15-20 days prior to the incident. In the *fardbeyan* Kamala Devi said that when she tried to save her husband, she also sustained burn injuries whereas the witnesses have stated a different story. Dying declaration given by Kamala Devi before the Executive Magistrate contains the exactly similar details which is not possible when the person has sustained serious burn injuries. From the deposition of the Executive Magistrate, it is revealed that when he reached to the hospital, the Investigating Officer narrated the entire story to him and while recording the dying declaration of the injured Kamala Devi, villagers were also present. Therefore also, there are all chances of tutoring.

42. Najo Yadav, P.W. 1, who is very close to the brother of appellant No.1 and both the deceased, was present from the beginning upto the hospital and also signed the



fardbeyan. The appellant No.1 has filed a case against Najo Yadav. There is no endorsement of the doctor obtained by the Investigating Officer to record the *fardbeyan* as well as the Executive Magistrate as to whether the patient was in a fit state of mind to make such declaration.

43. Surprisingly, the dying declaration of the deceased was recorded by the Investigating Officer and the Executive Magistrate has merely signed the same. Even there are two versions with regard to the recording of dying declaration. At one place it is stated that the Investigating Officer has recorded the dying declaration whereas at another place the Executive Magistrate has stated that the dying declaration is in his handwriting. Thus, it raises serious doubt. The dying declarations recorded by the Executive Magistrate is not in question-answer format. Ordinarily it should be in the question-answer format.

44. It is the specific defence of the accused (appellant No.1) in the statement under Section-313 of Cr.P.C. that he has been falsely implicated by his brother, uncle and Najo Yadav because of the land-dispute and they wanted to grab the land. Admittedly, after the death of the parents, the aforesaid three persons have taken over the possession of the land.



45. Thus, looking to the aforesaid facts and circumstances of the present case and the evidence led by the prosecution, we are of the view that we cannot simply rely upon the dying declarations given by the deceased Kamala Devi to the police as well as to the Executive Magistrate.

46. Thus, from the aforesaid deposition of the prosecution-witnesses, we are of the view that there are major contradictions, inconsistencies and improvements in the deposition of the prosecution-witnesses.

47. Thus, the prosecution has failed to prove its case against the appellants beyond reasonable doubt, despite which the Trial Court has recorded the judgment of conviction and order of sentence which require to be quashed and set aside.

48. Accordingly, the impugned judgment of conviction dated 16.08.2017 and order of sentence dated 22.08.2017 passed by learned Sessions Judge, Purnea in Sessions Trial No. 16 of 2017, C.I.S. No. 16 of 2017 (arising out of Banmankhi P.S. Case No. 188 of 2016) are quashed and set aside. The appellants are acquitted of the charges levelled against them by the learned Trial Court.

49. Since both the appellants are in jail, they are directed to be released from jail custody forthwith, if their



presence is not required in any other case.

50. The appeal stands allowed.

(Vipul M. Pancholi, J)

(Ramesh Chand Malviya, J)

K.C.Jha/-

AFR/NAFR	A.F.R.
CAV DATE	N.A.
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