

IN THE HIGH COURT AT CALCUTTA
Criminal Appellate Jurisdiction
Appellate Side

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Md. Shabbar Rashidi

CRA 62 of 2012

With

IA NO: CRAN 1 of 2023

Ajoy Mandal

Vs.

The State of West Bengal

For the Appellant : Mr. Jayanta Narayan Chatterjee, Adv.
 Ms. Moumita Pandit, Adv.
 Mr. Supreem Naskar, Adv.
 Ms. Sreeparna Ghosh, Adv.
 Ms. Ritushree Banerjee, Adv.

For the State : Mr. Debasish Roy, PP
 Mr. Rudradipta Nandi, APP
 Mr. Saryati Datta, Adv.

Hearing Concluded on : February 29, 2024
 Judgement on : March 07, 2024

DEBANGSU BASAK, J.:-

1. Appellant has assailed the judgement of conviction dated January 9, 2012 and the order of sentence dated January 10, 2012 passed by the learned Additional Sessions Judge, Fast Track Court I, Uluberia, Howrah in Sessions Trial No. 168 of 2010.

2. By the impugned judgement of conviction, the learned Trial Judge has found the appellant guilty under Section 302

of the Indian Penal Code, 1860. By the impugned order of sentence learned Trial Judge has sentenced the appellant to suffer rigorous imprisonment for life and to pay a fine of Rs. 2000, in default to suffer rigorous imprisonment for a further period of one year.

3. Learned advocate appearing for the appellant has submitted that, the prosecution did not examine any eye witness to the incident of murder. He has contended that, the prosecution relied upon circumstantial evidence to prove the charge of murder as against the appellant. According to him the prosecution has failed to establish the chain of circumstances leading to the guilt of the appellant, conclusively.

4. Learned advocate appearing for the appellant has contended that, 11 out of 24 prosecution witnesses turned hostile at the trial. The prosecution had failed to establish the presence of the appellant at the place and time of occurrence of the murder. None of the prosecution witnesses had seen the appellant at the place of occurrence.

5. Referring to the evidence led by the prosecution at the trial, learned advocate appearing for the appellant has contended that, three persons suffering from burn injuries

were removed to the hospital. He has referred to the evidence of PW 4 and contended that, such witness stated in examination-in-chief that, the female victim was not in a position to talk with any other persons.

6. Learned advocate appearing for the appellant has contended that, the victim suffered 100 per cent burn injuries. The female victim had allegedly made a dying declaration although, she had suffered 100 per cent burn injury. He has pointed out prior to the alleged dying declaration being made by the female victim, PW 4, who had assisted in transporting the victims to the hospital, including the female victim, had stated that, the female victim was not in a position to talk with any other person.

7. Referring to the dying declaration, learned advocate appearing for the appellant has contended that, the same cannot be treated as a valid dying declaration by the female victim. He has contended that, the dying declaration was not marked as an exhibit at the trial. Moreover, the bed head ticket of the female victim showed that the female victim had been administered a number of medicines at the hospital. He has contended that, given the nature of the 100 per cent burn injury suffered by the female victim and the nature of the

medicine administered, at best the female victim was in a state of delirium, making the so called dying declaration suspicious and at the very least unreliable to base a conviction.

8. Referring to the dying declaration learned advocate for the appellant has contended that, such dying declaration does not contain a certificate from the doctor concerned to the effect that the female victim was in a fit mental condition to make the dying declaration. He has contended that, the dying declaration was unreliable and that, conviction should not be based on so called dying declaration. In support of his contention he has relied upon **1976 Volume 3 Supreme Court Cases 618 (K. Ramachandra Reddy and Another vs. The Public Prosecutor)**, **1983 Volume 2 Supreme Court Cases 411 (Darshan Sinigh alias Bhasuri and Others vs. State of Punjab)**, **2002 Supreme Court Cases (Cri) 211 (Panchdeo Singh vs. State of Bihar)**, **2002 Volume 7 Supreme Court Cases 56 (Ramilaben Hasmukhbhai Khristi and Another vs. State of Gujarat)**, **2009 Volume 12 Supreme Court Cases 498 (Kantilal vs. State of Rajasthan)**, **2010 Volume 9 Supreme Court Cases 1 (Atbir vs. Government of NCT of Delhi)** and **2014 Volume 2**

Calcutta Law Journal 309 (Tarak Chakraborty & Anr. vs. The State of West Bengal).

9. Learned advocate appearing for the appellant has contended that, the appellant was not present at the place of occurrence when the incident was alleged to have occurred. Therefore, prosecution could not have called upon the appellant to discharge obligations under Section 106 of the Evidence Act, 1872. He has contended that since the prosecution failed to prove the chain of circumstances leading to the guilt of the appellant, exclusively the appellant should be discharged from the charge framed.

10. Learned public prosecutor appearing for the State has drawn the attention of the Court to the evidence recorded at the trial. He has contended that three persons were murdered. Out of three, the female victim was able to make a dying declaration before the doctor. He has referred to the testimony of the doctor who recorded the dying declaration of the female victim being PW 15. He has also referred to Exhibit 20 being the dying declaration. He has contended that, the female victim had implicated the appellant in the crime. Appellant had poured kerosene oil in the room at which the three

victims were sleeping and set such room on fire. Female victim had seen the appellant to do so.

11. Learned public prosecutor has contended that, there was enmity between the appellant and the victim. The appellant was the elder brother of the victim. Father of the appellant and appellant had given property to the younger brother of the appellant. The victims were the younger brother of the appellant, wife of the younger brother of the appellant and the son of the younger brother of the appellant.

12. Relying upon **2002 Volume 6 Supreme Court Cases 710 (Laxman vs. State of Maharashtra)** learned public prosecutor has contended that, absence of the doctor's certification as to mental fitness of the declarant making the dying declaration is not a sine qua non for the credibility of the dying declaration. In the facts of this case, he has contended that, the female victim made a dying declaration before the doctor who was treating her. Such doctor had recorded the dying declaration in the handwriting of the doctor on the bed head ticket which was tendered in evidence and marked as Exhibit 20. He has contended that, the dying declaration was convincing, trustworthy and can be relied upon for the purpose of conviction of the appellant.

13. Learned public prosecutor has pointed out that three jerry cans of kerosene were seized from the place of occurrence. It has come out in the evidence that, both the appellant and his younger brother who is one of the victims were agriculturists. He has therefore contended that, the impugned judgement of conviction and the order of sentence should be upheld and the appeal dismissed.

14. Police had received a written complaint from the father of the appellant on July 7, 2009. On the basis of such written complaint police registered Shyampur Police Station F.I.R No. 115 dated July 7, 2009 under Section 302 of the Indian Penal Code, 1860 against the appellant. On conclusion of the investigation police had submitted charge sheet against the appellant under Section 302 of the Indian Penal Code, 1860 on April 7, 2010. Charge under Section 302 of the Indian Penal Code, 1860 had been framed against the appellant on August 20, 2010.

15. The case of the prosecution at the trial had been that, the appellant had murdered his younger brother, wife of the younger brother and the son of the younger by setting the room at which the victims were sleeping on fire on the night of July 5 and July 6, 2009. In order to prove the charge as

against the appellant, prosecution had examined 24 witnesses. Prosecution had relied upon various documentary and material exhibits to bring home the charge as against the appellant.

16. Father of the appellant had deposed as PW 1. He had stated that, he had seven children namely Ajoy (appellant), Arup and five daughters. He had stated that he along with his wife and his two sons and five daughters used to live in the same house. He had stated that, the appellant was married and that the wife of the appellant was living separately at the time of the incident. His younger son one of the victims was married to Sadhana and that they had a son out of such wedlock. With regard to the incident he had stated that, a fire took place at about 12.45 AM in the night at the room of his youngest son where the youngest son, wife of the youngest son and child of the youngest son were sleeping. On hearing the hue and cry of his two daughters he and his wife woke up. He went out of the bedroom and had found the bedroom of his youngest son to be ablaze. He along with his family members had cried out for help. On hearing their hue and cry village people and neighbours had rushed to the place. Thereafter, they had tried to extinguish the fire by pouring water. After

extinguishing the fire, he and the other neighbours had entered the room when he found his grandson to be dead, his younger son to be unconscious and to be lying on the corner of the cot, and his daughter-in-law to be under the cot and also unconscious. When he had found that his younger son and daughter-in-law to be in agony he called his nephew who in turn got a trolley van and with the help of co-villagers lifted the body of his younger son and daughter-in-law on the trolley van and shifted both of them to the main road. Thereafter, by a pickup van they had shifted the victims to the Uluberia Hospital. He and his wife had accompanied the victims to the hospital. He had admitted his younger son and daughter-in-law in the hospital. His younger son had died within a short time after the admission. His daughter-in-law had died after 30 minutes from the death of his younger son.

17. PW 1 had been declared hostile by the prosecution. He had been cross-examined by the prosecution after such declaration. He had also been cross-examined on behalf of the defence. During his cross-examination, he had stated that, he lodged the written complaint with the police. He had also stated that, the appellant used to hit him and his wife and that out of fear he could not say anything to the appellant. He

had identified the seized kerosene oil jerry can seized by the police at the place of occurrence. He had identified his signatures on the seizure list.

18. The scribe of the written complaint had deposed as PW 2. He has stated that, PW 1 narrated the facts of the incident before him and as per the instruction and declaration of PW 1 he had prepared the complaint in his own handwriting. He had read over and explained the contents of the complaint to PW 1 who after understanding the contents and being satisfied therewith set his signature on each page of the complaint in his presence. He had identified his signatures on the seizure list as well as in the written complaint which were marked as exhibits. In cross-examination PW 2 had stated that he did not have personal knowledge about the facts of the complaint.

19. Co-villager had deposed as PW 3. He had stated that he had no knowledge about the case. However, he had gone to the place of occurrence on the morning of the incident. He had been declared hostile by the prosecution. In cross-examination by the prosecution, he had stated that the appellant used to hit others in the family and quarrel with the younger brother. Appellant had demanded transfer of

ownership of all property in his name. Appellant had tried to kill all the members of his family on two previous occasions. Appellant had tried to kill the family members by mixing poison with milk. He had also tried to kill them by short circuit of the electrical wires. Appellant had often threatened that he would be the sole owner of the property by killing others. Defence did not cross-examine PW 3 with regard to the previous attempts of the appellant to murder his family.

20. Another co-villager had deposed as PW 4. He had driven one of the two trolley vans used for the purpose of transporting the victims from the residence of PW 1 to the main road. He had stated that after the incident he did not see the appellant within the locality or at the village.

21. Another co-villager had deposed as PW 5. He had stated that, he heard about the incident. He had been declared hostile by the prosecution. During the cross-examination by the prosecution, PW 5 had stated that, appellant tried to kill his family members earlier. In the year 2006, appellant tried to kill his family members by poisoning food. Thereafter he had tried to kill them by short circuit by connecting wires with the electric line. He had stated that it

was his firm belief that the appellant had killed his brother, wife of his brother and their son by setting them on fire.

22. PW 6 is another co-villager who had stated that, he came to the house of the appellant the next morning of the incident. He had also been declared hostile by the prosecution. In cross examination by the prosecution, he had stated that, the appellant used to torture his family members and used to say that he would be the sole owner of the property by killing others.

23. Another co villager had deposed as PW 7. He had stated that, on the date of the incident at night, he heard a hue and cry and on hearing the same he rushed to the house of the appellant. In the house of the appellant, he had found the burnt body of the younger brother of the appellant and the wife of the younger brother of the appellant. After seeing such burnt bodies, he had come back to his own residence. He had been declared hostile by the prosecution. On cross examination by the prosecution, he had stated that, PW 1 told him that on the way to the hospital, younger brother of the appellant came back to his senses and told PW 1 not to exempt the appellant, sell the dwelling place and leave the place or otherwise the appellant would kill PW 1 also. He had

stated that, appellant was dishonest in nature and that is why the wife of the appellant left with their child. Appellant had wanted to be the sole owner of the property by torturing the other family members routinely. Appellant had tried to kill all the family members twice, once by mixing poison with the food and the 2nd time by short-circuit.

24. PW 8 is another co-villager who he had gone to the place of occurrence to find the burnt body of the younger brother of the appellant. He had been declared hostile by the prosecution. During such cross examination by the prosecution, he had stated that, on the night of the incident, sister of the appellant watched television at his house till 10 PM. Then she had returned to her home. At that night, appellant had been seen walking about his house till 10 PM. After the incident, he did not see the appellant in the locality.

25. PW 9 is a co-villager and had stated that he went to the place of occurrence on the next morning of the incident. He had been declared hostile by the prosecution. During cross examination by the prosecution, he had stated that, appellant used to quarrel with his younger brother for property. Appellant had demanded transfer of ownership of the entire property in his name. Appellant had tried to kill other

members of the family by mixing poison with food. He had also tried to kill the family members by connecting electric wires. He had seen the appellant standing in front of a shop in the village at 11:30 PM on July 5, 2009.

26. The doctor who had performed the post-mortem on the dead bodies of the victims deposed as PW 10. He had stated that so far as the child was concerned, the cause of death was due to 100 per cent burn, ante mortem in nature, accidental. He had tendered the post-mortem report of the child in evidence which was marked as Exhibit 8. He had performed the post-mortem on the dead body of the younger brother of the appellant. He had opined that the cause of death was due to 100 per cent burn injury, accidental in nature. He had explained that, if some person is sleeping inside the room and somebody set such room on fire, due to such fire this type of 100 per cent burn injury can be done. Cause of death would be 100 per cent burn injury, ante-mortem in nature, accidental. He had tendered the post-mortem report of the younger brother of the appellant, in evidence which was marked as Exhibit 9. He had conducted the post-mortem on the wife of the younger brother of the appellant. He had opined that the cause of death was ante-mortem, burnt 60 per

cent, accidental in nature. He had tendered the post-mortem report which was marked as Exhibit 10. He had stated that if a person is sleeping inside the room and somebody set the room on fire, that will cause the person to burn due to such fire and it may be accidental.

27. The police personnel who had performed the inquest over the dead bodies of the 3 victims, deposed as PW 11. He had narrated about the conduct of the inquest. He had tendered the inquest reports which were marked as exhibits at the trial.

28. The police constable who was present during the inquest on the dead bodies of the 3 victims had deposed as PW 12. He had identified the signatures on the inquest report.

29. A co-villager had deposed as PW 13. He had stated that on the night of the incident, PW 1 called him and on his call he went to the place of occurrence. He had found the burnt body of the younger brother of the appellant and the wife of the younger brother of the appellant lying on the courtyard of the house of the father of the appellant.

30. He had described how he obtained two trolley vans and that, with the help of other village people lifted the 2 persons onto the 2 trolley vans. They had taken the victims to the

main road and thereafter shifted the victims to the hospital on a pickup van. He had stated that 2 of the victims namely, the younger brother of the appellant and the wife of the younger brother of the appellant were alive. He had been declared hostile by the prosecution. In cross examination by the prosecution, he had stated that after the incident, he did not see the appellant in the village.

31. The doctor who had treated the wife of the appellant on April 25, 2003 at a private medical facility deposed as PW 14. He had tendered the medical documents of such treatment in evidence. He had stated that, four persons were brought to him for the purpose of treatment for consumption of unknown poison.

32. The doctor who had treated the younger brother of the appellant and the wife of the younger brother of the appellant at the hospital on July 6, 2009 deposed as PW 15. He had stated that, the younger brother of the appellant was admitted by the father of the appellant, at the hospital on July 6, 2009 at 3.02 AM. He had treated such patient at 3:30 AM at the male surgical ward. He had stated that, as per the statement of PW 1, appellant had poured some petrol through the window of the room of the patient and ignited the same.

History of the patient as stated by PW 1 had been recorded on the patient sheet in his own handwriting. Younger brother of the appellant had suffered 100 per cent burn injury. He had stated that, patient was unconscious and not in a position to make any statement. Patient had expired on 4:30 AM on the same date. He had tendered the certified copy of the patient sheet of the younger brother of the appellant in evidence which was marked as Exhibit 19.

33. PW 15 had treated the wife of the younger brother of the appellant also. He had stated that, such patient was admitted at 3.04 AM on July 6, 2009 at the female surgical ward and that such patient was brought to the hospital by PW 1. Patient had been admitted with about 100 per cent burn injury. He had treated the patient at the female surgical ward of the hospital at 3:45 AM when the patient had made a statement which he recorded in his own handwriting on the treatment sheet of the patient. As per the statement of the patient, appellant had poured petrol through the window and ignited the patient with her husband and their little child. He had stated that the patient was in agonising pain but conscious. The patient had expired at 8:12 AM on the same

day. The treatment sheet written by him had been tendered in evidence and marked as Exhibit 20.

34. Defence had cross examined PW 15 at some length. However, no question had been put to PW 15 as to the mental fitness or consciousness of the wife of the younger brother of the appellant to make the statement to him as he had recorded on Exhibit 20.

35. A police constable who had participated in the post-mortem deposed as PW 16. He had narrated about his participation in the process.

36. An assistant sub- inspector of police who was a seizure list witness of the seizures made on August 18, 2009 deposed as PW 17. He had identified the signature on the seizure list which was marked as Exhibit 22.

37. Another assistant sub- inspector of police who had received the written complaint of PW 1 deposed as PW 18. He had narrated about the process by which, he received the written complaint from PW 1 and started the formal first information report. The formal information report was tendered in evidence and marked as Exhibit 5/2.

38. Wife of the appellant had deposed as PW 19. She had stated that, after marriage she started living at her

matrimonial home. They had a son and a daughter born to them out of the wedlock. Appellant used to claim money from her and she had to bring money from her paternal home. All the time she could not fulfil the demands of the appellant and when she had failed to do so the appellant assaulted her. She had left her matrimonial home on such an incident of assault. However she had returned to her matrimonial home at the request of the family members. He had narrated how, one day the matrimonial family and she consumed vegetable curry except her husband. After consumption of such vegetable curry all the family members including her had fallen seriously ill due to food poisoning. She had stated that seeds of a flower which contained poison was mixed with the vegetable curry. She had suspected that the appellant mixed such poison. She had been admitted to a private medical facility along with other family members. She had stated that, she was presently living at her paternal home. She had left the matrimonial home due to quarrels with the appellant and her in-laws.

39. A co-village who had pushed the trolley van deposed as PW 20. He had recorded a statement under section 164 of the

criminal procedure code. He had been declared hostile by the prosecution.

40. Mother of the appellant had deposed as PW 21. She had witnessed the inquest of the dead body of her grandson. She had tendered the inquest report which was marked as exhibit 4/1. She had identified her signature on the bed head ticket of the hospital dated July 6, 2009 which was marked as Exhibit 20/1. She had admitted that she was present at the bedside of her younger daughter-in-law on July 6, 2009. She had admitted that on April 25, 2003 she went to the private medical facility where the wife of the appellant was admitted. She had been declared hostile by the prosecution.

41. The 2nd investigating officer had deposed as PW 22. He had narrated about the course of investigation undertaken by him. He had arrested the appellant on March 5, 2010. The appellant had been absconding all this time. He had submitted the charge sheet and the supplementary charge sheet against the appellant.

42. One of the sisters of the appellant had deposed as PW 23. She had stated that, the younger brother, wife of her younger brother and their son had died inside the room in which they used to live due to burn injuries suffered in a fire.

She had stated that, both her younger brother and the wife of the younger brother were still alive when they were shifted to the hospital. She had been at her father's house at the material point of time. At about 1:30 AM she had seen fire in the house. Seeing that the room occupied by her younger brother and his family being ablaze, she along with other family members had rushed to such room and tried to extinguish the fire by pouring water. They had entered inside the room when she found her youngest brother, his wife and their son inside. She had found the nephew to be dead. They had removed the injured victims to the hospital. On the next morning police officer along with police personnel came to their residence and took away the dead body of the nephew to the hospital. She had identified her signature on the inquest reported dated July 6, 2009 which was tendered in evidence and marked as exhibit 4/2. She had been declared hostile by the prosecution.

43. The first investigating officer had deposed as PW 24. He had narrated about the investigations conducted by him. He had stated that, he recorded statements of the prosecution witnesses most of whom had turned hostile. He had identified the portion of the statements made by the prosecution

witnesses to him. He had identified and tendered the seized articles.

44. On conclusion of the evidence of the prosecution, the appellant had been examined under section 313 of the Criminal Procedure Code when he claimed to be innocent and falsely implicated. He had declined to adduce any defence witness.

45. Three persons had expired in an incident of fire. Post-mortem reports of the 3 victims being exhibits 8, 9 and 10 had stated that, cause of death was due to burn injuries. In respect of the burn injuries of the child and the younger brother of the appellant, post-mortem report being Exhibits 8 and 9 had stated that, the burn injuries were 100 per cent. In respect of the wife of the younger brother of the appellant, post-mortem report being exhibits and had stated that, the burn injury was 60per cent. Post-mortem Doctor in his evidence had stated that, if a person is sleeping inside the room and somebody sets fire to such room then such fire can cause such burn injuries. Whether or not, the fire had been accidental will depend upon circumstantial evidence.

46. Prosecution did not examine any witnesses who claimed to have witnessed the appellant setting the room in

which the victims were sleeping, on fire. Prosecution had relied upon circumstantial evidence and dying declarations to prove the charge as against the appellant.

47. Parents of the appellant, sister of the appellant, co-villagers of the appellant, have in unison stated that, there was a fire in the room in which, the three victims were sleeping, on the night of July 5, 2009 and July 06, 2009 when the three victims had suffered burn injuries. The three victims had been rescued after dousing the fire in such room. Two of the injured had been removed to the hospital with one being found dead at the room in which the fire was seen.

48. That two of the victims were alive at the time when they were rescued from the room had been established at the trial both by the parents of the appellant, sister of the appellant as well as by the co-villagers who assisted in shifting the victims from the place of occurrence to the hospital. Doctor treating the victims at the hospital had deposed that the victims were alive when they were brought into the hospital and that they expired at the hospital.

49. At the trial prosecution had introduced two dying declarations made by the two victims individually at different points of time. One dying declaration was made by the

younger brother with appellant while the other dying declaration was made by the wife of the younger brother of the appellant. Legality, validity and sufficiency of the dying declaration of the wife of the younger brother of the appellant have been questioned by the appellant. The trial judge had referred to and relied upon such dying declaration as one of the grounds to find the appellant guilty. Across the board a number of authorities have cited on such issue which are discussed hereafter.

50. *K. Ramachandra Reddy and Another (supra)* has observed that dying declaration is admissible under Section 32 of the Evidence Act. It has also observed that Court needs to guard against the statement of the deceased being a result of either tutoring, prompting or a product of his imagination. The Court has to be satisfied that the deceased was in a fit state of mind to make a statement after the deceased had a clear opportunity to observe and identify his assailants and that he was making the statement without any influence or rancour. Once Court has satisfied itself that, the dying declaration is true and voluntary, it can convict the accused without further corroboration.

- 51. *Darshan Sinigh alias Bhasuri and Others (supra)*** has disbelieved the so called dying declaration since it found that the vital organs of the person claiming to make the dying declaration was completely smashed and it was impossible to believe that he was in a fit state of mind and body to make any coherent or credible statement relating to the circumstances which resulted in his death.
- 52. *Panchdeo Singh (supra)*** has observed in the facts of that case, that there was no doctor's certification as regards the state of condition of the declarant. In the facts of that case it is found that it was not possible to repose confidence in the dying declaration.
- 53. *Ramilaben Hasmukhbhai Khristi and Another (supra)*** has observed that, dying declaration can be the sole basis of a conviction if it was free from doubt, inspire confidence and had been recorded as per law. It has also observed that doctor's certificate about mental fitness of the declarant to make the statement was necessary.
- 54. *Kantilal (supra)*** has observed that, for placing implicit reliance on dying declaration, the Court must be satisfied that the deceased was in a fit state of mind to narrate the correct facts of occurrence. If the custody of the maker of

the statement to narrate the facts was found to be impaired such dying declaration should be rejected. Moreover, a dying declaration should be voluntary and should not be prompted.

55. *Atbir (supra)* has taken into consideration a number of judgements of the Hon'ble Supreme Court. It has observed as follows :-

“22. The analysis of the above decisions clearly shows that:

(i) Dying declaration can be the sole basis of conviction if it inspires the full confidence of the court.

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

(iii) Where the court is satisfied that the declaration is true and voluntary, it can base its conviction without any further corroboration.

(iv) It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence.

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

(vi) A dying declaration which suffers from infirmity such as the deceased was unconscious and could never make any statement cannot form the basis of conviction.

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

(viii) *Even if it is a brief statement, it is not to be discarded.*

(ix) *When the eyewitness affirms that the deceased was not in a fit and conscious state to make the dying declaration, medical opinion cannot prevail.*

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

56. A Division Bench of this Court in ***Tarak Chakraborty & Anr. (supra)*** has disbelieved the dying declaration in the facts and circumstances of that case. Such Division Bench has observed that, if the lady was burnt to the extent of 80 per cent then it was very difficult to believe that she managed to say two different things to two different prosecution witnesses.

57. On a reference, ***Laxman (supra)*** has decided on the so called conflict of the views of the Hon’ble Supreme Court rendered in ***1999 Volume 9 Supreme Court Cases 562 (Koli Chunilal Savji and Another vs. State of Gujarat)*** and ***1999 Volume 7 Supreme Court Cases 695 (Pararambaka Rosamma and Others vs. State of A.P.)***. It has affirmed the view rendered in ***Koli Chunilal Savji and Another (supra)***. In ***Koli Chunilal Savji and Another (supra)*** the Supreme Court has held that, the ultimate test is whether the dying declaration can be held to be truthful one and voluntarily

given. Moreover, before recording the declaration, the officer concerned must find that the declarant was in a fit condition to make the statement in question. It has observed that paragraph 8 of ***Pararambaka Rosamma and Others (supra)*** with regard to absence of medical certification was too broadly stated and was not the correct enunciation of law.

58. Absence of certification by the doctor as to the fitness of the declarant to make the declaration will not render the dying declaration unreliable if it is otherwise established that, the declarant was in a fit state of mind to make the declaration made such statement voluntarily, had the opportunity to observe the assistants so as to clearly identify them.

59. As has been noted above, two persons had made two dying declarations.

60. Younger brother of the appellant had implicated the appellant in the murder when he was being taken to the hospital from the place of occurrence. He had made such dying declaration to his father, PW 1 herein. PW 1 had stated about such dying declaration being made by the younger brother of the appellant to him when he was being moved to the hospital from the place of occurrence, in the written complaint which was tendered in evidence and marked as

Exhibit 1. He had shared such information contemporaneously with PW 7. PW 1 and PW 7 had been declared hostile by the prosecution. In cross examination by the prosecution, PW 1 had stated that, the written complaint being Exhibit 1 was written by PW 2 as per his instruction and dictation. PW 2 had corroborated such statement of PW 1.

61. PW 7 had stated that, PW 1 had told him that the younger brother of the appellant had made a dying declaration implicating the appellant in the murder. However, PW 1 did not advert to the dying declaration made by the younger brother of the appellant to him, during his examination in chief or in cross examination by the prosecution. Since, PW 1 as the father of one of the victims, did not advert to the dying declaration made by his younger son, to him, in his testimony, it would be imprudent to rely solely upon such dying declaration of the younger brother of the appellant to convict the appellant.

62. The wife of the younger brother of the appellant had made a dying declaration to the doctor treating her at the hospital. The doctor who had treated the wife of the younger daughter of the appellant at the hospital when she made the dying declaration to him was examined as PW 15. Dying

declaration of the wife of the younger brother of the appellant had been recorded by PW 15 on the treatment sheet of such victim. The certified true copy of the treatment sheet of such victim had been tendered in evidence and marked as Exhibit 20 without any objection.

63. In her dying declaration, the wife of the younger brother of the appellant had stated that, appellant had poured petrol from the window of the room where they were sleeping and ignited the same.

64. Exhibit 20 contains the writing of PW 15 to the effect that the patient was conscious but in agonising pain. It does not contain a certificate as to the fitness of the state of mind of the patient to make the dying declaration. Contention of the appellant is that absence of such certificate is fatal.

65. Certificate of fitness by a doctor in respect of a patient making the dying declaration is not a *sine qua non* for a dying declaration to be considered legal, valid and sufficient. The court has to satisfy its conscience that, the dying declaration was voluntarily made, truthful, not tutored and that the person making it was in a position to see the assailant and make a statement with regard thereto.

66. In the facts of the present case, the doctor who had treated the wife of the younger brother of the appellant had recorded the oral dying declaration of his patient on the treatment sheet of the patient, being Exhibit 20 while treating the patient.

67. Exhibit 20 contains the oral dying declaration of the patient written in the hand of PW 15 followed by medicines that had been prescribed by PW 15. Exhibit 20 does not contain a formal certificate to the effect that, the patient was fit to make a statement but, attending circumstances and the fact that, a doctor recorded the statement of the patient on the treatment sheet of the patient, during treating her, inspires sufficient confidence to hold that, the patient was with requisite mental fitness to make the statement.

68. Victim making the dying declaration was present at the room which caught fire and she had suffered burn injuries due to the fire. Therefore, she was in a position to observe the assailant and make a statement with regard to his involvement. There is nothing on record to disbelief such victim when she had stated to the doctor treating her that, appellant had poured petrol through the window onto the

room where she and her family members were sleeping and ignited the same.

69. This version of the involvement of the appellant is corroborated by the contents of Exhibit 1 which contains the oral dying declaration made by the other victim to PW 1.

70. Police had seized jerry can and wearing apparel, amongst other, from the place of occurrence which was tendered in evidence. Seizure list had been tendered in evidence and marked as Exhibit 2. Seized articles had been sent for forensic examination. Forensic examination report had been tendered in evidence and marked as Exhibit 23. Exhibit 23 had recorded that on forensic examination traces of inflammable mineral oil was found. Exhibit 23 had corroborated the victims as to use of petrol, an inflammable mineral oil, in setting fire to the room where they were sleeping.

71. Independent of Exhibit 1, Exhibit 20 is sufficient to find the appellant guilty of the charge that had been framed against him. Prosecution had therefore conclusively proved a charge of murder of the victims as against the appellant, at the trial.

72. In the impugned judgement of conviction, the learned trial judge had cited and discussed five circumstances to hold the appellant guilty. Save and except the dying declaration, of the wife of the younger brother of the appellant, the other four circumstances cited and discussed by the learned trial judge, individually, would not have been sufficient to hold the appellant guilty. Collectively and more particularly read with the oral dying declarations, they conclusively establish the guilt of the appellant to the charge for which he had faced the trial.

73. After finding the appellant to be guilty of the charge of murder, the learned trial judge had heard the appellant on the quantum of sentence to be imposed. The learned trial judge had held that, although, the appellant was guilty of murder, the same did not qualify as the rarest of rare case. The learned trial judge had therefore proceeded to sentence the appellant to suffer rigorous imprisonment for life with a fine of Rs. 2,000 and in default of payment of which to suffer rigorous imprisonment for one year.

74. In our view, learned trial judge had correctly appreciated the evidence brought on record at the trial and

convicted the appellant on the charge of murder and sentenced the appellant for life.

75. In such circumstances, we affirm the judgement of conviction and the order of sentence, impugned in the appeal.

76. CRA 62 of 2012 is therefore dismissed. All pending applications are disposed of.

77. A copy of this judgement and order along with the trial court records be transmitted to the trial court forthwith.

78. Urgent Photostat certified copy of this order if applied for, be supplied expeditiously after complying with all necessary legal formalities.

[DEBANGSU BASAK, J.]

79. I agree.

[MD. SHABBAR RASHIDI, J.]