

***IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION***

CONFIRMATION CASE NO. 4 OF 2023

The State of Maharashtra
Through Bandra Police Station,
Mumbai
Vide C.R. No. 156 of 2017

... Appellant

Versus

Deepak Birbahadur Jath,
Age about 45 years,
Residing at Room No.16, Ganesh Nagar,
Bandstand, B.J. Road, Bandra (W),
Mumbai – 400 050

... Respondent

At present in District Central Prison,
Akola

***WITH
CRIMINAL APPEAL NO. 434 OF 2024
WITH
INTERIM APPLICATION NO. 1305 OF 2024
(Application for Bail and Suspension of Sentence)
IN
CRIMINAL APPEAL NO. 434 OF 2024***

Deepak Birbahadur Jath,
Age about 45 years,
Residing at Room No.16, Ganesh Nagar,
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... Appellant/
Applicant

Versus

The State of Maharashtra
Through Bandra Police Station,
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Vide C.R. No. 156 of 2017

... Respondent

Mr. K. V. Saste, Addl. P.P for the Appellant-State in CONF-4/2023 & for the Respondent-State in Appeal/434/2024

Ms. Farhana Shah for the Respondent in CONF-4/2023, for the Appellant in Appeal/434/2024 and for the Applicant in IA1305/2024

**CORAM : REVATI MOHITE DERE &
SHYAM C. CHANDAK, JJ.**

RESERVED ON : 11th JULY 2024

PRONOUNCED ON : 10th OCTOBER 2024

JUDGMENT (Per Revati Mohite Dere, J.) :

1 The aforesaid confirmation case arises out of a reference made by the learned Sessions Judge, City Civil Court, Mumbai, under Section 366(1) of the Code of Criminal Procedure (`Cr.P.C`) for confirmation of the death sentence

awarded to the convict, vide judgment and order dated 7th November 2023 passed in Sessions Case No. 562/2017. The learned Sessions Judge vide the said judgment and order has sentenced accused-Deepak Birbahadur Jath, to death. The operative part of the order reads thus :

“O R D E R

- 1. Accused Deepak Birbahadur Jath is hereby convicted for the commission of offences punishable U/s.302, 307 of Indian Penal Code registered by Bandra Police Station in Crime No.156 of 2017.*
- 2. Accused Deepak Birbahadur Jath is hereby sentenced to Death and fine of Rs 5,000/- (Rupees Five Thousand Only) in default further rigorous imprisonment of six months on each count of Death of Amrawati and Angel, for the commission of offence punishable U/s.302, of Indian Penal Code registered by Bandra Police Station in Crime No.156 of 2017.*
- 3. The sentence of the death penalty be executed once by hanging the accused Deepak Birbahadur Jath by the neck till he is dead subject to confirmation of the death sentence by the Hon'ble High Court under Section 368(a) read with Section 366 of the Code of Criminal Procedure, 1973.*
- 4. Accused Deepak Birbahadur Jath is hereby sentenced for rigorous imprisonment of life and fine of Rs.5000/- in default further rigorous imprisonment of six months for*

the commission of offence punishable U/s. 307 of Indian Penal Code registered by Bandra Police Station in Crime No.155 of 2017.

5. All sentences to run consecutively.

6. Accused is entitled for set off for the period already undergone if entitled to.

.....”

2 Deepak Birbahadur Jath (respondent in Confirmation Case) has also filed the aforesaid appeal against his conviction and sentence as stated aforesaid. For the sake of convenience, hereinafter, we would be referring Deepak Jath as ‘accused’.

3 Since the challenge is to the same impugned judgment and order, the confirmation case as well as the appeal against conviction, are being disposed of together.

4 The prosecution case in brief is as under :

 The incident in question took place on 14th April 2017 between 12:00 to 12:30 noon, when Amravati (deceased)

and her daughter Roshni (PW1) were preparing bracelets in the house; and at which time, their tenant one Kanta Eikka (PW7) with her 2 year old daughter-Angel (deceased) were sitting next to Amravati. It is the prosecution case that the accused came there with a bottle filled with petrol and stated that "आज मैं तुझे जिंदा जला दूंगा" and poured the said petrol on Amravati; that the petrol also fell on Kanta (PW7) and her daughter-Angel; that when Amravati tried to get up, the accused-Deepak Jath threw a lit matchstick on Amravati, as a result of which, Amravati caught fire and so did Kanta and her daughter-Angel. It is also the prosecution case, that prior to pouring petrol on Amravati, the accused had thrown petrol on PW1-Roshni, however, Roshni ran inside the house, and when she came out, she saw her mother-Amravati on fire. On hearing the cries, the neighbours came and doused the fire, after which, the injured were taken to the hospital, where Amravati's (deceased) statement was recorded. Amravati and Angel, died during the course of treatment on 27th April 2017 and 22nd April 2017, respectively, as a result of the

burn injuries. Initially, on the basis of Amravati's statement, C.R. was registered for the offence punishable under Section 307 of the Indian Penal Code ('IPC') and on the demise of Amravati and Kanta's daughter-Angel, Section 302 of the IPC came to be added. During the course of investigation, the police arrested the accused, recorded the statements of the witnesses, carried out panchnama, etc. and thereafter, filed charge-sheet as against the accused in the Court of the learned Metropolitan Magistrate, Mumbai. Since the offences were triable by the Court of Sessions, the learned Metropolitan Magistrate, Mumbai, committed the case to the Court of Sessions, for trial.

The trial Court framed charge as against the accused for the offences punishable under Sections 307, 326(A), 302 of the IPC. The accused pleaded not guilty to the charge and claimed to be tried.

The prosecution, in support of its case, examined as

many as 17 witnesses i.e. PW1-Roshni Harijan (daughter of deceased-Amravati); PW2-Riyaj Shaikh (Panch to the seizure of clothes of the accused); PW3-Ajay Varma (Panch to the seizure of lighter); PW4-Jitendra Singh (Panch to the inquest panchnama); PW5-Shainaz Singh (fruit vendor); PW6-Suresh Valanju (shop-keeper from whom, the lighter was purchased by the accused); PW7-Kanta Eikka (injured, eye witness); PW8-Mithu Singh; PW9-Birju Rana (tea stall owner, who saw the smoke and took the victims to the hospital); PW10-Dr. Suhas Abhyankar, (Medical Officer of Masina Hospital, where Amravati was treated); PW11-Dr. Siddharth Sawardekar (Medical Officer, who performed postmortem of Angel on 22nd April 2017); PW12-Rohit Kalubarme, API attached to the Azad Nagar Police Station (Investigating Officer, to whom Amravati gave a dying declaration); PW13-Anandrao Ghadge, API, (who arrested the accused and seized the accused's clothes); PW14-Deepika Parab, (Executive Magistrate, who recorded the dying declaration of Amravati on 15th April 2017); PW15-Dr. Amit Ilankar (Medical

Officer, who gave opinion that Amravati was oriented and fit to give her statement); PW16-Dr. Sunil Pandey (Medical Officer, who examined the injured Kanta Eikka); and PW17-Vijay Belge, Sr.PI, the Investigating Officer.

The accused's statement was recorded under Section 313 of the Cr.P.C. The accused in his 313 statement stated that the deceased and others were calling him *Chhakka* and *Hijda* and that though he was not talking to them, they were calling him *Chhakka*. Exact words in 313 are, 'मेरे को छक्का हिजरा बोल रहे थे. इसलिये मैंने उनको जिंदा फुंक दिया, मैंने कुछ किया नहीं. में उनसे बात भी नहीं कर रहा था. मुझे दो बार छक्का हिजरा कहा'. It is the accused's case, that on the second occasion, when he was called *Chhakka* and *Hijda*, he flashed his private part, however, despite the same, he was called *Chhakka* and *Hijda*. According to the accused, as he was provoked, the incident took place.

After hearing the learned counsel for the respective

parties, the learned Judge convicted and sentenced the accused, as stated in para 1 above.

5 Ms. Farhana Shah, learned counsel appearing for the accused submitted that the incident took place on account of Amravati calling the accused *Chhakka* and *Hijda*. She submits that the accused was examined, post the incident and was found to be mentally unstable. She submitted that the accused was not only unfit during the trial, but was also unable to comprehend the trial. She relied on the medical case papers of the accused, which are part of the paper-book. Ms. Shah submitted that infact, the accused was declared unfit for trial on 23rd October 2021 and that the trial proceeded from 10th June 2022, only when he was declared fit for trial. She submitted that the evidence of the eye-witnesses i.e. PW1-Roshni and PW7-Kanta, cannot be relied upon because of the inconsistencies in their evidence and as such, the accused is entitled to benefit of doubt. She further submits that in the event, the Court comes to the conclusion that the

accused has committed the offences in question, this is not a case warranting death sentence, having regard to the facts of the case.

6 Mr. Saste, learned Addl. P.P supported the impugned judgment and order of conviction and sentence. He submitted that the evidence of PW1-Roshni and PW7-Kanta, (injured), inspire confidence and as such, have rightly been relied upon by the trial Court, whilst convicting the accused. Learned Addl. P.P also relied on the evidence of PW9-Birju Rana, who helped take Amravati to the hospital and to whom an oral dying declaration was made by Amravati. Learned Addl. P.P further relied on the evidence of PW12-Rohit Kalubarme, API attached to Azad Nagar Police Station, who recorded the dying declaration of Amravati, clearly pointing to the complicity of the accused. He submitted that the said dying declaration has been duly corroborated by PW15-Dr. Amit Ilankar, Medical Officer attached to the Sion Hospital, who has deposed that Amravati, at the time of making the dying declaration, was oriented and fit to make the statement.

As far as sentence of capital punishment is concerned, he submitted that two persons had lost their lives in the said incident and that the act of the accused in coming and throwing petrol shows that it was pre-planned and as such, no interference was warranted in the sentence so awarded by the trial Court.

7 We have heard learned counsel for the respective parties and perused the evidence with their assistance.

8 PW1-Roshni, is the daughter of deceased-Amravati. At the relevant time, she was aged 17 years and at the time of deposition, 19 years. PW1-Roshni, in her evidence, has stated that at the time of the incident, she was studying and was also helping her mother prepare bracelets; and that the accused being her neighbour, she knew him. She has stated that 15 days prior to the incident i.e. on 14th April 2017, when she was sitting outside her house, at about 10:30 a.m, the accused came from his house; saw that there was no one in the lane; after which, he

lowered his pant and flashed his private part at her; that she went inside the house and disclosed the said incident to her mother-Amravati; pursuant to which, her mother-Amravati went and disclosed the incident to the accused's father, after which there was a quarrel between the accused's father and her mother (Amravati). According to PW1-Roshni, after the said incident, the accused would look at her angrily, whenever he would see her. According to PW1-Roshni, on 14th April 2017, at about 12:00/12:30 noon, when she was sitting with her mother (Amravati) in the lane outside their house and preparing bracelets, Kanta Eikka (PW7) and her daughter-Angel joined them; that at that time, the accused came there with a plastic bottle, containing petrol and poured petrol on her person; that she ran from the said spot, after which, the accused poured petrol on the persons present there; that when she was running, she heard the accused threatening her mother (Amravati) "*aaj main tujhe jinda jala dunga*"; that as her skin was burning due to petrol, she went inside the house, cleaned herself, and when she came

out, she saw that her mother-Amravati, Angel and Kanta (PW7) were in flames; that she started shouting for help, pursuant to which, her neighbours came to the spot; that with their help, Amravati, Kanta and Angel were taken to Sion hospital; however, as the doctor refused to admit Amravati in Sion hospital, she was shifted to Masina Hospital, Byculla. PW1-Roshni, has stated that her mother (Amravati) was admitted at Masina hospital for 14 days and that during the treatment she expired; that Angel also expired in Sion hospital during the course of treatment and Kanta sustained serious injuries. According to PW1-Roshni, the police recorded her statement, drew the spot panchnama in her presence, after she showed the spot to the police; seized the mobile phone of her mother-Amravati, , which was completely damaged due to fire; seized the burnt clothes of her mother-Amravati, Angel and Kanta (PW7); and also seized some bracelets and a plastic bottle from which the accused had thrown petrol. PW1 has identified the aforesaid articles in Court.

In her cross-examination, PW1 has given her date of

birth as 15th February 1998. Admittedly, there is no challenge to the same. PW1 in her cross-examination, has further stated that they had given a complaint in the Police Station with respect to the incident that had taken place 15 days prior i.e. on 14th April 2017 i.e. the incident when the accused flashed his private part, however, the police did not take any action nor did the police give her a copy of the complaint. PW1 has admitted that after the said incident, though the accused would look at her angrily, neither she nor her parents informed the police about the same. She has denied the suggestion that the accused was a mentally ill person. It is pertinent to note that PW1 in her cross-examination has admitted that it was true that the accused poured petrol on her person, due to which, she was scared and ran away without helping her mother and others; and that when she returned, she saw her mother-Amravati, Angel and Kanta (PW7) in flames. Infact, there is no cross-examination with respect to the incident which took place on 14th April 2017 as stated herein-above i.e. how the accused came to the spot and poured petrol on her, her

mother-Amravati and others. The same has gone completely unchallenged.

9 The other witness is PW7-Kanta Eikka (injured witness). PW7-Kanta has, in her evidence, stated that she was living as a tenant of Amravati (deceased); that on 14th July 2017 at about 12:00 to 12.30 in the afternoon, she was sitting and making bracelets, when the accused came there; that the accused was angry and was having a bottle filled with petrol with him and was saying " जिंदा जला दूंगा, जिंदा जला दूंगा" to Amravati (deceased); that the accused sprinkled petrol on Amravati (deceased); that she and her daughter-Angel were sitting nearby and a few drops fell on them; that thereafter, the accused took a lighter and set Amravati ablaze; that she and her daughter Angel also sustained burn injuries in the said incident; that her daughter was admitted to the hospital for 8-9 days, after which, she expired; that she too sustained serious burn injuries i.e. injuries to her right hand, chest and right leg, however, she survived.

According to PW7, the accused ran away from the spot, soon after the incident.

In her cross-examination, PW7 has admitted that she had never seen the accused quarreling or fighting with anyone in the area; that she knew him for five years; that the accused was behind Amravati's daughter-Roshni and wanted to marry her and since Amravati and her daughter were not ready, there were issues between them. PW7 has further in her cross-examination, stated that she did not know whether the accused was harassing or chasing any other girls in the area and that she did not have any personal knowledge about the accused wanting to marry Amravati's daughter. The actual incident of the accused pouring petrol on Amravati and setting her ablaze has gone unchallenged.

10 Thus, it is evident from the aforesaid evidence of PW1-Roshni, that the accused poured petrol on her and then on Amravati and set Amravati ablaze. As noted above, the said

evidence has gone unchallenged. PW7-Kanta (injured) has corroborated the evidence of PW1. PW7's evidence clearly shows that the accused came to the spot, after saying " जिंदा जला दूंगा", poured kerosene on Amravati and set her ablaze and in the said process, she and Angel also sustained burn injuries. Even PW7-Kanta's evidence with respect to the actual incident has gone challenged. Infact, there is nothing in the cross examination of PW7-Kanta, to disbelieve her testimony, more particularly when she was an injured witness. We find the evidence of both these witnesses credible, inspiring confidence.

11 The aforesaid evidence of PW1-Roshni Harijan and PW7-Kanta Eikka is duly corroborated by PW5-Shainaz Singh and PW9-Birju Rana.

12 PW5-Shainaz Singh was residing next to deceased Amravati's house. PW5 has stated that he was working as a fruit vendor at Band Stand; that on 14th April 2017, as usual he was at

his shop; that when he saw smoke coming out of the house in the nearby chawl, he went towards the said house; that when he was reaching the said house, he saw the accused trying to escape; that he dashed against the accused and asked him as to what had happened, pursuant to which, the accused replied that he should go and see what has happened; that when he went to Amravati's house, he saw that two ladies and one child had sustained burn injuries, out of which, one lady had sustained serious injuries; that the said lady was saying "मुझे दिपक जट (accused) ने petrol डाल के जलाया" again and again; that he wrapped her with a saree and bed sheet and took her to Sion Hospital.

Although 5-6 questions were put to PW5-Shainaz in his cross-examination, nothing material has been elicited to discredit his testimony. In his cross-examination, PW5 has accepted that he did not know the reason why the accused had burnt the victim.

13 PW9-Birju Rana has in his evidence stated that he was

running a Tea and Samosa Stall; that on 14th April 2017, when he was standing in front of Girish Tower, he saw smoke coming from the Ganesh Nagar lane; that he ran towards his house and told his brother to switch off the DP, pursuant to which his brother switched off the DP; that in the lane, one lady named Amravati was lying in a burnt condition; that Shainaz (PW5) brought one bed-sheet, wrapped Amravati and brought her on the road; that they put her in a tempo and took her to Sion Hospital; that at that time, Amravati told that the accused had sprinkled petrol on her person and set her ablaze.

In the cross-examination, PW9-Birju Rana has admitted that he was sitting besides Amravati, when they took her to the hospital; that she was speaking in a low voice; that she was repeatedly saying that the accused had burnt her. Although an endeavour was made to discredit the testimony of PW9 by submitting that he was deposing at the behest of the police, as he did not have a license for the stall i.e. his business, the said

suggestion has been denied by him.

14 The evidence of PW5-Shainaz and PW9-Birju reveals that Amravati had made an oral dying declaration to them, that the accused had set her ablaze. Their evidence inspires confidence and there is nothing in their cross which will want us to disbelieve their presence at the spot; or the oral dying declaration made to them.

15 PW8-Mithu Singh has also deposed that on 14th April 2017 at about 9:30 – 10:00 a.m, he heard PW1-Roshni shouting and saying that the accused had poured petrol on her body and face; that when he went there, he found Amravati and one small child had sustained burn injuries. The said evidence has gone unchallenged in the cross-examination. Thus, this witness has also duly corroborated the witnesses with respect to the accused throwing petrol on the victims.

16 Coming to the written dying declaration, the prosecution, in support of its case, examined PW12-Rohit Kalubarme, PW14-Deepika Parab and PW15-Dr. Amit Ilankar, to prove the said dying declarations.

17 PW12-Rohit Kalubarme was examined by the prosecution to prove the complaint (FIR) given by Amravati (deceased) i.e. Exh.P-59. According to PW12-Rohit Kalubarme, on 14th April 2017, he was attached to Bandra Police Station, as a PSI on day duty. PW12-Rohit Kalubarme has deposed that the concerned police received information that a person was admitted in Sion Hospital, pursuant to which, he visited the hospital and recorded the complaint; that he made inquiries with the medical officer about the condition of the patient, pursuant to which, the doctor gave an endorsement on the left hand side of the said report; and that he recorded the complaint as per the say of the patient. PW12 has further deposed that the

complainant i.e. Amravati disclosed to him (i) that the accused had an earlier dispute and hence he poured cumbersome material and lit them up and stated ‘आज मैं तुझे जिंदा जला दूंगा’; (ii) that the accused had poured the cumbersome material on her, the other lady and a child and set her (Amravati) ablaze first, and then another lady and child; pursuant to which, they all sustained burn injuries. PW12 identified the complaint and the endorsement made by the Medical Officer with his signature on the said complaint. He also identified the right toe impression of the complainant i.e. Amravati and his (PW12’s) signature on the said complaint. The said complaint which was treated as an FIR was marked as Exh.P-59. According to PW12, he thereafter visited the spot of the incident in Ganesh Nagar Slum; called panchas; that the spot was shown by the complainant’s daughter; that one Samsung Mobile, burnt clothes, half burnt plastic bottle and dress of a child was seized and the said articles were sealed. The said panchanama is at Exh.28. PW12 has identified the seized articles i.e. burnt bottle

(Art.1), Mobile (Art.1), burnt clothes (Art.3), baby frock (Art.4), Kurti (Art.5) and partly burnt tarpaulin (Art.8). He has further stated that on 17th April 2017, the accused gave a disclosure statement that he will show the place where the lighter was concealed by him and that he should accompany him; that pursuant thereto, memorandum statement was recorded (Exh.25) and thereafter, he alongwith panchas and the accused went in a vehicle near a garden, where the accused stopped the vehicle and removed the lighter from the trunk of the tree and produced the same. The said lighter was identified as Art.9. According to PW12, the accused disclosed that he had purchased the lighter from Gurukrupa Shop and accordingly showed them the shop from where the said lighter was purchased. The said panchanama is at Exh.26. During the course of the investigation, the said witness recorded the statement of the witnesses and thereafter handed over the investigation to P.I.-Vijay Berde.

In his cross-examination, PW12 has admitted that he had taken permission of the Medical Officer, prior to recording of the complaint, although the same was not a written permission; and that after recording the complaint, he had requested the Special Executive Magistrate to record Amravati's statement. PW12 further in his cross-examination has deposed that he had got the accused examined clinically before his statement was recorded, however, his examination was not done by a psychologist. PW12 has denied that the mental condition of the accused was not proper and that despite the same, he proceeded to record his memorandum statement. PW12 has denied the suggestion that no such incident had taken place and that he carried out the investigation properly. PW 12 has denied that the complainant (Amravati) did not give any complaint. As noted above, Amravati's statement recorded by PW12 was treated as an FIR, and subsequently, as a dying declaration, after her demise.

It is pertinent to note, that there is no cross-examination of PW12-Rohit Kalubarme vis-a-vis what was disclosed by Amravati to him i.e. with respect to the accused pouring liquid on her and stating ‘आज मैं तुझे जिंदा जला दूंगा’.

18 The said evidence of PW12-Rohit Kalubarme has been duly corroborated by PW15-Dr. Amit Ilankar.

19 The prosecution examined PW15-Dr. Amit Ilankar, who opined that Amravati was oriented and fit to give the statement. PW15 has stated that on 14th April 2017, he was deputed in the Burns Ward in Sion Hospital; that one Amravati was admitted in their ward; that the police approached him to certify that the said patient was oriented and able to give the statement; pursuant to which, he opined that the patient i.e. Amravati was oriented and fit to give her statement. He has stated that he gave an endorsement on the statement after it was

recorded. He has identified the endorsement made by him which is at Exhibit P-59.

There is nothing in the cross-examination of this witness to disbelieve his testimony with respect to the endorsement given by him on the statement recorded by the police i.e. Exhibit P-59. There is no cross with respect to whether Amravati was in a position to give the statement or not or whether she was oriented or not when she gave the statement.

The aforesaid witness's evidence has also been duly corroborated by PW14–Deepika Parab, Executive Magistrate, Mumbai City, who recorded the dying declaration of Amravati on 15th April 2017 at Masina Hospital.

20 The prosecution examined PW14-Deepika Parab, Executive Magistrate, to prove the dying declaration made by Amravati to the said witness. PW14-Deepali was working in the Collector's Office, Mumbai City, as an Executive Magistrate,

Mumbai City, at the relevant time. She has stated that she was informed that one Amravati had suffered burn injuries and that she had to record her dying declaration; that she received the said information at around 3:30 pm and accordingly, she reached Masina Hospital at about 4:20 pm; that she made inquiry with the Medical Officer as to whether Amravati was in a position to give her dying declaration; that the Medical Officer informed her that Amravati was in a fit condition to give a statement; that she went and met Amravati, who was in the ICU in Masina Hospital; that she introduced herself and informed her that she had come to record her dying declaration; that Amravati consented for the same; that she asked Amravati, her name, age and other details, pursuant to which, Amravati informed her how she had sustained the burn injuries. PW14 has stated in her evidence in para 4, that Amravati informed her that she sustained burn injuries on 14th April 2017 at about 12:30 noon. PW14 has deposed as to what was disclosed to her by Amravati in para 4 of her evidence. The same reads thus :

“दिपक हयाने जुन्या वादातुन मुलीच्या अंगावर प्रथम पेट्रोल टाकले. मुलगी तिथून पळून गेली. नंतर त्याने अमरावती हयांच्या अंगावर पेट्रोल टाकले व लायटर ने आग लावली. त्याच्या बाजूला अजून एक स्त्री बसली होती त्यांच्या अंगावर सुद्धा पेट्रोल टाकले आणि तिला पण आग लागली त्याची मुलगी आणि आजूबाजूच्या लोकांनी अमरावतीला वाचवण्याचा प्रयत्न केला. जितेंद्र यांनी त्यांना सायन हॉस्पिटल ला घेऊन आले व सायन हॉस्पिटल येथे भरती केले. त्या नंतर तिचा नवरा आला व त्याने व दिराने मसिना हॉस्पिटल येथे भरती केले.”

PW14 has further stated that she read over Amravati's statement to her; that Amravati accepted it to be correct; that as she could not take her signature, she took impression of her right big toe and handed over the papers to the police. PW14 has identified the dying declaration scribed by her and has identified the toe impression of Amravati and her own signature. The said dying declaration was recorded on 15th April 2017 at about 4:35 pm and was marked as Exh. P-67.

It is pertinent to note that the Apex Court in *Sher Singh & Anr. vs. State of Punjab*¹ has held in para 16 as under :

1 (2008) 4 SCC 265

“16 What is essential is that the person recording the 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 without there being the doctor's opinion to that effect, it can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certificate by the doctor is essentially a rule of caution and, therefore, the voluntary and truthful nature of a statement can be established otherwise.”

In the facts, PW14-Deepika Parab, after making necessary inquiry, recorded her dying declaration and as such, there is no reason to disbelieve her testimony and dying declaration recorded by her, in the absence of a certification from the doctor.

There is no cross-examination of the said witness, with respect to what was disclosed by Amravati to PW14 i.e. the contents of dying declaration or that Amravati was not in a position to speak. The only cross-examination of PW14 is to the effect, that there is no separate register or document maintained with regard to recording of dying declaration i.e. except Exh.P-

67, there is no other document to show that she had recorded the dying declaration; and that she had not taken any endorsement on the dying declaration of the concerned medical officer. PW14 has denied the suggestion that she had not visited Masina Hospital or that she had not met Amravati or that she was deposing falsely at the behest of the police.

As noted aforesaid, there is no cross-examination of this witness vis-a-vis what was disclosed to her by Amravati i.e. the act of the accused of pouring petrol and setting her ablaze. No doubt, there is no endorsement of any doctor, when PW14 recorded Amravati's statement, however, there is no challenge to the same or with respect to Amravati's medical condition.

21 The prosecution examined PW10-Dr.Suhas Abhyankar, the doctor, who treated Amravati (deceased) at Masina Hospital. PW10-Dr. Abhyankar has stated that he was working with the Masina Hospital as a Consultant Reconstructive

Surgeon since 2006; that a patient by name Amravati was brought to the hospital on 14th April 2017; that she was forwarded from Sion Hospital; that they started giving her treatment, as soon as she came to Masina Hospital; that the general condition of the patient was poor; that she was admitted in the hospital at about 4:15 pm; that Amravati had 94% burn injuries on her face, neck, both upper extremities, chest, back, buttocks, lower limbs, and private parts; that the foot soles and some part of back were not having burn injuries; and, that she was under treatment till 27th April 2017. PW10 has further deposed that from 25th April 2017, Amravati's general condition deteriorated, as a result of infection and septicimia, resulting in multi organ failure. According to PW10, Amravati was initially in a position to speak and thereafter, she became semiconscious and that on 27th April 2017, she died because of the said injuries and complications. PW10 has placed on record the admission form which is at Exhibit P-52 and the Certificate which is at Exhibit P-54. PW10 has categorically stated that the injuries were flame burn injuries.

In the postmortem report, Amravati's cause of death is stated to be *"infection and septicimia, resulting in multi organ failure"*.

In his cross-examination, PW10, although has admitted that he was not present when Amravati was brought to the hospital, he has stated that he was informed about Amravati's condition at 4:15 p.m itself and hence, he knew her medical condition and as such, had given instructions regarding treatment to be given to Amravati. According to PW10, he had personally examined the patient at 7:00 p.m on the same day of admission.

22 Taking into consideration the aforesaid evidence vis-a-vis dying declaration, we have no manner of doubt that the prosecution has proved the oral, as well as written dying declarations made to the witnesses by legal, cogent and admissible evidence. All the dying declarations, oral and written corroborate each other. This evidence in turn is also corroborated by the ocular testimony of PW1- Roshni and

PW7-Kanta (injured).

23 The fact, that PW7-Kanta Eikka, injured witness had also sustained injuries has been duly proved by PW16-Dr. Sunil Pandey. PW16 was working at the Sion Hospital at the relevant time. He has stated that on 14th April 2017, Kanta was brought to the hospital; that she gave history of homicidal burns; that on examination, he found that Kanta had sustained burns over right upper arm; burns injury over right foot; burns over left foot; flame burns over right side of chest and abdomen and flame burns over a small portion of back on right side. He has stated that the said injuries were grievous in nature and were life threatening. He has identified the medical certificate, which bears his signature, Exh.P-72.

 There is nothing in the cross-examination of PW16-Dr.Sunil Pandey with respect to the disclosure made by Kanta to him i.e. `history of homicidal burns`.

24 As far as Angel, aged 2 years is concerned, it appears that Angel sustained 60% burn injuries. PW11-Dr.Siddharth Sawardekar has stated that he was attached to the Sion Hospital as a Resident Doctor at the relevant time; that on 22nd April 2017, he was assigned postmortem duty alongwith another doctor; that the body of Angel was forwarded by the police for postmortem, pursuant to which, he conducted the postmortem on Angel on 22nd April 2017. According to PW11, on observing the body, he found 60% burn injuries on Angel. On internal examination, he found infections in lung and spleen. The cause of death stated by PW11 is ‘Septicemia following burns (unnatural)’. He has identified his signature on the postmortem report, which is at Exh.P-57. He has categorically deposed that the injuries to Angel were such that it would cause death in natural course, if left untreated.

25 The prosecution examined PW6-Suresh Valanju, the

shop-keeper, who had sold the lighter to the accused. PW6 has stated that he was running a stall by the name "*Sadguru Krupa Store*" and would sell miscellaneous items at Band Stand; that he knew the accused; that the accused had come to his shop on 14th April 2017 at 8:00 a.m and purchased a cigarette lighter from his shop for Rs.25/-. He has identified the lighter (Article 9) purchased from his shop.

In his cross-examination, PW6 has denied that he was deposing falsely on the say of the police and that the accused had not purchased a lighter from him.

26 Considering the evidence as stated aforesaid, we find that the prosecution has proved the complicity of the accused in the crime, beyond reasonable doubt.

27 Infact, the fact that the accused committed the said act of throwing petrol on Amravati is not disputed by the

accused. In this connection, it would be pertinent to note the answers to the questions of the accused under 313 of Cr.P.C. To question No. 3, when the accused was asked with respect to the incident that had taken place 15 days prior to 14th April 2017 i.e. of lowering his pant and showing his private part to PW1-Roshni, the accused has stated “मुझे छक्का कहा था इस लिये मैने बताया, मुझे मालूम नही कि वो १७ साल कि है”. To question No. 6 that he poured petrol on PW1-Roshni, the accused has answered in the affirmative i.e. “डाला मैने”. To the question No. 7 that Roshni had stated that after pouring petrol, she started running and that the accused poured petrol on everybody present there, the accused answered, “बाकी लोगों के उपर नही डाला”. To question No. 28 that on the day of the incident, the accused had come there; that he was angry and had a kerosene bottle with him, the accused replied that ‘*he had a petrol bottle*’. To question No. 30 put to the accused that Kanta (PW7) in her evidence, has stated that the accused had poured kerosene on Amravati and some drops fell on them and thereafter the accused had set her ablaze

and in the said incident, she and her daughter-Angel also sustained burn injuries, the accused replied '*that he did not pour kerosene, but he poured petrol*'. To question No. 56 as to whether the accused wanted to say anything more, the accused replied as under :

"मेरे को छक्का हिजरा बोल रहे थे. इसलिये मैंने उनको जिंदा फुंक दिया, मैंने कुछ किया नहीं. में उनसे बात भी नहीं कर रहा था. मुझे दो बार छक्का हिजरा कहा."

28 From the aforesaid replies given by the accused in his 313 statement as well as the tenor of cross-examination of the concerned witnesses, it is evident that the accused has not challenged the act of throwing petrol on Amravati and PW1-Roshni and of setting Amravati ablaze. The reason offered by the accused is that he was called *Hijda/Chhakka*, as a result of which, he committed the said act.

29 Although, during the course of hearing, learned

counsel for the accused submitted that the accused was suffering from mental illness at the time of the incident, there is nothing in the cross-examination suggesting the same, nor have any medical case papers been produced to show that the accused was undergoing any treatment for his mental illness at the time when the incident took place or prior thereto. However, it appears that during the course of the trial, the advocate for the accused had filed an application on 18th September 2021, seeking medical check-up and treatment for the accused, since according to the advocate for the accused, the accused was not mentally stable. In the said application which is at page 97 of the paper-book (Exhibit 38), the advocate for the accused has stated that when the advocate interacted with the accused on 2nd September 2021, he was not speaking anything relevant; that he was speaking incoherently and that he told the advocate that the complainant and her mother (now deceased) used to call him *Hijda* and *Chhakka*. Accordingly, the advocate for the accused prayed that the accused be sent to J.J. Hospital for his medical examination,

i.e. for assessing his mental condition and for submitting a report. It appears that the trial Court allowed the said application and sent the accused for medical check-up to the Department of Psychiatry, J.J. Hospital. It appears from the document which is at page 102 of the paper-book that the accused was examined by a panel of three mental health experts and accordingly a report was submitted by them dated 23rd October 2021 to the Court. According to the said mental health experts, the accused was assessed on four days between 29th September 2021 to 18th October 2021. Accordingly the said Panel of three doctors submitted their report to the Superintendent, J.J. Group of Hospitals dated 23rd October 2021 with the psychiatric evaluation of the accused. The same reads thus :

“MENTAL HEALTH REPORT

Mr. Deepak Birbhahadur Jath, age 32 years, Hindu by religion, an Inmate in Mumbai Central Prison, was referred by Superintendent, JJH for Psychiatric evaluation and reporting.

He was assessed by Associate Professor, Assistant Professor and Junior resident between 29/09/2021

to 18/10/2021 for 4 days. On Mental Status Examination: He is conscious, cooperative, communicative; Attention is aroused and sustained; eye to eye contact initiated and maintained; rapport established; oriented to time, place and person; Speech and thought: continuous, coherent, occasionally irrelevant, pressure of speech+, clang association + Delusion of persecution+, Delusion of grandiose identity and ability+He was advised treatment but refused as he denied having any illness. Concept is intact; no perceptual abnormality, Mood euthymic, Affect- Hostile; Insight-Absent; Judgment- Impaired

IMPRESSION: *1. He is suffering from Psychosis which is a severe Mental Illness.*

2. He is of unsound Mind at present.

3. He requires treatment and admission preferably in RMH Thane in view of severity of mental illness and lack of Insight. 4. His mental state long back (at the time of crime) cannot be determined.”

30 It is also a matter of record that the accused was declared unfit for trial on 23rd October 2021 and the trial was not conducted for the said reason. The trial proceeded from 10th June 2022, only when he was declared fit for trial.

31 Taking all the aforesaid factors into consideration, we now proceed to consider whether the facts in hand warrant confirmation of the death sentence of the accused i.e. whether the case in hand can be termed as a ‘rarest of rare case’.

32 Before we proceed to consider whether the case in hand warrants confirmation of death sentence or not, or whether the case falls in the category of ‘rarest of rare case’, it would be apposite to consider the law on this subject.

33 In order to consider the same, we, vide order dated 8th July 2024, called for a report with respect to the conduct of the accused as well as the psychiatric and psychological report and all medical case papers with respect to his mental and physical health/examination done, till that date, having regard to the judgment of the Apex Court in *Manoj & Ors. v. State of Madhya Pradesh*². The said report and the relevant documents were submitted to this Court on 11th July 2024. The opinion

2 (2023) 2 SCC 353

given by the Medical Officer, Kolhapur Central Prison in the report dated 10th July 2024, is reproduced as under :

“As per opinion given today by Psychiatrician from Govt. C.P.R. Hospital, Kolhapur the provision has been kept by jail authority to sent the prisoner to Sassoon Hospital, Pune for his ailments.

At present the health condition of the said prisoner is clinically stable. He is conscious, Oriented, Ambulatory and Hemodynamically stable.”

34 As far as the conduct of the accused in jail is concerned, the Superintendent of Kolhapur Central Prison, has submitted the report dated 10th July 2024, which reads thus :

"कोल्हापूर मध्यवर्ती कारागृहातील मृत्युदंड शिक्षा बंदी क.८/८०६२ दिपक बीर बहादुर जाट हा दि.- २७.०१. २०२४ रोजी मुंबई मध्यवर्ती कारागृह येथून दाखल झालेला आहे. सदर बंदी मृत्युदंडाची शिक्षा भोगत असल्यामुळे बंदीस सुरक्षा कारणास्तव कारागृहातील अतिसुरक्षा विभागात (अंडासेल) ठेवण्यात आलेले आहे. सदर बंदीने कारागृहात दाखल झालेपासून कोणतेही गैरवर्तन केलेले नसून, बंदीची कारागृहातील वर्तुणूक समाधानकारक आहे. बंदी कारागृहातील दैनंदिन कामे स्वतः करित आहे. बंदीचे कारागृहातील अधिकारी व कर्मचारी यांचेशी वागणूक चांगली आहे. कारागृहीन शिस्त व नियमांचे पालन करतो. सदर बंदी मृत्युदंडाची शिक्षा भोगत असल्यामुळे त्यास कारागृहात काम देण्यात आलेले नाही.”

English translation of the above report is as under :

"Kolhapur Central Jail Death Penalty Convict No. C/8062 Deepak Bir Bahadur Jat has been admitted from Mumbai Central Jail on 27.01.2024. As the said convict is serving the death penalty, the convict has been kept in the High Security Section (Andacell) of the prison for security reasons. The said convict has not committed any misbehaviour since his incarceration and the behaviour of the convict in the prison is satisfactory. The convict is doing the daily tasks in the prison by himself. Convict's behaviour towards Prison Officials and Staff is good. Convict follows discipline and rules of the prison. As the said convict is serving the death penalty, he has not been given work in the prison."

The law with respect to when death sentence can be awarded and the factors to be borne in mind and to be taken into consideration, is no longer *res integra*.

35 In ***Bachan Singh v. State of Punjab***³, the Apex Court in Paras 213, 214, 218 and 221 has observed thus :

"213. We will first notice some of the aggravating circumstances which, in the absence of any mitigating circumstance, have been regarded as an indication for imposition of the extreme penalty."

3 (1982) 3 SCC 24

214. Pre-planned, calculated, cold-blooded murder has always been regarded as one of an aggravated kind. In Jagmohan, it was reiterated by this Court that if a murder is "diabolically conceived and cruelly executed", it would justify the imposition of the death penalty on the murderer. The same principle was substantially reiterated by V.R. Krishna Iyer, J., speaking for the Bench, in Ediga Anamma, in these terms: The weapons used and the manner of their use, the horrendous features of the crime and hapless, helpless state of the victim, and the like, steel the heart of the law for a sterner sentence.....

Aggravating circumstances: A Court may, however, in the following cases impose the penalty of death in its discretion: (a) if the murder has been committed after previous planning and involves extreme brutality; or (b) if the murder involves exceptional depravity;

218. Stated broadly, there can be no objection to the acceptance of these indicators but as we have indicated already, we would prefer not to fetter judicial discretion by attempting to make an exhaustive enumeration one way or the other.....

221. Dr. Chitaley has suggested these mitigating factors: Mitigating circumstances: In the exercise of its discretion in the above cases, the Court shall take into account the following circumstances: (1) That the offence was committed under the influence of extreme mental or emotional disturbance. (2) The age of the accused. If the accused is young or old, he shall not be sentenced to death. (3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society. (4) The probability that the

accused can be reformed and rehabilitated. The State shall by evidence prove that the. accused does not satisfy the conditions 3 and 4 above. (5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence. (6) That the accused acted under the duress or domination of another person, (7) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct. 222. We will do no more than to say that these are undoubtedly relevant circumstances and must be given great weight in the determination of sentence. Some of these factors like extreme youth can instead be of compelling importance.

Judges should never be blood-thirsty. Hedging of murderers has never been too good for them. Facts and figures, albeit incomplete, furnished by the Union of India, show that in the past, Courts have inflicted the extreme penalty with extreme infrequency-a fact which attests to the caution and compassion which they have always brought to bear on the exercise of their sentencing discretion in so grave a matter. It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guidelines indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354(3), viz, that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed "

36 In *Swamy Shraddananda (2) v. State of Karnataka*⁴,

the Apex Court in paras 91 to 93 has observed as under :

“91. The legal position as enunciated in Pandit Kishori Lal, Gopal Vinayak Godse-(2000) 7 SCC 626, Mau Ram-(1981) 1 SCC 107, Ratan Singh-(1976) 3 SCC 470 and Shri Bhagwan-(2001) 6 SCC 296 and the unsound way in which remission is actually allowed in cases of life imprisonment make out a very strong case to make a special category for the very few cases where the death penalty might be substituted by the punishment of imprisonment for life or imprisonment for a term in excess of fourteen years and to put that category beyond the application of remission.

92. The matter may be looked at from a slightly different angle. The issue of sentencing has two aspects. A sentence may be excessive and unduly harsh or it may be highly disproportionately inadequate. When an accused comes to this court carrying a death sentence awarded by the trial court and confirmed by the High Court, this Court may find, as in the present appeal, that the case just falls short of the rarest of the rare category and may feel somewhat reluctant in endorsing the death sentence. But at the same time, having regard to the nature of the crime, the Court may strongly feel that a sentence of life imprisonment that subject to remission normally works out to a term of 14 years would be grossly disproportionate and inadequate. What then the Court should do? If the Court's option is limited only to two

4 (2008) 13 SCC 767

punishments, one a sentence of imprisonment, for all intents and purposes, of not more than 14 years and the other death, the court may feel tempted and find itself nudged into endorsing the death penalty. Such a course would indeed be disastrous. A far more just, reasonable and proper course would be to expand the options and to take over what, as a matter of fact, lawfully belongs to the court, i.e., the vast hiatus between 14 years' imprisonment and death. It needs to be emphasized that the Court would take recourse to the expanded option primarily because in the facts of the case, the sentence of 14 years imprisonment would amount to no punishment at all.

93. Further, the formalisation of a special category of sentence, though for an extremely few number of cases, shall have the great advantage of having the death penalty on the statute book but to actually use it as little as possible, really in the rarest of the rare cases. This would only be a reassertion of the Constitution Bench decision in Bachan Singh-(1980) 2 SCC 684 besides being in accord with the modern trends in penology.”

37 In ***Rajendra Pralhadrao v. State of Maharashtra***⁵, the Apex Court held that while awarding death penalty, it is mandatory to consider the probability that the convict can be reformed and rehabilitated in the society and that the same must be seriously and earnestly considered.

5 (2019) 12 SCC 460

38 In *Mohinder Singh v. State of Punjab*⁶, the Apex Court in para 25 observed thus :

“25. It is well settled law that awarding of life sentence is a rule and death is an exception. The application of the “rarest of rare” case principle is dependent upon and differs from case to case. However, the principles laid down and reiterated in various decisions of this Court show that in a deliberately planned crime, executed meticulously in a diabolic manner, exhibiting inhuman conduct in a ghastly manner, touching the conscience of everyone and thereby disturbing the moral fiber of the society, would call for imposition of capital punishment in order to ensure that it acts as a deterrent. While we are convinced that the case of the prosecution based on the evidence adduced confirms the commission of offence by the appellant, however, we are of the considered opinion that still the case does not fall within the four corners of the “rarest of rare” cases.”

39 We have examined the facts and the evidence minutely as well as the parameters laid down in various judgments by the Apex Court. After examining the same, we do not find that this case, in any way, falls in the category of ‘rarest of rare case’ warranting death sentence to the accused. As noted above, the accused has infact

6 (2013) 3 SCC 294

admitted to committing the offence. The reason according to the accused was that he was being called *Hijda and Chhakka* by PW1-Roshni and Amravati.

40 In the said incident, Amravati and an innocent young girl-Angel, aged 2 years lost their lives and one Kanta (PW7) sustained serious burn injuries. There is no past history as far as the accused is concerned. We find that the intention of the accused was clear i.e. to cause the death of Amravati and PW1-Roshni. Of course, Roshni (PW1) survived as she ran away after petrol was poured on her, however, Amravati sustained burn injuries and succumbed to the same. Angel and Kanta, who were sitting next to Amravati, also sustained burn injuries i.e. Angel died and Kanta received serious burn injuries. Thus, the act of the accused resulting in the death of Amravati and Angel, would squarely fall under Section 302 of the IPC, and the act of causing injuries to PW6-Kanta, under Section 307 of the IPC.

41 If evidence of Kanta (PW7) is taken into consideration, she has categorically in her evidence, stated that the accused threw petrol on Amravati and since she and Angel were sitting next to Amravati, a few drops of petrol fell on her and Angel. Kanta (PW7) has further stated that the accused set Amravati ablaze, however, since they were next to Amravati, they also sustained burn injuries. As noted above in the said incident, Kanta sustained grievous injuries i.e. 60% burn injuries and her daughter Angel succumbed to death.

42 We find that the accused had come with the intent of killing Amravati and PW1-Roshni and not Kanta and her daughter Angel, however, in the process, both Amravati and Angel sustained injuries and succumbed to the same, and Kanta sustained injuries as stated aforesaid. Thus, the conviction awarded to the accused for causing the death of Amravati and Angel and injury to Kanta needs to be confirmed. We, in the facts, do not find that imposition of death penalty is the only

alternative, having regard to the evidence that has come on record and we also do not find that the case falls in the category of 'rarest of rare cases' warranting death sentence. Hence, the death sentence awarded to the accused for causing the death of Amravati and Angel requires to be commuted.

43 Accordingly, we pass the following order :

ORDER

- (i) Confirmation Case No. 4/2023 is dismissed;
- (ii) Appeal is partly allowed;
- (iii) The impugned judgment and order dated 7th November 2023, passed by the learned Additional Sessions Judge, Greater Bombay in Sessions Case No.562/2017, insofar as, it convicts the accused for the offence punishable under Section 302 of the IPC for causing the death of Amravati and Angel, stands confirmed, however, the sentence of death awarded to

the accused is commuted to imprisonment of life. The sentence of fine awarded is, however, maintained.

(iv) The conviction and sentence awarded to the accused vide the said judgment and order for the offence punishable under Section 307 of the IPC i.e. for causing injuries to Kanta, stands confirmed. The sentence of fine awarded is maintained.

44 In view of the above order, nothing survives for consideration in the Interim Application. The same stands disposed of accordingly.

45 All concerned to act on the authenticated copy of this judgment.

SHYAM C. CHANDAK, J.

REVATI MOHITE DERE, J.