



2024:DHC:9200-DB



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* IN THE HIGH COURT OF DELHI AT NEW DELHI

*Reserved on: 3rd October, 2024**Date of Decision: 28th November, 2024*

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CRL.A. 381/2002

NOWA BAI & ANR.

.....Appellants

Through: Mr. S.C. Buttan and Mr. Ojasvi
Annadi Shambu, Advocates.

versus

STATE

.....Respondent

Through: Mr. Ritesh Kumar Bahri, APP for the
State with Insp. Karmveer Singh, P.S.
Kalkaji.**CORAM:****JUSTICE PRATHIBA M. SINGH****JUSTICE AMIT SHARMA****JUDGMENT****AMIT SHARMA, J.**

1. The present appeal under Section 374 of the Code of Criminal Procedure, 1973, (for short, 'CrPC') has been filed assailing the judgment of conviction and order on sentence both dated 10.04.2002 passed by Sh. J.R. Aryan, learned Additional Sessions Judge, New Delhi whereby, the Appellants have been convicted in Sessions Case No. 133/95, arising out of FIR No. 60/1995, under Sections 304B/498A/34 of the Indian Penal Code, 1860, (for short, 'IPC'), registered at Police Station Kalkaji.

2. *Vide* the impugned judgment of conviction and order on sentence, the Appellants were convicted for the offences punishable under Sections 302/34 of the IPC. The Appellants were sentenced to undergo life imprisonment alongwith a fine of Rs. 500/- each, and in default of payment of fine, to



undergo rigorous imprisonment for a period of 1 month.

3. *Vide* order dated 09.07.2004, passed by Predecessor Bench of this Court in **Crl.M.A. 4261/2004**, sentence awarded to the Appellant No. 2, Kalabai, was suspended and she was directed to be released on bail on her furnishing personal bond in the sum of Rs. 5,000/- with one surety of like amount. However, she was not able to avail the benefits of the said order, and thereafter, *vide* order dated 21.02.2005, she was directed to be released on bail on her furnishing a personal bond in the sum of Rs. 5,000/-. Subsequently, on 29.05.2014, learned counsel for the Appellants had apprised this Court that Appellant No. 2 had since passed away on 27.10.2009 and placed on record a certified copy of her death certificate to this effect. Therefore, the present appeal stood abated *qua* Appellant No. 2 *vide* order dated 29.05.2014. Thus, this Court will be adjudicating the present appeal insofar as the conviction of the Appellant No. 1 is concerned.

FACTUAL BACKGROUND

4. The facts which are necessary for the disposal of present appeal are as follows: -

- i) On 13.02.1995 at around 12:30 P.M., *vide* DD No. 11 (Ex. PW-8/A), an information was received at police station Govind Puri from Safdarjung Hospital that one Smt. Jyoti (the deceased) w/o Santosh, aged around 23 years resident of Jawahar Lal Nehru Camp, has been admitted in the hospital with 80% burns by her uncle Gulab Joshi (PW-3).
- ii) Copy of the said DD entry was provided to ASI Ganga Dass (PW-8), who alongwith Constable Mahavir (PW-11) reached hospital. PW-8 thereafter, moved an application, being Ex. PW-8/B, to record the statement of the deceased by obtaining a fitness certificate from the



concerned doctor (PW-14). Deceased was declared fit to make statement by PW-14. Statement of the deceased was recorded (Ex. PW-8/C) and duly attested by PW-8 and the same also bears right thumb impression of the deceased. Later on, this statement was handed over to the main Investigating Officer, PW-15.

iii) In the meanwhile, investigation of the present case was assigned to PW-15, SI Uday Bir Singh, who after reaching Safdarjung Hospital tried to secure the presence of the concerned SDM to record the statement of the deceased. After reaching Patiala House Courts, PW-15 found that the concerned SDM, South was on leave and duty SDM, New Delhi will be looking after the work. PW-15 then, alongwith SDM, New Delhi, Sh. Rakesh Nagpal, PW-13, went to the hospital. Fitness certificate of the deceased to make statement was again sought from PW-14, who declared her fit to make statement. PW-13 recorded the statement of the deceased (Ex. PW-13/A) which has been sought to be proved as dying declaration by the prosecution in the present case.

iv) Sum and substance of both the statements of the deceased is that the present Appellants, who are sister-in-law and mother-in-law of the deceased respectively, were behind this incident whereby the deceased has been burnt. It was stated therein that the Appellants used to ill-treat and abuse the deceased. They also used to say to the deceased that she should be earning money and bring money to them from her parents and that day, in the early hours of the morning, when her husband was not at home, Appellant No. 1 caught hold of her while Appellant No. 2 set her on fire by spilling kerosine oil on her.

v) The said statement recorded by the SDM, New Delhi was kept



for obtaining further directions, and subsequently, SDM, South, Smt. Namita Dutta, *vide* letter being Ex. PW-10/A directed SHO, Kalkaji to register an FIR. In pursuance thereof, FIR No. 60/95 (Ex. PW-4/A) was registered on 14.02.1995 at 02:30 P.M. for the offences punishable under Sections 307/498A/34 of the IPC.

vi) During the investigation, IO/PW-15 *vide* Ex. PW-11/A has seized certain articles from the *jhuggi* of the victim, *viz* one old iron stove to which one oil tank (*tanki*) was attached (Ex. PA); two pieces of red coloured clothes which may be of a blouse or *dhoti* (Ex. PC); one box of match sticks in which few sticks were unused, and also, contained 2-3 burnt sticks (Ex. PB (colly)).

vii) The Appellants were arrested on 14.02.1995 and both of them were stated to have given confessional statements being Ex. PW-9/C and Ex. PW-9/D whereby they allegedly had admitted the fact that they had set the deceased on fire.

viii) Father of the deceased, PW-5, handed over an agreement (Ex. PW-1/C) to the police on 19.02.1995 wherein it is stated that husband of the deceased had given assurances to the parents of the latter to not treat the deceased with any kind of cruelty. The said agreement was taken into custody *vide* Ex. PW-5/A.

ix) In the meanwhile, on 14.02.1995 at 10:05 P.M., deceased succumbed to the burn injuries sustained by her on 13.02.1995. Her post-mortem was conducted in Safdarjung Hospital by PW-6. Post-mortem report, Ex. PW-6/A, shows the cause of death as shock as a result of 60% superficial and deep and 1st, 2nd and 3rd degree, type 1 and type 2 burns caused by the flames. MLC, Ex. PW-7/A, of the deceased was also



collected. Post-mortem report further revealed that the deceased was four months pregnant when she died and was expecting a child. After completion of investigation, chargesheet was filed before the Court of competent jurisdiction, arraying the Appellants as accused persons in the present case.

x) *Vide* order dated 10.12.1996, charges for the offences punishable under Section 498A and Section 304B/34 of the IPC were framed against both the Appellants. Trial commenced and most of the prosecution witnesses were examined before the learned Trial Court. Subsequently, learned ASJ framed an alternate charge for the offence punishable under Section 302 read with Section 34 of the IPC against the Appellants *vide* order dated 10.04.2001. Appellants pleaded not guilty to all the charges levelled against them. They were provided with an opportunity to recall prosecution witnesses which were examined prior to the framing of alternate charge *vide* order dated 10.04.2001. Accordingly, all prosecution witnesses except PW Nos. 4, 5, 9, 11 and 12 were re-called for cross-examination on the point of additional alternate charge.

xi) After culmination of the trial, learned Trial Court found the Appellants guilty for the offences punishable under Sections 302/34 of the IPC and sentenced them accordingly, as noted hereinabove. Appellants, however, were acquitted for the offences punishable under Sections 498A/304B/34 of the IPC. Hence, the present appeal has been filed assailing the said impugned judgment of conviction.

SUBMISSIONS ON BEHALF OF APPELLANT NO. 1

5. Learned Counsel for the Appellant No. 1 has raised the following contentions in support of the present appeal: -



- i) That the learned Trial Court has not correctly appreciated the evidence led by the prosecution as the same suffers from various infirmities and inconsistencies and has erred in convicting the Appellants on the basis of the same.
- ii) Attention of this Court has been drawn towards Ex. PW-8/B, application addressed to the Chief Medical Officer, Safdarjung Hospital by PW-8 whereby permission was sought to record the statement of the deceased and it is submitted that no time has been mentioned by the concerned doctor (PW-14) in the said application whereby the deceased was declared fit for making the statement.
- iii) Regarding the second dying declaration, Ex. PW-13/A, recorded by the then SDM, New Delhi (PW-13), it is submitted that the concerned doctor (PW-14), who had declared the deceased fit for making the statement, has stated that he had declared deceased fit to make statement at around 07:55 P.M., which is contrary to what has been stated by PW-13 in his testimony. Attention of this Court was drawn towards the testimony of PW-13 and it was submitted that the latter has stated that he had recorded the statement of the deceased at 07:45 P.M. Therefore, there is discrepancy as to the timeline of events that had taken place as per the case of the prosecution and the same, if found true, leads to conclusion that PW-13 had recorded the statement of the deceased when the concerned doctor, PW-14, had not even declared the former fit to make statement.
- iv) It has further been submitted that, as per the Rules enacted by this Court regarding the recording of dying declaration in Chapter 13-A of Delhi High Court Rules: Practice and Procedure (Volume III), SDM



is not a competent or authorised person to record a dying declaration as has been done in the present case. Reliance has been placed on Rule 2 of Chapter 13-A of the said Rules which reads as under: -

“2. Dying declarations to be recorded by Judicial Magistrates—(i) Where a person whose evidence is essential to the prosecution of a criminal charge or to the proper investigation of an alleged crime, is in danger of dying before the enquiry proceedings or the trial of the case commences, his statement, if possible, be got recorded by a Judicial Magistrate. When the police officer concerned with the investigation of the case or the medical officer attending upon such person apprehends that such person is in the danger of dying before the case is put in Court, he may apply to the Chief Judicial Magistrate, and, in his absence, to the seniormost Judicial Magistrate present at the headquarters, for recording the dying declaration.
(ii) On receiving such application, the Judicial Magistrate shall at once either himself proceed, or depute some other stipendiary Judicial Magistrate to record the dying declaration.”

Reliance has also been placed on **Smt. Madhu Bala v. State (Delhi Admn.), 1989 SCC OnLine Del 287**, to contend that it is mandatory for the investigating officer to apply to Chief Metropolitan Magistrate to depute some Magistrate for recording of dying declaration.

v) It is further the case of Appellant No. 1 that PW-13, after recording the statement of the deceased (Ex. PW-13/A), had handed over the said statement to the IO/PW-15 for further procedural compliance. Therefore, the possibility of the said statement being fabricated cannot be ruled out as the directions for registration of FIR in the present case were given by PW-10 on the next day i.e., 14.02.1995, *vide* Ex. PW-10/A. Attention of this Court has further been drawn towards the testimony of the concerned doctor (PW-14), who had declared the deceased fit to make statement, wherein he has stated that, he was not



present at the time when the statement of the deceased was recorded by PW-13. In view of these circumstances, it is submitted that dying declaration of the deceased (Ex. PW-13/A) is not free from doubt and has not been cogently proven by the prosecution.

vi) That the investigating officer, PW-15, after taking the articles enlisted in Ex. PW-11/A, into his possession has not sent them for forensic analysis to FSL. It is pointed out that among those articles there were burnt clothes which could have been crucial evidence in the present case regarding the presence of kerosine oil. It is further submitted that no inquest or *panchnama* report has been undertaken by the investigation officer in the present case required under Section 176 of the CrPC. It is also pointed out that IO had not inspected the crime spot on the date of alleged incident and has straight away taken the said articles into his custody on the very next day, i.e., 14.02.1995.

vii) It is argued that, as per the case of the prosecution, the deceased was set to fire by the Appellants by pouring kerosine oil on her, however, the post-mortem report (Ex. PW-6/A) as well as the MLC (Ex. PW-7/A) of the deceased does not find any mention of any smell or presence of kerosine oil on either body or scalp of the deceased. Attention of this Court has been drawn towards the testimonies of PW-6, who had conducted the post-mortem of the deceased, and PW-7, who has conducted the medical examination of the deceased, in support of this contention.

viii) It is also contended that in the MLC (Ex. PW-7/A) of the deceased, the date of her admission has been mentioned as 14.02.1995, and therefore, the first dying declaration (Ex. PW-8/C) cannot be taken



into account as the same has been recorded on 13.02.1995, a day prior to the date of admission of the deceased in the hospital.

ix) It is further submitted that, as per the post-mortem report (Ex. PW-6/A), the deceased died of cardiac arrest and the said report does not state the cause of death of the deceased as burn injuries. It is further pointed out that the place where the incident had taken place is a very densely populated area and the prosecution has not examined any witness from locality to corroborate their case. It is pointed out that the key witnesses, i.e., PW-2 and PW-3, who had rescued the deceased when she was allegedly set ablaze, have resiled from their previous statements given to the police and the prosecution has not been able to prove the presence of the Appellants at the spot of incident at the relevant point in time. It is further contended that both PW-2 and PW-3 in their testimonies have not stated anything regarding the presence of the Appellants at the spot of the incident at their respective arrival at the spot.

x) It is also contended that the stove, Ex. PA, which was recovered by IO/PW-15 was not having any oil tank attached to it and what, in fact, recovered was a burner stove which clearly rules out the possibility of kerosine oil being used in the present case.

xi) Therefore, in view of the aforesaid submissions, it is submitted that Appellant No. 1 is now aged around 65-70 years and 30 years have passed since the said incident. Despite this being the position, the Appellant No. 1 has to suffer the conviction. Moreover, the Appellant No. 1 has undergone incarceration for approximately 5 ½ years including the remissions earned by her during the said custody period which could



also be a mitigating factor in considering the present appeal.

SUBMISSIONS ON BEHALF OF STATE/RESPONDENT

6. Learned APP for the State, while refuting the contentions of the learned Counsel for the Appellant(s), has made the following submissions: -

i) That there have been four clear and cogent statements made by the deceased whereby consistent allegations have been made against the present Appellants. Out of these, three are written however, one is oral. The details of the said statements are as follows: -

a) PW-7 in his testimony has stated that he had mentioned the alleged history in the MLC, Ex. PW-7/A, at the instance of the deceased on 13.02.1995;

b) Ex. PW-8/C, statement of the deceased as recorded by PW-8 on 13.02.1995;

c) Ex. PW-13/A, statement of the deceased as recorded by PW-13 on 13.02.1995;

d) PW-1, brother of the deceased, had stated in his testimony before the learned Trial Court, that the deceased had narrated the entire incident to him when he had met his sister in the hospital on the said day when the incident had taken place.

ii) Learned APP has pointed out that the PW-7 in his cross-examination, while answering the Court question on 28.07.2001, has clarified that date 14.02.1995 in the portions encircled then, in Ex. PW-7/A, appeared to have been inadvertently erroneously mentioned. Therefore, there is no inconsistency in the timeline of events as occasioned, per the case of the prosecution.

iii) It is further submitted that even though PW-3 has turned hostile



however, the fact that he had found the deceased near her house and that he had taken the deceased to hospital, stood duly proved before the learned Trial Court. Regarding the testimony of PW-2, learned APP has submitted that he was a child witness at the relevant point in time and can be tutored. It is further submitted that there were many contradictions in the testimonies of PW-2 and PW-3 and the learned Trial Court after duly appreciating the material on record has given findings regarding the same in the para 17 of the impugned judgment. Moreover, it is contended that PW-2 was a witness who had to prove the site plan, Ex. PW-15/A, and the learned Trial Court has, after duly appreciating the said contradiction, has rightly discarded his testimony.

iv) Regarding the delay in the registration of FIR, it is submitted that on 13.02.1995 SDM, South was on leave and the affairs were looked after by SDM, New Delhi, who has, in fact, recorded the statement of the deceased (Ex. PW-13/A). Attention of this Court has drawn towards the testimony of IO/PW-15, who has stated that on 14.02.1995, all relevant documents pertaining to the present case were produced before the SDM, South (PW-10), who had directed the registration of FIR on the basis of the said documents. Reliance has also been placed on the testimony of PW-10, wherein SDM, South, has herself explained the circumstances in which the direction for registration of FIR in the present case was made.

v) It is further submitted that the allegations and contents of all the statements of the deceased are similar and there has been no inconsistency *qua* the allegations levelled by the deceased against the present Appellant insofar as the offence for which they have been



convicted.

vi) Regarding the mandate as provided under Rule 2 of the Chapter 13-A of the Delhi High Court Rules for Practice and Procedure (Volume III), it submitted that the language of the said provision demonstrates that the same is directory and not mandatory in nature as the words which have been employed are “if possible”. Therefore, the same does not cast a mandatory duty on the investigating officer to get the dying declaration recorded by a Judicial Magistrate. Reliance has been placed on **Hansraj v. State, 2006 SCC OnLine Del 39**, to contend that only thing the Court has to see is whether dying declaration is actually made and genuineness of the same cannot be challenged on technical grounds. Reliance has also been placed on **Balbir Singh & Anr. v. State of Punjab, AIR 2006 SC 3221**, to contend that the dying declaration need not necessarily be made before a Judicial Magistrate.

vii) Attention of this Court has been drawn towards the statement of the deceased (Ex. PW-13/A) recorded by PW-13, and it is submitted that the same has been recorded in the form of questions and answers which lends more credence to it. It is also argued that SDMs in Delhi exercise both judicial as well as quasi-judicial powers.

viii) Regarding the recovery of the stove (Ex. PA), it is submitted that the said stove was recovered from the house of the Appellant, place of incident, and the recovery memo (Ex. PW-11/A) explicitly records that there was a “*tel ki tanki*” attached to it. Therefore, the presence of kerosine oil at the spot of incident cannot be ruled out.

ix) In circumstances thereof and the aforesaid submissions, present case is a fit case of conviction for the offence punishable under Section



302 of the IPC in view of the cogent incriminating evidence placed on record.

x) Learned APP has further placed reliance on the following precedents: -

- a. Nawab v. State of Uttarakhand, (2020) 2 SCC 736;
- b. Bhagwan v. State of Maharashtra through Secretary Home, Mumbai, Maharashtra, 2019(10) Scale;
- c. Ravinder Kaur Grewal & Ors. v. Manjit Kaur & Ors, 2019(10) Scale;
- d. Purshottam Chopra and another v. State (Govt. of NCT Delhi), AIR 2020 SC 476;
- e. Gajaraba Bhikhubha Vadher v. Sumara Umar Amad, AIR 2020 SC 506: AIR Online 2020 SC 31: AIR Online 2020 SC 15;
- f. State of M.P. v. Ashok & Ors. etc., 2015 [4] JCC 2228;
- g. Khushal Rao v. State of Bombay, AIR 1958 SC 22;
- h. Crown Aluminium works v. Their Workmen, AIR 1958 SC 30;
- i. Gulzari Lal v. State of Haryana, 2016 [1] JCC 731;
- j. Ali Hasan @ Mallah v. State of Uttarakhand, 2016 [1] JCC 736;
- k. U.P. State Road Transport Corporation, Dehradun v. Suresh Pal, AIR 2006 SC 3227;
- l. Kodadi Srinivasa Lingam & Anr. v. The State of Andhra Pradesh, JT 2002 (6) SC 200;
- m. Bharatiya Gramin Punarrachana Sanstha v. Vijay Kumar & Ors., JT 2002 (6) SC 201.



REJOINDER SUBMISSIONS ON BEHALF OF APPELLANT NO. 1

7. Learned Counsel for the Appellant has made the following submissions in rejoinder: -

- i) That the general condition of the deceased was critical as she was in a dehydrated state. Attention of this Court has been drawn towards the MLC (Ex. PW-7/A) of the deceased to show that the doctor had opined that her central nervous system (CNS) was confused. However, learned APP for the State while disputing the same has submitted that it is 'confirmed', not confused. It is further pointed out that the respiration by deceased was shallow and since she was not administered any medication, her statement, in view of the fact that she had 60% burns, cannot be relied upon.
- ii) The said discrepancy regarding the confirmed or confused was not put to PW-7 while his testimony was recorded. Nothing has also been narrated by either PW-2 or PW-3, who had taken the deceased to the hospital as to who had set her on fire.
- iii) Fact that the Appellants were residing together with the deceased in a same house was not put to them while their statement under Section 313 of the CrPC was recorded. It has also been pointed out that the role ascribed to the Appellants by the deceased in her statement given to SDM, PW-13, has not been narrated to the statement given to the police ASI, PW-8. Moreover, none of the prosecution witnesses have stated that they had seen the Appellants running or escaping from their home (*jhuggi*) and it is only PW-3 who had seen the deceased at the road side at a distance of about 500 yards of her house.
- iv) It is also pointed out that IO/PW-15 had stated that he had



recovered an iron gas stove and not a kerosene stove from the home of the Appellants *vide* seizure memo Ex. PW-11/A. It is further the case of the Appellant that it was a UVS burner stove which was taken into possession by the IO/PW-15 and no traces of kerosene oil have been stated to be recovered from the site of the incident.

ANALYSIS AND FINDINGS

8. The entire case of the prosecution hinges upon the following alleged dying declarations made by the deceased: -

(a) In MLC (Ex. PW-7/A), the present incident was recorded in the following manner: -

“Alleged H/O burn injury sustained because her sister-in-law (nanad) poured kerosene oil assisted by mother-in-law who then lighted fire”.

The aforesaid MLC was recorded at 9 A.M. on 13.02.1995 and the alleged date and time of the incident was stated to be 7 A.M. on 13.02.1995, i.e., the same day. The aforesaid history was recorded by Dr Manoj Gupta (PW-7) who in his testimony before the learned Trial Court stated that the alleged history was given by the patient herself. The testimony of PW-7 as recorded before the learned Trial Court is as follows: -

“On 13.02.1995 I examined Jyoti w/o Santosh aged about 23 years. Alleged history given by patient herself is that she sustained burns because her sister-in-law (nanad) poured kerosene oil on her, assisted by mother-in-law who then lighted fire. The time of sustaining burns was given as 7 AM. On medical examination, I found that Jyoti has sustained 60% burns which I have mentioned in MLC Ex. PW7/A; which is prepared by me and bears my signatures at point A. On local examination, I found that 2nd degree burns were there on the front of the chest, upper part of right arm, front and back of left arm, and on front and back of thigh of Jyoti. I have mentioned in the MLC that burns were caused by fire.”



(b) Sanjay Joshi (PW-1), brother of the deceased, in his examination-in-chief before the learned Trial Court gave the following statement: -

“Then I went to the hospital where my sister met me and, on my asking, she told that both the accused persons present in Court had burnt her. My sister-Jyoti died two days thereafter in the hospital.”

This witness does not give any specific time as to when the deceased informed him about the incident. However, in his cross-examination, after being re-called post framing of charge for the offence punishable under Section 302 of the IPC, he stated that, when she (deceased) was admitted in the hospital she (deceased) was unconscious, however she had spoken to him during the periods when she regained consciousness in between.

(c) ASI Ganga Dass (PW-8) reached Safdarjung hospital on receipt on DD No. 11 (Ex. PW-8/A) and moved an application (Ex. PW-8/B) to record the statement of injured Jyoti on which an endorsement was made by the doctor (PW-14) that the patient was fit for making statement. The English translation of the dying declaration (Ex. PW-8/C) as recorded by PW-8 is as under: -

“Statement of Jyoti W/o Santosh R/o H. No. B 43 Nehru Camp, Govind Puri

Stated that I reside at the aforesaid address. My marriage was solemnised 6-7 years ago. I have a son aged 3 years old. I am four month pregnant. My mother-in-law (Saas) Kalawati and Sister-in-law (Nanad) Nawa said that either throw her out or kill her. They used to say that go for work and bring money. (When) My mother-in-law and sister-in-law were throwing me out of the house, I did not go out of the house therefore they started abusing me in filthy language. My husband was not at home. My mother-in-law caught hold of me and my sister-in-law poured kerosene oil on me. I started removing my Saree. Then, I was set on fire by lighting a match stick. Then, both of them ran outside. It happened at 7 in the morning. I also came out running to the road. My mother-in-law used to quarrel with me on daily basis. On the road, I came across my Uncle (Chacha) Gulab Joshi. Thereafter, I fell unconscious. My mother-in-law and sister-in-law had set me on fire deliberately by pouring kerosene oil with the intent to kill me. Legal action be taken against them.”



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(RTI of Jyoti)
Sd/- (illegible)
(In English)"

(d) Thereafter, it is the case of the prosecution that SI Uday Bir Singh (PW-15) brought SDM (PW-13) to the hospital. Dr. Haripal Singh (PW-14) declared the injured-Jyoti fit for statement on 13.02.1995 at 07:55 PM by making endorsement on Ex. PW-8/B. The English translation of the dying declaration of the deceased (Ex. PW-13/A) as recorded by SDM (PW-13) on 13.02.1995, is as under: -

“Statement of Jyoti W/o Santosh R/o H. No. B 43, Jhuggi Jawahar Lal Nehru Camp, Govind Puri, Aged 23 Years

1. Name: Jyoti
 2. Name of Husband: Santosh
 3. Address: The aforesaid given
 4. Age: 23 Years
 5. For how many years you are married? : Approximately 6 years
 6. How many children do you have? : One 3 year old son.
 7. Relation with Husband ? : Relation with husband was good.
 8. Is there issue of Dowry? : Mother-in-law and sister-in-law Nawa Bai used to abuse me in filthy language and say that either earn money by working or bring money from your parents' house.
 9. How did this fire occur? : On 13.02.95 at 07:00 in the morning, my husband was not at home. My mother-in-law caught hold of me and my sister-in-law, Nawa Bai poured kerosene oil on me. They had kept the door of the room locked from inside. I was not able to raise an alarm because my mother-in-law had shut my mouth by her hand and I was set on fire with the help of a matchstick and both of them ran away after opening the door and I also being set ablaze ran behind them. Due to this burning, I fell unconscious. I do not know who brought me to the hospital.
- The statement was read over to me and I put my thumb impression."

(RTI of Jyoti)
Recorded by me
Sd/- (illegible)
(In English)
Stamp of Sub Divisional Magistrate
New Delhi."



9. Apart from the aforesaid dying declaration, the prosecution had also cited Gulab Joshi (PW-3) and Anklesh (PW-2) as witnesses in support of their case. Gulab Joshi (PW-3), who was the uncle of the deceased, had brought her to the hospital. The deceased in her first dying declaration (Ex. PW-8/C) had stated that her uncle Gulab Joshi (PW-3) had brought her to the hospital. Although in her subsequent dying declaration (Ex. PW-13/A), she has stated that, “due to burning she had become unconscious and did not know who brought her to the hospital”. This witness, PW-3, in his statement before the learned Trial Court has stated as under: -

“I along with Sudhakar and Ganesh were returning back after easing out, at about 7 A.M. and we saw Jyoti lying in a burned condition on the road side, at a distance of 500 yards from her house. We took Jyoti to the hospital. I cannot tell how Jyoti had died.”

This witness was, subsequently, declared hostile by the prosecution as he did not testify that the Appellants used to ill-treat the deceased. It is not the case of the prosecution that the deceased while being taken to the hospital gave any statement to this witness (PW-3) with regard to the cause of her burn injuries.

9.1 Similarly, Anklesh (PW-2), was cited by the prosecution as a witness to the site plan only. However, when he entered the witness box before the learned Trial Court, he gave the following statement: -

“About 2-2 ½ years ago, I was returning back after easing myself in the morning at about 8:00 A.M. I saw public persons were standing outside the house of my maternal aunt (Maami), who were shouting that some one has burnt inside. The door was bolted from inside as the roof of the jhuggi was lifted upward and found that Jyoti was burning. The police did not take any photographs of the spot in my presence.”

This witness again was declared hostile by the prosecution.



9.2 It is also the case of the prosecution that SI Uday Bir Singh (PW-15) had gone to the spot and seized one stove, two pieces of burned clothes, one matchbox with 2-3 burned match sticks which were lying in the *jhuggi* where the deceased had caught fire. The same were seized *vide* Ex. PW-11/A, the description of the aforesaid stove in the said seizure memo has been made in the following manner: -

“(1) एक अदद पुराना stove लोहे का जिसमें Burner के साथ तेल की टंकी लगी है तथा जिसमें से तेल निकल कर उड़लाना ब्यान हुआ है। जिसको कपड़े के पुलिंदा जात में रखकर मोहर निशानी U.B.S. से सर्वमोहर किया गया.”

The aforesaid articles as mentioned in the said seizure memo were never sent to CFSL for any examination. It is pertinent to note that the case of the prosecution on the basis of the dying declarations is that the Appellants had poured kerosene oil on the deceased in order to burn her.

9.3 Dr Chander Kant (PW-6), who conducted the post mortem of the deceased and prepared the postmortem report (Ex. PW-6/A), in his testimony before the learned Trial Court has categorically stated that there was no smell of the kerosene oil coming out of the scalp of the body of the deceased. He also stated that there were singeing of scalp hairs, eye brows, eye lashes present. He further stated that during external examination of the deceased, I found the following ante mortem injuries on the body, which as recorded in his testimony are as follows: -

“60% superficial and deep ante mortem burns covering right cheek, left cheek, lower lip, front of neck, both breast, upper part of chest, both upper arms, part of back, lower part of abdomen, both lower limb upto knee region including perineum. The skin was peeled of at places revealing area of vital reactions.

During internal examination of the deceased, I noted the following: -

1. Brain was congested. 2. Laryngs was congested with fine carbon soots mixed with mucous present at the bifurcation of trachea. 3.



Both lungs, liver, spleen and kidneys were congested. 4. Utterus contained material of conception of a male foetus 100 grams in weight.”

9.4 The Appellants in their defence had examined Subhadra Devi (DW-1), who gave the following testimony: -

“About 6 years back I had gone to fetch milk and when I came back I saw smoke coming out of the *jhuggi* of Jyoti. The *jhuggi* of Jyoti is situated at a distance of 4 *jhuggis* from my *jhuggi*. I raised alarm and many people collected at the spot. One boy Aklesh went inside the *jhuggi* after removing the portion of the roof and he went inside. The door was locked from inside the *jhuggi*. He opened the door from inside and came out and after him Jyoti also came out in burnt state. After sometime Gulab uncle of Jyoti came and took her to hospital in a 3 wheeler *schhoter*. When Anklesh opened the door from inside the *jhuggi* there was on one inside except Jyoti.”

She was cross-examined by the learned APP of the State wherein she stated that the deceased was living in the said *jhuggi* with her husband and mother-in-law Kalabai (Appellant No. 2) and Nawa Bai, Appellant No.1, used to live 3/5 *jhuggis* away from that of the deceased and she (Nawa Bai) was married. She further denied the suggestion given by the learned APP that she was deposing falsely in order to save the Appellants as the latter are her neighbours. She further denied the suggestion that deceased was admitted in the hospital by her husband (Santosh) and volunteered that she was taken to the hospital by Gulab Joshi (PW-3).

10. As can be observed from the aforesaid discussion, apart from the dying declarations there is no evidence on record to prove the presence of the present Appellant No. 1 (Nawa Bai) at the spot on the said date and time of the incident. However, it has come on record that Appellant No. 2-Kalawati, who was mother-in-law of the deceased and was living with her. Thus, as pointed hereinabove, the only incriminating evidence against the present Appellant



are the four alleged dying declarations made by the deceased which have to be analysed.

11. Law with respect to appreciating the evidence in the nature of dying declaration has been the subject matter of various precedents and recently the Hon'ble Supreme Court in **Irfan @ Naka v. State of Uttar Pradesh, 2023 SCC OnLine SC 1060**, while discussing the importance and value of dying declaration has observed and held as under: -

“43. The juristic theory regarding the acceptability of a dying declaration is that such declaration is made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the man is induced by the most powerful consideration to speak only the truth. Notwithstanding the same, great caution must be exercised in considering the weight to be given to this species of evidence on account of the existence of many circumstances which may affect their truth. The situation in which a man is on the deathbed is so solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason, the requirements of oath and cross-examination are dispensed with. Since the accused has no power of cross-examination, the courts insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The court, however, should always be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. [See : *Laxman v. State of Maharashtra*, (2002) 6 SCC 710]

48. The justification for the sanctity/presumption attached to a dying declaration, is two fold; (i) ethically and religiously it is presumed that a person while at the brink of death will not lie, whereas (ii) from a public policy perspective it is to tackle a situation where the only witness to the crime is not available.

49. One of the earliest judicial pronouncements where the rule as above can be traced is the King's Bench decision of *the King v. William Woodcock*, (1789) 1 Leach 500 : 168 ER 352, where a dying woman blamed her husband for her mortal injuries, wherein Judge Eyre held this declaration to be admissible by observing:—

“...the general principle on which this species of evidence is admitted is, that they are declarations made in extremity, when the party is at



the point of death and when every hope of this world is gone : when every motive to falsehood is silent, and the mind is induced by the most powerful consideration to speak the truth; a situation so solemn, and so awful, is considered by the law as creating obligation equal to that which is imposed by a positive oath administered in a Court of Justice. (b) But a difficulty also arises with respect to these declarations; for it has not appeared and it seems impossible to find out, whether the deceased herself apprehended that she was in such a state of morality as would inevitably oblige her soon to answer before her Maker for the truth or falsehood of her assertions. Declarations so made are certainly entitled to credit; they ought therefore to be received in evidence : but the degree of credit to which they are entitled must always be a matter for the sober consideration of the Jury, under all the circumstances of the case."

(Emphasis supplied)

50. Interestingly, the last observation of Judge Eyre showcases, even at the inception of this principle, that the Courts were wary of the inherent weakness of dying declarations and cautioned for great care to be adopted.

51. It is significant to note the observations made by Taylor that "*Though these declarations, when deliberately made under a solemn sense of impending death, and concerning circumstances wherein the deceased is not likely to be mistaken, are entitled to great weight, if precisely identified, it should always be recollected that the accused has not the power of cross examination, a power quite as essential to the eliciting of the truth as the obligation of an oath can be, and that, where a witness has not a deep sense of accountability to his Maker, feelings of anger or revenge, or, in the case of mutual conflict, the natural desire of screening his own misconduct, may effect the accuracy of his statements and give a false colouring to the whole transaction. ...*". [See : Taylor on "*Treatise on the Law of Evidence*", 1931, 12th Edition Pg. 462]

52. It is observed in Corpus Juris Secundum Vol XL, Page 1283 that:

"In weighing dying declarations, the jury may consider the circumstances under which they were made, as, whether they were due to outside influence or were made in a spirit of revenge, or when declarant was unable or unwilling to state the facts, the inconsistent or contradictory character of the declarations, and the fact that deceased has not appeared and accused has been deprived of the opportunity to cross-examine him, and may give to them the credit and weight to which they believe, under all the circumstances, they are fairly and reasonably entitled."



53. In India in the relevant provision of Section 32 of the Act, 1872, the first exception to the rule against admissibility of hearsay evidence, is as under:

“32(1). When it relates to cause of death.— When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.”

54. Jon R. Waltz, American Jurist observed that, “It has been thought, rightly or wrongly, that Dying Declarations have intrinsic assurances of trustworthiness, making cross examination unnecessary. The notion is that a person who is in the process of dying, and knows it, will be truthful immediately before departing to meet his Maker. (Of course, the validity of this hearsay exceptions is open to some debate. What about the person who is not deeply religious? What of the person who, as his last act, seeks revenge by falsely naming a life-long enemy as his killer? How reliable is the perception and memory of a person who is dying?)” [See : Waltz, J.R. (1975) Criminal Evidence, Chicago : Nelson-Hall. pp.75-76]

55. The Privy Council in *Neville Nembhard v. The Queen*, [1982] 1 All ER 183, on Section 32(1) of the Act, 1872 opined that the evidence of dying declaration under the Indian law lacks the special quality as in Common Law and hence, the weight to be attached to a dying declaration admitted under Section 32 of the Act, 1872 would necessarily be less than that attached to a dying declaration admitted under the common law rules.

56. The below cited observations from the decision of *Nembhard* (supra) are of significant importance:

“final observation should be made concerning the cases already mentioned that have been decided in the Court of Appeal for Eastern Africa. It appears that rule of practice has been developed that when a dying declaration has been the only evidence implicating an accused person a conviction usually cannot be allowed to stand where there had been a failure to give a warning on the necessity for corroboration : see for example *Pius Jasunga s/o Akumu v. The Queen* (1954) 21 E.A.C.A. 331 and *Terikabi v. Uganda* [1975] E.A. 60. But it is important to notice that in the countries concerned, the admissibility of a dying declaration does not depend upon the common law test : upon the deceased having at the time a settled



hopeless expectation of impending death. Instead there is the very different statutory provision contained in section 32 (1) of the Indian Evidence Act, 1872. That section provides that statements of relevant facts made by a person who is dead are themselves relevant facts:

“When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.”

(emphasis added).

In *Pius Jasunga s/o Akumu v. The Queen* it was pointed out (for the reason associated with the italicised words in the subsection) that the weight to be attached to a dying declaration admitted by reference to section 32 of the Indian Evidence Act, 1872 would necessarily be less than that attached to a dying declaration admitted under the common law rules. The first kind of statement would lack that special quality that is thought to surround a declaration made by a dying man who was conscious of his condition and who had given up all hope of survival. Accordingly it may not seem surprising that the courts dealing with such statements have felt the need to exercise even more caution in the use to be made of them than is the case where the common law test is applied.”

57. This Court in *Muthu Kutty v. State by Inspector of Police, T.N.*, (2005) 9 SCC 113, while discussing the decision in *Woodcock* (supra) referred to above had cautioned the courts to ensure that a dying declaration is reliable before relying on it, with the following observations : -

“13. ... The general principle on which this species of evidence is admitted is that they are declarations made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn and so lawful is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice. These aspects have been eloquently stated by Eyre, L.C.B. in *R. v. Woodcock* ((1789) 1 Leach 500 : 168 ER 352). Shakespeare makes the wounded Melun, finding himself disbelieved while announcing the intended treachery of the Dauphin Lewis explain:

“Have I met hideous death within my view,



Retaining but a quantity of life,
Which bleeds away even as a form of wax,
Resolveth from his figure 'gainst the fire?
What is the world should make me now deceive,
Since I must lose the use of all deceit?
Why should I then be false since it is true
That I must die here and live hence by truth?"
(See King John, Act V, Scene IV)

The principle on which dying declaration is admitted in evidence is indicated in the legal maxim "nemo moriturus praesumitur mentire — a man will not meet his Maker with a lie in his mouth".

14. ... The situation in which a person is on the deathbed is so solemn and serene when he is dying that the grave position in which he is placed, is the reason in law to accept veracity of his statement. It is for this reason that the requirements of oath and cross-examination are dispensed with. Besides, should the dying declaration be excluded it will result in miscarriage of justice because the victim being generally the only eyewitness in a serious crime, the exclusion of the statement would leave the court without a scrap of evidence.

15. Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross-examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the court also insists that the dying declaration should be of such a nature as to inspire full confidence of the court in its correctness. The court has to be on guard that the statement of the deceased was not as a result of either tutoring, or prompting or a product of imagination. The court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailant. Once the court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence. ..."

(Emphasis supplied)

58. This Court in *Nallapati Sivaiah v. Sub-Divisional Officer, Guntur, Andhra Pradesh*, (2007) 15 SCC 465 and *Bhajju alias Karan Singh v. State of Madhya Pradesh*, (2012) 4 SCC 327 had explained the meaning and principles of dying declarations upon which its admissibility is founded, with the following observations:—



“20. There is a historical and a literary basis for recognition of dying declaration as an exception to the hearsay rule. Some authorities suggest the rule is of Shakespearian origin. In The Life and Death of King John, Shakespeare had made Lord Melun utter “Have I met hideous death within my view, retaining but a quantity of life, which bleeds away, ... lose the use of all deceit” and asked, “Why should I then be false, since it is true that I must die here and live hence by truth?” William Shakespeare, The Life and Death of King John, Act 5, Scene 4, lines 22-29.

xxx xxx xxx

22. It is equally well settled and needs no restatement at our hands that dying declaration can form the sole basis for conviction. But at the same time due care and caution must be exercised in considering weight to be given to dying declaration inasmuch as there could be any number of circumstances which may affect the truth. This Court in more than one decision has cautioned that the courts have always to be on guard to see that the dying declaration was not the result of either tutoring or prompting or a product of imagination. It is the duty of the courts to find that the deceased was in a fit state of mind to make the dying declaration. In order to satisfy itself that the deceased was in a fit mental condition to make the dying declaration, the courts have to look for the medical opinion.

23. It is not difficult to appreciate why dying declarations are admitted in evidence at a trial for murder, as a striking exception to the general rule against hearsay. For example, any sanction of the oath in the case of a living witness is thought to be balanced at least by the final conscience of the dying man. Nobody, it has been said, would wish to die with a lie on his lips. A dying declaration has got sanctity and a person giving the dying declaration will be the last to give untruth as he stands before his creator.

24. There is a legal maxim “nemo moriturus praesumitur mentire” meaning, that a man will not meet his Maker with a lie in his mouth. Woodroffe and Amir Ali, in their Treatise on Evidence Act state: “when a man is dying, the grave position in which he is placed is held by law to be a sufficient ground for his veracity and therefore the tests of oath and cross-examination are dispensed with”.

25. The court has to consider each case in the circumstances of the case. What value should be given to a dying declaration is left to court, which on assessment of the circumstances and the evidence and materials on record, will come to a conclusion about the truth or otherwise of the version, be it written, oral, verbal or by sign or by



gestures.”

(Emphasis supplied)

59. This Court in *Bhajju* (supra) has observed as under:

“23. The “dying declaration” essentially means the statement made by a person as to the cause of his death or as to the circumstances of the transaction resulting into his death. The admissibility of the dying declaration is based on the principle that the sense of impending death produces in a man's mind, the same feeling as that of a conscientious and virtuous man under oath. The dying declaration is admissible upon the consideration that the declaration was made in extremity, when the maker is at the point of death and when every hope of this world is gone, when every motive to file a false suit is silenced in the mind and the person deposing is induced by the most powerful considerations to speak the truth.

Xxx xxx xxx

26. The law is well settled that a dying declaration is admissible in evidence and the admissibility is founded on the principle of necessity. ...”

60. Since time immemorial, despite a general consensus of presuming that the dying declaration is true, they have not been *stricto-sensu* accepted, rather the general course of action has been that judge decides whether the essentials of a dying declaration are met and if it can be admissible, once done, it is upon the duty of the court to see the extent to which the dying declaration is entitled to credit.

61. In India too, a similar pattern is followed, where the Courts are first required to satisfy themselves that the dying declaration in question is reliable and truthful before placing any reliance upon it. Thus, dying declaration while carrying a presumption of being true must be wholly reliable and inspire confidence. Where there is any suspicion over the veracity of the same or the evidence on record shows that the dying declaration is not true it will only be considered as a piece of evidence but cannot be the basis for conviction alone.

62. There is no hard and fast rule for determining when a dying declaration should be accepted; the duty of the Court is to decide this question in the facts and surrounding circumstances of the case and be fully convinced of the truthfulness of the same. Certain factors below reproduced can be considered to determine the same, however, they will only affect the weight of the dying declaration and not its admissibility:—

(i) Whether the person making the statement was in expectation of death?



- (ii) Whether the dying declaration was made at the earliest opportunity?
“Rule of First Opportunity”
- (iii) Whether there is any reasonable suspicion to believe the dying declaration was put in the mouth of the dying person?
- (iv) Whether the dying declaration was a product of prompting, tutoring or leading at the instance of police or any interested party?
- (v) Whether the statement was not recorded properly?
- (vi) Whether, the dying declarant had opportunity to clearly observe the incident?
- (vii) Whether, the dying declaration has been consistent throughout?
- (viii) Whether, the dying declaration in itself is a manifestation/fiction of the dying person's imagination of what he thinks transpired?
- (ix) Whether, the dying declaration was itself voluntary?
- (x) In case of multiple dying declarations, whether, the first one inspires truth and consistent with the other dying declaration?
- (xi) Whether, as per the injuries, it would have been impossible for the deceased to make a dying declaration?

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

64. It is unsafe to record the conviction on the basis of a dying declaration alone in the cases where suspicion, like the case on hand is raised, as regards the correctness of the dying declaration. In such cases, the Court may have to look for some corroborative evidence by treating the dying declaration only as a piece of evidence. The evidence and material available on record must be properly weighed in each case to arrive at an appropriate conclusion. The reason why we say so is that in the case on hand, although the appellant-convict has been named in the two dying declarations as a person who set the room on fire yet the surrounding circumstances render such statement of the declarants very doubtful.

65. In *Sujit Biswas v. State of Assam*, (2013) 12 SCC 406, this Court, while examining the distinction between “proof beyond reasonable doubt” and “suspicion” in para 13 has held as under:

“13. Suspicion, however grave it may be, cannot take the place of proof, and there is a large difference between something that “may



be” proved, and something that “will be proved”. In a criminal trial, suspicion no matter how strong, cannot and must not be permitted to take place of proof. This is for the reason that the mental distance between “may be” and “must be” is quite large, and divides vague conjectures from sure conclusions. In a criminal case, the court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof. The large distance between “may be” true and “must be” true, must be covered by way of clear, cogent and unimpeachable evidence produced by the prosecution, before an accused is condemned as a convict, and the basic and golden rule must be applied. In such cases, while keeping in mind the distance between “may be” true and “must be” true, the court must maintain the vital distance between mere conjectures and sure conclusions to be arrived at, on the touchstone of dispassionate judicial scrutiny, based upon a complete and comprehensive appreciation of all features of the case, as well as the quality and credibility of the evidence brought on record. The court must ensure, that miscarriage of justice is avoided, and if the facts and circumstances of a case so demand, then the benefit of doubt must be given to the accused, keeping in mind that a reasonable doubt is not an imaginary, trivial or a merely probable doubt, but a fair doubt that is based upon reason and common sense.”

66. It may be true as said by this Court, speaking through Justice Krishna Iyer in *Dharm Das Wadhvani v. State of Uttar Pradesh*, (1974) 4 SCC 267, that the rule of benefit of reasonable doubt does not imply a frail willow bending to every whiff of hesitancy. Judges are made of sterner stuff and must take a practical view of the legitimate inferences flowing from the evidence, circumstantial or direct. Even applying this principle, we have a doubt as regards the complicity of the appellant-convict in the crime.”

(emphasis supplied)

In view of the aforesaid principles laid down by the Hon’ble Supreme Court, this Court needs to examine whether dying declaration made by the deceased in the present case could be the sole basis of convicting the Appellant No. 1. The prosecution has to prove their case beyond reasonable doubt.

12. In the present case, this Court is of the considered opinion that



corroborative evidence ought to have been placed on record by the prosecution to support the dying declaration made by the deceased. There is no corroboration to the dying declarations made by the deceased. Nobody had seen the Appellant No. 1 at the spot. It was the categorical statement of the deceased, from the very first instance, that Appellant No. 1 along with Appellant No. 2, mother-in-law (since deceased) of the deceased, had poured kerosene oil on her before lighting her on fire. PW-7, who treated the deceased, at the very first instance in his cross-examination, has admitted that in the MLC, it is not mentioned that any smell of kerosene oil was coming from the body of the deceased. This fact that the smell of kerosene oil was not mentioned in the MLC becomes extremely significant as in the alleged history of the incident recorded in the MLC and as per PW-7 as well, the latter was apprised by the deceased that she was burnt on account of pouring kerosene oil on her. In such circumstances, if the deceased was burnt with the help of the kerosene oil, then, the smell ought to have been there, and thus, should have been recorded in the MLC.

13. It is pertinent to note that the MLC was prepared on 13.02.1995 at 09:00 AM and the alleged time of burning was recorded as 07:00 AM and it is also not the case of the prosecution that any water was poured over the deceased to extinguish the fire or that any other substance was used to dispose the fire. In these circumstances, absence of smell of kerosene oil from the body of the deceased creates a doubt with regard to statement given by the deceased to PW-7.

14. Further, the stove, burned piece of cloth as well as the matchbox which was seized by the Investigation Officer/PW-15, *vide* Ex. PW-11/A, were never sent for forensic examination with regard to presence of any kerosene



oil. Strangely, it is recorded in the said seizure memo that the stove had a tank which had kerosene oil and was stated to have been used for burning the deceased. This statement that the kerosene oil in the stove was used to burn the deceased was not mentioned by the deceased herself in any of her statements given by her or by any other witness. This narration by the Investigation Officer/PW-15 is figment of his own imagination. It is also noted that none of the police witnesses who had gone to the crime spot, i.e., *jhuggi* stated anything about smell of kerosene. Even in the seizure memo, Ex.PW-11/A, there is no mention of smell of kerosene coming from the burnt piece of cloth or match stick that was seized.

15. Even the post mortem report (Ex. PW-6/A) does not say anything about presence of kerosene oil on the examination of the body of the deceased. For the sake of the repetition, it is stated that since the prosecution from the beginning says that the deceased was burnt by using kerosene oil then in absence of any trace or smell of kerosene oil coming from the body of the deceased cast a doubt over the facts narrated by the deceased in her dying declaration.

16. It has repeatedly come on record by way of cross-examination of various witnesses that the *jhuggi* of the deceased was located in a densely populated area and no efforts were ever made to join any witness, who would show the presence of the Appellant No. 1 on the spot.

17. Further, the manner in which it has been narrated by the deceased that Appellant No. 2, her mother-in-law (since deceased) had caught hold of her and the Appellant No. 1 poured kerosene oil on her and she was set on fire by lighting a matchstick, it is improbable that the deceased did not make any attempt to resist them. In fact, she, in her dying declaration, had stated that



her mother-in-law (since deceased) had closed her mouth with her hands. In such a circumstance, if a person is resisting, there is high degree of possibility that the person holding would also catch fire. It has come on record that the *jhuggi* in which the incident took place is of size 7/8 feet. Thus, in such a confined place, the manner in which it has stated that the Appellants put the deceased on fire becomes doubtful.

18. There are also certain discrepancies in the dying declaration. In her first dying declaration (Ex. PW-8/C) given to PW-8, the deceased does not say as to who lit the matchstick. Similarly, in the said dying declaration (Ex. PW-8/C), she has also not stated that the door was bolted from inside by Appellant No. 1 and her mother-in-law (since deceased).

19. It has also come on record that the relations between the deceased and the Appellant were not cordial as PW-1, brother of the deceased, has made specific allegations against the Appellant No. 1 and Appellant No. 2 (since deceased) that they used to illtreat his late sister. The Hon'ble Supreme Court in **P. Mani v. State of Tamil Nadu, (2006) 3 SCC 161: 2006 SCC OnLine SC 230**, held that while appreciating the dying declaration, the Court should be conscious of the fact whether the deceased had been nurturing a grudge against the persons/accused by making such dying declaration. It was observed and held as under: -

“14. Indisputably conviction can be recorded on the basis of the dying declaration alone but therefor the same must be wholly reliable. In a case where suspicion can be raised as regards the correctness of the dying declaration, the court before convicting an accused on the basis thereof would look for some corroborative evidence. Suspicion, it is trite, is no substitute for proof. If evidence brought on record suggests that such dying declaration does not reveal the entire truth, it may be considered only as a piece of evidence in which event conviction may not be rested only on the basis thereof. The question as to whether a dying declaration is of



impeccable character would depend upon several factors; physical and mental condition of the deceased is one of them. In this case the circumstances which have been brought on record clearly point out that what might have been stated in the dying declaration may not be correct. If the deceased had been nurturing a grudge against her husband for a long time, she while committing suicide herself may try to implicate him so as to make his life miserable. In the present case where the appellant has been charged under Section 302 of the Penal Code, the presumption in terms of Section 113-A of the Evidence Act is not available. In the absence of such a presumption, the conviction and sentence of the accused must be based on cogent and reliable evidence brought on record by the prosecution. In this case, we find that the evidences are not such which point out only to the guilt of the accused.”

20. It could have been a possibility on the fateful day there was a quarrel between the deceased and Appellant No. 2, her mother-in-law (since deceased), with whom she was staying alongwith her husband. However, it has come on record that Appellant No. 1 was not staying with the deceased, and therefore, her presence cannot simply be presumed. It is further observed that it has come on record that the *jhuggi* of the deceased was located in a very densely populated and congested area and no one was examined to prove the presence of Appellant No. 1 at the spot.

21. The Hon’ble Supreme Court in **Mukeshbhai Gopalbhai Barot v. State of Gujarat, (2010) 12 SCC 224**, while noting significance of non-presence of smell of kerosene oil in cases of alleged burning by kerosene, has observed and held as under: -

“26. We have examined the statement of the doctor. He had found several injuries on the dead body, mostly on the front of the body which could be caused if kerosene oil had been sprinkled on the person and then set alight. He was, however, forced to admit that he had not recorded any such fact in the post-mortem report and further clarified in cross-examination that he had not observed any smell of kerosene oil and further that if there was indeed a smell from the body, he would have recorded such fact in the post-mortem report. In the light of this statement of the doctor, the panchnama loses much of its significance. Concededly in this document there is a



reference to the fact that there was a smell of kerosene on the burnt saree as well as on the carpet in the room. It also noted the presence of a tin with some kerosene oil in it and a primus stove with the cap of the oil receptacle lying open. This document to our mind in no way advances the prosecution story as it is more compatible with the version of accidental death than homicide and explains the sudden flare up of the oil.”

22. Similarly, the learned Division Bench of this Court in **Raj Narain v. State, 1995 SCC OnLine Del 122**, in similar set of circumstances, had observed and held as under: -

“20. Now coming to the contents of the dying declaration, it has been mentioned categorically that she was burnt by Raj Narain by pouring kerosene on her. In the post-mortem report, the doctor who had performed the post-mortem had not mentioned that there was any smell of kerosene coming from the body when he performed the post-mortem. Rather, PW-12, Dr. George Paul, categorically stated that he found no smell of kerosene coming from the scalp hair of the deceased or from any other portion of the dead body. The burnt Saree and *bra* of the deceased which were sent for examination to C.F.S.L. also did not have any trace of kerosene in them as per C.F.S.L. report, Ex.PW15-E.

21. Dr. V.K. Popli, PW5, in M.L.C. had recorded in one sentence that there was no smell of alcohol/smell of kerosene. If we read that sentence, which is in one line, the inference would be that there was no smell of alcohol and kerosene but in Court, Dr. Popli has stated that there was smell of kerosene coming from the body of that lady. There is again doubtful fact as to whether the body of the lady was giving smell of kerosene at the time she was examined by Dr. Popli and the said M.L.C. was prepared.”

23. In **State (Delhi Administration) v. Kuldeep Kaur & Anr., 2006 SCC OnLine Del 457**, the learned Division Bench of this Court while dealing with a similar set of circumstances, had observed and held as under: -

“20. The conduct of PWs 1, 2, 4, 8, 18 & 20 witnesses also appear to be very unnatural. In case they had heard the dying declaration being made by the deceased the immediate natural impulse would have been to throw Kuldeep Kaur out of the ward and to have immediately raised a ruckus and to have drawn the attention of the police as well as the staff of the hospital about the attempt to murder. The learned trial court has observed that the prosecution has put up all these witnesses only in order to support the alleged dying declaration made to the police officer, PW-23 and the



Metropolitan Magistrate, PW-21. Before discarding the prosecution version the trial court has even examined the other evidence on the record. The circumstantial evidence on the record gives no support to the theory of the dying declarations. In the first place nothing incriminating whatsoever was recovered from the room in which the TV was kept. No trace of any kerosene oil in that room was visible. The map, Ext. PW-10/A, says that the room had sofas and if kerosene had been poured on her there would have been some trace of kerosene oil on the sofa covers and cushions. There was no mark of any burning in any part of that room. One matchstick box recovered from the pelmet of the room does not indicate any crime having been committed in that room. The doctors did not find any smell of kerosene oil on her body. The prosecution did not collect the clothes of the deceased and, therefore, there is no evidence which could prove that kerosene oil had been poured on her. The post mortem report, Ext. PW-25/A, says partial burnt hairs, eyebrows auxiliary and pubic hair but none of these part of the body of the deceased there was any smell of kerosene. Dr. Bharat Singh, PW-25, says

“since no kerosene smell existed on the body it cannot be said with certainty if burns were caused by a fire using kerosene oil.”

21. All these facts together are sufficient to raise a doubt about the prosecution version of the story. The trial court accordingly gave the benefit of doubt to the accused.”

24. Learned Trial Court while dealing with the issue of absence of smell of kerosene oil has observed as under: -

“19. Ld. defence counsel sought to impeach the dying declarations from the circumstance that doctor had not observed in MLC if any kerosene oils smell was found from the clothes or body of the victim when she was brought to hospital. I think omission by the doctor to record such a fact should not be taken such a strong circumstance to disbelieve the statement of the deceased which is now a dying declaration. Post mortem doctor PW6 admits that there was not smell of kerosene oil coming out of the body of the deceased, but then this is a fact that postmortem was conducted on 16.2.95, Whereas incident of burning had taken on 13.2.95 at 7 AM **moreover, as appears from evidence of IO that article seized from the spot was a kerosene stove which contained a little quantity and had been used to take out kerosene which had been poured on the victim. It shows that not a good amount of kerosene had been used by the accused to pour it on the body of the victim, may be a small quantity taken out of the stove, and that was sufficient to catch fire, and consequently victim**



suffered only 60% burns, 2nd degree, but then these burns finally proved fatal. non-observance of any kind of kerosene smell by the doctor, I find cannot be given unproportionate importance so as to disbelieve or these dying declaration which is otherwise duly proved to have been recorded as given by the victim. As seen a verb, there appears no reason why deceased would commit suicide, she was maintaining good relation with her husband and 3 years old son, and was also carrying four months pregnancy and then even if she would commit suicide why she would accused persons as the culprits. Conclusion arrived from evidence, is that dying declaration given by the disease to the doctor, to ASI PW8 and add finally to SDM PW 13 is believable and can be accepted. That kind of declaration proves the prosecution charge that two accused by pouring kerosene on the disease, set her on fire and ultimately disease died because of burn injuries as appears from the post-mortem report. Both accuse committed murder of the victim with intention to cause her death by putting her on fire. Both accused are accordingly liable to be convicted for this offence of murder which they commit committed in prosecution of common intention. I accordingly find prosecution establishes its charge u/s 302/34 IPC and as such, I convict accused for this offence.”

(emphasis supplied)

The aforesaid reasoning of the learned Trial Court suffers from two infirmities: -

- a) The observation that the kerosene which was poured on the deceased was taken out of the kerosene stove is based on no evidence. As pointed out hereinbefore, neither the deceased in her dying declaration nor any circumstances pointed out to this fact. The said fact was recorded by the IO/PW-15, which was, as observed hereinbefore, a figment of his own imagination.
- b) The finding that the articles seized from the spot had little quantity of kerosene which was used to pour on the deceased is also incorrect inasmuch as the said stove has not been sent to the FSL to establish whether it had kerosene or not. Further, the fact that the stove was kerosene stove or not is doubtful in view of the description of the case



property exhibited before the learned Trial Court.

25. Learned Counsel for the Appellant has contended that the IO/PW-15 has recovered a burner stove and not an iron stove to which oil tank was attached. In support of this contention, attention of this Court has been drawn towards the description of the said recovered case property (Ex. PA) when the same was produced before the learned Trial Court as recorded in the testimony of PW-11 wherein it is mentioned as follows: -

“(At this stage one parcel having seal of UVS is opened and one burner stove is taken out and shown to the witness, who states that it is the same stove which was seized by the IO in his presence. Stove is Ex. PA.)”

On the other hand, it has further been submitted that in the testimony of IO/PW-15 the description of the said property has been described thus: -

“At this stage, one sealed parcel with the court seal is opened and one iron gas stove, one match box having few burnt match sticks and some burnt pieces of a red cloth are taken out and shown to the witness who identify the same correctly. Gas Stove is ex.PA. match sticks Ex. PB (already exhibited) and the burnt pieces of the cloth is Ex. PC.”

It has also been argued that the aforesaid descriptions as recorded during the exhibition of the said case property before the learned Trial Court contradicts the description which has been mentioned in the recovered memo (Ex. PW-11/A) *vide* which the said case property was taken by the IO/PW-15 in his possession.

26. Refuting this contention of learned Counsel for the Appellant, learned APP for the State has drawn the attention of this Court towards the description of the iron stove recovered by IO/PW-15 mentioned in Ex. PW-11/A and has submitted that the said description, as noted hereinabove in *supra para 9.2*, does not leave any ambiguity regarding the fact that what recovered was, in fact, an iron stove to which an oil tank was attached.

27. This Court so as to address the aforesaid contentions had called for the



production of the said case property (Ex. PA) for examination *vide* order dated 05.09.2024. However, learned APP for the State has placed on record a status report dated 01.10.2024, along with the relevant entries from the *maalkhana* wherein the description of the Ex. PA has been given. In the status report it is stated that after the completion of the trial in the present case, the said property (Ex. PA) was kept in the custody of the District Nazir, Divisional Commissioner's Office, Govt. of NCT of Delhi *vide* mud No. 503/08 on 10.11.2008. The same was subsequently, disposed of accordingly in furtherance of the order obtained from the concerned learned Metropolitan Magistrate.

28. It is a matter of record that, in the testimonies of PW-11 and IO/PW-15, the descriptions of Ex. PA, as noted hereinabove, have been recorded by the learned Trial Court when the said property was exhibited before it. It has also come on record that what exhibited before the learned Trial Court was a burner gas stove as it can be seen from the aforesaid descriptions the words employed by the learned Trial Court to address the said property are “burner stove”, “stove”, “iron gas stove”, “gas stove”. It has nowhere been mentioned that Ex. PA was having an oil tank attached to it and is, therefore, in contrast with the description as mentioned in the recovery memo (Ex. PW-11/A). It is also a matter of record that the testimonies of PW-11 and PW-15 were recorded on different occasions, i.e., 13.07.1999 and 28.11.2000 respectively, and not on same day, and therefore, if the said case property was wrongly described in the testimony of PW-11 then, the same could have been rectified in the evidence of PW-15. Benefit of this discrepancy ought to be given to the Appellant.

29. The contention of the learned counsel for the Appellant that the dying



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declarations were not recorded as per the procedure and that it should not be considered as evidence has not been examined by this Court in view of the aforesaid discussion.

30. In view of the aforesaid facts and circumstances, the present appeal is allowed and the impugned judgment of conviction and order on sentence both dated 10.04.2002 are set aside.

31. The Appellant No. 1 stands acquitted for the offences punishable under Sections 302/34 of the IPC.

32. Bail bonds stand discharged.

33. Copy of this order be sent to the concerned Jail Superintendent for necessary information and compliance.

34. Judgment be uploaded on the website of this Court *forthwith*.

AMIT SHARMA, J.

PRATHIBA M. SINGH, J.

NOVEMBER 28, 2024/kr/bsr