HIGH COURT OF MADHYA PRADESH
GWALIOR BENCH

DIVISION BENCH

G.S. AHLUWALIA

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RAJEEV KUMAR SHRIVASTAVA J.J.

Cr.A. No. 478 of 2010

Kalla @ Kallu and another

Vs.

State of M.P.

Shri R.K. Shrivastava, Counsel for the Appellant
Shri Naval Gupta Counsel for the State

Date of Hearing : 23-11-2021
Date of Judgment : 26-11-2021
Approved for Reporting : Yes

Judgment

26- November -2021

Per G.S. Ahluwalia J.

1. This Criminal Appeal under Section 374 of Cr.P.C. has been filed against the judgment and sentence dated 19-5-2010 passed by 1st Additional Sessions Judge, Shivpuri in S.T. No. 209 of 2009 by which the appellant no.1 has been convicted under Section 302 of

I.P.C., whereas the appellant No. 2 Kaliya has been convicted under Section 302/34 of I.P.C. and have been sentenced to undergo the Life Imprisonment and a fine of Rs. 1,000/- with default imprisonment of 3 months R.I.

2. The prosecution story in short is that on 3-6-2009, Pran Singh along with his mother Kasia, brought the injured Rajkumari to C.H.C., Kolaras in a burnt condition. On examination, her condition was found to be critical, therefore, She was referred to District Hospital, Shivpuri. An information was given to the police. The injured Rajkumari was attended by Dr. A.L. Sharma in District Hospital, Shivpuri. Accordingly, he requested the police authorities to arrange for recording the dying declaration of the injured. Naib-Tahsildar Lokendra Shrivastava, recorded the dying declaration. The deceased Rajkumari succumbed to the burn injuries. The body was sent for post-mortem. The statements of the witnesses were recorded. The spot map was prepared. Burnt pieces of Saree, broken pieces of bangles etc. were seized from the spot. F.S.L. report was obtained. The police after completing the investigation, filed the charge sheet for offence under Sections 302/34 of I.P.C., against the appellants as well as against Nandu @ Nandulal and Sheela.

3. The Trial Court by order dated 4-9-2009 framed charge under Section 302 of I.P.C. against the appellant no.1 Kallu, whereas charge under Section 302/34 of I.P.C. was framed against the appellant no. 2 and Nandu @ Nandulal and Sheela.

4. The appellants and co-accused persons abjured their guilt and pleaded not guilty.

5. The prosecution examined Pran Singh (P.W.1), Guddibai (P.W.2), Dr. V.C. Goyal (P.W.3), Dr. M.L. Kasera (P.W.4), C.L. Uikey (P.W.5), Ramlakhan (P.W.6), Dr. O.P. Sharma (P.W.7), Lokendra Shrivastava (P.W.8), Dr. A.L. Sharma (P.W.9), Ramesh Chandra Sharma (P.W.10) and Dilip Singh (P.W.11).

6. The appellants and co-accused persons, did not examine any witness in their defence.

7. The Trial Court by the impugned judgment has convicted and sentenced the appellants for the above mentioned offence. However, the co-accused Nandu @ Nandulal and Sheela were acquitted.

8. It is submitted by the Counsel for the State that the acquittal of Nandu @ Nandulal and Sheela was not challenged. Thus, the acquittal of Nandu @ Nandulal and Sheela has attained finality.

9. Challenging the conviction, it is submitted by the Counsel for the appellants, that all the material witnesses have turned hostile. The deceased had suffered 98% burns, therefore, She was not in a fit state of mind to make dying declaration. On the similar set of allegations, the co-accused Nandu @ Nandulal and Sheela have been acquitted, therefore, the appellant no.2 Kaliya should also have been acquitted.

10. Per contra, the Counsel for the State has supported the prosecution case.

11. Heard the learned Counsel for the parties.

12. Before adverting to the facts of the case, this Court thinks it apposite to consider as to whether the death of Rajkumari was homicidal, suicidal or accidental.

13. Dr. M.L. Kasera (P.W.4) has stated that on 3-6-2009, he was posted in C.H.C., Kolaras. The injured Rajkumari was brought in a burnt condition by Pran Singh and his mother. Since, the injured had suffered burn injuries due to pouring of kerosene oil, therefore, her treatment was not possible in C.H.C., Kolaras, accordingly, She was referred to District Hospital, Shivpuri. An information was also given to Police Station Kolaras. In cross-examination, this witness has stated that he had not written any M.L.C. separately. The injured was unconscious and was not in a position to speak.

14. Dr. A.L.Sharma (P.W. 9) had examined the injured Rajkumari in District Hospital Shivpuri. Since, the injured was in a serious condition, therefore, requisition was sent to Police Outpost, Ex. P.19 for recording her dying declaration. On medical examination, the smell of kerosene oil was present. He scalp hairs were burnt. Her face, neck, chest, both upper limbs and both lower limbs were burnt. She had suffered 98% burn. She was in a critical condition. The M.L.C. is Ex. P.20. This witness was cross-examined.

15. In cross-examination, he stated that the entire skin of the patient was burnt. However, he denied that the blood veins had become inactive. He further stated that it is not necessary that a person with 98% burn would necessarily become unconscious.

Since, nothing is mentioned in M.L.C., Ex. P.20, therefore, he cannot say as to whether he had enquired anything from the patient or not? The patient was treated by a surgeon. He denied the suggestion that the patient was not in a position to make dying declaration. He further clarified that since, he had asked the police to get her dying declaration recorded, therefore, it means that she was in a position to speak. He further admitted that in a case of emergency, the dying declaration can also be recorded by the Doctor.

16. The post-mortem of the body of deceased was conducted by Dr. V.C. Goyal (P.W. 3). In post-mortem, he found that the deceased had sustained 90% burns. All the internal organs were normal and congested. Semi digested food was found. The cause of death was shock due to burn injuries. The post-mortem report is Ex. P.8. This witness was cross-examined.

17. In cross-examination, it is stated by this witness that after sustaining burn injuries, the patient cannot intake solid food. The semi digested food may be milk, water etc. He further stated that the marks of drip were found on her body. He further stated that it is not necessary that the person suffering 90% burn marks would certainly fell unconscious.

18. Thus, it is clear that the deceased Rajkumari had died on account of shock due to burn injuries.

19. Whether the death of the deceased Rajkumari was homicidal, suicidal or accidental shall be decided after considering the

surrounding circumstances.

20. Pran Singh (P.W. 1) is the husband of the deceased. He has stated that his wife had committed suicide by burning herself. He took her to the hospital and thereafter, to Distt. Hosptial Shivpuri. His wife had requested him to call her parents, therefore, he also went to Piroth to take her parents. When he returned back, his wife had already died. He stated that no writing work was done by the police, however, admitted his signatures on Naksha Panchayatnama, Ex. P.2. He also admitted his signatures on Safina form, Ex. P.1. The police had gone to his house and has inspected the place of incident. The spot map is Ex. P.3. He doesnot know as to whether, the police had seized any thing or not. However, he admitted his signatures on Ex. P.4. The dead body was handed over to him and panchnama is Ex. P.5. He expressed his ignorance about the reasons of death. Accordingly, this witness was declared hostile. Nothing could be elicited from his cross-examination, which may support the prosecution case. However, this witness was cross-examined by the defence, and he admitted that his wife used to say that since, She is issueless therefore, her life is useless.

21. Guddibai (P.W. 2) has also turned hostile. In cross-examination, this witness has admitted that Pran Singh was residing separately along with his wife.

22. C.L. Uike (P.W. 5) has conducted partial investigation. It is stated by him that he had received letter on 7-6-2009 from the office

of S.D.O.(P) Kolaras and accordingly, he started investigation. He registered the F.I.R. for offence under Section 302/34 of I.P.C. He also arrested the appellant no.2 and recorded the statements of Pran Singh and Guddibai. In cross-examination, this witness has stated that he had tried to record the statements of the residents of adjoining area, but none of them were available. Thereafter, he handed over the investigation to T.I., Kolaras.

23. Ramlakhan Singh (P.W. 6) had conducted the *merg* enquiry. He went to the spot, and vide seizure memo Ex. P.4, seized burnt pieces of red coloured saree, 5 broken pieces of bangles. He also recorded the statements of the witnesses and accordingly found that offence under Section 302/34 of IPC has been committed by the appellants and Nandu @ Nandulal and Sheela. Accordingly sent his report, Ex.P.10. The seized articles were sent to F.S.L. Sagar, through S.P., Shivpuri. The draft is Ex. P.16 and the F.S.L. report is Ex. P.17. This witness was cross-examined.

24. In cross-examination, this witness has clarified that he had tried to talk to the neighbourers, but no body was ready to speak.

25. Ramesh Chandra Sharma (P.W.10) has stated that on 3-6-2009, he was posted in police outpost, District Hospital, Shivpuri. A requisition was sent by Dr. A.L. Sharma for recording dying declaration and accordingly, he got the dying declaration recorded. On 4-6-2009, Dr.V.C. Goyal, had sent the information of death of the injured. Accordingly, merg no. 94/2009, Ex. P.21 was registered. An

application for conducting post-mortem was prepared, Ex. P.7.

26. Thus, it is clear that two witnesses, namely Pran Singh (P.W.1) and Guddibai (P.W.2) have turned hostile. The entire prosecution case hinges around the dying declaration of the deceased.

27. Dr. O.P. Sharma (P.W. 7) had examined the patient and had given a certificate that the patient is in a fit state of mind to give dying declaration and a similar certificate was also given after the dying declaration was recorded. This witness clearly stated that the patient was in fit state of mind, during the recording of dying declaration.

28. Lokendra Shrivastava (P.W. 8) is the Naib-Tahsildar, who had recorded the dying declaration. This witness has stated that the patient had given the dying declaration which is Ex. P.18. He further stated that the patient had informed that her elder brother-in-law (Jeth) Kalyan had set her fire and Jethani Kaliya has got her burnt. Her another elder-brother-in-law Nandu was also there. This witness was cross-examined.

29. In cross-examination, this witness has stated that he had received the information about 10:30 in the morning. Dr. O.P. Sharma (P.W.7) was on duty. No police personal was present at the time of recording of dying declaration. The patient had disclosed her name as Rajkumari. In the dying declaration, he has not mentioned the bed no. of the patient. When he went to record the dying declaration, nobody was there. When he reached the hospital, the

patient was not talking to anybody. There was no attender near the patient. He did not ask any body about the identity of the patient. He denied that the patient was not in a position to speak. He denied that nothing was disclosed by the patient. He also denied that he has written a false dying declaration on the instructions of the father of the deceased.

30. Thus, if the evidence of Dr. O.P. Sharma (P.W.7) and Lokendra Shrivastava (P.W. 8) is read conjointly, then it is clear that the patient was in a fit state of mind and was well oriented even during recording of dying declaration. Dying declaration, Ex. P.18 reads as under :

प्र. क्या हुआ

उ. आग लगाई है

प्र. किसने लगाई है

उ. **आग जेठ कल्ला ने लगाई है जिठानी कलिया ने लगवाई है** दूसरा जेठ नन्नू भी साथ मे था

प्र. क्यो लगाई आग

उ. दोनो जेठ धर मे धुसते थे मै मना करती थी तो उनने आग लगा दी

प्र. पति कहां था

उ. मजदूरी करने गया था

प्र. आग लगाई तब कौन कौन था तुम्हारे पास

उ. कलिया जेठानी. जेठ कल्ला दूसरा जेठ नन्न व जिठानी शीला मौजूद थे चारो की सलाह से मुझ मे आग लगाई

प्र. किसी ने बचाने की कोशिश नही की

उ. सास कसिया एव एक अन्य जिठानी गुड्डी को पता चला तब वे आई और मुझे बचाने की कोशिश की

प्र. और कुछ कहना है

उ. और कुछ नही कहना है

प्र. आग कैसे लगाई

उ. कल्ला ने अपने धर से मिट्टी के तेल की कट्टी लाकर मेरे उपर डाली और माचिस से आग लगाई

31. It is submitted that although in the dying declaration, it was stated by the patient (deceased) all the four persons were present and had discussed together, but the Trial Court has acquitted Nandu @ Nandulal and Sheela therefore, same benefit of doubt should have been given to appellant no. 2 Kaliya.

32. Considered the submissions made by the Counsel for the appellants.

33. The Trial Court has acquitted Nandu @ Nandulal and Sheela on the ground that there is nothing on record to show that what was discussed by the above mentioned accused persons. The appellants are husband and wife. The deceased had stated that both the elder-brother-in-laws (Jeth) were in habit of coming inside the house, which was being objected by her, therefore, the appellant no.1 burnt her after pouring kerosene oil and the appellant no.2 has got her burnt. According to Guddibai (P.W.2), Pran Singh (P.W.1) was residing separately along with his wife, deceased Rajkumari. The

house of Kalla is at a different place, as is evident from the spot map, Ex. P. 3. The spot map, Ex. P.3 was prepared on the instructions of Pran Singh (P.W.1) who has admitted that spot map was prepared. At the time of incident, the appellant no.2 was also present on the spot. It was alleged in the dying declaration that the appellant no.1 Kalla brought a container of kerosene oil from his house and set her on fire after pouring kerosene oil on her. The allegation that the appellant no.2 had got her burnt is clear from the fact, that when the appellant no.1 was going to the house of the deceased along with kerosene oil and set her on fire, even then the appellant no.2 did not make any attempt to stop the appellant no. 1 or to extinguish the fire. This conduct of the appellant no. 2 Kaliya, clearly shows the meeting of mind with appellant no.1. The fire was extinguished by Kasia and Guddi bai. If the intention of the patient (Deceased) was to falsely implicate her in-laws, then She would have falsely implicated her mother-in-law and Guddibai also. Thus, it clear that the appellant no.2 was actively and intentionally involved in burning of the deceased by appellant no.1. Thus, it is held that She was sharing common intention. Merely because the Trial Court has acquitted some of the co-accused persons, is not sufficient to acquit the appellant no.2 Kaliya also as there is an additional allegation against her.

34. It is next contended by the Counsel for the appellants, that since, the deceased had suffered 98% burns, therefore, She was not in

fit state of mind or to speak to give dying declaration. Considered the submissions made by the Counsel for the appellant.

35. Pran Singh (P.W.1) has stated that after the deceased Rajkumari was shifted to Distt. Hospital, Shivpuri, She had requested to call her parents, and therefore, he went to call her parents. Thus, it is clear that the deceased was in a position to speak. Further, Dr. O.P. Sharma (P.W.7) has given fitness certificates i.e., prior to and after the recording of dying declaration.

36. The Supreme Court in the case of **Purshottam Chopra v. State (NCT of Delhi),** reported in **(2020) 11 SCC 489** has held as under :

> **18.** The principles relating to admission and acceptability of the statement made by a victim representing the cause of death, usually referred to as a dying declaration, are well settled and a few doubts as regards pre-requisites for acceptability of a dying declaration were also put at rest by the Constitution Bench of this Court in *Laxman* v. *State of Maharashtra*.
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> **18.1.** In the said case of *Laxman*, conviction of the appellant was based on dying declaration of the deceased which was recorded by the Judicial Magistrate. The Session Judge and the High Court found such dying declaration to be truthful, voluntary and trustworthy; and recorded conviction on that basis. In appeal to this Court, it was urged with reference to the decision in *Paparambaka Rosamma* v. *State of A.P.* that the dying declaration could not have been accepted by the Court to form the sole basis of conviction since certification of the doctor was not to the effect that the patient was in a fit state of mind to make the statement. On the other hand, it was contended on behalf of the State, with reference to the decision in *Koli Chunilal Savji* v. *State of Gujarat*, that the material on record indicated that the deceased was fully conscious and was capable of making a statement; and his dying declaration cannot be ignored merely because the doctor had not made the endorsement about his fit state of mind to make the

statement. In view of these somewhat discordant notes, the matter came to be referred to the larger Bench.

18.2. The Constitution Bench in *Laxman* summed up the principles applicable as regards the acceptability of dying declaration in the following: (*Laxman case*, SCC pp. 713-14, para 3)

"*3*. The juristic theory regarding 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, has always to 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. The court also must further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Normally, therefore, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration looks up to the medical opinion. But where the eyewitnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a Magistrate or a doctor or a police officer. When it is recorded, no oath is necessary nor is the presence of a Magistrate absolutely necessary, although to assure authenticity it is usual to call a Magistrate, if available for recording the statement of a man about to die. There is no requirement of law that a dying declaration must

necessarily be made to a Magistrate and when such statement is recorded by a Magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the Magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise."

18.3. The Constitution Bench affirmed the view in *Koli Chunilal Savji* while holding that *Paparambaka Rosamma*, was not correctly decided. The Court said: (*Laxman case*, SCC p. 715, para 5)

"*5*. … It is indeed a hypertechnical view that the certification of the doctor was to the effect that the patient is conscious and there was no certification that the patient was in a fit state of mind especially when the Magistrate categorically stated in his evidence indicating the questions he had put to the patient and from the answers elicited was satisfied that the patient was in a fit state of mind whereafter he recorded the dying declaration. Therefore, the judgment of this Court in *Paparambaka Rosamma* v. *State of A.P.* must be held to be not correctly decided and we affirm the law laid down by this Court in *Koli Chunilal Savji* v. *State of Gujarat*."

19. In *Dal Singh case*, this Court has pointed out that the law does not provide as to who could record dying declaration nor is there a prescribed format or procedure for the same. All that is required is the person recording dying declaration must be satisfied that the maker is in a fit state of mind and is capable of making such a statement. This Court also pointed out that as to whether in a given burn case, the skin of thumb had been completely burnt or if some part of it will remain intact, would also be a question of fact. This Court said: (SCC p. 167, paras 20-22)

"*20*. The law on the issue can be summarised to the effect that law does not provide who can record a dying declaration, nor is there any prescribed form, format, or procedure for the same. The person who records a dying declaration must be satisfied that the maker is in a fit state

of mind and is capable of making such a statement. Moreover, the requirement of a certificate provided by a doctor in respect of such state of the deceased, is not essential in every case.

21. Undoubtedly, the subject of the evidentiary value and acceptability of a dying declaration, must be approached with caution for the reason that the maker of such a statement cannot be subjected to cross-examination. However, the court may not look for corroboration of a dying declaration, unless the declaration suffers from any infirmity.

22. So far as the question of thumb impression is concerned, the same depends upon facts, as regards whether the skin of the thumb that was placed upon the dying declaration was also burnt. Even in case of such burns in the body, the skin of a small part of the body i.e. of the thumb, may remain intact. Therefore, it is a question of fact regarding whether the 520skin of the thumb had in fact been completely burnt, and if not, whether the ridges and curves had remained intact."

19.1. In *Bhagwan*, this Court accepted the dying declaration made by a person having suffered 92% burn injury and whose continued consciousness was certified by the doctor. This Court referred to the decision in *Vijay Pal* v. *State (NCT of Delhi)*, where the statement made by the victim having suffered 100% burn injury was also accepted. This Court said: (*Bhagwan case*, SCC pp. 106-107, paras 24-25)

"**(B)** ***Can a person who has suffered 92% burn injuries be in a condition to give a dying declaration?***

24. This question is also no longer res integra. In *Vijay Pal* v. *State (NCT of Delhi)*, we notice the following discussion: (SCC p. 759, paras 23-24)

'*23*. It is contended by the learned counsel for the appellant that when the deceased sustained 100% burn injuries, she could not have made any statement to her brother. In this regard, we may profitably refer to the decision in *Mafabhai Nagarbhai Raval* v. *State of Gujarat* wherein it has been held that a person suffering 99% burn injuries could be deemed capable enough for the purpose of making a dying declaration. The Court in the said case opined that unless there existed some inherent and apparent defect, the trial court should not have substituted its opinion for that of the doctor. In the light of the facts of the case, the dying declaration was found to be worthy of reliance.

24. In *State of M.P.* v. *Dal Singh*, a two-Judge Bench placed reliance on the dying declaration of the deceased who had

suffered 100% burn injuries on the ground that the dying declaration was found to be credible.'

25. Therefore, the mere fact that the patient suffered 92% burn injuries as in this case would not stand in the way of patient giving a dying declaration which otherwise inspires the confidence of the Court and is free from tutoring, and can be found reliable."

20. In *Gian Kaur*, the dying declaration was disbelieved on the ground that though as per medical evidence the deceased had 100% burn injuries but the thumb mark appearing on the dying declaration had clear ridges and curves. The benefit of doubt extended by the High Court was found to be not unreasonable and hence, this Court declined to interfere while observing as under: (*Gian Kaur case*, SCC p. 943, para 5)

"*5*. The High Court disbelieved the dying declaration on the ground that even though according to the medical evidence Rita had 100% burns, the thumb mark of Rita appearing on the dying declaration had clear ridges and curves. The High Court found the evidence of Dr Ajay Sahni-PW 1 not reliable as he failed to satisfactorily explain how such a thumb mark could appear on the dying declaration when Rita had 100% burns over her body. The High Court relied upon the deposition of Doctor Aneja, who had performed the post-mortem and who has categorically stated that there were 100% burns over her body and both the thumbs of Rita were burnt. In view of such inconsistent evidence, the High Court was right in giving benefit of doubt to the respondents. It cannot be said in this case that the High Court has taken an unreasonable view."

20.1. In *Gopalsingh*, the Court found that the dying declaration did not contain complete names and addresses of the persons charged with the offence and it was found that conviction could not be based on such dying declaration alone without corroboration. Essentially, for the infirmity carried by such dying declaration, this Court found lesser justification for the High Court's interference with the order of acquittal while observing as under: (SCC p. 272, para 8)

"*8*. But even if we assume that the High Court was right in concluding that the dying declaration established the identity of the appellants, it was certainly not of that character as would warrant its acceptance without corroboration. It is settled law that a court is entitled to convict on the sole basis of a dying declaration if it is such that in the circumstances of the case it can be regarded as truthful. On the other hand if on account of an infirmity, it

cannot be held to be entirely reliable, corroboration would be required."

20.2. In *Dalip Singh*, the alleged dying declaration turned out to be doubtful for it contained such facts which could not have been in the knowledge of the deceased and hence, this Court found it unsafe to rely on the same while observing as under: (SCC p. 335, para 9)

"*9*. … The dying declaration seems to be otherwise truthful but for the fact that it could not be within the knowledge or vision of Teja Singh that Jetha Singh was murdered by the appellants. His saying so in the dying declaration makes his statement a bit doubtful. It is, therefore, safe to leave out of consideration this dying declaration."

20.3. In *Thurukanni Pompiah*, this Court held that while a truthful and reliable dying declaration may form the sole basis of conviction, even without corroboration but the Court must be satisfied about its truthfulness and reliability; and if the Court finds that the declaration is not wholly reliable and a material portion of the deceased's version of the occurrence is untrue, the Court may, in the circumstances of a given case, may consider it unsafe to convict the accused on the basis of the declaration alone without further corroboration. This Court observed, inter alia, as under: (AIR p. 941, para 9)

"*9*. Under clause (1) of Section 32 of the Evidence Act, 1872, a statement made by a person who is dead, as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death is a relevant fact in cases in which the cause of that person's death comes into question, and such a statement is relevant whether the person who made it was or was not, at the time when it was made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question. The dying declaration of Eranna is, therefore, relevant and material evidence in the case. A truthful and reliable dying declaration may form the sole basis of conviction, even though it is not corroborated. But the Court must be satisfied that the declaration is truthful. The reliability of the declaration should be subjected to a close scrutiny, considering that it was made in the absence of the accused who had no opportunity to test its veracity by cross-examination. If the Court finds that the declaration is not wholly reliable and a material and integral portion of the deceased's version of the entire occurrence is untrue, the Court may, in all the circumstances of the case, consider it unsafe to convict the accused on the basis of the declaration alone without further corroboration."

20.4. In *Uka Ram*, this Court again emphasised on the requirement that the Court should be satisfied about trustworthiness of the dying declaration, its voluntary nature and fitness of the mind of the deceased and it was held that: (SCC p. 257, para 6)

"*6*. … Once the court is satisfied that the dying declaration was true, voluntary and not influenced by any extraneous consideration, it can base its conviction without any further corroboration as a rule requiring corroboration is not a rule of law but only a rule of prudence."

20.4.1. In the said case of *Uka Ram*, however, the Court found that the deceased was a mental patient and there existed a doubt about mental condition of the deceased at the time of making the dying declaration. In the given circumstances, this Court found that to be a fit case to extend the benefit of doubt to the accused.

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

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

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

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

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

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

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

21.7. As regards a burns case, the percentage and degree of

burns would not, by itself, be decisive of the credibility of dying declaration; and the decisive factor would be the quality of evidence about the fit and conscious state of the declarant to make the statement.

* * * *

25.2. Another emphasis laid on behalf of the appellants is on the fact that the victim Sher Singh had suffered 100% burns and he was already in critical condition and further to that, his condition was regularly deteriorating. It is, therefore, contended that in such a critical and deteriorating condition, he could not have made proper, coherent and intelligible statement. The submissions do not make out a case for interference. As laid down in *Vijay Pal case* and reiterated in *Bhagwan case*, the extent of burn injuries — going beyond 92% and even to 100% — would not, by itself, lead to a conclusion that victim of such burn injuries may not be in a position to make the statement. Irrespective of the extent and gravity of burn injuries, when the doctor had certified him to be in fit state of mind to make the statement; and the person recording the statement was also satisfied about his fitness for making such statement; and when there does not appear any inherent or apparent defect, in our view, the dying declaration cannot be discarded.

25.3. Contra to what has been argued on behalf of the appellants, we are of the view that the juristic theory regarding acceptability of statement made by a person who is at the point of death has its fundamentals in the recognition that at the terminal point of life, every motive to falsehood is removed or silenced. To a fire victim like that of present case, the gravity of injuries is an obvious indicator towards the diminishing hope of life in the victim; and on the accepted principles, acceleration of diminishing of hope of life could only obliterate the likelihood of falsehood or improper motive. Of course, it may not lead to the principle that gravity of injury would itself lead to trustworthiness of the dying declaration. As noticed, there could still be some inherent defect for which a statement, even if recorded as dying declaration, cannot be relied upon without corroboration. Suffice would be to observe to present purpose that merely for 100% burn injuries, it cannot be said that the victim was incapable to make a statement which could be acted upon as dying declaration.

25.4. The suggestions have also been made that the victim was in 100% burnt condition and therefore, the alleged statements Exts. PW-8/A and PW-16/B are manipulated and manufactured. We find nothing of substance in such suggestions for there had not been shown any reason for

> which PW 8 Dr Sushma and PW 16 SI Rajesh Kumar would manufacture any such document. Interestingly, certain suggestions were made to PW 19 Inspector Om Prakash in his cross-examination about his previous exchange of hot words or altercation with the accused persons. However, there was no such suggestion to PW 16 or to PW 8. For the same reason, the doubts sought to be suggested about availability of thumb impression of the victim on the statement Ext. PW-16/B deserve to be rejected. In *Dal Singh*, this Court has pointed out that in the case of burns, the skin of a small part of the body like thumb may remain intact; and it is essentially a question of fact as to whether skin of thumb had also been burnt completely. In this regard, it is also noticeable that even when the victim was carrying 100% deep burns, as per the post-mortem report, peeling off of skin was noticed on dorsum of hands and therefore, taking of thumb impression on Ext. PW-16/B is not ruled out. The concurrent findings of the trial court and the High Court in accepting the thumb impression on Ext. PW-16/B do not appear calling for any interference. It gets, perforce, reiterated that there appears no reason for PW 16 to go to the extent of manufacturing the document with a false thumb impression.
>
> **21.8.** If after careful scrutiny, the court finds the statement placed as dying declaration to be voluntary and also finds it coherent and consistent, there is no legal impediment in recording conviction on its basis even without corroboration.

37. As per Modi's Medical Jurisprudence, 1st degree burn mark is also known as epidermal burn. First Degree burns consists of eythema or simple redness of the skin caused by the momentary application of flame or hot solids, or liquids much below boiling point. It can also be produced by mild irritants. The erythema marked with superficial inflammation usually disappear in few hours, but may last for several days, when the upper layer of the skin peels off but leaves no scars. They disappear after death due to the gravitation of blood to the dependent parts. Second degree burns

comprise acute inflammation and blisters produced by prolonged application of a flame, liquids at boiling point or solids much above the boiling point of water. The third and fourth degree burns are also known as Dermo-Epidermal burns. The third degree burn refers to the destruction of the cuticle and part of the true skin which appears horny and dark, owing to it having been charred and shrivelled. Exposure of nerve endings gives rise to much pain. Whereas in Fourth degree burn, the whole skin is destroyed. The fifth and sixth degree burns are also known as Deep burns. Fifth degree burn includes penetration of the deep fascia and implications of the muscles, and results in great scarring and deformity whereas sixth degree burn involves charring of the whole limb including the bones and ends in inflammation of the subjacent tissues and organs, if death is not the immediate result. Thus, it is clear that it is not the extent of superficial burn which effects the state of mind of the patient, but it is the degree of burn which effects the state of mind of the patient. Dr. V.C. Goyal (P.W. 3) who had conducted the post-mortem, had found that all the internal organs were normal and congested. Thus, it is clear that the deceased had not suffered Dermo-Epidermal or deep burns. Therefore, it cannot be said that She was not in a fit state of mind.

38. As per the F.S.L. report, Ex. P.17, kerosene oil was found in plastic container, semi burnt pieces of saree and broken pieces of bangles. Further more, as per the M.L.C., Ex. P.40, smell of kerosene

oil was coming from the body. Thus, the dying declaration is further corroborated by the medical as well as forensic evidence.

39. The Supreme Court in the case of **Madan Vs. State of Maharashtra** reported in **(2019) 13 SCC 464** has held as under :

> **11.** We are aware of the fact that the physical or mental weakness consequent upon the approach of death, a desire of self-vindication, or a disposition to impute the responsibility for a wrong to another, as well as the fact that the declarations are made in the absence of the accused, and often in response to leading questions and direct suggestions, and with no opportunity for cross-examination: all these considerations conspire to render such declarations a dangerous kind of evidence. In order to ameliorate such concerns, this Court has cautioned in umpteen number of cases to have a cautious approach when considering a conviction solely based on dying declaration. Although there is no absolute rule of law that the dying declaration cannot form the sole basis for conviction unless it is corroborated, the courts must be cautious and must rely on the same if it inspires confidence in the mind of the Court [see: *Ram Bihari Yadav* v. *State of Bihar* and *Suresh Chandra Jana* v. *State of W.B.*].
>
> **12.** Moreover, this Court has consistently laid down that a dying declaration can form basis of conviction, if in the opinion of the Court, it inspires confidence that the deceased at the time of making such declaration, was in a fit state of mind and there was no tutoring or prompting. If the dying declaration creates any suspicion in the mind of Court as to its correctness and genuineness, it should not be acted upon without corroborative evidence [see also: *Atbir* v. *Govt. (NCT of Delhi)*, *Paniben* v. *State of Gujarat* and *Panneerselvam* v. *State of T.N.*].

40. The Supreme Court in the case of **Mukesh Vs. State (NCT of Delhi)** reported in **(2017) 6 SCC 1** has held as under :

> **174.** A dying declaration is an important piece of evidence which, if found veracious and voluntary by the court, could be the sole basis for conviction. If a dying declaration is found to be voluntary and made in a fit mental condition, it can be relied upon even without any corroboration. However, the court, while admitting a dying declaration,

must be vigilant towards the need for "*compos mentis certificate*" from a doctor as well as the absence of any kind of tutoring.

175. In *Laxman* v. *State of Maharashtra*, the law relating to dying declaration was succinctly put in the following words: (SCC pp. 713-14, para 3)

> "*3*. … A dying declaration can be oral or in writing and any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a Magistrate or a doctor or a police officer. When it is recorded, no oath is necessary nor is the presence of a Magistrate absolutely necessary, although to assure authenticity it is usual to call a Magistrate, if available for recording the statement of a man about to die. There is no requirement of law that a dying declaration must necessarily be made to a Magistrate and when such statement is recorded by a Magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the Magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise."

176. The legal position regarding the admissibility of a dying declaration is settled by this Court in several judgments. This Court in *Atbir* v. *Govt. (NCT of Delhi)*, taking into consideration the earlier judgment of this Court in *Paniben* v. *State of Gujarat* and another judgment of this Court in *Panneerselvam* v. *State of T.N.*, has exhaustively laid down the following guidelines with respect to the admissibility of dying declaration: (*Atbir case*, SCC pp. 8-9, para 22)

> "*22*. (*i*) Dying declaration can be the sole basis of conviction if it inspires the full confidence of the court.

> (*ii*) The court should be satisfied that the deceased was in a fit state of mind at the time of making the statement and that it was not the result of tutoring, prompting or imagination.
>
> (*iii*) Where the court is satisfied that the declaration is true and voluntary, it can base its conviction without any further corroboration.
>
> (*iv*) It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence.
>
> (*v*) Where the dying declaration is suspicious, it should not be acted upon without corroborative evidence.
>
> (*vi*) A dying declaration which suffers from infirmity such as the deceased was unconscious and could never make any statement cannot form the basis of conviction.
>
> (*vii*) Merely because a dying declaration does not contain all the details as to the occurrence, it is not to be rejected.
>
> (*viii*) Even if it is a brief statement, it is not to be discarded.
>
> (*ix*) When the eyewitness affirms that the deceased was not in a fit and conscious state to make the dying declaration, medical opinion cannot prevail.
>
> (*x*) If after careful scrutiny, the court is satisfied that it is true and free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal impediment to make it the basis of conviction, even if there is no corroboration."
>
> **177.** It is well settled that dying declaration can form the sole basis of conviction provided that it is free from infirmities and satisfies various other tests. In a case where there are more than one dying declaration, if some inconsistencies are noticed between one and the other, the court has to examine the nature of inconsistencies as to whether they are material or not. The court has to examine the contents of the dying declarations in the light of the various surrounding facts and circumstances.

41. Thus, it is clear that if the dying declaration inspires confidence, then it can be the sole basis for conviction.

42. Further, it was stated by Pran Singh (P.W.1) that at the request

of his wife, he went to call her parents and when he returned back, he found that his wife was already dead. Thus, it is clear that the parents of the deceased had reached the hospital after her death. Thus, there is no question or possibility of tutoring by anybody.

43. Considering the totality of the facts and circumstances of the case, this Court is of the considered opinion, that the prosecution has proved the dying declaration beyond reasonable doubt. Accordingly, it is held that the appellant no.1 Kalla burnt the deceased Rajkumari after pouring kerosene oil on her and the appellant no.2 Kaliya was sharing common intention and has got the deceased burnt by her husband i.e., appellant no.1 Kalla. Accordingly, the appellant no.1 Kalla @ Kallu is held guilty of offence under Section 302 of I.P.C. and the appellant no.2 Kaliya is held guilty of offence under Section 302/34 of I.P.C. Accordingly, their conviction by the Trial Court is **Upheld.**

44. So far as the question of sentence is concerned, the minimum sentence for offence under Section 302 of I.P.C. is Life Imprisonment, therefore, it doesnot require any interference.

45. Ex-Consequenti, the judgment and sentence dated 19-5-2010 passed by 1st Additional Sessions Judge, Shivpuri in S.T. No. 209 of 2009 is hereby **affirmed.**

46. The appellant no. 1 Kalla @ Kallu is in jail. He shall undergo the remaining jail sentence.

47. The appellant no. 2 Kaliya is on bail. Her bail bonds are

cancelled. She is directed to immediately surrender before the Trial Court for undergoing the remaining jail sentence.

48. A copy of this judgment be provided to the appellants free of cost.

49. The record of this case be send back to the Trial Court along with the copy of the judgment for necessary information and compliance.

50. The appeal fails and is hereby **Dismissed.**

(G.S. Ahluwalia)
Judge

(Rajeev Kumar Shrivastava)
Judge