IN THE HIGH COURT OF MADHYA PRADESH AT INDORE

BEFORE

HON'BLE SHRI JUSTICE VIVEK RUSIA

&

HON'BLE SHRI JUSTICE BINOD KUMAR DWIVEDI

CRIMINAL APPEAL NO. 1385/2015

ANKIT S/O SHRI SUNIL RATHORE & ORS.

Versus

THE STATE OF MADHYA PRADESH

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Appearance:

Shri Chinmay Kalgawar and Shri Yatish Kumar Laad, learned counsel for the appellants No. 1 & 3.

Shri Ashish Gupta, learned counsel for the appellant No. 2.

Shri H.S. Rathore, learned Public Prosecutor for the respondent/State.

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Reserved on : 09/10/2025

Pronounced on : 17/10/2025

JUDGMENT

Per*: *Justice Binod Kumar Dwivedi

This appeal is directed against the judgment and order dated 16.09.2015 in S.T. No. 317/2014, whereby appellants have been found guilty for offences under Section 376(ए)/34, 376(डी), 302 r/w 34 and Section 449/34 of Indian Penal Code, 1860 (hereinafter referred for short 'IPC') and sentenced to undergo life imprisonment with fine of Rs.5000/- for the offence under Section

376(ए) r/w Section 34 of IPC, rigorous imprisonment of 20 years with fine of Rs.2000/- for offence under Section 376(डी) of IPC, rigorous imprisonment of 10 years with fine of Rs.1000/- for the offence under Section 449/34 of IPC with usual default stipulations. The learned trial Court with the aid of Section 71 of IPC treating the offence under Section 376(ए) r/w 34 of IPC grievous to the offence under Section 302 r/w 34 of IPC, has not sentenced the appellants separately for the offence under Section 302 r/w Section 34 of IPC.

02. It is made clear that due to involvement of the alleged sexual offences with the deceased in the present case, her name or any matter which may make known her identity is not be disclosed as per provisions of Section 228A of IPC, hence victim (now deceased) will be referred as ‘victim’ and witnesses, who are her parents, brother and sister will be referred with their witness number only.

03. It is admitted that the victim, aged about 22-23 years, was daughter of PW-5 and at the time of incident and was a student of Final Year of B. Pharmacy in G.R.Y. College, Borawan Tehsil Kasravad, District Khargone. It is also admitted that accused/appellant Ankit at the time of incident was a student of Final Year of B. Pharmacy and appellants Akshay and Vishal were also student of 3rd Year student of B. Pharmacy in the same college. Arrest of the

appellants vide arrest memo Ex.P/14, P/15 and P/16 on the date of incident i.e. 10.05.2014 is also not disputed.

04. The prosecution story, briefly stated, is that on 10.05.2014 Saturday, the date of incident, victim was alone in her house situated at Khargone-Kasravad Road, village Ojhara. Her parents and brother had gone to attend a marriage ceremony. On the date of incident, in noon at 12:30 from the upper floor of her house hearing cries of victim for help to save her, her Jitendra Agrawal (PW-2), neighbor and cousin of her father and neighbor Satish Yadav (PW-4) rushed to the house of the victim and when they reached upper floor of the house, they found victim burning. Appellants Ankit Rathore, Vishal Choudhary and Appellant Akshay Joshi were found inside house and were ready to escape. Jitendra Agrawal (PW-2)) with the help of Satish Yadav (PW-4) doused fire and in this he also suffered burn injuries. Appellants were nabbed on the spot with the help of villagers and were sent to police station Kasravad.. Jitendra Agrawal (PW-2) was also informed by the appellants that they had come to give an invitation card to the victim. Hearing hue and cries, other villagers also gathered on the spot.

05. Victim in the critical condition was brought to Community Health Center, Kasravad for treatment, where Dr. Chandresh Dixit (PW-10) after giving intimation (Ex.P/29) to the Police Station – Kasravad, examined her and

found that her head, face, chest, back, stomach and limbs were in 90% burnt condition. He prepared pre-MLC report (Ex.P/30). Dr. Chandresh Dixit (PW-10) also examined Jitendra Agrawal (PW-2) who has suffered burn injuries in attempt to save the victim and prepared MLC report (Ex.P/31). After primary treatment, looking to the critical condition of the victim, she was referred to Choithram Hospital for further treatment. In Choithram Hospital, Dr. Geetika Paliwal (PW-7), expert Plastic Surgeon after admitting the victim in Burn Unit, started her treatment as mentioned in Ex.P/13. She mentioned that victim had suffered 96% deep burn injuries. Additional Tehsildar Pradeep Kaurav (PW-16) on telephonic information reached burn unit of Choithram Hospital and recorded dying declaration (Ex.P/44) of deceased on which the left toe impression of the victim was got affixed. In dying declaration, the victim in response to the questions told that appellants Vishal, Ankit and Akshya had set her ablaze as *they wanted something from her*. Dying declaration Ex.P/44 was submitted to the Police Station - Kasravad in a sealed envelope with letter Ex.P/45 and seized by seizure memo Ex.P/56. Next day of the incident i.e. on 11.05.2014 in the morning at 7:35 AM victim succumbed to injuries whereon a death certificate Ex.P/12 was issued.

06. Intimation with regard to death of the victim from Choithram Hospital, Indore was given by Dr. R. Mehta by telephone on 11.05.2014 to

Police Station – Rajendra Nagar, Indore, where *Merg* No. 042/14 (Ex.P/32) was registered and during *Merg* enquiry, *Saffina* Form (Ex.P/33) was issued and *Panchayatnama* of dead body of victim (Ex.P/34) was prepared in the presence of the witnesses wherein it was found that the deceased died due to burn injuries. To ascertain the exact cause of death, an application Ex.P/14 for postmortem report was submitted by the police to District Hospital, Indore along with dead body of the victim. Dr. Bharat Bajpayee (PW-9) and his associate Dr. Smt. P. Azad performed autopsy on the dead body on 11.05.2014 and submitted postmortem report Ex.P/17 wherein it was opined that the victim died due to complexities from burn injuries which included respiratory and cardiac failure and the death occurred within 24 hours from the time of postmortem. Short P.M. report (Ex.P/28) was given to the police. Viscera of the victim including hairs of the head and slide of vaginal swab were seized and seizure memo Ex.P/35 was prepared.

07. Appellants were sent for medical examination to Community Health Center, Kasravad for ascertaining their capability to perform sexual intercourse with applications Ex.P/36, P/38 & P/40 whereon report Ex.P/37, P/39 and P/41 was obtained with specific mention that they were found capable of performing sexual intercourse. During their medical examination, two semen slides from each appellant were prepared, their pubic hairs and underwear were

also collected and seal packed. A *Panchnama* in this regard Ex. P/42 was prepared. Seal packed burnt clothes of the victim collected by the Police Station - Kasravad on 10.05.2014 were also seized by seizure memo Ex.P/43. As per Story narrated by Jitendra Agrawal (PW-2) to the Police Station – Kasravad, FIR (Ex.P/25) was registered against the appellants on Crime No. 209/2014 under Sections 450 & 307/34 of IPC and investigation ensued.

08. During investigation, at the instance of Jitendra Agrawal (PW-2), spot map (Ex.P/4) was prepared. Appellants were arrested and arrest memo Ex.P/14 to Ex.P/16 was prepared. During their custody, appellants were interrogated under Section 27 of Indian Evidence Act, 1872 (hereinafter referred for short 'the Evidence Act') wherein they gave information about motorcycle which was used by them. Memorandum Ex.P/17, P/18 & P/19 were prepared. During search of person of appellant Akshay, one used mobile phone of Nokia company and SIM of Idea service provider were seized and seizure memo Ex.P/20 was prepared. From appellant Ankit, an election identity card issued by Election Commission, Aadhar card, identity card of RGPV, Bhopal, identity card issued from G.R.Y. College, Boravaon, driving license, debit card of Union Bank and 3 SIMs of mobile phone along with Rs.5000/- cash and used old purse were seized and seizure memo Ex.P/21 was prepared. Similarly, on search of person of appellant Vishal, an identity card issued from G.R.Y. College,

Boravaon, a Samsung mobile phone bearing SIM of Idea service provider along with Rs.110/- cash were seized and seizure memo Ex.P/22 was prepared. During investigation at the instance of the appellants, a Bajaj Discover motorcycle was seized from the rear side of house of the victim and seizure memo Ex.P/23 was prepared. Police from spot recovered a plastic can capacity of 1/2 liters filled with kerosene oil and a match box of Rajkamal company along with 2 burnt sticks, plain cotton and cotton soaked in kerosene, Terrycot scarf having smell of kerosene, skin of hand and nails of victim and remains of burnt clothes, burnt hair of the deceased with kerosene smell, white mobile cover and a mobile of Nokia company was seized vide seizure memo Ex.P/24.

09. During investigation, statements of Jitendra (PW-2), Rajendra (PW-3) Satish Yadav (PW-4), Mahesh (PW-5), Ganesh (PW-6), Dr. Geetika Paliwal (PW-7), Mohit Agrawal (PW-8), Dr. Bharat Bajpai (PW-9), Dr. Chandresh Dixit (PW-10), Kailash Khandegar (PW-11), Arpit Agrawal (PW-12), Dr. Rakesh Patidar (PW-13), Jagdish Chandra Rathore (PW-14), Munshi (PW-15), Tehsildar Pradeep Kourav (PW-16), Dilip Gangle (PW-17), Head Constable Purushottam Vishwakarma (PW-18), Deputy Superintendent of Police Shri H.S. Ohriya (PW-19) and Town Inspector / SHO Shri Girish Jejulkar (PW-20) were recorded. During investigation, father of the deceased submitted a mobile phone which was seized vide seizure memo Ex.P/9 and

papers relating to motorcycle used by the appellants were also seized vide seizure memo Ex.P/3.

10. An application for trace map of the spot was submitted to Naib Tehsildar, Kasravad i.e. Ex.P/50 and letter from Naib Tehsildar, Kasravad to Patwari is Ex.P/52, *Panchnama* is Ex.P/53 and Trace map Ex.P/54 submitted to police with application Ex.P/51. Statements of witnesses Jitendra Agrawal (PW-2) and Satish Yadav (PW-4) were also got recorded through letter Ex.P/57 under Section 164 of Code of Criminal Procedure, 1973 (hereinafter referred for short 'CR.P.C.'). A letter was also written to the Superintendent of Police, Khargone for call details whereon response (Ex.P/59) was received through draft of Superintendent of Police, Khargone. Seized kerosene, sticks, cotton soaked scarf, hairs of head of victim and hairs found on mattress were also sent through draft Ex.P/60 to FSL Sagar. Vaginal slide, underwear, pubic hairs and semen slide collected from the appellants were also sent for FSL examination (Ex.P/61) and viscera was sent for examination to FSL, Rau with draft (Ex.P/62). Similarly, semen slides and blood samples collected from the appellants during examination were also sent to FSL, Rau with draft (Ex.P/63). Seized articles were deposited in FSL, Rau and receipt of the same Ex.P/65 and Ex.P/66 was obtained. Similarly, receipts (Ex.P/67, 68 & P/69) were also

received from FSL, Sagar. From FSL, Sagar, FSL report (Ex.P/70) and from FSL, Rau, FSL report (Ex.P/71 & P/72) were received.

11. Blood samples of appellants Ankit, Akshay and Vishal were taken for DNA examination after preparing the applications vide Ex.P/46, P/47 & P/48. Blood samples were seized by seizure memo Ex.P/55. All the seized articles including blood samples, vaginal slide were sent for DNA examination to FSL Sagar from where FSL report (Ex.P/58) was received. From Superintendent of Police, Khargone, a letter for DNA examination was sent to Inspector General of Police, Indore (Ex.P/76) whereon permission from Inspector General of Police, Indore (Ex.P/77) was obtained. For collecting blood samples of the appellants for DNA examination, application (Ex.P/78) was submitted before the Judicial Magistrate First Class, Kasravad whereon permission (Ex.P/79) was obtained. For collection of blood samples an application to the Govt. Hospital, Kasravad (Ex.P/80) was submitted. FSL report from Central Forensic Science Laboratory, Bhopal was received vide Ex.P/86. DNA report on slide of vaginal swab is received vide Ex.P/58. Chemical examination report received from FSL, Bhopal is Ex.P/86.

12. Dr. Chandresh Dixit (PW-10) on 10.05.2014 examined the appellants and submitted report Ex.D/3, D/4 & D/5. He on medical examination found that upper part of index, middle and ring finger of left hand of appellant

Ankit Rathore was found burnt. Similarly, on medical examination burn injuries were also found on appellant Vishal. After completion of investigation, charge-sheet was filed under Sections 450, 302, 376(क), 376(घ), 376(2)(एम) of IPC before Additional Chief Judicial Magistrate, Kasravad, Magistrate of competent local jurisdiction.

13. Learned Additional Chief Judicial Magistrate after completing formalities under Section 207 of CR.P.C. committed the case to the Court of Sessions, Mandleshwar for trial. Charges under Section 449 & 449 r/w 34, 376(1), 376(डी), 376(ए), 376(ए) r/w 34 of IPC and Section 302 and 302 r/w 34 of IPC were framed by learned trial Court against the appellants, who abjured their guilt and claimed to be tried.

14. Prosecution in order to prove its case examined as many as 20 witnesses before the trial Court including Jitendra Agrawal (PW-2), Rajendra Yadav (PW-3) – alleged eyewitnesses, Dr. Geetika Paliwal (PW-7), Dr. Bharat Bajpai (PW-9), Dr. Chandresh Dixit (PW-10), and Dr. Rakesh Patidar (PW-13) (who examined victim, conducted autopsy and also examined appellants) along with Tehsildar Pradeep Kourav (PW-16), who recorded dying declaration of the deceased, Head Constable Purushottam Vishwakarma (PW-18), Deputy Superintendent of Police Shri H.S. Ohriya (PW-19) and Town Inspector / SHO

Shri Girish Jejulkarkr (PW-20), who conducted investigation. Apart that documents Ex.P/1 to P/86 were also marked in evidence.

15. The incriminating circumstances appearing against the appellants in prosecution evidence were brought to their notice. During examination under Section 313 of CR.P.C., they either denied them or expressed their innocence. They took defence that they are innocent and they have been falsely implicated in this case, however, no evidence has been led in defence except documents Ex.D/1 to D/7 which has been marked in evidence. Learned trial Court on the basis of evidence adduced before it vide impugned judgment, convicted and sentenced the appellants as stated herein-before.

16. The conviction and sentence is challenged on the ground that the learned trial Court has not properly appreciated the evidence available on record and that, material omissions, contradictions and anomalies have been ignored. Further contention is that no ocular evidence is available with regard to the alleged offences. Victim herself has stated nothing even in her alleged dying declaration about sexual assault by the appellants on her. It has further been contended that chain of circumstances is not complete. Since the appellants and the victim were students of same college, they were known to each other and, therefore, their presence in the house of the appellants is not unnatural. Appellants have not escaped the spot after the incident which in itself reveals

their innocence. They have fully cooperated in the investigation. Prosecution has failed to prove its case beyond reasonable doubt against the appellants. On these contentions, learned counsel for the appellants urges the Court for allowing the appeal by setting aside conviction and sentence as imposed by the learned trial Court.

17. Learned counsel appearing for the appellants Ankit and Akshay have placed reliance upon para 12, 13 & 14 of judgment passed by the Apex Court in ***Suresh vs. State rep. by Inspector of Police, 2025 INSC 318*** which runs as under:-

> "12. Now coming to the issue of the dying declaration. There is no doubt regarding the well-settled position of law that a dying declaration is an important piece of evidence and a conviction can be made by relying solely on a dying declaration alone as it holds immense importance in criminal law. However, such reliance should be placed after ascertaining the quality of the dying declaration and considering the entire facts of a given case. This Court in ***Uttam v. State of Maharashtra (2022) 8 SCC 576***, with respect to inconsistent dying declarations, observed as follows:-
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> "15. In cases involving multiple dying declarations made by the deceased, the question that arises for consideration is as to which of the said dying declarations ought to be believed by the court and what would be the guiding factors for arriving at a just and lawful conclusion. The problem becomes all the more knotty when the dying declarations made by the deceased are found to be contradictory. Faced with such a situation, the court would be expected to carefully scrutinise the evidence to find out as to which of the dying declarations can be corroborated by other material evidence produced by the prosecution."

In other words, if a dying declaration is surrounded by doubt or there are inconsistent dying declarations by the deceased, then Courts must look for corroborative evidence to find out which dying declaration is to be believed. This will depend upon the facts of the case and Courts are required to act cautiously in such cases. The matter at hand is one such case. In the present case, the deceased had given two statements which are totally different from her subsequent statements including the statement made before PW-12 on 18.09.2008, which has been considered a dying declaration based on which the appellant has been convicted. The first statement was made to the doctor (PW-13) on the day of the incident itself where she told PW-13 that the incident occurred while she was cooking. On the same day, the second statement was made to the police constable (PW-9) where the deceased said the same thing i.e. she caught fire by accident while cooking in the kitchen.

13. Now, the variances in deceased's statements cast serious doubts on the veracity of her subsequent statement of 18.09.2008 made before the Judicial Magistrate (PW-12) where the deceased had blamed the appellant for the incident. The deceased tried to explain her conduct by stating that she made false statements on the day of the incident as she could not tell the truth in the presence of her husband. It is very difficult to believe this version of the deceased because no other evidence corroborates the deceased's statement that the appellant had poured kerosene on her and then set her on fire. Moreover, in his cross-examination, Judicial Magistrate (PW-12) admitted that he did not question the deceased with regards to the details of her previous statements made before the police. The deceased did not say anything to the Judicial Magistrate regarding her previous statements of 12.09.2008 and 15.09.2008. In other words, the deceased did not tell the Magistrate that she lied in her statement of 12.09.2008. It is not a case of dowry harassment as all such possibilities were already ruled out during the investigation. When the Judicial Magistrate (PW-12) questioned the deceased about the reason for which appellant had set her on fire, as claimed by the deceased, the deceased answered as follows:-

"I had beaten my son Rubiston. My husband had asked

> me why you are beating the child. My husband had abused me with filthy language. I told him that I am going to die. He said that why do you die and he himself had poured kerosene and burnt me"
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> This is also contradictory to the other evidence on record and here, the timeline of the events becomes important. From the deposition of PW-1, it comes out that PW-1 was called by the deceased around 2 pm and PW-1 went to deceased's house and brought the deceased's son to her house. The incident occurred in the evening at around 6 pm. As per the deceased's dying declaration, she was beating her child to which the appellant raised objections and the matter escalated, leading to the alleged incident. All of this makes the dying declaration extremely doubtful.
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> 14. As discussed above, in cases where the dying declaration is suspicious, it is not safe to convict an accused in the absence of corroborative evidence. In a case like the present one, where the deceased has been changing her stance and has completely turned around her statements, such a dying declaration cannot become the sole basis for the conviction in the absence of any other corroborative evidence."

18. Learned counsel has further placed reliance upon paragraph No. 15, 16 & 17 in the case of ***Makhan Singh vs. State of Haryana, 2022 INC 831*** for buttressing their point that this is a case of multiple dying declaration where none is reliable as the doctor had neither made any endorsement nor had issued any certificate that the victim was fit to make a statement. The relevant paragraphs No. 15, 16 & 17 runs as under:-

> "15. In the present case, we are faced with two dying declarations, which are totally inconsistent and contradictory to each other. Both are recorded by Judicial Magistrates. A difficult question that we have to answer is which one of the dying declarations is to be believed.

> 16. The first dying declaration (Ex. DO/C) is recorded by Ms. Vani Gopal Sharma (DW-1). A perusal of the said would reveal that prior to recording the statement of deceased Manjit Kaur, Dr. Sobti (PW-1) had examined as to whether she was in a fit state of mind and conscious to make the statement. After certification, Ms. Vani Gopal Sharma (DW-1) got herself satisfied as to whether deceased Manjit Kaur was voluntarily making the statement or not and thereafter, recorded her statement. The said dying declaration (Ex. DO/C) is also endorsed by Dr. Sobti (PW-1) with the remarks that deceased Manjit Kaur was conscious throughout while making statement. Ms. Vani Gopal Sharma (DW-1) has also deposed that even after making the statement, she confirmed from the deceased as to whether the statement was voluntarily made by her.
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> 17. As against this, as far as the second dying declaration (Ex. PE) which was recorded by another Judicial Magistrate Ms. Kanchan Nariala (PW-6) after 3 days is concerned, it was recorded without there being examination by a doctor with regard to the fitness of the deceased Manjit Kaur to make the statement. Though the statement is recorded in L.N.J.P. Hospital and though doctors were available, Ms. Kanchan Nariala (PW-6) did not find it necessary to get the medical condition of the deceased examined from the doctors available in the hospital. It is further to be noted that Ms. Kanchan Nariala (PW-6) herself has admitted that Bhan Singh (PW-13) and Kamlesh Kaur (PW-11), father and sister of deceased Manjit Kaur were present in the hospital. The possibility of the second dying declaration (Ex. PE) being given after tutoring by her relatives cannot therefore be ruled out."

19. Learned counsel appearing on behalf of appellant Vishal has also vehemently attacked authenticity of dying declarations specifically dying declaration Ex.P/44 recorded by Tehsildar Pradeep Kourav (PW-16) to demolish case of prosecution. Learned counsel has further invited attention of this Court towards para – 2, 7, 8, 12, 14, 19 & 35 of Jitendra Agrawal (PW-2),

para-1, 2, 3, 7 & 14 of Rajendra Yadav (PW-3), para-1 & 5 of Satish Yadav (PW-4), para-6 of Ganesh Yadav (PW-6), para-2, 10 & 12 of Dr. Geetika Paliwal (PW-7), treating doctor and para-5 of Tehsildar Pradeep Kourav (PW-16), who has allegedly recorded dying declaration of the deceased at 05:20 PM on the date of incident i.e. 10.05.2014, to impeach their testimony and further buttress that prosecution has utterly failed to prove its case against the appellants and therefore urged to set aside conviction of the appellant and acquit him of the charges .

20. Learned counsel appearing for the appellant Vishal for buttressing the point that this is a case of multiple dying declaration wherein none is reliable has placed reliance upon the judgment passed by the Apex Court in ***P.V. Radhakrishna vs. State of Karnataka (2003) 6 SCC 443*** which runs as under:-

> "Accused-appellant allegedly committed uxoricide was found guilty of offence punishable u/s 302 Indian Penal Code, 1860 (for short "IPC"); and sentenced to undergo imprisonment for life and a fine of Rs. 1,000/- with default stipulation of one month imprisonment by 22nd Additional City Civil and Sessions Judge, Bangalore. The appeal before the High Court of Karnataka having yielded no success, this appeal has been filed.
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> 2. Accusations which led to trial of the accused-appellant in essence are as follows:
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> On 7.2.1993 Smt. Dharni (hereinafter referred to as "the deceased") was in the house with the accused-appellant when they quarrelled over certain, domestic differences, and the accused poured kerosene and set her on fire. On hearing her screams and seeing smoke coming out of the room, their

landlord V.N. Gupta (PW1) rushed to the spot. He did not find the accused there: but was told by the deceased that the accused had poured Kerosene and set her on fire and run away. On receiving of information about the incident Srinivasa Murthy, ASI, (PW6) arrived at the spot along with Sivanna (PW4) Police constable. The deceased was taken to the Victoria Hospital for treatment. At the hospital PW6 recorded statement of the deceased in the presence of Dr. M. Narayana Reddy (PW7). This was treated as FIR. After registering the case, investigation was started. In the hospital the deceased breathed her last while undergoing treatment on 8.2.1993 at about 10.25 p.m.

3. Dr. Thirunavukkarasu (PW3) conducted the post-mortem and found that the deceased had sustained about 80 to 85% ante-mortem burns. On completion of investigation, charge sheet was placed. Learned Trial Judge on consideration of the evidence on record found the accused guilty, as afore-mentioned, and convicted and sentenced him.

4. Reliance was placed on the dying declaration which was recorded by PW6 in the presence of PW7 and was marked as Exhibit P-7. In appeal before the High Court, the accused-appellant contended that the so-called dying declaration was not credible and acceptable. But the High Court did not find any substance in the plea, and dismissed the appeal by the impugned judgment.

5. Learned counsel appearing for the accused-appellant submitted that the so-called dying declaration (Exhibit P-7) cannot by any stretch of imagination be considered to be a dying declaration in the sense it is understood in law. The same was recorded by PW6, a police official. Though there was ample time, as the factual scenario shows, no effort was made to secure the presence of a magistrate if really a dying declaration was to be recorded. Furthermore PW7 has himself stated that the deceased had suffered 100% burns. It is highly improbable that the deceased was in a fit state of health and mind to give the dying declaration. There is no mention in the document treated as dying declaration that the deceased was in fit state of mind to give the statement. PW6 stated that attempt was made to get permission from the Chief Medical Officer. There is no material to substantiate the claim. On the contrary PW7 stated that though

there was no requisition, being the doctor at the spot he had given the permission to record the dying declaration on request by PW6.

6. The post-mortem report stated that the burns suffered were second and third degree burns and with those types of burns it is unlikely that the condition of the deceased permitted making of a statement and putting of signature. On the basis of uncorroborated dying declaration, conviction should not have been made.

7. Strong reliance was placed on *Munnu Raja v. State of M.P.*, *Laxmi vs. Om Prakash and Chacko vs. State of Kerala* to contend that evidence recorded by a police official as dying declaration is of no probative value.

8. Further, it was contended that conviction is impermissible solely on the basis of dying declaration.

9. By way of reply, learned counsel for the State submitted that dying declaration can be the sole basis for conviction if it is found to be credible and cogent. There is no hard and fast rule that the dying declaration should be recorded by a magistrate only. As a rule of caution it has been said that it would be advisable to have the statement recorded by a magistrate. There is nothing irregular or illegal if a police officer records a dying declaration.

10. At this juncture, it is relevant to take note of Section 32 of the Indian Evidence Act, 1872 (in short "Evidence Act") which deals with cases in which statement of relevant fact by person who is dead or cannot be found, etc. is relevant. The general rule is that all oral evidence must be direct viz., if it refers to a fact which could be seen it must be the evidence of the witness who says he saw it, if it refers to a fact which could be heard, it must be the evidence of the witness who says he heard it, if it refers to a fact which could be perceived by any other sense, it must be the evidence of the witness who says he perceived it by that sense. Similar is the case with opinion. These aspects are elaborated in Section 60. The eight clauses of Section 32 are exceptions to the general rule against hearsay just stated. Clause (1) of Section 32 makes relevant what is generally described as dying declaration,

though such an expression has not been used in any Statute. It essentially means statements made by a person as to the cause of his death or as to the circumstances of the transaction resulting in his death. The grounds of admission are; firstly, necessity for the victim being generally the only principal eye-witness the crime, the exclusion of the statement might deflect the ends of justice; and secondly, the sense of impending death, which creates a sanction equal to the obligation of an oath. 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.

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The principle on which dying declaration is admitted in evidence is indicated in legal maxim ""nemo moriturus proesumitur mentiri - a man will not meet his maker with a lie in his mouth.

11. This is a case where the basis the basis of conviction of the accused is the dying declaration. The situation in which a person is a on 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 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 eye-witness in a serious crime, the exclusion of the statement would leave the Court without a scrap of evidence.

12. 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 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. This Court has laid down in several judgments the principles governing dying declaration, which could be summed up as under as indicated in *Paniben vs. State of Gujarat* (1992) 2 SCC 474:

(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. (*See: Munnu Raja vs. State of M.P.*)

(ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. *(See: State of U.P. vs. Ram Sagar Yadav and Ramawati Devi vs. State of Bihar, (1983) 1 SCC 211)*

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

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

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. *(See: Kake Singh vs. State of M.P., AIR 1982 SC 1021)*

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. *(See: Ram Manorath vs. State of U.P., (1981)2 SCC 654)*

(vii) Merely because a dying declaration does contain the details as to the occurrence, it is not to be rejected. *(See: State of*

Maharashtra vs. Krishamurti Laxmipati Naidu, AIR 1981 SC 617)

(viii) Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth. *(See: Surajdeo Ojha vs. State of Bihar, AIR 1979 SC 1505)*

(ix) Normally the Court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eye-witness said that the deceased was in a fit and conscious state to make the dying declaration, the medical opinion cannot prevail. [*See: Nanahau Ram and Anr. v. State of Madhya Pradesh AIR 1988 SCC 912]*.

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

(xi) Where there are more than one statement in the nature of dying declaration, one first in point of time must be preferred. Of course, if the plurality of dying declaration could be held to be trustworthy and reliable, it has to be accepted. *(See: Mohanlal Gangaram Gehani vs. State of Maharashtra, (1982) 1 SCC 700)*

14. In the light of the above principles, the acceptability of alleged dying declaration in the instant case has to be considered. The dying declaration is only a piece of untested evidence and must like any other evidence, satisfy the Court that what is stated therein is the unallowed truth and that it is absolutely safe to act upon it. 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 basis of conviction, even if there is no corroboration.

15. There is no material to show that dying declaration was result of product of imagination, tutoring or prompting. On the contrary, the same appears to have been made by the deceased voluntarily. It is trustworthy and has credibility.

> 16. It was observed by a Constitution Bench of this Court in 267620 that where the medical certificate indicated that the patient was conscious, it would not be correct to say that there was no certification as to state of mind of declarant. Moreover, state of mind was proved by testimony of the doctor who was present when the dying declaration was recorded. In the aforesaid background it cannot be said that there was any infirmity.
>
> Further if the person recording the dying declaration is satisfied that the declarant is in a fit medical condition to make a dying declaration then such dying declaration will not be invalid solely on the ground that is not certified by the doctor as to the condition of the declarant to make the dying declaration.
>
> 17. The residuary question whether the percentage of burns suffered is determinative factor to affect the credibility of the dying declaration and the improbability of its recording. There is no hard and fast rule of universal application in this regard. Much would depend upon the nature of the burn, part of the body affected by the burn, impact of the burn on the faculties to think and convey the idea or facts coming to mind and other relevant factors. Percentage of burns along would not determine the probability or otherwise of making dying declaration. As noted in Rambai"s case (supra) physical state or injuries on the declarant do not by themselves become determinative of mental fitness of the declarant to make the statement."

21. *Per contra*, learned counsel appearing on behalf of the State, supporting the impugned judgment submits that the trial Court on due and proper appreciation of evidence has come to the finding that it is the appellants, who have committed rape and murder of the victim by setting her ablaze after committing ghastly crime of rape. Learned counsel for the State further submits that ample evidence is available on record to prove the complicity of the

appellants. Dying declaration is also available which cannot be discarded merely on whims and surmises. Appellants have not given any explanation with regard to their presence in the house of the victim as she was alone and they have also not offered any explanation as to how the incident has occurred wherein the victim lost life. Since no other person except appellants and victim were in the house at the time of incident, therefore, inference under Section 106 of Evidence Act will also come into operation against them. In the absence of any explanation, in the facts and circumstances of the case, appellants cannot escape from the punishment merely by keeping mysterious silence. On these submissions, learned counsel submits that the appeal is devoid of any substance and is liable to be dismissed.

Heard and considered the rival submissions raised at Bar and perused the record.

22. This is a prosecution case based on ocular evidence to some extent and also based on circumstantial evidence. The five golden principles, otherwise known as the 'Panchsheel' with regard to proof of a case based on circumstantial evidence which have been stated by the apex Court in the case of ***Sharad Birdhichand Sarda v. State of Maharashtra: AIR 1984 SC 1622*** are as follows:

> "(i) the circumstances from which the conclusion of guilt is to be drawn should be fully established, as distinguished from 'may be' established;

> (ii) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;
>
> (iii) the circumstances should be of a conclusive nature and tendency;
>
> (iv) they should exclude every possible hypothesis except the one to be proved; and
>
> (v) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

23. In the case of ***Aftab Ahmed Ansari vs. State of Uttranchal, AIR 2010 SC 773***, the Apex Court has considered about the mode and manner as well as the approach to be adopted by a Court while dealing with a case of circumstantial evidence. The relevant part whereof runs as under :

> "In dealing with circumstantial evidence, there is always a danger that conjecture or suspicion lingering on mind may take place of proof. Suspicion howsoever strong cannot be allowed to take place of proof and, therefore, the Court has to judge watchfully and ensure that the conjectures and suspicions do not take place of legal proof. However, it is no derogation of evidence to say that it is circumstantial. Human agency may be faulty in expressing picturization of actual incident but the circumstances cannot fail. Therefore, many a times, it is aptly said that "men may tell lies, but circumstances do not". In cases where evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established. Each fact must be proved individually and only thereafter the Court should consider the total cumulative effect of all the proved facts, each one of which reinforces the conclusion of the guilt. If the combined effect of

> all the facts taken together is conclusive in establishing the guilt of the accused, the conviction would be justified even though it may be that one or more of these facts, by itself/themselves, is/are not decisive. The circumstances proved should be such as to exclude every hypothesis except the one sought to be proved. But this does not mean that before the prosecution case succeeds in a case of circumstantial evidence alone, it must exclude each and every hypothesis suggested by the accused, howsoever extravagant and fanciful it might be. There must be a chain of evidence so far complete as not to leave any reasonable ground for conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability, the act must have been done by the accused. Where the various links in a chain are in themselves complete, then a false plea or a false defence may be called into aid only to lend assurance to the Court. If the circumstances proved are consistent with the innocence of the accused, then the accused is entitled to the benefit of doubt. However, in applying this principle, distinction must be made between facts called primary or basic on the one hand and inference of facts to be drawn from them on the other. In regard to the proof of basic or primary facts, the Court has to judge the evidence and decide whether that evidence proves a particular fact or not and if that fact is proved, the question arises whether that fact leads to the inference of guilt of the accused person or not. In dealing with this aspect of the problem, the doctrine of benefit of doubt applies. Although there should be no missing links in the case, yet it is not essential that every one of the links must appear on the surface of the evidence adduced and some of these links may have to be inferred from the proved facts. In drawing these inferences or presumptions, the Court must have regard to the common course of natural events, and to human conduct and their relations to the facts of the particular case."

24. We will appreciate the circumstantial evidence adduced by the prosecution in the instant case in the light of the aforesaid legal principles so as to examine as to whether the findings arrived at by the learned trial Court with regard to proof of the circumstances are in conformity of the evidence as well as

whether a complete chain of circumstances was established exclusively pointing towards the guilt of the accused?

25. Firstly, we will deal with the evidence adduced with regard to the charge of murder against the appellants. It is not in dispute that the appellants and deceased were known to each other as they were students of same college, appellant Ankit Rathore has been her classmate and Akshay and Vishal were 3rd Year student of B. Pharmacy of G.R.Y. College, Borawan Tehsil Kasravad District Khargone. This has been accepted by the appellants in their examination under Section 313 of Cr.P.C. in answer to question Nos. 2 & 3. Jitendra Agrawal (PW-2), cousin of father of the deceased, has stated in examination-in-chief in para-2 of his statement before the Court that Satish Yadav (PW-4) has told him that some persons have come to house in between 12.00 to 1.00 pm. On this, he reached in the house of his cousin Mahesh and found that some persons (appellants) had come there for giving invitation card. When he heard screams from the upper floor of the house, he went there and found that deceased burning. He has identified appellants, who had come to the house of the victim on the fateful day. Though this witness has turned hostile up to certain extent but his evidence cannot be discarded totally. In cross-examination para-14 he has also admitted the presence of the appellants in the house when he reached there. In paragraph-20, he has admitted his signatures on arrest memo

(Ex.P/14 to P/16) prepared with regard to the appellants. Though he has denied arrest of the appellants in his presence in para-24, but looking to the answers of question No. 80 to the appellants in the questionnaire prepared for their examination under Section 313 of CR.P.C. and testimony in this regard of Girish Jejulkar (PW-20), Inspector / SHO of the concerned Police Station, Afjalpur, it is proved that appellants were arrested and Ex.P/14 to P/16 were prepared in this regard. Therefore, denial in para-24 of the testimony of Jitendra Agrawal (PW-2) is of no consequence.

26. Satish Yadav (PW-4) has also proved presence of appellants in the house of the deceased on the date of the incident and he has also proved that on enquiry, they have told that they had come for giving invitation card and when he came to the upper floor, he found that the deceased was burning whereon with the help of bed-sheet and mattress, doused the fire. Though this witness has also turned hostile to some extent, but his testimony along with Jitenra Agrawal (PW-2) and admissions of the appellants in answer the questions put to them under their examination under Section 313 of CR.P.C., it is apparent that the appellants were present in the house of the deceased on the fateful day when deceased was set ablaze. This has been properly appreciated by the learned trial Court in para-38 to 41 of the impugned judgment. In the instant case, it is true that none has witnessed how the deceased caught fire or was set ablaze, but

from the evidence available on record by way of statement of Dr. Chandresh Dixit (PW-10), who first of all examined the deceased in Community Health Center, Kasravad, Dr. Geetika Paliwa (PW-7), who admitted the deceased on the date of the incident i.e. 10.05.2014 in Choithram Hospital, Indore of Burn Unit and also treated her, Dr. Bharat Bajpayee (PW-9), who has conducted autopsy on the dead body that the victim suffered serious burn injuries on her vital parts of her body, are of utmost importance with regard to cause of death of the deceased. She was found near about 96% deep burn injuries and she succumbed due to the complications which arose from the burn injuries on 11.05.2014, i.e. the next day of the incident. Thus, the trial Court has rightly held that the death of the deceased is of homicidal in nature, it is not suicidal or accidental. The aforesaid finding is based on the evidence available on record which requires no interference.

27. Since none has witnessed how the deceased caught fire, therefore, it is to be ascertained from the other evidence available in the form of circumstantial evidence on record, whether these are the appellants only, who had set ablaze the deceased. As discussed hereinabove, the presence of the appellants in the house of the victim at the time of the incident is conclusively proved and it has folded in the statement of Satish Yadav (PW-4) and Jitendra Agrawal (PW-2) that in enquiry, the appellants had told them that they have

come for giving invitation card, but it is noteworthy that no invitation card has been seized from the spot or from the house of the deceased which gives an indication that appellants have given false explanation with regard to their presence in unusual hours when she was alone in her house.

28. Dr. Geetika Paliwal (PW-7) has admitted in para-3 of her examination-in-chief before the Court that when the victim admitted for treatment in Choithram Hospital, Indore, she took history wherein the deceased told her that she has made suicidal attempt by pouring kerosene oil on her and she has also submitted that she found deceased with 96% deep burn injuries. Defence has tried to build up a case of suicide on the basis of this history and statement of the witness Dr. Geetika Paliwal (PW-7) and to build up this case, they have also vehemently impeached the credibility of dying declaration Ex.P/44 recorded by the Tehsildar Pradeep Kourav (PW-16). Before testing the veracity and giving any probative value to the history vis-à-vis dying declaration (Ex.P/44), we deem it fit to deal with dying declaration (Ex.P/44) and arguments and law cited on behalf of the appellants with regard to the cases where multiple dying declarations have been recorded. Dr. Chandresh Dixit (PW-10), who for the first time examined the deceased on 10.05.2014 at about 12:55 PM, prepared Ex.P/30 and has mentioned in para-4 that when he examined the victim, she was near about 90% with burn injuries on her head,

face, chest, back, belly, both upper and lower limbs and she was in semi-conscious state. Dr. Geetika Paliwal (PW-7), who has recorded history allegedly at the instance of the deceased has stated in para-3 that on examination, she found that victim (now deceased) was having 96% deep burn injuries. This examination has been carried out same day at 03:21 PM (Afternoon). She has nowhere mentioned that at the time when she took history from the victim, what was her mental state, therefore, much weight cannot be attached to the history taken by Dr. Geetika Paliwal (PW-7) specifically in the facts where dying declaration which is categorical in nature, was recorded by Tehsildar Pradeep Kourav (PW-16) on the same day at about 05:20 PM and this has been admitted even by Dr. Geetika Paliwal (PW-7) in her cross-examination of para-8. Though she has mentioned that Tehsildar has not recorded dying declaration of the victim in her presence, but it does not mean that the dying declaration was not recorded by the Tehsildar Pradeep Kourav (PW-16).

29. When we examine the dying declaration recorded by Tehsildar Pradeep Kourav (PW-16), it is found that it is in question and answer form wherein the victim has specifically stated that she has been set ablaze by the appellants Ankit, Vishal and Akshay and the reason was mentioned by the victim that ‘they wanted something from her. She has specifically mentioned their presence at the time of the incident which has also been substantiated by

other evidence as mentioned hereinabove. She has also answered the date and time of the incident. It is apposite to reproduce the dying declaration (Ex.P/44) recorded by the Tehsildar Pradeep Kourav (PW-16) which runs as under:-

मृत्यु□कालीन पत्र

नाम – नि ध पता – महेश अग्रवाल उम्र- 22 वर्ष
निवासी - ओझरा कसरावद जिला- खरगौन
स्थान- टी चोइयराम अस्पताल दिनांक- 10.05.14
समय- 5.20pm.

1. तुम्हें क्याि हो गया?
   मैं जल गई।
2. यह कैसे हो गया?
   मुझे लड़कों ने जला दिया वशाल, अं कत, अक्षय ने जला दिया। वो कुछ चाहते थे।
3. घटना के समय कौन-कौन लोग उपस्थित थे?
   घटना के समय वशाल, अं कत, अक्षय थे।
4. घटना कस समय एवं कस दिनांक को घटित हुई?
   दिनांक 10.05.2014 को 12.30 बजे के लगभग
5. इसके अलावा कुछ कहना है?
   नहीं।
   पी.डता के बांये पैर का अंगूठा

प्रदीप कौरव
तहसीलदार इंदौर

30. Defence has raised serious doubts about veracity of this dying declaration (Ex.P/44) on the ground that mental fitness of deceased at the time of statement has not been got certified by any doctor, therefore, this dying declaration cannot be relied upon. For this, he has relied on ***Suresh (supra)*** and

Makhan Singh (supra). From statement of Tehsildar Pradeep Kourav (PW-16) and Dr. Geetika Paliwal (PW-7) which is supported by treatment history sheet (Ex.P/13), dated 10.05.2014, it is not in dispute that the dying declaration of the victim (Ex.P/44) was taken by the Tehsildar Pradeep Kourav (PW-16) on the date and time mentioned in the aforesaid dying declaration. From perusal of cross-examination in para-3 of Tehsildar Pradeep Kourav (PW-16), it is clear that he has asked for certificate from the doctors to ascertain mental fitness of the deceased before recording her statement, but he has explained that doctors told him that patient (victim) (*Bol chal rahi hai*) i.e. she is giving response to the questions put to her, therefore, no certificate is required. In cross-examination para-11, he has also mentioned that at the time of recording statement of the deceased, nurse and hospital staffs (*Chikistak*/doctor) were present. This statement could not be demolished in cross-examination which in itself reveals that at the time of recording of dying declaration (Ex.P/44), the victim was in fit mental condition to give the statement which is also apparent from the response given by her to the questions put to her during her examination by Tehsildar Pradeep Kourav (PW-16). There is nothing on record to show that she was tutored by anyone before recording of dying declaration.

31. In the case of ***Laxman vs. State of Maharashtra, AIR 2002 SC 2973,*** the Constitution Bench of Apex Court has held that if the evidence to the

effect maker of the statement was in fit mental condition at the time of giving statement which is now dying declaration, it can be acted upon without certificate of doctor. Relevant paragraph runs as under:-

> "A dying declaration can be oral or in writing and in 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 is 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."

32. In the case of ***Rakesh v. State of Haryana, (2013) 4 SCC 69,*** the Apex Court has held that much weightage is not to be given to the history given to doctor in view of the clear dying declaration of the deceased. Relevant

paragraph runs as under:-

> **"14.** Dr S.P. Chug, Casualty Medical Officer, PGIMS, Rohtak was examined as PW 11. In his evidence, he deposed that on 15-5-1998 at about 1.30 a.m., he examined Kailash w/o Rakesh and on examination he found that the patient was conscious, pulse and BP were unrecordable. He further stated that there were superficial to deep burns involving almost all the body except the legs below the knees. There was approx. 85% burns which were subjected to surgeon's opinion and was kept under observation. Though it was pointed out that while recording the history of the patient, he noted that it was the accidental fire while cooking food, in view of the categorical statement by the deceased in her dying declaration the reference made by PW 11 while recording the history of the patient would not affect the prosecution case."

33. In the instant case, the dying declaration recorded by the Tehsildar Pradeep Kourav (PW-16) is clear and cogent given in a fit mental condition, therefore, no weightage can be attached to the statement allegedly made by the victim during giving history to Dr. Geetika Paliwal (PW-7). Hon'ble Apex Court in catena of judgments has dealt with and summarized the principles of law relating to the admissibility and probative value of dying declaration and gist of the judgment may be taken as where there are inconsistent dying declarations then it is to be ascertained which one of the dying declaration can be acted upon. One of such judgment is ***Jagbir Singh vs. State of NCT Delhi, AIR 2019 SC 4321***, wherein dealing with the cases where multiple dying declarations were involved, Hon'ble Apex Court has summarised the principle guidelines which runs as under:-

"30. A survey of the decisions would show that the principles can be culled out as follows:

a. Conviction of a person can be made solely on the basis of a dying declaration which inspires confidence of the court;

b. If there is nothing suspicious about the declaration, no corroboration may be necessary;

c. No doubt, the court must be satisfied that there is no tutoring or prompting;

d. The court must also analyse and come to the conclusion that imagination of the deceased was not at play in making the declaration. In this regard, the court must look to the entirety of the language of the dying declaration;

e. Considering material before it, both in the form of oral and documentary evidence, the court must be satisfied that the version is compatible with the reality and the truth as can be gleaned from the facts established;

f. However, there may be cases where there are more than one dying declaration. If there are more than one dying declaration, the dying declarations may entirely agree with one another. There may be dying declarations where inconsistencies between the declarations emerge. The extent of the inconsistencies would then have to be considered by the court. The inconsistencies may turn out to be reconciliable.

g. In such cases, where the inconsistencies go to some matter of detail or description but is incriminatory in nature as far as the Accused is concerned, the court would look to the material on record to conclude as to which dying declaration is to be relied on unless it be shown that they are unreliable;

h. The third category of cases is that where there are more than one dying declaration and inconsistencies between the declarations are absolute and the dying declarations are irreconcilable being repugnant to one another. In a dying declaration, the Accused may not be blamed at all and the cause of death may be placed at the doorstep of an unfortunate accident. This may be followed up by another dying declaration

> which is diametrically opposed to the first dying declaration. In fact, in that scenario, it may not be a question of an inconsistent dying declaration but a dying declaration which is completely opposed to the dying declaration which is given earlier. There may be more than two."
>
> i. In the third scenario, what is the duty of the court? Should the court, without looking into anything else, conclude that in view of complete inconsistency, the second or the third dying declaration which is relied on by the prosecution is demolished by the earlier dying declaration or dying declarations or is it the duty of the court to carefully attend to not only the dying declarations but examine the rest of the materials in the form of evidence placed before the court and still conclude that the incriminatory dying declaration is capable of being relied upon?"

34. In the light of proposition of law laid down by the Apex Court in the aforesaid judgments, in the instant case where recording of dying declaration recorded by the Tehsildar Pradeep Kourav (PW-16) is well proved, along with the fact that appellant was in fit mental condition at the time of recording of the statement, arguments advanced on behalf of the defence relying upon the judgments in ***Suresh (supra)*** and ***Makhan Singh (supra)*** that since it does not bear certificates of the doctor, therefore, it cannot be relied upon, is not sustainable and rejected.

35. Learned trial Court has appreciated the aforesaid point in para 30 to 60 of the impugned judgment which in the considered opinion of this Court is proper and in accordance with the settled the legal position with regard to the probative value of dying declaration where more than one are on record.

36. Apart that, it is also to be noted that when presence of the appellants on spot at the time of the incident has been proved by cogent evidence on record, Section 106 of the Indian Evidence Act, 1872 (hereinafter referred for short 'the Evidence Act') comes into play wherein explanation is required from the accused/appellants for the facts which are in their specific knowledge. Section 106 of Evidence Act runs as under:

> **"106. Burden of proving fact especially within knowledge.-** When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."

37. Hon'ble Apex Court in various judgments has elaborated upon the principles as enshrined in Section 106 of Evidence Act. In ***Trimukh Maroti Kirkan vs. State of Maharashtra (2006) 10 SCC 681,*** the Apex Court has held that the offences which are committed in secrecy inside boundary of the house, persons present at the scene of crime are required to give explanation as to how the crime was committed or incident took place. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that burden to establish its case lies entirely upon the prosecution and there is no duty at all on the accused to offer any explanation. The relevant para 15 runs as under:-

> **"15.** Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would

> undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation."

38. In view of the above, when we scrutinise the evidence in the instant case being present in the house of the deceased at the time of the incident, appellants have not offered any explanation as to how the incident wherein the deceased was set ablaze, occurred. It is also pertinent to mention that the appellants were medically examined on 10.05.2014 and appellant Ankit was found with burn injuries in his index, middle and ring finger. When this question was put to him as question No. 124 of questionnaire prepared under Section 313 of Cr.P.C., he has pleaded ignorance. Similarly, appellant Vishal has pleaded an answer to the question No. 125 are not true that he suffered any burn injury on his person, but the same has been proved by Dr. Chandresh Dixit (PW-10) that he had examined appellant Vishal on 10.05.2014 at about 05:45 PM wherein he was found with burn injuries in his hands. He has further in para-20 admitted that medical reports Ex.D/3, D/4 & D/5 are of the appellants prepared by him. Thus, it is also apparent that with regard to their burn injuries,

appellants Vishal and Akshay have not given any explanation as to how they sustained those injuries which is also a circumstance against them giving additional link.

39. A motorcycle which was borrowed from Mukesh (PW-1) by the appellant Akshay which was used by the appellants to reach the house of the deceased has been found parked in the rear side of the house which in itself reveals their bad intention. It is of common knowledge that unless proved otherwise, if a person comes to visit his friend or known person, parks his vehicle by the side or in front of his house. Appellants have not offered any explanation as to why they had parked the motorcycle used by them to come to the house of the deceased, in the rear side of the house of the deceased. This also raises adverse inference against them. All these facts have been taken into account and appreciated by the Court below in paragraph No. 36, 37,40, 42, 43, 44 & 45 of the impugned judgment. Taking into account all these circumstances, the learned trial Court reached to the conclusion that these are the appellants, who have set ablaze the victim on fire by pouring kerosene on her which resulted in her death. Thus, the learned trial Court found proved the offence under Section 302 of IPC against the appellants. No factual or legal error appears to have been committed in coming to the aforesaid conclusion. After due consideration to the aforesaid appreciation of evidence available on

record, we are of view that no fault can be found with the aforesaid finding recorded by the learned trial Court and hence it finds stamp of approval of this Court.

40. Now we will advert to the charges of gang rape levelled against the appellants. It is not in dispute that Dr. Bharat Bajpayee (PW-9), who has conducted autopsy on the dead body of the deceased, has found serious injuries on vaginal part of the victim. He has stated in para-4 of the statement that on examination he found that pubic hairs are twisted, hymen were freshly and in 3, 5, 7, 9 o clock position with blood. Lower and rear part of the vagina was having contused injury measuring 3 x 1.7 cm. Right part of labia minora was also injured and all the injuries were red in colour and the cause of ante mortem was within 24 hours from the time of examination. Dr. Bharat Bajpayee (PW-9) has also in paragraph -5 has mentioned that he has found 6 x 4 cm. wound in the right side of the head and also 7 x 5 cm. wound in the left side of the head. Her lower lip was also having contused injury, size 2 x 1.4 cm. Aforesaid injuries was caused by hard and blunt object, were ante-mortem in nature and caused within 24 hours of the examination. In cross-examination, it cannot be demolished and, therefore, it is proved that before setting her ablaze, the deceased was assaulted sexually as well as physically which is apparent from the injuries found on her private parts and also on her head.

41. Now the question arises whether the injuries found on the vaginal part of the victim, who was of near about 23 years in age, in itself is a proof of gang rape by the appellants. From the definition of rape as given under Section 375 of the IPC prevailing on the date of incident is that penetration of penis inside the vaginal part, anus, urethra of a woman should be against her will and without her consent to bring this under definition of rape. For ready reference, Section 375 of IPC is reproduced as under:-

> "**375. Rape.—**A man is said to commit "rape" if he—
>
> (a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or
>
> (b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or
>
> (c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or
>
> (d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,
>
> under the circumstances falling under any of the following seven descriptions:—
>
> **(First.)— Against her will.**
>
> **(Secondly.) — Without her consent.**
>
> ....."

42. From perusal of the entire record, no evidence is found available to prove the fact that sexual assault was committed upon the deceased against her will and/or without her consent, therefore, even in the presence of other evidence on record about the injuries on the vaginal part of the deceased, it cannot be presumed that the aforesaid injuries alone constitute offence of rape or gang rape. It is well settled that on suspicion how so ever strong cannot take place of proof. The above enunciations resonated umpteen times to be reiterated in ***Raj Kumar Singh vs. State of Rajasthan, AIR 2013 SC 3150, (Para 17)*** as succinctly summarized in paragraph 21 as hereunder:

> "21. 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 "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 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."

In the light of aforesaid findings given by the learned trial Court in para-76 of the impugned judgment with regard to commission of gang rape by appellants is not sustainable and, therefore, it is set aside for the reasons mentioned hereinabove.

43. As far as the findings with regard to the offence under Section 449/34 of IPC i.e. in respect of house-trespass in order to commit offence punishable with death are upheld as presence of the appellants in the house of the deceased has been established and it has also been established that she was set ablaze by the appellants with intention to commit her murder which actually has been found to have taken place. Therefore, conviction and sentence of the appellants for the aforesaid offence is affirmed.

44. Resultantly, this appeal is **partly allowed** and conviction and sentence of the appellants under Section 376(ए)/34, 376(डी) of IPC are hereby set aside and the appellants are acquitted of the aforesaid charges. Conviction and sentence of the appellants under Section 302 and alternatively Section 302 r/w 34 of IPC is also upheld. Since the learned trial Court while awarding sentence, awarded life imprisonment only under Section 376(ए)/34 of IPC holding that the offence under Section 302 of IPC is included in that offence being a major offence and, therefore, no separate sentence was passed for the offence under Section 302 of IPC. Since this Court has set aside conviction and sentence of the appellants under Section 376(ए)/34, 376(डी) of IPC, therefore, sentence for the offence under Section 302 of IPC is awarded separately for each of the appellant. They will have to undergo life imprisonment with fine of Rs.5000/- and in case of failing to deposit the fine amount, they have to undergo further rigorous imprisonment of six months. Period of jail sentence undergone by the appellants will be set off in accordance with the law if occasion arises.

45. The appeal stands partly allowed as mentioned herein-above. Copy of the judgment be sent by fastest mode to the concerned jail authorities for compliance and necessary action at their end. Copy of judgment passed by this Court along with the record of this case be also remitted back to the concerned

Trial Court forthwith for necessary action. Direction as contained in para-88 of the impugned judgment with regard to the properties seized is also affirmed.

Accordingly, the appeal is **partly allowed and disposed of**.

(VIVEK RUSIA)
JUDGE

(BINOD KUMAR DWIVEDI)
JUDGE

Soumya