

**IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR**

BEFORE

JUSTICE SUJOY PAUL

&

JUSTICE ACHAL KUMAR PALIWAL

CRIMINAL APPEAL No. 220/2014

BETWEEN:-

**SONU @ BALLU HATHKAIYA S/O LATE SHRI
CHHANNU LAL HATHKAIYA, AGED ABOUT 28
YEARS, CHANDI MOHALLA P.S. KATANGI
(MADHYA PRADESH)**

.....APPELLANT

***(SHRI V.K. RISHI WITH SHRI ABHISHEK RISHI - ADVOCATE FOR
APPELLANT)***

AND

**P.S. KATANGI THE STATE OF MADHYA PRADESH
JABALPUR (MADHYA PRADESH)**

.....RESPONDENT

***(BY SHRI ARVIND SINGH – GOVERNMENT ADVOCATE FOR THE
STATE)***

.....
Reserved on : 26/06/2023

Pronounced on : 03/07/2023
.....

*This Criminal Appeal having been heard and reserved for
judgment, coming on for pronouncement on this day, Justice Achal
Kumar Paliwal pronounced the following:*

JUDGMENT

This is an appeal filed under Section 374(2) of the Code of
Criminal Procedure, 1973 (In short “Cr.P.C.”) against the judgment dated

25/07/2012 passed in Sessions Trial No. 465/2011 by Sessions Judge, Jabalpur whereby appellant was held guilty for committing an offence punishable under Sections 302 of IPC and directed him to undergo sentence of R.I. for life with fine of Rs. 500/-, in default to suffer further RI for one month.

2. The prosecution story, in brief, is that on the date of incident i.e. 14-02-2011, in the evening at 06-07 pm, when deceased Gunja was preparing meal, appellant/accused, who is brother-in-law (*Devar*) of deceased Gunja, poured kerosene oil on her & thereafter, set her ablaze. Chaman Lal, elder brother of appellant, took her to Medical College, Jabalpur & got admitted there for treatment. On 15/02/2011, Tehsildar P.S. Tripathi recorded dying declaration of Gunja Ex.P-10. Initially Offence punishable u/s 307 of IPC was registered against appellant by ASI JP Dwivedi & lodged FIR Exh. P-8. On 15/02/2011, SI Lokendra Singh received information Exhibit P-15 about deceased's admission & when deceased succumbed to injuries, he received information relating to death of deceased Exhibit P-14.

3. Tehsildar P.S. Tripathi prepared Naksha Panchayatnama Exhibit P-2. Dr. Ashok Jain conducted postmortem & prepared report Exhibit P-7 & sealed scalp hairs of deceased & handed over to the concerned police constable & same were seized by SI Lokendra Singh vide seizure memo Exhibit P-16. During investigation, SI J.P. Dwivedi prepared site map Exhibit P-8 & recovered plastic can from appellant vide recovery memo Exhibit P-4 in pursuance information(Exhibit P-3) provided by appellant. SI Hakam Singh recorded statements of Dharmendra, Rajendra, Kandhilal, Ram Ji, Chaman Lal, Mamta Bai, Shekhar & Nitesh. During investigation, he sent seized articles for FSL examination vide Exhibit P-11 & report thereof is Exhibit P-12. After investigation charge sheet was

filed before the Court of learned JMFC, Patan where from the case was committed to the court of learned Sessions Judge, Jabalpur.

4. After the case was committed to the Sessions Court, Sessions Court framed the charge against appellant under section 302 of IPC and he denied the charge and stated that he be tried. Thereafter, learned trial court recorded the prosecution evidence and examined the appellant under section 313 of Cr.P.C. wherein appellant stated that he did not burn Gunja & he was in his *sasural* in Katni, a day ago when incident occurred. Appellant examined one witness Sourabh (DW-1) in his defence.

Submissions of Appellant:-

5. Learned counsel for the appellant submits that there is no eye witness to the incident. Learned trial court has convicted appellant on the basis of dying declaration (Exhibit P-10) recorded by Tehsildar P.S. Tripathi, (PW-7) and oral dying declarations as deposed by prosecution witnesses Babulal and Rajendra but there are material contradictions in oral dying declarations allegedly made to Rajendra and Babulal and written dying declaration (Exhibit P-1) recorded by P.S. Tripathi on the point that as to whether appellant alone set on fire deceased or whether alongwith appellant, Amit and Sonu also set on fire deceased & whether appellant did anything more after pouring kerosene over deceased . Mother of deceased Laxmi Bai (PW-4) has stated that she is not aware about circumstances as to how her daughter got burnt and died. The burning is accidental. Nothing incriminating has been recovered from the appellant.

6. Learned counsel for the appellant has also contended that even if dying declaration (Exhibit P-10) is relied upon, still, offence under section 302 of IPC is not made out, as in above dying declaration itself, only it is mentioned that appellant poured kerosene over the deceased and

deceased caught fire from the *chulha* and therein, it is not mentioned that appellant after pouring kerosene over the deceased, set her to ablaze. Therefore, at the most offence under section 304 part II of IPC is made out. Learned trial court has committed error of law & fact in discarding the evidence of defence witness Sourabh. Learned trial court has not properly appreciated the evidence on record. Hence, the impugned judgment be set aside & appellant be acquitted.

Submissions of Government Counsel:-

7. Learned counsel for the respondent/State opposed the prayer made by appellant and submitted that trial Court has rightly convicted and sentenced appellant under section 302 of IPC. Prosecution witnesses Babulal, Rajendra, P.S. Tripathi and Dr. Kanhaiyalal Gupta are wholly reliable. It is proved from the statement of P.S. Tripathi and Dr. Kanhaiyalal, that at the time of recording of dying declaration (Exhibit P-10), the deceased was physically and mentally fit to give statement. Further, prosecution witness Babulal has stated that when he met his daughter in the hospital, his daughter informed him that appellant had burnt her after pouring kerosene over her. There are no material contradictions and omissions between oral dying declarations & written dying declaration and there is sufficient evidence on record to convict the appellant under section 302 of IPC. Learned Government Advocate has also submitted that in the case, it is clearly proved that appellant poured kerosene over the deceased & that in itself shows that intention of appellant was to kill the deceased. Therefore, offence under section 302 of IPC is made out. Hence, he prays for dismissal of appeal.

8. We have heard learned counsel for parties and perused the record of Trial Court.

Findings:-

9. Perusal of evidence adduced by the prosecution reveals that there is no eye witness to the incident and prosecution case rests on multiple dying declarations i.e. (i) Dying declaration recorded by Tehsildar P.S. Tripathi, and (ii) two oral dying declarations made by deceased, one to her father and another to her brother.

10. Hence, before proceedings further, it would be appropriate to refer the principles governing dying declarations/ multiple dying declarations/requirement of corroboration.

11. In **Paniben vs. State of Gujarat, (1992) 2 SCC 474** { *referred to in Uttam vs. State of Maharashtra (2022) 8 SCC 576*}, Hon'ble Apex Court on examining the entire conspectus of the law on the principles governing dying declaration, concluded thus :

“18. (i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. (Munnu Raja v. State of M.P. (1976) 3 SCC 104)

(ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. (State of U.P. v. Ram Sagar Yadav (1985) 1 SCC 552 , Ramawati Devi v. State of Bihar (1983) 1 SCC 211).

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

(iv) Where dying declaration is suspicious it should not be acted upon without corroborative evidence. (Rasheed Beg v. 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. (Kake Singh v. State of M.P. 1981 Supp SCC 25).

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. (Ram Manorath v. State of U.P.(1981) 2 SCC 651).

(vii) *Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected. (State of Maharashtra v. Krishnamurti Laxmipati Naidu, 1980 Supp SCC 455)*

(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. (Surajdeo Oza v. State of Bihar 1980 Supp SCC 769).*

(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 has said that the deceased was in a fit and conscious state to make this dying declaration, the medical opinion cannot prevail. (Nanahau Ram v. State of M.P., 1988 Supp SCC 152).*

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

12. Kushal Rao V. State of Bombay(AIR 1958 SC 22) is a watershed judgment on the law on the evidentiary value of dying declarations. In this case, Hon'ble apex Court laid down the following principles as to the circumstances under which a dying declaration may be accepted, without corroboration:

"16. On a review of the relevant provisions of the Evidence Act and of the decided cases in the different High Courts in India and in this Court, we have come to the conclusion, in agreement with the opinion of the Full Bench of the Madras High Court, aforesaid,

(1) that it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated;

(2) that each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made;

(3) that it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other pieces of evidence;

(4) that a dying declaration stands on the same footing as another piece of evidence and has to be judged in the

light of surrounding circumstances and with reference to the principles governing the weighing of evidence;

(5) that a dying declaration which has been recorded by a competent Magistrate in the proper manner, that is to say, in the form of questions and answers, and, as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character, and

(6) that in order to test the reliability of a dying declaration, the court has to keep in view, the circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the facts stated, had not been impaired at the time he was making the statement, by circumstances beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties.”

13. In the present case, there are three dying declarations, one written dying declaration and two oral dying declarations. Therefore, it is also relevant to refer to principles enunciated by Hon’ble apex court with regard to a case where there is more than one dying declaration.

14. In **Uttam vs. State of Maharashtra (2022) 8 SCC 576** , Hon’ble Apex Court has held as under:-

“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 scrutinize the evidence to find out as to which of the dying declarations can be corroborated by other material evidence produced by the prosecution. Of

equal significance is the condition of the deceased at the relevant point in time, the medical evidence brought on record that would indicate the physical and mental fitness of the deceased, the scope of the close relatives/family members having influenced/ tutored the deceased and all the other attendant circumstances that would help the Court in exercise of its discretion.”

“19. It is thus clear that in cases where the Court finds that there exist more than one dying declarations, each one of them must be examined with care and caution and only after satisfying itself as to which of the dying declarations appears to be free from suspicious circumstances and has been made voluntarily, should it be accepted. As observed in the judgments quoted above, it is not necessary that in every case, a dying declaration ought to be corroborated with material evidence, ocular or otherwise. It is more a rule of prudence that courts seek validation of the dying declaration from attending facts and circumstances and other evidence brought on record. For the very same reason, a certificate by the doctor that the declarant was fit to make a statement, is treated as a rule of caution to establish the truthfulness of the statement made by the deceased.”

15. In Shudhakar vs. State of M.P.(AIR 2012 SC 3265), Hon’ble Apex Court has held as under :-

“22. In the case of Nallam Veera Stayanandam and Others v. Public Prosecutor, High Court of A.P. [(2004) 10 SCC 769], this Court, while declining to except the findings of the Trial Court, held that the Trial Court had erred because in the case of multiple dying declarations, each dying declaration has to be considered independently on its own merit so as to appreciate its evidentiary value and one cannot be rejected because of the contents of the other. In cases where there is more than one dying declaration, it is the duty of the court to consider each one of them in its correct perspective and satisfy itself which one of them reflects the true state of affairs.”

16. In the case of Nagabhushan vs. State of Karnataka (AIR 2021 SC 1290), Hon’ble Apex Court has held as under :-

“8. At this stage, the decisions of this Court in the cases of Nallam Veera Stayanandam v. Public Prosecutor (2004) 10 SCC 769; Kashmira Devi v. State of Uttarakhand (2020) 11 SCC 343; and Ashabai v. State of Maharashtra (2013) 2 SCC 224 are required to be referred to. In the aforesaid decisions, this Court had an occasion to consider the cases where there are multiple dying declarations. In the aforesaid decisions, it is held that each dying declaration has to be considered independently on its own merit as to its evidentiary value and one cannot be rejected because of the contents of the other. It is also held that the Court has to consider each of them in its correct perspective and satisfy itself which one of them reflects the true state of affairs. When there are multiple dying declarations, each dying declaration has to be separately assessed and evaluated on its own merits.”

17. In **State of U.P. vs. Veerpal and another (2022) 4 SCC 741**, Hon’ble Apex Court observed that in the case of **Jagbir Singh V. State (2019) 8 SCC 779**, this Court had an occasion to consider the law relating to the dying declaration and the problem of multiple dying declarations in detail. It was observed and held that merely because there are two/multiple dying declarations, all the dying declarations are not to be rejected. It was observed and held that when there are multiple dying declarations the case must be decided on the facts of each case and the court will not be relieved of its duty to carefully examine the entirety of the material on record as also the circumstances surrounding the making of the different dying declarations. Ultimately, in paragraph 32, this Court concluded as under:

*“Our conclusion on multiple dying declarations
32. We would think that on a conspectus of the law as laid down by this Court, when there are more than one dying declaration, and in the earlier dying declaration, the accused is not sought to be roped in but in the later dying declaration, a somersault is made by the deceased, the case must be decided on the facts of each*

case. The court will not be relieved of its duty to carefully examine the entirety of materials as also the circumstances surrounding the making of the different dying declarations. If the court finds that the incriminatory dying declaration brings out the truthful position particularly in conjunction with the capacity of the deceased to make such declaration, the voluntariness with which it was made which involves, no doubt, ruling out tutoring and prompting and also the other evidence which support the contents of the incriminatory dying declaration, it can be acted upon. Equally, the circumstances which render the earlier dying declaration, worthy or unworthy of acceptance, can be considered.”

18. In the case of **Raju Devade vs. State of Maharashtra(AIR 2016 SC 3209)**, Hon’ble Apex Court has observed as under :-

23. Another case which is relevant is State of Punjab versus Parveen Kumar, 2005 (9) SCC 769. The test for relying on a dying declaration in a case where there is more than one dying declaration has clearly been laid down by this court in para 10 following was observed:

“The court must be satisfied that the dying declaration is truthful. If there are two dying declarations giving two different versions, a serious doubt is created about the truthfulness of the dying declarations. It may be that if there was any other reliable evidence on record, this Court could have considered such corroborative evidence to test the truthfulness of the dying declarations. The two dying declarations, however, in the instant case stand by themselves and there is no other reliable evidence on record by reference to which their truthfulness can be tested.”

27. This court had clearly laid down that the each dying declaration has to be considered independently on its own merit so as to appreciate its evidentiary value and one cannot be rejected because of the contents of the other. In cases where there is more than one dying declaration, it is the duty of the court to consider the each one of them in its correct perspective and satisfy itself that which one of them reflects the true state of affairs.

19. Now we will discuss each one of dying declarations one by one in the light of principles enunciated by Hon'ble apex court in aforesaid decisions.

WRITTEN DD Exh.P/10

20. For better appreciation and assessment of written dying declaration Ex.P/10, which is said to be recorded by Tehsildar P.S. Tripathi, it would be apt to reproduce the said dying declaration of deceased Gunja verbatim which is as under:-

प्रश्न— कैसे जली?

उत्तर— मेरे देवर बल्लू ने जलाया है।

प्रश्न— कैसे जलाया?

उत्तर— मेरे देवर से लड़ाई हो गई थी। मैं खाना बना रही थी देवर ने पीछे से मिट्टी का तेल डाल दिया जिससे चूल्हे से शरीर में आग लग गई।

प्रश्न— क्यों लड़ाई हुई थी?

उत्तर— घर खाली करने तथा भाग जाने के लिए कह रहा था।

प्रश्न— तुम्हारा पति कहां था?

उत्तर— वह सब्जी लेने गया था।

प्रश्न— पति से लड़ाई तो नहीं थी?

उत्तर— नहीं।

प्रश्न— उस समय घर में कौन था?

उत्तर— देवरानी थी। उसने न बचाया न मना किया।

21. In this connection, it is also important to reproduce relevant paras of defence witness Sourabh, who is son of deceased, which are as under:-

मुख्य परीक्षण द्वारा श्री सुरेन्द्र रजक अधि० वास्ते अभियुक्त

प्र०४— घर पर बिजली थी या बंद थी?

उत्तर— बिजली गोल थी।

प्र०५— क्या हुआ था?

उत्तर— मम्मी अंदर से मिट्टी का तेल डालकर आई थी दिवाल के पास दिया जल रहा था।

मम्मी की साड़ी में दिये से आग लग गई थी।

प्र०६— उस समय चाचा (अभियुक्त) कहां थे?

उत्तर— कटनी में थे।

प्र07— जब आग लगी तब तुम्हारे पिताजी कहां थे?

उत्तर— घर पर थे।

प्र08— फिर क्या हुआ?

उत्तर— मैंने बोला कि पापा—पापा आग लगी है। मेरे पापा आग बुझाने लगे और कंबल लाकर मम्मी के ऊपर डाल दिये। फिर आग बुझ गई थी।

प्रतिपरीक्षण द्वारा श्री जे एस चौधरी लोक अभियोजक वास्ते अभियोजन

प्र01— तुम्हारी चाची का क्या नाम है?

उत्तर— संतोषी।

प्र02— तुम्हारी चाची घटना के समय कहां थीं?

उत्तर— घर में खाना बना रही थी।

प्र03— मम्मी क्या खाना बना रही थीं?

उत्तर— मम्मी खाना रखकर आई थी और फिर मिट्टी का तेल डालकर आई थी।

प्र06— जिस समय तुम्हारी मम्मी खाना बना रही थी उस समय तुम्हारे चाचा सोनी आ गये थे?

उत्तर— नहीं आये थे। फोन लगाया था तब आये थे।

प्र08— तुम्हारी मां चूल्हे में गिर गई थी और आग लग गई थी?

उत्तर— ऐसा नहीं हुआ। स्वतः कहा कि दिये से आग लगी थी।

22. Now we will examine the facts of the case in the light of principles enunciated by Hon'ble Apex Court in aforesaid decisions. Foremost question that arises for consideration with respect to Exhibit P-10's dying declaration is whether it is voluntary, truthful and whether it is also corroborated by other evidence on record. In this connection, if we scrutinize Exhibit P-10's dying declaration along with other oral/documentary evidence adduced by the prosecution, following factual position/conclusions emerge:-

(a) From written dying declaration (Exhibit P-10) & depositions of prosecution witness Babulal (PW-8), Rajendra (PW-2), Nitin (PW-3), Laxmi Bai (PW-4), P.S. Tripathi (PW-7), Sub Inspector Lokendra Singh (PW-9), Dr. Kanhaiyalal Gupta (PW-12) , it is clearly established that dying declaration Exhibit P-10 has been recorded by prosecution witness Tehsildar P.S. Tripathi.

(b) Evidently, Exhibit P-10's dying declaration has been recorded by Tehsildar P.S. Tripathi in question and answer format and testimonies of P.S. Tripathi, Babulal, Rajendra, Laxmi Bai etc. and appellant's examination under section 313 of Cr.P.C do not show that Tehsildar P.S. Tripathi had any enmity with the appellant or had any reason or motive to falsely implicate the appellant.

(c) In this connection, a few decisions of Hon'ble Apex Court on the credibility of the dying declaration recorded by the Magistrate may be gainfully referred to. In **Uttam** (supra) Hon'ble Apex Court observed as under-

25. "The credibility of a dying declaration recorded by the Magistrate has also come up for consideration in several cases and it has been held that a Magistrate being an uninterested witness and a respected officer and there being no circumstances or material to suspect that he would have any animus against the accused or would in any way be interested for fabricating a dying declaration, such a declaration recorded by the Magistrate, ought not be doubted.... [Ref.: Munnu Raja Vs. State of MP (1976) 3 SCC 104, Paniben Vs. State of Gujraj, (1992) 2 SCC 474, State of UP Vs. Ram Sagar Yadav, (1985) 1 SCC 552, Ramawati Devi Vs. State of Bihar, (1983) 1 SCC 211]."

(d) In **Laxman V. State of Maharashtra**, (2002) 6 SCC 710 after referring to and considering the earlier decisions on the credibility of the dying declaration recorded by the Magistrate, it was observed that the Magistrate being a disinterested witness and a responsible officer and there being no circumstances or material to suspect that the Magistrate had any animus against the accused or was in any way interested for fabricating a dying declaration, question of doubt on the declaration, recorded by the Magistrate does not arise." To the same effect are observations by Hon'ble apex court in para 16 (5) of **Kushal Rao (supra)**.

(e) In this court's opinion, principles laid down in above decisions are squarely applicable to the facts of instant case, as in the present case also Exhibit P-10's dying declaration is recorded in question & answer

format by a Tehsildar & it is not proved that Tehsildar had any motive etc. to falsely implicate the appellant.

(f) Further, from depositions of P.S. Tripathi and Dr. Kanhaiyalal Gupta and endorsement made on dying declaration (Exhibit P-10)/bed head ticket (Exhibit P-20), it is also clearly established that at the time of recording of dying declaration Exhibit P-10, deceased was physically and mentally fit to give statement and in view of clear and categorical statements of P.S. Tripathi and Dr. Kanhaiyalal Gupta and endorsement made on Exhibit P-10's dying declaration/Exhibit P-20's bed head ticket, merely on the basis of testimonies of Rajendra and Nitesh etc., it cannot be said that deceased was not in a condition to speak.

(g) Depositions of Babulal, Rajendra, Laxmi Bai, P.S. Tripathi & Dr. Kanhaiyalal Gupta show that, at the time of recording of dying declaration Exhibit P-10, none of the family members of deceased were present, and from depositions of above witnesses, it is also clear that no such suggestion has been given to any of the above witness, and otherwise also, it is not proved from their evidence, that before recording of dying declaration Exhibit P-10, deceased was tutored by her family members. Therefore, it is also not established that dying declaration Exhibit P-10 is a result of tutoring.

(h) From evidence on record, it is not proved that deceased had any enmity with the appellant or any reason to falsely implicate him. In this connection, it is also important to note that at the time of incident, presence of appellant's wife is also clearly proved but deceased has not implicated her. It is correct that from evidence of Babulal, Laxmi Bai, it appears that a few days before the incident, there was some dispute with appellant and prosecution witness Laxmi Bai had slapped him but in this scenario, it would be the appellant who would have a grudge against Laxmi Bai and not Laxmi Bai against the appellant.

(i) So far as reason/motive of incident is concerned, in dying declaration Exhibit P-10, it is mentioned that deceased had a quarrel with the appellant and the reason of quarrel was that appellant was asking deceased to vacate the house and to go from there. On this point, dying declaration Exhibit P-10 gets corroborated from prosecution witness Laxmi Bai's deposition wherein she has stated that approximately, since two months prior to the incident, a dispute with respect to partition of the house was going on between deceased and appellant. Prosecution witness Laxmi Bai's above statement has not been challenged in her cross-examination and thus, it has remained uncrossed. Thus, it is also established that appellant had a motive to commit the crime.

(j) In the instant case, it is also important to note whether deceased's husband Ramji was present at the time of incident or had come there immediately after the incident. In dying declaration Exhibit P-10, it is mentioned that there was no dispute with the husband and at the time of incident, husband had gone to bring vegetables. With respect to presence of deceased's husband at the time of incident/immediately after the incident, testimony of defence witness Sourabh (DW-1), who is son of deceased, is noticeable. Defence witness Sourabh has stated in his deposition that when fire started, i.e. his mother caught fire, his father was at home. His father started extinguishing fire and brought and put a blanket over his mother.

(k) In this Court's opinion, if defence witness Sourabh's above statement is correct, then, in normal course, his father should have taken deceased to hospital for treatment but testimonies of Babulal, Rajendra, Laxmi Bai, Sub Inspector Lokendra Singh (PW-9) and FIR (Exhibit P-18) information regarding intimation of death (Exhibits P-13, P-14 and P-15) reveal that it is Chaman Lal (elder brother of appellant) who had taken deceased to hospital and got admitted her there for treatment and not

deceased's husband. Therefore, defence witness Sourabh and prosecution witness Nitesh are not right that at the time of incident, deceased's husband was also there/had immediately come there & he extinguished the fire.

(l) Now the question arises whether deceased accidentally caught fire from *diya* as deposed by prosecution witness Nitesh, who is neighbor of appellant and who has turned hostile and defence witness Sourabh.

(m) As per dying declaration Exhibit P-10 , at the time of incident, deceased was preparing food on *chulha*. In this connection, if question no. 3 & 6 put to defence witness Sourabh in his cross-examination and answers thereof, which have been reproduced verbatim in the foregoing paras, are also taken into consideration, then, from them also, it is apparent that at the time of incident, deceased was preparing food. Thus, on this point also, Sourabh's statement corroborates dying declaration Exhibit P-10.

(n) In dying declaration Exhibit P-10, it is mentioned that while she (deceased) was preparing food, her brother-in-law/appellant poured kerosene on her from behind & on account of which her body caught fire from *chulha*. On this point, it is important to refer Dr. Ashok Jain's testimony who has conducted postmortem of deceased and prepared postmortem report Exhibit P-7. Dr. Ashok Jain's testimony & his above report shows that front parts of deceased's body had got burn injuries whereas back parts of deceased's body (back part of stomach & both legs and toes of the feet etc.) were not burnt & above pattern of burning/burns found on the parts of the body, also corroborates dying declaration Exhibit P-10 that kerosene was poured over deceased from behind & on account of which she caught fire from the *chullah*.

(o) Defence witness Sourabh has deposed in his examination-in-chief that her mother had come out after pouring kerosene and *diya* was

kept near wall and her mother's sari caught fire from *diya*. Sourabh's above testimony is not correct because, in this Court's opinion, *diya* would not contain/would not have so much of kerosene and deceased would not get caught fire to such extent, that the fire could not have been extinguished even after attempts made by deceased's husband and putting blanket over her, as deposed by Sourabh. Further, Sourabh has nowhere stated in his deposition that *diya* fell over the head of deceased.

(p) Further, testimonies of Dr. Ashok Jain (PW-5), Sub Inspector Hakam Singh (PW-8), Sub Inspector Lokendra Singh (PW-9) and postmortem report (Exhibit P-7), seizure memo (Exhibit P-16), FSL draft (Exhibit P-11) and FSL report (Exhibit P-12) show that scalp hairs of deceased were sealed and handed over to concerned police constable by Dr. Ashok Jain and the same were seized vide above seizure memo and they were also sent to FSL for chemical examination and in FSL report (Exhibit P-12) residues of kerosene oil have been found in deceased's hairs. In this connection Dr. Ashok Jain's statement in para 3 of cross-examination is noticeable wherein he has stated that deceased's hair were not burnt. In this Court's opinion, it is possible only when kerosene has been poured on her head & she caught fire the *chullah*.

(q) Therefore, if we take into consideration the parts of deceased's body, over which burn injuries have been found and pattern of burn injuries and parts of body, where no burn injuries have been found and above FSL report along with Dr. Ashok Jain's statement in para 3 of cross-examination conjointly, then, the only conclusion that can be drawn from them is that kerosene was poured on the head of deceased when she was preparing food on *chulha* and on account of which, she caught fire and not accidentally, on account of falling of *diya*. In almost similar fact situation, Hon'ble apex court also in **Sudhakar** (supra) concluded that it is not a case of accidental burning.

(r) So far as appellant's plea of alibi is concerned, appellant has stated in his examination under section 313 of Cr.P.C that a day before the incident, he was in his *Sasural* in Katni. Similar is the statement of defence witness Sourabh but appellant has not examined any person from his *Sasural* who might have proved the said fact. Appellant has also neither clarified/explained in his above examination nor through any other evidence that, if at the time of incident, he was in Katni, then, when did he return to his house at Jabalpur & whether he came suo moto or after receiving information about the incident. Further, prosecution witness Babulal has denied the suggestion given to him in his cross examination that it is wrong to say that a day before the incident, on 13/02/2011 appellant had gone to Katni in Kajal's marriage but no such suggestion has been given to Rajendra and Laxmi Bai in their cross-examination & neither defence witness Sourabh has deposed so nor it is stated by appellant in his examination u/s 313 of CrPC. Therefore, in this Court's opinion, from evidence on record, it is not proved that a day prior to the incident, appellant had gone to Katni and therefore, he was not present at the scene of incident.

(s) Further, perusal of appellant's examination under section 313 of Cr.P.C shows that he has not furnished any explanation with respect to incriminating circumstances put to him during his above examination, instead, he has only stated that does not know/not correct.

(t) It is correct that in the instant case, it is not proved that immediately after recording, written dying declaration Exhibit P-10 was sealed but there is no such requirement of law that a written dying declaration has to be sealed after recording the same.

23. In view of above discussion & analysis/appreciation of evidence on record, we are of considered view that when dying declaration Exhibit P-

10 was recorded , deceased was in a fit state of physical and mental condition and it is voluntary and truthful. Further, it is also evident that it gets corroborated in material particulars from other evidence on record. It is also not established in the case that deceased accidentally caught fire.

Oral dying declaration made to Babulal

24. So far as oral dying declaration made by deceased to his father Babulal is concerned, Babulal has stated in his examination-in-chief that after receiving information, he had gone to Medical College, Jabalpur, where his daughter Gunja was admitted. On next day, Gunja told him that a day before, she had a quarrel/fight with Sonu (appellant) and his wife and on the next day, Sonu burnt Gunja. Gunja also told him in the hospital that Sonu @ Ballu had burnt her by pouring kerosene. If oral dying declaration given to Babulal and written dying declaration (Exhibit P-10) are conjointly read, then, it would be clear that there is no material contradiction/ discrepancy among them. Therefore, this oral dying declaration also corroborate written dying declaration Exhibit P-10.

Oral dying declaration made to Rajendra

25. So far as oral dying declaration said to have been made by deceased to his brother Rajendra is concerned, prosecution witness Rajendra has deposed in his examination-in-chief that he had a talk with Gunja on 3rd day and at that time, Gunja told him that Sonu @ Ballu, Amit and Sonu's wife have burnt her. Gunja also told him that while she was preparing rice at *chulha*, then, Sonu came from behind and poured kerosene on her and pushed her and on account of that, she fell in *chulha* and got burnt.

26. If oral dying declaration, as deposed by Rajendra, is conjointly read with oral dying declaration as deposed by Babulal and written dying declaration Exhibit P-10 & other evidence on record, then, it would be clear that there are material contradictions/discrepancies between oral

dying declaration as deposed by Rajendra and written dying declaration Exhibit P-10/ oral dying declaration as deposed by Babulal. Therefore, in this Court's opinion, oral dying declaration, as deposed by Rajendra, does not inspire confidence and the same is not reliable and trustworthy but in this Court's considered view, this fact does not adversely affect the credibility and reliability of written dying declaration Exhibit P-10 and oral dying declaration as deposed by Babulal.

Conclusions with respect to dying declarations

27. Applying the law laid down by Hon'ble apex court in decisions referred to in foregoing paras to the facts of the case in hand, & on evaluation of all three dying declarations independently & along with other evidence on record, dying declaration Exhibit P-10 reflects the true state of affairs & the contents are supported by medical/forensic evidence, injuries sustained by the deceased & other evidence/surrounding circumstances, including oral dying declaration made to Babulal & it is also established to be true & voluntary. The plea put forth by the appellant, that it is a case of accidental burning, is not proved by any reliable evidence on record.

Recovery

28. So far as recovery of 5 ltr Plastic *Kuppi* from appellant is concerned, Assistant Sub Inspector J.P. Dwivedi (PW-11) has stated in his examination-in-chief that in pursuance of information (Exhibit P-3) provided by accused, he seized yellow colour five ltr capacity Plastic *Kuppi* vide seizure memo Exhibit P-4 after accused produced it from his house. Perusal of deposition of J.P. Dwivedi shows that accused had provided information to the effect that he had kept Kerosene *Kuppi* in his room and from there he would get it recovered but in recovery memo Exhibit P-4 and in J.P. Dwivedi's testimony, it is not mentioned that accused got recovered Plastic *Kuppi* from room of his house. In recovery memo Exhibit P-4 and in deposition of J.P. Dwivedi, it is also not mentioned

as to from which place in his house, appellant produced Plastic *Kuppi* and get it recovered.

29. Perusal of testimonies of J.P. Dwivedi, Rajendra and Kandhilal (PW-6) show that Rajendra and Kandhilal are witnesses of memorandum (Exhibit P-3) and recovery memo (Exhibit P-4) but they are completely hostile and they have not supported prosecution on memorandum and recovery of Plastic *Kuppi*. It is so when one witness Rajendra is real brother of deceased whereas Kandhilal is related to both, deceased's family and accused's family. Therefore, in view of above, it cannot be said that 5 ltr yellow colour Plastic Kerosene *Kuppi* was recovered from appellant vide recovery memo (Exhibit P-4) in pursuance of information given by him vide Exhibit P-3.

Final Conclusions:-

30. Thus, in this Court's opinion, from discussion in the foregoing paras, it is clearly established and proved that when at alleged date, time and place, deceased was preparing food on *Chulha*, appellant poured kerosene on her from behind and on account of which, deceased caught fire from the *Chulha* and later on, she succumbed to injuries on 25.2.2011.

31. Now the question arises whether in the instant case, offence under Section 302 of IPC is made out or offence under Section 304-part I or part II of IPC is made out, i.e. culpable homicide not amounting to murder.

32. Learned counsel for the appellant has submitted that from Ex.P/10's written dying declaration it is not proved that after pouring kerosene, appellant had also set ablaze the deceased. Therefore, in the instant case, section 302 of IPC would not be attracted, instead, section 304- part II of IPC would be attracted. On the contrary, learned Government Advocate has submitted that pouring of kerosene by appellant on deceased, in itself, shows that the intention of appellant was to commit murder, therefore, section 302 of IPC would be attracted.

33. Evidently in the instant case from evidence on record, only, it is proved that, while deceased was preparing food on *chulha*, appellant poured

kerosene on her from behind and did nothing more and after that deceased caught fire from *chulha*. It is not proved from evidence on record that after pouring kerosene on deceased, either appellant set her ablaze or pushed her into the *chulha*. Therefore, in this Court's opinion, appellant's above act of merely pouring kerosene on deceased and doing nothing more, would not come within the purview of section 302 of IPC, instead, it would come within the purview of section 304 part II of IPC, i.e. culpable homicide not amounting to murder.

34. Therefore, in view of discussion in the foregoing paras and appreciation/evaluation of evidence on record, in our considered view, learned trial court has wrongly convicted and sentenced appellant under Section 302 of IPC. Hence, we deem it proper to modify conviction of appellant from Section 302 of IPC to 304 Part-II of IPC. Therefore, appellant is acquitted of charge under Section 302 of IPC & instead, he is convicted under Section 304-Part-II of IPC and is sentenced to undergo 10 years R.I. with fine of Rs.500/- in default of payment of fine, to undergo one month R.I.

35. In view of above, we direct that, as appellant is in custody since 27.2.2011 & he has undergone the sentence as imposed above, he be released forthwith if not required in any other case.

36. A copy of this judgment be sent forthwith to concerned jail for information and compliance.

37. The Criminal Appeal is partly allowed to the extent indicated above.

(SUJOY PAUL)
JUDGE

(ACHAL KUMAR PALIWAL)
JUDGE