Jagbir Singh vs State (Nct Of Delhi) on 4 September, 2019

Equivalent citations: AIR 2019 SUPREME COURT 4321, AIRONLINE 2019 SC 980, 2020 CRI LJ 266, (2019) 12 SCALE 57, (2019) 2 ALD(CRL) 1025, (2019) 3 CRIMES 389, (2019) 3 DMC 398, 2019 (3) SCC (CRI) 657, (2019) 4 ALLCRILR 390, (2019) 4 MAD LJ(CRI) 95, (2019) 4 PAT LJR 107, (2019) 4 RECCRIR 265, (2019) 76 OCR 472, 2019 (8) SCC 779, (2020) 1 ALLCRIR 563, AIR 2019 SC(CRI) 1617

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Bench: K.M. Joseph, Sanjay Kishan Kaul

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 967 OF 2015

JAGBIR SINGH ... APPELLANT(S)

VERSUS

STATE (N.C.T. OF DELHI) ... RESPONDENT(S)

J U D G M E N T

K.M. JOSEPH, J.

1. The appellant stands convicted under Sections 302 and 506 of the Indian Penal Code, 1860 (hereinafter referred to as 'the IPC', for short) by the Trial court, and the appeal carried by him before the High Court being unsuccessful and is, therefore, before this Court.

2. appellant is as follows:

> The deceased was married to the appellant in the year 1999. He was unemployed at that time.
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> Later, he secured employment in the C.R.P.F.. He did not take his wife on the basis

that he could not take her far away. Wife continued to reside with the mother of the deceased at her house.

Appellant used to harass his wife and had illicit relationship with the wife of his brother. A Panchayat was held. A settlement was arrived at, pursuant to which, after four years, when the appellant was transferred to Delhi, he assured the mother of the deceased that he will not harass his wife and he started residing at the house along with his wife and mother-in-law. It is the further case of the prosecution that the appellant continued to have an affair with the wife of his brother. On 23.01.2008, the mother of the deceased went to the matrimonial home of another daughter.

On 24.01.2008, at about 06.00 P.M., the appellant came to the house under influence of liquor, and in short, poured kerosene oil upon his wife and also some kerosene oil over himself and threw a lighted matchstick on his wife. Initially, both, the appellant and the deceased, were taken to the hospital. Initially, the wife gave statement which did not implicate the appellant. However, on 27.01.2008, a dying declaration was made by the deceased pointing the finger of blame clearly at the appellant and attributing the act of pouring kerosene and setting her ablaze to him. Initially, a First Information Report was lodged on 27.01.2008 on the basis of the dying declaration dated 27.01.2008 under Section 307 of the IPC, which was, upon the deceased succumbing to the burn injuries, converted to Section 302 of the IPC. This is besides a charge under Section 506 of the IPC for extending threat to his wife.

3. 31 witnesses were examined by the prosecution. After closure of prosecution evidence, appellant was questioned under Section 313 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Code' for short).

FINDINGS BY THE TRIAL COURT

4. It is a case where there are two dying declarations, viz., one made on 24.01.2008 and another on 27.01.2008. In regard to the statement on 24.1.2008 it is actually the history which is recorded in the M.L.C. of the deceased and it is stated that it has noted history of sustaining thermal burns when her husband was trying to ignite a match stick for smoking; accidently a fire erupted due to petrol leaking from the tank of the motorcycle as told by the patient herself. Patient got burnt along with her husband. Patient is unable to tell the cause of kerosene smell from her body.

5. The Trial Court noticed the contention that PW29- Investigating Officer admitted that, on 25.01.2008, the mother of the deceased also made a statement on the lines of what her daughter had made which appeared to clear the appellant of any wrong doing.

6. Commenting on PW10-Smt. Indrawati, the Court wades through her evidence and found that the witness has reached the place after the incident and seen both the deceased as well as the accused in the burnt condition. She was not an eyewitness to the incident. The same was found true about Chhoto Devi-PW7-the mother of the deceased. The statement is of no avail with regard to the dying

declaration made on 24.01.2008. We may advert to paragraph 49 in regard to the first version:

> "49. As per the first version, it was leaking of petrol pipe of the motorcycle, which was the cause of fire and sustaining of burn injuries by both the accused and the deceased, and in this regard, the testimony of PW-30 is very material. PW-30 Dr. Thakur Thussu has stated that as per MLC Ex. PW-30/A of accused Jagbir and Ex.PW-30/B of deceased Santosh, the alleged history given was of thermal burns when the accused was trying to ignite the matchstick for smoking and accidentally a fire erupted and probably due to nearby leaking of petrol tank, they got engulfed in fire, but at that very time, Dr. K.K. Sharma, who had examined them and who had left the hospital (and his present whereabouts could not be ascertained and because of the same reason, request was sent to Medical Superintendent, Safdarjung Hospital, to depute any doctor or doctor or doctors conversant with the handwriting and signature of Dr. K.K. Sharma and who can depose about the contents of the MLC. PW-30 Dr. Thakur Thussu, Sr. Resident, Deptt. Of Burns and Plastic Surgery, Safdarjung Hospital, was called), in the MLC itself, the history was disbelieved by the doctor, who has specifically mentioned that both the husband and wife were unable to tell the cause of kerosene oil emanating from their body and on examination, smell of kerosene was emanating from the body, and special note in this regard was appended by Dr. K.K. Sharma that the patient is not giving a proper history."

7. The differentiation between smell of petrol and kerosene oil has been explained by PW31-Senior Scientific Assistant (Chemistry). It was further found that the deceased had deep burns present over her face, neck, anterior trunk, lower part, both upper limbs, portions of both lower limbs. The study of the injuries ruled out sustaining burn injuries from leaking petrol of a motorcycle as it was highly unlikely that upper portion of the body will be burnt so as the fire travelled from downward to upward. Only a very small quantity would have leaked out in case of the petrol leaking. The biri has not been recovered. Clothes were seized from the house which were in burnt condition and kerosene oil was present in the house immediately after the incident and much before the recording of the dying declaration dated 27.01.2008, demolished completely the defence of the appellant. The appellant has not given any explanation in regard to the presence of kerosene oil in the house or how the clothes contained residue of kerosene oil. The case set up by the appellant regarding the conspiracy of other sisters of the deceased and his brother-in-law with the mother of the deceased to deprive him of the property, is found to be frivolous. The argument that dying declaration dated 27.01.2008 was a long one, and therefore, should not be relied upon, was rejected.

8. Regarding the Investigating Officer not obtaining certificate from Doctor about the medical fitness of the deceased to make the dying declaration, it was found, not material. It was not a case where at any point of time, the deceased was declared unfit for the statement. No question was asked from PW30-the Doctor that considering the nature of the burn injuries and the medicines given to the deceased, it was not possible for her to give a statement without being certified. MLC-Exhibit 30/B does not show that the patient is unfit to give a statement. Evidence of PWs 1, 7 and 29 are relied upon to repose faith in the dying declaration. No cross-examination was conducted in regard to PW29-Investigating Officer with reference to his going to the hospital on the basis of the

call received from the hospital. Discrepancy in the timings, as emerged from the testimony of PW29 and dying declaration No. 20B, is overcome by the finding that timings will not be remembered exactly. Regarding the inconsistency in evidence as to whether deceased was in the ward or in the Intensive Care Unit (ICU), assurance was drawn from the dying declaration wherein reference is made to the ICU Ward. The dying declaration was got recorded without noting as to what is the statement to be made on the basis of a call. PW1 and PW7 have supported the recording of the dying declaration, being witnesses. The testimony of mother of the deceased-PW7 would reveal that though her daughter was under

> sedation, she was competent to make the statement. The first dying declaration dated 24.01.2008 was also recorded by the Investigating Officer without certificate issued by the Doctor. The evidence of Dinesh (neighbour) was found to corroborate the dying declaration. The appellant was found guilty under Sections 302 and 506 of the IPC and convicted thereunder. He was awarded substantive sentence of rigorous imprisonment for life and fine for the offence. Further, the appellant was also sentenced to rigorous imprisonment for two years for the offence under Section 506 of the IPC. Both the sentences were to run concurrently.
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> FINDINGS BY THE HIGH COURT

9. There are three dying declarations given by the victim. At about 09.30 P.M. on 24.01.2008, the first dying declaration was given in the form of history given by the patient to the Doctor. It was recorded in the MLC. No role was attributed to the appellant. The history was recorded as one of sustaining thermal burns when her husband was trying to ignite matchstick for smoking and accidentally a fire erupted due to the petrol leaking from the tank of the motorcycle. This is stated to be told by the patient herself. It was further recorded therein that the patient is unable to tell the reason for kerosene smell from her body. What is referred to as the second dying declaration and is recorded by PW10 in his case diary on 25.01.2008, is extracted by the High Court. The Court held:

> "22. The second dying declaration of the victim was recorded by the Investigating Officer in his daily diary on 25.01.2008. The relevant extract of this reads herein as under:-
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> "Time 01:31 P.M.. it is entered that I, the SI alongwith accompanying Ct.
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> Ram Kumar have come to the Police Station after investigation vide DD No. 50- A, dated 24/01/08. On the receipt of the call, I reached the place of occurrence i.e. H.No. RZ-40, Mataji Line, Sultan Puri Road, (sic) School, Gopal Nagar, Najafgarh where many burnt clothes were lying in the gallery of the house. The seat of a passion motorcycle bearing Regn. No. HR-14B-1992 was found burnt and one burnt cream coloured jeans shirt was also lying behind the motorcycle. And one ladies" Kurta, one cardigan, a salwar, shawl were lying burnt near the front wheel of the motorcycle. The foul smell of kerosene oil was coming from the whole house.

The SHO arrived at the spot and after enquiry it was learnt that one Jagbir Singh lived in the house as “gharjamai” (son-in-law living at the in-laws” home) alongwith his wife Santosh and mother-in-law Chhoti Devi. The mother-in-law Chhtoi Devi had gone to the matrimonial home of their younger daughter Rakesh at Rohtak. And as per the neighbourers, husband-wife were living all alone in the house and the motorcycle got fire due the leakage of petrol from the motorcycle.

Jagbir works as sweeper in CRPF. G-91 Mobile Crime Team was called on wireless. The photographs of the place of the occurrence were taken by the Crime Team and all the burnt clothes and the can of the Kerosene oil which was kept near the drum in the interior room and a lot of kerosene which was also lying outside and on the floor were taken into the police possession as a piece of evidence by means of a memo.

Thereafter, I, the SI reached S.J. Hospital after receiving the information where Jagbir s/o Sh. Devi Singh and Santosh w/o Sh. Jagbir Singh were admitted vide MLC Nos.

respectively. Jagbir was 45% burnt and Santosh was 60% burnt. The doctor wrote in (sic...) that when Jagbir ignited the match-stick for smoking, the motor-cycle caught fire accidently as its petrol tank had been leaking. The patient was unable to tell the cause of kerosene oil smell from his body.

Santosh Devi w/o Jagbir Singh deposed that I reside with my husband Jagbir and mother Chhoti Devi in the house.

Earlier there had been some problem between me and my husband. I had got married in the year 1999. But for the last one year, I have been living with my husband happily. There is no such quarrel between us. Today on 24/01/08 my mother had gone to the matrimonial home of my younger sister Rakesh at Rohtak. My husband Jagbir came back in the evening from his duty as sweeper in CRPF.

We have had our dinner and were preparing to go for sleep. I locked the gate while my husband was smoking “Bidi” near the motorcycle.

All of a sudden, the motorcycle caught fire.

Jagbir was trying to extinguish the fire and his clothes also caught fire.

Both of us screamed and shouted for help. Our neighbours saved both of us by jumping the wall (of our house). No one has done this intentionally. You have recorded my statement and read over the same to me. I have heard the statement and the same is correct.

> LTI of Santosh Devi Thereafter, the statement of Jagbir Singh s/o Lt. Sh. Devi Singh was recorded who also gave the aforesaid statement and Mrs. Chhoti Devi also deposed the same and told that there was no dispute between both of them and they were living together happily. Both the husband-wife had caught fire because of the catching of the fire by the motorcycle due to the smoking "Bidi" by Jagbir and leakage of petrol from the motorcycle. No one has intentionally done this. I do not suspect anyone. All the facts were apprised to the SHO and the call was held pending." (Emphasis supplied)
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> 10. Thereafter, the court referred to the dying declaration on 27.01.2008, which we will refer to later on.
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> 11. The first dying declaration is discarded by noting that it was in the presence of her husband. PW30-the Doctor who was examined to identify the signatures of another Doctor, viz., Dr. K. K. Sharma who had actually prepared the MLC and who could not be examined, has specifically stated that the smell of spirit and kerosene is different. No possible explanation could be given as to why kerosene smell was emanating from the body and clothes. The presence of the appellant/her husband inhibited the deceased from speaking the truth.

Second dying declaration, which was recorded at 01.30 P.M. on the next day 25.01.2008, was also discarded for the same reason, viz., her husband was in the same hospital and it was recorded in his presence. The court discussed the evidence of the Investigating Officer- PW29 who recorded the third dying declaration. The court also discussed the contents of the dying declaration and finds support from the fact that the evidence of PW29 is supported by PWs 1 and 7. The deceased was fully conscious and well-oriented going by the MLC dated 24.01.2008. Her mental faculties to make a statement, was never in challenge. The deceased, being fit to make the statement on 27.01.2008, it cannot be doubted. The defence set up by the appellant was found to be palpably false. The dying declaration was an answer found worthy of acceptance. The kerosene can and also clothes were sent for scientific examination and CFSL Report found that kerosene oil was detected on the clothes of the appellant. No explanation from the appellant is forthcoming about kerosene. Site plan and also the photographs were relied upon.

12. The High Court found no merit in the appeal and dismissed the same.

13. We have heard learned counsel for the appellant.

14. The learned counsel for the appellant would undoubtedly emphasise that this is a case where there are three dying declarations. In the first two dying declarations, which were given by the deceased herself, no incriminatory role is attributed to the appellant. Rather, the cause of her catching fire is attributed to an accident generated by the appellant lighting his biri. It is submitted that there is evidence of PW1- husband of the sister of the deceased visiting the deceased at the hospital on 26.01.2008. It is on the very next day, i.e. 27.01.2008, as a result of the tutoring and prompting by PW1, that the deceased comes up with a completely different version in the dying

declaration. The mother of the deceased-PW7 was also in the hospital. The theory of conspiracy to sabotage the claim to the property is pressed into service.

15. In other words, the argument is painting the appellant as the murderer, his claim to the property would stand extinguished, thus enabling the other two daughters to claim exclusive right. In this regard, he would point out that PW29 has deposed that he went to the hospital on 27.01.2008 and recorded the dying declaration on the basis of a telephone call which came from the hospital. He points out that the call did not come from any Doctor as ordinarily would have been the case if the patient wanted to make the dying declaration but strangely it came from his co-brother, viz., PW1. PW1 has admitted in his evidence that he did indeed made the call to the Police to come and record the statement of the sister-in-law. Therefore, the dying declaration, in other words, is the brain child of PW1 in pursuance to the conspiracy to oust the appellant from property rights. He next points out that the very case of homicide is irreconcilable with the appellant himself suffering burn injuries to the extent of 40 per cent. In the dying declaration, it is stated that after pouring kerosene on the deceased, the appellant poured less kerosene oil on himself. The medical evidence establishes that the appellant suffered 40 per cent burns. A reference is made to the evidence of PW15 who is a Police Constable working with the Police Control Room (PCR) as in cross-examination, she has this to state:

> "It is correct that as per further proceedings mentioned in Ex.PW15/DA, it is mentioned that the husband was smoking a biri inside the room and lid of the petrol tank of a motorcycle lying nearby was lying open as a result of which the husband got fire and wife tried to extinguish the fire, she also caught fire and that Indrawati who is their relation had also stated so and both husband and wife were conscious."

16. He, therefore, would point out that the said statement, which is recorded at the earliest point of time after the incident, corroborates the first and the second dying declaration and the case of accidental burn injuries is clearly probablised.

17. The learned counsel for the State, on the other hand, would submit that it is not correct to characterise the first statement as dying declaration. There is only one dying declaration and that dying declaration was recorded on 27.01.2008. This dying declaration is believable. The case of tutoring is sought to be rebuffed. As far as the Officer recording the dying declaration without the certificate from the Doctor is concerned, it is pointed out that the very fact that the dying declaration was recorded when the patient was in the ward, itself shows that her condition had not deteriorated to such an extent as otherwise she would have been in the ICU. PWs 1 and 7 have witnessed the recording of the dying declaration. They have stood by the dying declaration and evidence of PW29-Investigation Officer. The dying declaration dated 27.01.2008 brings out the truth. The statements contained therein could not have been made up. Presence of kerosene is made conspicuous by being smelt by witnesses and also being found on the clothes by PW31- Senior Scientific Assistant (Chemistry) and also the admitted fact that the can from which the kerosene was used being also sent for forensic report, squarely establishes prosecution case.

THE LAW RELATING TO DYING DECLARATION

18. A Dying declaration is relevant evidence as declared by Section 32 of the Indian Evidence Act, 1872. A distinction exists, however, between English Law and Indian Law in regard to dying declaration. We may, in this regard, note the declaration of the law contained in Kishan Lal v. State of Rajasthan1:

> "18. Now we proceed to examine the principle of evaluation of any dying declaration. There is a distinction between the evaluation of a dying declaration under the English law and that under the Indian law. Under the English law, credence and the relevancy of a dying declaration is only when a person making such a statement is in a hopeless condition and expecting an imminent death.
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> So under the English law, for its admissibility, the declarant should have been in actual danger of death at the time when they are made, and that he should have had a full apprehension of this danger and the death should have ensued. Under the Indian law the dying declaration is relevant whether the person who makes it was or was not under expectation of death at the time of declaration. Dying declaration is admissible not only in the case of homicide but also in civil suits. Under the English law, the admissibility rests on the principle that a sense of impending death produces in a man's mind the same feeling as that of a conscientious and virtuous man under oath. The general principle on which this species of evidence are 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 1 AIR 1999 SC 3062 powerful considerations to speak only the truth. If evidence in a case reveals that the declarant has reached this state while making a declaration then within the sphere of the Indian law, while testing the credibility of such dying declaration weightage can be given. Of course depending on other relevant facts and circumstances of the case." (Emphasis supplied)

19. But when a declaration is made, either oral or in writing, by a person whose death is imminent, the principle attributed to Mathew Arnold that "truth sits upon the lips of a dying man" and no man will go to meet his maker with falsehood in his mouth will come into play. The principles relating to dying declaration are no longer res integra and it would be apposite that we refer to the decision of this Court in Paniben (Smt) v. State of Gujarat2 wherein the concepts are summed up as follows:

> "(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 : 1976 SCC (Cri) 376 : (1976) 2 SCR 764]) 2 (1992) 2 SCC 474
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> (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 : 1985 SCC (Cri) 127 : AIR 1985 SC 416] ; Ramawati Devi v. State of Bihar [(1983) 1 SCC 211 :
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> 1983 SCC (Cri) 169 : AIR 1983 SC 164]).

(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 : 1976 SCC (Cri) 473 : AIR 1976 SC 1994]).

(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 :

1974 SCC (Cri) 426])

(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 : 1981 SCC (Cri) 645 : AIR 1982 SC 1021]

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. (Ram Manorath v. State of U.P. [(1981) 2 SCC 654 : 1981 SCC (Cri) 581])

(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 : 1981 SCC (Cri) 364 : AIR 1981 SC 617])

(viii) Equally, merely because it is a brief statement, it is not be discarded.

On the contrary, the shortness of the statement itself guarantees truth. Surajdeo Oza v. State of Bihar[1980 Supp SCC 769 : 1979 SCC (Cri) 519 : 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 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 : 1988 SCC (Cri) 342 : AIR 1988 SC 912])

(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 :

1989 SCC (Cri) 585 : AIR 1989 SC 1519])" Also, in paragraph 19, it was held as follows:

"19. In the light of the above principles, we will consider the three dying declarations in the instant case and we will ascertain the truth with reference to all dying declarations made by the deceased Bai Kanta. This Court in Mohanlal Gangaram Gehani v. State of Maharashtra [(1982) 1 SCC 700 : 1982 SCC (Cri) 334 : AIR 1982 SC 839] held:

"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 declarations could be held to be trust worthy and reliable, they have to be accepted." The problem of multiple dying declarations has engaged the attention of this Court.

20. In Kundula Bala Subrahmanyam and another v. State of Andhra Pradesh3, this Court held as follows:

"18. Section 32(1) of the Evidence Act is an exception to the general rule that hearsay evidence is not admissible evidence and unless evidence is tested by cross-examination, it is not creditworthy.

3 (1993) 2 SCC 684 Under Section 32, when a statement is made by a person, as to the cause of death or as to any of the circumstances which result in his death, in cases in which the cause of that person's death comes into question, such a statement, oral or in writing, made by the deceased to the witness is a relevant fact and is admissible in evidence. The statement made by the deceased, called the dying declaration, falls in that category provided it has been made by the deceased while in a fit mental condition. A dying declaration made by person on the verge of his death has a special sanctity as at that solemn moment, a person is most unlikely to make any untrue statement. The shadow of impending death is by itself the guarantee of the truth of the statement made by the deceased regarding the causes or circumstances leading to his death. A dying declaration, therefore, enjoys almost a sacrosanct status, as a piece of evidence, coming as it does from the mouth of the deceased victim. Once the statement of the dying person and the evidence of the witnesses testifying to the same passes the test of careful scrutiny of the courts, it becomes a very important and a reliable piece of evidence and if the court is satisfied that the dying declaration is true and free from any embellishment such a dying declaration, by itself, can be sufficient for recording conviction even without looking for any corroboration. If there are more than one dying declarations then the court has also to scrutinise all the dying declarations to find out if each one of these passes the test of being trustworthy. The Court must further find out whether the different dying declarations are consistent with each other in material particulars before accepting and relying upon the same..." (Emphasis supplied)

21. In Lella Srinivasa Rao v. State of A.P.4, in the dying declaration which was recorded by the Magistrate, there was no mention about appellant having treated the deceased with cruelty or having caused harassment. His name did not figure in the declaration. The deceased was in a position to make the statement. Five minutes thereafter, another statement was recorded by the Head Constable. Allegations were made against the appellant.

It related to the immediate cause which led to the deceased committing suicide. Court found that the witnesses including the father of the deceased did not support the case of the prosecution that the

deceased was treated with cruelty by the accused. The Court did not act upon the second dying declaration. 4 (2004) 9 SCC 713

22. In Sayarabano Alias Sultanabegum v. State of Maharashtra5, the offence involved was under Section 302 of the IPC. There was a quarrel between the appellant/accused and the deceased, during which, it was the case of the prosecution that appellant poured kerosene from the lamp on the deceased which resulted in the deceased catching fire and finally succumbing to death. In the first dying declaration, the deceased attributed her catching fire to an accident. She absolved all the inmates of her husband family of any wrong doing. When the Special Judicial Magistrate was called on the next day for dying declaration, she set up a different version whereunder the accused was alleged to have thrown the kerosene lamp on her and also that her husband used to beat her after listening to his mother. The deceased was asked by the Magistrate as to why she was changing the statement. The deceased told the Magistrate that she was told that she should not give any statement against family members and she reiterated that the appellant/ mother-in-law of the 5 (2007) 12 SCC 562 deceased had thrown the kerosene lamp and she was burnt. The deceased died almost a week thereafter. This Court took the view that the judgment of this Court in Lella Srinivasa Rao v. State of A.P.6 (supra), was distinguishable noticing that in the said case there was no other evidence, and this Court in Sayarabano v. State of Maharashtra 2007 (12) SCC 562 also finally held as follows:

> "16. In our opinion, criminal cases are decided on facts and on evidence rather than on case law and precedents. In the case on hand, there is ample evidence to show that even prior to the incident in question, the appellant used to beat the deceased and ill-treat her. It is in the light of the said fact that other evidence requires to be considered. In our view, both the courts were right in relying upon the second dying declaration of the deceased treating it as true disclosure of facts by the deceased Halimabi. In the light of the evidence of parents of the deceased (PW 2 and PW 3), Dr. Kishore (PW 6) and Special Judicial Magistrate (PW
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> 5), it cannot be said that the courts

6 (2004) 9 SCC 713 below had committed any error and the conviction deserves to be set aside."

23. In Amol Singh v. State of M.P.7, the High Court rejected the plea on the basis that there being more than one dying declaration and on the basis that the extent of difference between the two declarations was insignificant:

> "13. Law relating to appreciation of evidence in the form of more than one dying declaration is well settled. Accordingly, it is not the plurality of the dying declarations but the reliability thereof that adds weight to the prosecution case. If a dying declaration is found to be voluntary, reliable and made in fit mental condition, it can be relied upon without any corroboration. The statement should be consistent throughout. If the deceased had several opportunities of making such dying declarations, that is to say, if there are more than one dying declaration they should

> be consistent. (See Kundula Bala Subrahmanyam v. State of A.P. [(1993) 2 SCC 684 : 1993 SCC (Cri) 655]) However, if some inconsistencies are noticed between one dying declaration and the other, the court has to examine the nature of the inconsistencies, namely, whether they are material or not. While scrutinising the contents of various dying 7 (2008) 5 SCC 468 declarations, in such a situation, the court has to examine the same in the light of the various surrounding facts and circumstances." (Emphasis supplied)

24. The court finally, in the facts of the said case, took the view that the discrepancies made the last declaration doubtful and it was found unsafe to convict the accused.

25. In Heeralal v. State of M.P.8, in the first dying declaration recorded by the Tehsildar, the deceased stated clearly that she tried to set herself ablaze by pouring kerosene on herself. The second dying declaration, however, contained the contrary statement. The Court held, inter alia, as follows:

> "9. Undisputedly, in the first dying declaration recorded by a Naib Tahsildar, it has been clearly stated that she tried to set herself ablaze by pouring kerosene on herself, but in the subsequent declaration, recorded by another Nayab 8 (2009) 12 SCC 671 Tahsildar, a contrary statement was made.

It appears that one dying declaration earlier was made before the doctor. The trial court referred to the evidence of Dr. Chaturvedi who stated that the deceased was admitted on Bed No. 8, but the father of the deceased stated that her daughter was admitted on some other bed number.

10. The trial court and the High Court came to abrupt conclusions on the purported possibility that the relatives of the accused may have compelled the deceased to give a false dying declaration. No material was brought on record to justify such a conclusion. The evidence of the Nayab Tahsildar who recorded Ext. D-4 was examined as PW 8.

His statement was clear to the effect that nobody else was present when he was recording the statement. That being so, in view of the apparent discrepancies in the two dying declarations it would be unsafe to convict the appellant." (Emphasis supplied) The Conviction of the appellant came to be set aside.

26. In Lakhan v. State of M.P.9, this Court was dealing with the case of death as a result of burn injuries suffered by the wife. In the first dying declaration before the Magistrate, the deceased stated that when she was cooking, kerosene oil had been put behind her back. In the next dying declaration, it was stated that the appellant/accused brought a metal container full of kerosene and poured it on her body and the fire was lit by him and she was burnt. This Court, after going through all the decisions, held as follows:

> "21. In view of the above, the law on the issue of dying declaration can be summarised to the effect that in case the court comes to the conclusion that the dying declaration

> is true and reliable, has been recorded by a person at a time when the deceased was fit physically and mentally to make the declaration and it has not been made under any tutoring/duress/prompting; it can be the sole basis for recording conviction. In such an eventuality no corroboration is required. In case there are multiple dying declarations and there are inconsistencies between them, generally, the dying declaration recorded by the higher officer like a Magistrate can be relied upon, 9 (2010) 8 SCC 514 provided that there is no circumstance giving rise to any suspicion about its truthfulness. In case there are circumstances wherein the declaration had been made, not voluntarily and even otherwise, it is not supported by the other evidence, the court has to scrutinise the facts of an individual case very carefully and take a decision as to which of the declarations is worth reliance."

27. In the course of its discussion, the Court found that the second dying declaration was reliable inter alia on the ground that it was corroborated by the earlier declaration made by the deceased to her parents who were examined as PW1 and PW3.

28. We may also notice the judgment in Sher Singh v. State of Punjab10. This is also a case of burn injuries suffered by the deceased/wife of the appellant. Upon being taken to the hospital, the Police Officer recorded a statement wherein it was stated that the fire was accidental and it happened when she was preparing tea. When her uncle met her on the next day, she informed that the accused had burnt her. On the 10 (2008) 4 SCC 265 very next day he moved an application for recording a statement which came to be recorded. Yet another application was moved requesting for re-examining the matter as the deceased had made a wrong statement before the police officer initially and another statement was accordingly recorded.

29. In the second dying declaration, deceased had stated that she was burnt by her in-laws. It was stated that her father-in-law, mother-in-law and sister-in-law poured oil on her and burnt her. She further stated that her husband was not with her but in the next sentence, she stated that there were four. The fourth person was her husband. She further stated that they had stated that unless she made a wrong statement, they would not take her to the hospital. It was thereafter that she made a third declaration. The Court went on to hold as follows:

> "17. In the present case, the first dying declaration was recorded on 18-7- 1994 by ASI Hakim Singh (DW 1). The victim did not name any of the accused persons and said that it was a case of an accident. However, in the statement before the court, Hakim Singh (DW 1) specifically deposed that he noted that the declarant was under pressure and at the time of recording of the dying declaration, her mother-in-law was present with her. In the subsequent dying declaration recorded by the Executive Magistrate Rajiv Prashar (PW
>
> 7) on 20-7-1994, she stated that she was taken to the hospital by the accused only on the condition that she would make a wrong statement. This was reiterated by her in her oral dying declaration and also in the written dying declaration recorded by SI Arvind Puri (PW 8) on 22-7-1994. The first dying declaration exonerating the accused

persons made immediately after she was admitted in the hospital was under

threat and duress that she would be admitted in the hospital only if she would give a statement in favour of the accused persons in order to save her in-laws and husband. The first dying declaration does not appear to be coming from a person with free mind without there being any threat. The second dying declaration was more probable and looks natural to us. Although it does not contain the certificate of the doctor that she was in a fit state of mind to give the dying declaration but the Magistrate who recorded the statement had certified that she was in a conscious state of mind and in a position to make the statement to him. Mere fact that it was contrary to the first declaration would not make it untrue. The oral dying declaration made to the uncle is consistent with the second dying declaration implicating the accused persons stating about their involvement in the commission of crime. The third dying declaration recorded by the SI on the direction of his superior officer is consistent with the second dying declaration and the oral dying declaration made to her uncle though with some minor inconsistencies. The third dying declaration was recorded after the doctor certified that she was in a fit state of mind to give the statement." (Emphasis supplied)

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?

OUR CONCLUSION ON MULTIPLE DYING DECLARATION

31. 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 summersault is made by the deceased, the case must be decided on the facts of each case. The court will not be relived 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.

CONSPIRACY

32. It is strenuously argued before us by the learned counsel for the appellant that the dying declaration dated 27.01.2008 is the result of conspiracy. PW7-the mother-in-law of the appellant is

the owner of the property. She is a widow. She had three daughters, one of whom was the deceased. The other two daughters were married. PW1 is the husband of one of the daughters. It was to eliminate the chance of appellant succeeding to the property that PW1-the co-brother of the appellant visits the hospital where the deceased was admitted. She is tutored. The result of tutoring is the controversial declaration dated 27.01.2008. This fact receives support from the admission made by PW1 that it was he who made the call to the Police Officer, viz., PW29, and PW29, without any call from the hospital authorities, came and recorded the dying declaration. No doubt, the cross-examination of the deposition of PW7-mother of the deceased shows her as a witness whose deposition exposes omissions with reference to her statement to the Police. Likewise, there are certain omissions brought out in the evidence of PW1. But for reasons, as stated hereinafter, it would not be fatal.

33. The Trial Court has brushed aside this contention as frivolous. The property belonged to PW7-mother-in- law of the appellant. It is inconceivable how the appellant would have any right either during her lifetime or even upon her dying intestate to get the property under the Hindu Succession Act, 1956. Having regard to Sections 15 and 16 of the Hindu Succession Act, 1956, it is clear that the appellant cannot claim any right. No doubt, it is always open to the person to bequeath the property. Therefore, we would think that that the submission in this regard is totally ill-founded.

THE DYING DECLARATOIN DATED 27.01.2008

34. The dying declaration dated 27.01.2008 reads as hereunder:

> "I reside at my parental house along with my mother Chhpoto Devi and husband Jagbir Singh. My marriage took place in year 1999. In the meanwhile, for about four years, there were differences between me and my husband, after a settlement took place in Panchayat, I along with my husband had been residing in my parental house.
>
> On 24.01.2008 in the afternoon, my mother left for matrimonial home of Rakesh at Rohtak. My husband Jagbir works as a Sweeper in CRPF, who came from his duty at about 6 p.m. in a drunken position and said to me. "You want to live with me". I said 'Yes', then Jagbir took me to a big room and picket up a 'can' of kerosene oil and poured kerosene oil upon me. He poured kerosene oil upon me and poured less kerosene oil upon him. Then, I got myself free from the clutches of Jagbir and ran towards a small room, and he came to me after following me, and then he ignited a matchstick and threw it upon me, and immediately my clothes caught fire. After that when I, in order to save myself, ran towards main gate, he caught me from behind as a result, I fell down near a handpump, which was installed at the house. Thereafter, my husband brought out the pipe of petrol tank of the motorcycle, which was lying in the Chowk, as a result of which fire erupted near the motorcycle, and Jagbir also caught fire and when I raised hue and cry to save, the one boy namely Dinesh Jain, who resides in the neighbourhood, came inside by jumping the main gate and broke the lock placed inside the main gate with the help of 'Hathi' of the handpump. Then

all the neighbourers saved me and Jagbir while burning. As my husband had extended threat to me, I could not give my statement on the same very day. My husband has tried to kill me by pouring kerosene oil upon me because of the reason that he has illicit relations with his 'Bhabhi' namely Babita. You have recorded my statement in presence of my mother Chhoto Devi and my 'Jija' Vinod, which I have been read over and is correct." PHYSICAL AND MENTAL CONDITION OF DECEASED

35. We have noticed the contents of the MLC concerning the deceased. Her condition was characterised as critical. She had suffered deep burns. The injuries were understood as dangerous. The patient, no doubt, died only on 02.02.2008, i.e., on the ninth day after admission on 24.01.2008.

36. As far as the dying declaration made on 27.01.2008 is concerned, particularly, when Doctors were near at hand, the Investigating Officer ought to have taken the caution of obtaining a certificate after the Doctor put questions to the patient for ascertaining her condition. It is equally true that a declaration does not appear to be preceded by questions put by the Investigating Officer to the deceased from which he could ascertain details from which he could have received verification about her condition.

37. The first question, one must bear in mind, is whether the deceased was in a physical and mental condition to make a dying declaration. It is not in dispute that in the dying declaration dated 27.01.2008, there is no certificate by the Doctor certifying that the patient was conscious or that the patient was mentally or physically fit to give the declaration. The patient was, in fact, admittedly lying in the hospital. Even in the narrative of the dying declaration, there are no questions seen put by PW29 to ascertain her condition. Undoubtedly, it is true that the certificate by a Doctor about the patient being conscious and fit to give a dying declaration would go a long way in inspiring confidence of the court. However, the Constitution Bench in Laxman v. State of Maharashtra11, has held as follows:

> "……Where it is proved by the testimony of the Magistrate that the

11 (2002) 6 SCC 710

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." (Emphasis supplied)

38. We can proceed on the basis that even absence of the certificate by a Doctor is not fatal to act upon a dying declaration. However, the requirement remains that the person who records the dying

declaration must ensure that the patient was in a fit condition, both mentally and physically, to give the declaration.

39. Turning to the facts of this case, the following features are most important:

> A. The patient was brought to the hospital on 24.01.2008 at about 09.30 P.M. where MLC was recorded. The MLC specifically records that the patient was conscious, oriented, follows verbal command and able to speak. This material undoubtedly would show that as on 24.01.2008 at 09.30 P.M., the patient was fully conscious and oriented. In fact, the statement, which is made by her/deceased, is sought to be made use of by the appellant himself as a dying declaration. If that is so, it would be illogical to not proceed on the basis that the patient was capable of making a dying declaration. Deceased also made a statement at 01.30 P.M. on 25.01.2008 which is the next day. Again, it was relied upon by the appellant himself. This means that the appellant is also proceeding on the basis that on 25.01.2008, the deceased was in a condition to make the statement.

B. It is on 27.01.2008 that the controversial dying declaration is made implicating the appellant. It is recorded by a Police Officer. We have set out the entirety of the dying declaration. We have to undoubtedly proceed on the basis that the Police Officer was performing his official functions. There is no acceptable material to show that he was interested in implicating the appellant or that he was showing any undue favour to PW1 or PW7. Even though, it may be true that he may not have put questions to ascertain her condition, the declaration, which is seen made, in our view, sufficiently assures us of the physical and mental condition of the deceased to make the declaration. In this regard, we may notice that there is no case for the appellant that after 24.01.2008 and 25.01.2008, the condition of the deceased took a turn for the worse. It is further important to notice that the death took place only on the sixth day after making the declaration on 27.01.2008. Therefore, we are of the considered opinion that the deceased was in a position to make the declaration.

WHETHER DECLARATION BETRAYS IMAGINATION LET LOOSE?

40. However, question which would arise is whether the declaration was vitiated, it being tutored, prompted and result of her imagination running wild. Taking the last point first, namely, that the dying declaration must not be the figment of the imagination of the deceased, nothing is established by the appellant to show that the facts which have been stated in regard to the physical places and things spoken of by the deceased in regard to the rooms, etc., do not match with the reality on the ground. In fact, there is no material before us to hold that the dying declaration is a creation of her imagination.

WHETHER STATEMENTS MADE ON 24.01.2008 AND 25.01.2008 ARE DYING DECLARATION?

41. We are not much impressed by the contention of the State that the statements made at the hospital on 24.01.2008 and to the Police Officer on 25.01.2008, are not dying declarations. Under Section 32 of the Evidence Act any statement made by a person as to the cause of his death or to any

circumstance of the transaction which resulted in his death would be relevant. Once it is proved that such statement is made by the deceased then it cannot be brushed aside on the basis that it is not elaborate or that it was not recorded in a particular fashion. We have already noted that the principle that the statement is brief, would not detract from it being reliable. Equally, when there are divergent dying declarations it is not the law that the court must invariably prefer the statement which is incriminatory and must reject the statement which does not implicate the accused. The real point is to ascertain which contains the truth. FURTHER ANALYSIS

42. On 24.01.2008, the appellant and the deceased suffered burn injuries. A call was made to the Police Control Room. PW22-Police Constable deposed about taking the appellant and the deceased to the hospital. Investigation Officer-PW29 has spoken about immediately coming to the site of the incident. He states he made inquiries. He stayed there for about two hours. It is not in the region of dispute that the deceased and the appellant, who had suffered the injuries, were in the hospital, viz., the Safdarjung Hospital. PW13-ASI, has deposed about responding to the call received, inspecting the spot on 24.01.2008. Photographs were got taken. PW14-the Police Photographer has been examined. He speaks about going to the site on 24.01.2008 at about 09.00 P.M.. He took nine photographs. Two of the photographs were washed out. He has produced the negatives. He speaks about photographs of plastic can as also the matchstick. On the MLC of the deceased, the time of arrival is shows as 09.30 P.M.. It is further noted that the patient was not giving proper history. Thereafter, it is stated, alleging a case of accidental fire when husband was trying to ignite matchstick for smoking probably due to nearby bike leaking petrol tank. It is stated, as told by patient self. Patient got burn injury with her husband. It was further stated, patient unable to tell the cause of kerosene smell from her body. She was brought to the casualty by the PCR Van. She had deep burns present over her face, neck, anterior trunk, lower part, both upper limbs, portions of both lower limbs. It is further stated that patient is very critical. However, it is written, patient is conscious, oriented, follows verbal command, able to speak. It is also stated, kerosene smell present in body of the patient. The nature of the injuries was classified as ‘dangerous’. The Doctor is Dr. K.K. Sharma. It is thereafter that on the next day on 25.01.2008 at 01.30 P.M., a statement was given to the Investigating Officer by the deceased which we have already extracted. It is thereafter that the dying declaration dated 27.01.2008 (extracted above) came to be recorded.

43. It is found by two courts to be witnessed by PW1- the co-brother of the appellant and PW7-the mother-in- law of the appellant. PW29 is the Police Officer who has recorded the statement. He has also deposed that on receiving a call, which is no doubt, a call made by PW1, he had come to the hospital and recorded the statement.

44. Let us look at the circumstances emerging from the facts. There can be only two possible causes for fire which finally resulted in the death of the deceased. It is either accidental or homicidal. If it is found to be accidental, certainly, it would rule out homicide. The converse is also true.

LANGUAGE IN WHICH DYING DECLARATOIN RECORDED

45. The dying declaration dated 27.01.2008 is seen recorded in Hindi. There is no case that the deceased was not familiar with Hindi and we can safely conclude that the dying declaration was

recorded in a language with which the deceased was familiar. There can be no doubt in regard to the same.

THE DYING DECLARATION IS A DETAILED NARRATIVE

46. The dying declaration dated 27.01.2008 is a fairly lengthy narration. It contains details about what happened on the fateful day, viz., 24.01.2008 in a fairly graphic manner including details regarding the place where it happened, the manner in which it happened, the specific role played by the appellant, even things (presence of the motorcycle), the door being locked, are reflected. Even reference was made to the relationship which the appellant was having with his sister-in-law.

THE SMELL OF KEROSENE

47. There is evidence on record, both in the form of oral testimony and documentary evidence, to suggest that there was kerosene kept in the premises. The can is found, the photograph of the can is taken. It is also sent for forensic examination.

48. There is reference to the smell of kerosene available in evidence. The very first document available, viz., the MLC is dated 24.01.2008. In the same, it is clearly stated that there is smell of kerosene from the body of the deceased. In the second statement recorded by the Investigating Officer on the very next day, i.e., on 25.01.2008, it is stated that the patient was unable to tell the cause of kerosene oil smell from her body. This is in regard to the statement by the appellant which has also come to be recorded. As far as further evidence indicating presence of kerosene oil is concerned, there is evidence of PW1 who speaks about being told about pouring of kerosene oil by the appellant over the deceased. PW7-mother-in-law of the appellant states that her daughter told her while in the hospital that kerosene oil was kept behind in a small container meant for storing grains. The appellant poured kerosene oil over her. He also sprinkled some kerosene oil on himself also. She, no doubt, states that she had stated before the Police that she had no ration card, that they never used to purchase kerosene oil or never used to keep kerosene oil and the kerosene oil must have been purchased from outside. She was, no doubt, confronted about such omission in the statement. PW8 conducted the post-mortem. She does not, undoubtedly, note the smell of kerosene. But here we cannot ignore the submission of the counsel for the State that post- mortem was conducted on 03.02.2008, almost ten days after the incident.

49. PW-29 is the Investigating Officer. He deposes that the can of kerosene oil was lying and kerosene was lying spread on all the sides of the can. He has spoken about seizing the burnt matchstick and matchbox. He reiterates that in the report, he has mentioned about the smell of kerosene oil emanating from the clothes seized by him.

50. PW30 is the Doctor who identified the handwriting of Dr. K. K. Sharma who took down the statement of the deceased inter alia on 24.01.2008. He says that on 24.01.2008, Dr. K. K. Sharma also examined the deceased with alleged history of sustaining thermal burns when patient's husband was trying to ignite matchstick for smoking and accidentally fire erupted, probably due to nearby bike leaving petrol tank, as told by the patient by herself. He also says that patient got burnt along

with her husband and was unable to tell the cause of kerosene smell present on her body. More significantly, it is stated, Dr. K.K. Sharma also appended a note that patient is not giving proper history. In the cross- examination, a suggestion was made that since spirit was used in the hospital, the Doctor may have been under misapprehension that kerosene oil was present on the body. This suggestion was denied as incorrect by PW30 and he went on to say that even the smell of spirit and kerosene is different. It may be noticed that the suggestion is not that the Doctor was confused between the smell of kerosene and petrol. Though, PW30 goes on to state that kerosene oil is the product of petroleum. PW30 also denied as incorrect a foul smell was wrongly treated as kerosene smell.

51. PW31 is the Senior Scientific Assistant (Chemistry), C.F.S.L.. He has stated that on chemical and gas chromatographic examination, Exhibits 1A, 1B, 2A, 2B, 2C, 2D and 2F and Exhibit 3 were found to contain residue of kerosene oil. Residue of kerosene oil, diesel and petrol could not be detected in Exhibit 4 and Exhibit 5. He further states as follows “only in case, in a mixture of petrol and kerosene, if the quantity of kerosene is more, it will emanate smell of kerosene. The residue can remain even for about one year or so unless the article is placed in Sun and is not properly preserved”.

52. Exhibit 1A, which is found containing the residue of kerosene oil, is brown colour shirt. Exhibit 1B is the blue colour jeans. Exhibit 2A, which is found to contain kerosene oil, is a printed scarf with black border. Exhibit 2B is the glittering printed shawl partially burnt. Exhibit 2C which again is found to contain residue of kerosene oil is mustard colour cardigan pieces which were partially burnt. Exhibit 2D is the yellow colour cloth piece stated to be kurta in semi-burnt condition. Exhibit 2F is a green colour partially burnt cloth stated to be the bra. It also contains residue of kerosene oil. Exhibit 4 consists of two burnt matchsticks which did not contain kerosene oil, diesel or petrol. This is not inconsistent with the case of kerosene being used in the manner canvassed by the prosecution. Exhibit 5 contains scissors of iron and copper metal. Overwhelming evidence relating to the presence of kerosene starting with the can, kerosene being found by PW29 on the spot near the can on his inspection on the same day, the presence of kerosene residue on the clothing belonging both to the deceased and the appellant, as found by the Scientific Expert, would clearly establish that kerosene was used in causing the fire. This completely fortifies the prosecution. It equally clearly rules out the case ought to be set up by the appellant that it was a case of accidental fire which was brought about when the appellant was lighting his biri and a leak from the motorbike causing the fire. As deposed by the Scientific Expert, the possibility of kerosene smell would be there only if kerosene content is more in the petrol. Secondly, we must also remember that the leak would not have been of such an extent as to lead to the incident of this nature.

OTHER CIRCUMSTANCES

53. As against this, we may also examine what circumstances can be culled out in favour of the appellant. In the first two statements, which have been made by the deceased to the Police, the blame is placed at the doorstep of an unfortunate accident, which the appellant while trying to light his biri and the leak from the motorcycle, caused. This version is repeated in the statement to the Police on 25.01.2008 also. PW1 states, and it is not disputed by the counsel for the State, that the

deceased had put her footmark in the dying declaration dated 27.01.2008. PW29, however, speaks about the thumb impression. This is apparently a lapse of memory of the Officer.

54. Coming to tutoring and prompting, there is no doubt that it is on PW1-the co-brother of the appellant informing the Police Officer, the Police Officer-PW29 came on 27.01.2008 and took down the declaration. It is true that the presence of PW1 and PW7, at the time of making the dying declaration, cannot be doubted. Their proximity with the deceased, before PW29 came to take the declaration, can be easily assumed.

55. It is a double-edged sword. On the one hand, if the Police Officer recording the statement was to call somebody else as witness, when the mother and the other relatives are near at hand, it can be challenged on the ground that it is unnatural. On the other hand, if such close relatives are made witnesses and it turns out later on that a case is set up that they had an interest in the declaration being made in a particular manner, again, the prosecution would be in trouble. In this case, however, the nature of the case set up by the appellant to bring the dying declaration under a cloud, on account of the interest shown by PW1, is the conspiracy theory mainly to prevent the appellant from succeeding to the property. We have already dealt with the same and found that the said version is totally unacceptable. If that be so, in the facts of this case, we cannot read much into the presence of PW1 playing a role he did, namely, calling the Police Officer and being a witness in the dying declaration. PWs 1 and 7 were witnesses to the dying declaration. They have spoken about the dying declaration and about it being recorded by PW29.

56. The question then arises about the fact of the previous statements which have been attributed to the deceased contained in the MLC dated 24.01.2005 and in the statement of the deceased recorded on 25.01.2008. The view taken by the courts is that the deceased and the appellant were admitted in the same hospital, the presence of the appellant would have come in the way of the deceased speaking of the truth.

57. We are of the view that the courts below were not in error in disregarding the statement attributed to the deceased in the MLC dated 24.01.2008 and the statement taken on the next day, i.e., on 25.01.2008. The incident, admittedly, took place towards in the evening of 24.01.2008. The appellant and the deceased were taken by the Police in the PCR vehicle to the hospital. It is the proximity of the appellant, which apparently stood in the way of the deceased, disclosing the truth of the matter. The appellant and the deceased continued to be in the same hospital on 25.01.2008 also. In this regard, in the dying declaration, relied upon by the prosecution, the deceased has stated that as the appellant had extended threat to her, she could not give a statement on the very same day. Apparently, this means that she has proceeded on the basis that the declaration made on 27.01.2008 is the first dying declaration which she is making. She has, in other words, not treated the statement made on 24.01.2008 at the time when she was admitted, as a declaration. So also, the statement made on 25.01.2008, she was operating under the threat extended by her husband.

58. Further, the motive of the appellant to kill her, has been stated by her to be that he had illicit relations with his Bhabhi (sister-in-law). She has also spoken about differences which she had with her husband and the settlement which had taken place in the Panchayat. PW7-mother of the

deceased has also spoken about the affair, which appellant had with his sister- in-law. Thus, the motive attributed to the appellant by the deceased, is not the figment of her imagination. She is very coherent and clear in this regard.

59. In dying declaration dated 27.01.2008, she speaks of one boy, viz., Dinesh Jain, a neighbour coming inside by jumping the main gate and breaking the lock placed inside the main gate with the help of hathi (handle) of the handpump. Dinesh Jain has been examined as PW24. He states that on 24.07.2008, at about 08.00 P.M., he heard the sound of loud cries. He saw the appellant and the deceased both engulfed in fire. He tried to push the gate of the house of PW7 but it could not be opened. He climbed the wall. He found that the gate was locked from inside. After reaching inside the house, he found the handpump in the house. He pulled down the handle, and with it, broke open the lock. By the time he came out of the house, certain persons had gathered there. In the cross-examination, he says that Police did not record his statement either on the date of the incident nor on any other date. A motorcycle was lying seen near the handpump. He was unable to tell the number of rooms in the house. It is for the first time that he is going there. He did not try to extinguish the fire. The handle of the handpump could be removed easily as there was no nut and only a nail was there. It is difficult to find that the deceased could have given the detail about PW24 doing what he did only on the basis of any tutoring or prompting by PW1 or PW7. Thus, this portion of the statement stands fortified by the corroborative evidence of PW24.

60. Let us also examine the content of the actual case of the defence as is sought to be established through the statement in the MLC dated 24.01.2008 and the statement on 25.01.2008. The case set up in the MLC is that deceased suffered burns when the appellant tried to ignite a matchstick for smoking and the fire erupted due to petrol leaking from the tank of the motorcycle. As already noted, there is no smell of petrol. However, what is to be noted is the presence of kerosene. In fact, in the very statement, which is ascribed to the deceased on 24.01.2008, it is recorded that the deceased was unable to explain the cause of kerosene smell from her body. This, apparently, shows that the deceased was hoping that she would survive, and if she explained the cause of the smell of the kerosene, necessarily implicating the appellant, the chance of her married life surviving would come to an end. As already noted, there is a note of Dr. K. K. Sharma that the patient was not giving proper history. There is also the aspect of the threat explained. Whether it is her desire or the threat, both prevented the disclosure of the truth. In the statement of 25.01.2008, it is stated that the deceased deposed that she resides with the appellant and mother. Earlier, there had been some problem between the appellant and the deceased. She was since last one year living with the appellant happily. There is no such quarrel between them. Mother had gone on 24.01.2008 for matrimonial home of Rakesh, younger sister, at Rohtak. Appellant came back in the evening. They had dinner and were preparing to go for sleep. She locked the gate while the appellant was smoking biri near the motorcycle. All of a sudden, the motorcycle caught fire. Appellant was trying to extinguish the fire and his clothes also caught fire. Both of them screamed. Neighbours saved both of them. No one had done this intentionally. The above case is founded on a premise which eliminates the possibility of kerosene. We have, however, noted that there is overwhelming evidence that the fire was caused by the use of kerosene. In the statement, there is no reference to the appellant being drunk. Everything was normal till the accidental fire erupted upon the motorcycle catching fire. Deceased states that the appellant was trying to extinguish the fire and his clothes also

caught fire. The deceased, however, does not state that she went to extinguish the fire and thereby sustained the burn injuries. In other words, the statement on 25.01.2008 does not contain any reason as to how the deceased caught fire. There was no statement that she suffered the extensive (65 per cent) burn injuries when she tried to put out the fire. Secondly, the version involves the motorcycle catching fire. There are photographs of the motorcycle. It is only the part of the seat of the motorcycle which was burnt. In this regard, it is apposite to notice that PW14-Police Photographer has deposed about reaching the spot on 24.01.2008 at 09.00 P.M. and taking the photographs, inter alia, of the motorcycle. Statement of 25.01.2008 does not appear to indicate the cause of the burn injuries suffered by the deceased, for the reasons stated above. This version also is incompatible with the presence of the kerosene can which is proved by the evidence of PW29-Investigating Officer, PW-14- photographer and the photograph. The statements made on 24.01.2008 and 25.01.2008 will not explain the cause of smell of kerosene emanating from the body, both of the deceased and from the appellant, as also the clothes smelling of kerosene. PW30 apparently spoke about the clothes smelling (MLC recorded by Dr. K.K. Sharma). That the appellant was unable to tell the cause of kerosene smell from his body. It is found that kerosene smell was present in the body of the patient.

61. It must be remembered that in the statement on 27.01.2008, the deceased had spoken about the appellant coming drunk. He poured kerosene over the deceased. He also poured some kerosene on himself. The cause of fire was by lighting matchstick after pouring the kerosene. The deceased runs and trips over the handpump. The presence of the handpump is corroborated by the evidence of PW24-neighbour. No doubt, the action of the appellant in pulling out the petrol pipe is also referred to by the deceased in the dying declaration dated 27.01.2008. The fire erupting near the motorcycle is, thus, explained in the declaration dated 27.01.2008. It is here that the role of alcohol in the whole incident, which must be borne in mind.

62. In the declaration dated 27.01.2008, it is true that the deceased states that the appellant poured less kerosene oil upon himself. It must be, at once, remembered that deceased had stated that the appellant had come on the said day in the drunken position. The appellant's act in bringing out the pipe of the petrol tank of the motorcycle resulting in fire erupting and him also catching fire, does establish that fire did erupt near the motorcycle. What the deceased has stated is compatible with the motorcycle itself not being burnt as such which is in accord with the evidence.

63. As to why the appellant would bring out the pipe of the petrol tank, is one question which may require consideration. The Trial Court holds that it was in order to show it to be an accident, that he brought out the petrol pipe and took the defence that because of the leaking pipe, the fire engulfed and both of them caught fire, which defence was found absolutely improbable. The High Court, in the impugned order, on the other hand, would state that the appellant suffered 40 per cent injuries on his face, neck and both upper limbs, was found compatible with the dying declaration dated 27.01.2008 wherein the deceased has explained that when she tried to flee, the appellant caught her trying to prevent her from running out. It is how the burn injuries occurred on his face and upper trunk and upper limbs. It is true, a question may arise that if this version is accepted and the appellant caught fire from catching the deceased from behind, why would he pull out the petrol pipe when both of his upper limbs (hands) had caught fire. In the dying declaration, the deceased has

stated that the appellant caught fire when the fire erupted near the motorcycle as a result of the pipe of the petrol tank being taken out by the appellant. It is to be remembered that the case of the appellant is that the fire occurred when he had lit a biri. He had no case that the pipe of the petrol tank had been taken out thereby causing the fire. But PW29- Investigating Officer, visited the site on 24.01.2008, has deposed that the petrol pipe of the motorcycle had been detached from the place where it should be. As already noticed, he has also stated that in the inner room, a can of kerosene oil was lying and the kerosene was lying spread on all the four sides of the can. We have no reason to disbelieve PW29 when he speaks about kerosene oil lying in the inner room and the can also. The version, as projected in the declaration dated 27.01.2008, is clinchingly proved by this circumstance that kerosene was indeed the fuel used which caused the burn injuries and its position in the inner room is entire compatible with the dying declaration dated 27.01.2008.

64. In the above facts and circumstances, we see no ground to interfere. The appeal will stand dismissed. Since, appellant has been released on bail, his bail bonds shall stand cancelled and he shall be taken into custody.

.....J. (SANJAY KISHAN KAUL) .....J. (K.M. JOSEPH) New Delhi, September 4, 2019.