

Jagbir Singh Vs. State

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SooperKanoon Citation : sooperkanoon.com/1093099

Court : Delhi

Decided On : Oct-07-2013

Judge : Indermeet Kaur

Appellant : Jagbir Singh

Respondent : State

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI % + Judgment reserved on :26.09.2013 Judgment delivered on :07.10.2013 CRL.A. 757/2010 JAGBIR SIGH Through: Appellant Mr.M.C.Sharma, Advocate. Versus STATE Through: Respondent Mr. Richa Kapoor, APP. CORAM: HON'BLE MR. JUSTICE KAILASH GAMBHIR HON'BLE MS. JUSTICE INDERMEET KAUR INDERMEET KAUR, J.

1 The appellant is aggrieved by the impugned judgment dated 06.04.2010 vide which he had been convicted under Section 302 of the IPC for having committed the murder of his deceased wife Santosh by burning her to death. Vide order of sentence dated 09.04.2010, he had been sentenced to undergo life imprisonment and to pay a fine of Rs.5,000/- and in default of payment of fine to undergo SI for six months. He had separately been convicted for the offence punishable under Section 506 of the IPC as well for which he had been awarded RI for a period of two years. 2 Record shows that the accused Jagbir was employed as sweeper in the CRPF. He was married to the deceased (Santosh) in the year 1999; at that time, he was unemployed but thereafter he got employment in the CRPF. In the

eight years of their married life, they did not share cordial relations; it was only about four years prior to the date of the incident that a panchayat was held and on the intervention of the said panchayat, Santosh had gone back to reside with her husband. The parties were living in their matrimonial home at RZ-40, Netaji Line, Gopal Nagar-II, Najafgarh. 3 On 24.01.2008, information was received in the local police station Najafgarh that a husband and wife had been burnt at the aforementioned residence. This information was documented vide DD No.50-A (Ex.PW-29/D) 4 On receipt of this information, SI Mahesh Soni (PW-29) along with constable Ram Kumar (PW-21) reached the spot. On inquiry, it transpired that the appellant and his wife had already been removed to Safdarjung Hospital by the PCR. This was confirmed by constable Meenakshi (PW-15) who was at that time posted on PCR duty. 5 The investigating team reached the hospital. The MLC of the victim Santosh (Ex.PW30/D) was recorded at 09:30 PM by Dr.K.K. Sharma. It has noted history of sustaining thermal burns when her husband was trying to ignite a match stick for smoking; accidentally 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; patient brought to burn casualty by PCR van. The MLC had noted deep burns on her face, neck, anterior trunk lower back both upper limbs and lower limbs; 60% burns were recorded and the injuries opined to be dangerous. 6 The MLC of the appellant was also recorded on the same day. It is Ex.PW-30/A. It also notes Patient not giving proper history. Alleged history of sustaining thermal burn when he was trying to ignite match stick for smoking, accidentally fire erupted out possibly due to nearby bike leaking petrol tank told by the patient himself.

Patient got burnt along with his wife; unable to tell cause of kerosene smell from his body. Patient brought to the casualty by PCR van. The MLC had noted deep burns present on the face, neck and anterior trunk of both upper limbs. 40% burns were recorded and the injuries opined to be dangerous. 7 Ex.PW30/D was treated as the first dying declaration of the victim. 8 On 25.01.2008, the victim gave a second declaration to PW29 which was recorded in the daily diary Ex.PW29/DA. The victim did not cast any aspersion upon the appellant even up to this stage. 9 Investigating team returned to the spot where the burnt clothes of the appellant and the victim were taken into possession vide memo Ex.PW-29/A. At the spot a

partially burnt motor-cycle was also taken into possession vide memo Ex.PW-29/B; it was noted that the petrol pipe of the motor-cycle had been detached; from the inner room, a can of kerosene oil was also taken into possession vide memo Ex.PW-29/A. A broken lock and the handle of a hand-pump was separately taken into possession vide a separate memo Ex.PW-29/C. 10 Crime team was summoned at the spot. Nine photographs were taken by constable Ajmer Singh (PW-14) which included the photograph of the plastic kerosene can lying in the room; burnt match sticks were also photographed; out of the nine photographs taken, two were washed off; positives of the remaining seven photos had been proved as Ex.PW-14/1 to Ex.PW-14/7; negatives had been proved as Ex.PW-14/8 to Ex.PW-14/16. 11 On 27.01.2008, PW-29 received a call from the hospital informing him that the victim Santosh wanted to make a fresh statement. The statement of the victim was recorded by PW-29 (Ex.PW-29/D). It was in this statement that for the first time, the victim implicated the appellant. The version of the prosecution is in fact hinged upon this statement. Relevant would it be to extract this statement. It reads herein as under:

I reside at my parental house alongwith my mother Chhoto 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, and after settlement took place in Panchayat, I alongwith my husband had been residing in my parental house. On 24.1.08 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 picked up a can of kerosene oil and poured kerosene oil upon me. He poured more kerosene oil upon me and poured less kerosene oil upon him. The, 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, then 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 Hati of the handpump. Then all the neighbours 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 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. (Santosh)

1. It was on this statement that the rukka was taken at 04:30 PM on the same day and the FIR under Section 307/506 was registered. 13 Unfortunately, the victim succumbed to her injuries after about eight days. This was on 02.02.2008. On the death of the victim, the FIR was converted from Section 307/506 of the IPC to Section 302/506 of the IPC. 14 The post-mortem of the victim was conducted by Dr. Prem Kumar (PW-8). It was proved as Ex.PW-8/A; the post-mortem report recorded 60% burns. Smell of kerosene was not found present. The burnt areas on the body have been detailed in the ante-mortem external injuries and reads as follows:

ANTE MORTEM EXTERNAL INJURIES : BURNT AREAS ON THE BODY: (Epidermal, dermal) present on a face, neck, front of chest, upper 2/3, front of abdomen (R) forearm, Inner back of (R) arm, front and inner part (R), thigh patches and mid part, inner of (R) by extending to inner half back, inner and inner feet (L) thigh. Patches back of (L) leg, small patches, back of chest, back of abdomen , (R) hand , (R) wrist ,front of forearm (R) , small patches (R) arm. State of burn injuries granulation tissue Blacking ... infection on the involved area of burn. Approximate percentage of burn injuries:

66. Other injuries: No other injury seen over the body.

The internal examination revealed as under:

INTERNAL EXAMINATION: HEAD :SCALP AND SKULL: NAD BRAIN: NAD NECK: NASSO-LARYNGO-PHARYNX: NAD CHEST: LUNGS: Consolidated TRACHEA AND BRONCHI: NAD HEART: NAD ABDOMEN: STOMACH: liquid MUCOSAL WALL: NAD INTERSTINES-NAD, LIVER-NAD, SPLEEN-ENLARGED, KIDNEYS-SWOLLEN, MEDIALY CONGESTION & PANCREAS- NAD: PELVIS:BLEDDER- NAD UTERUS- NAD.

Cause of death was opined as septicemia and shock consequent to the burn injuries. 15 The appellant was arrested by SI Kishore Pandey (PW-25) on 29.02.2008 vide memo Ex.PW-25/A; he was in the hospital at that time; his arrest was made in the hospital. His personal search Ex.PW-25/B was conducted. 16 Statement of the witnesses was recorded which included the statement of the mother of the victim Chhoto Devi examined as PW-7. The statements of the other near relatives of the victim which included her brother-in-laws Vinod Kumar (PW-1), Raj Kumar (PW-18); aunt Om Devi (PW-9), sisters-in-law Indrawati (PW-10) and Usha Devi (PW-11), uncles Dharampal (PW-17), Balwan Singh (PW-19) and Hukum Chand (PW-20), was also recorded. All the aforementioned witnesses had in one tone deposed that the relationship between the appellant and the victim was strained after their marriage; demands were made by the appellant upon the victim; he used to harass the victim; all of them had opined that the appellant was responsible for the death of the victim. Dinesh (PW-24) was the first person who had heard the cries of the victim and the appellant and had climbed the wall to enter their house where he found both of them engulfed in a fire. 17 The evidence collected by the prosecution largely boiled down to the dying declaration given by the victim to the Investigating Officer on 27.01.2008 implicating the appellant. This evidence coupled with the medical evidence and the scientific evidence both of which had noted smell of kerosene on the bodies and clothes of the victim and the appellant had been relied upon by the trial Court to convict the appellant. The trial Judge had also noted that the defence sought to be set up by the appellant that he and his wife had got burn injuries because of an accidental fire which had taken place when the appellant was trying to smoke a bidi which aggravated from the leakage of petrol from his motor-cycle was false. 18 On behalf of the appellant, arguments have been addressed at length. Written submissions have also been filed. Submission being that this is admittedly a case of circumstantial evidence;

the whole thrust of the prosecution is on the dying declaration upon which no reliance can be placed as there were three dying declarations i.e. MLC of the victim noted by the doctor on 24.01.2008; the second dying declaration was in the form of the DD recorded by the Investigating Officer Ex.PW-29/DA which was on 25.01.2008 i.e. one day after the first dying declaration was recorded. In both these dying declarations no role has been attributed to the appellant. It was only as an afterthought on 27.01.2008 that the third dying declaration was recorded where for the first time the name of the appellant has surfaced. Submission being that this dying declaration has also been recorded by the Investigating Officer without obtaining any fitness from doctor. There is no explanation as to why the SDM had not been called. The burn injuries suffered by the appellant also cannot be ignored; his MLC has recorded 40% burn injuries whereas the MLC of the victim has recorded 60% burn injuries and had the intention of the appellant been to kill the victim, he himself would not have sustained burn injuries to such a large extent. The so called intent is clearly eliminated. It was only because of the accidental fire which had taken place at the time when the appellant was trying to light cycle which had led to this incident; this is amply substantiated by the 40% injuries suffered by him. Further submission being that the recovery of so called kerosene can from the spot is also liable to be disbelieved for the reason that the only attesting witness to this seizure memo (Ex.PW-29/A) was constable Ram Kumar (PW-21) who has nowhere in his version stated that the can of kerosene oil was seized by the Investigating Officer. Attention has been drawn to his version. Submission being that he had been permitted to be cross-examined by the learned public prosecutor but even in the cross-examination no question had been put to this witness about the recovery of kerosene can. On all scores, there are dents in the version of the prosecution for which benefit of doubt has to accrue in favour of the appellant and he is entitled to a consequent acquittal. To support his arguments, reliance has been placed upon 2011 (2) JCC804Smt. Sudesh Sharma Vs. The State & Anr.; submission being that where there are multiple dying declarations and one contradicts the other, no reliance can be placed upon any of them. Reliance has also been placed upon 2013 (2) JCC1099 State Vs. Kumari Mubin Fatima & Others; submission being that where there is no evidence to show that the deceased was in fact fit to make a statement when the dying declaration

was recorded and in fact there being no fitness certificate appended to this dying declaration no reliance can be placed upon such a version. 19 Learned public prosecutor has refuted these submissions. Submission being that the dying declaration given by the victim is clear and cogent; there was no reason for a dying woman to have implicated the accused but for the reason that he had in fact committed the murder; her version has been fully supported by the medical evidence which is the MLC of the victim which had noted kerosene smell both on the bodies of the appellant and the victim as also on their clothes for which no plausible explanation had been furnished by either of them; and this has been recorded in their MLCs itself. Further submission being that the scientific evidence which is the report of the CFSL had also detected kerosene oil in the clothes of the victim and the appellant for which also there is no explanation. Impugned judgment does not call for any interference. The learned public prosecutor has placed reliance upon AIR 2002 SC2973 Laxman Vs. State of Maharashtra to support her stand. 20 Record has been perused. We have also appreciated the submissions of the learned counsel for the parties. 21 There are three dying declarations given by the victim. The first dying declaration was made on 24.01.2008 at about 09:30 PM and this was in the form of the history given by the patient to the doctor and recorded in her MLC (Ex.PW-30/D). Details have been noted supra. Admittedly in this dying declaration no role has been attributed to the appellant. The patient who had given the history herself had got recorded that because of accidental fire which had taken place when her husband was trying to light the bidi and the leakage of petrol from the petrol tank of their motorcycle had led to the incident. Burn injuries of the victim were noted to be 60%. There were deep burns noted over the face, neck, anterior trunk lower back both upper limbs parts of the body as also the lower limbs evidencing thereby that the victim had sustained injuries almost on every part of her body. This MLC had noted that the patient was not giving a proper history and in spite of queries, the doctor having noted the kerosene oil smell coming from her body as also from her clothes but no explanation was furnished by either the victim or her husband about this kerosene smell. This MLC (on the right hand corner) has again noted dehydration and kerosene smell present in the body of the patient. 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:

Time 01:31 P.M.. It is entered that I, the SI alongwith accompanying Ct. 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 Jabgir 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 Chhoti Devi had gone to the matrimonial home of their younger daughter Rakesh at Rohtak. And as per the neighbours, husband-wife were living all alone in the house and the motor cycle got fire due to the leakage of petrol from the motorcycle. Jabgir 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 Jabgir s/o Sh. Devi Singh and Santosh w/o Sh. Jabgir Singh were admitted vide MLC Nos. 17608/08 and 17609/08 respectively. Jabgir was 45% burnt and Santosh was 60% burnt. The doctor wrote in (sic) that when Jabgir ignited the match-stick for smoking, the motor-cycle caught fire accidentally 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 Jabgir Singh deposed that I reside with my husband Jabgir 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 Jabgir 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. Jabgir 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 Jabgir 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 Jabgir 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.

23 This was on the following day i.e. one day after the date of the incident at 1.30 p.m. This dying declaration was also made to PW-29, the Investigating Officer. In this dying declaration, also no role has been attributed to the appellant. For a second time, it had been reiterated that the victim had caught fire because of the accident suffered when her husband tried to light a bidi and which got aggravated by the leakage of petrol from his motor-cycle. 24 On 27.01.2008, the third dying declaration Ex.PW-29/D had been recorded. Detailed version has been noted supra. It was in this statement that the victim for the first time stated that on the fateful day i.e. on 24.01.2008 when her husband came home in the evening at 06:00 PM, he being in an intoxicated stage had asked her whether she wishes to stay with him; thereupon he picked up a can of kerosene oil and poured kerosene oil on her body; he poured some kerosene oil upon himself also; he lit a match stick as a result of which she caught fire; on her attempt to run away from the room, her husband caught hold of her from the back; she fell upon the hand-pump just outside the room; thereafter her husband detached the pipe of the petrol tank of the motorcycle which was standing at the chowk outside as a result of which the motor-cycle also got partially burnt; the appellant also sustained burn injuries.

Dinesh (PW-24) as also some other neighbours reached the spot on hearing the cries of the appellant. She did not disclose the incident earlier because of threats extended by her husband. The strained relations between the couple and the intervention of the Panchayat pursuant to which the victim had rejoined the appellant had also been detailed; so also the reason for their discord, i.e. because the appellant was having illicit relations with his Bhabhi Babita, PCR was informed and she was removed to the hospital. 25 This is the gist of the third dying declaration. 26 This is also the most lethal evidence which the prosecution has pitched against the appellant. 27 The law on dying declaration is clear. It is settled that a dying declaration if after a careful scrutiny is found to be true and free from inducement; being coherent and consistent, it would be sufficient in itself even in the absence of corroboration to nail the accused. {See AIR 1958 SC22Khushal Rao Vs. The State of Bombay). It is not the number of dying declarations which weigh with the Court. However if there is plurality in the dying declarations and one is different from the other and the inconsistencies are apparent and evident, the Court will be dissuaded from relying upon such dying declaration. 28 A dying declaration cannot be put at the same pedestal as an eye- witness account. It has to be treated with circumspection and care; this is especially so as a dying declaration is admissible in evidence without the right of cross-examination to the accused. The dying declaration which is admissible evidence under Section 32 of the Indian Evidence Act is the exception to the rule that hearsay evidence is inadmissible. 29 The law also does not provide that a dying declaration should be made in any prescribed manner or in the form of questions and answers; it may be in the narrative form also. It is also not necessary that the dying declaration has to be recorded by a Magistrate and non-recording of dying declaration by a Magistrate would not per-se be a ground to dis-believe the version of the prosecution. {See 2006 CriL LJ4646 Balbir Singh and Anr. Vs. State of Punjab). 30 The question that has to be answered is whether this dying declaration (Ex. PW-29/DA) which is the third dying declaration and opposed to the earlier two dying declarations inspires confidence and can be accepted. 31 Record shows that the first dying declaration was recorded within less than an hour of the incident; it was in the presence of the husband of the victim. It is a declaration which has been recorded by the doctor. The MLC Ex. PW-30/A notes the name of the doctor as

Dr.K.K. Sharma, The said doctor has not come in the witness box; he had apparently left the hospital. In his place Dr. Thakur Thussu (PW-30) had come into the witness box and had identified the signatures of Dr. K.K. Sharma. He was subjected to a cross-examination. In his crossexamination, he has specifically stated that the smell of spirit and kerosene is different; he had denied the suggestion that smell of kerosene which was noted in the MLC (Ex.PW30/A) was wrongly noted and it was the smell of spirit; he specifically stated that the smell of kerosene is distinct from the smell of a spirit. 32 The second dying declaration Ex.PW-29/DA which was recorded within a span of 14 hours from the first version also did not implicate the appellant. The first two dying declarations were in fact consistent. They had both spoken of the accidental fire pursuant to which the victim had sustained injuries when her husband tried to light a bidi and the petrol had leaked from his motor-cycle. 33 The victim and the appellant had been taken to the hospital in the PCR. The husband was also 40% burnt. Kerosene oil both on the body of the victim as also on the appellant as also on their clothes was noted in their MLCs. No plausible explanation could be given by either of them to the repeated queries put by the doctor as to why kerosene smell was emanating from their bodies and clothes. The victim was in the company of her husband. It is but natural that being in the emotional and turbulent turmoil in which she was and her husband also being in a burnt state his presence inhibited and prevented her from speaking the truth to the doctor. This can be gathered from the fact that there are question marks put in the MLCs by the doctor as to why no explanation could be given by both of them about the presence of kerosene oil. The second dying declaration which was recorded at 01:30 on the following day was also probably for the same reason. Her husband was in the same hospital. It was again recorded in his presence. This has been noted in Ex.PW29/A. The victim was pre-empted from making a true disclosure. She did have the courage to do so. Two days later i.e. on 27.01.2008, she voluntarily informed the police that she wanted to make a statement. This narration in Ex.PW-29/D is in the words of the victim and has been recorded by the Investigating Officer. She has explained that she was under threat from her husband. 34 In this context the testimony of PW-29 is relevant. He has on oath stated that on 27.01.2008, call was received from the hospital which had been documented in DD No.20-B. This was to the effect that the victim wanted to

make statement. PW-29 reached the hospital along with the Inspector and recorded the statement (Ex.PW-29/D) of the victim. He has deposed that the statement as narrated to him by Santosh was recorded. It was recorded in hindi, the language of the victim. The disclosure being that the appellant had poured kerosene oil over her and had burnt her with a match stick; she had not disclosed this incident earlier because of the threats which had been extended to her by her husband. In his cross-examination, PW-29 stated that he has received DD No.20-B on 27.01.2008 at 01:30 PM and he had reached the hospital at 02:30 PM. At that time, the mother of the victim and her brother-in-law i.e. PW-7 and PW-1 were both present in the hospital. He has admitted that the victim was in the ward at that time; she was not in the ICU; he had not moved any separate application for obtaining opinion of the doctor about her fitness as in the MLC itself it has been stated that the patient is fit for statement. He denied the suggestion that Ex.PW-29/D was manipulated at the instance of PW-1 and PW-7. 35 Relevant would it be to note that this dying declaration was not recorded by PW-29 on his own. He had received a phone call from the hospital informing him that the victim wished to make a statement. This was documented vide DD No.20-B. It was only then that he reached the hospital to record the statement of the victim. Patient was in the ward at that time; this was the third day of her admission; at the time of her admission (as is evident from the MLC) she was conscious, able to speak and follow verbal commands. Her vitals i.e. her blood pressure and pulse were also stable. The fact that she was in the regular ward and not in the Intensive Care Unit (ICU) shows that her condition had not deteriorated. PW-29 in all probability did not obtain a fitness from the doctor before recording the victims statement for this reason. This has also been explained by PW-29 in his cross-examination wherein he stated that he did not move a separate application for obtaining the opinion of the doctor as the MLC itself had recorded that she was fit for statement; moreover she was in the ward and not in the ICU. PW-29 had also explained that the SDM was not called because the marriage of the parties having taken place in year 1999 and being more than seven years old and only in cases of abnormal death, within seven years of marriage that a Magistrate is summoned. 36 Relevant would it be to also point out that certain private informations elicited in Ex.PW-29/D by the victim were in the personal knowledge of the victim alone; these related to the

intervention of the panchayat; the fact that kerosene was poured by the appellant not only upon the victim but also upon himself; he detached the petrol pipe of the motor cycle standing outside in the chowk; she fell down on the handpump; on hearing her cries, Dinesh Kumar their neighbour jumped the wall to save her; her husband had illicit relations with his bhabhi Babita. All these facts were in the know-how of the victim alone; it is also relevant to state that up to this time, statement of the other relatives had not recorded; they were recorded by PW-29 later on. This narration of the victim in Ex. PW-29/A stood corroborated by their testimonies; as such the suggestion that this statement was manipulated by the Investigating Officer is patently incorrect. The victim had also explained that she did not disclose the true picture earlier because of the threats extended by her husband. 37 It is true that a dying declaration recorded by the Investigating Officer should not be encouraged but under extenuating circumstances as was so in the present case where the Investigating Officer noting that the marriage was more than seven years old did not think it a fit case to summon the SDM, it was he himself who recorded this statement. His version that this dying declaration was made in the presence of PW-7 & PW-1 is also corroborated not only from their ocular testimonies but also from the fact that Ex.PW-29/D has been attested by PW-7 & PW-1 as well. It is also not the case of the appellant that any tutoring was done upon the victim pursuant to which she had made this statement. No such suggestion has been given to PW-1, PW-7 & PW-29 on this count, this is also not their defence. Defence projected by the appellant was that this was an incident that when he tried to light his biri and the petrol pipe had leaked. 38 The medical record (MLC of the victim) shows that she had been admitted in the hospital with 60% burns. This was on 9.30 p.m on 24.01.2008. She was fully conscious and well oriented. She had succumbed to her injuries five days later. Her mental faculties to make a statement were never in challenge. It is not the defence of the appellant that on 27.01.2008 when she had given her this statement incriminating the accused, she was not of a sound disposing mind. 39 The fact that the declarant was fit to make a statement on 27.01.2008 in fact cannot be doubted. 40 PW-7 is the mother of the victim. She was in Rohtak at the time of incident. She has on oath deposed that at 10:00 PM on the fateful day, she has received a phone call informing her that the appellant had burnt her daughter; phone call was

received by her son-in-law Vinod. She returned to Delhi on the same day; on the next day, she met her daughter for hardly for one minute and being in a burnt condition, she came back. Her daughter informed her that she wanted to make a statement to the police pursuant to which the police in her presence and in the presence of PW-1 recorded the statement of Santosh wherein she incriminated the appellant and stated that he has poured kerosene oil on her and ignited a matchstick and threw it upon her. PW-7 also stated that her daughter told her that kerosene oil was kept in a small can behind a small container which the appellant had sprinkled upon her; the victim also told her that when she tried to run outside, he caught hold of her from behind as a result of which she fell down and the motor-cycle which was parked outside caught fire; the appellant had detached its petrol pipe. In her cross-examination, PW-7 has admitted that she has no male issue and her house at Najafgarh is in her name where the appellant and his wife were living; she admitted that they have a gas connection; she admitted that they have never used kerosene oil and in fact kerosene oil was never kept at the house; the appellant must have purchased the same. She denied the suggestion that Santosh had not made a statement on 27.01.2008. 41 The brother-in-law of the victim was examined as PW-1. He was in Rohtak at the relevant time. He has deposed that on 24.01.2008, phone call was received that Santosh had been put on fire by the appellant. He along with his mother-in-law (PW-7) reached Delhi where they learnt that the appellant and the victim had been admitted in Safdarjung Hospital. He deposed that about one or two days later, Santosh made a statement before PW-29 and to another senior officer and in the presence of his mother-in-law (PW-7) stating that the appellant had put her on fire by pouring kerosene oil upon her. He admitted that his mother-in-law does not have any son; he arrived in Delhi on 24.01.2008 and stayed there till 28.01.2008. He denied the suggestion that no statement was given by the victim on 27.01.2008 to PW-29. 42 The other relatives of the victim i.e. PW-17, PW-18 and PW-19 had also reached the hospital after hearing about the incident. PW-17 Dharampal was the uncle-in-law of the victim. His version is that when he went to the room of Santosh and made inquiries from her she informed him that her husband had burnt her by pouring kerosene oil upon her. PW-18 had also deposed on the same lines. PW-19, Balwan Singh is the uncle of the victim. He is a witness who had reached the

place of incident on hearing cries of his niece. His version is that on 24.01.2008 he heard shrieks of Santosh; his house was at the backside; there was a road in between. When he reached the house, he saw appellant scratching on the neck of Santosh and saying that he will not permit her to escape; at the hospital he was told by Santosh that she had been burnt by her husband. PW-20 Hukum Chand is another uncle of the victim. He also received a phone call on 24.01.2008 about the incident. This phone call was received by his son Yogesh. He reached the spot where he learnt that Santosh had been admitted at the hospital. He reached Safdarjung Hospital where she met Santosh at the Hospital and she told him that her husband had poured kerosene oil and burnt her to death. PW-10 Indrawati is the sister-in-law of the victim. PW-11- is also another sister-in-law. As per their version both of the them had learnt that the appellant had burnt Santosh; they reached there; both of them tried to extinguish the fire; the door was locked from inside; a neighbour jumped over the wall; the appellant and the victim were taken to the hospital. The neighbour who had removed the injured to the hospital was Dinesh examined as PW-24. He has corroborated this fact. 43 This defence as set up by the appellant is palpably false. The theory of petrol leakage has been answered by the victim herself in the dying declaration. She has narrated that when she tried to flee from the room, her husband caught her from behind and prevented her from running out; she fell on the water pump outside the room; her husband detached the petrol pipe from the motor-cycle. Although there is no direct evidence on this point and there can also be none as what goes inside the mind of a person is known only to that person but it appears that the appellant at that point to save his skin and build up a defence he detached the petrol pipe from the motor-cycle. The fact that this is a bogus defence is also evident from the fact that MLC has positively noted kerosene smell emanating from the bodies of the victim and the appellant as also from their clothes as also the further noting that inspite of repeated inquiries, there was no plausible explanation given by the victim and the appellant on this count. PW-29 in Ex.PW29/DA had also noted that the whole house was smelling of kerosene. 44 The recovery of the kerosene can from the spot as also the clothes of the victim which had been sent for scientific examination and the CFSL report (Ex PW31/A) opined that kerosene oil was detected on the clothes of the appellant and of the victim further establishing that

the narration given by the victim in the dying declaration was a true and correct narration. That is how and why kerosene was detected. PW- 30 the doctor, who had come into the witness box to answer the queries on the MLC has also stated that there is a distinction between the smell of kerosene and spirit. He denied the suggestion that kerosene oil was wrongly noted in the MLC. 45 There is no explanation by the appellant on this score. Even on repeated questioning to the learned counsel for the appellant, he was devoid of any answer on this count. The observation that no kerosene was noted at the time when the post-mortem was conducted was for the obvious reason that the post mortem was conducted on 03.02.2008 i.e. after 10-11 days from the date of the incident and the patient having been treated in the hospital in this intervening period from 24.01.2008 up to 02.02.2008 (when she finally succumbed to her injuries) it was obvious that it was for this reason that the kerosene could not be noted in the post-mortem. 46 PW-21 was an attesting witness to the seizure of the kerosene can which had been seized vide memo Ex.PW31/A. He had, however, been silent on this recovery. However, silence by him on this point would not score out the recovery. This recovery has been specifically deposed to the Investigating Officer PW-29; the photographer (PW-14) has also taken photographs of the scene of the crime; from the photographs it is evident that kerosene can was present at the spot; in fact PW-4 had specifically stated that he had taken the photograph of kerosene can lying at the spot. PW-7 has also admitted that there was no gas connection in their house. Why and who brought the kerosene to the house and that too when PW-7 was away in Rohtak?. It was no other reason but the appellant having brought it for a specific purpose i.e. to commit the aforementioned offence. 47 The site plan Ex.PW12/A has also been perused. The broken handle and pump and the motor cycle parked outside the room had been seized vide memo Ex PW-29/C. This has also been depicted in the photographs. The photograph of motor-cycle shows that only the seat had been partially burnt. If the defence as sought to be set up by the appellant was true and there was leakage of petrol from its petrol tank, there would not have been a partial burning of the seat alone. Moreover, PW-1 has stated that the motorcycle was driven to the police station meaning thereby that it was in a working condition. 48 There is no doubt that the appellant had suffered injuries. He remained in the hospital for almost a month. His burn injuries were 40%. His MLC

evidenced superficial burn injuries on his face, neck and both upper limbs. The placement of these burn injuries in fact corroborates the narration in the dying declaration (Ex.PW-29/D) wherein the victim has explained when she was trying to flee; her husband caught her from behind and tried to prevent her from running out; that is how the burn injuries occurred on his face and his upper trunk and upper limbs. The medical evidence thus corroborates this narration in the dying declaration. 49 The landmark Constitution Bench judgment of the Apex Court on a dying declaration reported as AIR 2002 SC2973 Laxman Vs. State of Maharashtra had noted that it is not necessary that a dying declaration should be made in the presence of a Magistrate; the evidential value or weight to be attached to such statement depends on the facts and circumstances of each case; The deceased must be in a fit state of mind; even without examination by the doctor such a declaration can be acted upon provided the Court ultimately held the same to be voluntary and truthful. The observations of the Apex Court are reproduced herein below:

The juristic theory regarding acceptability of a dying declaration is that such declaration is made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the man is induced by the most powerful consideration to speak only the truth. Notwithstanding the same, great caution must be exercised in considering the weight to be given to this species of evidence on account of the existence of many circumstances which may affect their truth. The situation in which a man is on death bed is so solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason the requirements of oath and cross examination are dispensed with. Since the accused has no power of cross examination, the court insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The court, however has to always be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. The court also must further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Normally, therefore, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eyewitnesses state

that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and in any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a magistrate or a doctor or a police officer. When it is recorded, no oath is necessary nor is the presence of a magistrate absolutely necessary, although to assure authenticity it is usual to call a magistrate, if available for recording the statement of a man about to die. There is no requirement of law that a dying declaration must necessarily be made to a magistrate and when such statement is recorded by a magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise.

50 Tested on this anvil Ex.PW-29/D is true, accurate and a correct depiction of facts; it is cogent coherent and inspires confidence. Prosecution has been able to establish it case to the hilt.

51. Appeal is without any merit. Dismissed. **INDERMEET KAUR, J KAILASH GAMBHIR, J** OCTOBER07 2013 A

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