Manik Vs. the State of Maharashtra

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SooperKanoon Citation : sooperkanoon.com/1105166

Court : Mumbai Aurangabad

Decided On : Dec-21-2012

Judge : A.H. Joshi &Amp; Sunil P. Deshmukh

Appeal No. : CRIMINAL APPEAL NO. 292 OF 2006

Appellant : Manik

Respondent : The State of Maharashtra

Judgement :

A.H. Joshi, J.

1. Appellant herein was charged in Sessions Case No. 3 of 2004 by 4th Ad hoc Additional Sessions Judge, Dhule, for pouring kerosene on his wife Sangita, setting her fire on 10.10.2003, at 4.15 p.m. and murdering her under section 302 of the Indian Penal Code.

CASE OF PROSECUTION :

2. The story as was put forward by prosecution :-

On 10.10.2003 victim Sangita and accused Manik were present in their house. Accused had arrived at his house in a drunken state. Over some quarrel the accused got enraged due to the expression of the wife Sangita. He poured kerosene on her person and ignited her by a match stick. Sangita shouted. The

accused poured water on her and extinguished the fire. Due to shouts of Sangita neighbours came up. One woman amongst the neighbours called Sangita's mother who arrived soon. One woman and Sangita's mother took Sangita to hospital. Sangita was admitted, examined and was treated by the Dr. Rahul Hatorkar the Medical Officer. Sangita gave oral dying declaration to her brother Nitin Patil. Police Officer and Executive Magistrate have recorded dying declarations. Sangita succumbed to those injuries. Medical Officer Dr. Mr Rahul Hatorkar had opined that Sangita was fit to make the dying declaration.

Accused had also suffered burn injuries, he was admitted in the hospital on 10.10.2003 and was discharged on 19.10.2003. He was arrested after discharge from hospital.

3. Accused pleaded not guilty and claimed to be tried.

AS TO THE EVIDENCE TENDERED BY THE PROSECUTION :

4. Prosecution has examined in all eight witnesses as follows :-

(a) **For dying declarations** :

- P. W.6 Rajesh Bhagwat Assistant Sub Inspector

- P. W.1 Suresh Koli Executive Magistrate

(b) **Medical witnesses** :

- P. W.3 Dr.Rahul Hatorkar to prove the admission of Sangita in the hospital in Burn

Ward, treatment, and her fitness to give dying declaration

- P. W.2 Dr. Ajit Patil- to prove post mortem examination, the extent of burn injuries and cause of death.

(c) **For oral dying declarations** :

- P. W.7 Nitin Patil

(d) **Panch witnesses** :

- P. W.4 Prabhakar Wagh,

- P. W.5 Kamlabai Navgire

for spot panchnama and inquest panchnama, respectively.

(e) **Investigating Officer** :

- P. W.8 - Ukhardu Dhobi, P.I.

5. The trial has ended in conviction towards the charge for murder and the sentence for life imprisonment, etc.

6. Spot panchnama and inquest panchnama are not amongst the disputed facts.

7. P.W.3 Dr.Rahul Hatorkar has proved the medical case papers Exh.29 showing that Sangita's mother had admitted her to the hospital, she was kept in Burn Ward. P.W.3 Dr. Hatorkar has recorded the background of the case. Relevant portion reads as follows :-

"....H/o uoand;k'kh HkkaM.k kY;kus uoand;kus vaxkoj jkWdsy vksrwu dkMh ykoyh o tGkys at about 3 pm today."

(quoted from paper-book page no.66)

8. It is seen that dying declaration, recorded as such which is first in point of time was recorded by P.W.6 Assistant Sub Inspector Rajesh Bhagwat. He had arrived at the spot some time at 5.45 p.m. Medical Officer P.W.3 Dr. Rahul has certified that Sangita was conscious, fully composed, well oriented and in fit mental condition to give the statement. This dying declaration is Exh.40.

9. The version contained in the dying declaration Exh.40 when translated, would mean as follows :-

(a) On 10.10.2003 Manik her husband arrived in the house at 16.15 hours. He was already drunk.

(b) Sangita told the accused that people had arrived at the house to demand the repayment of loans taken by him and he should pay the loan immediately.

(c) Getting angry with the talk, accused told her that she should engage herself in business (DHANDA KAR) and make the payment and abused Sangita with filthy language. He opened the Can containing kerosene, poured it on her person and ignited with a match stick.

(d) Her clothes caught fire. The fire became unbearable. She started shouting.

(e) Neighbours arrived, saw her position.

(f) Seeing that Sangita had caught fire, the accused Manik Gawali took her to hospital at 16.45 hours.

(g) Her husband has second wife and Sangita's relations with second wife are good and she is not involved in the offence.

(h) She has a complaint against her husband.

10. Oral evidence of P.W.6 Rajesh Bhagwat is at Exh. 39.

11. Second dying declaration is recorded by P.W.1 Suresh Koli an Executive Magistrate. It is Exh.21, and is at page 38.

12. The contents of this dying declaration Exh.21 recorded by the Executive Magistrate are translated as follows :-

(a) Accused arrived at home and asked for food, and she began to serve.

(b) While taking food, accused demanded that she should bring from her home (parents) amount of Rs.50,000/- for paying interest bearing loans incurred by him. 10th day of month was nearing and the creditors were pursuing him for repayment.

(c) Sangita declined.

(d) Accused picked up the container of kerosene and poured the kerosene on her, lit a match stick and threw it on her person, in spite that she had objected.

(e) She started shouting. Accused poured water on her and extinguished the fire.

(f) Women in the lane telephoned her mother, who came and admitted her in the hospital.

(g) Her husband has another wife and she stays in the area known as Moglai with whom her relations are good. Second wife is not involved in the commission of offence.

13. Oral evidence of Executive Magistrate Shri Suresh Koli P.W.1 is at Exh.17.

14. Prosecution has also relied upon oral dying declaration made by Sangita to P.W.7 Nitin Patil - Sangita's brother whose oral evidence is at Exh.48. P.W.7 has deposed that the prosecutrix Sangita had revealed to him that she had committed suicide. Thus this witness has not supported the prosecution. He was declared hostile and was cross-examined. Nothing useful for prosecution was elicited in the cross-examination.

15. The defence has emphasized following submissions:-

(a) Prosecution has not proved that Sangita was in fit state of mind and health to give the dying declaration.

(b) P.W.1 Executive Magistrate, P.W.6 Rajesh Bhagwat both who have recorded the dying declaration as well Exh.26 or Medical Officer Dr. Rahul Hatorkar the P.W.3 either, have not proved the device i.e. the questions put to Sangita and answers thereto given by her for ascertaining the state of her mind and health of Sangita to be fit for making the dying declaration.

(c) The questions on the basis of which effort if any was made by the witnesses to ascertain the fitness based on questions and answers thereto, constitutes the material leading to opinion as to fact of the fitness of the declarant.

(d) The statement that Sangita was fit to give dying declaration is an opinion by Medical Officer. In absence of proof of questions and answers between the Doctor and the declarant it turns out to be subjective.

In absence of proof of such questions and answers, it cannot be said that the prosecution has proved the basis of "opinion" as to fitness of the person to make said declaration.

(e) Proof of questions and answers by the person recording the dying declaration too could make up deficiency in that regard on the part of the Doctor. In present case P.W.1 Suresh Koli and P.W.6 Rajesh Bhagwat too did not reveal before the Court and did not prove that any questions for exploring the state of health and fitness were asked by them and outcome thereof if any i.e. answers were heard by them.

(f) The version which is common in both the dying declarations is that the accused poured kerosene on her and set her to fire.

(g) The circumstances immediately preceding and the reason of quarrel, which is the basic circumstance leading to reason of quarrel as disclosed in both dying declarations is at gross variance.

(h) These variations are over the matters which are related to the cause of enragement of accused and are of crucial nature.

(i) Both the dying declarations vary in material particulars.

(j) The dying declaration is a statement as to cause of death, made by a person who could not be offered for and cannot be tested by cross-examination. Such statement therefore has to be proved to be free from all doubts.

(k) Therefore, it will be extremely unsafe to believe such statement (as in present case) it being on the face of it shrouded with anomalies and doubts.

(l) The version of P.W.7 Nitin Patil that oral dying declaration is as to suicide needs appropriate weight.

SUBMISSIONS, CASE LAW AND PRECEDENTS CITED AT BAR

16. Learned Advocate Mr Chatterji, appearing in support of appeal, has placed reliance on following judgments :-

JUDGMENTS AND PROPOSITIONS:

(1) Judgment rendered by this Court in Criminal Appeal No.7 of 2012 (Harichandra Pandit Chaudhari vs. State of Maharashtra), dated 8.10.2012

(a) When first degree relatives of deceased have not supported the prosecution, the dying declaration come under cloud of doubt.

(b) Gravity of wounds : Fact that both palms were burnt, all taken together will render the dying declaration relied upon by the prosecution to be untrustworthy.

(2) Govind Narain and anr. vs. State of Rajasthan, AIR 1993 S.C. 2457

When the scribe of document is not examined, the dying declaration is liable to be discarded.

(3) P.V. Radhakrishna vs. State of Karnataka, AIR 2003 S.C. 2859

Dying declaration, being an untested piece of evidence, to be absolutely safe to be acted upon has to be free from any incoherence or legal impediments.

Each case would depend upon its own facts, but the dying declaration must stand the test of it being a piece of unalloyed truth.

(4) Suresh s/o Arjun Dodorkar (Sonar) vs. State of Maharashtra, 2005 ALL MR (Cri) 1599

When it is a case of reliance by the prosecution on multiple dying declarations, those can be relied upon provided consistency is seen therein from the prelude of the incident to its end.

When the variance was apparent on the perusal of dying declarations, it would not be safe to rely upon those.

(5) Tukaram Dashrath Padhen and ors. vs. State of Maharashtra, 2012 ALL MR (Cri) 2754

It is to be remembered that conviction can be recorded only on the dying declaration if Court finds that the declaration is wholly reliable being of sterling quality and free from any suspicious circumstances, and not otherwise.

(6) Dandu Lakshmi Reddy vs. State of A.P., AIR 1999 S.C. 3255

When the dying declarations are multiple in number and when those are required to be reconciled with strain, the Court ought not sideline the different versions in the dying declarations.

The dying declaration must be scrutinized with meticulous circumspection. It is necessary because those have to be made the basis of conviction, while those are not tested to the touchstone of crossexamination, which is a touchstone to satisfy the truth.

17. In answer to the submissions of defence, learned A.P.P. has argued as follows :-

(a) History recorded by Medical Offi cer as well needs to be considered as a dying declaration;

(b) Therefore, present is a case of three dying declarations;

(c) The fact is that dying declaration Exh.40 recorded by Police Officer is criticized by defence on the ground that it has come under cloud of doubt due to failure to examine the scribe. This criticism does not by itself undermine the worthiness of the dying declaration which is recorded by Executive Magistrate coupled with dying declaration in the shape of case history recorded by the Medical Officer P.W. 3 Dr. Rahul Hatorkar.

(d) Trustworthiness of a dying declaration is within judicial realm as a fact finding. The doubts cannot be casually entertained, and facts or circumstances argued as points of doubt should not be unduly magnified.

(e) The circumstances which compel to entertain doubts are not duly demonstrated in present case.

(f) In the present case the dying declaration recorded by Executive Magistrate alone would be sufficient to base the conviction;

(g) The fact that the husband was drunk and was present in the house when Sangita was burnt was proved from the burn injuries suffered by the accused. This circumstance constitutes adequate ground to connect and involve the accused with the place of offence and strongest probability that he alone and none else is involved in the homicidal death of Sangita.

(h) Presence of accused at the time of occurrence at the place of offence is the strongest fact against him and hence the dying declaration subject-matter cannot be regarded as suspicious barely on account of some variations or difference appearing in two sets of dying declarations.

(i) Considering totality of circumstances, the charge that the husband - accused had committed the act of pouring kerosene and setting his wife Sangita to fire are proved to such extent that said charge is liable to be believed and to be regarded as a truth.

(j) Considering the facts as are proved in totality, conviction deserves to be confirmed.

18. Learned A.P.P. has placed reliance on various judgments. The judgments and the proposition for which those are relied by learned A.P.P. are noted below :-

(1) Tejram s/o Ukandrao Patil vs. State of Maharashtra, 2009 ALL MR(Cri) 1047;

(2) Varikuppal Srinivas vs. State of A.P., AIR 2009 S.C. 1487;

(3) Paniben vs. State of Gujrat, 1992 (2) SCC 474;

(4) Nallam Veera Satyanandam and ors. vs. Public Prosecutor, High Court of A.P., AIR 2004 S.C. 1708;

(5) Jaswant Singh vs. State (Delhi Administration), AIR 1970 S.C. 190;

(6) Lakhan vs. State of M.P., 2010 AIR SCW 5993;

(7) Jaishree Anant Khandekar vs. State of Maharashtra, 2009 (11) SCC 647. PROPOSITION based on these seven citations :-

If it is shown from the evidence that the dying declaration is voluntary and the crucial factor constituting the act of accused in setting the victim to burns is seen to be coherent, it would be a fit case to order conviction.

OF APPRECIATION and ASSESSMENT OF EVIDENCE:

19. We have scrutinized the evidence and considered the case law cited by both sides. The factor which would decide the question involved is whether the dying declarations do rise to the height of being trustworthy.

20. Now this Court has to proceed to assess the worthiness of evidence relied to prove dying declarations.

21. In the examination-in-chief, P.W.6 A.S.I. Bhagwat has stated after narrating the facts as to the mode of recording version of the prosecutrix, etc., this witness has stated as follows:-

Now I see the statement of Sangita. The same is in the hand writing of ASI Fulpagare.

(quoted from paperbook page no.137)

22. He has also stated that before recording the statement of Sangita (Exh.40) he had asked relatives to go out. He deposes as to the version of Sangita as recorded in the dying declaration.

23. Upon evaluation of evidence of P.W.6 Rajesh Bhagwat it reveals that,

(a) He is not a scribe of dying declaration. In the result it became necessary for the prosecution to prov e the dying declaration by examining the scribe. The scribe is the person who is primarily involved in the activity of listening and writing to the dictation of the Officer who was involved in exploring, listening and dictating to the scribe the version whichever Sangita has disclosed.

(b) Relatives were present and were in company of Sangita after she was brought to hospital and was kept in the ward until P.W.6 arrived and had and asked them to go out.

(c) This witness has not proved if he had ascertained the fitness of Sangita to make dying declaration.

(d) He relies solely on medical certificate as to state of mind and health of Sangita to give dying declaration.

24. It is seen from the statement of P.W.1 Shri Suresh Koli the Executive Magistrate that he has given the substance of version of Sangita. Perusal of testimony of P.W.1 Suresh Koli reveals as follows :-

(a) He has stated that he has got impressed the thumb of the left hand of Sangita on the said statement.

(b) He has admitted the fact that thumb impression is required to be attested, but it was not attested by himself or by Doctor.

(c) He does not remember the questions which Doctor has put to the prosecutrix to ascertain her state of mind.

(d) He does not remember the questions which he had put to the victim Sangita.

25. The case history written by Dr. Hatorkar, which is relied by the prosecution as dying declaration, is a brief of statement of version of the patient Sangita. It emerges from the testimony of P.W.3 Dr. Hatorkar that it is not clear :-

(a) As to whether he had asked any questions to Sangita to find out Sangita's orientation to know her capacity to give a statement as a dying declaration.

(b) If P.W.3 Dr. Hatorkar before writing case history had examined the patient for a scrutiny of fitness of the injured to give a dying declaration.

YARDSTICK OF EVALUATION OF OPINION AS TO STATE OF FITNESS OF PERSON MAKING A STATEMENT AS TO CIRCUMSTANCES AND CAUSE OF

DEATH:

26. Whenever a person other than a Medical Attendant or an expert medical witness deposes before the Court, his opinion is his judgment over the fact or the point over which it is sought or tendered. As regards the dying declaration is concerned, an opinion that the declarant is in fit state of health and mind to make declaration is one such opinion. A witness, who opines fitness therefore, has to support his opinion by the evidence of facts which he has seen. Whatever things he has observed as regards the declarant due to which he has formed the opinion, constitute the foundation of his evidence.

27. An expert witness too has to pass through the same scrutiny of having assessed the capacity of the declarant to be fit to make a declaration on some touch-stone based on his expertise. Insofar as the fact of assessing the consciousness and state of health from the point of medical science is concerned, his expertise plays the role.

28. Insofar as fact of orientation and alertness of the declarant as to time, place, events, past and future is concerned, it is a matter to be ascertained by viva voce, i.e. questions and answers, or responses, irrespective of the expertise based on medical science. Oral inquiry or by use of gestures as the modes of communication, alone are the objective material on the basis of which he has to form an opinion.

29. The opinion formed by an expert or by a layman, would be worthy of cognizance for influencing the mind of the Judge on account of the facts which such witness proves as reason which has led to formation of his opinion.

30. A person who receives the dying declaration retains it as oral or records its memorandum has to form an opinion that the person making the declaration and narrating the circumstances and cause of death was in a fit state of health and mind to make said statement.

31. Whether a declarant is in fit state of mind is a question of fact. That fact is to be proved by the person who has received, listened, drawn a memorandum or

leaves in his memory. He has to prove the fact of state of health and mind of the declarant. Whenever such person proves that the declarant was in fit state of mind, it is his own opinion based on judgment as to said state derived from facts.

32. The judgment and opinion as to fitness of declarant would be liable to be classified as subjective or reached objectively.

33. An opinion would be liable to be classified as reached subjectively, if the person who receives, when he steps in as witness is not able to state and depose "the reasons" which have propelled formation of opinion. For example :- He may say that I saw the declarant, observed him and he has a "gut feeling", or he "believes" that the declarant was in fit state of mind. Such an opinion would be subjective.

34. In contrast, there may be cases where the person who receives the statement ascertains the degree and level of orientation of the person making declaration as to place, time, identity of men around as well as events, contemporary past and future. He then forms an opinion and judgement based on his observations based on what he has seen and noticed as regards orientation, will render his judgement and opinion to be based on reasons formed from evidence i.e. the objectivity.

35. It is thus evident that whenever a person receives and/or records dying declaration he has to exert to ascertain the orientation and state of mind and health of the declarant. For this ascertainment, he ought to employ the devices to explore the information, and thereby know and perceive the orientation. These devices are certain questions, receive answers thereto if given, observe and note the manner of response or lack thereof, quickness, pauses, reactions, etc.

36. All these observations by the person receiving dying declaration are "facts" relating to the declarant which are observed by the person receiving and/or recording the dying declaration.

37. The question as to whether the person recording the dying declaration, either oral or by drawing it in the form of memorandum may be a Medical Doctor, a Police Officer, a Magistrate, or any other person. In case any such person adopts

any modality including one as indicated hereinbefore, his "opinion" that the declarant is in "fit state of mind" rises to the height of being objective.

38. An opinion would undoubtedly be liable to be taken into consideration being relevant under section 45 of the Evidence Act. An opinion undoubtedly gets the credibility for consideration in absence of direct evidence or even when evidence is available, depending upon respective weight. This strength is attached to an opinion not merely for it falls from the mouth of Expert, but because it has a foundation of 'facts' and based on application of expertise, said opinion is expressed.

39. The questions by Doctors and answers by the declarant are a matters of "fact" and when such fact is proved, the strength of the opinion rises to be worthy of consideration by Court to act upon said opinion for supposition of said opinion as a relevant fact duly proved in accordance with law.

40. Unlike any other opinion, every opinion of an Expert has to be based on objective foundation. Opinions of Expert get worthiness of consideration by the Court because those are objectively propelled and concluded due to expertise. Any opinion without objective foundation would be liable for criticism of it being propelled due to subjectivity and would lose credibility as expert opinion.

41. An opinion to be worthy of weight is to be supported by reasons. This view of ours is supported by the judgments of Honourable Supreme Court, namely, **Madan Gopal Kakad vs. Naval Dubey and anr., (1992) 3 SCC 204**. Contents of paragraphs 34 and 35 of said judgment are quoted for ready reference :-

34. We really need not reiterate various judgments which have taken the view that the purpose of an expert opinion is primarily to assist the Court in arriving at a final conclusion. Such report is not binding upon the Court. The Court is expected to analyse the report, read it in conjunction with the other evidence on record and then form its final opinion as to whether such report is worthy of reliance or not. Just to illustrate this point of view, in a given case, there may be two diametrically contradictory opinions of handwriting experts and both the opinions may be well reasoned. In such case, the Court has to critically examine the basis, reasoning,

approach and experience of the expert to come to a conclusion as to which of the two reports can be safely relied upon by the Court. The assistance and value of expert opinion is indisputable, but there can be reports which are, ex facie, incorrect or deliberately so distorted as to render the entire prosecution case unbelievable. But if such eye-witness and other prosecution evidence are trustworthy, have credence and are consistent with the eye version given by the eye-witnesses, the Court will be well within its jurisdiction to discard the expert opinion. An expert report, duly proved, has its evidentiary value but such appreciation has to be within the limitations prescribed and with careful examination by the Court. A complete contradiction or inconsistency between the medical evidence and the ocular evidence on the one hand and the statement of the prosecution witnesses between themselves on the other, may result in seriously denting the case of the prosecution in its entirety but not otherwise.

35. Reverting to the case in hand, the Trial Court has rightly ignored the deliberate lapses of the investigating officer as well as the post mortem report prepared by Dr. C.N. Tewari. The consistent statement of the eye-witnesses which were fully supported and corroborated by other witnesses, and the investigation of the crime, including recovery of lathis, inquest report, recovery of the pagri of one of the accused from the place of occurrence, immediate lodging of FIR and the deceased succumbing to his injuries within a very short time, establish the case of the prosecution beyond reasonable doubt. These lapses on the part of PW3 and PW6 are a deliberate attempt on their part to prepare reports and documents in a designedly defective manner which would have prejudiced the case of the prosecution and resulted in the acquittal of the accused, but for the correct approach of the trial court to do justice and ensure that the guilty did not go scot-free. The evidence of the eyewitness which was reliable and worthy of credence has justifiably been relied upon by the court."

42. This view is followed later in **Dayal Singh and ors. vs. State of Uttaranchal, 2012 AIR SCW 4488.** Contents of paragraph 30 of said judgment are quoted for ready reference:-

30. Where the eye witness account is found credible and trustworthy, medical opinion pointing to alternative possibilities may not be accepted as conclusive. The expert witness is expected to put before the Court all materials inclusive of the data which induced him to come to the conclusion and enlighten the court on the technical aspect of the case by examining the terms of science, so that the court, although not an expert, may form its own judgment on those materials after giving due regard to the expert's opinion, because once the expert opinion is accepted, it is not the opinion of the medical officer but that of the Court.

43. In Dayalsing's case (supra), Honourable Apex Court went ahead, inter alia observing from treatise, namely, Forensic Science in Criminal Investigation and Trial (Fourth Edition) by B.R. Sharma, as follows :-

... ... The opinion is required to be presented in a convenient manner and the reasons for a conclusion based on certain visible evidence, properly placed before the Court. In other words the value of expert evidence depends largely on the cogency of reasons on which it is based."

44. It is seen that the view as expressed by author which we have underlined was taken in old times by Single Judge of Allahabad High Court in **Saqlain Ahmad vs. Emperor, AIR 1936 Allahabad 165.** The learned Judge has observed as follows :-

The value of the expert evidence depends largely on the cogency of the reasons on which it is based. In general it cannot be the basis of conviction unless it is corroborated by the other evidence. In the present case the evidence offered in corroboration, namely, the evidence of the witnesses is itself unsatisfactory."

45. Same line is taken in **State of H.P. vs. Jai Lal, (1999) 7 SCC 280**. Contents of paragraphs 18 and 19 of said judgment are quoted for ready reference :-

18. An expert is not a witness of fact. His evidence is really of an advisory character. The duty of an expert witness is to furnish the Judge with the necessary scientific criteria for testing the accuracy of the conclusions so as to enable the Judge to form his independent judgment by the application of this criteria to the

facts proved by the evidence of the case. The scientific opinion evidence, if intelligible, convincing and tested becomes a factor and often an important factor for consideration along with the other evidence of the case. The credibility of such a witness depends on the reasons stated in support of his conclusions and the data and materials furnished which form the basis of his conclusions.

19. The report submitted by an expert does not go in evidence automatically. He is to be examined as a witness in court and has to face cross-examination. This court in the case of Hazi Mohammed Ikramul Haque vs. State of West Bengal concurred with the finding of the High Court in not placing any reliance upon the evidence of an expert witness on the ground that his evidence was merely an opinion unsupported by any reasons."

46. Even if a certificate by an expert about fitness of state of health is placed on record, such certificate by itself will not prove the fact represented therein, rather it will have to be proved by the medical witness by stepping into witness box. This aspect is ruled, inter alia, in **Malay Kumar Ganguly vs. Dr. Sukumar Mukherjee and ors., (2009) 9 Supreme Court Cases 221** at paragraph 34 by placing reliance on State of H.P. vs. Jai Lal (supra). Paragraph 34 of the said judgment is quoted below for ready reference :-

34. Medical evidence is a difficult one. The court for the purpose of arriving at a decision on the basis of the opinions of experts must take into consideration the difference between an "expert witness" and an "ordinary witness". The opinion must be based on a person having special skill or knowledge in medical science. It could be admitted or denied. Whether such an evidence could be admitted or how much weight should be given thereto, lies within the domain of the court. The evidence of an expert should, however, be interpreted like any other evidence. This Court in State of H.P. vs. Jai Lal held as under : (SCC pp 285= 86, paras 17-10)"

18. An expert is not a witness of fact. His evidence is really of an advisory character. The duty of an expert witness is to furnish the Judge with the necessary scientific criteria for testing the accuracy of the conclusions so as to enable the Judge to form his independent judgment by the application of this criteria to the

facts proved by the evidence of the case. The scientific opinion evidence, if intelligible, convincing and tested becomes a factor and often an important factor for consideration along with the other evidence of the case. The credibility of such a witness depends on the reasons stated in support of his conclusions and the date and material furnished which form the basis of his conclusions.

19. The report submitted by an expert does not go in evidence automatically. He is to be examined as a witness in court and has to face cross-examination. This Court in Haji Mohammad Ekramul Haq vs. State of W.B. (2003) 8 SCC 752 concurred with the finding of the High Court in not placing any reliance upon the evidence of an expert witness on the ground that his evidence was merely an opinion unsupported by any reasons."

47. In this background, whether it is opinion of a Medical Attendant or any other person relating to fitness of the declarant to make a statement, the weight of such opinion has to be assessed on the basis of the reasons.

48. It is in this background, the reasons being facts, those have to be proved, and because of those facts which operate as reasons, the opinion as to a fact is rendered relevant by section 45 of the Evidence Act, and its evidence can be given under section 5 of the Act.

49. A corollary thereof is that unless from questions and answers, if any, put to the witness by expert or ordinary witness, it is proved that the victim was well oriented and was fit to make the dying declaration, it would be unsafe to rely upon such dying declaration. Opinion without facts which reason out and support and/or justify the conclusions would get gravely shrouded by suspicion.

50. Conclusions which emerge on collective examination of P.W.1 Suresh Koli, P.W.3 Dr. Rahul Hatorkar, P.W.6 Rajesh Bhagwat and the notes of post mortem examination are as follows :-

(A) It is suggested that it was impossible to produce the scribe of dying declaration recorded by P.W.6, namely A.S.I. Mr Fulpagare for examination as witness.

A.S.I. Rajesh Bhagwat P.W.6 himself is not the scribe. He does not claim that he has listened to the dying declaration, he had dictated to his scribe and that it was scribed to his dictation that he has verified the accuracy and correct reproduction of Sangita's version, himself and also from Sangita. In absence of proof of all these set of facts, omission of prosecution to examine the scribe renders the scheme of proof of the said dying declaration incomplete.

The dying declaration Exh.40 sought to be proved by P.W.6 therefore, needs to be excluded from consideration.

(B) Exh.21 dying declaration recorded by P.W.1 Suresh Koli the Executive Magistrate turns out to be the only dying declaration which would decide the fate of the case.

(C) It has come on record from admissions given by P.W.1 Suresh Koli and P.W.3 Dr.Rahul Hatorkar that both these witnesses have not recorded nor otherwise proved before the Court as to what were the questions asked by them to Sangita, as a device to ascertain her level of orientation for enabling them to judge Sangita's degree and quality of her orientation and fitness of mind revealing from the questions, the response and answers.

(D) Exh.24 post mortem notes show that upper left limb has 8% burn.

Inquest does not show ink residues nor post mortem describes ink residues on the thumb of left hand of the corpse of Sangita.

(E) The case history recorded by P.W.3 Dr. Hatorkar if treated as dying declaration as urged by prosecution, it does not contain the prelude i.e. facts or events which had occurred between Sangita and accused before act of accused of setting Sangita to fire.

(F) It appears that the purpose for which a Doctor records the history as disclosed by the patient on the case papers is to help the Medical Officer to have brief background of case to decide his line of treatment. In each case such history cannot constitute a dying declaration. It would be highly risky to rely on the history noted by the Doctor as a dying declaration.

(G) The case papers, the certificate and the testimonies pf P.W.1 Suresh Koli and P.W.3 Dr. Hatorkar are silent on the point as to questions if any put by Dr. Rahul Hatorkar P.W.3 to Sangita and her answers.

(H) The opinion of Dr. Hatorkar P.W.3 turns out to be an "opinion" of the Doctor which is not supported by any material which has led to formation of said opinion.

51. We, therefore, hold that the expression of P.W.3 Dr. Hatorkar is more or less a matter of opinion arrived at without objective analysis that Sangita was fit to give a statement.

52. In the present case, since no questions and answers have been proved by telling those before the Court, though the prosecution wants the Court to believe the version in the form and tenor it has come before the Court, it turns out to be and is proved to be subjective than propelled due to objectivity. Therefore, the opinion of Dr. Hatorkar P.W.3 would not achieve the sanctity as an "Expert opinion".

53. As discussed hereinbefore, the aspect, namely, that the person making dying declaration was conscious and fit to make a declaration is ultimately a matter of an opinion.

54. Thus, collective effect of evidence tendered by the prosecution, the law on the point and on facts is as follows :-

(a) There is variation in the dying declarations on the facts which were the cause of quarrel and enragement of the accused.

(b) Mother and other ladies who had brought the prosecutrix to hospital are withheld from the Court.

(c) P.W.7 Nitin Patil - brother of deceased who was relied to prove the oral dying declaration has told the story of suicide.

(d) The questions and answers leading to opinion that Sangita was in fit state of mind to give statement are not brought before the Court.

(e) The fact that Sangita was in a fit state of mind is not proved.

(f) Effect of entire evidence taken together is that the prosecution has failed to prove the dying declaration, the only evidence worthy to be considered for basing conviction.

55. In the result, the appeal succeeds and is allowed. The judgment and order of conviction and sentence is set aside. Appellant's bail bonds stand cancelled. Fine amount if paid, be refunded.