

Jagdish Lal Malhotra Vs. the State

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Court : Delhi

Decided On : Sep-30-1983

Reported in : 1984(2)Crimes108; 25(1984)DLT405

Judge : R.N. Aggarwal and; Malik Sharief-Ud-Din, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 302; [Evidence Act, 1872](#) - Sections 32

Appeal No. : Criminal Appeal No. 273 of 1980

Appellant : Jagdish Lal Malhotra

Respondent : The State

Advocate for Pet/Ap. : F. Anthony,; B.B. Lal,; Neelam Grover and;

Judgement :

Malik Sharief-ud-din, J.

(1) In case Fir No. 939 police station Moti Nagar, West Delhi, Shri S.C. Jain, Additional Sessions Judge, Delhi, convicted the appellant Jagdish Lal Malhotra under section 32 Indian Penal Code and sentenced him to undergo rigorous imprisonment for life. The court on trial of the appellant came to the conclusion that on the night intervening 22nd and 23rd October 1979 between 3.30 Am to 3.45 Am the appellant had sprinkled Kerosin oil on his wife, Smt. Santosh

Malhotra and set her on fire. This was done by the appellant while she had gone to the bath room for urination. He further found that as a result of this the deceased Santosh Malhotra got 100% burns consequent to which she died in the Willingdon Hospital at 8.15 Am on 23rd October, 1979.

(2) The relevant facts are that the appellant was married to Santosh Malhotra deceased in the year 1960. The married life of the couple proved to be unhappy as they used to quarrel constantly. The deceased had given birth to two daughters and a son. On the night intervening 22nd and 23rd October 1979 between 3.30 to 3.45 A.M. the deceased Santosh Malhotra is stated to have got up and gone to the bath room for urination when the appellant, her husband, sprinkled kero

(3) At this stage we may also take notice of the fact that immediately after she is taken to the hospital, Ext. PW. 24/A-1 came to be recorded by Dr. R.P. Sharma which shows that she had told Dr. R.P. sharma that she had been burnt by her husband. We may also take notice of the dying declaration which came to be recorded somewhere between 5.30 and 6.30 Am by S.I. Surender Dev but before we do so a detailed reference may be made to the contents of Ext. PW. 24/A-1. It reads as under :-

'TIME4.30 Am, dated 23rd October, 1979. Patients says that she has been burnt by her husband. Pulse rate 120 per minute. Patient is conscious. There is 100% burn'.

This is recorded on out-patient slip by Dr. R.P. Sharma. At 5 Am when the patient is admitted, Dr. V. Thukral vide Ext. Pw, 24/B makes the following note :-

'TIMES5 Am, dated 23rd October, 1979. Allegedly burnt by her husband. Patient conscious, Pulse cannot be palpated. Respiration 20 per minute, 100% burns. Police constable on duty informed for taking dying declaration.'

The documents Ext. PW. 24/C indicates the time about 4.50 Am on the same day and pertains to the information to police for recording dying declaration. Dr. Anil Mehandiratta at 5.30 Am gives certificate about the deceased being in a fit condition to make a statement. S.I. Surender Dev who reaches hospital at 5.30

Am and after procuring the fitness certificate records dying declaration, Ext. PW. 24/A which read Smt. Santosh Malhotra, wife of Shri Jagdish Lal Malhotra, resident of C-42, Kirti Nagar, Delhi, made the following statement :-

'I reside at the address mentioned above Along with my children. I had married to Jagdish La1 Malhotra 18/15 years ago and have three children. There was shortage of money in the house and due to that my husband Jagdish Lal Malhotra and my Devar, Surinder Malhotra resident of D-86, Kirti Nagar, used to quarrel (probably meaning thereby with her) My husband had taken all the ornaments from me out of which two gold bangles had been sold. On the night of 22nd October 1979 my husband and Surender Malhotra again quarrelled on this issue (probably meaning with her). Thereafter my husband's brother went to his house and we went to sleep. Between 3.30 or 3.45 Am I woke up to make water when my husband sprinkled kerosin oil on my person and set me on fire and after burning me took me to Willingdon hospital. This statement I am making in my full senses. I have beard the statement. It is correct. When I was set on fire all my three children were sleeping.

(4) This dying declaration is witnessed by Dr. V. Thukral who wrote before signing it, 'Statement taken before me. She is unable to sign the statement'. It is also endorsed by Dr. Anil Mehandiratta and before appending his signatures he put down the following words, 'Statement taken in my presence. Patient was fully consciously and unable to sign because of burns both hands' Dr. R.P. Sharma before appending his signatures on this statement writes : 'Statement was taken in front of me. The patient was fully conscious at the time of giving statement. She is unable to sign or put thumb impression because of burns.'

(5) We are reproducing the contents of this dying declaration in detail for the simple reason that the deceased has admittedly died of shock due to 100% burns and there is no dispute about it. We are also doing it for the reason that apart from this dying declaration we do not have any direct evidence having hearing on the fact as to how the deceased come to be burnt. In order to appreciate this dying declaration and assess its evidentiary value is correct perspective we believe it is necessary for us to take notice of the other side of the story which is as under.

(6) On the night of occurrence and at the relevant time DW. 2 Anuradha, daughter of the deceased and Jagdish Lal Malhotra, husband of the deceased, the present appellant, were also sleeping in the same room of the first floor of the house which they had taken on rent from PW. 7 Tek Chand Kora; that the appellant and his daughter Anuradha on hearing 'HaiHai' sound of the deceased woke up and when they came out they found the deceased burning. The appellant at the top of his voice raised an alarm 'Bachao Bachao' as a result of which Tek Chand Kora PW. 7 was awakened and ran upstairs but found the door bolted. In the meantime the appellant asked her daughter to get blanket and in his attempt to extinguish the fire by wrapping the deceased in blanket the appellant also got burn injuries. The daughter opened the door for Tek Chand Kora PW. 7 and when he enters he finds the deceased wrapped in blanket in burnt condition with her face 'pen and burnt. The children were found crying 'Mummy what have you done' and the accused was found wailing with choked voice that his house has been destroyed and what she has done. While this was going on a few more neighbours were attracted to the scene. The appellant and the children were weeping. The deceased was not speaking at all despite, to cries of the children and the husband saying as to what she has done. The appellant entreated PW. 7 Tek Chand Kora to call his brother Surinder Malhotra. Tek Chand fetched him and with the help of Surinder Malhotra and other neighbours the deceased was put in the back seat of car and accompanied by the appellant and PW. 7 was removed to Willingdon Hospital. This side of the story obviously leaves no doubt in the mind that the deceased had committed suicide.

(7) It is apparently in the light of these two sides of the picture that the case will have to be examined thoroughly. We, however, feel it necessary at this stage to take notice of the statement of the accused made under section 313 Cr.P.C. This will enable us to find out as to how the accused has explained the various circumstances appearing against him in evidence. We are embarking on this course because we find that there are some admitted premises of the prosecution case and we may not unnecessarily waste our time on facts admitted and only refer to those pieces of evidence which have been adduced in respect of matters in dispute.

(8) In his statement, the accused admits that on 21-10-1979 Smt. Sushila Sablok Along with her sister Smt. Krishna accompanied by her husband came to his house to settle the dispute about bangles and on their intervention deceased Santosh admitted her mistake of selling two gold bangles without the permission of her husband. The accused admits that in their presence he buried a glass of water on the face of the deceased and also slapped her. The accused also admits to have written the letters PW. 2/DB and PW. 2/B to his brother-in-law, Manmohan Nanda and also admits to have received the reply PW. 2/C from Manmohan Nanda. He also admits to have brought the deceased to hospital in a burnt condition but says that he does not know if she had made a statement Ext. PW. 24/A-1 before Dr. R.P. Sharma and also a dying declaration Ext. PW. 24/A, but that if she has done so, it is spiteful, vicious and false and has been made with a view to involve him falsely and to humiliate him. He further admits that when she made a statement she was conscious, as stated by Dr. He says that he was not present when her statement, if any, was made. About the seized blankets he admits that these were used by him to extinguish fire. He further admits that the inventory of jewellery of the deceased was prepared as Ex. PW. 6/A and this Along with the original list Ex. PW. 12/A, were handed over to him by the deceased. He further admits that on his suspicion the inventory of this jewellery in the presence of his relatives and in the presence of the relatives of the deceased was prepared from the bank locker operated by the deceased and when he Along with the deceased went home from the bank the deceased was mum on his questioning about the missing ornaments. In reply to the question as to why he was involved in this case, he has said that it was done because of the viciousness of his wife and relatives.

(9) Thus, it would appear that the admitted premises of the prosecution case is that there were strained relations between the appellant and the deceased because of the suspicion that a number of jewellery articles lying in the locker, which was operated by the deceased, were missing. Apparently, the deceased had only admitted that she had sold two gold bangles due to shortage of money but in respect of other jewellery articles she had given no Explanationn. The estrangement of relations between the couple was, perhaps, going on particularly from 27-1-1979 when the bank locker was opened in the presence of the parties

and their relations and inventory Ext. PW. 6/A was prepared and the inventory Ext. PW. 12/A came to be recovered from the locker. It would appear that out of 51 items of jewellery only 21 were there and this in all probability had ruptured the relationship between the parties. It would appear that ever since then; relations between them remained under constant strain. The inventory had been prepared about 9 months before the occurrence and it was this strained relationship of the couple which, in fact, had attacked the two sisters of the deceased, Smt. Sushila Sablok and Smt. Krishna together with the husband of Krishna to the house of the accused on 21-10-1979. The idea was to somehow put an end to the strained relationship of the parties. It would also appear that Smt. Sushila Sablok was told by the deceased that her husband is accusing her of having sold other jewellery apart from the two gold bangles and that it was on that account that quarrel had started. It is also admitted that on 21st October 1979 when the two sisters and brother-in-law of the deceased intervened, the accused asked his wife to fetch a guarantee of her brother to the effect that she would not behave like this in future and she promised to do so (that perhaps accounts for the deceased going to the brother's house on 22nd October 1979).

(10) In the aforesaid paras we have given a detailed resume of the facts and have also indicated the contents of the dying declaration, the other side of the picture and the admitted premises of the prosecution case. Now before we proceed further in the matter we may make a reference to those pieces of testimony which under the circumstances of this case are relevant to the issue in dispute. It is not necessary for us to refer to the entire evidence.

(11) Public Witness .1 Manohar Lalis the brother of the deceased and has stated that on the sale of two gold bangles by the deceased the relationship of the parties had become strained and that the deceased had been telling him that since she was short of money to run the house-hold and pay rent she sold the two gold bangles. She had also complained that the appellant was not giving to run the house-hold. He has further stated that on 22nd October, 1979 the deceased had come to his house to meet him but since he was not there she had told his eldest son that, we would be coming next morning to meet him. He further has deposed that on the morning on 23rd October 1979, Anuradha, daughter of the deceased

informed him that the deceased had been removed to hospital due to burn injuries. He further testifies to the seizure of letters P-A, P-B and P-C by the police, Ext. PW. 1/A.

(12) PW. 2, Shri Manmohan is also a brother of the deceased. Besides making a similar statement as the proceeding witness, PW. 1, he says that soon after the marriage the accused proved to be greedy and ever since he was constantly demanding cash and other articles. He further says that the accused used to misbehave with them and with the father-in-law. He has produced photo copies of the three letters Ext. PW. 2/B, Ext. PW. 2/C and PW. 2/D and also says that the deceased had been complaining to them about harassment at the hands of the accused.

(13) PW. 3, Jagdish Lal is also a brother of the deceased. He has endorsed the testimony of PW. 2. He, however, has added that after they stopped meeting the demand of the accused, the accused started maltreating Santosh and also started beating her. He has further said that once in the year 1972 the deceased had come to him and had told him that the accused had kept a mistress from Wardha and was wasting a lot of money on her. He has also said that in March 1979 the deceased again told him that the accused was harassing her and was giving money for house-hold expenses. This witness was at Chanderpur when he received the news of her death and since it was late and he could not get any transport he came to Delhi on 24th October 1979. He has, however, admitted that the pay of the accused is about Rs. 200.00 per month.

(14) PW. 4, Smt. Gora Devi is the mother of the deceased. She has said that her daughter deceased Santosh used to complain that the accused was beating her. She has also said that after the marriage the accused used to demand money from his in-laws. She admits that on 22nd October 1979 the deceased had come to their house and met her and that she had expressed her desire to meet his brother but since they were not there she left and said that she would come next day. She admits that on the next day, the daughter of the deceased telephoned that her mother has been taken to the hospital in burnt condition.

(15) Another set of witnesses in this case is PW. 5, Smt. Sushila Sablok and PW.6 Smt. Krishna and both of them have said that on 19th October 1979 when they met they decided to go to the house of the accused on 21st October 1979 in order of to resolve the dispute between the couple, that they were accompanied by the husband of PW. 6 Smt. Krishna and they came to know during this meeting that the deceased had sold two gold bangles but her husband was accusing her of having sold other gold jewellery and that this was the reason for strained relations between the parties. They further admit that in their presence the deceased apologized for the mistake but the appellant in their presence threw a glass of water at her face and also slapped her. The accused in that meeting had asked the deceased to fetch a guarantee from her brother that in future she will not behave like that. PW. 6, Krishna has further admitted that the deceased had a locker which the deceased had operated in the presence of her husband.

(16) PW. 20, Dharm Vir has deposed that he was called by the parties on 27.1.79 and in his presence and in the presence of Surinder Malhotra and his uncle the bank locker was opened and Ext. PW. 12/A inventory recovered from it. He further says that Ext. PW. 6/A is the inventory of the articles which were lying in the locker and this was prepared in the presence of the parties and after it was done the deceased asked the accused to keep the original list Ext. PW. 12/A.

(17) Since most of the facts of the case including the cause of death are undisputed, we need not refer to the testimony of other witnesses including Dr. Ramani who has conducted postmortem examination. There is, however, a set of two more witnesses whose testimony is of very great importance and we would like to reproduce it at this stage. These two witnesses are Public Witness . 7 Tek Chand Kora and Dw 2 Anuradha, daughter of the deceased. Public Witness . 7 Tek Chand Kora has deposed that the appellant together with his wife were residing in the first floor of his house No. C-42 Kirti Nagar, and on 22nd October 1979 while he was sleeping in the ground floor of his house heard Jagdish Lal Malhotra accused crying at the top of his voice 'Bachao Bachao'. He came running and saw flames outside the kitchen of the first floor. He called Jagdish Lal to open the door and as he went inside he saw Mrs. Malhotra lying on the ground outside the kitchen, her body was wrapped in a blanket and her burnt face was open. The

accused Jagdish Lal requested him to call his younger brothers so that Mrs. Malhotra is removed to the hospital. He along with his son went on their scooter to inform Surinder Malhotra and brought him to the house of the accused. He then started his car and the accused and his brother brought Mrs. Malhotra downstairs with the help of some neighbours. She was made to lie in the back seat of the car and was taken to Willingdon Hospital. The police in his presence took possession of a can containing some kerosin oil, Ext. P. 1, one match box which was lying on the projection, Ext. P-2 vide memo Ext. Public Witness . 7/A which was also signed by him. One burnt match stick was taken into possession vide the same memo. In the Verandah outside the kitchen some burnt pieces of Sar and some burnt pieces of skin, Ext. P-3 and P-4 were seized by the police vide memo, Ext. Public Witness . 7/B. He further says that the burnt match, stick was lying on the floor of the bath room. He has named a set of persons namely, Sunil Katarya, Parveen Chopra, Parmodh Chopra, Mrs. Ajay Talwar, Pardeep Talwar who had also come on the spot besides his son and is servant. He noticed the burnt injuries on the hands and face of the accused on reaching the hospital. He admits that when he went upstairs the children of the accused were weeping. The deceased was not speaking and the children were crying 'Mummy what she had done' and the accused was saying in choked voice that his house has been destroyed and what she had done. He further says that the deceased used to pay him rent but then she went in default and the rent went into arrears for four months. Later on the deceased paid two months' rent and he complained to the accused who then started paying rent direct through cheque.

(18) This brings us to the testimony of Dw 2, Anuradha Malhotra daughter of the deceased. She has said that on the night intervening 22nd and 23rd October 1979 they were also sleeping in the same bed room opposite kitchen when she heard noise 'Hai Hai'. She saw from the window of the room and found her mother burning near the kitchen which is at a distance of 6/7 feet from the bed-room ; that when she got up her father also got up; that her father ran outside the room and started shouting 'Bachao Bachao' and also started extinguishing fire with his own hands ; that meanwhile my brother and sister also woke up and her father then asked her to fetch blankets and she brought two blankets and the other sister brought the third one; that Mr. Kora resides on the ground floor and while her

mother was still aflame, Mr. Kora called from downstairs and asked for opening the door ; that her sister then opened the door while her father tried to extinguish fire with the help of blankets ; that in the meanwhile Mr. Kora and other neighbours came upstairs and by that time her father with their help was trying to lay the deceased on the ground ; that her father told her mother 'What she had done, she has destroyed the home, that they were weeping and they also asked their mother as to what she had done but she did not reply. The remaining story she told was the same as given by PW. 7. She has, however, said that while removing the deceased to the hospital the accused had told her to telephone her maternal uncle and she telephoned them about the incident. She has totally denied the fact that the just before the night of occurrence there was any quarrel in the house or that Surinder Malhotra was there. She has totally denied the suggestion that her father had returned from the hospital and advised her not to make a statement. She however, admits that she used to go to hospital as well as to Jail to see her father. She has totally repelled the suggestion that she was making this statement to save her father. She has also said that it is incorrect that they were short of money or that they were being financially supported by their maternal grand mother. She does not know if her mother had sold two gold bangles and whether on that account there was a quarrel between her father and her mother. She has further repelled the suggestion of having telephoned her maternal uncle that her father had killed her mother. Instead says that she only told them that mother had put kerosin oil on herself and tried to commit suicide and that her father was also seriously injured. She has also repelled the suggestion that when she got up she saw her mother burning and her father had pressed her against the wall so that she could not escape and that in the process he got burns. She has, however, added that in fact her father got burns while trying to extinguish fire on her mother.

(19) There is another set of three witnesses whose testimony is relevant to the enquiry and they are Public Witness 24 Dr. V. Thukral, Public Witness 25 Dr. R.P. Sharma and Public Witness . 26 S.I. Surender Dev. Their statements are relevant for a limited purpose as they are the witnesses to the dying declaration. It is necessary therefore to examine as to what they have said in respect of this fact.

(20) Public Witness . 25 Dr. R.P. Sharma was on the casualty duty and has deposed that immediately on arrival of the deceased in the hospital she gave a statement that she was burnt by her husband and he makes record of the same on Ext. P.W.24/A-1. He says that she was conscious at that time and he refers the patient to the surgical side and asked the constable to send information the police station concerned. He is also a witness to the dying declaration, Ext. P.W. 24/A recorded by S.I. Surender Dev Public Witness . 26. He says that the patient was conscious at the time of making the statement and that it was taken down in his presence, in the presence of Dr. Anil Mehendiratta and Dr. V. Thukral. He also says that the accused was also examined by him and in respect of the burnt injuries the accused had said that these were received by him while saving his wife.

(21) Public Witness . 24 Dr. V. Thukral is also a witness to the dying declaration, Ext. Public Witness . 24/A. He has testified that the patient was conscious when she made a statement and that it was he who questioned the patient and the replies were recorded by S.I. Surender Dev. He further testifies to the presence of Dr. R.P. Sharma and Dr. Anil Mehendiratta at the time of recording the statement. He, however, says that in but shell what he remembers is that she stated that in early hours of the morning she has gone to bath-room to make water and from her back room husband set her on fire after sprinkling kerosin oil on her body.

(22) Public Witness . 26, S.I. Surender Dev has deposed that on reaching the hospital he called Dr. R.P. Sharma, Dr. Anil Mehendiratta and Dr. V. Thukral and after getting a certificate that she was fit to make statement he recorded her statement Ext. Public Witness . 24/A in the presence of the doctors.

(23) We have heard the learned counsel at great length. Sodi Teja Singh, learned counsel for the State, has frankly admitted that apart from the dying declaration we do not have any direct evidence in respect of the cause of death of the deceased. He, however, invited our attention to the evidence of PWs. 1 to 6, the brothers and sisters and mother of the deceased and pointed out that the accused appellant had a motive to kill the deceased as is evident from the testimony of these witnesses. He has also invited our attention to the letters Exts. PW. 2/B, Public

Witness 2/C and 2/D to indicate that the accused was a greedy man and his wife were further strained as he found that she had surrendered her right in the estate of her father without consulting him. He has pointed out to certain pieces of evidence indicating that the accused soon after his marriage with the deceased was out to extract cash and kind from bids in-laws.

(24) While admitting that there was some sort of strain in the relations of the parties we do not think it proper to use the evidence in respect of the greed of the accused as also in respect of the dispute about the estate of his father-in-law against the accused. The prosecution evidence in respect of the conduct of the accused in these matters is too remote in time to be taken into consideration. The attempt of this prosecution is to persuade, just to take into consideration the fact that the accused is proved to be a greedy man right from the beginning and that they have been meeting all is unreasonable demands. From our point of view this is too old a story and we are not inclined to believe that it can form the basis for the accused to commit this crime. We, however, find that there has been a rupture of relationship of the parties for some time back due to the fact that the accused took serious notice of that apart from two gold bangles, his wife deceased Santosh had disposed of about 30 items of the gold jewellery which were not found present in the bank locker, when on 27th January 1979 it was opened in the presence of the parties, Dharam Vir Pw 20 and Surinder Malhotra, brother of the accused. The deceased was unable to explain it though in the presence of her sisters PW. 5 and P.W. 6 on 21st October 1979 she has told that these had been given by her to her mother-in-law. In any case, whatever the nature of the dispute, the fact remains that there was a strain on the relationship of the parties and on 21st October 1979 things seem to have worsened and that explains the reason for the intervention of the sisters of the deceased P.Ws. 5 and 6.

(25) As we have pointed out earlier, the fate of this case depends upon the fact as to whether the dying declaration, Ext. P.W. 24/A, is to be believed or not and once the dying declaration is believed, it is not possible for the accused appellant to extricate himself. Mr. Sodhi counsel for the State has very vehemently argued that the deceased has made successive dying declarations and prior to the dying declarations and prior to the dying declaration, Ext. P.W. 24/A came to .be

recorded the court must take into consideration the fact that immediately on the arrival of the deceased in the hospital at 5 Am she had also told Dr. R.P. Sharma that she has been burnt by her husband.

(26) He has further submitted that the dying declaration Ex. P.W. 24/A has been witnessed by as many as three doctors namely, Dr. R.P. Sharma, Dr. V. Thukral and Dr. Mehandiratta, and that by no stretch of imagination they can be discredited as interested witnesses. He has further submitted that since the lady was dying she could not be expected to involve her husband unnecessarily. His further contention is that there was no time for the investigating officer to summon a Magistrate for recording dying declaration and as such he was left with no option and that the dying declaration as such should be considered in the light of these circumstances.

(27) Mr. Frank Anthony, however, met these arguments by submitting that dying declaration has been recorded by the investigating officer who naturally is interested in the success of investigation and that the recording of such statement by the investigating Officer himself is not favored by law and that it should be excluded from consideration. He has further submitted that this dying declaration will have to be examined thoroughly in the light of the conduct of the accused and in the light of the statements of P.W. 7 and D.W. 2. His contention further is that if the accused had committed the crime he could not have raised hue and cry immediately on noticing his wife on fire and what the children and the appellant were telling the deceased at the time of occurrence sufficiently goes to show that the deceased had commits suicide. That the way accused had behaved cannot be said to be the conduct of a culprit. He has further submitted that even while the accused was leaving with the deceased for hospital he asks his daughter, Anuradha Dw 2 to ring up her maternal uncle about the incident. He seriously contended that argument of learned counsel for the State that Dw 2 Anuradha is not speaking the truth should not be taken seriously for the simple reason that she immediately after the occurrence has transmitted message regarding the cause of burning to her maternal uncle on telephone and, it cannot be said that at that point of time she could ever think of creating a defense for the father. Mr. Frank Anthony has invited our attention to the case reported as Munnu Raja and another v. The

State of Madhya Pradesh : 1976 CriLJ1718 wherein it has been observed :-

'The investigating officer who recorded the dying declaration had undoubtedly taken the precaution of keeping a doctor present and it appears that some of the friends and relations of the deceased were also present at the time when the statement was recorded. But, if the investigating officer thought that Bahadur Singh was in a precarious condition he ought to have requisitioned the services of a Magistrate for recording the dying declaration. Investigating Officers are naturally interested in the success of the investigation and the practice of the investigating officer himself recording a dying declaration during the course of investigation ought not to be encouraged. We have therefore excluded from our consideration the dying declaration, Ext. P. 2, recorded in the hospital.'

(28) Mr. Frank Anthony also cited the case of Dalip Singh and others v. State of Punjab AIR 1979 S.C. 1173 wherein it has been observed :-

'Although a dying declaration recorded by a police officer during the course of investigation is admissible under S. 32 of the evidence Act in view of the exception provided in sub section (2) S. 162, Criminal Procedure Code, 1973, it is better to leave such dying declaration out of consideration until and unless the prosecution satisfies the court as to why it was not recorded by Magistrate or by a Doctor. The practice of the Investigating Officer himself recording a dying declaration during the course of investigation Court not to be encouraged. This is not to suggest that such dying declaration are always untrustworthy, but, what was to be emphasized is that better and more reliable methods of recording a dying declaration of an injured person should be taken recourse to and the one recorded by the Police Officer may be relied upon if there was not time or facility available to the prosecution for adopting any better method. HELD: A dying declaration in a murder case, though could not be rejected on the ground that it was recorded by a police officer as the deceased was in a critical condition and no other person could be available in the village to record the dying declaration, was left out of consideration as it contained a statement which was a bit doubtful.'

(29) A reference was also made to the case reported as Thurukanni Pompaiah and another v. State of Mysore : 1965 CriLJ31 where it has been held:-

'A dying declaration is relevant and material evidence in the prosecution of the assailants and a truthful and reliable dying declaration may form the sole basis of conviction, even though it is not corroborated. But the Court must be satisfied that the declaration is truthful. The reliability of a dying declaration should be subjected to a close scrutiny, considering that it was made in the absence of the accused who had no opportunity to test its veracity by cross-examination. If the Court finds that the declaration is not wholly reliable and a material and integral portion of the deceased's version of the entire occurrence is untrue, the Court may, in all the circumstances of the case consider it unsafe to convict the accused on the basis of the declaration alone without further corroboration.'

(30) Sodhi Teja Singh, learned counsel for the State also invited our attention to *Amba Shanker Daw v. The State of Rajasthan* (The Indian Law Reports 1971(21) Rajasthan page 541). In this case it has been held :-

'Though the rule of 'Ipsissima verba' is salutary, but it cannot be held that unless the actual words are repeated by each witness to the declaration, it is not possible for the court to come to the conclusion what the declarant made the declaration or what the import or the meaning of that declaration was. Sometimes it is difficult for all the witnesses to be able to correctly reproduce the words which they heard the declarant uttering. All what they can be expected to say is that the words very similar to the words that they purported to put in the mouth of the deceased were uttered by him and the witnesses can be safely relied upon to that extent.'

This was referred to by Sodhi Teja Singh out of his awareness that Dr. V. Thukral or Dr. R.P. Sharma witnesses to the dying declaration have not given the details about it and Dr. V. Thukral has simply said that 'In nut shell what he remembers is that she stated that in the early hours of the morning she had gone to bath-room to make water and from back her husband set her on fire after sprinkling kerosin oil on her body.'

(31) We may point that on consideration of the citations we firmly believe that there can be precedent on law but there can be no precedent on facts. Each case as such to be considered in the light of its peculiar facts and circumstances and in the light of the requirement of law. It would thus appear that the settled law

regarding dying declaration is that such declarations must be approached with caution and before such statement is accepted it must be thoroughly examined in all details. There is no rule or law excluding the use of dying declaration without corroboration. It is the duty of the prosecution to law the whole statement before the court in the manner in which it was made, without tempering with its terms or its tenor. The courts are also required to keep in view that the Investigating Officers, who are interested in the success of the investigations, should not be encouraged to record such dying declarations themselves and if it appears to the court that the investigating officer had plenty of time and facility to procure the services of a Magistrate for recording a dying declaration then in that case the dying declaration recorded by the investigating officer should be excluded from consideration. Whether the investigating officer had sufficient time or facility to fetch a Magistrate is a question of fact and should be determined in the light of peculiar facts and circumstances of each case. If the broad statement of facts made in the dying declaration is at variance with the other evidence of the prosecution in respect of such matters and if what the prosecution has proved by other evidence controverts the facts mentioned in the dying declaration it will render the dying declaration as untrustworthy and suspicious.

(32) We, however, do not agree with Mr. Frank Anthony that the dying declaration recorded in this case by the investigating officer should be excluded from consideration for the simple reason of its having been recorded by the investigating officer and not a Magistrate. We have evidence in this case which is also supported by the treatment sheet that the investigating officer had no time to fetch a Magistrate and doctor had asked for immediate arrangements to be made for recording declaration. We, are however, of the opinion that dying declaration in this case has to be excluded from consideration for the reason that it contains statements which have rendered it doubtful.

(33) In this context we may, therefore, examine Ext. Pw 24/A and Ext. Pw 24/A. The first dying declaration that comes into existence is Ext. Pw 24/A-1. It is written in one sentence by Dr. R.P. Sharma that the patient disclosed that she has been burnt by her husband. The second dying declaration i.e. Ext. Pw 24/A has been recorded by S.I. Surender Dev investigating officer in the presence of Dr. R.P.

Sharma, Dr. V. Thukral and Dr. Anil Mehendiratta and is in detail. Ext. Pw 24/A-1 is recorded at about 4.30 Am while Ext. Pw 24/A is recorded somewhere between 5.30 Am and 6.30 AM. The investigating officer has not recorded the exact time though the importance of time factor in such matters is very great. It is flashed to police station at 6.30 A.M. This dying declaration i.e. Pw 24/A has admittedly been written at a time when the condition of the patient was going from bad to worse. We have notice from the treatment chart that she was collapsing further on each examination and she had in fact completely collapsed at 7.55 AM. The treatment chart which is reproduced at the back of Ex. Pw 24/C would show that at 7.55 Am the pulse, respiration, heart beat and blood pressure of the patient were absent. Patient's condition, as depicted in the treatment chart right from 6.30 Am was continuously deterioration. This would show that she had completely collapsed at 7.55 Am though she is clinically declared dead at 8.15 AM. The condition of the patient as is evident by this treatment chart even at 6.30 Am was such which makes it difficult to hold that she was conscious to the extent as to be in a position to understand and reply. In any case, at 6.30 Am the condition of the patient was such that she could not give the narration of the kind and quality which is recorded in the dying declaration, Ext. Pw 24/A. One has only to imagine her condition prior to 6.30 AM. We are told by Dr. V. Thukral that on his questioning, the replies given by her were recorded by S.I. Surender Dev. This would clearly indicate that the dying declaration came to be recorded on her questioning by Dr. V. Thukral though only her replies to questions have been reproduced. Since it is not recorded in the form of questions and answers it is difficult for us to find out as to what questions were asked and in what form. We are left guessing as to how much was suggested by the examiner and how much was produced by the person making the declaration. How can it as such be said that this is a declaration representing the true statement of the deceased. Apart from this, the form of the declaration is such which renders it suspicious. She is reported to have said that 'I reside at the above mentioned address.' It is not known how scheme to know the address that had been recorded by the investigating officer. It is also said in the dying declaration 'due to shortages of money my husband Jagdish Malhotra and my Devar Surinder Malhotra used to quarrel' (probably meaning with her). This statement is palpably wrong. We have soon the evidence of all her three brothers

two sisters and mother PWs 1 to 6, wherein they have clearly said that the relations of the parties were strained due to the fact that she had disposed of two gold bangles. At no stage it has been suggested by them that Surinder Malhotra brother of the appellant accused has ever interfered in the quarrel between the parties. All those PWs 1 to 6 assert that this information has been given to them at various intervals by the deceased herself. It is not understandable as to why she never told them that the brother of the appellant Surinder Malhotra also used to quarrel with her. In fact, the children of the deceased, particularly the grown up one, Dw 2 Anuradha should have known about it but she has categorically said during her cross-examination that Surinder Malhotra never quarrelled with the deceased. We also know for certain that the basic fact straining the relations between the parties was that the deceased had disposed of major portion of her jewellery, last being two gold bangles. This fact is sufficiently established by the testimony of Pw 5 Sushila Sablok, Pw 6 Krishna and Pw 20 Dharam Vir, brother-in-law of the deceased. In the presence of her sister Krishna Pw 6 the deceased had admitted that the accused was alleging that she had disposed off other jewellery while she was saying that she gave it to her mother-in-law. If this is the basic premises of the prosecution case, how can a dying declaration inspire confidence particularly, when it is said therein that her husband had taken all the ornaments from her out of which two gold bangles had been sold. In fact, we are told by Pw 20 Dharam Vir that all that the accused did was to get the jewellery lying in the locker and under the lock and key of the deceased verified. The inventories Ext. Pw 12/A which was taken out from the locker and Ext. PW/6 A which was prepared in respect of the items lying in the locker clearly go to show that the jewellery had fallen short by 30 items. In the dying declaration she further says that 'even on the night of occurrence her husband had picked up a quarrel on this issue' probably meaning with her). This again is not true. The children do not support the story. If there had been such frequent quarrels and if Surinder Malhotra, the brother of the accused used to come right from his house to the house of his brother to pick up quarrel then Pw 7 Tek Chand Kora would definitely have known it. The declaration' that kerosin oil was sprinkled upon her by her husband between 3.30 and 3.45 AM. When she had gone to urinate and that she was set on fire by him', is obviously wrong. In fact, her daughter Anuradha Dw 2

got up first on hearing her mother's cries 'hai hai'. The accused also woke up immediately and they both saw her on fire. The accused first used his hands to put off the fire and asked the girl to fetch blanket. Dw 2 Anuradha and her sister fetches the blankets in which the accused wrapped the deceased to extinguish fire and in the process he also got burns. There is evidence of Dw 2 and Pw 7 Anuradha and Tek Chand Kora that the accused was shouting at the top of his voice and calling for help and when Tek Chand Kora entered he found the whole family wrapping and wailing and they were saying 'what she has done' and the appellant was also crying 'that she has ruined the house'. It is necessary to bear in mind that Dw 2 Anuradha is the daughter of the deceased and if she had seen her father doing such a great wrong to her mother, her sympathies at that stage would have naturally been with the victim. It is obviously untenable to argue that she has been influenced. We must express our regrets that the police did not record her statement. If the offence has taken place inside the house, inmates of the house are the natural witnesses. We have reasons to believe that she has neither been won over nor has she come to depose in defense with a view to save her father. The reason being that immediately after the occurrence she is told by the father to ring up her maternal uncle and she flashes a telephonic message to her maternal uncle that her mother was burnt in fire accident and has been removed to hospital. If she had seen her father setting the deceased on fire, she at that stage would have abhorred her father and would have certainly accused him of the crime. This perhaps is the reason why Anuradha is kept out of the scone by the investigating officer. If a case is to be built then her presence is to be excluded. It cannot be said that she was not an eye witness as it is she who within a short time informs her maternal uncle about the nature of occurrence. We have no reason to disbelieve Pw 7 Tek Chand Kora's testimony. He is most independent and disinterested witness. With all these glaring facts staring on the face we cannot ignore the testimony of Pw 7 Tek Chand Kora and Dw 2 Anuradha. We are surprised to find her saying in the dying declaration, 'that after burning her, the appellant removed her to Willingdon hospital'. We knew the condition in which she was removed to the hospital. We can understand her saying that she was removed to the hospital but we do not appreciate how she came to know that she was brought to Willingdon hospital. Obviously, all this shows that those things

have been suggested to her and we do not know the state of her mind at that time nor we know how she replied. But assuming, she knew that she had been brought to Willingdon hospital then, one has to presume that she was conscious and could see where she was being taken. This again renders the dying declaration Ext. Pw 24/A suspicious. The reason being that if she was conscious and knows that she is being taken by her husband to Willingdon hospital then every important question arises as to why she did not accuse her husband of the crime in the presence of her children, landlord and other neighbours while they were wailing and weeping and asking her as to what she had done. If she was conscious then why she was tied lipped. From our point of view, therefore, there has been an attempt to make this declaration appear very respectable. If the doctor had given a certificate that she is fit to make a statement where was the occasion for S.I. Surinder Dev, the scribe of the document to extract an answer from the deceased to the effect that she was making a statement while in full senses. Ordinarily, and normally, after saying that the statement as heard and is correct it should be the end of the matter but somehow it does not end there. The investigating officer is conscious that children are not prepared to fall in line with this version. He thus makes sure to keep them out and therefore the last line in the dying declaration 'At the time I was set on fire my all three children were sleeping'.

(34) We have examined the dying declaration Ext. PW. 24/A in the light of its essential characteristics and in the light of prosecution evidence itself. That sufficiently goes to show that the statement is surrounded by suspicion and it is absolutely unsafe to base conviction on this alone. We have evidence in this case of Dr. V. Thukral Pw 24 that his statement of the deceased was written by Dw 26 Surinder Dev S.I. on his questioning from the patient. We, however, are not taken into confidence as to what those questions were, in what form they were put, what were the suggestions, if any, given and how were the answers given and recorded. It is due to this difficulty that Dr. V. Thukral Pw 26 has not been able to depose in respect of the broad feature of the dying declaration and he is content by telling us that 'in nut shell what he remembers is that she stated that in the early hours of the morning she had gone to bath room to make water and from her back her husband set her on fire after sprinkling kerosin oil on her body'. It is very strange that the words 'from her back' have come in the statement for the first time

in spite of fact case that this is not to be found in the declaration itself. In any case, if a statement is made on questioning, the proper course to record it would be to record the questions and the replies so as to enable the court to appreciate its evidentiary value. The argument of Shri Sodhi learned counsel for the State that this dying declaration should be assessed in the light of the earlier dying declaration made by her before Dr. R.P. Sharma, Pw 25 'that she was burnt by her husband' under the circumstances does not appear to be a sound approach. Why should we look at the dying declaration in isolation of the totality of the circumstances and other evidence of the prosecution particularly when we know that its vital contents are by and large controverted by the prosecution evidence itself.

(35) This apart, we have other reasons to suspect the veracity of this dying declaration. We are of the firm belief that facts and circumstances of this case clearly go to show that this statement is not free from suspicion. We know there has been some strain in the relationship of the couple but we have feeble evidence to indicate that there were frequent quarrels. The best persons to depose about it were the inmates of the house but they do not support it. On the basis of the sequences of events and the material produced before the court by the prosecution it is impossible to believe that the accused sprinkled kerosin oil on her and set her on fire while she had gone to bath-room for urination. We are required to believe that this was done in the bath-room itself because the tin carrying the kerosin oil, the match box and the burnt match stick were recovered from the bathroom. It is said that this tin contained some kerosin oil. One can see from the photograph of the tin that it has hardly an opening of about 'diameter. It is not a case of the oil being in a bucket and being thrown upon the deceased suddenly. If the oil is to be sprinkled from this tin it would take a minute or so to sprinkle the same. If that view is correct than how is it that she does not offer any resistance, raise cries and make an attempt to run away. Normally and ordinarily noticing the ill design of her husband her immediate reaction would have been to offer resistance, raise alarm and make an attempt to run away. The fact that she was found burning in the corridor further shows that the door of the bath room was not closed and as such there was no question of preventing her from offering resistance. If the husband was to burn her in the bath-room, he would ensure that

she does not come out. She has 100% burns meaning thereby that the whole body was soaked by kerosin oil and keeping in view the opening of the tin the oil has been sprinkled leisurely. It would appear that even her glass bangles were unbroken while clearly shows that no resistance has been offered. There is another small circumstances worthy of notice and it is that hair from the scalp of the deceased was sent for examination to C.F.S.L. and kerosin oil was in the hair. This would be indicative that in all probability kerosin oil was poured by the deceased on herself. All these circumstances taken together clearly show that she has herself and leisurely sprinkled kerosin oil upon herself. Apparently, after setting herself on fire she is stricken with panic and she runs from the bath room crying. On her cries both the daughter Dw 2 Anuradha and the husband accused wake up. They come out and see her burning, the accused cries for help at the top of his voice and also asks his daughter to fetch blankets. Earlier, he makes an attempt to extinguish fire with his hands and sustain burns. The daughter fetches blankets and he wraps her to extinguish fire and in the process gets burns on the face. The father immediately after leaving with her for the hospital also asks the daughter to ring up maternal uncle about the accident and she does it and in her first version she says that she has burnt in a fire accident. The suggestion of Mr. Frank Anthony, learned counsel for the appellant that this could never be the behavior of a culprit seems to be full of force. They are seen wailing and weeping and asking her as to what she had done and that she as ruined home. The deceased does not open the mouth though we have evidence that she was conscious as she knows that she is being carried by the husband to the hospital. We are of the view that under the circumstances if it were a case of burning by the husband, she would have immediately told it to the children, the landlord and the neighbours, who were there.

(36) On the basis of the observations we have made in respect of the dying declaration, we are of the opinion that it does not seem to be truthful and is surrounded by suspicion. Since we do not have before us any other evidence connecting the accused with the commission of crime we are of the view that the accused must be given benefit of doubt.

(37) We accordingly accept the appeal, set aside the conviction and sentence passed by the learned Additional Sessions Judge and direct acquittal of the accused. R.N. Aggarwal J.

(38) I have perused the judgment prepared by my brother Malik Sharief-ud-Din, J. and I entirely agree in his reasoning and conclusion. I wish to add that when the prosecution case and the defense version are so evenly balanced that it is not possible to say with certainty whether the prosecution case is true or the defense version is false the safer course would be to give benefit of doubt and acquit the accused. I agree in the proposed order.

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