

Geeta and anr. Vs. State

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Court : Delhi

Decided On : Aug-13-2009

Reported in : 170(2009)DLT268

Judge : Badar Durrez Ahmed and; P.K. Bhasin, JJ.

Acts : Indian Penal Code (IPC) - Sections 34, 109, 302 and 307; Code of Criminal Procedure (CrPC) - Sections 82, 83, 222 and 313

Appeal No. : Crl. A. 79/1994

Appellant : Geeta and anr.

Respondent : State

Advocate for Def. : M.N. Dudeja, APP

Advocate for Pet/Ap. : Rajesh Harnal and; Ranjan Kumar Rai, Advs

Disposition : Appeal allowed

Judgement :

Badar Durrez Ahmed, J

1. The present appeal on behalf of the appellants Geeta and Dropti, who are daughter and mother respectively, is directed against the judgment dated 14.09.1993 delivered by the learned Additional Sessions Judge, Delhi whereby the

appellant Dropti has been found guilty of having committed the offence of murder of her son-in-law Madan Lal, punishable under Section 302 IPC and appellant Geeta was found guilty for the offence punishable under Section 302 read with Section 109 IPC for having assisted her mother, appellant Dropti and another Ghanshyam (who has been declared to be a proclaimed offender), in the said murder of her husband Madan Lal. They were both convicted primarily on the basis of Exhibit PW10/A which was accepted by the learned Additional Sessions Judge as the true and correct dying declaration made by the deceased Madan Lal. By a separate order dated 27.09.1993 passed by the learned Additional Sessions Judge, Delhi, the appellants were sentenced to undergo imprisonment for life and also to pay a fine of Rs 5,000/- each and, in default thereof, they were required to undergo further rigorous imprisonment for three months each. The appellants are aggrieved by the impugned judgment and order on sentence and have preferred this appeal.

2. At the outset, it may be pointed out that initially there were three accused, namely, Geeta (wife of the deceased Madan Lal), Smt. Dropti (mother-in-law of the deceased) and one Ghanshyam, who is said to have arranged the marriage between Geeta and Madan Lal and also to have participated in the murder of Madan Lal on 28.12.1987 at about 10:30 am at Durga Temple, C-Block, Vikas Puri, Delhi. However, the impugned judgment and order on sentence relates only to the appellants Geeta and Dropti inasmuch as Ghanshyam had gone missing after having been granted bail during the trial and consequently, he had been declared to be a proclaimed offender.

3. The police machinery was brought into action on receipt of DD No. 9-A (Exhibit PW 3/A) recorded at Police Station Vikas Puri on 28.12.1987 at about 11:53 am. A copy of the said DD No. 9-A (Exhibit PW3/A) was handed over to Sub-Inspector Raj Singh, who, along with Constable Surinder, reached Durga Temple, Vikas Puri where they came across Constable Daya Nand, who told them that the injured Madan Lal, son of Lal Chand and resident of the said Durga Mandir had been taken to Deen Dayal Upadhaya Hospital (DDU Hospital). Sub-Inspector Raj Singh left Constable Surinder to guard the scene of occurrence and proceeded to the said hospital. There, he obtained the MLC No. E-18096 (Exhibit PW13/A) in

respect of the injured Madan Lal. The endorsement made at 12:45pm in the MLC indicates that Madan Lal was unfit to give his statement at that point of time. However, the doctor on duty handed over Exhibit PW10/A, which purported to be a statement given by Madan Lal and which had allegedly been attested by Dr Ravi Mahajan and Dr Ashwani Gupta. The said statement had allegedly been recorded by Constable Satbir Singh immediately after the injured Madan Lal had been admitted to the said hospital. The said statement is as under:-

C:\Users\Administrator\Desktop\Exhibit-PW10-A1.jpg

C:\Users\Administrator\Desktop\Exhibit-PW10-A.jpg

The transliterated portion of Mark A to A of the purported dying declaration Exhibit PW10/A reads as under:-

Mai Pata Bala Par Rehta Hoo Aur Aaj Dinank 28.12.87 Ke Subah, 10 1/2 Baje Karib Aaj Meri Saas Ne Mere Ko Tel Chhirak Kar Aag Laga Di. Meri Saas Ke Saath Ghanshyam Koshi Wala Tha Jis Ne Mere Ko Pakar Liya Aur Meri Saas Jiska Naam Dropti Hai, Usne Mere Mein Aag Laga Di. Yeh Ghanshyam Meri Shaadi Ka Bichola Hai. Meri Shaadi Dinank 13.11.86 Ko Shastri Nagar Dilli Me Hooi Thi. Aur Meri Patni Ka Naam Gita Rani Hai. Meri Patni Ne Bhi Mere Ko Jalane Me Madad Ki Hai. Aur Kahane Lagi Ki Aapke Marne Ke Baad Mai Raand (Vidhwa) Ho Kar Koi Nokri Kar Loongi. Aur Mere Mata Pita Ka Koi Dosh Nahi Hai. Yeh Ghansham Keshi Kala Bus Stand Ke Pichhe Thane Ke Paas U.P. Me Rehta Hai.

The English translation of the above as given in the impugned judgment is set out herein below:-

I have been residing at the above said address and today dated 28-12-87 in the morning at about 10-30 A. M., my mother-in-law poured oil on me and set on fire. My mother-in-law was accompanied by Ghanshyam Koshiwala, who caught held of me and my mother-in-law whose name is Dropti set me on fire. This Ghanshyam is the intervener (Bicholia) of my marriage. My marriage had taken place on 13.11.86 at Shastri Nagar, Delhi and name of my wife is Geeta Rani. My wife has also helped in burning me and had been saying that after killing me she

would do some job being a widow. My parents have nothing to be blamed. This Ghanshyam has been living behind Keshi Kalan Bus Stand near Police Station in U. P.

4. On the basis of the said statement Exhibit PW10/A, Sub- Inspector Raj Singh got a case registered under Section 307 read with Section 34 IPC, through Constable Satbir Singh at Vikas Puri Police Station vide FIR No. 350 dated 28.12.1987 at 1:40 pm. On the same day, at about 1:30 pm, Sub-Inspector Raj Singh got the scene of occurrence photographed and prepared a rough site plan. Subsequently, a site plan to scale was also prepared through a draughtsman. However, on 28.12.1987, Sub-Inspector Raj Singh took into his possession, from the scene of occurrence, one dented plastic can of five litres capacity, containing some kerosene oil in it. He also took into his possession one match box having a few match sticks and two burnt sticks, a few pieces of burnt clothing, one cotton mattress (gadda) and one bed sheet, both of which were slightly burnt, some sand smelling of kerosene oil and one brass lock of 'Harrison. make, which indicated that attempts of breaking it had been made on it. The said lock was in an unlocked condition.

5. Injured Madan Lal was referred to Ram Manohar Lohia Hospital (RML Hospital) by the doctor at DDU Hospital for further treatment. However, Madan Lal's condition did not improve and he succumbed to his injuries on 29.12.1987. Information of his death was given on telephone by Constable Ombir Singh and DD No. 9-A (Exhibit PW 17/C) dated 29.12.1987 was recorded.

6. Sub-Inspector Raj Singh conducted inquest proceedings and sent the dead body of Madan Lal for post mortem examination. Death was declared to be due to burning. Consequently, the offence recorded in the said FIR was converted from Section 307/34 to 302/34 IPC. Apparently, statements of witnesses were recorded and as per the prosecution, Geeta and Dropti were arrested on 29.12.1987. It is further alleged by the prosecution that upon personal search being conducted on the appellant Geeta, a key exhibit P-8 of 'Harrison. make bearing No. 272 was recovered. Sub-Inspector Raj Singh also sent the pieces of burnt clothing and the sand to the Central Forensic Science Laboratory for testing and examination. By

its report Exhibit PW17/H, CFSL was of the opinion that the contents of the burnt pieces of clothes and the sand received by the CFSL did not contain kerosene oil.

7. Initially, the other accused, Ghanshyam, was not available for arrest. Proceedings under Section 82/83 Cr. P.C had been undertaken. However, later on, he was arrested and, consequently, a challan was filed against him on 05.04.1988. The challan in respect of the appellants Geeta and Dropti had already been filed. The charge was framed against all the three accused on 19.09.1988 for having committed the offence punishable under Section 302 read with Section 34 IPC. All the accused pleaded not guilty and claimed trial. However, as indicated above, in the course of trial, Ghanshyam went missing while on bail and, by an order dated 22.05.1989, he was declared to be a proclaimed offender and the case proceeded against the appellants Geeta and Dropti.

8. The prosecution examined as many as 17 witnesses. The important witnesses being PW6 Smt. Phool Wati, who is the mother of the deceased Madan Lal and PW2 Satya Prakash, who is a public witness. Apart from this, the testimonies of some of the police officials including the Investigating Officer PW17 Sub-Inspector Raj Singh and the two doctors PW10 Dr Ashwani Gupta and PW13 Dr Ravi Mahajan, who attested the purported dying declaration Exhibit PW10/A, are important. After considering the entire evidence on record as also the explanations given by the appellants in their Section 313 Cr. P.C statements, the learned Additional Sessions Judge returned a finding of guilt in respect of both the appellants. However, while appellant Dropti was found guilty of having committed the offence punishable under Section 302 IPC, appellant Geeta was found guilty for the offence punishable under Section 302 read with Section 109 IPC. According to the learned Additional Sessions Judge, the entire prosecution case rested solely on the statement Exhibit PW10/A, which had allegedly been recorded by PW11 Constable Suresh in the presence of PW10 Dr Ashwani Gupta and PW13 Dr Ravi Mahajan, immediately after the injured Madan Lal was brought to DDU Hospital on 28.12.1987. The Trial Court also took the view that apart from the dying declaration Exhibit PW10/A, the testimony of PW6 Smt. Phool Wati, the mother of the deceased Madan Lal, although it suffered from embellishments and improvements, could not be rejected in its entirety. The Trial Court, believing

Exhibit PW10/A to be the true and correct dying declaration of the deceased Madan Lal, held that the prosecution had been able to establish and prove its case that Dropti sprinkled kerosene oil on Madan Lal and set him ablaze and that the appellant Geeta also assisted her mother Dropti and the other person, namely, Ghanshyam, in the said incident.

9. The learned Counsel for the appellants broadly submitted that the testimony of PW6 Smt. Phool Wati cannot be relied upon at all inasmuch as it contains far too many contradictions. He submitted that if the testimony of PW6 Smt. Phool Wati is put aside, there is no evidence whatsoever against the appellants, apart from the purported dying declaration Exhibit PW10/A. It was contended that the said dying declaration does not bear any signature or thumb impression of the deceased Madan Lal. Apart from this, even the manner in which Exhibit PW10/A has been written indicates that it could not have been a statement made by Madan Lal. He further submitted that Exhibit PW10/A was not the statement of the deceased Madan Lal and even if it is assumed that it was the statement made by the deceased Madan Lal, it was certainly not a truthful statement and, therefore, no reliance can be placed upon it for returning a finding of guilt insofar as the appellants Geeta and Dropti are concerned. The learned Counsel submitted that if the statement of PW6 Smt. Phool Wati and the purported dying declaration Exhibit PW10/A are rejected, there remains nothing in the prosecution case which could lead to the conviction of the appellants. He also submitted that Exhibit PW10/A would itself indicate that there were manipulations and that there were additions made to the statement. Two instances pointed out by the learned Counsel were that '10. was made '10-1/2. by adding '1/2. subsequently. Similarly, the words 'mere ko. were added later. There is also a great deal of controversy as regards the portions marked B to B and C to C in Exhibit PW10/A. It was the suggestion of the learned Counsel for the appellants that Exhibit PW10/A was not the statement of Madan Lal at all but that of his father Lal Chand, who was present in the hospital though, the prosecution has tried to bring out an entirely different story.

10. On the other hand, Mr Dudeja, appearing on behalf of the State, submitted that the present case is based on two dying declarations. The first dying declaration is an oral declaration made by Madan Lal to his mother PW6 Smt. Phool Wati, as

indicated in her testimony. The second dying declaration is the one recorded by PW11 Constable Suresh Kumar between 12:10 pm and 12:15 pm, immediately upon Madan Lal's arrival at DDU Hospital on 28.12.1987. He submitted that Exhibit PW10/A was recorded on the pages of the hospital diary. This indicates that the statement was recorded urgently and whatever writing material was available, was pressed into service. This itself indicates that it was authentic and not cooked up. Furthermore, he submitted that Exhibit PW10/A was recorded in the presence of two government doctors who had no personal interest in the matter and they have fully supported the prosecution case. He further submitted that the testimony of PW6 Smt. Phool Wati cannot be rejected. She did say that after her return, she found her son Madan Lal in a burnt condition, lying outside the room. It is thereafter that he is said to have given his oral dying declaration to his mother PW6 Smt. Phool Wati. Mr Dudeja also submitted that a five-litre can containing kerosene as well as two used match sticks and a match box were also recovered from the scene of occurrence. He submitted that there is no denying the fact that Madan Lal did die of burn injuries. Mr Dudeja submitted that taking into account all the circumstances, it is a clear-cut case which leads to only one conclusion and that is the guilt of the appellants. Consequently, he submitted that the impugned judgment and order on sentence ought not to be disturbed and the appeal be dismissed.

11. From the above resume of facts it becomes immediately clear that two things are of vital importance for deciding this appeal. The first is the testimony of PW6 Smt. Phool Wati and the second is the statement Exhibit PW10/A and the supporting testimonies of the two doctors and PW11 Constable Suresh Kumar, who is said to have scribed the said statement as given by Madan Lal. We shall first examine the testimony of PW6 Smt. Phool Wati. In her examination-in-chief she stated that her son Madan Lal was married to the appellant Geeta and the matrimonial alliance was settled through Ghanshyam. She further stated that after their marriage, Geeta used to pick up quarrels with Madan Lal and used to say that she would not allow her (Smt. Phool Wati), her husband (Lal Chand) and her other son in her house. PW6 Smt. Phool Wati also stated that Geeta used to say that she would get Madan Lal killed and spend her remaining life as a widow. She also stated that at the time of the occurrence, Madan Lal was living in a room in

the temple at Vikas Puri. On that day, that is, on 28.12.1987 at about 10 am she is stated to have been with Madan Lal in the temple when the appellants Dropti and Geeta along with Ghanshyam came there. According to her, they enquired from her as to where her husband (Lal Chand) was. She told them that he had left for Hathras. Thereafter, all the three are said to have gone inside the room and asked her to call her relatives as they wanted to have talks with regard to Geeta. It is then stated by her that she went to call her relatives but nobody was available. She returned to the temple after about 30 minutes and there she saw her son Madan Lal lying in a burnt condition outside the room. The room was locked. According to her, Madan Lal told her that Ghanshyam caught his legs while Geeta had caught his hands and kerosene oil was sprinkled by Dropti, who also set him ablaze. All the three accused left the place by the time she reached there. She stated that the public had taken Madan Lal to Deen Dayal Upadhaya Hospital and the police had visited the spot and seized one plastic can of five litres, two used match sticks, one match box and burnt clothes including gadda and bed sheet. A lock was also taken into possession by the police. She stated that at the mortuary, she later identified the dead body of Madan Lal.

12. In her cross-examination, amongst other things, she admitted that the appellant Geeta had left for her parental house two months prior to the date of occurrence. She stated that since inception of the marriage, Geeta was pressurizing Madan Lal that she (PW6 Smt. Phool Wati) should not stay with him and despite that she continued to stay with Madan Lal. At the same time, Geeta also continued to stay with Madan Lal, despite her protest. She admitted that Geeta left for her parental house on the day of Bhaiya Duj and did not return till the fateful day, i.e., 28.12.1987. She, of course, stated that she was not aware that the appellant Geeta had given birth in the meanwhile to a male child on 18.11.1987. She denied that she was informed about the birth of the child and that despite such information, she had not even visited the parental house of the appellant Geeta. She also stated that after 2-3 days of the marriage, the appellant Geeta had told Madan Lal that she would get him killed and would be spending her remaining life as a widow. According to PW6 Smt. Phool Wati, Geeta used to repeat this time and again, twice every month, whenever there was an altercation.

13. From the above testimony it is clear that there was no love lost between PW6 Smt. Phool Wati and her daughter-in-law, Geeta. At least, from PW6 Smt. Phool Wati's side there was clear animosity between the two. This circumstance, therefore, indicates that PW6 Smt. Phool Wati could be an interested witness and her testimony has to be scrutinized with great care.

14. In her cross-examination PW6 Smt. Phool Wati further stated that she had gone to call only one relative of hers, who was not available at his house. She did not know the name of that relative. She did not have any other relative in Delhi. Even that person, whom she went to fetch, was a distant relation and was a behnoi (sister's husband). She did not even recollect the name of the sister who was married to him. She then stated that the said relative resided in the temple in B-Block. She stated that no number was allotted to that temple. She further stated that the relative was working as a pujari in that temple. However, she stated that Block B was at some distance from Vikas Puri and that it was not actually in Vikas Puri. She further stated that she did not know the name of the area where that B Block was located.

15. From the above answers elicited in cross-examination, it is apparent that PW6 Smt. Phool Wati has conjured up the story that she went to call a relative and it took her 30 minutes to return empty handed. She did not even know the name of the relative. She stated that the relative was her sister's husband but was distantly related. She did not even know the name of her sister whose husband the said relative was. She was unable to identify the place of his residence. In other words, the existence of the relative as also the fact that she had gone to call the said relative is not established.

16. She stated that when she returned to the temple, a large crowd had gathered there and Madan Lal was crying 'Maiya Ma.. She stated that at that point of time she did not see any police constable and the police reached the spot later on. At this juncture, it would be relevant to notice as to what PW8 Constable Daya Nand has to say. We must remember that PW6 Smt. Phool Wati's story is that the appellant along with Ghanshyam arrived at the temple at about 10 am. After a few minutes she had left the temple to go and call her relative and returned only after

30 minutes. That means that according to her own statement she was absent from the temple between 10 to 10:30 am. Now, let us see what PW8 Constable Daya Nand has stated in his examination-in- chief. He stated that on 28.12.1987, he was posted at Police Station Vikas Puri as a beat constable of beat No. 1. At about 10:30 am, when he reached Durga Mandir in C Block he noticed a crowd. According to him 'by that time pujari in burnt condition had been taken away to the hospital'. He further stated that Sub-Inspector Raj Singh and Constable Surinder also reached the temple. People had told them that Madan Lal was burnt. In cross-examination this witness stated that at about 10:45/ 11 am he did not see Madan Lal's mother and nobody told him that she was in the crowd. This witness denied that when he reached the temple Madan Lal was lying outside in a burnt condition. He also denied that Madan Lal was removed to the hospital in his presence. PW8 Constable Daya Nand further admitted, in his cross- examination, that he saw Madan Lal's mother after about one hour of his reaching the spot and in his presence she had no talks with her son Madan Lal. He also admitted that Madan Lal had been taken out of the room by breaking open the door of the room. According to him this fact was disclosed to him by the persons standing there.

17. Now, comparing the testimonies of PW6 Smt. Phool Wati and PW8 Constable Daya Nand, it is apparent that there are clear contradictions. According to PW6 Smt. Phool Wati, when she returned at about 10:30 am, she found that a large number of people had gathered at the temple and also found Madan Lal in a burnt condition lying outside his room. On the other hand, PW8 Constable Daya Nand has stated that he arrived at the temple around 10:30 am. He found a gathering but by that time Madan Lal had already been removed to DDU Hospital. He also stated that he did not see Madan Lal's mother at the temple till after one hour of his arrival. That would mean that PW8 Daya Nand did not notice or meet Madan Lal's mother PW6 Smt. Phool Wati till 11:30 am. Again, PW6 Smt. Phool Wati stated that when she reached the temple at about 10:30 am, she did not see any police constable there and that the police reached the spot later on. But, according to PW8 Constable Daya Nand he was at the spot at 10:30 am. So, on the one hand, we have PW6 Smt. Phool Wati, who says that she was at the temple at 10:30 am but there was no police man, on the other we have PW8 Constable Daya Nand who says that he was at the spot at 10:30 am but PW6 Smt. Phool

Wati was not there. If PW8 Constable Daya Nand is to be believed, then it is obvious that Madan Lal had already been removed to the hospital before Smt. Phool Wati arrived at the temple. Consequently, there is no possibility of PW6 Smt. Phool Wati having had any conversation with her son Madan Lal and, therefore, her statement that Madan Lal told her that Ghanshyam caught his legs while Geeta had caught his hands and kerosene oil was sprinkled by Dropti, who also put him ablaze, cannot be believed.

18. There are other problems with the testimony of PW6. She stated that her husband Lal Chand had left for Hathras in the morning of 28.12.987. In other words, Lal Chand was not present in Delhi at the time of the occurrence or at any point subsequent thereto. This is so because no witness has said that Lal Chand had left for Hathras in the morning but had returned in the meanwhile. There is no reference to the return of Lal Chand on that date after his alleged departure in the morning. In this backdrop, let us now examine what PW17 Sub- Inspector Raj Singh has stated. We may recall that PW17 Sub- Inspector Raj Singh, who is the Investigating Officer, went to the spot on receipt of DD No. 9-A (Exhibit PW3/A) along with Constable Surinder. There they found PW8 Constable Daya Nand to be present and he had informed them that the injured had been removed to DDU Hospital. In cross-examination, PW17 Sub-Inspector Raj Singh stated that on reaching the hospital, he had come to know that Madan Lal had been admitted in the hospital by Som Dutt. Incidentally, Som Dutt is appellant Geeta.s brother. PW17 further stated that he asked Som Dutt to give his statement but he refused. More importantly, PW17 Sub- Inspector Raj Singh stated that 'similarly, Lal Chand also refused to give his statement'. This clearly implies that Lal Chand was present in the hospital when PW17 Sub-Inspector Raj Singh arrived there. The presence of Lal Chand in the hospital means that he was present in Delhi and, therefore, negates the statement made by PW6 Smt. Phool Wati that he had left for Hathras. PW17 Sub-Inspector Raj Singh categorically stated that:-

I reached DDU Hospital at about 12-15 pm. In the hospital, I met Som Dutt and Lal Chand, brother of Geeta accused and father of Madan Lal, respectively. I found them outside the hospital, but within the premises of the hospital. I did not see mother of Madan Lal Phool Wati in the hospital so long as I remained there. I

remained in the hospital till 1-10 pm.

It is thus clear from the testimony of PW17 Sub-Inspector Raj Singh that Lal Chand was present in the hospital at about 12:15 pm. This completely contradicts the story of PW6 Smt. Phool Wati, who stated that her husband Lal Chand had left for Hathras in the morning.

19. The absence / presence of Lal Chand in Delhi is a key factor in the prosecution case, which is built up entirely on the testimony of PW6 Smt. Phool Wati and Exhibit PW10/A. Insofar as PW6 Smt. Phool Wati is concerned, the very reason for her allegedly leaving the temple in search of some relative for the purposes of discussion with the appellants and Ghanshyam, was the absence of her husband Lal Chand who, according to PW6 Smt. Phool Wati, had gone away to Hathras. The presence of Lal Chand in Delhi, as indicated by the testimony of PW17 Sub-Inspector Raj Singh, knocks out the foundation of PW6 Smt. Phool Wati's story completely.

20. There are several other contradictions in the testimony of PW6 Smt. Phool Wati when compared to the other evidence on record. For example, there is a contradiction with regard to her statement being recorded. In her cross-examination she stated that at the time her statement was recorded by the Investigating Officer, the material exhibits had also been taken into possession. More importantly, she stated that her statement had been recorded and the material exhibits had been taken into possession by the Investigating Officer by 11 am and that the proceedings had completed by that time. On the other hand, PW 17 Sub-Inspector Raj Singh, who is the Investigating Officer, stated that when he arrived at the scene for the first time he stayed there for half an hour but did not record the statement of any of the persons present there. He categorically stated:-

I did not record statement of Phool Wati at that time.

21. From the above discussion, it becomes absolutely clear that no reliance whatsoever can be placed on the testimony of PW6 Smt. Phool Wati. In any event, the entire story appears to be farfetched. If her version is to be believed, then one would have to imagine that the appellants Geeta and Dropti and Ghanshyam left

their residence and came to the room in which Madan Lal was residing in the temple with the object of committing his murder. They came unarmed without any murder weapon. They did not know that Madan Lal's father or any other male members would not be present when they would arrive at the temple. They did not know how they would commit the murder. Would it be by stabbing? Would it be by strangulation? Would it be by burning? And, if it was to be by burning Madan Lal, how could they be sure that they would find any inflammable substance, such as kerosene oil, available at the scene? How could they be sure that there would be no other persons in the temple, particularly when it was 10 O. clock in the morning? All these questions arise in our minds and indicate the unlikeliness of the story conjured up by PW6 Smt. Phool Wati.

22. We now come to the second and more important aspect of the case and that is consideration of the so-called dying declaration Exhibit PW10/A. The top portion which comprises of the portion marked B to B and C to C is as under:-

B Madan Lal S/o Lal Chand Master

R/o C Lal Chand Master Mohalla Sri Nagar B

Hathras Zila Aligarh, U.P.C.

It was contended by the learned Counsel for the appellant that the statement was actually that of Lal Chand, which only comprises of the portion marked C to C which indicated 'Lal Chand Master Mohalla Sri Nagar Hathras Zila Aligarh, U. P'. He submitted that the top portion:- 'Madan Lal S/o Lal Chand Master R/o' was added subsequently and the statement given by Lal Chand Master was converted into one as having been given by Madan Lal.

23. PW10 Dr Ashwani Gupta stated that the statement Exhibit PW10/A was recorded by PW11 Constable Suresh Kumar in his presence and that of Dr Ravi Mahajan. He also stated that he attested the statement Exhibit PW10/A by appending his signatures thereupon. According to him, the statement Exhibit PW10/A was recorded at 12:15 pm on 28.12.1987 and whatever Madan Lal had stated to the duty constable, was recorded by him in his presence. In cross-

examination, PW10 Dr Ashwani Gupta explained that the portion marked A to A, which is the body of the statement Exhibit PW10/A, was recorded initially and that the portion marked B to B was recorded later on. He, however, denied the suggestion that the portion marked C to C of Exhibit PW10/A was recorded initially and that the words 'Madan Lal son of Lal Chand Master R/o' were recorded afterwards. He, of course, admitted that neither the signature nor the thumb mark of Madan Lal appears on Exhibit PW10/A. The testimony of PW13 Dr Ravi Mahajan is to the same effect, the only difference being that this witness, i.e., PW13 Dr Ravi Mahajan, stated that the statement Exhibit PW10/A started from the point B to B and continued till its conclusion. The learned Counsel for the appellants had made an attempt to raise serious doubts with regard to Exhibit PW10/A as being the statement of the deceased Madan Lal. As pointed out earlier, his contention was that the portion marked B to B and C to C were written after the portion marked A to A. It was his contention that it was actually the statement of Lal Chand, which had been recorded by the duty constable PW11 Suresh Kumar, and later on it was shown to have been made by the deceased Madan Lal by adding the portions marked B to B and C to C. If we look at the portion marked A to A, it does not appear to have been made by Lal Chand at all because there is clear reference to the mother-in-law of the maker of the statement. The mother-in-law being Dropti. There is also a clear reference to the wife of the maker of the statement and the name of the wife has been given as Geeta. It is obvious that the maker of the statement purported to be Madan Lal and could by no stretch of imagination be considered to be his father Lal Chand. But that does not in any manner advance the prosecution case. It only enables us to repel the argument of the learned Counsel for the appellants that the entire statement was that of Lal Chand Master and subsequently it was converted into a statement alleged to have been made by the deceased Madan Lal.

24. The law with regard to dying declarations is quite well settled. It is an established principle that a conviction can be based solely upon a dying declaration. But, before this can be done, the dying declaration must be established to be authentic and correct as well as truthful. Insofar as the authenticity and correctness of the dying declaration is concerned, the prosecution has to establish that the dying declaration in question was, in fact, made by the

person who lost his life. Even where it can be established that the statement, which purports to be the dying declaration of the deceased, was in fact made by the deceased, the prosecution has also to establish that the statement was truthful. Of course, it is normally presumed that a dying person in his last moments does not utter any falsehood. But that does not rule out the possibility that in some cases this may not be the position. There may be instances where out of hate or spite a person may falsely implicate his enemy, even in his dying moments. It is also quite possible that the person making the dying declaration is under the influence or control of someone else and out of fear or other reasons, he may make a false statement prior to his death. There is also a possibility that a person, in order to save his honour and the honour of his family, who would survive him, may make statements which are not entirely correct or truthful. There is also a possibility that the person making the dying declaration is under some medication or because of his precarious condition is suffering from hallucinations and, therefore, the statements he makes at that point of time may be far removed from the truth. It is only when all these circumstances are ruled out and the court is of the belief and opinion that what the dying declaration states is truthful, can a conviction be based upon it without seeking corroboration. A dying declaration must always pass the scrutiny by the Court because, after all, it is merely hearsay evidence and it is admissible and relevant only because the person who made the declaration is no longer alive and cannot be produced before Court for testifying. At the same time, the courts need to exercise caution in relying upon dying declarations because the maker of the statement is not before it and nor does the defence have an opportunity to cross-examine him. Thus, while there is no rule of law which suggests that a conviction cannot be based solely upon a dying declaration, the courts, as a rule of prudence, look for other corroborative material. If the dying declaration is of such a stellar and unimpeachable quality that it fully inspires confidence of the Court, there is nothing to prevent the Court from relying solely on such a dying declaration and on basing a conviction thereupon. But, the emphasis must be on the quality of the dying declaration. If the dying declaration is suspicious or suffers from some infirmity, then it should not be acted upon without any corroborative evidence.

25. In *Khushal Rao v. State of Bombay* : AIR 1958 SC 22, the Supreme Court summarized the principles with regard to dying declarations as under:-

16...(1) that it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated; (2) that each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made; (3) that it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other pieces of evidence; (4) that a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence; (5) that a dying declaration which has been recorded by a competent Magistrate in the proper manner, that is to say, in the form of questions and answers, and, as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character, and (6) that in order to test the reliability of a dying declaration, the court has to keep in view, the circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the facts stated, had not been impaired at the time he was making the statement, by circumstances beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties.

After referring to various decisions of the Supreme Court, which had been rendered after the decision in the case of *Khushal Rao* (supra), the Supreme Court in *Paniben v. State of Gujarat* : (1992) 2 SCC 474 summed up the principles as under:-

18. (i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration.

(ii) If the court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration.

(iii) This Court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had opportunity to observe and identify the assailants and was in a fit state to make the declaration.

(iv) Where dying declaration is suspicious it should not be acted upon without corroborative evidence.

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected.

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction.

(vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected.

(viii) Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth.

(ix) Normally the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration looks up to the medical opinion. But where the eyewitness has said that the deceased was in a fit and conscious state to make this dying declaration, the medical opinion cannot prevail.

(x) Where the prosecution version differs from the versions as given in the dying declaration, the said declaration cannot be acted upon.

The same position has been reiterated in subsequent decisions of the Supreme Court including that of *Vikas v. State of Maharashtra* : (2008) 2 SCC 516.

26. In the present case, we have to examine Exhibit PW10/A in the light of the above principles. For this purpose, let us first assume that Exhibit PW10/A was truthfully recorded and is the authentic and genuine statement of the deceased

Madan Lal. Even if we assume this, we have to go a step further before a conviction can be based upon Exhibit PW10/A. The further step is to satisfy ourselves as to whether the statement is truthful. As pointed out in Khushal Rao (supra), in order to base the reliability on a dying declaration, the Court has to keep in view several circumstances such as the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night. This clearly indicates that in order to ascertain the truthfulness of a dying declaration the Court may look at surrounding circumstances.

27. In the present case, we find that the prosecution version stands on two pillars. One pillar is the testimony of PW6 Smt. Phool Wati and the other pillar is that of Exhibit PW10/A. If the testimony of PW6 Smt. Phool Wati is removed from the purview, the edifice of the prosecution case would come crashing down inasmuch as it cannot survive on Exhibit PW10/A alone. This will become clear by recalling that it is as per the testimony of PW6 Smt. Phool Wati that the presence of the appellants Geeta and Dropti are sought to be explained. It is an admitted position that Geeta was not residing with her husband Madan Lal in his room in the said temple for some time. It is also admitted that she had stopped residing with her husband since the day of Bhaiya Duj. If that be the case, her presence at the room in the temple would not be natural or normal. The presence of her mother Dropti and that of Ghanshyam would also be quite unnatural. It is another matter that the reasons for Geeta leaving her matrimonial home are different, but, both, the prosecution as well as the defence, are agreed on one point and that is that Geeta was not residing in her matrimonial home for some time prior to the incident. The explanation which is sought to be provided by PW6 Smt. Phool Wati is that the two appellants and Ghanshyam had come to the room in the temple to discuss about Geeta, meaning thereby, that the topic of discussion would be with regard to the relations between Madan Lal and Geeta. It is in this backdrop that the Exhibit PW10/A becomes natural because it must be remembered that Madan Lal received the burn injuries in his home and not in the paternal home of his wife Geeta. As per Exhibit PW10/A, Madan Lal's mother-in-law poured oil over him and set him on fire. Ghanshyam is said to have caught hold of Madan Lal while his mother-in-law Dropti poured oil on him and set him ablaze. It is also stated that his wife also assisted in setting him on fire. According to him, she also stated that after

killing him she would become a widow and would take up some job. This statement, out of the blue, would be quite unbelievable because neither his wife nor his mother-in-law nor Ghanshyam resided with him or nearby. There was no occasion for any of them to have been present at the temple at around 10:30 am. What we are saying is that the statement Exhibit PW10/A cannot by itself support the prosecution case unless and until it is buttressed by the testimony of PW6 Smt. Phool Wati which seeks to explain the circumstance and presence of the accused. We have already held that no reliance whatsoever can be placed on the testimony of PW6. Consequently, the prosecution case cannot be made out solely on the basis of Exhibit PW10/A, even assuming it to be the statement of the deceased Madan Lal, truthfully recorded.

28. Exhibit PW10/A does not state as to how and why the accused were present in his house. It may be argued that he had very little time and, therefore, there was no possibility of giving details. Yet, the statement Exhibit PW10/A goes into great detail to explain as to who Ghanshyam Koshiwala was and where he resided.

29. We also note that in the statement Exhibit PW10/A the time '10. has been altered to read '10-1/2. by subsequently adding '1/2.. We do not know at whose instance this was done. It is obvious that if the incident occurred at 10:30 am, then the testimony of PW8 Constable Daya Nand would contradict it. PW8 Constable Daya Nand, as noted above, stated that he arrived at the scene at about 10:30 am and by that time a crowd had gathered and the injured Madan Lal had already been removed to hospital. So, this factor also adds some element of doubt with regard to the truthfulness of the statement as recorded in Exhibit PW10/A. Another aspect which goes to indicate that the portion marked A to A in Exhibit PW10/A are not the exact words as spoken by the deceased Madan Lal, is the expression 'Mai Pata Bala Par Rehta Hoo (I live in the abovementioned address)'. Since the deceased Madan Lal was not writing the statement in his own hand and he did not know as to what was written above in portion marked B to B and C to C, he could not have said that he resided at the abovementioned address. He could have said that he resides at such and such address and that would have been the natural statement on his part. If we assume that these words were altered by the scribe in order to save him from writing the address all over again, then, can we say with

certainty that none of the other words contained in the statement were not altered by the scribe PW11 Suresh Kumar

30. It has come on record vide Exhibit PW13/A, which is the MLC drawn up at DDU Hospital, that Madan Lal was brought to the hospital in an injured condition at 12:10 pm. Exhibit PW10/A indicates that it was recorded at 12:15 pm. In other words, if the timings given above are to be believed, within five minutes of the arrival of Madan Lal in an injured condition having about 90% burns, the patient was examined by the doctors, given treatment, the duty constable was called, PW11 Suresh Kumar sat along with the injured Madan Lal and wrote down the statement, as indicated in Exhibit PW10/A. All, within five minutes. Both the doctors, PW10 Dr Ashwani Gupta and PW13 Dr Ravi Mahajan stated that the moment a patient is brought to the hospital, the immediate concern for the doctors is to check up the patient and provide treatment and it is only thereafter that the formalities of drawing up the MLC etc. are done. If that be the case, the doubt raised by the learned Counsel for the appellants, that it was not possible for Exhibit PW10/A to have been recorded and completed by 12:15 pm as recorded thereupon, within five minutes of the arrival of Madan Lal in the hospital doesn't get removed. It is also of significance to note that the said doctors indicated that pathedine was administered upon the patient. There was, of course, a suggestion that, because of this, Madan Lal may not have been in a fit state of mind inasmuch as pathedine was not only a pain killer but also a strong sedative with side effects. This argument of the learned Counsel for the appellants does not cut much ice inasmuch as the statement Exhibit PW10/A is said to have been recorded within five minutes of the arrival of Madan Lal in the hospital. Thus, if pathedine was administered upon Madan Lal within those five minutes, it was not enough time for it to have taken effect. It is also recorded in the MLC Exhibit PW13/A that he was unfit to make a statement at 12:45 pm. So, the only critical period of time is the five-minute duration between 12:10 and 12:15 pm during which the said statement Exhibit PW10/A is said to have been made. Considering the sequence of events which take place when an injured patient is brought to hospital, the possibility cannot be ruled out that there was not enough time for having recorded the statement Exhibit PW10/A within those five minutes.

31. For all these reasons, we are unable to regard Exhibit PW10/A as a dying declaration, if at all, of such a stellar and unimpeachable quality that a conviction can solely be based upon it without requiring any corroboration. And, when we look for corroboration, there is none. This is because the testimony of PW6 Smt. Phool Wati is highly unreliable, as already indicated above.

32. There is another aspect of the matter which needs to be highlighted. In answer to question No. 13 put to the appellant Geeta in the course of her examination under Section 313 Cr. P.C, she stated that her marriage with Madan Lal took place on 13.11.1986 and thereafter they went to Hathras and lived there with her parents for a month. She stated that soon after their marriage, her mother-in-law and other family members started demanding more dowry articles like colour TV, fridge, washing machine, scooter and gold ornaments and even cash of Rs 10,000/-. She stated that she was unable to meet the demands. After a month of their marriage, they returned to Delhi where her husband Madan Lal was employed as a pujari in Durga Mandir, Vikas Puri and they started living together in his room in the temple. After a few days, Phool Wati also joined them. Om Prakash and Dinesh Kumar, who are the brothers of Madan Lal, also used to live with Madan Lal. She stated that her father-in-law, who was a teacher at Hathras, used to visit, on occasion. She further stated that sometime in August-September, 1987, her husband Madan Lal had been removed from the post of Pujari of Durga Temple by Vikaspuri Sanathan Dharam Sabha, which managed that temple and he was being pressed by that Sabha to vacate that room immediately. She stated that her husband had very little income and his brothers Om Prakash and Dinesh had no income. Consequently, her husband had to support not only himself as well as his wife Geeta but also his mother and his two brothers. She stated that it was not her, but Madan Lal who used to fight with his mother and his brothers for economic and financial reasons. According to her, after he was removed from the post of Pujari, he became very frustrated and as he had been asked to vacate the room, he was very disturbed, disgusted and worried. She stated that his mother and two brothers used to instigate him against her and wanted that either she should bring cash and other articles from her parents or otherwise she should be turned out of that room. She further stated that on the day of Bhai Duj in 1987, her younger brother Khushi Ram and younger sister Rukmani Rani came to meet her but Om Prakash,

Dinesh, Smt. Phool Wati and her husband Madan Lal misbehaved with them and even beat them and forced them to go back. When she protested, she was also beaten by them. She stated that at that point she was pregnant. She left her matrimonial home along with her brother and sister and went to her paternal house at Shastri Nagar, New Delhi and continued to stay there till the time of her arrest in the afternoon of 28.12.1987. She stated that neither her husband nor any member of his family ever visited her during the said period and even when she gave birth to a male child on 18.11.1987, although they had been informed, neither Madan Lal nor his mother came to see her or her son. She further stated that she and her mother had been falsely implicated in this case at the instance of Smt. Phool Wati, Lal Chand and others and that they had not even gone to Durga Mandir, Vikas Puri at any time on 28.12.1987.

33. This is her explanation of the sequence of events and her relationship with her husband Madan Lal. It suggests an alternative theory. The theory being that Madan Lal had become so disturbed and frustrated that he committed suicide. In order to implicate the appellants Geeta and her mother Dropti, the whole story against them was concocted by PW6 Smt. Phool Wati. Even the statement Exhibit PW10/A was at the instance of Madan Lal's father Lal Chand.

34. We may also note that the defence also led evidence and produced two witnesses. The first is DW1 Jagdish Vashisth, who is the record clerk of DDU Hospital, who merely brought the casualty / emergency register pertaining to the date 28.12.1987 of DDU Hospital, Hari Nagar. He indicated that the time of arrival and departure of the patient from casualty was not recorded in the said register. DW2 Som Dutt is an important witness. He is appellant Geeta's brother. Even as per the prosecution case it is he (Som Dutt) who brought Madan Lal to the DDU Hospital in an injured condition. In his testimony DW2 Som Dutt stated that Geeta was his sister and Dropti was his mother. He stated that while he was on his bicycle near the hospital, he saw a taxi coming in the opposite direction. One Narender, who was sitting in the front seat of the taxi, told him to come inside the hospital as Madan Lal had got burnt. According to DW2 this incident was at about 12:20 pm. He stated that he followed the taxi and parked his bicycle at the stand and went to the taxi. There, he saw Madan Lal lying in a burnt condition, on the

back seat of the taxi. Thereafter, he, Narender and two other persons, who were with him, lifted Madan Lal and took him inside the hospital. The doctor inside the hospital enquired from him about the name and age of Madan Lal which was recorded by the doctor in a register. He stated that then a police constable came and recorded his name, parentage and address in a register. He stated that the constable enquired from him as to how Madan got burnt and he replied that he did not know anything about it. This witness also stated that in the meanwhile Sub-Inspector Raj Singh also arrived. He also saw Madan Lal's father Lal Chand arriving in the hospital compound. He stated that he told the constable that Lal Chand was the father of Madan Lal. In the meanwhile, Sub-Inspector Raj Singh also arrived. He is said to have asked DW2 Som Dutt as to what happened and he replied that he had no knowledge. Sub-Inspector Raj Singh then enquired from Lal Chand but, Lal Chand took Sub-Inspector Raj Singh and the police constable to one corner at a distance of 10-12 paces from him and he could not hear what transpired between them. DW2 further stated that he tried to talk to Madan Lal but he was not in a position to speak. Thereafter, he left the hospital and went to his father in Maya Puri but could not find him there. He went back to his house, which he reached at about 2:30 pm where his younger brother and sister were crying. On asking them, they told him that the police had apprehended Geeta and their mother Dropti and taken them along with them. In cross-examination also this witness stated that he had met Madan Lal's father in the compound of the hospital at about 12:45 noon. He also denied the suggestion that Madan was in a position to speak.

35. The testimony of DW2 Som Dutt, whose presence in the hospital is admitted, also casts some doubt on the prosecution case. First of all, as per his testimony, Madan Lal was brought to the hospital by him around 12:30 pm. This would mean that the statement Exhibit PW10/A, which was purportedly recorded at 12:15 pm, could not have been so recorded. Secondly, DW2 Som Dutt also stated that he saw and met Madan Lal's father Lal Chand in the hospital, who also spoke with PW17 Sub-Inspector Raj Singh. This fact also indicates that contrary to the prosecution case, founded upon PW6 Smt. Phool Wati's testimony, Madan Lal's father, Lal Chand, was throughout in Delhi on that date and had not gone to Hathras at all. Thirdly, as per DW2 Som Dutt, he tried to speak with Madan Lal but

he (Madan Lal) was not in a position to do so. In any event, shortly thereafter, at 12:45 pm, he was declared unfit for making any statement. These are the circumstances which also cast a shadow of doubt on the so-called dying declaration Exhibit PW10/A.

36. Considering all these factors, we feel that apart from the statement Exhibit PW10/A, there is no evidence beyond the realm of doubt to suggest that the appellants were guilty of the aforesaid crime. And, Exhibit PW10/A does not fall in the category of unimpeachable dying declarations which would not require any corroboration. Thus, Exhibit PW10/A cannot be made the sole basis for convicting the appellants. The prosecution has not been able to establish its case beyond reasonable doubt and, therefore, the appellants would be entitled to an order of acquittal.

37. Before parting with this case, we may also point out another aspect which pertains only to appellant Geeta. We may recall that appellant Geeta was convicted under Section 302 read with Section 109 IPC. This must be considered in the backdrop of the fact that originally she had been charged under Section 302/34 IPC. Thus, it is apparent that her conviction is different from what she was charged with. Normally, when a person is charged with a higher offence and convicted for a lesser offence, no grievance can be made in respect thereof, particularly in view of Section 222 Cr. P.C. However, where the offence for which a person is convicted is a substantive offence and is different from the species of the other offence, the situation is different. Section 109 IPC has been regarded as an offence by itself by various decisions of the Supreme Court. In such an eventuality, since no charge was framed under Section 109 IPC, the appellant Geeta ought not to have been convicted under Section 302 read with Section 109 IPC. If Section 109 IPC is removed, insofar the appellant Geeta is concerned, conviction under Section 302 IPC could not be possible because even as per the statement Exhibit PW10/A, no specific role has been ascribed to the appellant Geeta and the only allegation is that she also assisted her mother Dropti and Ghanshyam. It is clear that even if the statement Exhibit PW10/A were to be regarded as the authentic and truthful dying declaration of Madan Lal, the appellant Geeta cannot be convicted under Section 302 IPC simpliciter. She could not have been convicted

under Section 302 IPC read with Section 109 IPC because no charge under Section 109 had been framed against her. This proposition is clear from the following decisions of the Supreme Court:-

(1) Kishori Lal v. State of M.P. : (2007) 10 SCC 797;

(2) Wakil Yadav and Anr. v. State of Bihar : (2000) 10 SCC 500; and

(3) Joseph Kurian Philip Jose v. State of Kerala : (1994) 6 SCC 535.

It is, therefore, clear that in any event, insofar as the appellant Geeta is concerned in spite of the statement Exhibit PW10/A, she could not have been convicted under Section 302 read with Section 109 IPC.

38. The result of this discussion is that the appellants are acquitted of all charges against them. The impugned judgment and order on sentence are set aside. Since the appellants are on bail, their bail bonds stand cancelled and the sureties stand discharged. The appeal is allowed.