

Pratima Devi and ors Vs. State

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SooperKanoon Citation : sooperkanoon.com/911962

Court : Delhi

Decided On : Mar-18-2011

Judge : Anil Kumar; Suresh Kait, Jj.

Acts : Indian Penal Code (IPC) - Sections 302, 34; Code of Criminal Procedure (CrPC) (Cr.P.C) - Section 313; Evidence Act - Section 32

Appeal No. : CRL.APPEAL No.817/2001; CRL.APPEAL No.18/2002

Appellant : Pratima Devi and ors

Respondent : State

Advocate for Def. : Mr.Lovkesh Sawhney, Adv.

Advocate for Pet/Ap. : Mr.M.L.Yadav, Adv.

Judgement :

1. Whether the Reporters of local papers may be allowed to see the judgment?
Yes

2. To be referred to the Reporter or not? Yes

3. Whether the judgment should be reported in the Digest? Yes

1. By judgment dated 28.03.2001, the trial court has convicted all the 5 accused persons in the case FIR No.216/1999 PS Lodhi Colony, New Delhi, under Section

302/34 IPC on the charge that all the accused persons in furtherance of their common intentions, had burnt deceased Sonu by pouring kerosene oil on him on 07.06.1999 at about 11:00 PM in Jhuggi No.181, A block, Rajiv Gandhi Camp within the jurisdiction of PS Lodhi Colony, New Delhi.

2. Vide order dated 30.03.2001 all the accused persons were punished with life imprisonment, and payment of fine of Rs 10/- each and in default to undergo simple imprisonment till rising of the Court. The benefit of Section 428 Cr.P.C. was also given to them.

3. Appellants Pratima Devi, Basanti and Kavita have jointly challenged the aforesaid

JUDGMENT / ORDER

by filing Crl.Appeal No.817/2001 and appellants Vir Singh and Anil Kumar have filed Crl.Appeal No.18/2002 challenging the same.

4. The facts in brief are that on 07.06.1999 Sonu (deceased) had gone to his in-laws house to fetch his wife Neetu @ Lali (DW-3) at A- 181, Rajiv Gandhi Camp, Lodhi Colony, New Delhi. Vir Singh, father-in-law of deceased and Anil Kumar @ Pappu brother-in-law of the deceased were drunk at that time. An altercation took place between the deceased, his father-in-law and brother-in-law at around 11:00 PM, which ultimately escalated into a quarrel. Appellants Pratima, Basanti and Kavita allegedly beat Sonu. Though he received beatings, he insisted on going home with Neetu. He was allegedly caught hold by Pratima, Basanti and Kavita. Sister-in-law of Sonu namely Jyoti fled from that place. Appellant Vir Singh and Anil then poured kerosene oil on Sonu, and Vir Singh lit a bidi, and Anil lit a match stick and set Sonu ablaze.

5. Somehow, the deceased Sonu came out of the Jhuggi of Vir Singh and succeeded in running from that place. However, he fell down near the jhuggi of a neighbour. Number of persons gathered there and water was sprinkled on Sonu to douse the fire. Sonu was removed to the hospital by his sister-in-law Jyoti, who had earlier fled, and he was admitted at 12:30 AM on 08.06.1999.

6. The deceased Sonu was medico legally examined by Dr.Rajinder Kumar PW-19 vide MLC Ex.PW-19/1. Since Abulash, a neighbour had also sustained burn injuries was also examined vide MLC Ex.PW-19/2.

7. At about 11:45 PM someone made a telephone call at No.100 and informed the PCR about the incident. The same information was transmitted through wireless operator to police station Lodhi Colony, New Delhi and was recorded in DD No.75-B (Ex.PW-8/A). The said DD No.75-B was handed over for investigation to Rajpal PW-8 HC. He along with Ct. Satish Chand (PW-14) went to the place of occurrence. Since, the injured had already been removed to the hospital by the PCR van, they went to Safdarjung Hospital. HC Rajpal PW-8 moved an application Ex.PW-8/B to ascertain as to whether Sonu was fit for making a statement. Dr.Anil Khurana (PW- 23) declared deceased Sonu fit for making a statement at 1:45 AM (Ex.PW-23/1). HC Rajpal (PW-8) recorded the statement of the deceased vide Ex. PW-8/C and sent it to the police station for lodging the FIR and the same was registered bearing No.216/1999 under Section 302/34 IPC, as Ex.PW-2/1.

8. Realizing the gravity of the offence, the SHO concerned, directed (PW-3) SI Hulash Giri to get the available Magistrate for recording the statement of burnt Sonu. Ms.Poonam Chaudhary (PW- 12), learned MM, New Delhi after obtaining the fitness certificate Ex.PW-19/4 from the doctor, recorded the statement Ex.PW-12/A of Sonu. Her proceedings are Ex.PW-12/B.

9. Deceased Sonu though fought for his survival but he breathed his last on 12.06.1999 at 7:15 AM. The information about the death of Sonu was transmitted to PS vide DD No.87-B, copy of which is Ex.PW-22/1.

10. SI R.D.Pandey (PW-18) had collected the burnt pieces of polythene sheets and the burnt pieces of newspapers Ex.P/2. A plastic can, Ex.P/1 containing few drops of kerosene oil, was also recovered from jhuggi No. A-181 of accused Vir Singh. The burnt pieces of plastic sheets were further recovered from jhuggi No.A-180, A-181, A-447, A-260 & A-153.

11. SI R.D.Pandey (PW-18) prepared a rough site plan Ex.PW-8/1 and he also got a scaled site plan Ex.PW-13/A prepared through Inspector Devender Singh (PW-

13).

12. On 08.06.1999, appellants Pratima, Basanti and Vir Singh were arrested vide their personal search memos Ex.PW-6/B to PW- 6/D respectively. The place of occurrence was photographed vide Ex.PW-7/1 to PW-7/8. Inquest proceedings were completed vide Ex.PW-18/5. Dr.Alexander (PW-5) had conducted the post-mortem Ex.PW-5/1.

13. On 23.06.1999, appellant Kavita was also arrested and subsequently on 22.07.1999 appellant Anil was arrested.

14. To prove the guilt of the accused persons the prosecution examined as many as 23 witnesses. The statements of all the accused persons were recorded under Section 313 Cr.P.C. They had produced three DWs in their defence.

15. While making statement under Section 313 Cr.P.C. appellant Vir Singh put his defence by taking the plea of alibi, stating that at the time of occurrence, he was away with his employer Dinesh Arya, in Pant Nagar. The defence taken by accused Pratima Devi was that she was in a sound sleep at that time therefore, she does not know as to what had happened. She further stated that she was sleeping with Neetu (DW-3) in the same jhuggi. She even stated that deceased Sonu did not come to meet them. Accused Anil Kumar has also taken the plea of alibi by stating that he had gone to his employer in Lajpat Nagar and thereafter, he immediately went to sleep after coming home. He further stated that after about two months, he was arrested. The defence of Basanti was that she was present at her jhuggi No.A-183. Therefore, she was not present at the place of occurrence and that she had nothing to do with the incident. Accused Kavita had also claimed the plea of alibi stating that she was in Khureji and was not near the place of the alleged occurrence.

16. The present case rests on the three dying declarations, as observed by the trial Judge. First recorded by Dr.Rajender Kumar PW-19 which is as under:-

"The alleged history of burn injuries when all members of patients in-laws family poured kerosene oil on him to set him on fire resulting in burn injuries."

17. The time of the burning of deceased was allegedly 10:00 PM on 07.06.1999. While the time of admission of the deceased was 12.30 AM on 08.06.1999. In the MLC, the nature of injuries was opined to be 95% fresh burns. On perusal of the MLC it transpires that deceased Sonu was brought by her sister-in-law Jyoti. Dr.Rajender Kumar (PW-19) has proved the MLC as Ex.PW-19/1.

18. Second dying declaration of deceased Sonu was recorded by HC Rajpal Singh (PW-8) and the left thumb impression of the deceased Sonu was also obtained on the said dying declaration. The English translated version of the same is as under:- "Statement of Sonu S/o Mahim Chand r/o H.No.20/135, Trilokpuri, Delhi, aged 20 years.

On 07.06.1999, at about 11:00 PM he came to his in-laws house at A-Block, Rajiv Gandhi Camp and then he was involved in some altercation with his father-in-law Vir Singh on fetching his wife Neetu @ Lali and further stated that his brother-in-law Pappu, who was in drunken condition started quarrelling with him and his brother-in-law said that they will not send Lali during the night time. On this issue, hot discussion took place and his brother- in-law Pappu and his father-in-law Vir Singh poured kerosene oil on him from the plastic can and his mother-in-law and sister-in-law Kavita caught hold from back and his brother-in-law Pappu lit fire on him by match stick and at the end he stated that legal action be taken against all the accused persons."

19. The aforesaid statement was attested by HC Rajpal PW-8 and the same is proved by HC Rajpal as Ex.PW-8/C.

20. The third dying declaration was recorded by learned MM, Ms.Poonam Chaudhary (PW-12). After taking the fitness certificate of Sonu, she recorded the statement of deceased Sonu, which is in question-answer form. The same is as under:-

"Q- How did you get burnt?

A- My wife Neetu Charan had called me at her parents house where she was already there. I was talking to my wife. My father-in-law Vir Singh was in a drunken

condition and brother-in-law Pappu was also drunken. In the meantime, my mother-in-law and my elder sister-in-law Basanti and Kavita had beaten me up. Thereafter, I said that leave me and let me go to my house. Thereafter, my mother-in-law, sister-in-law Basanti and Kavita caught hold of me. My sister-in-law Jyoti ran away and my father-in-law Vir Singh and Pappu poured kerosene oil on me from a plastic can. I tried to free myself from their clutches but could not succeed. My father-in-law Vir Singh lit bidi and my brother-in-law Pappu lit match stick on me and I started burning. I ran and fell down in neighbours jhuggi. All neighbours cried. Public persons doused the fire by putting water on me and I was made to lay down there and police was called. One of the neighbours also caught fire. I do not remember his name. Police brought me in hospital.

Q- Do you want to say something more?

A- I was married five months back. During this period a quarrel took place between me and my wife only once. I had no quarrel with my wife. I had quarreled with my in-laws once. My wife went to her house without telling me."

21. Learned MM had also certified that the statement had been given voluntarily. It had been read over to the victim and was admitted by him to be correct. Nothing has been added or subtracted therefrom. The thumb impression of Sonu/victim was taken on the statement. This statement has been proved by the learned MM as Ex.PW-12/C.

22. The Trial Court has mainly relied upon the dying declaration made by the deceased Sonu before Ld.MM (PW-12). The Trial Judge further has opined that the dying declaration was voluntary without any pressure or influence and the concerned MM has also endorsed the dying declaration recorded by her stating that she had observed that the victim/patient was conscious and voluntarily gave the statement.

23. As per the Trial Judge, apart from the dying declaration, the other prosecution witnesses have also supported the prosecution story.

24. The learned counsel for the appellants argued separately on behalf of appellant Basanti contending that, though she had been staying in the same locality, her house was not the immediate neighbour to Jhuggi No.A-181 which belongs to her father accused Vir Singh. He emphatically contended that after knowing about the incident, Basanti came over to the jhuggi of her father, however, she was not involved in committing the offence. According to him that fact can be inferred on account of inconsistencies in the various dying declarations of the deceased and the fact that on the basis of the site plans it is apparent that her jhuggi is not adjacent to the jhuggi where the deceased was allegedly burnt by other accused.

25. Learned counsel for the appellants had assailed the prosecution case on the ground that there are inconsistencies in the dying declarations; one recorded by Dr. Rajender Kumar (PW-19); one recorded by HC Rajpal (PW-8), which had been exhibited as Ex.PW-8/C and the last one recorded by Id. MM, which was exhibited as Ex.PW-12/A. He submits that there are contradictions in the statements of HC Rajpal PW-8 and Ct. Satish Kumar (PW-14). As according to him someone in the hospital with Sonu had prompted him to make the improvements in his statements. He has pointed out that there are cuttings in the statement recorded by HC Rajpal Ex.PW-8/C. It shows that either Sonu was unfit to make the statement or HC Rajpal had introduced the facts. Therefore, HC Rajpal had deposed that the doctor on duty had refused to become a witness on the ground that he had to attend the other patients however; this fact has been contradicted by Dr. Anil (PW-23).

26. It was further argued that the dying declaration recorded by Id. MM (PW-12), was not in accordance with the rules prescribed under the Punjab and Haryana High Court Rules (as applicable to Delhi High Court) that MM should have obtained the fitness certificate of the patient not only at the time of starting but also at the time of concluding the statement. The appellant Basantis name is not mentioned in the statement Ex.PW-8/C cannot be a minor inconsistency as it involves the life and liberty of one of the appellants. As per the learned counsel for the appellant, Sonu was unfit to make the statement after having sustained 95% burn injuries. If however, Sonu was fit to make the statement before HC Rajpal then, in that case there would not have been any overwriting on the MLC

regarding the age of Sonu. In MLC Ex.PW-19/1 the age of Sonu is mentioned as 20 years. If the MLC was in possession of HC Rajpal, he would not have mentioned the age of deceased Sonu as 23 years in Ex.PW-8/B. Similarly, he would not have mentioned the age of Sonu as 23 years in Ex. PW-8/C and then changed it to 20 years. As per the learned counsel, HC Rajpal had recorded the statement of Sonu when he was in casualty, however, PW-23 had stated that Sonu was in the Intensive Care Unit which is different from casualty.

27. Learned counsel for the appellants vehemently argued that MM (PW-12) should have recorded as to what was stated by deceased Sonu. He further argued that the doctor, who had declared Sonu fit for the making statement which was recorded by (PW-12) has not been examined by the prosecution and his handwriting and signature have instead been proved by the prosecution witness, Dr.Rajender (PW-19). Hence, Dr.Sahil (not examined) who had given the opinion about the fitness of Sonu, before his statement had been recorded by PW-12, should have been examined by the prosecution. In support of this submission, learned counsel has relied on Shanti Lal Vs.State of Delhi 1975 CLR 429 while stating that the prosecution has failed to prove that Sonu was fit to make the statement before the MM (PW-12).

28. Learned counsel for the appellant stated that Sonus entire body was bandaged except for his face while recording his statement as stated by (PW-12) therefore thumb impression of Sonu could not have been obtained. He further pointed out that in the post-mortem report i.e. Ex. PW-5/1 it was recorded that every part of the deceased was burnt, therefore as per his contention if every part of the body was burnt then the thumb impression could not have been taken.

29. The learned Additional Public Prosecutor has refuted the pleas and contentions raised on behalf of the appellants. He has contended that the dying declarations are admissible under Section 32 of the Evidence Act. Dying declarations have sanctity and solemnity attached to them as a dying man is not likely to tell lies or to concoct a case as to implicate innocent persons. The learned counsel urged that the dying declarations first recorded by Dr.Rajinder Kumar, and thereafter by HC Rajpal Singh (PW-8) and lastly by the MM are consistent and

inculcate the accused persons. Before the dying declarations were recorded the doctors had also certified that the deceased Sonu was fit to make the statements.

30. The learned Additional Public Prosecutor also emphasized that the MM (PW-12) had recorded the dying declarations in question and answer form after ascertaining his fitness from the doctor who had given a certificate to that effect. According to him the dying declaration recorded by the MM is true and voluntary. He also emphasized that as no one was present in the room where the dying declaration of the deceased was recorded, therefore, no one could have possibly influenced the deceased. He also contended that a dying declaration recorded by a Magistrate stands on a higher pedestal and on the basis of the categorical dying declaration that the deceased was caught hold by his mother-in-law Basanti and sisters-in-law and Kavita, kerosene was poured on him by his father-in-law Vir Singh and his brother-in-law Anil who lit a matchstick and set him ablaze; this fact can neither be doubted nor does it require any corroboration in the facts and circumstances.

31. The learned Additional Public Prosecutor has also contended that the alleged overwriting in the dying declaration of the deceased made before HC Rajpal Singh regarding the age of the deceased, would not make the dying declaration doubtful. In any case according to him this plea is trivial and does not cast any doubt about the dying declaration. It is contended that in any case the dying declaration recorded by the MM cannot be rejected in the facts and circumstances. The plea that the dying declaration was not recorded by the MM in accordance with the rules has not been established. Lastly, the plea of the counsel for the appellant that, even after conclusion of the dying declaration, the fitness of the deceased ought to have been ascertained is without any basis. This plea is not based on any rules or guidelines or any precedent. It is also contended that (PW-19) has proved the fitness certificate given by Dr.Salil Ex.PW-12/B as he was conversant with his handwriting and signatures and in the circumstances non-examination of Dr.Salil would also not cast any doubt about the fitness of the deceased when he made the dying declarations. It is submitted that neither the (PW-19) nor the MM had any prejudice and bias to falsely implicate the appellants so as to record a dying declaration contrary to what was stated by the deceased or allegedly not stated.

32. The learned Additional Public Prosecutor has also refuted the plea of the learned counsel for the appellants that the deceased could not have thumb marked the dying declaration on the ground that his entire body was bandaged. It is submitted in the statement that the entire body was bandaged does not mean and reflect that the deceased's mouth, nose, eyes and fingers were also bandaged. From the post mortem report it cannot be inferred that the thumb of the deceased was burnt to the extent that the skin had peeled off and the deceased could not have thumb marked the dying declaration. The MM was also not inimical to the appellant so as to take the thumb impression of someone else and to implicate them.

33. The marriage of the deceased with the daughter of Vir Singh and Pratima and sister of Basanti, Kavita and Anil is not disputed. The deceased had sustained burn injuries which resulted into his death is also established on record. Whether the burn injuries were accidental or were caused by the appellants or the deceased had burnt himself, as has been deposed by the deceased's wife Neetu, DW-3 has to be ascertained and adjudicated on the basis of evidence and record.

34. The MLC of the deceased, Ex.PW19/1 which was recorded by the doctor at 12.30 AM on the basis of the information divulged by the deceased himself, recorded that all the members of the in-laws of the deceased poured kerosene on him and set him on fire. The doctor had opined that the deceased had 95% fresh burns and he was brought by Jyoti, his sister-in-law. The fact about the burn injuries are also reflected from the death summary Ex.PW1/1 and the post mortem report Ex.PW5/1. The post mortem report also reveals that the death was due to septicemia caused by anti mortem thermal burn injuries. Dr.Alexander (PW-5) had deposed in his statement the post-mortem was conducted by him and the smell of kerosene was present all over the body of the deceased. Scalp hairs of the deceased were also taken and were handed over to IO. The report of CFSL Ex. PW18/6 reveals the residue of kerosene on the exhibits Ex.1/a plastic box (dabbi) containing scalp hairs of the deceased and Ex.2/a plastic can, black in colour which was seized by IO from the place of occurrence.

35. The testimony of Atiq Ahmed (PW-4) also reveals that on 7th June, 1999 at about 10 or 10:15 PM noises were heard nearby his jhuggi and the people were shouting "Aag Lug Gai- Aag Lug Gai" and he had seen that a boy named Sonu was burning and was taken to the hospital by Jyoti and another person named Gupta ji. Though this witness was declared hostile, but his testimony to some extent does corroborate the prosecution version, and hence can be relied on. Reliance for this can be placed on Gora Singh v. State, (1997) 9 SCC 338, Balram Prasad Agarwal v. State of Bihar & ors; (1991) 3 SCC 627, Khujji v. State of MP ; (1976) 1 SCC 727, Sat Paul Vs Delhi Administration holding that turning hostile of a prosecution witness does not mean that his testimony has to be treated as effaced or washed off the record all together. The Supreme Court had held that it can be accepted to the extent his version is found to be dependable, on a careful scrutiny of the entire evidence.

36. The next question for determination is whether the deceased committed suicide or got accidentally burnt or he was burnt by the appellants. Accepting the testimony of deceaseds wife Neetu that the deceased had committed suicide is not rationally possible, as no other witness had deposed that he had committed suicide. Also to none of the witnesses any suggestions were given that the deceased had committed suicide. The accused in their statements under Section 313 of the Criminal Procedure Code had also not revealed that the deceased had committed suicide. No case has been made out that the deceased got accidentally burnt. The recovery memo Ex.PW18/2 reveals the details of jhuggis which had caught fire on account of deceased running from the Jhuggi of the appellants on to the passage outside. This fact and document does not show in any manner that the deceased had committed suicide. A plastic can of kerosene was recovered from inside the Jhuggi No.A-181. In the facts and circumstances of the case it is highly improbable that the deceased knew that his wife would not be sent with him and he had pre planned to commit suicide and had brought kerosene oil in a can with him with the intention of committing suicide at the Jhuggi of his in-laws, so as to implicate all the appellants. This is also quite improbable to note the fact that the deceased would commit suicide because of the reason that his newly wedded wife (5 to 6 months) was not sent back with him. The plea that Sonu had committed suicide propounded on behalf of the appellants cannot be accepted on any

account.

37. If the deceased had not committed suicide then the burn injuries could either be accidental or inflicted by the appellants by pouring kerosene and lighting the deceased. The plea of accidental burning has not been propounded by the appellants. Moreover, whether the deceased was burnt by the appellants has to be considered on the basis of the dying declarations of the deceased.

38. This is not disputed that dying declarations are admissible under Section 32 of the Evidence Act. Great sanctity and solemnity has to be attached to the words of a dying man as he is not likely to lie or to concoct a case as to implicate innocent persons. The only requirement is that while construing a dying declaration, it has to be ascertained if the deceased had been tutored or prompted or not and whether the dying declaration was given on account of his imagination. Before relying on the dying declarations it also has to be ascertained that the deceased was in a fit state of mind and had a clear opportunity to observe and identify his assailants and that the statement, dying declaration, was made without any influence or rancor. If the dying declaration is true and voluntary, the conviction can be based on it without any further corroboration. If the dying declaration is recorded by a competent Magistrate in a proper manner i.e in the form of questions and answers and in the words of the maker of the declaration, such a declaration will be more reliable than an oral dying declaration. If there is more than one dying declaration then, the consistency in the versions of the maker in the declaration is to be regarded. One such test of the reliability of a dying declaration is that the person who recorded it must be satisfied that, the deceased was in a fit state of mind. The Supreme Court in Smt. Paniben v. State of Gujarat, AIR 1992 SC 1817 had summed up the principles regarding the dying declaration as under:-

"1. There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration.

2. If the court is satisfied that the dying declaration is true and voluntarily it can base conviction on it, without corroboration.

3. The court has to scrutinize the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination, that the deceased had an opportunity to observe and identify the assailants and was in a fit state to make the declaration.

4. Where the dying declaration is suspicious, it should not be acted upon without corroborative evidence.

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

6. A dying declaration which suffers from infirmity cannot form the basis of conviction.

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

8. 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.

9. 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 said that the deceased was in a fit and conscience state to make the dying declaration, the medical opinion cannot prevail.

10. Where the prosecution version differs from the version as given in the dying declaration, the said cannot be acted upon.

11. Where there is more than one statement in the nature of dying declaration, the one made first in point of time must be preferred. Of course, if the plurality of dying declaration could be held to be trustworthy and reliable, it has to be accepted."

39. In the present case, the first document which reveals the declaration made by the deceased was in his MLC exhibit PW19/1 which was recorded by the doctor. The deceased had revealed to the doctor that he received the burn injuries on account of all the members of his in-laws family. From the evidence produced by the prosecution it is apparent that all the in-laws had not been involved in burning

him, as Jyoti, one of his sisters-in-laws had run away during the incident and later on when the deceased was burnt she had rather helped him by removing him to the hospital with another person named Gupta ji. The first dying declaration of the deceased Sonu as is reflected from Ex PW-19/1 is as under:

"Alleged history of burn injuries when all members of patients in-laws family poured kerosene oil on him to set him on fire resulting in burn injury. The Doctor had opined that the patient was having 95% fresh burns and the patient was brought by Jyoti, sister-in-law. These very facts are mentioned in the death summary (Ex.PW-1/1). The post-mortem report Ex.PW-5/1 also describes that the burn injuries were 95%. The death was due to septicemia caused by ante-mortem thermal burn injuries."

40. The other members of his in-laws family against whom there is no evidence of burning the deceased is another sister-in-law namely Anju and brother-in-laws namely Amit and Arun. Even in the subsequent dying declarations the deceased had not named members of the in-laws family. Resultantly this dying declaration is inconsistent with the other dying declarations, i.e. the one recorded by the HC and thereafter another recorded by the MM. Therefore this dying declaration cannot be relied on to ascertain conclusively as to who were the persons who had burnt him, except the fact that neither the deceased committed suicide nor that he was burnt accidentally. As two other dying declarations were recorded giving other details, this dying declaration can only support the prosecution case to the extent that the deceased did not commit suicide nor did he get burnt accidentally.

41. Whether or not the deceased was fit to make the dying declaration is also to be ascertained. The doctor had declared the deceased fit to make the statement though he had sustained 95% burns. The opinion of the doctor cannot be ignored on the basis of the assumptions of the learned counsel for the appellant. This Court in the case Govardhan Dass v. State (NCT of Delhi) Crl.Appeal No.357/2004 and another case Gokul v. State Crl.Appeal No.228/2001 where it was held that with the advancement in medical science and the availability of life saving drugs, it is possible that patients are in a position to understand and speak till their very breath of life. Dr.Salil Kumar had declared the deceased fit for

statement, he had left the hospital and his endorsement/certificate regarding the fitness of the deceased was proved by Dr.Rajinder Kumar (PW-19) who identified the signatures and handwriting of Dr.Salil Kumar on Ex.PW12/B which was exhibited as Ex.PW19/4. PW-19 also deposed that all the medicines were given to the deceased on his advice and there is entry to this effect in the record. He categorically deposed that the deceased was not given any sedatives or pain killers by other doctors who had attended him after perusing the entire record pertaining to the deceased. He had also deposed that in epidermal burn usually the impression of the thumb remains only in case of deep burns the possibility of peeling of the skin is there. No suggestion was given to him that on account of the burns the thumb impression could not be given by the deceased on his dying declarations which were recorded by the HC Ex.PW8/C and by the MM Ex.PW12/A. No facts can be inferred in the circumstances that the doctors and the Magistrate would have had any animus against the accused or would have been interested in fabricating the dying declarations against the accused. In Ravi Chander & Ors. v. State of Punjab, (1998) 9 SCC 303 it was held by the Apex Court that for not examining the doctor, the dying declarations recorded by the executive Magistrate and the dying declaration orally made need not be doubted. The Supreme Court had held that the executive Magistrate is a disinterested witness and is a responsible officer and there is no circumstance or material on record to suspect that the executive Magistrate had any animus against the accused or in any way was interested in fabricating the dying declaration and, therefore, the question of genuineness of the dying declaration recorded by the executive Magistrate could not be doubted. The Supreme Court in K.C.Savji & Anr. v. State of Gujrat, AIR 1999 SC 3695 had held that, in absence of doctor while recording the dying declaration, the said dying declaration does not lose its value and can be accepted. In this case the Magistrate who had recorded the dying declaration had been examined and had deposed that as soon as she had reached the hospital she had told the doctor on duty that she was required to take the statement of the deceased. The doctor had introduced her to the deceased and the executive Magistrate had also asked about the condition of the deceased categorically and it was replied that the deceased was in a conscious condition. No endorsement about the fitness of the deceased was made on the dying

declaration, however, the Supreme Court had believed the dying declaration and had not rejected it on account of no endorsement made by the concerned doctor. In the present case the dying declaration Ex.PW8/C though does not have any endorsement about the fitness of the deceased, however, the dying declaration recorded thereafter by the executive Magistrate on the same day i.e. 8th June, 1999 was subsequent to the fitness certificate given by the doctor, pursuant to which the Magistrate himself had observed that the victim was conscious and voluntarily wanted to make the statement. Thereafter the statement of the deceased was written in question answer form. The Magistrate when appearing as a witness (PW-12) had categorically denied the suggestion that the deceased was not mentally/physically fit to make the statement. She had also deposed that, at the time the statement of the deceased was recorded no one else was present in the room, who could have prompted him or could have tutored him to make the statement. In K.C.Savji (Supra) there were two dying declarations one recorded by the police officers and the other recorded by the Magistrate and both the dying declarations were believed and the appeals filed by the accused were dismissed.

42. The deceased was admitted in the hospital at 12:30 AM on 8th June, 1999 and his statement was reflected in his MLC which was recorded by Dr.Rajinder Kumar (PW-19) and which was proved as Ex.PW19/1. Thereafter the statement of the deceased Ex.PW8/C was recorded after about 45 minutes at 1:45 AM. The FIR was registered at 2:10 AM and the MM (PW-12) had recorded the statement of Sonu at 9:50 PM. In these circumstances these dying declarations cannot be rejected on the premise that the deceased was not fit to make the statement.

43. The next question for consideration is whether the two dying declarations i.e. one recorded by the HC Rajbir Singh as Ex.PW8/C and one recorded by the MM, Ex.PW12/A are consistent or have certain inconsistencies. The statement recorded by the HC Rajpal (PW-8) cannot be rejected on the ground that it was not in question answer form. The deceased had not implicated his sister-in-law Basanti whereas in the statement which was recorded at 9:50 PM he had implicated Basanti. Whether this inconsistency will create a doubt about the presence of Basanti has to be considered by taking into consideration certain other facts also. Though the learned Additional Sessions Judge was of the view

that this inconsistency will not knock out the dying declaration recorded by the MM and that it would hold against the accused Basanti, on the ground that if the intention of the deceased was to implicate all of the in-laws, then he would have named the other in-laws as well namely Anju, Jyoti, Amit and Arjun and also the presence of Basanti had been established by the deposition of Sanjay Kumar, (DW-2). However, certain other facts have not been considered by the Sessions Judge which have been highlighted and demonstrated by the learned counsel for Basanti. This has not been disputed that the address of Basanti is Jhuggi No.A-183 whereas the jhuggi of Vir Singh is A-181. Numerologically the jhuggi No.A-181 should be adjacent to jhuggi No.183 of Basanti, however, this is contrary to the facts established by the prosecution itself. Perusal of Ex.PW18/1 reveals that jhuggi No.A-181 is not adjacent to jhuggi No.A-183 which is the residence of Basanti. Exhibit PW18/1 is as under:- In the scaled site plan which was proved as Ex.PW13/A jhuggi of the accused Basanti is not shown adjacent to the jhuggi of Vir Singh where the incident of burning of the deceased had taken place. Ex.PW13/A is as under:-

44. From these two plans it is apparent that jhuggi No.A-183 (residence of Basanti) is not adjacent or near the vicinity of the place of incident i.e. jhuggi No.A-181. Basanti in her statement under Section 313 of the Criminal Procedure Code had also reiterated that her address is A-183 which has not been disputed by anyone.

45. If both the dying declarations are to be relied on by the prosecution i.e. the dying declaration recorded by HC Rajpal Singh and the dying declaration recorded by the MM, then the inconsistency in the dying declaration also ought to have been established i.e. the presence of Basanti at the time of incident. In case this inconsistency has not been explained, the accused Basanti would be entitled for the benefit of doubt. Since the jhuggi of Basanti bearing No.A-183 has not been established adjacent to jhuggi No.A-181 where the incident had occurred, it cannot be inferred that she was present at the time of incident i.e. when the kerosene was poured on the deceased and he was lit by his brother-in-law, Anil Kumar. There is no cogent explanation as to why the deceased had omitted the name of Basanti in his dying declaration before the HC and had included her name

in the dying declaration given before the MM. The reasoning of the Sessions Judge also cannot be the basis for treating it as a minor inconsistency as the deceased in his statement before the doctor which was incorporated in his MLC had rather implicated all the members of his in-laws family.

46. If accused Basanti jhuggi is not near the jhuggi of her father bearing No.A-181 where the incident had taken place, and if the said jhuggi is located in the same locality it is natural that after knowing of the incident she would have come to the jhuggi of her father i.e.A-181 which was stated by Sanjay Kumar (DW-2). However, DW-2 had not stated that the accused Basanti was present at the time kerosene was poured over the deceased and when the deceased was lit by the accused Anil Kumar. The statement of DW-2 Sh.Sanjay Kumar is as under:-

"Earlier I used to reside in jhuggi No.A-320, Rajiv Gandhi Camp, Nehru Stadium, New Delhi. On 7th June, 1999 again said, I am unable to recollect the exact date, it was between afternoon and before the sunset when I had heard that one boy had committed suicide by burning himself. I do not know as to who that boy was. On that very date, in the evening, again said by that time it was night time, Basanti accused present in the Court had come there. I was told that Basanti had been taken to police station for questioning her."

47. Thus, the statement of the witness is that the accused Basanti had come there and not that she had been present at the time of the incident. In the circumstances the accused Basanti shall be entitled of benefit of doubt in view of the inconsistency between the two dying declarations and the other facts which makes her presence doubtful at the time of incident though she had come there later.

48. In summing up it can be held that though the prosecution has not established the motive of burning by the accused, however, from the statement of Sonu wife Neetu (DW-3) it is clear that deceased was not earning and he was idle and had been demanding money from Vir Singh. The accused Vir Singh had rather taken loan from his employer at the time of his daughters marriage and were fed up of the persistent demands for money by the deceased. On the date of the incident, on account of altercation between the accused and the deceased, the incident occurred and had been described by the deceased in both his dying declarations.

The dying declarations are consistent except in the inconsistency regarding Basanti, whose presence was not disclosed in the dying declaration Ex.PW8/C, however the same was included in the dying declaration Ex.PW12/A. In the circumstances it can be inferred that Pratima Devi (mother-in-law) and Kavita (sister-in-law) caught hold of Sonu deceased and Vir Singh (father-in-law) poured kerosene oil and the Anil Kumar (brother-in-law) set the deceased ablaze, which resulted in extensive burn injuries to the deceased ultimately leading to his death. In the circumstances the prosecution has been able to establish the charge of murder against accused Vir Singh, Anil Kumar, Kavita and Pratima and they are liable for conviction under Section 302/34 of Indian Penal Code. The sentence awarded by the trial Court to them to suffer life-imprisonment and a fine of Rs.10/- and in default to suffer simple imprisonment till rising of the Court.

49. The appeal of Pratima & Ors. Crl.Appeal No.817/2001 is, however, accepted qua appellant No.2 Basanti by giving benefit of doubt to the said accused. Therefore, Judgment and order passed by the Trial Court against the accused Basanti is modified. Accordingly, accused Basanti be set free forthwith, if not required in any other case. Since she is on bail, her bail bonds and surety bonds given on her behalf are discharged and any endorsement made on her account as a surety bond be cancelled. The appeal of other accused namely Pratima Devi and Kavita is however, dismissed and their conviction and sentence is upheld. Finding no discrepancies in the judgment of the Trial Court qua appellants, we are not inclined to interfere with Crl.Appeal No.18 of 2002; therefore, the same is dismissed. The said accused persons shall, however, be entitled for benefit of Section 428 of Cr.P.C.

50. The other accused namely Pratima Devi, Vir Singh, Anil Kumar and Kavita are directed to surrender before the jail authorities forthwith. Their bail bonds stand cancelled.

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