[2023] 11 S.C.R. 789 : 2023 INSC 758

CASE DETAILS

IRFAN @ NAKA

v.

THE STATE OF UTTAR PRADESH

(Criminal Appeal Nos. 825-826 of 2022)

AUGUST 23, 2023

[B.R. GAVAI, J.B. PARDIWALA AND PRASHANT KUMAR MISHRA, JJ.]

HEADNOTES

Issue for consideration: Whether the prosecution could be said to have proved its case beyond reasonable doubt against the appellant who was convicted for offence punishable u/ss.302, 436 and 326-A, IPC and sentenced to death, for allegedly setting his son and his real brothers on fire, solely on the basis of dying declarations.

Evidence – Dying declarations – Sole basis of conviction – When not justified – Appellant had strained relationship with his son (victim-deceased) from his first marriage and his two brothers (victims-deceased), all of whom, as per the prosecution, were opposed to his second marriage – He is said to have locked the door of the room from outside in which the victims were sleeping, poured kerosene in the room and set it on fire – Dying declarations of two of the deceased persons relied upon – Legality:

Held: Courts are first required to satisfy themselves that the dying declaration in question is reliable and truthful before placing any reliance upon it – Dying declaration while carrying a presumption of being true must be wholly reliable and inspire confidence – Where there is any suspicion over the veracity of the same or the evidence on record shows that the dying declaration is not true it will only be considered as a piece of evidence but cannot be the basis for conviction alone – In the instant case, neither the two dying declarations nor the oral evidence of PW-2 and PW-4 inspire any confidence – Both these witnesses do not figure in the two dying declarations

– The two dying declarations are not consistent or rather contradictory to the oral evidence on record – Although, the appellant was named in the two dying declarations as a person who set the room on fire yet the surrounding circumstances render such statement very doubtful – Difficult to rest the conviction solely based on the two dying declarations – Prosecution has not proved its case against the appellant beyond reasonable doubt – Appellant acquitted. [Paras 47, 61, 64, 67-69]

Criminal Law – Charge against accused – Duty of prosecution to establish beyond reasonable doubt:

Held: It is the duty of the prosecution to establish the charge against the accused beyond reasonable doubt – The benefit of doubt must always go in favour of the accused – Dying declaration is a substantive piece of evidence to be relied on provided it is proved that it was voluntary and truthful and the victim was in a fit state of mind – It is just not enough for the court to say that the dying declaration is reliable as the accused is named in the dying declaration as the assailant – Evidence – Dying declaration. [Para 63]

Evidence – Dying declaration – Acceptability – Theory:

Held: The juristic theory regarding the acceptability of a dying declaration is that such declaration is made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the man is induced by the most powerful consideration to speak only the truth – Notwithstanding the same, great caution must be exercised in considering the weight to be given to it on account of the existence of many circumstances which may affect their truth – The situation in which a man is on the deathbed is so solemn and serene, is the reason in law to accept the veracity of his statement – It is for this reason, the requirements of oath and cross-examination are dispensed with – Since, the accused has no power of cross-examination, the courts insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness – However, the court should always be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. [Para 43]

Evidence – Dying declaration – Reliance upon – Factors to be considered – Duty of the Court:

Held: Despite a general consensus of presuming that the dying declaration is true, they have not been stricto-sensu accepted, rather the general course of action has been that judge decides whether the essentials of a dying declaration are met and if it can be admissible, once done, it is upon the duty of the court to see the extent to which the dying declaration is entitled to credit – Thus, there is no hard and fast rule for determining when a dying declaration should be accepted – Duty of the Court is to decide this question in the facts and surrounding circumstances of the case and be fully convinced of the truthfulness of the same – Factors to be considered, enumerated. [Paras 60 and 62]

Evidence Act, 1872 – s.8 – Conduct:

The conduct of the accused may be unnatural because he was residing in the very same house, however, the conduct which may be a relevant fact u/s.8, by itself may not be sufficient to hold a person guilty of the offence of murder – Penal Code, 1860 – s.302. [Para 46]

Evidence – Dying declaration – Sanctity/presumption attached to – Justification for:

The justification for the sanctity/presumption attached to a dying declaration is two fold- (i) ethically and religiously it is presumed that a person while at the brink of death will not lie, whereas (ii) from a public policy perspective it is to tackle a situation where the only witness to the crime is not available. [Para 64]

Evidence – Dying declaration – Suspicion as regards correctness of – Duty of Court:

It is unsafe to record the conviction on the basis of a dying declaration alone in the cases where suspicion, like the case on hand is raised, as regards the correctness of the dying declaration – In such cases, the Court may have to look for some corroborative evidence by treating the dying declaration only as a piece of evidence – The evidence and material available on record must be properly weighed in each case to arrive at an appropriate conclusion. [Para 48]

Practice and Procedure – Criminal appeals filed against concurrent findings – Jurisdiction of Supreme Court – Discussed.

LIST OF CITATIONS AND OTHER REFERENCES

Mst. Dalbir Kaur and Others v. State of Punjab (1976) 4 SCC 158 : [1977] 1 SCR 280; *Laxman v. State of Maharashtra* (2002) 6 SCC 710; *Muthu Kutty & Anr. v. State by Inspector of Police, T.N.* (2005) 9 SCC 113 : [2004] 6 Suppl. SCR 222; *Nallapati Sivaiah v. Sub-Divisional Officer, Guntur, Andhra Pradesh* (2007) 15 SCC 465 : [2007] 10 SCR 347; *Bhajju alias Karan Singh v. State of Madhya Pradesh* (2012) 4 SCC 327 : [2012] 5 SCR 37; *Sujit Biswas v. State of Assam* (2013) 12 SCC 406 : [2013] 3 SCR 830; *Dharm Das Wadhwani v. State of Uttar Pradesh* (1974) 4 SCC 267: [1974] 3 SCR 607 – relied on.

King v. William Woodcock (1789) 1 Leach 500 : 168 ER 352; *Neville Nembhard v. The Queen* (1982) 1 AII ER 183 – referred to.

OTHER CASE DETAILS INCLUDING IMPUGNED ORDER AND APPEARANCES

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal Nos. 825-826 of 2022.

From the Judgment and Order dated 25.04.2018 of the High Court of Judicature at Allahabad in CCN No.4669 of 2017 in RN No.11 of 2017.

Appearances:

Gopal Sankaranarayanan, Sr. Adv., Ms. Adeeba Mujahid, Adv. for the Appellant.

Ardhendumauli Kumar Prashad, AAG, Adarsh Upadhyay, Ms. Pallavi Kumari, Ms. Ananya Sahu, Advs. for the Respondent.

JUDGMENT / ORDER OF THE SUPREME COURT

JUDGMENT

J. B. PARDIWALA, J.

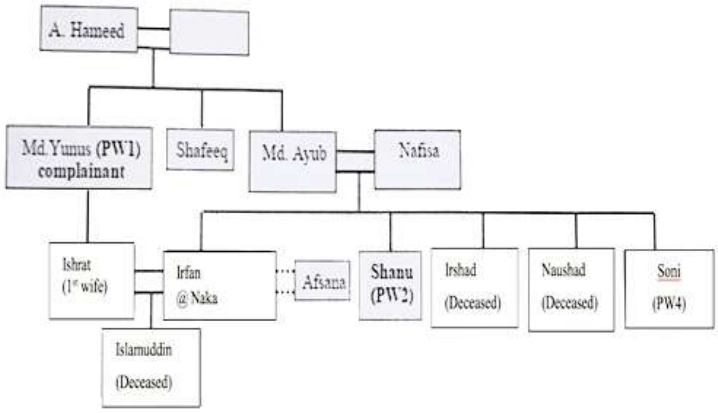
1. These appeals by special leave are at the instance of a convict-accused and is directed against the judgment and order dated 25.04.2018, passed by the High Court of Judicature at Allahabad in Capital Case No. 4669 of 2017 connected with Reference No. 11 of 2017 by which, the High Court dismissed the appeal filed by the convict-accused and thereby affirmed the judgment and order of conviction and sentence of death passed by the Additional Sessions Judge Court No. 6, Bijnore for the offence punishable under Sections 302, 436 and 326-A of the Indian Penal Code, 1860 (for short, 'the IPC') respectively.

2. The convict was awarded death penalty with fine of Rs. 20,000/- by the trial court for the offence punishable under Section 302 IPC. For the offence punishable under Section 436 IPC, the convict was awarded life imprisonment with fine of Rs. 10,000/- and for the offence punishable under Section 326-A IPC, the appellant came to be sentenced for life imprisonment with fine of Rs. 10,000/- and in default of payment of fines, further six months of rigorous imprisonment.

3. While the criminal reference was submitted by the trial court under Section 366 of the Code of Criminal Procedure, 1973 (for short, 'the CrPC') for confirmation of capital punishment awarded to the appellant- convict, the appellant-convict preferred an appeal by way of Capital Case No. 4669 of 2017, putting in issue his conviction and sentence. The High Court dismissed the case filed by the appellant-convict thereby confirming the death reference under Section 366 of the CrPC.

CASE OF THE PROSECUTION

4. FAMILY CHART



5. The appellant-convict was married twice. The first marriage was with a lady by name Ishrat, who was the daughter of his uncle Mohammad Yunus (PW-1). His second marriage was solemnised with a lady named Afsana. One son by name Islamuddin (deceased) was born in wedlock with Ishrat. The convict had two brothers, namely, Irshad (deceased) and Naushad (deceased), who lived along with him and his sister Soni (PW-4). Another brother by name Shanu alias Shahnawaz (PW-2) of the convict lived in the neighbourhood.

6. It is the case of the prosecution that the three deceased persons more particularly Islamuddin (convict's son) was highly opposed to the second marriage of his father, i.e., the appellant-convict. Islamuddin (deceased) was even once beaten by the appellant-convict as he had offered lot of opposition to the second marriage of his father. Islamuddin was also threatened by the appellant-convict that he would be thrown out of the house. Deceased Naushad (appellant-convict's brother) was in Saudi Arabia. He had just returned to Bijnore from Saudi Arabia on 04.08.2014.

7. Few days before the date of the incident, the appellant-convict had beaten his son (deceased Islamuddin) and at that point of time, Naushad and Irshad (deceased persons) had intervened to save Islamuddin. On 05.08.2014, at around 05.30 pm, PW-2 Shanu (convict's brother) went to see deceased Naushad and had dinner with PW-4 (convict's sister), Islamuddin and Irshad. The PW-2 also invited the appellant-convict

for dinner. The appellant-convict lived in the same house as PW-4 and Naushad, but on a different floor.

8. On 05.08.2014, at around 10.00 pm, after the dinner was over, PW- 4 asked the PW-2 to stay overnight as it was too late. Naushad and Islamuddin slept in one room. As Irshad wanted to sleep on the roof, the appellant-convict advised him to sleep inside the room, as the weather was bad. Thus, all the three deceased persons ended up sleeping in one room.

9. PW-2 claims that the door of the room in which, the three deceased were sleeping, was open. However, according to the PW-4, it was locked from inside. The PW-2 lived at a distance of 200 metres from the place of the incident. It is pertinent to note that the High Court disbelieved the presence of the PW-2 at the place of occurrence, i.e., the house.

10. On 06.08.2014, at around 12.30 am, the PW-2 is said to have woken up to see flames and smoke coming from the room, where the deceased persons were sleeping. The PW-2 and his sister Soni (PW-4) claim to have seen the appellant-convict setting the room on fire and thereafter, fastening the door latch from outside and running away.

11. It is the case of the prosecution that the PW-2 and PW-4 opened the door and at that point of time, saw the appellant-convict running from the roof towards the stairs. According to the case of the prosecution, Amzad and one another person by name Shafiq (both not examined) also saw the appellant-convict running away.

12. The PW-1 (Original first informant- uncle of the appellant-convict) was sleeping in his room in his own house at the time of the incident. The uncle's house is at the distance of about 200 metres from the place of the occurrence.

13. The relatives first took Islamuddin, Irshad and Naushad to one Pooja Hospital situated at Najibabad in a vehicle. The Hospital declined to admit them. All the three injured were thereafter, taken to the hospitals at Bijnore and Meerut and finally were admitted to the Dr. Ram Manohar Lohiya Hospital, Delhi (RML Hospital).

14. On 06.08.2014, early in the morning at around 6.10 am all the three injured were brought to the casualty ward of the RML Hospital by

Shafiq Ahmad (not examined). At 9.00 am, PW-1 (first informant) lodged a First Information Report with the Najibabad Police Station. In the FIR, the first informant alleged that it was the appellant-convict, who set his own son and two real brothers on fire, while they were sleeping on account of personal animosity.

15. The dying declaration of deceased Irshad was recorded on 07.08.2014 by the A.S.I. at the RML Hospital. Irshad passed away on 09.08.2014. In the same way, the dying declaration of Islamuddin was recorded on 07.08.2014. Islamuddin passed away on 18.08.2014. It appears that the dying declaration of Naushad could not be recorded. Naushad also passed away on 18.08.2014. The two dying declarations were video- graphed in the mobile of the A.S.I.

16. On the strength of the FIR, the investigation was undertaken and on conclusion, the chargesheet came to be filed in the Court of Chief Judicial Magistrate, Bijnore, for the offences enumerated above, who in turn committed the case to the Court of Sessions.

17. On 06.01.2015, the Additional District and Sessions Judge framed charge against the accused for the offences punishable under Sections 436, 302 and 326-A respectively of the IPC. The accused did not admit the charge and claimed to be tried.

18. In the course of the trial, the prosecution adduced the following oral evidence in support of its case:

S. No.	Oral Evidences	Witnesses
1.	Mohd. Yunus, Uncle and Father-in-Law	PW-1
2.	Shanu @ Shahnawaz, Younger Brother	PW-2
3.	Mohd. Imran, Downstairs Neighbour, (examined to prove recovery memo)	PW-3
4.	Soni, Sister	PW-4
5.	ASI, Narender Singh Rawat, Police Post, RML Hospital	PW-5

6.	Dr Saurav, RML Hospital	PW-6
7.	Dr Rahul Band, Lady Hardinge Medical College, New Delhi	PW-7
8.	Dr Kuldeep Panchal, Lady Hardinge Medical College, New Delhi	PW-8
9.	Vishnu Gopal Upadhyaya, SI	PW-9
10.	R.P. Yadav, Inspector (Retd)	PW-10
11.	Dr Arvind Kumar, Associate Prof., Forensic Medicine, Lady Hardinge Medical College, New Delhi	PW-11
12.	Dr Charanjeet Kaur, RML Hospital	PW-12
13.	Riyaz-ud-din Khan, Constable Clerk 1184	PW-13

19. The prosecution also adduced the following documentary evidence:

S.No.	Particulars	Number and Name of with witness	Exhibit Nos.
1.	Original complaint dated 06.08.14	PW-1, Mohammad Yunus	Exhibit Ka-1
2.	Forensic Science Laboratory Report, Agra dated 08.12.14	Exhibited by Court vide order dated 19.03.15	Exhibit Ka-2
3.	Statement of the deceased Irshad dated 07.08.14	PW-5, A.S.I. Narender Singh Rawat	Exhibit Ka-2
4.	Request form of autopsy of the deceased Irshad dated 10.08.14	PW-5, A.S.I. Narender Singh Rawat	Exhibit Ka-3
5.	Request form of autopsy of the deceased Naushad dated 18.08.14	PW-5, A.S.I. Narender Singh Rawat	Exhibit Ka-4

6.	Copy of the statement of deceased Islamuddin dated 07.08.14	PW-5, A.S.I. Narender Singh Rawat	Exhibit Ka-5
7.	Statement of the deceased Islamuddin dated 07.08.14	PW-5, A.S.I. Narender Singh Rawat	Exhibit Ka-5A
8.	Request form of autopsy of the deceased Islamuddin dated 19.08.14	PW-5, A.S.I. Narender Singh Rawat	Exhibit Ka-6
9.	Receipt of dead body of Islamuddin 19.08.14	PW-5 A.S.I. Narender Singh Rawat	Exhibit Ka-7
10.	Statement for identification of dead	PW-5 A.S.I. Narender Singh Rawat	Exhibit Ka-8
11.	Receipt of dead body of Irshad dated 10.08.14	PW-5 A.S.I. Narender Singh Rawat	Exhibit Ka-9
12.	Medico Legal Case Sheet of the deceased Irshad dated 06.08.14	PW-6 Dr. Sourav	Exhibit Ka-10
13.	Medico Legal Case Sheet of the deceased Naushad dated 06.08.14	PW-6 Dr. Sourav	Exhibit Ka-11
14.	Medico Legal Case Sheet of the deceased Islamuddin dated 6.08.14	PW-6 Dr. Sourav	Exhibit Ka-12
15.	Medico Legal Post Mortem report of the deceased Islamuddin dated 19.08.14	PW-7 Dr. Rahul Band	Exhibit Ka-10 A
16.	Medico Legal Post Mortem report of the deceased Irshad dated 10.08.14	PW-7 Dr. Rahul Band	Exhibit Ka-11 A

17.	Medico Legal Post Mortem Report of the deceased Naushad dated 18.08.14	PW-8 Dr.Kuldeep Panchal	Exhibit Ka-12 A
18.	Site Plan dated 06.08.14	PW-9 S.I. Vishnu Gopal Upadhyay	Exhibit Ka-13
19.	Recovery Memo dated 06.08.14	PW-9 S.I. Vishnu Gopal Upadhyay	Exhibit Ka-14
20.	Charge Sheet dated 28.09.14	PW-10 Inspector R.P. Yadav (Retd.)	Exhibit Ka14-A
21.	Death report of the deceased Islamuddin dated 18.08.14	PW-12 Dr. Charanjeet Kaur	Exhibit Ka-15
22.	PW-9 S.I. Vishnu Gopal Upadhyay	PW-9 S.I. Vishnu Gopal Upadhyay	Exhibit Ka-16
23.	Chick FIR dated 06.08.14	PW-13 Constable Clerk Riyazudeen Khan	Exhibit Ka-17
24.	Carbon copy G.D.	PW-13 Riyazudeen Khan	Exhibit Ka-18

20. Upon completion of the oral as well as documentary evidence, the statement of the accused was recorded under Section 313 of the CrPC in which, the accused stated that he was innocent and had been falsely implicated in the alleged crime.

21. The trial court upon appreciation of the oral as well as the documentary evidence on record, arrived at the finding that the prosecution had been successful in establishing its case against the appellant-convict beyond reasonable doubt. Accordingly, the trial court held the appellant-convict guilty of the offence enumerated above and sentenced him to death.

22. The appellant-convict being dissatisfied with the judgment and order passed by the trial court, challenged the same before the High Court. The High Court dismissed the appeal of the appellant-convict and confirmed the death sentence imposed by the trial court.

23. In such circumstances referred to above, the appellant-convict is here before this Court with the present appeals.

SUBMISSIONS ON BEHALF OF THE APPELLANT

24. Mr. Gopal Sankaranarayanan, the learned Senior Counsel appearing for the appellant-convict vehemently submitted that:

a. The courts below committed a serious error in recording a finding that the prosecution has been able to establish its case against the convict beyond reasonable doubt.

b. The entire case hinges on circumstantial evidence and none of the circumstances, relied upon by the courts below to hold the appellant- convict guilty of the charges, could be termed as incriminating circumstances.

c. The two dying declarations; one of Irshad and the other of Islamuddin could not have been relied upon, as they do not inspire any confidence and are in conflict with the ocular version of the two eye- witnesses.

d. The manner in which, the dying declarations came to be recorded, speaks for itself. He would submit that the dying declaration should ordinarily be recorded in a question-answer form. The Investigating Officer did not even deem fit to call the Executive Magistrate to record the dying declarations. It was also argued that there is nothing to indicate as regards the condition of the injured persons, while they are said to have made the dying declarations before the Investigating Officer. To put it in other words, whether Irshad and Islamuddin were in a fit condition to speak so as to give dying declarations? It was pointed out by the learned Senior counsel that all the three Medico Legal Case (MLC) reports, which were prepared noted "No BP readable". Irshad and Naushad had suffered 95 % burns, whereas, Islamuddin had suffered 80-90 % burns.

e. In such circumstances referred to above, the learned Senior Counsel prayed that there being merit in his appeals, the same may be allowed and the judgment of the High Court and that of the trial court be set aside and the appellant-convict be acquitted of all the charges.

SUBMISSIONS ON BEHALF OF THE STATE

25. On the other hand, these appeals were vehemently opposed by Mr. Ardhendumauli Kumar Prashad, the learned AAG, appearing for the State. He submitted thus:

a. No error much less an error of law could be said to have been committed by the courts below in holding the appellant-convict guilty of the offences with which he was charged.

b. There was a strong motive for the appellant-convict to commit the crime. The second marriage of the appellant-convict was opposed by his son Islamuddin. As the appellant- convict wanted to disown his son, the same was opposed by his two brothers Naushad and Irshad. That is the reason why the appellant-convict was at inimical terms with his own son Islamuddin and his two real brothers Naushad and Irshad.

c. There is no good reason to discard the oral evidence of the PW-2 Shanu alias Shahnawaz and PW-4 Soni.

d. The courts below rightly believed the two dying declarations to be true and trustworthy.

e. To conclude, the learned counsel pointed out that the appellant-convict is a history-sheeter and has tendency to repeatedly indulge in serious crimes.

f. In such circumstances referred to above, the learned counsel prayed that there being no merit in the present appeals, the same may be dismissed and the death sentence awarded may be upheld.

ORAL EVIDENCE ON RECORD

26. Mohammad Yunus (PW-1) is the first informant. He has deposed that the appellant-convict is his real nephew and also happens to be his son- in-law. In the intervening night of 05/06.08.2014 at about 12.30 am in the night, the appellant set his real brothers, Naushad and Irshad on fire including his son Islamuddin by pouring highly inflammable substance on them, while they were sleeping in the room. He has deposed that after setting the deceased persons on fire, the appellant shut the door from outside. On hearing the cries and shouts of Islamuddin, Naushad and Irshad, his brother Amzad and others including Shafiq and Shanu came running from the neighbourhood and broke upon the door. The injured were thereafter, taken to the Hospital at Najibabad.

27. Shanu alias Shahnawaz was examined as PW-2. Shanu is the younger brother of the appellant-convict. He has deposed that on 05.08.2014,

late in the evening, he had gone to his old house to meet his brother Naushad. Naushad had returned from Saudi Arabia after a long time. His younger sister Soni (PW-4) had cooked food for them and they all had dinner together. His elder brother (convict) had also come down from his place of living to the ground floor. The convict had hatred towards Naushad and Irshad. The convict had solemnised his second marriage at Jaspura town, after his release from jail. After arrival of his second wife, the convict wanted to separate his son Islamuddin. The convict had also assaulted Islamuddin two days before the incident, which was settled by Irshad and Naushad. On 05.08.2014, the second wife of the convict had gone to her parents' house at Jaspura. Being the elder brother, he asked the convict to take meal along with them. It was around 11.00 in the night. His sister Soni asked the PW-2 to stay back as it was late in the night. Naushad slept in one room. Islamuddin slept in the room on the floor on a mattress. When Irshad went to sleep outside the room on the roof, the convict asked Irshad to sleep inside the room as the weather outside was bad. Irshad also slept by the side of Islamuddin in the room. Islamuddin, Irshad and Naushad slept together in one room. The door of that room was open. PW- 2 and his sister Soni slept in the adjoining room. At about 12.30 in the night, they saw smoke and flames coming out from the room, in which all the three deceased were sleeping. Then, he saw that the convict had poured some highly inflammable substance in the room in which Islamuddin, Irshad and Naushad were sleeping and set it on fire. The convict ran away after closing the door of the room from outside. All the three were severely burnt. All the three injured died at the RML Hospital. When the convict had solemnised second marriage, the same was opposed by Islamuddin. The convict at that point of time had beaten Islamuddin and had threatened that he would expel him from the house.

28. Soni (PW-4) was examined as an eye-witness to the incident. She deposed that the convict was her real brother. She was present at her house on 05.08.2014. She herself had prepared the meal in the evening on that day. Her brothers, the convict, Naushad and Irshad and her nephew Islamuddin were present on the second floor of her house. All of them had meal together. After taking meal, Naushad and Islamuddin went to sleep in the adjoining room and Irshad was sleeping on a cot outside the room. The convict asked Irshad to sleep inside the room, as the weather outside was bad. Irshad also slept by the side of Islamuddin in the room. They shut the

door of the room from inside. The convict shut the door of the room from outside. Then cries "bachao-bachao" came from the room and flames of fire were seen inside the room. When she opened the room, she saw that the convict was running towards the stairs. Amzad and Shafiq saw the convict while he was running away. They all saw the burning room. After opening the door, they evacuated Naushad, Irshad and Islamuddin. All three were severely burnt. The skin of their legs got stuck on the floor. They took all the three injured to Pooja hospital in a vehicle. On refusal to admit, they were taken to Bijnore, thereafter to Meerut and from Meerut to the RML Hospital. During travel, her brothers and nephew were talking. Her brothers and nephew said that the convict set fire in the room after pouring petrol on account of which, all of them got burnt. All the three died at the RML Hospital, Delhi. The convict had solemnised second marriage after coming out from jail. Her brothers Irshad, Naushad and nephew Islamuddin had objected to it. The convict wanted to oust Islamuddin from their house. Her brothers Irshad, Naushad took the side of Islamuddin. For this reason, the convict burnt all of them by pouring petrol, setting them on fire and shutting the room from outside in order to kill them.

29. In her cross-examination, she stated that to the best of her knowledge, Islamuddin and Naushad had bolted the room from inside. The room in which, she was sleeping, was not bolted from outside. No other room was bolted from outside, except the room in which Islamuddin and Naushad were sleeping.

30. A.S.I. Narender Singh Rawat was examined as PW-5. He was examined to prove the dying declarations of Irshad (Ex. Ka.2) and Islamuddin (Ex. Ka.5A) recorded by him. He has deposed that on 19.08.2014, he was posted at the Police Out-post of RML Hospital, New Delhi. Irshad, Naushad and Islamuddin were admitted on 06.08.2014, in the RML Hospital. He recorded statement of Irshad on 07.08.2014, who told that they lived with the entire family. He ran a mobile phone shop. On 05/06.08.2014, while he and his elder brother Naushad and nephew Islamuddin were sleeping in his house, at about 12.30 in the night, his brother Irfan/convict closed the door from outside and set the room on fire from inside with some inflammable substance. Due to which, they suffered severe burn injuries. The neighbours evacuated them from the room after a long time, and admitted them in

the Pooja Hospital, Najibabad. They were referred to the RML Hospital from there for treatment. This statement was given by the deceased Irshad. Paper No. 13, filed in the case, was in his handwriting and signature. He had obtained thumb marks of Irshad, which was identified by him. It was marked as Ex. Ka-2. Irshad died on 09.08.2014 at 07.30 pm. The dead body was sent to the Lady Hardinge Hospital for postmortem on 10.08.2014. After the postmortem, the body was handed over to his relatives Sadaqat and Shahnawaz after proper identification. The deceased Naushad died on 18.08.2014 at 08.40 am. His postmortem was conducted on the same day and dead body was handed over to his relative. He had also recorded the statement of the deceased Islamuddin. He had stated that the convict had closed the door from outside and set the room on fire from inside with some inflammable substance, due to which, he, his uncles Irshad and Naushad got burnt. The neighbours saved them on hearing their cries. PW-5 recorded the statement of the deceased on 07.08.2014, which was filed in case file and under his handwriting and signature. The same was marked as Ex. Ka-5. Islamuddin died on 18.08.2014 at 09.15 pm. His postmortem was conducted on 19.08.2014. Dead bodies of all the three were handed over to Shahnawaz and Sadaqat, after postmortem.

31. In his cross-examination he stated that he had not investigated this case. Neither any officer of Delhi Police nor U.P. Police deputed him to investigate this case. He had recorded the statements of the deceased Irshad and Islamuddin on 07.08.2014. He had recorded the statements of both in the emergency ward of the hospital. No one else was present at the time of recording the statement except him and the deceased persons. Both of them were in a fit condition when he recorded their statements. Exhibit Ka-2 and Exhibit Ka-5, the statement of Islamuddin does not bear the thumb impression or signature of anybody else except his own and the deceased. Exhibit Ka-2 and Ex. Ka-5 do not bear any certificate from the doctor with regard to fitness of both the deceased. Ex. Ka-2 and Ex. Ka-5 do not bear his endorsement with regard to fitness of the deceased at the time of recording the statements. There was a time gap of 15 – 20 minutes in recording of the two dying declarations. Both were written on the same day and at the same place. PW-5 had written only two statements. Different pens were used in recording the statements, but to obtain thumb impressions of the deceased, one ink pad was used.

32. A.S.I. Narender Singh Rawat PW-5 was recalled for the purpose of re-examination on 28.04.2017 in compliance of the order dated 15.04.2017. That on 07.08.2014, he was posted at the RML Hospital. On that day he had recorded the statement of Islamuddin aged about 16 years, son of the convict, resident of mohalla Muglooshah, Najibabad, District Bijnore. Islamuddin was in a fit condition to give a statement. He had recorded his statement word by word as stated by him. His thumb impression was taken on the statement. The thumb impression was identified by him. He had also put his signature on the statement. His statement has been recorded earlier in the court.

33. The appellant-convict examined himself as a defence witness. He deposed that his parents had five children. He was the eldest, his brothers were, namely, Shanu, Irshad and Naushad and one sister Soni. Islamuddin was born from his first wife Ishrat. His first wife had left his house as his brothers used to quarrel with her in respect of property. At the time, when his first wife left the house, Islamuddin was aged about 10 years. His brothers and sister were taking undue advantage of the tender age of Islamuddin and his mother deserting them. Taking advantage, they sent him to jail, in a false case. He came out from jail three years before the incident. During these three years, he did not quarrel with any neighbours or any person from the mohalla. He married another woman, one and half years prior to this incident. His sister also used to quarrel with his second wife frequently for the property due to which she left her house. He has deposed that his brothers, deceased Irshad and Naushad and his son Islamuddin used to consider him to be a weak person and with a view to grab the property, they all colluded to get my brothers and son killed. It was not known through whom, they got them killed. They falsely implicated him in the case. He ran away from the place of occurrence due to fear as he was released from jail in the recent past.

DYING DECLARATIONS:

34. We shall now look into the two dying declarations.

35. The deceased Irshad in his dying declaration recorded on 07.08.2014 stated thus:

"Statement of Irshad, s/o-Mo. Ayub, r/o Mohalla- Muglushah, P.S. Nazivabad, Distrinct-Bijnor, U.P., age- 20 years.

Stated that I am residing at the place mentioned above. I am running a mobile phone shop at Nazivabad. I was sleeping with my brother Naushad and nephew Islamuddin in the house. We were sleeping in the same room. Then at around 12.30 at night my brother Irfan locked the door from outside and set fire in the room with some inflammable substance. As the room was on fire, we raised alarm. We all seriously got burnt and after a long time neighbours took us out of the room and they got us admitted at the Pooja Hospital, Nazivabad. After first aid they got admitted us at Dr. R.M.L. Hospital New Delhi and my treatment is continuing here. Heard the statement, it is correct."

36. The deceased Islamuddin, in his dying declaration recorded on 07.08.2014, stated thus:

"Statement of Islamuddin, s/o-Irfan, r/o- Mohalla- Muglushah, P.S. Nazivabad, Distrinct-Bijnor, U.P., age- 16 years.

Stated that I am residing at the place mentioned above. I am running a mobile phone shop at Nazivabad. I was sleeping with my uncle Irshad and Naushad in the house. We were sleeping in the same room. Then at around 12.30 at night my father Irfan locked the door from outside and set fire in the room with some inflammable substance. After the room was on fire, we raised alarm. We all seriously got burnt and after a long time neighbours took us out of the room and they got us admitted at the Pooja Hospital, Nazivabad. After first aid they got admitted us at Dr. R.M.L. Hospital New Delhi and my treatment is continuing here. Heard the statement, it is correct. "

ANALYSIS

37. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the only question that falls for our consideration is whether the prosecution could be said to have proved its case against the appellant-convict beyond reasonable doubt.

38. The jurisdiction of this Court in criminal appeals filed against concurrent findings is circumscribed by principles summarised by this Court in ***Mst. Dalbir Kaur and Others v. State of Punjab*** reported in (1976) 4 SCC 158, para 8, as follows:

> *"8. Thus the principles governing interference by this Court in a criminal appeal by special leave may be summarised as follows:*
>
> *(1) that this Court would not interfere with the concurrent finding of fact based on pure appreciation of evidence even if it were to take a different view on the evidence;*
>
> *(2) that the Court will not normally enter into a reappraisement or review of the evidence, unless the assessment of the High Court is vitiated by an error of law or procedure or is based on error of record, misreading of evidence or is inconsistent with the evidence, for instance, where the ocular evidence is totally inconsistent with the medical evidence and so on;*
>
> *(3) that the Court would not enter into credibility of the evidence with a view to substitute its own opinion for that of the High Court;*
>
> *(4) that the Court would interfere where the High Court has arrived at a finding of fact in disregard of a judicial process, principles of natural justice or a fair hearing or has acted in violation of a mandatory provision of law or procedure resulting in serious prejudice or injustice to the accused;*
>
> *(5) this Court might also interfere where on the proved facts wrong inferences of law have been drawn or where the conclusions of the High Court are manifestly perverse and based on no evidence."*
>
> (Emphasis supplied)

DYING DECLARATIONS VIS-A-VIS ORAL EVIDENCE OF THE EYE-WITNESSES ON RECORD

39. The picture that emerges on cumulative assessment of the materials on record is that the appellant-convict had strained relationship with his son Islamuddin (deceased) born in the wedlock of his first marriage with

Ishrat. His relations with his two brothers (deceased persons) were also strained. The defence put forward by the appellant-convict is that with a view to grab the property, PW-2 Shanu alias Shahnawaz, PW-4 Soni and others conspired to eliminate the deceased persons and thereafter, to throw the entire blame on the appellant-convict of having committed the crime. The incident occurred in the night hours. The three deceased were sleeping in one room. The PW-2 and PW-4 are said to have been sleeping in an adjoining room in the house. The appellant-convict is said to have locked the door of the room from outside in which, the deceased persons were sleeping. He poured inflammable substance in the room and set the room on fire. The three deceased persons suffered severe burn injuries and ultimately succumbed to death. Islamuddin and Irshad are said to have given their dying declarations before the A.S.I. as referred to above. Why the dying declaration of Naushad could not be recorded is not clear. A close perusal of the two dying declarations indicates that Irshad and Islamuddin raised alarm on getting severely burnt and they were taken out of the room by the neighbour. Who is this neighbour, they are referring to in their dying declarations is also not clear? At the same time, it is pertinent to note that the Irshad and Islamuddin in their respective dying declarations do not say a word about the presence of the PW-2 Shanu alias Shahnawaz and PW-4 Soni. Both these witnesses do not figure in the two dying declarations. It is also pertinent to note that in both the dying declarations it has been very clearly stated that after a long time a neighbour came to their rescue and took them out of the burning room.

40. Keeping the aforesaid in mind, if we look into the oral evidence of the PW-2 Shanu alias Shahnawaz then according to him, he along with his sister Soni (PW-4) noticed fire in the room in which the deceased persons were sleeping. According to the PW-4, she also witnessed the appellant- convict pouring kerosene and setting the room on fire in which, the deceased persons were sleeping. PW-2 also claims to have witnessed, the appellant-convict fastening the door latch from outside and thereafter, running away from that place. In the same manner, if we closely look into the oral evidence of the PW-4 Soni, then according to her on seeing the flames of fire in the room, in which the deceased persons were sleeping, she immediately opened the door and saw that the appellant-convict was running from the roof towards the stairs. The PW-4 claims that Amzad and Shafiq

also saw the appellant-convict running away. Amzad and Shafiq have not been examined as the prosecution witnesses. It is not clear whether police even recorded the statements of Amzad and Shafiq under Section 161 of the CrPC?

41. If PW-2 and PW-4 were present at the time when the room was on fire and it is they who opened the door and took out the three deceased persons, then why the PW-2 and PW-4 do not figure in the dying declarations of Irshad and Islamuddin? Why Islamuddin and Irshad said in their dying declarations that after a long time, the neighbour came to their rescue and took them out of the room? If a neighbour came to their rescue, then where were PW-2 and PW-4 at the time of the incident? PW-2 and PW-4 have deposed that they both were sleeping in the room adjacent to the room in which the deceased persons were sleeping. This is one very crucial aspect of the matter which, the prosecution has not been able to explain or clarify.

42. In such circumstances referred to above, we are left with either to believe the dying declarations or the oral evidence of the two so called eye- witnesses to the incident. It is also important to note that the PW-4 Soni, in her cross-examination has stated that to the best of her knowledge, Islamuddin and Naushad had fastened the latch from inside. If the door of the room, in which the deceased persons were sleeping was closed from inside, then how did the appellant-convict manage to open the door and enter the room so as to set the room on fire as alleged?

43. The juristic theory regarding the acceptability of a dying declaration is that such declaration is made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the man is induced by the most powerful consideration to speak only the truth. Notwithstanding the same, great caution must be exercised in considering the weight to be given to this species of evidence on account of the existence of many circumstances which may affect their truth. The situation in which a man is on the deathbed is so solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason, the requirements of oath and cross- examination are dispensed with. Since the accused has no power of cross- examination, the courts insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The

court, however, should always be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. [See: Laxman v. State of Maharashtra, (2002) 6 SCC 710]

44. The mode and manner, in which the dying declarations came to be recorded, is also something which creates a doubt, as regards its truthfulness and trustworthiness. Although, the Investigating Officer says that the recording of the dying declarations was video-graphed and the CD has been exhibited in evidence yet it is very important to determine the evidentiary value of the same.

45. We should also look into the genesis of the occurrence from a different angle. It is not in dispute that the three deceased died on account of severe burn injuries. It is also not in dispute that the room in which they were sleeping caught fire on account of which they suffered severe burn injuries. It is also not in dispute that inflammable substance like kerosene was found from the room which ignited the fire. However, the moot question is who set the room on fire? Could it be said that the prosecution has been able to prove beyond reasonable doubt that it was only and only the appellant-convict who set the room on fire by pouring the inflammable substance?

46. It appears to us that whoever did the act, the inflammable substance was not directly poured or sprinkled on the three deceased persons. Had it been so, they would have immediately woken up and by the time, the room is sat on fire, they would make good their escape or catch hold of the culprit. It appears that the inflammable substance might have been poured on the floor of the room and thereafter, the fire must have been ignited. Once, the room is on fire, the person responsible for setting the room on fire would immediately leave that place. We find it very difficult to believe that the appellant-convict was still inside the room or even outside the room to be witnessed by the deceased persons as well as by the PW-2 and PW-4, locking the room from outside after setting the room on fire. The conduct of the accused may be unnatural because he was residing in the very same house, however, the conduct which may be a relevant fact under Section 8 of the Indian Evidence Act, 1872 (for short, 'the Act 1872'), by itself may not be sufficient to hold a person guilty of the offence of murder.

47. On overall assessment of the materials on record, we have reached to the conclusion that neither the two dying declarations inspire any confidence nor the oral evidence of the PW-2 and PW-4 respectively inspire any confidence. Had the dying declarations stood corroborated by the oral evidence of the PW-2 and PW-4, then probably, it would have been altogether a different scenario. However, as noted above, the two dying declarations are not consistent or rather contradictory to the oral evidence on record.

48. The justification for the sanctity/presumption attached to a dying declaration, is two fold; (i) ethically and religiously it is presumed that a person while at the brink of death will not lie, whereas (ii) from a public policy perspective it is to tackle a situation where the only witness to the crime is not available.

49. One of the earliest judicial pronouncements where the rule as above can be traced is the King's Bench decision of the King v. William Woodcock reported in (1789) 1 Leach 500 : 168 ER 352, where a dying woman blamed her husband for her mortal injuries, wherein Judge Eyre held this declaration to be admissible by observing: -

> *"...the general principle on which this species of evidence is admitted is, that they are declarations made in extremity, when the party is at the point of death and when every hope of this world is gone: when every motive to falsehood is silent, and the mind is induced by the most powerful consideration to speak the truth; a situation so solemn, and so awful, is considered by the law as creating obligation equal to that which is imposed by a positive oath administered in a Court of Justice. (b) But a difficulty also arises with respect to these declarations; for it has not appeared and it seems impossible to find out, whether the deceased herself apprehended that she was in such a state of morality as would inevitably oblige her soon to answer before her Maker for the truth or falsehood of her assertions. .... Declarations so made are certainly entitled to credit; they ought therefore to be received in evidence: but the degree of credit to which they are entitled must always be a matter for the sober consideration of the Jury, under all the circumstances of the case."*
>
> (Emphasis supplied)

50. Interestingly, the last observation of Judge Eyre showcases, even at the inception of this principle, that the Courts were wary of the inherent weakness of dying declarations and cautioned for great care to be adopted.

51. It is significant to note the observations made by Taylor that *"Though these declarations, when deliberately made under a solemn sense of impending death, and concerning circumstances wherein the deceased is not likely to be mistaken, are entitled to great weight, if precisely identified, it should always be recollected that the accused has not the power of cross examination, a power quite as essential to the eliciting of the truth as the obligation of an oath can be, and that, where a witness has not a deep sense of accountability to his Maker, feelings of anger or revenge, or, in the case of mutual conflict, the natural desire of screening his own misconduct, may effect the accuracy of his statements and give a false colouring to the whole transaction. ...".* [See: Taylor on "Treatise on the Law of Evidence", 1931, 12th Edition Pg. 462]

52. It is observed in Corpus Juris Secundum Vol XL, Page 1283 that:

> *"In weighing dying declarations, the jury may consider the circumstances under which they were made, as, whether they were due to outside influence or were made in a spirit of revenge, or when declarant was unable or unwilling to state the facts, the inconsistent or contradictory character of the declarations, and the fact that deceased has not appeared and accused has been deprived of the opportunity to cross- examine him, and may give to them the credit and weight to which they believe, under all the circumstances, they are fairly and reasonably entitled."*

53. In India in the relevant provision of Section 32 of the Act 1872, the first exception to the rule against admissibility of hearsay evidence, is as under:

> ***"32(1). When it relates to cause of death.—*** *When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death,*

and whatever may be the nature of the proceeding in which the cause of his death comes into question."

54. Jon R. Waltz, American Jurist observed that, *"It has been thought, rightly or wrongly, that Dying Declarations have intrinsic assurances of trustworthiness, making cross examination unnecessary. The notion is that a person who is in the process of dying, and knows it, will be truthful immediately before departing to meet his Maker. (Of course, the validity of this hearsay exceptions is open to some debate. What about the person who is not deeply religious? What of the person who, as his last act, seeks revenge by falsely naming a life-long enemy as his killer? How reliable is the perception and memory of a person who is dying?)"* [See: Waltz, J.R. (1975) Criminal Evidence, Chicago: Nelson-Hall. pp.75-76]

55. The Privy Council in ***Neville Nembhard v. The Queen*** reported in (1982) 1 AII ER 183, on Section 32(1) of the Act 1872 opined that the evidence of dying declaration under the Indian law lacks the special quality as in Common Law and hence, the weight to be attached to a dying declaration admitted under Section 32 of the Act 1872 would necessarily be less than that attached to a dying declaration admitted under the common law rules.

56. The below cited observations from the decision of ***Nembhard*** (supra) are of significant importance:

" final observation should be made concerning the cases al ready mentioned that have been decided in the Court of Appeal for Eastern Africa. It appears that rule of practice has been developed that when a dying declaration has been the only evidence implicating an accused person a conviction usually cannot be allowed to stand where there had been a failure to give a warning on the necessity for corroboration: see for example Pius Jasunga s/o Akumu v. The Queen (1954) 21 E.A.C.A. 331 and Terikabi v. Uganda [1975] E.A. 60. But it is important to notice that in the countries concerned, the admissibility of a dying declaration does not depend upon the common law test: upon the deceased having at the time a settled hopeless expectation of impending death. Instead there is the very different statutory provision contained in section 32 (1) of the Indian Evidence Act 1872. That section provides that statements of relevant facts made by a person who is dead are themselves relevant facts:

> *"When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question." (emphasis added).*

In Pius Jasunga s/o Akumu v. The Queen it was pointed out (for the reason associated with the italicised words in the subsection) that the weight to be attached to a dying declaration admitted by reference to section 32 of the Indian Evidence Act 1872 would necessarily be less than that attached to a dying declaration admitted under the common law rules. The first kind of statement would lack that special quality that is thought to surround a declaration made by a dying man who was conscious of his condition and who had given up all hope of survival. Accordingly it may not seem surprising that the courts dealing with such statements have felt the need to exercise even more caution in the use to be made of them than is the case where the common law test is applied.""

57. This Court in ***Muthu Kutty & Anr. v. State by Inspector of Police, T.N.*** reported in (2005) 9 SCC 113, while discussing the decision in Woodcock (supra) referred to above had cautioned the courts to ensure that a dying declaration is reliable before relying on it, with the following observations: -

> ***"13.*** *... The general principle on which this species of evidence is admitted is that they are declarations made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn and so lawful is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice. These aspects have been eloquently stated by* ***Eyre, L.C.B. in R. v. Woodcock ((1789) 1 Leah 500 : 168 ER 352)****. Shakespeare makes the wounded Melun, finding himself*

disbelieved while announcing the intended treachery of the Dauphin Lewis explain:

> *"Have I met hideous death within my view, Retaining but a quantity of life,*
>
> *Which bleeds away even as a form of wax, Resolveth from his figure 'gainst the fire?*
>
> *What is the world should make me now deceive, Since I must lose the use of all deceit?*
>
> *Why should I then be false since it is true That I must die here and live hence by truth?"*
>
> *(See King John, Act V, Scene IV)*

The principle on which dying declaration is admitted in evidence is indicated in the legal maxim "nemo moriturus praesumitur mentire — a man will not meet his Maker with a lie in his mouth".

14. *... The situation in which a person is on the deathbed is so solemn and serene when he is dying that the grave position in which he is placed, is the reason in law to accept veracity of his statement. It is for this reason that the requirements of oath and cross-examination are dispensed with. Besides, should the dying declaration be excluded it will result in miscarriage of justice because the victim being generally the only eyewitness in a serious crime, the exclusion of the statement would leave the court without a scrap of evidence.*

15. *Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross- examination. Such a power is essential for eliciting the truth as an obligation of oath could be.* ***This is the reason the court also insists that the dying declaration should be of such a nature as to inspire full confidence of the court in its correctness. The court has to be on guard that the statement of the deceased was not as a result of either tutoring, or prompting or a product of imagination. The court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailant. Once the court is satisfied that the declaration was true and voluntary, undoubtedly, it***

can base its conviction without any further corroboration. *It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence. ..."*

(Emphasis supplied)

58. This Court in ***Nallapati Sivaiah v. Sub-Divisional Officer, Guntur, Andhra Pradesh*** reported in (2007) 15 SCC 465 and ***Bhajju alias Karan Singh v. State of Madhya Pradesh*** reported in (2012) 4 SCC 327 had explained the meaning and principles of dying declarations upon which its admissibility is founded, with the following observations: -

"20. *There is a historical and a literary basis for recognition of dying declaration as an exception to the hearsay rule. Some authorities suggest the rule is of Shakespearian origin. In The Life and Death of King John, Shakespeare had made Lord Melun utter "Have I met hideous death within my view, retaining but a quantity of life, which bleeds away, ... lose the use of all deceit" and asked, "Why should I then be false, since it is true that I must die here and live hence by truth?" William Shakespeare, The Life and Death of King John, Act 5, Scene 4, lines 22-29.*

Xxx xxx xxx

22. *It is equally well settled and needs no restatement at our hands that dying declaration can form the sole basis for conviction. But at the same time due care and caution must be exercised in considering weight to be given to dying declaration inasmuch as there could be any number of circumstances which may affect the truth. This Court in more than one decision has cautioned that the courts have always to be on guard to see that the dying declaration was not the result of either tutoring or prompting or a product of imagination. It is the duty of the courts to find that the deceased was in a fit state of mind to make the dying declaration. In order to satisfy itself that the deceased was in a fit mental condition to make the dying declaration, the courts have to look for the medical opinion.*

23. *It is not difficult to appreciate why dying declarations are admitted in evidence at a trial for murder, as a striking exception to the general*

rule against hearsay. For example, any sanction of the oath in the case of a living witness is thought to be balanced at least by the final conscience of the dying man. Nobody, it has been said, would wish to die with a lie on his lips. A dying declaration has got sanctity and a person giving the dying declaration will be the last to give untruth as he stands before his creator.

24. *There is a legal maxim "nemo moriturus praesumitur mentire" meaning, that a man will not meet his Maker with a lie in his mouth. Woodroffe and Amir Ali, in their Treatise on Evidence Act state:*

> *"when a man is dying, the grave position in which he is placed is held by law to be a sufficient ground for his veracity and therefore the tests of oath and cross- examination are dispensed with".*

25. *The court has to consider each case in the circumstances of the case. What value should be given to a dying declaration is left to court, which on assessment of the circumstances and the evidence and materials on record, will come to a conclusion about the truth or otherwise of the version, be it written, oral, verbal or by sign or by gestures."*

(Emphasis supplied)

59. This Court in ***Bhajju*** (supra) has observed as under:

"23. *The "dying declaration" essentially means the statement made by a person as to the cause of his death or as to the circumstances of the transaction resulting into his death. The admissibility of the dying declaration is based on the principle that the sense of impending death produces in a man's mind, the same feeling as that of a conscientious and virtuous man under oath. The dying declaration is admissible upon the consideration that the declaration was made in extremity, when the maker is at the point of death and when every hope of this world is gone, when every motive to file a false suit is silenced in the mind and the person deposing is induced by the most powerful considerations to speak the truth.*

Xxx xxx xxx

26. *The law is well settled that a dying declaration is admissible in evidence and the admissibility is founded on the principle of necessity..."*

60. Since time immemorial, despite a general consensus of presuming that the dying declaration is true, they have not been *stricto-sensu* accepted, rather the general course of action has been that judge decides whether the essentials of a dying declaration are met and if it can be admissible, once done, it is upon the duty of the court to see the extent to which the dying declaration is entitled to credit.

61. In India too, a similar pattern is followed, where the Courts are first required to satisfy themselves that the dying declaration in question is reliable and truthful before placing any reliance upon it. Thus, dying declaration while carrying a presumption of being true must be wholly reliable and inspire confidence. Where there is any suspicion over the veracity of the same or the evidence on record shows that the dying declaration is not true it will only be considered as a piece of evidence but cannot be the basis for conviction alone.

62. There is no hard and fast rule for determining when a dying declaration should be accepted; the duty of the Court is to decide this question in the facts and surrounding circumstances of the case and be fully convinced of the truthfulness of the same. Certain factors below reproduced can be considered to determine the same, however, they will only affect the weight of the dying declaration and not its admissibility: -

(i) Whether the person making the statement was in expectation of death?

(ii) Whether the dying declaration was made at the earliest opportunity? "Rule of First Opportunity"

(iii) Whether there is any reasonable suspicion to believe the dying declaration was put in the mouth of the dying person?

(iv) Whether the dying declaration was a product of prompting, tutoring or leading at the instance of police or any interested party?

(v) Whether the statement was not recorded properly?

(vi) Whether, the dying declarant had opportunity to clearly observe the incident?

(vii) Whether, the dying declaration has been consistent throughout?

(viii) Whether, the dying declaration in itself is a manifestation / fiction of the dying person's imagination of what he thinks transpired?

(ix) Whether, the dying declaration was itself voluntary?

(x) In case of multiple dying declarations, whether, the first one inspires truth and consistent with the other dying declaration?

(xi) Whether, as per the injuries, it would have been impossible for the deceased to make a dying declaration?

63. It is the duty of the prosecution to establish the charge against the accused beyond the reasonable doubt. The benefit of doubt must always go in favour of the accused. It is true that dying declaration is a substantive piece of evidence to be relied on provided it is proved that the same was voluntary and truthful and the victim was in a fit state of mind. It is just not enough for the court to say that the dying declaration is reliable as the accused is named in the dying declaration as the assailant.

64. It is unsafe to record the conviction on the basis of a dying declaration alone in the cases where suspicion, like the case on hand is raised, as regards the correctness of the dying declaration. In such cases, the Court may have to look for some corroborative evidence by treating the dying declaration only as a piece of evidence. The evidence and material available on record must be properly weighed in each case to arrive at an appropriate conclusion. The reason why we say so is that in the case on hand, although the appellant-convict has been named in the two dying declarations as a person who set the room on fire yet the surrounding circumstances render such statement of the declarants very doubtful.

65. In Sujit Biswas v. State of Assam reported in (2013) 12 SCC 406, this Court, while examining the distinction between "proof beyond reasonable doubt" and "suspicion" in para 13 has held as under:

> ***"13.*** *Suspicion, however grave it may be, cannot take the place of proof, and there is a large difference between something that "may be" proved, and something that "will be proved". In a criminal trial, suspicion no matter how strong, cannot and must not be permitted to take place of proof. This is for the reason that the mental distance between "may be" and "must be" is quite large, and divides vague conjectures from sure conclusions. In a criminal case, the court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof. The large distance between "may be" true and "must be" true, must be covered by way of clear, cogent and unimpeachable evidence produced by the prosecution, before an accused is condemned as a convict, and the basic and golden rule must be applied. In such cases, while keeping in mind the distance between "may be" true and "must be" true, the court must maintain the vital distance between mere conjectures and sure conclusions to be arrived at, on the touchstone of dispassionate judicial scrutiny, based upon a complete and comprehensive appreciation of all features of the case, as well as the quality and credibility of the evidence brought on record. The court must ensure, that miscarriage of justice is avoided, and if the facts and circumstances of a case so demand, then the benefit of doubt must be given to the accused, keeping in mind that a reasonable doubt is not an imaginary, trivial or a merely probable doubt, but a fair doubt that is based upon reason and common sense."*

66. It may be true as said by this Court, speaking through Justice Krishna Iyer in ***Dharm Das Wadhwani v. State of Uttar Pradesh*** reported in (1974) 4 SCC 267, that the rule of benefit of reasonable doubt does not imply a frail willow bending to every whiff of hesitancy. Judges are made of sterner stuff and must take a practical view of the legitimate inferences flowing from the evidence, circumstantial or direct. Even applying this principle, we have a doubt as regards the complicity of the appellant-convict in the crime.

67. In the present case, it is difficult to rest the conviction solely based on the two dying declarations. At the cost of repetition, the PW-2 has been otherwise also not believed by the High Court.

68. As discussed above, the oral evidence of the PW-4 Soni, also does not inspire any confidence. We are not satisfied that the prosecution has proved its case against the appellant-convict beyond reasonable doubt.

69. We, therefore, allow these appeals and acquit the appellant-convict of all the charges levelled against him. The appellant-convict is, therefore, directed to be released forthwith provided he is not required in connection with any other case or cases.

Headnotes prepared by:
Divya Pandey

Appeals allowed.