Neutral Citation No. - 2023:AHC:122633-DB
A.F.R.

Court No. - 48

Case :- CRIMINAL APPEAL No. - 6920 of 2017

Appellant :- Rameshwar Lal Chauhan
Respondent :- State of U.P.
Counsel for Appellant :- Rajeev Kumar Singh,Divyanshu Nandan Tripathi,P.K. Singh
Counsel for Respondent :- G.A.

Hon'ble Siddhartha Varma,J.
Hon'ble Manish Kumar Nigam,J.

(Per : Manish Kumar Nigam, J.)

1. This criminal appeal has been filed against the judgment and order of conviction dated 30.11.2016 passed by learned Addl. District and Sessions Judge, Court no.7, Gorakhpur in Sessions Trial No.153 of 2015 whereby the learned Additional District and Sessions Judge, Court No.7, Gorakhpur (hereinafter referred as 'trial court') has convicted Rameshwar Lal Chauhan (appellant-accused) s/o late Mishri Lal Chauhan for the offence punishable under Section 302 IPC and sentenced him for life imprisonment and has ordered him to pay a fine of Rs. 25,000/-. In the default of the payment of fine, he had to further suffer rigorous imprisonment for a period of one year. By the same judgment dated 30.11.2016, learned trial Court acquitted the other co-accused namely Smt. Bela Devi, wife of late Mishri Lal Chauhan, Bhuvneshwar Lal Chauhan slo late Mishri Lal Chauhan, Parmeshwar Lal Chauhan, s/o late Mishri Lal Chauhan under Section 498A, 304B, 323, 302 IPC and ¾ Dowry Prohibition Act.

2. The factual matrix of the case is that the informant namely Sarju Chauhan s/o late Pyare Lal Chauhan submitted a written complaint Ex.Ka-1 on which the First Information Report Ex.Ka-11 was registered in Case Crime No.487 of 2014 under Section 498A, 304B, 323 IPC and Section ¾ Dowry Prohibition Act at P.S. Cantt, Gorakhpur against Smt. Bela Devi, widow of late Mishri Lal Chauhan (mother-in-law),

Bhuvneshwar Lal Chauhan, Kamleshwar Lal Chauhan, Parmeshwar Lal Chauhan, all sons of late Mishri Lal Chauhan (brother-in-laws), Rameshwar Lal Chauhan s/o late Mishri Lal Chauhan (husband) and Anuradha d/o late Mishri Lal Chauhan (Nanad).

3. As per the First Information Report, the informant stated that his daughter Pooja (deceased) was married to Rameshwar Lal Chauhan (appellant-accused) on 26.6.2012. It was further stated that in the marriage, the informant had given Rs.1,00,000/- cash, T.V., Fridge, Washing Machine, Almirah, Bed and other household goods but soon after the marriage, his daughter-Pooja was harassed by her mother-in-law, Bela Devi, husband, Rameshwar Lal Chauhan, brothers-in-law (devar), Bhuvneshwar Lal Chauhan, Parmeshwar Lal Chauhan and Sister-in-law (Nanad), Anuradha for dowry. It was further stated that all the persons used to beat his daughter and whenever informant visited daughter's place, he consoled his daughter that with the passage of time, everything would be alright but there was no improvement in the behaviour of Saas, Devar, Nanad and husband of the deceased-Pooja. On 31.5.2014, aforesaid persons had beaten his daughter for Rs.50,000/- and for a ring (angoothi). Upon being informed, the informant visited the house of his daughter and brought her back to his house. On 2.6.2014, when the informant came back with his daughter after her B.A. IIIrd year examination, his son-in-law Rameshwar Lal Chauhan took the daughter back to his house . On 11.6.2014, deceased-Pooja worked hard for making arrangements for the marriage of her sister-in-law, Anuradha and in the morning of 12.6.2014 at about 6-6:30 a.m., Pooja came from the place where the marriage was being solemnized in connection with some work. Her Devars Bhuvneshwar Lal Chauhan and Kamleshwar Lal Chauhan also came to the house and locked his daughter in a room and poured kerosine oil and set her to fire. On being informed by persons of the area, informant came to his daughter's house and saw that her daughter was

burnt. With the help of other people, informant admitted his daughter to the District hospital, from where she was referred to the medical College, where during the course of treatment she died at about 8-8:30 p.m on 12.6.2014.

4. The dying declaration Ex.Ka-8 of the deceased-Smt. Pooja, was recorded on 12.6.2014 at about 10:20 a.m at B.R.D Medical College, Gorakhpur by Naib Tehsildar posted at Tehsil Sadar, Gorakhpur.

5. After the First Information Report was lodged, the Police investigated the crime and after collecting the evidence, a charge-sheet Ex.Ka-10 was submitted under Section 173(2) Cr.P.C. against Smt. Bela Devi, Bhuvneshwar Lal Chauhan, Parmeshwar Lal Chauhan and Rameshwar Lal Chauhan under Sections 498A, 304B, 323 IPC and Section ¾ Dowry Prohibition Act on 5.8.2014. The Investigating Officer found that Kamleshwar Lal Chauhan (devar) and Anuradha (nanad) were not involved in the crime. The learned Magistrate after taking cognizance and complying with the provisions of Section 207 Cr.P.C. committed the case for trial to the court of sessions on 16.4.2015. On 2.7.2015, Bela Devi, Bhuvneshwar Lal Chauhan, Parmeshwar Lal Chauhan and Rameshwar Lal Chauhan (appellant-accused) were charged under Section 498A, 304B and alternatively under Section 302/34 IPC by the Sessions Judge, Gorakhpur. During the trial, statement of 17 persons were recorded by the prosecution namely Sarju Chauhan (father of the deceased) P.W.-1, Sudhir Chauhan (brother of the deceased) P.W.-2, Pushpa Devi (mother of the deceased) P.W.-3, Rajan Mishra (independent witness) P.W.-4, Guddu Chauhan (independent witness) P.W.-5, Ramrati Devi (independent witness) P.W.-6, Ashok Kumar Chauhan (independent witness) P.W.-7, Ram Ashish (independent witness) P.W.8, Mohd. Zeeshan (independent witness) P.W.-9, Naushad (independent witness) P.W.-10, Radhey Shyam Gupta (independent witness) P.W.-11, Subhash Chandra Chauhan (relative of the accused husband) P.W.-12, Nitish Kumar Chauhan (husband of

nanad of the deceased) P.W.-13, Dayaram (Tehsildar) who conducted Panchayatnama, P.W.-14, Rakesh Ram (Naib Tehsildar) who recorded dying declaration, P.W.-15, Dr. Sant Lal Kanaujia (Doctor who conducted postmartem) P.W.-16, Dr. Chandradev (Doctor who gave fitness certificate) P.W.-17. Statement of all the accused namely Smt. Bela Devi, Bhuvneshwar Lal Chauhan, Parmeshwar Lal Chauhan and Rameshwar Lal Chauhan was recorded under Section 313 Cr.P.C.

6. The prosecution produced written complaint Ex.Ka-1, chik F.I.R Ex.Ka-11, Police reports Ex.Ka-2, memo of possession of burnt saree and other goods by Police Ex.Ka-3, letter sent along with the dead body Ex.Ka-4, letter to Chauki In-charge Medical College Gulriha Ex.Ka-5, photonash Ex.Ka-6, letter to the Chief Medical Officer Ex.Ka-7, dying declaration of deceased-Pooja Ex.Ka-8, post martem report Ex.Ka-9, charge-sheet Ex.Ka-10, General diary Ex.Ka-12, spot inspection report Ex.Ka-13, letter to Police control Ex.Ka-14, letter to Station House Officer, P.S. Gulriha, Ex.Ka-15, Nakal report Ex.Ka-16, report of medical college Ex.Ka-17, Nakal Report Ex.Ka-18 as documentary evidence during the trial.

7. After considering the entire evidence, the learned Sessions Judge acquitted Smt. Bela Devi, Bhuvneshwar Lal Chauhan, Parmeshwar Lal Chauhan under Section 498A, 304B, 323, 302 IPC and ¾ Dowry Prohibition Act and convicted Rameshwar Lal Chauhan (appellant-accused) under Section 302 IPC and sentenced the appellant with life imprisonment and fine of Rs.25,000/- and in case of default, one year rigorous imprisonment.

8. Heard learned Counsel for the accused-appellant, learned AGA for the State and perused the material on record.

9. Learned Counsel for the accused-appellant vehemently assailed the order of conviction and made following submissions that :-

(i) Accused-appellant is innocent and has not committed the alleged offence.

(ii) The order of conviction is based on conjecture and surmises.

(iii) All the prosecution witnesses of the fact have turned hostile and have not supported the prosecution case.

(iv) The trial court has held that the accused-appellant was guilty only on the basis of the dying declaration Ex.Ka-8.

(v) The trial court totally earred in relying upon the dying declaration Ex.Ka-8 which does not inspire confidence at all.

(vi) The certificate of fitness of deceased as to give dying declaration given by the Dr. Chandra Dev, Emergency Medical Officer, P.W.-17 was not in a proper format and had been transcribed on the left side of the page on which dying declaration was recorded, Ex.Ka-8. From the evidence of P.W.17 Dr. Chandra Dev, it cannot be said that the deceased was in a fit mental condition to give the dying declaration.

(vii) As per the post-mortem report Ex.Ka-9, deceased Pooja sustained 100% burn injuries and except for both sole (pair ka talwa) and hair (head) every part of the body was burnt and the deceased-Pooja was not in fit condition to give the dying declaration.

(viii) Evidence of P.W.-15, Naib Tehsildar who has recorded the dying declaration and P.W.-17, Dr. Chandradev, Emergency Medical Officer who gave the fitness certificate does not inspire confidence. The evidence of P.W.-15 and P.W.-17 creates a strong suspision about the consciousness and mental fitness of the deceased, while the statement was being recorded.

(ix) Death of the deceased was because of an accident and was not a homicide.

(x) And lastly, it was submitted by the learned Counsel for the appellant that the appellant was not confronted with the dying declaration at the time of recording his statement under Section 313 Cr.P.C. and, therefore, same cannot be relied upon and has to be excluded from the evidence.

10. Per contra, learned AGA for the State refuted the submissions made by the learned Counsel for the appellant and made following submissions that :-

(i) Trial Court rightly relied upon the dying declaration of the deceased for convicting the accused as the witnesses of fact were won over by the defence.

(ii) There is no impediment in convicting the accused only on the basis of a dying declaration without there being any other corroborative evidence.

(iii) No format has been prescribed for recording the dying declaration.

(iv) From the evidence of P.W.-15 and P.W.-17, it is established that the deceased was physically and mentally fit while recording the dying declaration by P.W.-15.

(v) P.W.-15 and P.W.-17 are independent witnesses and there is no suggestion by the defence as to why the P.W.-15 and P.W.-17 would give false evidence against the accused-appellant.

(vi) Not putting a question to the accused with regard to Ex.Ka.-8 i.e. the dying declaration during questioning the accused under Section 313 Cr.P.C. will not vitiate the trial and the accused had to establish the prejudice caused to him.

(vii) And it was lastly submitted that the trial court rightly passed the judgment convicting the accused-appellant after considering the entire evidence and the appeal had no merits and was liable to be dismissed.

11. With the help of both Counsel, learned Counsel for the appellant and learned AGA for the State, we have perused the record of the case

from which, it is clear that P.W.-1 Sarju Chauhan who was father of the deceased-Pooja Chauhan and he had not supported the prosecution version and was declared hostile by the prosecution. It was stated by the P.W.-1, Sarju Chauhan in his examination-in-chief that his daughter, Pooja while heating the milk for her daughter met with an accident in which she was badly burnt at about 6:30-7:00 a.m. on 12.6.2014. At the time of incident, Rameshwar Lal Chauhan, accused-appellant (husband of the deceased), Bela Devi (mother-in-law), Bhuvneshwar Lal Chauhan, Kamleshwar Lal Chauhan (brother-in-laws), Anuradha (Nanad) all were at Kamla Marriage House. It was further stated by P.W.-1 that somebody informed him at Kamla Marriage House that his daughter had been burnt at about 6:30-7:00 a.m. and on receiving the aforesaid information all of them reached the house and found that Pooja was badly burnt. P.W.-1 along with husband of the deceased (appellant) and other relatives rushed Pooja to the Sadar Hospital, Gorakhpur from where, she was referred to the Medical College and on the very same day at about 8:00-9:00 p.m. Pooja succumbed to her injuries at the Medical College, Gorakhpur. In his cross examination, P.W.-1 denied the prosecution story and stated that his daughter died due to an accident. It was stated by P.W.-1 that in the Medical College, neither the Doctor nor the Magistrate had taken the statement of his daughter, the allegation of dowry made in the First Information Report was also denied by the P.W.-1.

12. P.W.-2 namely Sudhir Chauhan, who was the brother of the deceased-Pooja also did not support the prosecution version and in his cross examination, stated that Pooja had died because of burning which was accidently caused while heating the milk for her daughter at about 6:30-7:00 a.m. on 12.6.2014. He stated that she died at about 8:00-9:00 p.m. on the same day in the Medical College. P.W.-2 was also declared hostile by the prosecution and in cross examination by the Additional Government Advocate, P.W.-2 denied the suggestion that there was

settlement outside the Court with the accused and, therefore, P.W.-2 was not giving the correct statement.

13. P.W.-3, Pushpa Devi who was mother of the deceased-Pooja also did not support the prosecution version and stated in her examination-in-chief that Pooja died because of accidental fire while heating the milk for her daughter. P.W.-3 was also declared hostile by the prosecution and in her cross examination, P.W.-3 stated that after getting the information, she went to the Medical College, Gorakhpur where her daughter was unconscious and she remained with her unconscious daughter till she was alive.

14. P.W.-4, Rajan Mishra, P.W.5, Guddu Chauhan, P.W.-6 Ramrati Devi, P.W.-12, Subhash Chandra Chauhan, P.W.-13, Nitish Kumar Chauhan who were independent witnesses also turned hostile and not supported the prosecution case. P.W.-7, Ashok Kumar Chauhan, P.W.-8 Ram Ashish, P.W.-11 Radhey Shyam Gupta who were the witnesses of Panchayatnama were also declared hostile by the prosecution. P.W.-9, Mohd. Zeeshan, P.W.-10, Naushad who were witnesses of recovery were also declared hostile by the prosecution.

15. P.W-14, Daya Ram retired Naib Tehsildar who was the witness of the Panchayatnama proved the Panchayatnama and stated that Panchayatnama was conducted under his instructions on 13.6.2014.

16. P.W.-15 Rakesh Ram, who was Naib Tehsildar at the time of incident and recorded the dying declaration of the deceased Pooja on 12.6.2014 proved the dying declaration.

17. P.W.-16 Dr. Sant Lal Kanaujia who conducted the post-mortem of the deceased Pooja on 13.6.2014 proved the post-mortem.

18. P.W.-17, Dr. Chandra Dev, Emergency Medical Officer Nehru Hospital B.R.D Medical College, Gorakhpur stated that he gave the

certificate of fitness at the time when dying declaration was being recorded by the Magistrate and proved the same.

19. From the oral evidence as referred above, we find that all the witnesses of fact had not supported the prosecution version and were declared hostile by the prosecution. The learned trial court relying upon the dying declaration Ex.Ka-8 of the deceased-Pooja convicted the accused-appellant under Section 302 IPC but as all the witnesses were declared hostile acquitted the other accused for charges under Section 304B, 498A IPC and Section ¾ Dowry Prohibition Act.

20. It has been submitted by the learned Counsel for the appellant that since all the witnesses of fact had not supported the prosecution version, learned trial court ought not have convicted the accused-appellant only on the basis of dying declaration of the deceased without there being any other corroborative evidence. In this regard, submission of learned AGA on behalf of the State is that there is no impediment in relying upon dying declaration of the deceased without there being any corroborative evidence.

21. The question that whether a conviction can be recorded only on the basis of dying declaration without there being any corroborative evidence is no more res-integra as the dying declaration is a substantive piece of relevant evidence in view of Section 32(1) of the Evidence Act. Under Section 32, when a statement is made by a person, as to the cause of death or as to any of the circumstances which result in his death, in cases in which the cause of person's death comes in to question, such a statement, oral or in writing, made by the deceased to the witness is a relevant fact and is admissible in evidence. The statement made by the deceased before death is called a dying declaration.

22. 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 has Lord Melun utter what a "hideous death within my view, retaining but a quantity of life, which bleeds away,..lost 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, Sc.2, lines 22-29.

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 a 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 person to give an untruth as he stands before his creator.

24. There is a legal maxim "*Nemo Moriturous 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. It is also a settled principle of law that dying declaration is a substantive evidence and an order of conviction can be safely recorded on the basis of dying declaration.

26. Undeniably, the learned trial court has convicted the accused-appellant only on the basis of the dying declaration as the other witnesses of fact had not supported the prosecution version and had turned hostile. No doubt it is settled law that if a dying declaration inspires full confidence it can form the basis for conviction. There is neither rule of law nor of prudence that dying declaration cannot be relied upon without corroboration. Needles to say that if the Court is satisfied that the dying declaration is true and voluntary, it can base conviction on it without

corroboration. Before going to award conviction against the accused, the trial court must be mindful of the fact that there should be no room to suspect the evidence led by the prosecution on which conviction is being awarded. As a general rule, while appreciating evidence in a criminal case, the Court should bear in mind that it is not the quantity but the quality of evidence which is material. It is the duty of the Court to consider the trustworthiness of the dying declaration, and whether the same inspires full confidence so as to accept rely act upon before recording conviction.

27. In ***Khushal Rao Vs. State of Bombay*** reported in ***AIR 1958 SC 22***, a three Judges Bench of Supreme Court, after discussing the law in detail, observed as follows :-

> *"(16) On a review of the relevant provisions of the Evidence Act and of the decided cases in the different High Courts in India and in this Court, we have come to the conclusion, in agreement with the opinion of the Full Bench of the Madras High Court, aforesaid, (1) that it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated; (2)* ***that each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made;*** *(3) that it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other pieces of evidence; (4)* ***that a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence;*** *(5) that a dying declaration which has been recorded by a competent magistrate in the proper manner, that is to say, in the form of questions and answers, and, as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human, memory and human character, and (6) that in order to test the reliability of a dying declaration, the Court has to keep in view the. circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the facts stated had not been impaired at the time he was making the statement, by circumstances beyond his control; that the statement has been consistent throughout if he had several*

opportunities of making a dying declaration apart from the official record of it; and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties.

(17) ***Hence, in order to pass the test of reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused who had no opportunity of testing the veracity of the statement by cross-examination.*** *But once the court has come to the conclusion that the dying declaration was the truthful version as to the circumstances of the death and the assailants of the victim, there is no question of further corroboration. If, on the other hand, the Court, after examining the dying declaration in Judgment 12 apeal71.19 .odt all its aspects, and testing its veracity, has come to the conclusion that it is not reliable by itself, and that it suffers from an infirmity, then, without corroboration it cannot form the basis of a conviction. Thus, the necessity for corroboration arises not from any inherent weakness of a dying declaration as a piece of evidence, as held in some of the reported cases, but from the fact that the Court, in a given case, has come to the conclusion that that particular dying declaration was not free from the infirmities, referred to above or from such other infirmities as may be disclosed in evidence in that case."*

28. On the same line we find it relevant to note following observations of Hon'ble Supreme Court in case of **Paniben Vs. State of Gujrat** reported in **(1992) 2 SCC 747** (Para 18 at page 480 and 481).

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 deceased was not as a result of either tutoring, 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 assailants. 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. This Court has laid down in several judgments the principles governing dying declaration, which could be summed up as under:

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

corroboration.(Mannu Raja v. State of M.P., (1976) 2 SCR 764).

(ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. (State of U.P. v. Ram Sagar Yadav, AIR 1985 SC 416; Ramavati Devi v. State of Bihar, AIR 1983 SC 164).

(iii) This Court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had opportunity to observe and identify the assailants and was in a fit state to make the declaration. (K. Ramachandra Reddy v. Public Prosecutor, AIR 1976 SC 1994).

(iv) Where dying declaration is suspicious it should not be acted upon without corroborative evidence. (Rasheed Beg v. State of Madhya Pradesh, (1974) 4 SCC 264).

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. (Kake Singh v. State of M. P., AIR 1982 SC 1021)

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. (Ram Manorath v. State of U.P., 1981 SCC (Crl.) 581).

(vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected. (State of Maharashtra v. Krishnamurthi Laxmipati Naidu, AIR 1981 SC 617).

(viii) Equally, merely because it is a brief statement, it is not be discarded. On the contrary, the shortness of the statement itself guarantees truth. (Surajdeo Oza v. State of Bihar, AIR 1979 SC 1505)

(ix) Normally the court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eye witness has said that the deceased was in a fit and conscious state to make this dying declaration, the medical opinion cannot prevail. (Nanahau Ram and another v. State of M.P., AIR 1988 SC 912)

(x) Where the prosecution version differs from the version as given in the dying declaration, the said

> *declaration c*annot be acted upon. (State U.P. v. Madan Mohan, AIR 1989 SC 1519)

29. It would be appropriate here to remind ourselves that generally, there are two issues with respect to a dying declaration. The first one would be, whether the declaration was actually made. Naturally, this would be assessed on the basis of the evidence of the witnesses, who claim that such declaration was made and witnessed by them. There would be a question of accuracy of the record of such declaration, if made or maintained by such witnesses. If the evidence in that regard is satisfactory, the Court would come to a conclusion that a particular statement was, indeed, made by the deceased. It is not the end of the matter, the Court thereafter would be required to decide whether such statement made by the deceased was true. In other words, the fact of having made the statement and the truthfulness of the said statement are both required to be established before a declaration is termed as reliable.

30. For ascertaining the truthfulness of the statement of a dying person, the parameters, which are applied to the witnesses while judging reliability of their evidence, must be applied. The reliability of a version of a witness would depend on several factors including opportunity available to witness to know, physical and mental capacity of the patient to convey, kind of treatment which the patient was undergoing, chances of tutoring, relation of witness with patient and so on. The law does not afford to take a risk of blindly relying on the statement only because it has been recorded by Executive Magistrate. Usual scrutiny from every possible angle is must and evidence of Executive Magistrate must withstand the test of reliability.

31. In case of ***Nallapati Sivaiah Vs. Sub-Divisional Officer, Guntur, Andhra Pradesh*** reported in ***(2007) 15 Supreme Court Cases 465*** (in paragraph no.26 of judgment at Page 475 SCC), Supreme Court observed as follows:-

> *"It is also a settled principle of law that dying declaration is a substantive evidence and an order of conviction can be safely recorded on the basis of dying declaration provided the court is fully satisfied that the dying declaration made by the deceased was voluntary and reliable and the author recorded the dying declaration as stated by the deceased. This Court laid down the principle that for relying upon the dying declaration the court must be conscious that the dying declaration was voluntary and further it was recorded correctly and above all the maker was in a fit condition-mentally and physically- to make such statement."*

32. The above noted principles have been recently reiterated by the Apex Court in the case of ***Jagbir Singh Vs. State (NCT of Delhi)*** reported in ***(2019) 8 SCC 779.***

33**.** In the light of such settled legal position, the facts of the case are to be assessed. On the basis of the factual aspects one has to independently decide whether the evidence of dying declaration inspires confidence. The principles would provide a guide but one has to decide the worth of a dying declaration only on the basis of facts and the attendant circumstances. The law is well settled that there is no specific format for writing a dying declaration, meaning thereby, written dying declaration can be in any form, but the essence is, it should inspire full confidence of the Court regarding its correctness and the statement of deceased was not a result of tutoring or product of imagination. More importantly, there should be evidence that the victim was well oriented and in a fit state of mind to give statement. It is duty of the recorder to satisfy himself that the deceased was in fit mental condition to give the statement and later the Court should also satisfy that the deceased was in a fit state of mind while giving statement.

34. Learned Counsel for the appellant drew our attention to the dying declaration Ex.Ka-8 and submitted that from the perusal of the dying declaration Ex.Ka-8, it is clear that the dying declaration was recorded at about 10:20 a.m. on 12.6.2014. It has been contended by learned Counsel

for the appellant that Dr. Chandra Dev, Emergency Medical Officer, Nehru Hospital B.R.D. Medical College, Gorakhpur, P.W.-17 has transcribed on the left margin of the page on which dying declaration was recorded that patient was mentally fit for giving the dying declaration on 12.6.2014 before, during and after 10:15 a.m.-10:30 a.m. It has been contended by learned Counsel for the appellant that by one stroke of the pen the Doctor has given a certificate of fitness and that too on the left margin of page on which the dying declaration was recorded.

35. It was also contended by learned Counsel for the appellant that in his statement Dr. Chandra Dev, P.W.17 stated that Paper No.39-Ka, memo dated 12.6.2014 was prepared by the pharmacists and after being prepared, P.W.-17 signed the same and the aforesaid memo was sent to the Magistrate on which the Magistrate recorded the dying declaration. P.W.17 after looking at the Paper No.39-Ka, memo stated that it has been transcribed on the memo that a lady who was seriously burned was brought on 12.6.2014 at about 10:15 a.m. and her dying declaration was necessary to be recorded. It had also been stated by P.W-17 that the time 10:15 a.m. mentioned in the memo had been transcribed on the basis of bedhead ticket.

36. Assailing the statement of P.W.-17 learned Counsel for the appellant contended that as per the evidence of P.W.-17 deceased was admitted in the medical college on 12.6.2014 at about 10:15 a.m. whereas the dying declaration was recorded at 10:20 a.m. on 12.6.2014 i.e within five minutes after the admission of deceased in the hospital. From the evidence of P.W.-17, Dr. Chandra Dev and P.W.-15, Rakesh Ram Sub-Registrar who had recorded the dying declaration, it is clear the memo of request Paper no.39-Ka was prepared by the Doctor after the admission of the deceased in the hospital at 10:15 a.m. and the aforesaid memo was served upon the Magistrate by the Police at his residence and only after the service of memo Paper No.13-Ga the P.W.-15 came to the hospital and

recorded the dying declaration. It has been further contended by learned Counsel for the appellant that it has come in the statement of P.W.-17 that he had no knowledge of the fact as to which Doctor admitted the deceased in the hospital and further from the statement of P.W.-17, it is also clear that P.W.-17 never treated the deceased but had given a certificate of fitness to the effect that the deceased was mentally fit for giving the dying declaration on 12.6.2014 before, during and after 10:15 a.m. -10:30 a.m. It has also been contended that the entire exercise of recording, the dying declaration was completed within a short period 15 minutes i.e. from 10:15 a.m. to 10:30 a.m.

37. It was further contended by learned Counsel for the appellant that P.W.-17 in his cross-examination stated that he had written on the left margin of Ex.Ka-8, after the same being prepared by the Magistrate, just as a formality that the patient is mentally fit for giving the dying declaration on 12.6.2014 before during and after 10:15 a.m.-10:30 a.m. Learned Counsel for the appellant further contended that P.W.-17 has not stated anything in his evidence as to how he came to the conclusion that the deceased was in a fit condition for recording the dying declaration. Referring to the statement of P.W.-15, Rakesh Ram, Sub-Registrar who recorded the dying declaration, learned Counsel for the appellant contended that P.W.-15 in his statement has stated that on 12.6.2014, he had not received any written intimation for recording the dying declaration and he was informed by the Police Control Room through telephone and thereafter a memo was also sent by the Police Control Room that one lady is admitted in B.R.D. Medical College and her dying declaration was to be recorded. It was further contended by learned Counsel for the appellant that in his statement P.W.-15 admitted that this information came to the P.W.-15 at about 8:00 a.m. on 12.6.2014 whereas as a matter of fact the deceased was admitted to the Medical College, as per the statement of P.W.-17, at about 10:15 a.m. P.W.-15 in his statement

after looking at the memo Paper No.39-Ka stated that this memo i.e. Paper No.39-Ka was shown to the P.W.-15 at around 8:30 a.m. to 9:00 a.m. at his residence by the Police. It was further pointed out by learned Counsel for the appellant that in his statement, P.W.-15 stated that P.W.-15 started for medical college at about 9:00 a.m. from his house and reached the medical college within 15-20 minutes at about 9:20 a.m. After reaching the hospital, P.W.-15 came to know that the deceased-Pooja was admitted in surgery OPD-C/Bed and on the basis of the same, P.W.-15 reached the deceased. P.W.-15 further stated that he did not remember that whether the deceased was in a burnt state or not. It was further stated by P.W.-15 that before recording the statement, he had taken a certificate from the Doctor as to whether the deceased was in a position to give her statement or not. Learned Counsel for the appellant further argued that dying declaration was recorded between 10:20 a.m. and 10:30 a.m. From the evidence of P.W.-15 and P.W.-17, it is clear that the deceased was admitted in the medical college at about 10:15 a.m. and P.W.-15 reached the hospital even before the deceased was admitted to the medical college at about 9:20 a.m. on the basis of an information given orally at about 8:00 a.m. in the morning by the Police at his residence and subsequently by a written memo Paper No.39-Ka which was served upon the appellant at about 8:30 a.m–9:00 a.m. at his residence. From the statement of P.W.-17, it is clear that the aforesaid memo Paper No.39 Ka was transcribed after the deceased was admitted in the medical college at about 10:15 a.m. and thereafter the same was sent to the P.W.-15 for getting the dying declaration recorded but the dying declaration itself as per Ex.Ka-8 was recorded at 10:20 a.m.

38. The learned Counsel for the appellant further drew out attention to the fact that P.W.-16, Dr. Sant Lal Kanaujia, who had conducted the post-mortem of the deceased stated that the deceased was in 100% burnt state. Except her hair and Talva, the entire body of the deceased was burnt.

Referring to the post-mortem report Ex.Ka-9, it has been pointed out by the learned Counsel for the appellant that the deceased had superficial to deep burns all over the body except both sole and hair.

39. Learned Counsel for the appellant further contended that from the evidence of P.W.-15, P.W.-16 and P.W.-17 it is clear that the deceased was seriously burned in the incident to the extent of 100%. Except her sole and hair, the whole body was burnt. She was not in a position to give a dying declaration. Further, the timing of the recording of the dying declaration is also doubtful as from the dying declaration Ex.Ka-8, it is clear that the same was recorded between 10:20 a.m. and 10:30 a.m. on 12.6.2014, whereas the deceased was admitted to the medical college at about 10:15 a.m. It was further contended that though the deceased was admitted at 10:15 a.m. on 12.6.2014, from the evidence of P.W.-15, it revealed that the P.W.-15 was served with the memo Paper No.39 Ka for recording the dying declaration much before the deceased was admitted to the medical college i.e. at about 8:30 a.m.- 9:00 a.m. on 12.6.2014 at his residence whereas from the evidence of P.W.-17, the aforesaid memo, Paper No.39-Ka was itself prepared after the admission of the deceased in the medical college at about 10:15 a.m. Thereafter, the same was sent to be served upon the Magistrate and as such it was not possible for the P.W.-15 to have recorded the statement, as recorded in Ex-Ka-8, at 10:20 a.m. on 12.6.2014 and as such the dying declaration does not inspire confidence and cannot be relied upon.

40. In rebuttal, learned A.G.A. contended that as there is no format prescribed for recording the dying declaration, the fact that certificate of fitness was transcribed by the Doctor on the left margin of the page on which dying declaration was recorded would have no effect. It has been further contended by learned A.G.A. that though there were minor inconsistencies in the statement of P.W.-15 and P.W.-17 as to service of memo paper No.39Ka but the same would not render their testimonies

unreliable. Learned A.G.A. stressed upon the fact that P.W.-15, Naib Tehsildar and P.W.-17, Doctor were responsible Government officials and there was no reason for them to give false evidence.

41. We have considered the rival submissions of the parties and perused the statement of P.W.-15 and P.W.-17. In our view the dying declaration Ex.8ka does not inspire confidence for more than one reason.

42. As per the memo Paper No.39Ka, the deceased was admitted at Medical College at about 10:15 a.m on 12.6.2014. P.W. 17, Dr. Chandra Deo in his statement had stated that after the deceased was admitted in the medical college, the aforesaid memo paper No.39 Ga was prepared by the pharmacist, and thereafter the same was signed by P.W.-17. The memo Paper No.39 Ka was then sent to P.W.-15 for recording the dying declaration. P.W.15, Rakesh Ram, Naib Tehsildar in his statement initially denied that any written information was received by him and stated that Police had informed the P.W.-15 on mobile phone (No.9454416245) for recording the dying declaration at about 8:00 a.m. In the later part of his statement P.W.-15 stated that Police Constable brought a memo for recording the dying declaration. It was further stated that memo was shown to P.W.-15 at about 8:30-9:00 a.m. P.W.-15 further stated that he had seen the memo and the same was Paper No.39 Ka. It was further stated by P.W.-15 that he had started for the medical college at about 9:00 a.m. and reached medical college at about 9:20 a.m.

43. From the statements of P.W.-17, Dr. Chandra Deo, who had signed the memo 39-Ka, it is clear that the memo Paper No.39 Ka was prepared only after deceased was admitted in medical college i.e. after 10:15 a.m. On the other hand from the evidence of P.W.-15, Rakesh Ram, the information was received by P.W.-15 on his mobile phone and was given by the Police at about 8:00 a.m. and the memo paper No.39Ka was served by Police Constable to P.W.-15 at about 8:30-9:00. Statement of both the

witnesses i.e. P.W.-17 and P.W.-15 are inconsistent so far as the memo sent to P.W.-15 for recording the dying declaration.

44. P.W.-15 Rakesh Ram, who recorded the dying declaration had stated that on being informed by the Police (orally as well as by memo in writing Paper No.39Ka), P.W.-15 reached the medical college at about 9:20 a.m. on 12.6.2014 for recording the dying declaration. From Paper No.39Ka, it is clear that deceased was admitted in medical college at about 10:15 a.m. Learned A.G.A. contended that it is possible that deceased might have been admitted prior in time than as had been mentioned in Paper No.39 Ka. Prosecution had only produced Paper No.39 Ka in evidence. Bed head ticket of the deceased which would be the best evidence to demonstrate the time of admission of deceased in medical was not produced by prosecution.

45. Further as per the prosecution story, the incident occurred at about 6:00 a.m. -6:30 a.m. on 12.6.2014 thereafter the information was received by the informant who was at Kamla marriage hall and after receiving the information reached the house where the deceased was found in a burnt state by the informant and the other family members. Thereafter she was taken to the District Hospital, Gorakhpur from where she was referred to the medical college. The prosecution failed to prove by producing any evidence from the District Hospital, Gorakhpur as to at what time the deceased was brought at District Hospital, Gorakhpur and was referred to the Medical College.

46. Thus from the evidence of P.W.-17, P.W.-15 and Paper No.39 Ka, timing of recording the dying declaration becomes doubtful. As per the evidence of P.W.-17 and Paper No.39Ka, the requisition sent to P.W.-15 for recording the dying declaration was sent after the 10:15 a.m. i.e. after the admission of deceased in the medical college. Whereas from the evidence of P.W.-15, he was informed (orally as well as in writing by

Memo Paper No.39Ka) at about 8:30-9:00 a.m. i.e. much before deceased was admitted in medical college. From the dying declaration Ex.Ka-8, it appears that the dying declaration was recorded between 10:20-10:30 a.m. on 12.6.2014 by P.W.-15. The recording of dying declaration at 10:20 a.m. itself creates a doubt in view of the fact that the P.W.-15 was informed much prior to the admission of the deceased in the medical college through a memo Paper No.39 Ka which was subsequently prepared after the admission of the deceased i.e. after 10:15 a.m. on 12.6.2014 as per evidence of P.W.-17.

47. P.W.-15, Rakesh Ram, Naib Tehsildar, who had recorded the dying declaration has stated that prior to the recording of the dying declaration, P.W.-15 had taken a certificate from the doctor as to whether patient was capable of giving the statement or not. P.W.-17, Dr. Chandra Deo who gave the medical certificate stated that before the Magistrate, I recorded my opinion as to condition of deceased to give her statement. On the left margin of Ex.Ka-8 I recorded " Patient is mentally fit for dying declaration on 12.6.2014 before, during and after the recording of dying declaration between 10:15 a.m. and 10:30 a.m. In his cross-examination, P.W.-17 stated that after Ex.-8 was prepared by Magistrate, and as a formality I wrote on the left side of Ex-8 that "Patient is mentally fit for dying declaration on 12.6.2014 before and during and after 10:30 a.m."

48. Thus there are apparent inconsistencies between the statements of P.W.-15 and P.W.-17 as to the timing of the certificate given by P.W.-17. From the reading of certificate given by P.W.-17 which is on left margin of Ex.8, it is clear that the same was given after the dying declaration was recorded by the P.W.-15.

49. From the evidence of P.W.-17 nothing has come as to how the Doctor came to the conclusion that the deceased was in a fit mental condition to give her dying declaration. Dr. Chandra Dev had not stated as

to how he had examined the patient. Neither he stated that he had checked her blood pressure, pulse rate or any other parameter to ascertain her mental fitness. It has also not come in evidence of P.W.-17, Dr. Chandra Dev that he had knowledge as to what treatment/medication was given to the deceased at the time, she was admitted in the medical college by the attending doctor. In the peculiar facts of the case, a mere omnibus statement that he gave the certificate of fitness would not suffice.

50. Even P.W.-15 who recorded the dying declaration stated that he got a certificate of fitness from the Doctor but has not stated that he was himself satisfied with regard to the fitness of the deceased to get her statement recorded. He has also not stated as to whether he had put any preliminary questions to the deceased or by any other mode he himself got satisfied about the mental fitness. Such evidence is totally absent.

51. In order to establish dying declaration the evidence of P.W.-17, Dr. Chandra Dev and evidence of P.W.-15, Rakesh Ram Sub-Registrar were taken into consideration by the prosecution. Neither the Medical Officer, P.W.-17 nor the Magistrate, P.W.15 has detailed as to how they got satisfied about the mental fitness of the patient, therefore, such type of evidence coupled with the fact that all the other prosecution witnesses of fact had turned hostile and had not supported the prosecution version the whole case becomes suspicious. The time of recording the dying declaration i.e. 10:20 a.m. to 10:30 a.m. on 12.6.2014 becomes absolutely doubtful. Prosecution has failed to establish that the dying declaration was recorded at the time when it is alleged to have been recorded as per Ex.Ka-8 specially in view of evidence P.W.-15 and P.W.-17, which contradict, the timing of recording the evidence. Even more suspicious the evidence becomes when the Doctor in his statement had admitted that he had given the certificate just as a formality.

52. The Apex Court in case of ***Kanchy Komuramma Vs. State of A.P.*** reported in ***1996 SCC (Cri) 31*** has held that the dying declaration has been recorded by a judicial Magistrate, by itself is not a proof of truthfulness of the dying declaration, which in order to earn acceptability has still to pass the test of scrutiny of the court. There are certain safeguards which must be observed by a Magistrate when requested to record a dying declaration. The Magistrate before recording the dying declaration must satisfy himself that the deceased is in a proper mental state to make the statement. He must record that satisfaction before recording the dying declaration. He must also obtain the opinion of the doctor, if one is available, about the fitness of the patient to make a statement and the prosecution must prove that opinion at the trial in the manner know to law. (Para 11)

53. The Apex Court in the case of ***Puran Chand Vs. State of Haryana (2010) 6 SCC 566*** advised the courts to remain alive to all attending circumstances when the dying declaration comes into being before making the same the basis of conviction. The relevant observations are contained in paragraphs 15 of the judgment extracted below:-

> *"15. The Courts below have to be extremely careful when they deal with a dying declaration as the maker thereof is not available for the cross-examination which poses a great difficulty to the accused person. A mechanical approach in relying upon a dying declaration just because it is there is extremely dangerous. The Court has to examine a dying declaration scrupulously with a microscopic eye to find out whether the dying declaration is voluntary, truthful, made in a conscious state of mind and without being influenced by the relatives present or by the investigation agency who may be interested in the success of investigation or which may be negligent while recording the dying declaration."*

54. No doubt, a dying declaration is a valuable piece of evidence but it has to be considered as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing evidence and if it is not found wholly trustworthy

or truthful, it should not form the sole basis of conviction without corroboration.

55. Although, P.W.-1 informant/father of deceased, P.W.-2, brother of the deceased and P.W.-3, mother of the deceased were declared hostile. The testimony of P.W.-3, mother of the deceased could have been considered to test the veracity of the dying declaration. P.W.-3 in her statement had stated when P.W.-3 reached the medical college, her daughter (deceased) was unconscious and that P.W.-3 remained with her daughter during the period deceased was unconscious and remained alive. Considering the evidence of the P.W.-3, mother of the deceased and of Dr. Sant Lal Kanaujia, P.W.-16 who had conducted the post-mortem and stated that the deceased was 100% burnt, further, creates doubt as to the fact that whether deceased was in fit physical and mental condition to have recorded the dying declaration as alleged by the prosecution.

56. It be noted that law in respect of value of the testimony of hostile witnesses has been settled by a catena of decisions of the Supreme Court. Their testimony can be utilized either by the prosecution or by the defence and the court may accept their testimony if it considers it truthful.

57. In the case of **Ramesh Harijan Vs. State of Uttar Pradesh (2012) 5 SCC 777,** the Supreme Court observed :-

> *"24. In State of U.P. Vs. Ramesh Prasad Misra and another (1996) 10 SCC 360, this Court held that evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. A similar view has been reiterated by this Court in Balu Sonba Shinde Vs. State of Maharashtra, (2002) 7 SCC 543; Radha Mohan Singh @ Lal Saheb & others Vs. State of U.P., AIR 2006 SC 951; Sarvesh Narain Shukla Vs. Daroga Singh and others, AIR 2008 SC 320; and Subbu Singh Vs. State (2009) 6 SCC 462.*
>
> *Thus, the law can be summarised to the effect that the evidence of a hostile witness cannot be discarded as a whole, and relevant parts thereof which are admissible in law, can be used by the prosecution or the defence."*
>
> *(See also case of **C. Muniappan Vs. State of T.N. (2010) 9 SCC 567** (SCC P.596, para 83) and **Himansh Vs. State (NCT of Delhi) 2011 (2) SCC 36**)*

58. It is also noteworthy that as per the evidence of P.W.-15 and P.W.-17, the dying declaration was recorded at about 10:20 a.m. on 12.6.2014.

There is no evidence as to when the same was handed over to the Investigating Officer. Incident allegedly had taken place at about 6:00-6:30 a.m. on 12.6.2014. The dying declaration was recorded at about 10:20 a.m. and the deceased got her injuries at about 8:00 a.m.-8:30 a.m. on 12.6.2014. The First Information Report, which was lodged on a written complaint made by the father of the deceased P.W.-1 on 14.6.2014 at about 1:30 p.m. In the First Information Report, there was no mention of the dying declaration of the deceased, though the same was recorded two days prior to the lodging of the First Information Report. The Investigating Officer, was not examined by the prosecution who could have deposed the fact as to when the alleged dying declaration was handed over to the Police either by the Doctor or by the person who had recorded the dying declaration. Even in the charge-sheet, P.W.-17 was not named as a witness by the prosecution. The aforesaid facts create a doubt as to whether the dying declaration was recorded as alleged by the prosecution at the time when it is said to have been recorded.

59. That apart, the natural instinct of the patient would be to immediately tell her nearest available relation, and there could be none more nearer to her than her own mother, as to how she received the burn injuries and who was responsible for the same. As per prosecution case, dying declaration was recorded at 10:20 a.m. on 12.6.2014 and the deceased remained alive till 8-8:30 p.m., but there is no evidence that during this period, the deceased informed about the incident to her near relatives who were present along with the deceased in the medical college. The non-mentioning of the dying declaration in the F.I.R. itself creates a doubt as to the recording of dying declaration itself specially when the deceased had not informed any other near relative as to how she had received the burn injuries.

60. The appellant has stated in his reply to Qus No.7 in his statement under Section 313 Cr.P.C. that deceased was heating the milk for the child and accidentally her clothes got fire and she was burnt. During the course of treatment, she died. At the time of incident, I was in Kamla Marriage Hall and I am innocent. A reply to question no.7 is quoted as under :-

> *"प्रश्न संख्या– 7– क्या आप को और कुछ कहना है ?*
>
> *उत्तर– मृतका पूजा अपनी बच्ची के लिए दूध गर्म कर रही थी। दुर्घटनावश उसके कपडों में आग लग गयी। जिससे वह जल गयी और दौरान इलाज उसकी मृत्यु हो गयी। घटना के समय मैं कमला मैरिज हाउस में था। मैं निर्दोष हूँ।"*

61. The answer to the question no.7 clearly shows that the appellant has come with a clear and plausible explanation of his innocence. This specific explanation offered by the appellant finds support from the statement of all the witnesses of fact. The trial court while convicting the appellant completely failed to take note of the explanation offered by the appellant in his statement under Section 313 Cr.P.C. which was probable in the facts of the present case.

62. The Supreme Court in the case of ***Reena Hazarika Vs. State of Assam, reported in AIR 2018 SC 5361***, in paragraph-16 of the judgment, observed as follows :

> *16. Section 313, Cr.P.C. cannot be seen simply as a part of audi alteram partem. It confers a valuable right upon an accused to establish his innocence and can well be considered beyond a statutory right as a constitutional right to a fair trial under Article 21 of the Constitution, even if it is not to be considered as a piece of substantive evidence, not being on oath under Section 313(2), Cr.P.C. The importance of this right has been considered time and again by this court, but it yet remains to be applied in practice as we shall see presently in the discussion to follow. If the accused takes a defence after the prosecution evidence is closed, under Section 313(1)(b) Cr.P.C. the Court is duty bound under Section 313(4) Cr.P.C. to consider the same. The mere use of the word 'may' cannot be held to confer a discretionary power on the court to consider or not to consider such defence, since it constitutes a valuable right of an accused for access to justice, and the likelihood of the prejudice that may be caused thereby. Whether the defence is acceptable or not and whether it is compatible or incompatible with the evidence available is an entirely different matter. If there has been no consideration at all of the defence taken under Section 313 Cr.P.C., in the given facts of a case, the conviction may well stand vitiated. To our mind, a solemn duty is cast on the court in dispensation of justice to adequately consider the defence of the accused taken under Section 313 Cr.P.C. and to either accept or reject the same for reasons specified in writing"*

63. In the present case, as the appellant has come with a specific and plausible defence but the trial court did not consider it and without considering it convicted the appellant. In our considered opinion, therefore, the conviction of the appellant from this angle too, is unsustainable.

64. Lastly, it was submitted by learned Counsel for the appellant that no question with regard to the dying declaration was not put to the appellant at the time of recording his statement under Section 313 Cr.P.C., and, therefore, the same cannot be relied upon and has to be excluded from the evidence.

65. In support of his contention, learned Counsel for the appellant referred the judgment of Hon'ble Apex Court in ***Sharad Birdhichand Sarda Vs. State of Maharashtra,*** reported in ***AIR 1984 SC 1622*** and contended that if the circumstances are not put to the accused in his statement under Section 313 of Cr.P.C., 1973, they must be completely excluded from consideration because the accused did not have any chance to explain them. In Sharad Birdhichand Sarda (supra), the Hon'ble Supreme Court in paragraph nos.142 and 144 of the judgment has held as under :-

> *"142. Apart from the aforesaid comments there is one vital defect in some of the circumstances mentioned above and relied upon by the High Court, viz., circumstances Nos. 4,5,6,8,9,11,12,13,16, and 17. As these circumstances were not put to the appellant in his statement under s.313 of the Criminal Procedure Code they must be completely excluded from consideration because the appellant did not have any chance to explain them. This has been consistently held by this Court as far back as 1953 where in the case of Fateh Singh Bhagat Singh v. State of Madhya Pradesh(1) this Court held that any circumstance in respect of which an accused was not examined under s. 342 of the Criminal procedure code cannot be used against him ever since this decision. there is a catena of authorities of this Court uniformly taking the view that unless the circumstance appearing against an accused is put to him in his examination under s.342 of the or s.313 of the Criminal Procedure Code, the same cannot be used against him. In Shamu Balu Chaugule v. State of Maharashtra(2) this Court held thus:*
>
> > *"The fact that the appellant was said to be absconding not having been put to him under section 342, Criminal Procedure Code, could not be used against him."*
>
> *144. It is not necessary for us to multiply authorities on this point as this question now stands concluded by several decision of this Court. In this view of the matter, the circumstances which were*

> *not put to the appellant in his examination under Section 313 of the Criminal Procedure Code have to be completely excluded from consideration."*

66. Learned Counsel for the appellant also referred to the judgment in ***Sujit Biswas Vs. State of Assam***, reported in ***(2013) 12 SCC 406*** for the proposition that the very purpose of examining the accused persons under Section 313 Cr.P.C., 1973 is to meet the requirement of the principles of natural justice, i.e., audi alteram partem. The accused, thus, must be given an opportunity to explain the incriminating material that has surfaced against him and in the circumstances which are not put to the accused in his examination under Section 313 Cr.P.C., 1973, cannot be used against him and must be excluded from consideration.

67. Section 313 Cr.P.C., 1973 has amended by Act no.5 of 2009, Section 22 (w.e.f. 31.12.2009) is quoted as under :-

> ***313. Power to examine the accused.****- (1) In every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the Court-*
>
> > *(a) may at any stage, without previously warning the accused, put such questions to him as the Court considers necessary;*
> >
> > *(b) shall, after the witnesses for the prosecution have been examined and before he is called on for his defence, question him generally on the case: Provided that in a summons- case, where the Court has dispensed with the personal attendance of the accused, it may also dispense with his examination under clause (b).*
>
> *(2) No oath shall be administered to the accused when he is examined under sub- section (1).*
>
> *(3) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them.*
>
> *(4) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.*
>
> *(5) The Court may take help of Prosecutor and Defence Counsel in preparing relevant questions which are to be put to the accused and the Court may permit filing of written statement by the accused as sufficient compliance of this section."*

68. The forerunner of the said provision in the Old Code was Section 342 therein. It was worded thus :-

> *342.(1) For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the court may, at any stage of any inquiry or trial, without previously warning the accused, put such questions to him as the court considers necessary, and shall, for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence.*
>
> *(2) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them; but the court and the jury (if any) may draw such inference from such refusal or answers as it thinks just.*
>
> *(3) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.*
>
> *(4) No oath shall be administered to the accused when he is examined under sub-section (1)."*

69. In view of the judgments referred to by the learned Counsel for the appellant, aforesaid, the incriminating material is to be put to the accused so that the accused gets a fair chance to defend himself. This is in recognition of the principles of audi alteram partem. The Hon'ble Supreme Court in ***Asraf Ali Vs. State of Assam*** *reported in* ***(2008) 16 SCC 328*** has made following observations in paragraphs 21 and 22 of the judgment which are quoted as under :-

> *"21. Section 313 of the Code casts a duty on the Court to put in an enquiry or trial questions to the accused for the purpose of enabling him to explain any of the circumstances appearing in the evidence against him. It follows as necessary corollary therefrom that each material circumstance appearing in the evidence against the accused is required to be put to him specifically, distinctly and separately and failure to do so amounts to a serious irregularity vitiating trial, if it is shown that the accused was prejudiced.*
>
> *22.The object of Section 313 of the Code is to establish a direct dialogue between the Court and the accused. If a point in the evidence is important against the accused, and the conviction is intended to be based upon it, it is right and proper that the accused should be questioned about the matter and be given an opportunity of explaining it. Where no specific question has been put by the trial Court on an inculpatory material in the*

prosecution evidence, it would vitiate the trial. Of course, all these are subject to rider whether they have caused miscarriage of justice or prejudice. This Court also expressed similar view in S. Harnam Singh v. The State (AIR 1976 Supreme Court 2140), while dealing with Section 342 of the Criminal Procedure Code, 1898 (corresponding to Section 313 of the Code). Non-indication of inculpatory material in its relevant facets by the trial Court to the accused adds to vulnerability of the prosecution case. Recording of a statement of the accused under Section 313 is not a purposeless exercise."

70. The learned Counsel for the appellant further referred to a judgment passed by Division Bench of Andhra Pradesh High Court in case of ***Andugula Shankaraiah Vs. State of Andhra Pradesh*** reported in ***2012 CRI.L.J.189*** wherein in paragraph 25 of the aforesaid judgment, the Andhra Pradesh High Court has held as under :-

"25. It is pertinent to mention here that in a case of dying declaration, the opportunity of cross-examination of the declarant will not be available to the accused. Hence, it is necessary for the trial Judge to put the incriminating material in a perfect manner to the accused so as to give an opportunity to him to explain his case. It is also to be noted that the Legislature taking into consideration the importance of provision under Section 313 Cr.P.C. amended the same by incorporating a new provision, which runs as follows:

"313(5) The court may take help of Prosecutor and Defence Counsel in preparing relevant questions which are to be put to the accused and the Court may permit fil written statement by the accused as sufficient compliance of this section."

In view of the above discussion, we are of the view that it is unsafe to convict the accused basing solely on the dying declaration. Hence, the same is liable to be set aside."

71. Learned Counsel for the appellant also referred to statement of the appellant under Section 313 Cr.P.C., 1973. Learned Addl. Sessions Judge, Court No.7, Gorakhpur on the basis of evidence of prosecution put following questions during the examination of accused under Section 313 Cr.P.C. :-

प्रश्न संख्या–1– अभियोजन साक्ष्य में आया है कि वादी मुकदमा सरजू चौहान की पुत्री पूजा की शादी दिनांक 26.6.2012 को रामेश्वर लाल चौहान से हिन्दू रीति रिवाज के साथ हुई थी। कुछ दिन बाद से ही मु०

50,000/– नगद एवं सोने की अंगूठी की मांग करते हुए उसे प्रताडित करने लगे और दिनांक – 12.06.14 को समय करीब 6.00 से 6.30 बजे के मध्य पूजा के ऊपर मिट्टी का तेल छिडकर जला दिये, जिसकी मृत्यु दवा इलाज के दौरान उसी दिन हो गयी। इस सम्बन्ध में आप को क्या कहना है?

उत्तर– गलत है।

प्रश्न संख्या–2– अभियोजन साक्ष्य में आया है कि उक्त घटना के सम्बन्ध में प्रथम सूचना रिपोर्ट पंजीकृत किया गया जिसके आधार पर चिक एफ०आई०आर० तैयार किया गया जिसका इन्द्राज जी०डी० में किया गया विवेचना विवेचक को सौपी गयी जिनके द्वारा घटना स्थल का निरीक्षण किया गया नक्शा नजरी बनाया गया गवाहान के बयान लिये गये विवेचना पूर्ण होने पर आरोप पत्र न्यायालय में प्रेषित किया गया। इस सम्बन्ध में आप को क्या कहना है ?

उत्तर– झूठी रिपोर्ट लिखाई गयी। गलत आरोप पत्र प्रेषित किया गया।

प्रश्न संख्या–3– अभियोजन की तरफ से आरोप को साबित करने के लिये अभियोजन साक्षी संख्या–1 सरजू चौहान, अ०सा०स०–2 सुधीर चौहान, अ०सा०स०–3 पुष्पा देवी, अ०सा०स०–4 राजन मिश्रा, अ०सा०स०–गुड्डू चौहान, अ०सा०स०–6 रामरती देवी, अ०सा०स०– 7 अशोक कुमार चौहान, अ०सा०स०–8 राम अशीष, अ०सा०स०–9 जीशान, अ०सा०स०–10 नौशाद, अ०सा०स०–11 राधेश्याम गुप्ता , अ०सा०स०–12 सुभाष चन्द्र कसौधन, अ०सा०स०–13 नीतिश कुमार चौहान को परीक्षित किया गया है। इस सम्बन्ध में आप को क्या कहना है ?

उत्तर– कुछ नहीं।

प्रश्न संख्या–4– अभियोजन पक्ष की ओर से अ०सा०स० –14 दयाराम सेवा निवृत तहसीलदार, अ०सा०स०– 15 राकेश राम सब रजिस्टार अ०सा०स०–16 सन्तलाल, अ०सा०स०– 17 डा० चन्द्रदेव को परीक्षित किया गया है जो आप के विरूद्ध साक्ष्य दे रहे है। इस सम्बन्ध में आप को क्या कहना है ?

उत्तर– गलत ब्यान दिया है।

प्रश्न संख्या–5– आप के विरूद्ध मुकदमा क्यों चला ?

उत्तर– सन्देहवश

प्रश्न संख्या–6– क्या आप सफाई में साक्ष्य देना है?

उत्तर– जी नहीं

प्रश्न संख्या– 7– क्या आप को और कुछ कहना है ?

उत्तर– मृतका पूजा अपनी बच्ची के लिए दूध गर्म कर रही थी। दुर्घटनावश उसके कपडों में आग लग गयी। जिससे वह जल गयी और दौरान इलाज

उसकी मृत्यु हो गयी। घटना के समय मैं कमला मैरिज हाउस में था। मैं निर्दोष हूँ।

72. Per contra, learned A.G.A. has relied upon the judgment of the Apex Court in case of **Nar Singh Vs. State of Haryana** reported in **(2015) 1 SCC 496**, wherein in Paragraph 30 of the aforesaid judgment, the Hon'ble Supreme Court has held as under :-

> *"30. Whenever a plea of omission to put a question to the accused on vital piece of evidence is raised in the appellate court, courses available to the appellate court can be briefly summarised as under:-*
>
> *(i) Whenever a plea of non-compliance of Section 313 Cr.P.C. is raised, it is within the powers of the appellate court to examine and further examine the convict or the counsel appearing for the accused and the said answers shall be taken into consideration for deciding the matter. If the accused is unable to offer the appellate court any reasonable explanation of such circumstance, the court may assume that the accused has no acceptable explanation to offer;*
>
> *(ii) In the facts and circumstances of the case, if the appellate court comes to the conclusion that no prejudice was caused or no failure of justice was occasioned, the appellate court will hear and decide the matter upon merits.*
>
> *(iii) If the appellate court is of the opinion that non-compliance with the provisions of Section 313 Cr.P.C. has occasioned or is likely to have occasioned prejudice to the accused, the appellate court may direct retrial from the stage of recording the statements of the accused from the point where the irregularity occurred, that is, from the stage of questioning the accused under Section 313 Cr.P.C. and the trial Judge may be directed to examine the accused afresh and defence witness if any and dispose of the matter afresh;*
>
> *(iv) The appellate court may decline to remit the matter to the trial court for retrial on account of long time already spent in the trial of the case and the period of sentence already undergone by the convict and in the facts and circumstances of the case, may decide the appeal on its own merits,*

keeping in view the prejudice caused to the accused. "

73. Learned AGA also referred to the judgment of Apex Court in case of ***Shivaji Sahabrao Bobade Vs. State of Maharashtra*** reported in ***(1973) 2 SCC 793,*** which considered the fall out of the omission to put the accused, a question on a vital circumstance appearing against him in the prosecution evidence, and the requirement that the accused's attention should be drawn to every inculpatory material so as to enable him to explain it. Ordinarily, in such a situation, such material as not put to the accused must be eschewed. No doubt, it is recognized, that where there is a perfunctory examination under Section 313 of the Cr.P.C., 1973, the matter is capable of being remitted to the trail court, with the direction to retry from the stage at which the prosecution was closed.

74. The trial court, though recorded the statement under Section 313 of Cr.P.C., omitted to put questions regarding a vital circumstance to the accused during his statement. The trial court, while convicting the accused mainly relied upon the written dying declaration Ex.Ka.-8. However, the contents of written dying declaration were not put to the accused during his statement. It is really a matter of concern that the trial court did not frame the question specifically putting the incriminating material stated by deceased in her statement. Thereby, a very important circumstance was lost. The deceased in her statement (dying declaration) stated that the accused had poured Kerosene on her person and set her on fire. Particularly, this incriminating part of dying declaration has not been put to the accused to get his explanation. Although, the dying declaration Ex.Ka-8 was treated as the basis to convict the accused, the same was not put to the accused in her statement recorded under Section 313 Cr.P.C. Apparently, the accused was not given opportunity to explain this vital circumstance. Recording of statement under Section 313 of the Cr.P.C. is not an empty formality during trial. Section 313 Cr.P.C. prescribes the

procedure to safeguard the interest of the accused. Obviously, in the absence of seeking explanation on this vital point, prejudice is caused to the accused.

75. We may note that considering the importance of statement under Section 313 of Cr.P.C., Sub-clause (5) has been added in Section 313 by amendment which permits the court to take help of prosecution and defence in preparing relevant questions which are put to the accused. One of the reasons for such amendment was to see that Court should not miss putting any incriminating circumstance to the accused while recording his statement.

76. In the result, the finding of guilt based on the written dying declaration for this reason alone would not sustain apart from the other reasons which we have recorded above. In the result, we hold that the dying declaration was not trustworthy and reliable.

77. To summarise we hold that, the evidence on the point of dying declaration does not inspire confidence and it cannot be relied upon. There is no reliable evidence to satisfy the judicial mind that the deponent was conscious and mentally fit at the time of giving her statement. Rather, the genesis of the case i.e. recording the statement of deceased itself becomes doubtful. From the material on record, we are absolutely not satisfied about the truthfulness of the voluntary nature of the dying declaration and the fitness of the mind of the deceased. In the aforesaid facts and circumstances, we find and hold that the prosecution failed to substantiate the charges levelled against the appellant-accused beyond all reasonable doubt by adducing consistent, cogent and reliable evidence. If dying declaration is excluded, nothing remains in the prosecution case, therefore the appellant-accused is legitimately entitled to avail the benefit of doubt. Hence, the impugned judgment and order of conviction passed by learned Addl. Sessions Judge, Court No.7, Gorakhpur could not withstand the

legal position and requires to be reversed by acquitting the accused from charges levelled against him. Consequently, the appeal deserves to be allowed by setting aside the impugned judgment and order of conviction.

In view of that following order :-

(I) The appeal stands allowed.

(II) The judgment and order of conviction dated 30.11.2016 passed by learned Addl. Sessions Judge, Court No.7, Gorakhpur stands quashed and set aside.

(III) The accused-appellant, Rameshwar Lal Chauhan is acquitted of the offence punishable under Section 302 of IPC.

(IV) The accused be released from jail forthwith, if not required in any other offence.

(V) The amount of fine, if deposited, be refunded to the accused.

Order Date :- 31.5.2023
S. Singh

Digitally signed by :-
SAVITA SINGH
High Court of Judicature at Allahabad