HIGH COURT OF TRIPURA
AGARTALA

CRL.A(J) 72 of 2019

Sri Tutan Sarkar,
son of Sri Jugal Sarkar @ Jogesh,
resident of Kalikapur (Shil Para),
PS: West Agartala,
District: West Tripura

----Appellant(s)

Versus

The State of Tripura

---- Respondent(s)

For Appellant(s)	: Mr. Subrata Sarkar, Adv.
For Respondent(s)	: Mr. S. Debnath, Addl. PP
Date of hearing	: 29.05.2020
Date of pronouncement	: 22.12.2020
Whether fit for reporting	: YES

HON'BLE MR. JUSTICE S. TALAPATRA
HON'BLE MR. JUSTICE S. G. CHATTOPADHYAY

Judgment & Order

[Talapatra, J)

This is an appeal under Section 374(2) of the CrPC to question the judgment and order of conviction and sentence dated 08.05.2019 delivered in Case No.ST(TS-1)80 of 2014 by the Additional Sessions Judge, Court No.5, West Tripura, Agartala. By the said judgment dated 08.05.2019, the appellant has been convicted under Section 302 of the IPC but acquitted from the charge framed under Sections 498A/494 and 304B of the IPC. Pursuant to the said conviction, the appellant has been sentenced to suffer a rigorous imprisonment for life and to pay fine of

Rs.20,000/- with default stipulation for the commission of offence punishable under Section 302 of the IPC. It has been observed in the order dated 08.05.2019 that the period of detention, if any, suffered by the convict in the course of investigation inquiry or trial shall be set off from the substantive period of sentence.

[2] The genesis of the prosecution case can be located in the complaint filed by one Tapash Sarkar (PW-12) to the officer-in-charge Ramnagar TOP, Agartala (Exbt-10). It was revealed by the said complaint that complainant's sister namely Shefali Sarkar (aged 32 years, at the time occurrence) was married to the appellant. At the time of marriage dowry/wedding gifts were given. After two years of marriage, the complainant's sister started facing physical torture on unlawful demand of bringing cash from her parental home. Over that demand, their broke out frequent quarrels between the appellant (the husband) and the complainant's sister (the wife). To mitigate this unhappy situation, the appellant had shifted to a rented house but the matrimonial discord was not adjusted. On 22.11.2012 at about 12.15 am in the midnight the appellant had, as alleged, set fire on the complainant's sister by pouring kerosine oil. In the fire incident the complainant's sister received 90% burn over her body. The owner of the rented home took her to the GBP Hospital and at the time of filing of the complainant on 23.011.2012, Shefali Sarkar

(the complainant's sister) was fighting for life. On the basis of the said complaint initially a case was registered under Sections 498A/326/307 of the IPC. On 27.11.2012 when the victim succumbed to the injuries, the said case was registered under Section 302 of the IPC and taken up for investigation.

[3] On completion of investigation, the police filed the final report chargsheeting the appellant. On taking cognizance as the offence of murder is exclusively triable by the court of Sessions, the police papers were committed to the court of the Sessions Judge, West Tripura, Agartala. The said Sessions trial was transferred to the court of the Additional Session Judge, West Tripura, Agartala, Court No.5, hereinafter referred to as the trial court. The trial judge framed the charge under Sections 498A, 494, 304B of the IPC separately and under Section 302 of the IPC alternatively. The appellant pleaded not guilty and claimed to be tried in accordance with law.

[4] In order to substantiate the charge, the prosecution adduced 16 witnesses (PWs 1 to 16) including the complainant (PW-12) and the investigating officer (PW-16). The prosecution admitted in the evidence as many as 13 documentary evidence (Exbts 1 to 13) including the post-mortem examination report (Exbt-C). The defence, however, did not adduce any evidence. After recording the prosecution evidence, the appellant was

examined under Section 313(1)(b) of the CrPC. During the course of the said investigation, the appellant had reiterated his plea of innocence stating that the victim had attempted to commit suicide by setting fire on her person. The appellant had also tried to save the victim and he had also received burn injuries on his person.

[5] Having taken note of the evidence as recorded and the arguments of the prosecution and the defence, the trial judge returned the finding of conviction under the alternative charge under section 302 of the IPC, but returned the finding of acquittal from the charge under Sections 498A/494 and 304B of the IPC, as stated, on observing that the prosecution has successfully proved the charge of murder against the appellant. It is required to be noted that no appeal has been preferred by the state against the said order of acquittal. As such, this court will refrain from giving elaborate reference to the evidence in respect of charges of bigamy, cruelty and dowry-death.

[6] Before the submission of the counsel appearing for the appellant and the state is recorded, some facts in respect of marriage and the victim's relation with the appellant be placed. The trial court has observed that one Renu Sarkar (PW-5) is the legally married wife of the appellant and in the wedlock with PW-5, the appellant has one daughter and two sons. The trial court has conclusively observed that Tapash Sarkar (PW-12) "is neither

related with the victim by blood nor by marriage or adoption". The trial judge has observed that the cognizance of offence under section 494 was not proper as the victim cannot be treated as the aggrieved person within the meaning of Section 198(1)(c) of the CrPC. It has been observed that there is no evidence of performance of marriage between the victim and the appellant. The consequence was, therefore, the acquittal of the appellant even from the charge under Section 498A of th3 IPC. Since this fact might have some ramification in the analysis of the evidence, these are taken note of.

[7] Mr. S. Sarkar, learned counsel appearing for the appellant has at the beginning submitted that the prosecution case is grossly improbable. The prosecution has, according to Mr. Sarkar, learned counsel relied on the testimonies of PWs-6, 9, 10, 12, 14, 15. According to Mr. Sarkar, learned counsel, the prosecution case rests entirely on the dying declaration and some circumstantial evidence as there is no eye witness to state how the victim was engulfed by fire or murdered by the appellant. Mr. Sarkar, learned counsel has also pointed out that 'kerosine' cannot be fired up by *bidi.* In support of this statement, Mr. Sarkar, learned counsel has produced some materials before this court to show that petroleum products like petrol and kerosine has a narrow flammable wings. Their vapour mixed with air has a lower

flammability limit which is just over 1 % and upper limit of 6 % by volume in air. Flammable range no doubt refers to the percentage of the flammable liquid in its gaseous state creates an exclusive mixture. The mixture of flammable vapour with air will combust only when they are within particular range of vapour/air concentration. Outside of this limit, the fuel-air mixture is either too lean and too rich to ignite.

[8] Mr. Sarkar, learned counsel has also referred a report published in The Guardian on 27.02.2007 where James Randerson, the correspondent has commented as follows:

> **"To find out whether this was possible, he and colleagues experimented. They dropped burning cigarettes into trays of petrol. They sprayed a fine mist of petrol at a lighted cigarette. They even used a vacuum device to produce the higher temperature (900-950C) of a cigarette being sucked. In more than 2,000 attempts the petrol did not ignite."**

[9] Mr. Sarkar, learned counsel has further submitted that there is no proof that kerosine was poured on the body of the victim or the fire was set on her body by the appellant "by a match stick or by a bidi." Mr. Sarkar, learned counsel, thereafter, has submitted that according to the prosecution, there are multiple dying declarations. PW-9 was one of the members of the fire service team which rescued the victim and he has stated that during the said operation the victim uttered "kill kill". The trial court, according to Mr. Sarkar, learned counsel, has drawn inference that the said utterance is a proof of "foul play" behind

such incident. But how the said piece is relevant for involving the appellant has not been reasoned. Thereafter, Mr. Sarkar, has questioned the procedure of recording the dying declaration (Exbt-9). In the said dying declaration, the victim has purportedly stated that on the night of occurrence, the appellant in the state of drunkenness quarreled with her and thereafter poured kerosine oil on her and set fire by means of a bidi.

[10] Mr. Sarkar, learned counsel has stated that apart from the procedure which was followed, the content of the dying declaration is highly improbable inasmuch as by bidi, kerosine oil, the flammable liquid that was doused according to the prosecution a flash point cannot be made inasmuch as the flash point is the lowest temperate at which a liquid fuel will produce a flammable vapour, a liquid fuel must be able to generate a vapour in sufficient quantity to reach the lower limit in the air before it can burn. The flash point is measured by two different ways. The first being a closedcup measurement and the second being an open cup measurement. Bidi cannot produce ignition temperature and as such even if the context of the dying declaration is believed, the combustion cannot be believed by this court.

[11] Mr. Sarkar, learned counsel has pointed out that the trial court since has rejected the statement recorded by PW-16 (the investigating officer) as the dying declaration, the only dying

declaration that is substantively relied is what has been recorded by PW-10 in writing (Exbt-9). Mr. Sarkar, learned counsel has submitted that PW-14 has given a certificate on the body of the dying declaration stating that the victim was in a fit state to make the dying declaration and later on another certificate was put on the body of the dying declaration that the said dying declaration was made in presence of PW14. The defence has made robust attempt to show that the dying declaration (Exbt-9) has been interpolated and the certificates were inserted thereon. In this regard, the reasoning of the trial judge has been seriously criticized by Mr. Sarkar, learned counsel appearing for the appellant.

[12] Mr. Sarkar, learned counsel has in support of his contention placed reliance on a few decisions of the apex court. In **Gentela Vijayavardhan Rao and Another vs. State of Andra Pradesh** reported in **(1996) 6 SCC 241,** the apex court has observed on doctrine of *res gestae* as under:

> **"15. The principle or law embodied in Section 6 of the Evidence Act is usually known as the rule of res gestae recognised in English Law. The essence of the doctrine is that fact which, though not in issue, is so connected with the fact in issue "as to form part of the same transaction" becomes relevant by itself. <u>This rule is, roughly speaking, an exception to the general rule that hearsay evidence is not admissible. The rationale in making certain statement or fact admissible under Section 6 of the Evidence Act is on account of the spontaneity and immediacy of such statement or fact in relation to the fact in issue. But it is necessary that such fact or statement must be part of the same transaction. In other words, such statement must have been made contemporaneous with the acts which constitute the offence or at least immediately thereafter.</u>**

> **<u>But if there was an interval, however slight it may be, which was sufficient enough for fabrication then the statement is not part of res gestae.</u> In R. v. Lillyman : (1898-99) AII ER Rep 586, a statement made by a raped woman after the ravishment was held to be not part of the res gestae on account of some interval of time lapsing between the act of rape and the making the statement. Privy Council while considering the extent up to which this rule of res gestae can be allowed as an exemption to the inhibition against nearsay evidence, has observed in Teper v. Reginam, (1952) 2 All E.R. 447, thus :**
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> > **"The rule that in a criminal trial hearsay evidence is admissible if it forms part of the res gestae is based on the propositions that the human utterance is both a fact and a means of communication and that human action may be so interwoven with words that the significance of the action cannot be understood without the correlative words and the dissociation of the words from the action would impede the discovery of the truth. It is essential that the words sought to be proved by hearsay should be, if not absolutely contemporaneous with the action or event, at least so clearly associated with it that they are part of the thing being done, and so an item or part of the real evidence and not merely a reported statement."**
>
> **The correct legal position stated above needs no further elucidation."**
>
> **[Emphasis added]**

[13] In this regard Mr. Sarkar, learned counsel has referred to Exbt-8, the entry dated 23.11.2012 recorded on 00.32 hours in the occurrence book of Tripura Fire Service, where it has been clearly recorded that the firemen had heard from the local people that victim had committed suicide. The entry as made in the said book reads as "*committed suicide as stated by local people."* Mr. Sarkar, learned counsel has also relied on a part of testimony of PW-9 where he had stated as follows:

> **"From the local people we had come to know that Shilpi Sarkar committed suicide. All the aforesaid facts were entered in our occurrence book dated 23.11.2012 This is the photocopy of occurrence book dated 23.11.2012 regarding the incident entered by me. The photocopy of occurrence book dated 23.11.12 is marked**

> **as Exbt.8 after comparing with the original occurrence book produced by witness in the court today as per order dated 30.05.2016 and 02.06.2016."**

[14] The said information recorded in the occurrence book is the most contemporaneous act. As such the observation of the local people has its consequence while appreciating the circumstances in which the victim was engulfed by fire. The passage as reproduced below from **Krishan Kumar Malik vs. State of Haryana** reported in **(2011) 7 SCC 130** has been referred by the learned counsel for the appellant:

> **"37. Section 6 of the Act has an exception to the general rule whereunder hearsay evidence becomes admissible. But as for bringing such hearsay evidence within the ambit of Section 6, what is required to be established is that it must be almost contemporaneous with the acts and there could not be an interval which would allow fabrication. In other words, the statements said to be admitted as forming part of res gestae must have been made contemporaneously with the act or immediately thereafter. Admittedly, she had met her mother Narayani and sister soon after the occurrence, thus, they could have been the best res gestae witnesses, still the prosecution did not think it proper to get their statements recorded. This shows the negligent and casual manner in which prosecution had conducted the investigation then the trial. This lacunae has not been explained by the prosecution. The prosecution has not tried to complete this missing link so as to prove it, beyond shadow of doubt, that it was Appellant who had committed the said offences."**

[15] According to Mr. Sarkar, learned counsel the utterance that *kill kill* cannot be treated as an oral dying declaration as PW-9 has clearly stated that at that time the victim was able to speak and was crying but they did not give much attention to her voice. Mr. Sarkar, learned counsel has further submitted that PW-12 from the very beginning has suppressed the material facts. His

statement that he was called by the victim in the hospital or the victim told him that "on previous night Tutan made a quarrel with her and went out from house subsequently he again came back in drunken condition and by burning match stick set her on fire" cannot also be treated as oral dying declaration inasmuch as in the cross examination he made the following statement in the trial:

> **"I did not state to police that when I visited GBP hospital at night my sister was found in senseless condition and on the following day I was called by sister through another person and then she told me that on previous nigh Tutan made a quarrel with her and went out from house. Subsequently, he again came back in drunken condition and by burning match stick set her on fire."**

[16] Even the statement made to PW-11 cannot be treated as oral dying declaration. In the said statement, the victim told him the following morning of the occurrence that in the previous night there was hot altercation between them. Subsequently, the appellant came back in the drunken condition. Thereafter, the appellant poured kerosine oil on her. When the victim told the appellant that she would complaint against him to the house owner, within a moment she was set in fire by a burning match stick while smoking a bidi. The said part of the statement was not available in his previous statement as recorded by the investigating officer. But PW11 had insisted that he made such statement to the investigating officer. But the investigating officer (P-16) has categorically asserted during the cross examination

that PW11 did not disclose to her that the victim told him on the previous night that there was hot altercation between them. Subsequently, he came back in drunken condition. Tutan poured kerosine oil on her. Then Shefali asked Tutan (the appellant) that she will complaint against Tutan to the house owner, but within a moment she was set on fire by burning match stick while smoking a bidi.

[17] PW-16 has also stated that PW12 did not state to her on getting information, he had rushed to the house where his sister used to reside. When he had reached there, she was already shifted to GB hospital by fire service vehicle. Mr. Sarkar, learned counsel has relied on a decision of the apex court in **Munnu Raja and Another vs. the State of Madhya Pradesh** reported in **(1976) 3 SCC 104 to** substantiate his plea that the dying declaration recorded by investigating officer cannot be piece of substantive evidence inasmuch as in **Munnu Raja (**supra) the apex court has observed that the investigating officer is naturally interested in the success of the investigation and the practice of investigating officer himself recording a dying declaration during the course of the investigation ought not to be encouraged. The apex court has excluded the dying declaration recorded by the investigating officer from their consideration. It may be noted at this juncture that the trial court did not give weight to the statement recoded

by PW-16. Mr. Sarkar, learned counsel has placed his reliance on some reports on the law of oral dying declaration.

[18] In **Darshana Devi vs. State of Punjab** reported in **1995 (4) Supp. SCC 126**, the apex court has observed that when there is variance between the statement of two witnesses as regards the exact words allegedly used by the deceased, such difference would detract materially the value of the oral dying declaration. The relevant passage is reproduced hereunder:

> **"10. There is variance in the statements of the two witnesses with regard to the exact words allegedly used by the deceased. According to PW-2, the deceased had stated that the appellant had sprinkled kerosine oil on him when he was lying asleep and had burnt him, while Lachhmi Devi, PW-1 did not attribute any such statement to the deceased. PW-1 reiterated in her cross-examination "all that Madan Lal told me was that he had been burnt by Darshana Devi by sprinkling kerosine oil". Even though an oral dying declaration can form basis of conviction, in a given case, but such a dying declaration has to be trustworthy and free from every blemish and inspire confidence. The reproduction of the exact words of the oral declaration in such cases is very important. The difference in the exact words of the declaration in this case detract materially from the value of the oral dying declaration."**
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> **[Emphasis added]**

[19] Further reliance has been placed on **Waikhom Yaima Singh vs. State of Manipur** reported in **(2011) 13 SCC 125** where the apex court had occasion to observe that the dying declaration has to be proved wholly reliable, and voluntarily and truthful. The observation of the apex court is reproduced hereunder:

> **"20. Last, but not the least, though the witnesses claimed to have reported to L. Ningthouren Singh (PW-14) about such dying declaration and the name of the assailant, there is no reflection of the name in the FIR. 16. In our opinion, had the witnesses heard the dying declaration and reported the matter to L. Ningthouren Singh (PW-14)**

> **who made the FIR, he would never have failed to mention the name. Instead, we have it in the FIR that it was some unknown person who had beaten up the deceased. It must be remembered that the FIR was almost immediately after L. Ningthouren Singh (PW-14) came to know about the death of his cousin Biren Singh (deceased).”**

[20] According to Mr. Sarkar, learned counsel neither the dying declaration nor the dying declaration recorded by PW10 can be relied on for various reasons as indicated. Even the prosecution case should suffer inasmuch as PW12 even though had claimed that the victim made a statement to him as regards how the occurrence took place, but he has not disclosed in the complaint how he could come to know about the fact that he had disclosed to the officer in charge Ramnagar TOP. The law in this regard is well known that omission of important that in the First Information Report (FIR) affects the probabilities of the case. Those facts are relevant under Section 11 of Evidence Act in judging the veracity of the prosecution case. In this regard, a reference may be made to **Ram Kumar Pande vs. State of Madhya Pradesh** reported in **1975 CRI.L.J 870** where the apex court had occasion to observe as follows:

> **“9. No doubt, an F.I.R. is a previous statement which can, strictly speaking, be only used to corroborate or contradict the maker of it. But, in this case, it had been made by the father of the murdered boy to whom all the important facts of the occurrence, so far as they were, known up to 9.15 p.m. on 23-3-1970, were bound to have been communicated. If his daughters had seen the appellant inflicting a blow' on Harbinder Singh, the father would certainly have mentioned it in the F.I.R. We think that or missions of such important facts, affecting the probabilities of the case, are relevant under Section 11 of the**

Evidence Act in judging the veracity of the prosecution case."

[21] Mr. Sarkar, learned counsel has contended that the prosecution has failed to prove their case according to standard "beyond reasonable doubt" Moreover, the burn injuries received by the appellant stand to show the appellant has no malafide intention and he is entitled to the benefit of doubt.

[22] Mr. S. Debnath, learned Addl. PP in order to repel the submission of Mr. Sarkar, learned counsel for the appellant has contended that the prosecution has proved the dying declaration to the hilt and there is no reason to disbelieve the content of the dying declaration. Mr. Debnath, learned Addl. PP has further submitted that for minor discrepancies, the statement of the victim and the statements of PW-6, 12 and 13 in particular, cannot weighed to debase the prosecution case as a whole. The trial is not a fault finding exercise, but a fact finding exercise. The dying declaration has been recorded by PW-10 who is non-interested person holding the post of the Executive Magistrate. PW-10 has followed all procedures and had taken the certificate of PW-14 who was a junior resident [the medical officer] of GBP hospital. PW-14 has categorically vouched in the trial that in his presence the said dying declaration was recorded. Moreover, he had certified that before taking up of exercise of recording dying declaration, he had examined the victim and even after recording

the dying declaration (Exbt-9), he had given the certificate in the body of the said dying declaration that the victim was fit to give the said dying declaration. He has also iterated that the content of the dying declaration or the statement the victim had disclosed that on the day of occurrence i.e. on 23.11.2012 about 12.30 o' clock at night, there was a quarrel between the victim and the husband (the appellant) in the house of one Sabita Das (PW-1) of Bitarban where they were residing as tenant. Thereafter, the husband consumed alcohol and poured kerosine oil and he set fire upon the victim by the fire of bidi. Thus, she sustained burn injuries and the victim made the appellant responsible for the said incident. He had identified his certificate over the body of the dying declaration.

[23] Mr. Debnath, learned Addl. PP has quite emphatically submitted that the value of testimony of PW-16 the investigating officer, cannot be discarded inasmuch as she had testified in the trial that the appellant after consuming alcohol around 12.12.15 hours at night had started assaulting the victim and by pouring kerosine oil on her, set fire on her body by a match stick. PW-16, has recorded the statement on the following day. In the cross-examination, her said statement could not be dented. PW-16 according to Mr. Debnath, learned Addl.PP is truthful and has clearly admitted that the witnesses namely Sudhir Sarkar (PW-11)

and Tapash Sarkar (PW12) did not disclose to her certain vital information which they have claimed in the trial to have disclosed to her. In support of this statement, Mr. Debnath, learned Addl. PP has relied on a few decisions of the apex court on dying declaration and multiple dying declarations.

[24] He has referred **Lakhan vs. State of Madhya Pradesh** reported in **(2010) 8 SCC 514** where the apex court has summarised the law of dying declaration and its probative value in the context that may vary and observed as follows:

> **"9. The doctrine of dying declaration is enshrined in the legal maxim *nemo moriturus praesumitur mentire*, which means "a man will not meet his Maker with a lie in his mouth". The doctrine of dying declaration is enshrined in Section 32 of the Indian Evidence Act, 1872 (hereinafter called as, "Evidence Act") as an exception to the general rule contained in Section 60 of the Evidence Act, which provides that oral evidence in all cases must be direct i.e. it must be the evidence of a witness, who says he saw it. The dying declaration is, in fact, the statement of a person, who cannot be called as witness and, therefore, cannot be cross-examined. Such statements themselves are relevant facts in certain cases.**
>
> **10. This Court has considered time and again the relevance/probative value of dying declarations recorded under different situations and also in cases where more than one dying declaration has been recorded. The law is that if the court is satisfied that the dying declaration is true and made voluntarily by the deceased, conviction can be based solely on it, without any further corroboration. It is neither a rule of law nor of prudence that a dying declaration cannot be relied upon without corroboration. When a dying declaration is suspicious, it should not be relied upon without having corroborative evidence. The court has to scrutinize the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased must be in a fit state of mind to make the declaration and must identify the assailants. Merely because a dying declaration does not contain the details of the occurrence, it cannot be rejected and in case there is merely a brief statement, it is more reliable for the reason that the shortness of the statement is itself a guarantee of its veracity. If the dying declaration suffers from some infirmity, it cannot alone form the basis of conviction. Where the prosecution**

version differs from the version given in the dying declaration, the said declaration cannot be acted upon. (vide : Kushal Rao v. State of Bombay, AIR 1958 SC 22; Rasheed Beg & Ors. v. State of Madhya Pradesh, (1974) 4 SCC 264; K. R. Reddy & Anr. v. The Public Prosecutor, AIR 1976 SC 1994; State of Maharashtra v. Krishnamurti Laxmipati Naidu, 1981 SCC (Cri) 364; Uka Ram v. State of Rajasthan, (2001) 5 SCC 254; Babulal & Ors. v. State of M.P., (2003) 12 SCC 490; Muthu Kutty & Anr. v. State, (2005) 9 SCC 113; State of Rajasthan v. Wakteng: (2007) 14 SCC 550; and Sharda v. State of Rajasthan, (2010) 2 SCC 85].

11. In Munnawar & Ors. v. State of Uttar Pradesh & Ors. (2010) 5 SCC 451, this Court held that a dying declaration can be relied upon if the deceased remained alive for a long period of time after the incident and died after recording of the dying declaration. That may be evidence to show that his condition was not overtly critical or precarious when the dying declaration was recorded.

12. A dying declaration recorded by a competent Magistrate would stand on a much higher footing than the declaration recorded by officer of lower rank, for the reason that the competent Magistrate has no axe to grind against the person named in the dying declaration of the victim, however, circumstances showing anything to the contrary should not be there in the facts of the case. [vide Ravi Chander & Ors. v. State of Punjab, (1998) 9 SCC 303; Harjit Kaur v. State of Punjab, (1999) 6 SCC 545; Koli Chunilal Savji & v. State of Gujarat, (1999) 9 SCC 562; and Vikas v. State of Maharashtra, (2008) 2 SCC 516.]

13. In Balak Ram v. State of U.P., AIR 1974 SC 2165, the question arose as to whether a dying declaration recorded by a higher officer can be discarded in case of multiple dying declarations. The Court held as under:-

> **"54..... The circumstances surrounding the dying declaration, though uninspiring, are not strong enough to justify the view that officers as high in the hierarchy as the Sub-Divisional Magistrate, the Civil Surgeon and the District Magistrate hatched a conspiracy to bring a false document into existence. The Civil services (sic servants) have no platform to controvert allegations, howsoever grave and unfounded. It is therefore, necessary that charges calculated to impair their career and character ought not to be accepted except on the clearest proof. We are not prepared to hold that the dying declaration is a fabrication."**

14. In Sayarabano@Sultanabegum v. State of Maharashtra, (2007) 12 SCC 562, two dying declarations had been recorded. As per the first declaration, the deceased had met with an accident. She was hit by the

kerosine lamp which fell on her body and caught fire. While recording the second declaration, the Judicial Magistrate asked her why she was changing her statement. The deceased replied that her Mother-in-Law had told her not to give any statement against the family members of her in-laws and that was the reason, why she had not involved any person in the earlier statement. But, in fact, it was her Mother-in-Law who threw the kerosine lamp on her and thus, she was burnt. She also stated that her Mother-in-Law was harassing her. In such a situation, this Court held that the second dying declaration was true and inspired confidence. Ill treatment of the decreased was clearly established and completely proved on the basis of the evidence of other witnesses.

15. In case, there are inconsistent dying declarations, the Court must rely upon any other evidence, if available, as it is not safe to act only on inconsistent dying declarations and convict the accused. [Vide Lella Srinivasa Rao v. State of A.P., (2004) 9 SCC 713].

16. In Sher Singh & Anr. v. State of Punjab, AIR 2008 SC 1426, a case of bride burning, three dying declarations had been recorded. In the first dying declaration, the decreased had denied the role of the accused persons. In second dying declaration deceased attributed a role to the accused but the said declaration did not contain the Certificate of the doctor that the deceased was in a fit state of mind to make a declaration, however, the Magistrate, who recorded the declaration, certified that the deceased was in a conscious state of mind and was in a position to make the statement to him. The third dying declaration was recorded by a police officer after the Doctor certified that she was in a fit state of mind to give the statement. This Court held that the conviction could be based on the third dying declaration as it was consistent with the second dying declaration and the oral dying declaration made to her uncle, though with some inconsistencies. First declaration was made immediately after she was admitted in the hospital and was under threat and duress by her mother-in-Law that she would be admitted in hospital only if she would give a statement in favour of the accused persons.

17. In Paras Yadav & Ors. Vs. State of Bihar (1999) 2 SCC 126, this Court held that a statement of the deceased recorded by a police officer in a routine manner as a complaint and not as a dying declaration can also be treated as dying declaration after the death of the injured and relied upon if the evidence of the prosecution witnesses clearly establishes that the deceased was conscious and was in a fit state of health to make the statement.

18. In Amol Singh Vs. State of M.P reported in (2008) 5 SCC 468, this Court, placing reliance upon the earlier Judgment in Kundula Bala Subrahmanyam v. State of Andhra Pradesh, (1993) 2 SCC 684, held that it is not the plurality of dying declarations but the reality thereto

that aids weight to the prosecution's case. If a dying declaration is found to be voluntary, reliable and made in a fit mental condition, it can be relied upon without any corroboration. If there is more than one dying declaration, they should be consistent. In case of inconsistencies between two or more dying declarations made by the deceased, the Court has to examine the nature of inconsistencies namely, whether they are material or not and in such a situation, *the Court has to examine the multiple dying declarations in the light of the various surrounding facts and circumstances.*

19. In Heeralal v. State of Madhya Pradesh, (2009) 12 SCC 671, this Court considered the case having two dying declarations, the first recorded by a Magistrate, wherein it was clearly stated that the deceased had tried to set herself ablaze by pouring kerosine on herself. However, the subsequent declaration was recorded by another Magistrate and a contrary statement was made. This Court set aside the conviction after appreciating the evidence and reaching the conclusion that the courts below came to abrupt conclusions on the purported possibility that the relatives of the accused might have compelled the deceased to give a false dying declaration. No material had been brought on record to justify such a conclusion.

20. In State of Andhra Pradesh v. P. Khaja Hussain, (2009) 15 SCC 120, this Court set aside the conviction as there was a variation between the two dying declarations about the manner in which the deceased was set on fire and for the reason that there was no other evidence to connect the accused with the crime.

21. In view of the above, the law on the issue of dying declaration can be summarized to the effect that in case, the Court comes to the conclusion that the dying declaration is true and reliable, has been recorded by a person at a time when the deceased was fit physically and mentally to make the declaration and it has not been made under any tutoring/duress/prompting; it can be the sole basis for recording conviction. In such an eventuality no corroboration is required. In case, there are multiple dying declarations and there are inconsistencies between them, generally, the dying declaration recorded by the higher officer like a Magistrate can be relied upon, provided that there is no circumstance giving rise to any suspicion about its truthfulness. In case, there are circumstances wherein the declaration had been made, not voluntarily and even otherwise, it is not supported by the other evidence, the Court has to scrutinize the facts of an individual case very carefully and take a decision as to which of the declarations is worth reliance."

[Emphasis added]

[25] Mr. Debnath, learned Addl. PP thereafter has placed his reliance on **Amit Kumar and Another vs. State of Punjab** reported

in **(2010) 12 SCC 285** where the apex court has discarded the plea raised by the defence of tutoring "by the family members" who visited her. In other words, the defence had intended to portray the dying declaration as tainted one. The apex court having relied **Paniben vs. State of Gujarat** reported in (1992) 2 SCC 474 has clearly observed that the dying declaration cannot be disbelieved if the authenticity of the dying declaration is tested through the principle laid down **Paniben** (supra). The relevant passages from the **Paniben** (supra), where those principles are laid down, are reproduced hereunder:

> **(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. (Munnu Raja v. State of M.P. (1976) 3 SCC 104).**
>
> **(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 (1985) 1 SCC 552; Ramawati Devi v. State of Bihar (1983) 1 SCC 211).**
>
> **(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 (1976) 3 SCC 618).**
>
> **(iv) Where dying declaration is suspicious it should not be acted upon without corroborative evidence. (Rasheed Beg v. State of M.P. (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. (1981) Supp SCC 25)**
>
> **(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. (Ram Manorath v. State of U.P. (1981) 2 SCC 654)**
>
> **(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. Krishnamurti Laxmipati Naidu (1980) Supp SCC 455)

(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 (1980) Supp SCC 769)
(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 v. State of M.P. (1988) Supp SCC 152)

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. (State of U.P. v. Madan Mohan (1989) 3 SCC 390)."

[26] On the aspect of multiple dying declaration where the multiple dying declarations are made by the deceased and those are either contradictory or are at variance with each other to a large extent, the apex court in **Shudhakar vs. State of Madhya Pradesh** reported in **(2012) 7 SCC 569** has held that the test of common prudence would be applied to prefer which dying declaration is corroborated by the other prosecution evidence. Further, attending circumstances conditions of the deceased at the time of making each declaration concerned, the medical evidence, voluntariness and genuineness of the statement made by deceased, physical and mental fitness of the deceased and possibility of the deceased being tutored and the sum factor would guide the exercise of judicial discretion by the court in such matter. If it is found that the first dying declaration absolving the accused was not made voluntary and not made in free will of the

deceased, the second or the third declaration which implicate the accused (the husband) were authentic, voluntary and duly corroborated by the other prosecution evidence including the medical evidence, the latter dying declaration can be read in conjunction with the statement of the prosecution's witnesses and such dying declaration can be made basis for conviction of the accused. For this purpose the following passages appear relevant:

> **26. Examining the evidence in the present case in light of the above- stated principles, we have no hesitation in holding that the first dying declaration was not voluntary and made by free will of the deceased. This we say so for variety of reasons:**
>
> **(i) When the deceased was brought to the hospital, she was accompanied by the accused and other relations. While her statement Exhibit D-2 was recorded by DW1, Naib Tehsildar, the accused and his relations were present by the side of the deceased.**
>
> **(ii) DW1, though mentions in his statement that the deceased was fully conscious, chose not to obtain any fitness certificate from the doctor on duty. In spite of it being a rule of caution, in the peculiar facts of the present case where the deceased had suffered 97% burn injuries, DW1 should have obtained the fitness certificate from the doctor.**
>
> **(iii) The statement of the deceased was totally tilted in favour of her husband and the version put forward was that she had caught fire from the stove while cooking. This appears to be factually incorrect inasmuch as if she had caught fire from the stove, the question of the mattress and other items catching fire, which were duly seized and recovered by the Investigating Officer, would not have arisen.**
>
> **(iv) Furthermore, within a short while, after her first statement, she changed her view. Exhibit P12, the second dying declaration, was recorded at 6.30 p.m. on the same day after due certification by the doctor that she was conscious and in a fit condition to make the statement. This statement was recorded by PW9, the Tehsildar. In his statement, PW9 has categorically stated that he was directed by the SDM to record the dying declaration. He had even prepared memo, Exhibit P-13, and sent the same to the Police Station. He specifically stated that the deceased was in a great pain and was groaning. She was not even fully conscious. According to him, he was not**

even informed of recording of the fact of the previous dying declaration. He had carried with him the memo issued by the SDM for recording the statement of the deceased. No such procedure was adhered to by DW1. All these proceedings are conspicuous by their very absence in the exhibited documents and the statement of the said witnesses.

(v) The third dying declaration which was recorded by PW7, Sub-Inspector, was also recorded after due certification and in presence of the independent witnesses Bharat Kumar and Abdul Rehman. Furthermore, PW6 gave the complete facts right from the place of occurrence to the recording of dying declaration of the deceased. He categorically denied the suggestion that the deceased had stated to him that she caught fire from the stove. Rather, he asserted that the deceased had specifically told him that the accused had put her on fire.

(vi) The second and third dying declarations of the deceased are quite in conformity with each other and are duly supported by PW6, PW7, PW9 and the medical evidence produced on record. The accused, having suffered 97% burns, could not have been fully conscious and painless, as stated by DW1. According to DW2, the doctor, the accused could suffer the injuries that he suffered when the deceased would have pushed him back when he was attempting to burn the deceased.

(vii) Besides all this, the accused had admitted the deceased to be his wife and they were living together and that she caught fire. It was expected of him to explain to the Court as to how she had caught the fire. Strangely, he did not state the story of his wife catching fire from the stove in his statement under Section 313 CrPC, though the trend of cross-examination of the prosecution witnesses on his behalf clearly indicates that stand.

(viii) We have already discussed that the theory of the deceased catching fire from the stove is neither probable nor possible in the facts of the present case. The kind of burn injuries she suffered clearly shows that she was deliberately put on fire, rather than being injured as a result of accidental fire.

(ix) Besides the deceased had herself stated the reason behind her falsely making the first declaration. According to her, her husband was likely to lose his job if she implicated him. It is clear from the record that the relations of the accused were present at the time of making the first dying declaration and the deceased had stated wrongly on the tutoring of her husband.

(x) The recoveries from the place of occurrence clearly show a struggle or fight between the deceased and the accused before she suffered the burn injuries.

(xi) In addition to the above, another significant aspect of the present case is that the deceased had also made a

> **dying declaration, even prior to the three written dying declarations, to PW1, the landlady and PW6. She had categorically stated to these witnesses when death was staring her in the eyes that she was burnt by her husband by pouring kerosine oil on her. Both these witnesses successfully stood the subtle cross-examination conducted by the counsel appearing for the accused. We see no reason to disbelieve these witnesses who were well known to both, the deceased as well as the accused.**
>
> **27. Thus, in our considered view, the second and third dying declarations are authentic, voluntary and duly corroborated by other prosecution witnesses including the medical evidence. These dying declarations, read in conjunction with the statement of the prosecution witnesses, can safely be made the basis for conviction of the accused.**
>
> **25. The argument that the first dying declaration recorded by DW1 had not been produced on record by the prosecution and, therefore, an adverse inference should be drawn against the prosecution in terms of Section 114 of the Evidence Act, is without any merit. This document has not only been produced but has even been critically examined by the Trial Court as well as the High Court. It is a settled principle of law of evidence that the question of presumption in terms of Section 114 of the Evidence Act only arises when an evidence is withheld from the Court and is not produced by any of the parties to the lis."**

[27] Mr. Debnath, learned Addl, PP has added that there is no substantive variance in the oral dying declarations and the dying declaration (Exbt-9) as recorded by PW-10. Only as regards how the combustible liquid was ignited, the oral declarations made to the witnesses namely PWs 11 and 12, the victim has stated that by burning match stick the appellant set fire on her body after pouring kerosine oil, whereas in the dying declaration, Exbt-9, she has stated that the combustible liquid as poured on her was ignited by a bidi.

[28] In the course of submission, this court had made reference to **Mukesh and Ors vs. State of NCT of Delhi and Ors**

reported in **2017 (6) SCC 1**, commonly knows as *Nirbhaya's* case where the apex court has relied on the dying declaration of the rape victim as the basis of conviction. From that report, the relevant passages are referred to indicate the development of law including on the aspect of multiple dying declarations.

> **"174. A dying declaration is an important piece of evidence which, if found veracious and voluntary by the court, could be the sole basis for conviction. If a dying declaration is found to be voluntary and made in fit mental condition, it can be relied upon even without any corroboration. However, the court, while admitting a dying declaration, must be vigilant towards the need for 'Compos Mentis Certificate' from a doctor as well as the absence of any kind of tutoring.**
>
> **175. In Laxman v. State of Maharashtra : (2002) 6 SCC 710, the law relating to dying declaration was succinctly put in the following words:**
>
> > **"3. ... A dying declaration can be oral or in writing and any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a Magistrate or a doctor or a police officer. When it is recorded, no oath is necessary nor is the presence of a Magistrate absolutely necessary, although to assure authenticity it is usual to call a Magistrate, if available for recording the statement of a man about to die. There is no requirement of law that a dying declaration must necessarily be made to a Magistrate and when such statement is recorded by a Magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the Magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise."**

176. The legal position regarding the admissibility of a dying declaration is settled by this Court in several judgments. This Court, in Atbir v. Government of NCT of Delhi: (2010) 9 SCC 1, taking into consideration the earlier judgment of this Court in Paniben v. State of Gujarat: (1992) 2 SCC 474 and another judgment of this Court in Panneerselvam v. State of Tamil Nadu: (2008) 17 SCC 190, has exhaustively laid down the following guidelines with respect to the admissibility of dying declaration:

> **"22. (i) Dying declaration can be the sole basis of conviction if it inspires the full confidence of the court.**
>
> **(ii) The court should be satisfied that the deceased was in a fit state of mind at the time of making the statement and that it was not the result of tutoring, prompting or imagination.**
>
> **(iii) Where the court is satisfied that the declaration is true and voluntary, it can base its conviction without any further corroboration.**
>
> **(iv) 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.**
>
> **(v) Where the dying declaration is suspicious, it should not be acted upon without corroborative evidence.**
>
> **(vi) A dying declaration which suffers from infirmity such as the deceased was unconscious and could never make any statement cannot form the basis of conviction.**
>
> **(vii) Merely because a dying declaration does not contain all the details as to the occurrence, it is not to be rejected.**
>
> **(viii) Even if it is a brief statement, it is not to be discarded.**
>
> **(ix) When the eyewitness affirms that the deceased was not in a fit and conscious state to make the dying declaration, medical opinion cannot prevail.**
>
> **(x) If after careful scrutiny, the court is satisfied that it is true and free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal impediment to make it the basis of conviction, even if there is no corroboration."**

177. It is well settled that dying declaration can form the sole basis of conviction provided that it is free from infirmities and satisfies various other tests. In a case

where there are more than one dying declaration, if some inconsistencies are noticed between one and the other, the court has to examine the nature of inconsistencies as to whether they are material or not. The court has to examine the contents of the dying declarations in the light of the various surrounding facts and circumstances.

178. In Shudhakar v. State of Madhya Pradesh: (2012) 7 SCC 569, this Court, after referring to the landmark decisions in Laxman (supra) and Chirra Shivraj v. State of Andhra Pradesh: (2010) 14 SCC 444, has dealt with the issues arising out of multiple dying declarations and has gone to the extent of declining the first dying declaration and accepting the subsequent dying declarations. The Court found that the first dying declaration was not voluntary and not made by free will of the deceased; and the second and third dying declarations were voluntary and duly corroborated by other prosecution witnesses and medical evidence. In the said case, the accused was married to the deceased whom he set ablaze by pouring kerosine in the matrimonial house itself. The smoke arising from the house attracted the neighbours who rushed the victim to the hospital where she recorded three statements before dying. In her first statement given to the Naib Tehsildar, she did not implicate her husband, but in the second and third statements, which were also recorded on the same day, she clearly stated that the accused poured kerosine on her and set her on fire. The accused was convicted Under Section 302 Indian Penal Code. In this regard, the Court made the following observations:

> **"21. Having referred to the law relating to dying declaration, now we may examine the issue that in cases involving multiple dying declarations made by the deceased, which of the various dying declarations should be believed by the court and what are the principles governing such determination. <u>This becomes important where the multiple dying declarations made by the deceased are either contradictory or are at variance with each other to a large extent. The test of common prudence would be to first examine which of the dying declarations is corroborated by other prosecution evidence. Further, the attendant circumstances, the condition of the deceased at the relevant time, the medical evidence, the voluntariness and genuineness of the statement made by the deceased, physical and mental fitness of the deceased and possibility of the deceased being tutored are some of the factors which would guide the exercise of judicial discretion by the court in such matters."</u>**

179. Recently, a two-Judge Bench of this Court in Sandeep and Anr. v. State of Haryana : (2015) 11 SCC 154 was faced with a similar situation where the first dying declaration given to a police officer was more elaborate and the subsequent dying declaration recorded by the

Judicial Magistrate lacked certain information given earlier. After referring to the two dying declarations, this Court examined whether there was any inconsistency between the two dying declarations. After examining the contents of the two dying declarations, this Court held that there was no inconsistency between the two dying declarations and non-mention of certain features in the dying declaration recorded by the Judicial Magistrate does not make both the dying declarations incompatible.

180. In this regard, it will be useful to reproduce a passage from Babulal and Ors. v. State of M.P. : (2003) 12 SCC 490 wherein the value of dying declaration in evidence has been stated:

> **"7. ... A person who is facing imminent death, with even a shadow of continuing in this world practically non-existent, every motive of falsehood is obliterated. The mind gets altered by most powerful ethical reasons to speak only the truth. Great solemnity and sanctity is attached to the words of a dying person because a person on the verge of death is not likely to tell lies or to concoct a case so as to implicate an innocent person. The maxim is "a man will not meet his Maker with a lie in his mouth" (nemo moriturus praesumitur mentire). Mathew Arnold said, "truth sits on the lips of a dying man". The general principle on which the 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 mind induced by the most powerful consideration to speak the truth; situation so solemn that law considers the same as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice. ..."**

181. Dealing with oral dying declaration, a two-Judge Bench in Prakash and Anr. v. State of Madhya Pradesh : (1992) 4 SCC 225 has ruled thus:

> **"11. ... In the ordinary course, the members of the family including the father were expected to ask the victim the names of the assailants at the first opportunity and if the victim was in a position to communicate, it is reasonably expected that he would give the names of the assailants if he had recognised the assailants. In the instant case there is no occasion to hold that the deceased was not in a position to identify the assailants because it is nobody's case that the deceased did not know the accused persons. It is therefore quite likely that on being asked the deceased would name the assailants. In the facts and circumstances of the case the High Court has accepted the dying declaration and we do not think that such a finding is perverse and requires to be interfered with. ..."**

> **182. In Vijay Pal v. State (Government of NCT of Delhi) : (2015) 4 SCC 749, after referring to the Constitution Bench decision in Laxman (supra) and the two-Judge Bench decisions in Babulal (supra) and Prakash (supra), the Court held:**
>
> > **"22. Thus, the law is quite clear that if the dying declaration is absolutely credible and nothing is brought on record that the deceased was in such a condition, he or she could not have made a dying declaration to a witness, there is no justification to discard the same. In the instant case, PW 1 had immediately rushed to the house of the deceased and she had told him that her husband had poured kerosine on her. The plea taken by the Appellant that he has been falsely implicated because his money was deposited with the in-laws and they were not inclined to return, does not also really breathe the truth, for there is even no suggestion to that effect.**
> > **23. It is contended by the learned Counsel for the Appellant that when the deceased sustained 100% burn injuries, she could not have made any statement to her brother. In this regard, we may profitably refer to the decision in Mafabhai Nagarbhai Raval v. State of Gujarat: (1992) 4 SCC 69 wherein it has been held that a person suffering 99% burn injuries could be deemed capable enough for the purpose of making a dying declaration. The Court in the said case opined that unless there existed some inherent and apparent defect, the trial court should not have substituted its opinion for that of the doctor. In the light of the facts of the case, the dying declaration was found to be worthy of reliance.**
> > **24. In State of M.P. v. Dal Singh : (2013) 14 SCC 159, a two-Judge Bench placed reliance on the dying declaration of the deceased who had suffered 100% burn injuries on the ground that the dying declaration was found to be credible."**

[29] Finally, Mr. Debnath, learned Addl. PP has referred **Jagbir Singh vs. State (NCT of Delhi)** reported in **(2019) 8 SCC 779** where the apex has revisited the law relating to dying declaration. It has been observed that when a declaration is made, either oral or in writing, by a person whose death is imminent, the principle attributing to Mathew Arnel "truth sits upon the lips of dying man" and no man will go to meet his maker

to falsehood in his mouth will come into play. However, for purpose of reference of the law as enunciated by the apex court as follows:

> **"20. A Dying declaration is relevant evidence as declared by Section 32 of the Indian Evidence Act, 1872. A distinction exists, however, between English Law and Indian Law in regard to dying declaration. We may, in this regard, note the declaration of the law contained in Kishan Lal v. State of Rajasthan : (2000) 1 SCC 310.**
>
> > **"18. Now we proceed to examine the principle of evaluation of any dying declaration. *There is a distinction between the evaluation of a dying declaration under the English law and that under the Indian law. Under the English law, credence and the relevancy of a dying declaration is only when a person making such a statement is in a hopeless condition and expecting an imminent death. So under the English law, for its admissibility, the declarant should have been in actual danger of death at the time when they are made, and that he should have had a full apprehension of this danger and the death should have ensued. Under the Indian law the dying declaration is relevant whether the person who makes it was or was not under expectation of death at the time of declaration. Dying declaration is admissible not only in the case of homicide but also in civil suits*. Under the English law, the admissibility rests on the principle that a sense of impending death produces in a man's mind the same feeling as that of a conscientious and virtuous man under oath. The general principle on which this species of evidence are 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 1 AIR 1999 SC 3062 powerful considerations to speak only the truth. If evidence in a case reveals that the declarant has reached this state while making a declaration then within the sphere of the Indian law, while testing the credibility of such dying declaration weightage can be given. Of course depending on other relevant facts and circumstances of the case.**
> >
> > **(Emphasis supplied)**
>
> **21. But when a declaration is made, either oral or in writing, by a person whose death is imminent, the principle attributed to Mathew Arnold that truth sits upon the lips of a dying man and no man will go to meet his maker with falsehood in his mouth will come into play. The principles relating to dying declaration are no longer**

res integra and it would be apposite that we refer to the decision of this Court in Paniben v. State of Gujarat (supra) wherein the concepts are summed up as follows:

> **(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. (Munnu Raja v. State of M.P.: (1976) 3 SCC 104).**
>
> **(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 : (1985) 1 SCC 552, Ramawati Devi V. State of Bihar (1983) 1 SCC 211.**
>
> **(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 :(1976) 3 SCC 618.**
>
> **(iv) Where dying declaration is suspicious it should not be acted upon without corroborative evidence. (Rasheed Beg v. State of M.P. :(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. : 1981 Supp SCC 25.**
>
> **(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. (Ram Manorath v. State of U.P. : (1981) 2 SCC 654.**
> **(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. Krishnamurti Laxmipati Naidu : 1980 Supp SCC 455.**
>
> **(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 :1980 Supp SCC**
> **769.**
>
> **(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 v. State of M.P. : 1988 Supp SCC 152.**
>
> **(x) Where the prosecution version differs from the version as given in the dying declaration,**

the said declaration cannot be acted upon. (State of U.P. v. Madan Mohan :(1989) 3 SCC 390.

Also, in paragraph 19, it was held as follows:

"19. In the light of the above principles, we will consider the three dying declarations in the instant case and we will ascertain the truth with reference to all dying declarations made by the deceased Bai Kanta. This Court in Mohanlal Gangaram Gehani v. State of Maharashtra :(1982) 1 SCC 700 held:

"where there are more than one statement in the nature of dying declaration, one first in point of time must be preferred.

Of course, if the plurality of dying declarations could be held to be trust worthy and reliable, they have to be accepted.

22.The problem of multiple dying declarations has engaged the attention of this Court.

23. In Kundula Bala Subrahmanyam and another v. State of Andhra Pradesh: (1993) 2 SCC 684, this Court held as follows:

"18. Section 32(1) of the Evidence Act is an exception to the general rule that hearsay evidence is not admissible evidence and unless evidence is tested by cross-examination, it is not creditworthy. 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 that person's death comes into 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, called the dying declaration, falls in that category provided it has been made by the deceased while in a fit mental condition.* A dying declaration made by person on the verge of his death has a special sanctity as at that solemn moment, a person is most unlikely to make any untrue statement. The shadow of impending death is by itself the guarantee of the truth of the statement made by the deceased regarding the causes or circumstances leading to his death. A dying declaration, therefore, enjoys almost a sacrosanct status, as a piece of evidence, coming as it does from the mouth of the deceased victim. Once the statement of the dying person and the evidence of the witnesses testifying to the same passes the test of careful scrutiny of the courts, it becomes a very important and a reliable piece of evidence and if the court is satisfied that the dying declaration is true and free from any embellishment such a dying declaration, by itself, can be sufficient for recording conviction even without looking for any

corroboration. *If there are more than one dying declarations then the court has also to scrutinise all the dying declarations to find out if each one of these passes the test of being trustworthy. The Court must further find out whether the different dying declarations are consistent with each other in material particulars before accepting and relying upon the same."*

(Emphasis supplied)

24. In Lella Srinivasa Rao v. State of A.P. : (2004) 9 SCC 713, in the dying declaration which was recorded by the Magistrate, there was no mention about appellant having treated the deceased with cruelty or having caused harassment. His name did not figure in the declaration. The deceased was in a position to make the statement. Five minutes thereafter, another statement was recorded by the Head Constable. Allegations were made against the appellant. It related to the immediate cause which led to the deceased committing suicide. Court found that the witnesses including the father of the deceased did not support the case of the prosecution that the deceased was treated with cruelty by the accused. The Court did not act upon the second dying declaration.

25. In Sayarabano Alias Sultanabegum v. State of Maharashtra : (2007) 12 SCC 562, the offence involved was under Section 302 of the IPC. There was a quarrel between the appellant/accused and the deceased, during which, it was the case of the prosecution that appellant poured kerosine from the lamp on the deceased which resulted in the deceased catching fire and finally succumbing to death. In the first dying declaration, the deceased attributed her catching fire to an accident. She absolved all the inmates of her husband family of any wrong doing. When the Special Judicial Magistrate was called on the next day for dying declaration, she set up a different version whereunder the accused was alleged to have thrown the kerosine lamp on her and also that her husband used to beat her after listening to his mother. The deceased was asked by the Magistrate as to why she was changing the statement. The deceased told the Magistrate that she was told that she should not give any statement against family members and she reiterated that the appellant/ mother-in-law of the deceased had thrown the kerosine lamp and she was burnt. The deceased died almost a week thereafter. This Court took the view that the judgment of this Court in Lella Srinivasa Rao v. State of A.P. (supra), was distinguishable noticing that in the said case there was no other evidence, and this Court in Sayarabano v. State of Maharashtra (supra) also finally held as follows:

> **"16. In our opinion, criminal cases are decided on facts and on evidence rather than on case law and precedents. In the case on hand, there is ample evidence to show that even prior to the incident in question, the appellant used to beat the deceased and ill-treat her. It is in the light of the**

said fact that other evidence requires to be considered. In our view, both the courts were right in relying upon the second dying declaration of the deceased treating it as true disclosure of facts by the deceased Halimabi. In the light of the evidence of parents of the deceased (PW 2 and PW 3), Dr. Kishore (PW 6) and Special Judicial Magistrate (PW 5), it cannot be said that the courts 6 (2004) 9 SCC 713 below had committed any error and the conviction deserves to be set aside."

26. In Amol Singh v. State of M.P. : (2008) 12 SCC 562, the High Court rejected the plea on the basis that there being more than one dying declaration and on the basis that the extent of difference between the two declarations was insignificant:

> **"13. Law relating to appreciation of evidence in the form of more than one dying declaration is well settled. Accordingly, it is not the plurality of the dying declarations but the reliability thereof that adds weight to the prosecution case. If a dying declaration is found to be voluntary, reliable and made in fit mental condition, it can be relied upon without any corroboration. The statement should be consistent throughout. *If the deceased had several opportunities of making such dying declarations, that is to say, if there are more than one dying declaration they should be consistent. (See Kundula Bala Subrahmanyam v. State of A.P. :(1993) 2 SCC 684). However, if some inconsistencies are noticed between one dying declaration and the other, the court has to examine the nature of the inconsistencies, namely, whether they are material or not. While scrutinising the contents of various dying 7 (2008) 5 SCC 468 declarations, in such a situation, the court has to examine the same in the light of the various surrounding facts and circumstances*."**
>
> **(Emphasis supplied)**

The court finally, in the facts of the said case, took the view that the discrepancies made the last declaration doubtful and it was found unsafe to convict the accused.

27. In Heeralal v. State of M.P.: (2009) 12 SCC 671, in the first dying declaration recorded by the Tehsildar, the deceased stated clearly that she tried to set herself ablaze by pouring kerosine on herself. The second dying declaration, however, contained the contrary statement. The Court held, inter alia, as follows:

> **"9. Undisputedly, in the first dying declaration recorded by a Naib Tahsildar, it has been clearly stated that she tried to set herself ablaze by pouring kerosine on herself, *but in the subsequent declaration, recorded by another Nayab Tahsildar, a contrary statement was made*. It appears that one dying declaration earlier was made before the**

doctor. The trial court referred to the evidence of Dr. Chaturvedi who stated that the deceased was admitted on Bed No. 8, but the father of the deceased stated that her daughter was admitted on some other bed number.

10. The trial court and the High Court came to abrupt conclusions on the purported possibility that the relatives of the accused may have compelled the deceased to give a false dying declaration. No material was brought on record to justify such a conclusion. The evidence of the Nayab Tahsildar who recorded Ext. D-4 was examined as PW 8. His statement was clear to the effect that nobody else was present when he was recording the statement. That being so, in view of the apparent discrepancies in the two dying declarations it would be unsafe to convict the appellant.

(Emphasis supplied)

The Conviction of the appellant came to be set aside.

28. In Lakhan v. State of M.P. (2010) 8 SCC 514, this Court was dealing with the case of death as a result of burn injuries suffered by the wife. In the first dying declaration before the Magistrate, the deceased stated that when she was cooking, kerosine oil had been put behind her back. In the next dying declaration, it was stated that the appellant/accused brought a metal container full of kerosine and poured it on her body and the fire was lit by him and she was burnt. This Court, after going through all the decisions, held as follows:

> **"21. In view of the above, the law on the issue of dying declaration can be summarized to the effect that in case the court comes to the conclusion that the dying declaration is true and reliable, has been recorded by a person at a time when the deceased was fit physically and mentally to make the declaration and it has not been made under any tutoring/duress/prompting; it can be the sole basis for recording conviction. In such an eventuality no corroboration is required. *In case there are multiple dying declarations and there are inconsistencies between them, generally, the dying declaration recorded by the higher officer like a Magistrate can be relied upon, provided that there is no circumstance giving rise to any suspicion about its truthfulness. In case there are circumstances wherein the declaration had been made, not voluntarily and even otherwise, it is not supported by the other evidence, the court has to scrutinise the facts of an individual case very carefully and take a decision as to which of the declarations is worth reliance.*"**

In the course of its discussion, the Court found that the second dying declaration was reliable inter alia on the ground that it was corroborated by the earlier declaration

made by the deceased to her parents who were examined as PW1 and PW3.

29. We may also notice the judgment in Sher Singh v. State of Punjab : (2008) 4 SCC 265. This is also a case of burn injuries suffered by the deceased/wife of the appellant. Upon being taken to the hospital, the Police Officer recorded a statement wherein it was stated that the fire was accidental and it happened when she was preparing tea. When her uncle met her on the next day, she informed that the accused had burnt her. On the very next day he moved an application for recording a statement which came to be recorded. Yet another application was moved requesting for re-examining the matter as the deceased had made a wrong statement before the police officer initially and another statement was accordingly recorded.

30. In the second dying declaration, deceased had stated that she was burnt by her in-laws. It was stated that her father-in-law, mother-in-law and sister-in-law poured oil on her and burnt her. She further stated that her husband was not with her but in the next sentence, she stated that there were four. The fourth person was her husband. She further stated that they had stated that unless she made a wrong statement, they would not take her to the hospital. It was thereafter that she made a third declaration. The Court went on to hold as follows:

> **"17. In the present case, the first dying declaration was recorded on 18-7- 1994 by ASI Hakim Singh (DW 1). The victim did not name any of the accused persons and said that it was a case of an accident. *However, in the statement before the court, Hakim Singh (DW 1) specifically deposed that he noted that the declarant was under pressure and at the time of recording of the dying declaration, her mother-in-law was present with her*. In the subsequent dying declaration recorded by the Executive Magistrate Rajiv Prashar (PW 7) on 20-7-1994, *she stated that she was taken to the hospital by the accused only on the condition that she would make a wrong statement. This was reiterated by her in her oral dying declaration and also in the written dying declaration recorded by SI Arvind Puri* (PW 8) on 22-7-1994. The first dying declaration exonerating the accused persons made immediately after she was admitted in the hospital was under threat and duress that she would be admitted in the hospital only if she would give a statement in favour of the accused persons in order to save her in-laws and husband. The first dying declaration does not appear to be coming from a person with free mind without there being any threat. *The second dying declaration was more probable and looks natural to us. Although it does not contain the certificate of the doctor that she was in a fit state of mind to give the dying declaration but the Magistrate who recorded the statement had certified that she was in a conscious***

state of mind and in a position to make the statement to him. Mere fact that it was contrary to the first declaration would not make it untrue. **The oral dying declaration made to the uncle is consistent with the second dying declaration implicating the accused persons stating about their involvement in the commission of crime.** ***The third dying declaration recorded by the SI on the direction of his superior officer is consistent with the second dying declaration and the oral dying declaration made to her uncle though with some minor inconsistencies.*** **The third dying declaration was recorded after the doctor certified that she was in a fit state of mind to give the statement.**

(Emphasis supplied)

31. A survey of the decisions would show that the principles can be culled out as follows:

(i) Conviction of a person can be made solely on the basis of a dying declaration which inspires confidence of the court;

(ii) If there is nothing suspicious about the declaration, no corroboration may be necessary;

(iii) No doubt, the court must be satisfied that there is no tutoring or prompting;

(iv) The court must also analyse and come to the conclusion that imagination of the deceased was not at play in making the declaration. In this regard, the court must look to the entirety of the language of the dying declaration;

(v) Considering material before it, both in the form of oral and documentary evidence, the court must be satisfied that the version is compatible with the reality and the truth as can be gleaned from the facts established;

(vi) However, there may be cases where there are more than one dying declaration. If there are more than one dying declaration, the dying declarations may entirely agree with one another. There may be dying declarations where inconsistencies between the declarations emerge. The extent of the inconsistencies would then have to be considered by the court. The inconsistencies may turn out to be reconciliable.

(vii) In such cases, where the inconsistencies go to some matter of detail or description but is incriminatory in nature as far as the accused is concerned, the court would look to the material on record to conclude as to which dying declaration is to be relied on unless it be shown that they are unreliable;

(viii) The third category of cases is that where there are more than one dying declaration and inconsistencies

> **between the declarations are absolute and the dying declarations are irreconcilable being repugnant to one another. In a dying declaration, the accused may not be blamed at all and the cause of death may be placed at the doorstep of an unfortunate accident. This may be followed up by another dying declaration which is diametrically opposed to the first dying declaration. In fact, in that scenario, it may not be a question of an inconsistent dying declaration but a dying declaration which is completely opposed to the dying declaration which is given earlier. There may be more than two.**
>
> **(ix) In the third scenario, what is the duty of the court? Should the court, without looking into anything else, conclude that in view of complete inconsistency, the second or the third dying declaration which is relied on by the prosecution is demolished by the earlier dying declaration or dying declarations or is it the duty of the court to carefully attend to not only the dying declarations but examine the rest of the materials in the form of evidence placed before the court and still conclude that the incriminatory dying declaration is capable of being relied upon?"**

[30] To appreciate the objections as raised in the appeal, supplemented by the submissions advanced by the counsel for the parties it is apposite to carry out a meaningful survey of the evidence as recorded in the trial. As already noted, the prosecution has adduced 16 witnesses including the investigating officer (PW-7).

[31] PW-1, Sabita Saha is the house owner where the appellant used to reside as a tenant with his 'wife', Shefali Sarkar (the deceased). PW-1 has testified in the trial that on the day of occurrence, at night about 1 am, she woke up on hearing cry of Shefali Sarkar. She came out of her dwelling hut and saw the victim (Shefali Sarkar) burning in their courtyard. The victim cried out – save save. The victim told her that "she herself set her on

fire." The victim had also stated to her that she was deserted wife of another person, though she was living in a house as "husband and wife with the appellant". She was declared hostile as she was found to be not supporting the prosecution case or her statement as recorded under Section 161 of the CrPC. PW-1 was cross-examined by the prosecution and part of her statement, which she did not support in the trial, was admitted conditionally as Exbt-1. She has also stated that immediately after the incident, the victim was shifted to GBP Hospital. PW-1 accompanied the victim to the GBP Hospital. She has testified in the trial that the appellant also sustained burn injuries on his hand. She has further testified that one bottle of kerosine and burnt pieces of cloths of the victim were seized by the police and she, as the witness, signed on the seizure list, Exbt-2.

In the cross examination, PW-1 has stated in the trial court that the victim told her that she had started living with the appellant "leaving her husband and son" and she had further stated that the appellant did not come back to house regularly and therefore, she committed suicide.

[32] PW-2, Smt. Najma Khatoon was a neighbour of PW-1. PW2 has denied to have any knowledge how the appellant sustained the burn injures.

[33] PW-3, Smt. Ranjana Saha has as well denied knowledge of the occurrence.

[34] PW-4, Smt. Fulchan Bibi followed the suits of PWs-2 and 3.

[35] PW-5, Smt. Renu Sarkar is the legally married wife of the appellant. She has stated that her husband (the appellant) got burn injuries but she cannot say where and how he sustained such injures. She was declared hostile and put to cross-examination by the prosecution. When her previous statement (Exbt-3) was shown to her in the cross-examination, she denied to have made such statement to the police officer. In the cross-examination, she has, however, stated that when she asked her husband (the appellant) how he had sustained the injury, her husband (the appellant) replied when he tried to extinguish fire on the body of a woman, he did receive the injury but her husband did not disclose the name of that woman.

[36] PW-6, Sri Sajal Sarkar is a cousin of the deceased. He has stated that her cousin was married to one Keshav Sarkar (the other name of the appellant) but at the same time PW6 has testified that 23-24 years ago her cousin married one Sudhir Sarkar (PW-11) whereas about 6-7 months before the occurrence, she had left the husband’s house and started living at Bhati Abhoynagar with the appellant. Having information from Tapash

Sarkar (PW-12) on the following morning, he had visited the hospital when the victim told him that *"Keshav poured kerosine and set her on her fire with match stick after the quarrel took place with her."* On the fifth day from the occurrence, she died in the hospital. In his presence, the inquest was carried out and as witness he signed over the inquest report (Exbt-5). In the cross-examination, he has stated that the police did not question him in the hospital. The police inquired him at the time of making the inquest report at GBP Hospital but at that time he did not make any allegation against the appellant. His cousin deserted her husband. Further, PW-6 has stated that he cannot recollect whether he had stated to the investigating officer that Shefali (the deceased) told him in the hospital that Keshav (the appellant) set her with fire with a match stick. However, he has denied the suggestion that the defence did not tell him that the appellant set her on fire pouring kerosine oil on her body and igniting by a match stick.

[37] PW-7, Dr. Juthika Debbarma had conducted the post mortem examination over the body of the victim on 27.11.2012. According to her, the victim suffered epidermo-dermal burns involving 96% of the total body surface. The cause of death as she opined was septicemic shock due to flame burn injuries, 96% of the total body surface. Such opinion in the post mortem

examination report (Exbt-6) has been admitted in the evidence. In the cross-examination, she has admitted that in the bedhead ticket, it was not mentioned that there was infection on the body of the deceased.

[38] PW-8, Smt. Emila Reang was the Sub-Divisional Magistrate (SDM) Sadar on 27.11.2012 and she carried out the inquest of the dead body of Shefali Sarkar alias Shilpi Sarkar in the report (Exbt-2), whatever was found during the said proceeding has been recorded.

[39] PW-9, Sri Pratap Dey, a fireman, who reached the place of occurrence immediately after the occurrence, has testified in the trial that on 23.11.2012 at 00.30 hours he received a call that a fire incident had taken place in the house of Shilpi Sarkar at Bitarban at Bhati Abhoynagar. On receiving the said call, he along with the other personnel of Agartala Fire station reached the destination. On appearing at that place, they found one woman struggling in the courtyard with severe burn injuries on her body. At that time, she was able to speak and was crying but they did not give much attention to her voice. They did not ask her anything nor even Tutan Sarkar (the appellant) about his injuries as they were busy to rescue them. However, he has stated that she uttered at that time “kill kill” but her voice was not clear, but he heard distinctly that she uttered “kill kill”. They also found the

appellant with burn injures on his hand. The victim was taken in the police vehicle and the appellant was taken in the fire service vehicle to the hospital (GBP Hospital). Thereafter, as already noted, he (PW-9) made the following statement. "From the local people we came to know that Shilpi Sarkar committed suicide. All the afroestated facts were entered in our occurrence book dated 23.11.12." He admitted the photocopy of the occurrence book dated 23.11.12 regarding the said. The photocopy of the occurrence book dated 23.11.12 is marked as Exbt-8 after comparing the same with the original occurrence book. The said occurrence book was produced by PW-9 in terms of the orders dated 13.05.2016 and 02.05.2016.

In the cross-examination, he has admitted that he did not mention in the occurrence book that the victim, Shefali Sarkar uttered the words "kill kill". But he denied the suggestions that he did not hear the victim utter "kill kill." It may be noted here that 'kill kill' is the translator's reproduction. It should imply "killing me killing me"

[40] PW-10, Sri Subrata Dutta, Deputy Collector and Magistrate recorded the statement of the victim in the ward at FS I of AGMC and GBP Hospital on 23.11.2012 at around 3.11 pm. He was directed by the SDM, Sadar for recording the statement of the victim. He has stated that he had recorded the statement in

Bengali. In the statement, the victim had stated that on 23.11.2012 after around 00.30 am, there broke out a quarrel between the victim and her 'husband' Tutan Sarkar in the house of one Sabita Saha (PW-1) of Bitarban over the issue of transaction of money. She had further stated to him that she was residing in that house as tenant. After quarrel, her husband consumed alcohol and then he poured kerosine oil upon her and set fire "by dint of fire of bidi". As a result, she got burn injuries. She made her 'husband' Tutan Sarkar liable for the said incident. PW-10 has stated that the victim had put her right thumb impression (RTI) in his presence. PW-10 also given the certificate below her statement and put his signature over there with his official seal. At the time of recording of the said statement, the investigating officer Smt. Bidya Laxmi Debbarma was present. He admitted the statement (Exbt-09), which will be referred hereafter as the dying declaration, in the cross-examination. He had admitted that in his certificate he did not mention that he has taken the certificate from the doctor before recording the statement about her ability of making such statement or that in pursuance of the attending doctor he recorded the said statement. He has further stated that he had also personally asked the victim whether she was really capable of making such statement. He has clearly denied that he was not requested by the SDM to record the statement.

[41] PW-11, Sudhir Sarkar, the legally married husband of the victim, has stated that the victim eloped with one man after 17-18 years of their marriage. She used to work as helper with that man who was mason. He testified in the trial that he had knowledge that both the appellant and his wife were residing at Bhati Abhoynagar. One day in the month of December, five years before the day when he deposed in the trial, he received one telephonic information from PW-12 , the brother of the deceased, that Shefali (the victim) got burn injuries. On the following morning, he went to the GBP Hospital and asked Shefali how that had happened. She replied that on the previous night there was a hot altercation between her and her 'husband' and subsequently, the appellant came back in drunken condition. Thereafter, the appellant poured kerosine oil on her person. When Shefali told him that she would complain against the appellant to the house owner, she was immediately set on fire by the appellant *"by a burning match stick while smoking bidi"*. After four days Shefali died at hospital, even though in the examination in chief, PW-11 had stated that he only knew the name of the appellant but identified him in the trial. PW-11 has clearly stated that his marriage with the victim was not dissolved by decree of divorce. He has denied the suggestions, contrary to the statements made during the examination-in-chief.

[42] PW-12, Sri Tapash Sarkar who lodged the First Information Report has stated in the trial that Keshav Sarkar alias Tutan (the appellant) developed a relation with the victim and they started living in a rented house at Bitanban area at Agartala. She was subjected to torture by the appellant. One day, in the later part of the year, 2012 the appellant after a quarrel with the 'sister' (the deceased) went out from his house and came back "in drunken condition" poured kerosine oil on the victim. The victim raised objection but ultimately, the appellant put a burning match stick to set her on fire. He got the information over telephone from the house owner, PW-1. At around 12 at night, he rushed to the house. There he came to learn that the victim had been shifted to the hospital by fire service vehicle. He went to the hospital where he found the victim senseless. On the following day between 10.30 to 12.00 am, he was called by his sister through another man and then he had a talk with her. At that juncture PW-12 testified , inter alia thus:

> **"……My sister told me that on previous night Tutan made a quarrel with her and went out from house. Subsequently, he again came back in drunken condition and by burning match stick set her on fire."**

[43] On the following day, at 12.30/1 pm, he informed the police station by lodging an ejahar (Exbt-10). On fifth day the occurrence, the victim died. One police officer prepared the inquest report and he had admitted that inquest report where he

had signed as the witness. During the cross-examination, PW-12 has stated that after making signature on the inquest report, he never met with the police. He has admitted that there was no divorce between Sudhir Sarkar and his cousin sister (the deceased). He has admitted in the First Information Report that he did not mention about the marriage of his sister with Sudhir Sarkar (PW-11). He has also stated that on the day of lodging ejahar, he was examined by police. He has expressed that he could not recollect as to whether on any other occasion he was examined by the police or not, but he has made the following statement succinctly:

> **"I did not state to the police when I visited GBP hospital at night my sister was found in senseless condition and on the following day I was called by sister through another person and then she told me that on previous night Tutan made a quarrel with her and went out from house. Subsequently, he again came back in drunker condition and by burning match stick set her on fire."**

[44] This part is an admission of not stating the police of the fact and that this is the reason why the defence did not make attempt to record contradiction. The suggestions as made in the trial were all denied by PW-12. PW-12 has also admitted that he did not reflect that when he rushed to the house of the victim, he did not find her there as she was shifted by then to the GBP hospital.

[45] PW-13, Partha Sarkar is the cousin of PW-12. He wrote the ejahar (Exbt-10) as per the dictation of PW-12. He did not state anything of material importance beyond that.

[46] PW-14, Dr. Dwaipayan Debanth was posted at AGMC and GBP Hospital in the departmental surgery being the junior resident on 23.11.2012 when the statement of the victim was recorded. He has categorically stated in the trial that he has certified the fitness of the victim before examination. Deputy Collector and Magistrate recorded the statement of the victim in his presence. The victim had put her RTI after recording her statement. In the statement, she has disclosed that on the day of occurrence i.e. 23.11.2012 at night around 12.30 am, there had been a quarrel between her and her 'husband' Tutan Sarkar at the house of one Sabita Saha (PW-1) where they were residing as tenant. After quarrel, her husband consumed alcohol and thereafter poured kerosine oil on her person and set her on fire by a burning bidi. As a result, she sustained burn injuries. The victim made her husband responsible for that incident. He identified his endorsement on the body of the statement (Exbt-9/1). After admission of the patient in hospital , he had informed the local police station as the victim was admitted with burn injuries on 23.11.2011 at 1.23 am. In the course of cross-examination, he has admitted that the police did not record her statement. In the

bedhead ticket every particulars of the patient is reflected including the time of admission and the condition of the patient. The bed head ticket shows that at 1.45 am on 23.11.2012, there is no entry made by him. The suggestions as made contrary to what PW14 had stated in the examination in chief were all denied. PW-14 has admitted that "*patient also did not disclose after quarrel after consumed alcohol and then pouring k oil upon her set her in fire by dint of fire of bidi by which she sustained burn injuries.*" He has denied the suggestions that he did not inform the local police station.

[47] PW-15, Sri Sanjoy Das a Sub-Inspector of police posted at West Agartala police Station received the written ejahar from PW-11 and registered the specific police case. The case was endorsed to PW-16 Bidya Laxmi Debbarma, a woman Sub-Inspector for investigation. She identified the FIR (Exbt-11) and her complaint (Exbt-10).

[48] PW-16, Bidya Laxmi Debbarma had investigated the case. She has briefly narrated in the trial how she had carried out the investigation. She had not only recorded the statement of the victim but also sent requisition for recording the statement of the victim. She has asserted in the trial that the victim told her that on 22.11.2012 when she came back to the rented house after completing the work as the helper of the mason, the appellant

demanded remuneration what she had earned. As she had refused over that issue, the appellant threatened to kill her and further stated that after killing her, he would flee to Bangladesh. At night at about 10 pm, the appellant went out and subsequently, came back with a bottle of alcohol. He consumed the full bottle and at around 12/12.15 am, he started assaulting her and by pouring kerosine oil over her person, set her body on fire by a match stick. She tried to save her life and came out of the room and raised alarm for help. The local people gathered and extinguished the fire and shifted her to the GBP Hospital. After the marriage "she came to learn that the appellant had previous marriage and he had three children with his family who were residing at Kalikapur. The previous statement of the victim has been admitted in the evidence as Exbt-12 under strong objection from the defence. During her visit at GBP Hospital, it was revealed to her that the appellant even got injured from the said incident. Thereafter, she gave a brief description how she had carried out the investigation. From the place of occurrence, she has seized sample of ash, one bottle of kerosine oil, and one empty bottle of whisky by preparing the seizure list (Exbt-2). She had prepared the site map of the place of occurrence. Thereafter, she had recorded the statement of the witnesses who were aware or who were supposed to be aware of the occurrence. She has

asserted that she had examined Sudhir Sarkar (PW-11). She had collected the inquest report (Exbt-5) and sent the requisition to the GBP Hospital for providing her bed head ticket. She had arranged the post mortem examination of the dead body after her death on 26.11.2012. She has given the details when she recorded the statement of the witnesses. She had also admitted her signature on the dying declaration (Exbt-9/2). She had collected the extract of the occurrence maintained by the Fire Servicemen. Thereafter, being satisfied of a *prima facie* case, she filed the charge sheet against the appellant in West Agartala Police Station Case No. 313/12 on 15.05.2013. The witness confirmed the previous statements of Sabita Saha (PW-1) and the statement of one Renu Sarkar (PW-5) .

In the cross-examination, she did not deny the suggestion as extended to her and held strongly and firmly the statement which were recorded by her. In the cross-examination, she has admitted that Sudhir Sarkar (PW-11) did not give any statement disclosing that the victim told her on the previous night that there was hot altercation between the victim and the appellant. Subsequently, the appellant came back in the drunken condition and thereafter, the appellant poured kerosine oil on her and set her on fire.

[49] What has surfaced from the appreciation as noted above is that the prosecution case has depended on the few circumstantial evidence and the dying declaration and on the multiple dying declarations (including Exbt9) as well. The trial court has considered the said dying declarations in the perspective fact, as the clinching evidence, to hold that the appellant committed the murder of Shefali Sarkar on 23.11.2012 at about 12.05 hours. The trial judge has completely discarded the attempt of the appellant in explaining the occurrence. That apart, the trial judge has observed that during the trial defence has taken different variable stands to exculpate the appellant. According to the trial judge that "to some extent strengthens the prosecution case." According to the version as indicated by the defence that since the appellant did not allow "their sons to meet with their mother, " Shefali Sarkar committed suicide out of frustration. Even the story of accidental fire at the time of cooking as projected by the defence has been discarded by the trial judge. The trial judge has observed at the fag-end of the judgment as follows:

> **"Regarding intention behind the crime, dying declaration (Exbt-9) is very specific that there was quarrel in between the victim and the accused on the issue of financial transaction of the family immediate before the unfortunate incident. This fact is found consistent with another dying declaration recorded by IO where victim stated that on that night accused demanded money to her which she earned but, she refused. Then the accused consumed alcohol and committed the crime."**

[50] The fundamental objection raised in this appeal is that there is no legal evidence and the finding of conviction is based on conjecture and surmise. Even the statement of PW 1 was not correctly appreciated by the trial judge. PW1, as noted before has stated that on the night of occurrence, she heard the cries of the victim and came out of her dwelling hut. She saw the victim burning in their courtyard. She was crying out for saving her. Thereafter, she has stated that she 'herself' set her on fire. The statement is in complete contrast to the previous statement of PW 5 made to the investigation officer. As consequence thereof, she was declared hostile. However, she has proved the seizure of the articles viz; bottle of kerosine and pieces of some burnt clothes of the victim. The other objection is based on the burn injury as received by the appellant.

[51] According to Mr. Sarkar, learned counsel this fact indicates that the appellant did not set the victim on fire. Even a reference has been made to the occurrence book maintained by the Tripura Fire Service (Exbt-8) where it has been noted that the local people told the fire service personnel that the victim committed suicide but the said evidence was again not considered by the trial judge without any apparent reason. The ancillary objection as raised in the course of the submission that by a bidi

the kerosine oil cannot be ignited. In support thereof, certain unconfirmed newspaper reports and writing of unknown experts has been relied on. The prosecution did not get opportunity of examining those opinions under Section 51 of the Evidence Act, even though at the first blush such submission appears very attractive. But legally those opinion cannot be juxtaposed against the statement of the victim (dying declaration).

[52] From the cause of death, it has surfaced conclusively that the cause of death was septicemic shock due to flame burn injuries over 96% of the body surface. In this regard, the defence has failed to discredit the opinion as recorded in the post mortem examination report (Exbt-6). The question that has been raised in respect of deposing capacity of the victim after having 96% burn injuries has been answered by the prosecution. The counsel for the appellant has submitted that the dying declaration was not recorded on 23.11.2012 as the victim was not fit to make such declaration on that day. But the dying declaration (Exbt-9) was recorded by the Executive Magistrate (PW-10) and the dying declaration has been accepted by the trial judge. It cannot be ignored that the dying declaration was preceded by a certificate issued by the attending doctor (PW14) to the effect that the victim was in the fit state of mind to give her statement about the cause of her injuries. From the testimonies of PWs10 and 14, we did not

find any element to question the authenticity of the victim's declaration.

[53] Even though the relation with PW12, Sajal Sarkar is shrouded for inconsistent statements about the relation between the victim and PW6. But PW 6 has lodged the complaint after hearing the narrative of the occurrence from the victim. In the complaint, PW6 has stated that the appellant has set fire on her person pouring kerosine oil forcibly and setting fire thereafter.

[54] PW9, a fire service personnel, deposed in the trial that when he met the victim in the course of the rescue operation, the victim uttered "killed killed". He has stated in the trial that he had suspected some foul play behind the fire incident. However, this court is of the view that this muttering is not adequate to arrive at any inference, particularly when in the occurrence book, it has been clearly noted by the fire service personnel that from the local people they came to know that Shilpi Sarkar, not referred as Shefali committed suicide. About the relation between the appellant and the victim, the testimony of PW11, the husband of the victim is the eye opener. He has testified in the trial that Shefali eloped with the appellant and started to live together. She was working as a helper to the appellant who was a mason. He has asserted that he went to the GBP hospital and asked the

victim how the occurrence took place. Then PW 11 has stated as under:

> **"In reply she told me that in previous night there was hot altercation in between them subsequently he came in drunker condition. Thereafter, Tutan poured k oil upon her then Shefali asked Tutan that she will complaint against Tutan to the house owner but in the meantime she was set in fire by Tutan by a burning matchstick while smoking a bidi.**

In the cross examination we have noted that the said statement was not available when the statement that the appellant set the victim on fire was recorded by the police.

[55] PW12 has stated that the victim disclosed about the occurrence to him on the following day of her hospitalization. She had stated that on the previous night the appellant after a quarrel with her left the home for sometimes and then returned in a drunken condition and by a burning matchstick set her on fire and based thereupon he filed the complaint (Exbt- 11). He denied the suggestion made contrary to the said statement.

[56] From the testimonies of PWs 6 and 13, it appears that PW 12 did immediately inform them about the occurrence and how the victim sustained burn injuries and got admitted in the GBP hospital. PW 6 has also stated that the appellant was also known to them as Keshab. When PW 6 visited the hospital to see the victim, his cousin, she told him that

> ***"Keshab poured kerosine and set her on fire with a matchstick after a quarrel took place with her."***

[57] PW 13 had written the complaint as per the statement of PW 12.

[58] PW 16 the investigating officer has stated in the trial that the victim Shefali alias Shilpi in her statement reported to her as follows:

> **"In her statement victim Sefali @ Silpi reported to me that on 22.11.2012 she came back in the rented house at evening after completion of her work as helper of mason. Then Tutan demanded to give her remuneration as he earned. She refused. On that issue Tutan threatened her to kill and also told that after killing her he would fled away at Bangladesh. At night around 10 pm Tutan went out and subsequently came back having a bottle of wine (alcohol) and after consuming wine (alcohol) around 12/12.15 hours he started assaulting to the victim and by pouring kerosine oil upon her set fir on her body by a match stick. She tried to save her life and came out and raised hue and cry. Then the local people fathered and after extinguishing fire shifted her to GB Hospital. She also told that after marriage with Tutan she came to know that he was previously married and already have three children who were residing at Kalikapur"**

Even if that statement is not treated as the dying declaration, the said statement of investigating officer has evidentiary value as the first hand statement recorded by the investigating officer since the victim has died. The said statement also cannot be rejected outright as the dying declaration.

[59] PW 16 has also seized an empty bottle of whisky from the place of occurrence along with an empty bottle of kerosine oil. Such seizure to some extent supports the content in the dying declaration. PW 16 has also clearly revealed in the trial that the husband of the victim (PW1) told her that the victim did state her that there was hot altercation between the victim and the

appellant. She has denied unequivocally the suggestion of the defence that the victim did not tell her that her husband named Tutan set her on fire with intention to kill her.

[60] Before we begin to appreciate the dying declaration (Exbt-9) it would be appropriate to appreciate the testimony of PW 14, Dr. Dwaipayan Debnath. He has testified that the victim was fit in mind and healthy to give her statement about the cause of injury. He has categorically stated in the trial that he had certified her fitness on due examination. Then, the Deputy Collector and Magistrate, Agartala recorded her statement in his presence. In the dying declaration, the victim put her right hand thumb impression. Thereafter, PW14 has made the following statement in the trial:

> **"In her statement victim Sefali Sarkar disclosed that on that day i.e. On 23.11.2012 night around 12.30 hours there was quarrel in between Sefali Sarkar and her husband Tutan Sarkar in the house of one Sabita Das of Bitarban where they were residing as tenant. After quarrel her husband consumed alcohol and then after pouring kerosine oil he set fire upon the victim by fire of bidi. As a result, she sustained burn injuries and the victim made responsible her husband for that incident. This is my endorsement on the body of aforesaid statement with my dated initial and official seal. Accordingly, the endorsement of witness having dated initial and official seal is marked as Exhibit-9/1. After admission of patient in hospital I informed the fact to local PS as patient admitted with burn injury. She was admitted on 23.11.2012 at 1.23 am."**

Therefore, there cannot be any reasonable doubt in respect of the deposing capacity of the victim.

[61] PW 10 has narrated in the trial how he has recorded the statement of the victim after having the state of health found fit for recording such statement. In the cross examination, the objection that has been taken by the defence is that in the certificate, the opinion of PW 14 as regards ability of giving statement has not been recorded. According to the court, this is not essential when there is definite evidence in respect of the status of health of the victim. Even at the cost of repetition, it would be apposite for us to refer to the statement (the dying declaration) which was recorded by PW 10. The dying declaration was recorded in the vernacular. The said statement is in the first person. We have compared the translation with the vernacular. It may be noted that PW14 has put a note on the body of the said dying declaration. The dying declaration of the victim (EXbt-9) reads as under:

> **"Today dated 23.11.2012 at night around 12.30 am a quarrel was ensued with my husband named Tutan Sarkar centering the matter of giving and taking the money of the family in the house belonging to one Sabita Das situated at Bitarban. We reside in that house as a tenant on rent. After ensuring quarrel thereon my husband had consumed liquor/wine. Thereafter, he had poured kerosine oil on my person and set fire on my person with the help of fire of "Bidi". At this my body was burnt. My husband named Tutan Sarkar (Keshab) is responsible for the said incident."**

[62] In the thick of multiple dying declarations made to witnesses, as noted above, we find a very consistent thread of narration except an insignificant variation how the fire was set in.

Whether that was by bidi or match stick. It is insignificant. There may be fire which was used for setting the fire on the victim. Thus, this element is not material as the overt act of the appellant has surfaced without any reasonable doubt. The law of the dying declaration has developed and crystallized. Its evidentiary value has become acknowledged in **Jagbir Singh** (supra). The law of dying declaration has been summarized on considering the various decisions of the apex court. We would not reiterate the summary. In **Lakhan vs State of MP** (supra), it has been observed that even if there are inconsistencies between the multiple dying declaration, the dying declaration recorded the high officer like the Magistrate can be relied upon, provided that there is no circumstances giving rise to any suspicion about its truthfulness. But it all depends on the scrutiny of the facts of the individual case. In Para 31 of **Jagbir Singh** (supra), the law has been laid down which has bolstered us to rely the dying declaration (Exbt-9) along with dying declarations to hold that it is the appellant and none else who set the victim on fire. The victim faced the death as consequence of that fire. We do not find any infirmity in the procedure in recording the dying declaration (Exbt-9).

[63] For purpose of brevity, we are not extensively referring the reports again which has been reproduced before. From a reading of the dying declaration, it has surfaced unequivocally that

following a quarrel, the appellant set the victim on fire in a state of rage and inebriated condition. The motive of murdering the victim has not surfaced. According to us, for that reason the said offence cannot be inferred as murder. Even there is no element of undue advantage. Thus, Exception 4 as engrafted under Section 300 of the IPC would define the offence. To make exception to the murder as defined under Section 300, Exception 4 provides as follows:

> **"Exception 4: Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offenders having taken undue advantage or acted in a cruel or unusual manner."**

[64] The victim, in the case in hand, has categorically stated that following the quarrel, all on a sudden, the appellant set her on fire. There is no premeditation and the appellant had lost his control on a sudden quarrel. Hence, the offence to be is covered under Section 304 (Part I) as the appellant committed the homicide, not amounting to murder by causing such bodily injury as is likely to cause death.

[65] Having observed thus, we interfere with the finding of conviction under Section 302 of the IPC. That finding and the consequent order of sentence are therefore set aside. As stated earlier that the prosecution has made out a case of culpable homicide not amounting to murder. Since, the offence punishable

under Sect 304, Part I of the IPC is a cognate and minor offence vis-a-vis the offence punishable under Section 302 of the IPC, we do convict the appellant under Section 304, Part I of the IPC without framing any formal charge in exercise of power as conferred by Section 222 of the CrPC.

As consequence of such conviction under Section 304, Part I of the IPC we sentence the appellant to suffer rigorous imprisonment for 10 years and to pay fine of Rs.10,000/-, in default to suffer simple imprisonment of two months.

In the result, the appeal is partly allowed.

LCRs be sent down forthwith.

JUDGE **JUDGE**

Dipak