



THE HIGH COURT OF SIKKIM: GANGTOK
(Criminal Appellate Jurisdiction)

DIVISION BENCH: THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE
THE HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE

Crl. Appeal No. 12 of 2019

Udai Pratap Verma,
Son of B.N. Verma,
R/o Buxa Village,
Mainpur, Gaziapaur District,
Uttar Pradesh.

..... **Appellant**

Versus

1. State of Sikkim
2. Sheela Sharma,
Wife of Bhola Sharma,
3. Shiv Shankar Sharma,
Son of Bhola Sharma,
4. Madhubala alias Madhumala Sharma,
Daughter of Bhola Sharma,

*(Respondents no. 2 to 4 are residents of Tadong,
C/o C.P. Dewan, Near Sikkim Government
College, P.O. Daragoan & P.S. Sadar,
East Sikkim)*

..... **Respondents**

**Appeal under Section 372 of the Code of Criminal Procedure,
1973.**

*(Against the impugned judgment and order of acquittal dated 31.08.2018 passed by
the learned Sessions Judge, Special Division-I, East Sikkim at Gangtok,
in Sessions Trial Case No. 02 of 2016 - State of Sikkim vs. Sheela Sharma & Ors.)*

Appearance:

Ms. Gita Bista, Advocate for the Appellant.

Mr. Sudesh Joshi, Public Prosecutor and Mr. Yadev Sharma,
Additional Public Prosecutor for the Respondent No.1.

Mr. Rahul Rathi, Advocate for the Respondents No. 2 to 4.

Date of hearing : 15.06.2022
Date of judgment : 06.07.2022



J U D G M E N T

Bhaskar Raj Pradhan, J.

1. Udai Pratap Verma (P.W.2) - father of Pankaj Verma (the deceased), has filed the present appeal against the acquittal of respondent nos. 2, 3 and 4 (the private respondents) in Sessions Trial Case No.02 of 2016 passed by the learned Sessions Judge, Special Division-I, East Sikkim at Gangtok (learned Sessions Judge). The respondents were acquitted of the charges against them under Section 302/34 of the Indian Penal Code, 1860 (IPC) by the judgment dated 31.08.2018 (the impugned judgment). The State (respondent no.1) has not preferred any appeal.

2. Heard Ms Gita Bista, learned Counsel for the appellant. Also heard Mr. Sudesh Joshi, learned Public Prosecutor for the respondent no.1 and Mr. Rahul Rathi, learned Counsel for the private respondents.

3. Ms Gita Bista submitted that she would challenge the impugned judgment on two points.

4. Firstly, it is submitted that although the dying declaration was unquestionable, the learned Sessions Judge disbelieved it without any valid or cogent reason. She submitted that there is no evidence in support of the learned Sessions Judge's conclusion that the dying declaration was tainted with malice. She pointed out that the respondents who were accused persons had decided to enter the witness box as defence witnesses and therefore, it was incumbent upon them to explain how the deceased had died. It was submitted that although it was the case of the respondents that the deceased



had poured kerosene on them and burnt them, strangely the deceased sustained more burn injuries and the respondents less. The defence story is not a plausible one. She relied upon two judgments of the Supreme Court in support of her contentions. They are:- ***Ranjit Kumar Haldar vs. State of Sikkim***¹ and ***Jayamma & Anr. vs. State of Karnataka with Lachma s/o Chandyanika & Anr. vs. State of Karnataka***². In ***Ranjit Haldar*** (supra), the appellants had argued that since the FIR which is the foundation of the case was itself shaky, the entire prosecution story is doubtful. The Supreme Court examined Section 106 of the Indian Evidence Act, 1872 and various judgments rendered by it from time to time. The Supreme Court held that the general rule is that the burden of proof is on the prosecution. Section 106 of the Indian Evidence Act, 1872 was introduced not to relieve the prosecution of their duty but it is designed to meet the situation in which it would be impossible or difficult for the prosecution to establish facts which are especially within the knowledge of the accused. In ***Jayamma*** (supra), the Supreme Court held that when a dying declaration has been recorded in accordance with law and it gives a cogent and plausible explanation of the occurrence, the court can rely upon it as the solitary piece of evidence to convict the accused. It is for such reason that section 32 of the Indian Evidence Act, 1872 is an exception to the general rule against the admissibility of hearsay evidence and its clause (1) makes the statement of the deceased admissible. Such statement, classified as “dying declaration” is made by a person as to the cause of his death or as to the injuries which culminated to his death or the circumstances under which the injuries were inflicted. A dying declaration is thus

¹ AIR 2019 SC 3542

² (2021) 6 SCC 213



admitted in evidence on the premise that the anticipation of brewing death breeds the same human feelings as that of conscientious and guiltless person under oath. It is a statement comprising of last words of a person before his death which are presumed to be truthful and not infected by any motive or malice. The dying declaration is therefore admissible in evidence on the principle of necessity as there is very little hope of survival of the maker, and if found reliable, it can certainly form the sole basis of conviction. The Supreme Court examined the dying declaration with the thumb impression of the deceased as well as the signature of the police officer who recorded the dying declaration in his own handwriting. It was also noticed that the doctor had endorsed that the patient was in a sound state of mind at that time. It was noticed that few remarks had been made subsequently by the police officer. The Supreme Court on examining the dying declaration and the governing law concluded that there was sufficient reason to cast clouds on the genuineness of the prosecution case, endorsing the view of the learned Trial Court which had been upset by the High Court and reversed the conviction of the accused person. In ***P.V. Radhakrishna vs. State of Karnataka***³, the Supreme Court noted that in its earlier judgment, it had held that there was no hard-and-fast rule of universal application that percentage of burns is a determinative factor to effect the credibility of a dying declaration and the probability of its recording and much would depend upon the nature of burns, part of the body effected, impact of burns on the faculties to think and other relevant factor. The Supreme Court also noticed that in ***Chacko vs. State of Kerala***⁴, it had declined to accept the prosecution case based on a dying

³ (2003) 6 SCC 443

⁴ (2003) 1 SCC 112



declaration where the deceased was about 70 years old and had suffered 80 percent burns. It was held that it would be difficult to accept that the injured could make a detailed dying declaration after a lapse of about 8 to 9 hours of the burning, giving minute details as to the motive and manner in which he had suffered the injuries. It was a case where there was no certification by the doctor regarding the mental and physical condition of the deceased to make dying declaration. The Supreme Court opined that the manner in which the incident was recorded in the dying declaration created great doubts to the genuineness of the document. It further opined that even though the doctor therein had recorded “*patient conscious, talking*” in the wound certificate, that fact by itself would not further the case of the prosecution as to the condition of the patient making the dying declaration, nor would the oral evidence of the doctor or the investigating officer, made before the court for the first time, in any manner improved the prosecution case. It also noticed that in ***Sham Shankar Kankaria vs. State of Maharashtra***⁵, the Supreme Court had restated that dying declaration is only a piece of untested evidence and must like any other evidence satisfy the court that what is stated therein is the unalloyed truth and that it is absolutely safe to act upon it.

5. Secondly, it was argued that the learned Sessions Judge ought to have noted the apparent falsehood in the defence evidence and since the private respondent no.3 had stepped in as a witness and given evidence on oath it must be taken as a circumstance against the private respondents.

⁵ (2006) 13 SCC 165



6. Mr. Sudesh Joshi while raising his concern on the acquittal of the respondents took us through the dying declaration (exhibit-10) and the evidence connected therewith. He submitted that although there is no fitness certificate of the deceased the very fact that the doctor on duty allowed the Magistrate to record the dying declaration reflected that he was fit. He referred to the judgment of the Supreme Court in **Laxman vs. State of Maharashtra**⁶ and **Purshottam Chopra & Anr. vs. State (Government of NCT Delhi)**⁷, to further elaborate on the law relating to dying declarations. In **Laxman** (supra) the Supreme Court held that since the accused has no power of cross-examination, the courts insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The court, however, has always to be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. It held that when the Magistrate categorically stated in his evidence indicating the questions he had put to the patient and from the answers elicited was satisfied that the patient was in a fit state of mind where after he recorded the dying declaration it would be hyper technical to also seek for certification by the doctor.

7. Mr. Rahul Rathi, learned counsel for the private respondents, supported their acquittal. He submitted that the dying declaration cannot be taken in isolation and the surrounding facts and circumstances must be considered. Drawing attention to the FIR, he submitted that it was registered not against the private respondents but against the deceased. Thereafter, Santa Bahadur Gurung (PW-12) the first Investigating Officer, submitted a closure report. At this

⁶ (2002) 6 SCC 710

⁷ (2020) 11 SCC 489



juncture, the appellant (PW-2)- the father of the deceased, raised an objection. The learned Chief Judicial Magistrate ordered further investigation which was conducted by Police Inspector Sameer Pradhan (PW-19). He re-examined witnesses including K.K. Jha (PW-14) who stated to the police that he had seen Bhola Sharma (father of private respondents nos. 3 and 4 and husband of private respondent no.2) taking kerosene in a fevicol jar from the shop of Shambhu Prasad (PW-20) on the day of the incident. On the basis of reinvestigation, Sameer Pradhan (PW-19) filed charge-sheet against Bhola Sharma and the private respondents. Drawing attention to the evidence of K.K. Jha (PW-14), Mr. Rahul Rathi submitted that apparently he had made a false statement to the police based on which the charge-sheet was filed against the private respondents which were however not substantiated during the trial. Drawing attention to the post mortem report of the deceased (exhibit-4), the learned counsel pointed out the noting therein “no abnormal smell detected”. It was submitted that this fact would nullify the allegation made against the private respondents of pouring kerosene on the deceased and burning him. If it was so, it is argued, the smell of kerosene would have been noticed. He referred to **Chapter 21** with the caption “*Injuries from burns, scalds, lightning and electricity*” from a ***Textbook of Medical Jurisprudence and Toxicology by Jaising P. Modi***. He drew our attention to a statement therein which states “*Burns caused by kerosene oil are usually very severe, and are known from its characteristics odour and the sooty blackening of the parts.*” Mr. Rahul Rathi also drew our attention to the various contradictions in the prosecution witnesses’ statements. It was submitted that Dr. Chedup Lepcha (PW-3), Sub-Inspector Umesh Pradhan (PW-6) and



Tashi Dorjee Bhutia (PW-13), have made statements which contradict the statement made by Kapil Meena (PW-16) regarding the bandage on the deceased. Dr. Chedup Lepcha (PW-3) deposed that during post mortem he found surgical bandages all over the body except the face and neck. He also admitted that the hands (interior and exterior) of the deceased were found burnt during post mortem examination. Sub-Inspector Umesh Pradhan (PW-6) deposed during cross-examination that both the hands of the deceased were bandaged. Kapil Meena (PW-16), however, deposed that since the deceased was not in a condition to put his signature due to burn injuries, his thumb impression was put on the dying declaration. Tashi Dorjee Bhutia (PW-13) also admitted during cross-examination that the entire body including the hands and clothes were burnt except his underwear. It was also pointed out that Arvind Kumar Shah (PW-8) had clearly admitted that he had been threatened by the appellant (PW-2) that he would falsely implicate him in the present case. The appellant (PW-2) deposed that the deceased on being asked by Kapil Meena (PW-16) informed him that the respondent no.2 had poured kerosene over him and lit him with a match box. However, according to Kapil Meena (PW-16), the mother of his girlfriend had thrown kerosene oil on him and that the brothers of his girlfriend prevented him from coming out of the house and lit the matchstick. Upendra Sharma (PW-17) deposed that he had reached the hospital at the same time as that of the appellant and on seeing his father, the deceased said that he had been called for a birthday party and that Arvind, his friend, knew everything about the incident. Arvind Kumar Shah (PW-8), however, did not confirm what was stated by Upendra Sharma (PW-17). The appellant (PW-2) deposed that the dying



declaration of the deceased was recorded in the ICU of Manipal Hospital. Sub-Inspector Umesh Pradhan (PW-6) stated that the dying declaration was recorded in the emergency ward of Central Referral Hospital, Tadong. K.K. Jha (PW-14) deposed that when the deceased was taken outside the house he saw him and told him that he was put on fire by the accused persons. However, during cross-examination, he admitted that the deceased was unconscious when he was taken out from the house. According to Mr. Rahul Rathi, these glaring contradictions in the prosecution version were well noticed and the private respondents acquitted of all charges. Relying upon ***Naresh Kumar vs. Kalawati***⁸, he submitted that in absence of evidence about fitness of mind of deceased to make dying declaration, it is not admissible. He referred to the judgment of the Supreme Court in ***Jayamma*** (supra) as well and submitted that it would be unsafe to convict an accused on the solitary basis of dying declaration recorded under section 32 of the Indian Evidence Act, 1872.

8. On 15.01.2014, Assistant Sub-Inspector Chalan Singh Tamang (PW-1) lodged the First Information Report (exhibit-1). It stated that at around 18:10 hours on 15.01.2014, one person came to Tadong Outpost and informed that the house belonging to C.P. Dewan located at Daragoan, in which a tenant Bhola Sharma, a carpenter, was residing, was on fire. He and another police officer (Beat No.7) went to the spot and found out that one Pankaj Verma (the deceased), resident of Tadong, Metro Point, had brought kerosene with him, closed the door of the house, sprayed kerosene and lit it on fire stating that he would kill all and would also die.

⁸ AIR 2021 SC 1607



9. Based on the above information, Sadar P.S. Case FIR No. 09(01)2014 dated 15.01.2014 under sections 447, 342, 326, 307, 436 and 309 IPC was registered against the deceased and endorsed to SI Santa Bahadur Gurung (PW-12) for investigation. According to him, the private respondents and Bhola Sharma had no role in the fire incident. Although, the deceased stated that he was burnt with kerosene oil and matchstick by the private respondents in the dying declaration, he could not make out the case against them and therefore, filed the final report. Udai Pratap Verma (PW-2), the father of the deceased, however, put an objection to the final report and as per the direction of the court, the case was reinvestigated by Inspector Sameer Pradhan (PW-19). In the charge-sheet filed by Inspector Sameer Pradhan (PW-19), Bhola Sharma, Ashis Sharma and the private respondents were implicated for committing the offences under sections 435, 436, 302, 341 read with section 34 of the IPC. It transpires that, however, charges were framed only against the private respondents and Bhola Sharma was discharged by the learned Sessions Judge on 31.05.2016. During the trial, twenty witnesses were examined by the prosecution including the Investigating Officer. The private respondents were examined under section 313 of the Cr.P.C. They stated that the prosecution witnesses deposed against them due to personal enmity and K.K. Jha (PW-14) disliked their family as they were close to Shambhu Prasad (PW-20) with whom he had enmity. They also stated that it was Pankaj Verma (the deceased) who had poured kerosene oil and started the fire with the lighter. They further desired to examine witnesses in their defence. Thereafter, the defence examined private respondent no.3 -



Shiv Shankar Sharma (DW-1) who was accused no.3, Mohan Kumar Sharma (DW-2) and Ashis Sharma (DW-3), in their defence.

10. The learned Sessions Judge rendered his judgment dated 31.08.2018 acquitting the private respondents of all charges holding that the evidence put forward by the prosecution was not convincing and clearly fell short of proving the case against them. Udai Pratap Verma (PW-2) the father of the deceased was not satisfied and has preferred the present appeal.

11. According to Chalan Singh Tamang (PW- 1), on 15.01.2014, a boy came to Tadong Police Outpost and informed them that a fire had broken out in the building of C.P. Dewan. He along with a beat personnel went to the spot and saw the building on fire. The fire brigade personnel were trying to douse it. On inquiry, he learnt that a floor of the building had been taken on rent by Bhola Sharma - husband of Sheela Sharma (private respondent no.2) and father of Shiv Shankar Sharma (private respondent no.3) and Madhubala Sharma (private respondent no.4). He also learnt that the occupants had been taken to the hospital. He sent Naik Tashi Dorjee Bhutia (PW-13) to the floor which was on fire who found out that one more person was inside it with burn injuries. He was also evacuated and forwarded to the hospital. According to this witness, on his inquiry he came to learn that the fire had broken out in the house after the boy evacuated by them had entered the house. In cross-examination, he confirmed that on his inquiry from the people gathered at the spot he had learnt that the deceased was the one who had come to the house of the private respondents with kerosene oil, spilled it there and lit it on fire threatening to kill the family of the private respondents as well as himself.



12. The appellant (PW-2) was also examined as a prosecution witness. He identified the private respondents. He deposed that the deceased married Madhubala Sharma (private respondent no. 4). They had eloped. Neither him nor Madhubala Sharma's (private respondent no.4) father had any knowledge about their affair. Bhola Sharma lodged a police complaint stating that his minor daughter was kidnapped. Sikkim Police then went to Uttar Pradesh and brought the girl to Sikkim and arrested the deceased. Later on, criminal case was filed against his son by the police and the case was pending in the court when the incident took place. The deceased used to tell him that he loved Madhubala Sharma (private respondent no.4) and if he was allowed by the court he would like to set up home with her. According to him, the incident took place on 15.01.2014. The deceased had told him that he wanted to attend Maghey Mela at Ranipool and left the house. Thereafter, Udai Pratap Verma (PW-2) went to 5th Mile and returned at around 2 p.m. Shambhu Prasad Gupta (PW-20) called him to his liquor shop as he was passing by it. There, he told him that the deceased had abused his wife and threatened him by stating that if his son repeated such acts he would beat him up. Thereafter, while passing by the house of the father of Shiv Shanker Sharma (private respondent no.3) he saw Bhola Sharma going towards Gairi Goan where K.K. Jha (PW-14) had his shop. He saw them sitting inside the shop of Shambhu Prasad adjacent to K.K. Jha's (PW-14) shop. He asked K.K. Jha (PW-14) whether his son had an altercation with the wife of Shambu Prasad (PW-20). Meena Jha, K.K. Jha's (PW-14) wife, told him that they did. Thereafter, he proceeded for home. On his way, he received a call from Arvind Shah (PW-8). He inquired if the deceased had returned



home. After some time, Arvind Shah once again inquired about the deceased. When he reached near his house at Metro Point, he saw Arvind Shah (PW-8) waiting for him and handed over the keys of his house which may have been received from the deceased. He asked Arvind Shah (PW-8) that if he met the deceased he should inform him that he had reached his house and that the deceased should also return immediately. As he entered his house, he received a call from his landlord Lendup Bhutia informing him that his son, the deceased, had been hospitalised in Manipal Hospital due to burn injuries. Thereafter, Arvind Shah (PW-8) also called him and informed him that a fire had broken in the rented premises of Bhola Sharma at Daragoan. He proceeded towards Manipal Hospital and saw his son there with severe burn injuries and in a horrible state. He was inside the Intensive Care Unit (ICU). After few minutes, Kapil Meena (PW-16) arrived. There were police officers, two three doctors and nursing staff inside it. Kapil Meena (PW-16) inquired about the incident from the deceased. The deceased informed him that Shiv Shanker Sharma (private respondent no.3) caught hold of him and Sheela Sharma (private respondent no.2) poured kerosene and lit him with a match box. Kapil Meena (PW-16) recorded the statement of the deceased which was given in his presence. When he saw the condition of the deceased deteriorating, he proceeded to Sadar Thana to lodge a complaint. He wrote the complaint, went to the Sadar Police Station to lodge it but could not do so as the police officer refused to take it. It was at the police station that he received the news that the deceased had expired. He hurriedly proceeded to Manipal to attend to the dead body of the deceased.



13. During cross-examination, he admitted that the family of the private respondents had filed a complaint against the deceased who was then sent to jail and later released on bail. He admitted that there was a fight between the deceased and Shiv Shanker Sharma (private respondent no.3). He also admitted that in the year 2012-2013, the deceased had filed a case of cheating and forgery against Bhola Sharma and that there was enmity between his family and the family of the private respondents. He admitted that the deceased and Madhubala Sharma (private respondent no.4) had lived together for around two months but were eventually separated by the family members of the private respondents. He also denied the suggestion that the dying declaration of the deceased had not been taken in the ICU of Manipal Hospital. According to him, Kapil Meena (PW-16) had asked questions to the deceased in Nepali and the deceased had also replied in Nepali.

14. Migendra Hamal (PW-7) and Birendra Prasad (PW-9) resided in the rented house of C.P. Dewan (PW-15). Asha Kumari Sunwar (PW-10) had a ration shop in the ground floor of the same building and also resided there. Hom Nath Timshina (PW-11) also resided in the same building in which his wife ran a shop as well. They all confirmed that the fire had taken place in the building. They deposed about the hue and cry outside. Hom Nath Timshina (PW-11) had also entered the house and seen a person lying with burn injuries on the bed and helped him to be evacuated with the help of others.

15. C.P. Dewan (PW-15) confirmed that the private respondents were his tenants. He confirmed that fire had taken place and when he came down the private respondents had already been evacuated. He saw the victim lying on the bed. He seemed to have been burnt in the



fire. He was evacuated to the hospital. He could smell kerosene oil at the spot. He was a witness to the seizure of MO I (partially burnt shoes), MO II (partially burnt cloth pieces), MO III (partially burnt leather wallet), MO IV (Rum Bottle), MO V (partially burnt plastic jar), MO VI (colly)(8 passport size photographs), MO VII (photograph of Madhubala), MO VIII (ID Card) and MO IX (Debit Card). Exhibit – 11 was the seizure Memo prepared.

16. In cross-examination, he admitted that the private respondents had no past criminal antecedents, they were well behaved and honest. He also admitted that when he met Bhola Sharma on the night of the incident he told him that one Pankaj had started the fire.

17. Arvind Kumar Shah (PW-8) confirmed that he had accompanied the deceased to the Maghey Mela at Ranipool and returned alone after borrowing Rs.100/- from the deceased. According to him, while he, Birendra, Pradeep and the appellant were eating food, the appellant received a call from his house owner informing him that the deceased was seriously injured due to burn and admitted to Manipal Hospital. He admitted in cross-examination that he had been threatened by the appellant that he would falsely implicate him in the case.

18. Upendra Sharma (PW-17) had received a call from the appellant on 15.01.2014 informing him that the deceased had been admitted in Manipal Hospital with burn injuries and requested him to come there. The appellant (PW-2) and Upendra Sharma (PW-17) reached the hospital together where the deceased on seeing his father told him that he had been called for a birthday party and Arvind knew everything about the incident. He confirmed that he did not say anything else. He also deposed that later a Magistrate had recorded



his statement and taken his thumb impression. He could not say as to what the deceased told the Magistrate as he was at a distance. In cross-examination, he admitted that the statement of the deceased was taken at the emergency ward of the Manipal Hospital and the appellant (PW-2) was near him when it was recorded. He also admitted that the appellant had told Sambhu Prasad (PW-20) who had also arrived at Manipal Hospital a little later that everything had happened because of him.

19. Although, Upendra Sharma (PW-17) deposed that he had heard the deceased tell his father - the appellant (PW-2), that Arvind knew everything about the incident, Arvind Kumar Shah (PW-8) did not enlighten further.

20. K.K. Jha (PW-14) knew the private respondents and identified them in court. He also knew the deceased, Shambhu Prasad (PW-20) and Hom Nath Timshina (PW-11). According to him, on 15.01.2014, at around 11:00 a.m. the deceased had come to his shop with Meena Jha [wife of K.K. Jha (PW-14)]. The deceased informed him that he was going to Daragoan and left. After an hour at around 11:30 a.m. the deceased returned to the shop of Meena Jha. The deceased then informed him that he intended to go to Maghey Mela somewhere at Ranipool or Saramsa garden. He told him that Madhubala alias Madhumala (private respondent no.4) had insisted that he should come for the Mela. K.K. Jha (PW-14) advised him not to do so as he feared that he would be falsely implicated. Thereafter, the deceased proceeded towards his house. At around 2:00 p.m., the deceased came back to his shop and told him that he was going to the Mela and asked him to accompany him. He declined. At around 4:30 p.m., he found Shambhu Prasad (PW-20), Bhola Sharma, Bhagwan



Sharma and two or three other persons sitting in front of the shop of Shambhu Prasad (PW-20) and talking. He saw it through the CCTV fixed in front of his wife's shop. He also noticed in the CCTV that Bhola Sharma was taking kerosene oil in a fevicol jar, liquor and mustard oil from the shop of Shambhu Prasad (PW-20). The CCTV was later taken by the police after the incident of rioting which had taken place in a protest. The CCTV was thereafter returned and thereafter he found that the footage of Bhola Sharma and others taken in front of his shop including the picture of Bhola Sharma taking kerosene oil from the shop of Shambhu Prasad (PW-20) was deleted. At around 5:00 p.m. the appellant (PW-2) came to his wife's shop and told them that Shambhu Prasad had threatened him stating that if anything happens to deceased he would not be responsible. At around 6:00 p.m., Sandeep Prasad, son of Shambhu Prasad (PW-20), came and informed his father that he had lodged an FIR before the Tadong Police Outpost and would like to go to Sadar Police Station to report the matter. K.K. Jha (PW-14) then proceeded towards the house of Bhola Sharma. There he found the family members of Bhola Sharma, i.e. the private respondents, and were rescued and were on the road side. Hom Nath Timshina (PW-11) went inside the house of Bhola Sharma and evacuated the deceased along with two three other persons. When the deceased was being taken outside he saw him and told him that he was put on fire by the private respondents. Thereafter, he returned home and went to the hospital. During cross-examination, he admitted that his statement to the police was typed by his staff under his instructions and is a computer printed one; that he was not the eye witness to the incident; the CCTV installed around his house does not record



sound; he did not know where the footages of CCTV would be stored; the CCTV had been taken by the police without preparing any seizure memo; till date he has been accused in two criminal cases in which witnesses have been examined; that he has seen the witnesses being examined and cross-examined in the criminal case against him; that he has been convicted and sentenced in a forgery case for which he has served the sentence; that he had not gone near Bhola Sharma on the relevant day; that a criminal case is going against Shambhu Prasad (PW-20) on the complaint of his wife as well; that he and his wife have filed numerous complaints against Shambhu Prasad (PW-20) before different authorities; and that the deceased was unconscious when he was taken out from the house of Bhola Sharma.

21. Shambhu Prasad (PW-20) confirmed that he knew the family members of Bhola Sharma and that their rented house was gutted by fire. He deposed that he had gone to see it but by the time he reached there the police and fire brigade had already arrived and doused the fire. He deposed that he did not sell kerosene oil and as such Bhola Sharma or any of his family members including the private respondents buying it from his shop around the date of the incident would not arise. In cross-examination he confirmed that he had not acquired any licence to sell kerosene oil in his shop.

22. Santa Bahadur Gurung (PW-12) was the Sub-Inspector who conducted the investigation pursuant to the FIR against the deceased. According to him, he did not find that the private respondents and Bhola Sharma had role in the fire accident and as such he had filed the final report. During cross-examination, he admitted that there was enmity between K.K. Jha (PW-14) and



Shambhu Prasad (PW-20); that Bhola Sharma was closer to Shambhu Prasad (PW-20) than K.K. Jha (PW-14); that the appellant (PW-2) and the deceased had close relations with K.K. Jha (PW-14) and his family; that he had recorded the statement of K.K. Jha (PW-14) but his statement was not corroborated by the statement of other witnesses who he had examined; that he had seen the CCTV footage placed outside the shop of K.K. Jha (PW-14) but he did not see anything as stated by him; that he had made a requisition for recording the CCTV footage from K.K. Jha (PW-14) but he did not allow the same; that he had recorded the statement of the accused persons, Bhola Sharma and his younger son and their statements were exactly the same about the incident; he did not receive any statement from Dr. Ajay Chettri (PW-21) to the effect that the deceased was mentally and physically fit; that Shambhu Prasad (PW-20) did not sell kerosene oil in his shop; that when he examined and recorded the statement of K.K. Jha (PW-14), he did not state anything regarding kerosene oil being carried by Bhola Sharma; that Shiv Shanker Sharma (private respondent no.3), Bhola Sharma and his younger son Asish Sharma had major burn injuries whereas Madhubala Sharma (private respondent no.4) and Sheela Sharma (private respondent no.2) also had burn injuries; according to his investigation, on the relevant day, Madubala (private respondent no.4) had returned from Ranipool Mela along with her mother, her elder brother and wife of Shambhu Prasad (PW-20); that the deceased had seen the private respondents at Ranipool Mela but had not met each other on the relevant date and that the deceased had never visited the house of the accused persons after 2012.



23. Tashi Dorjee Bhutia (PW-13) was the Police Officer who had been sent to examine the fire in a building near Himali Bela Press. He and Chalan Singh Tamang (PW-1) went inside the floor and examined the inside of the house. They found a boy inside who was burnt and lying on the bed. They evacuated him and sent him to Manipal Hospital wrapped in a blanket. During cross-examination, he admitted that the person who had burn injuries was unconscious from the time he was evacuated till he reached the hospital; and the entire body including the hands and clothes of the person were burnt except his underwear.

24. Sameer Pradhan (PW-19) was the Police Inspector who investigated the case after the investigation was handed over to him. He examined the witnesses acquainted with the facts of the case. During his further investigation, he examined Kapil Meena (PW-16), Umesh Pradhan (PW-6) and Dr. Ajay Chettri (PW-21), which revealed that deceased had made a dying declaration voluntarily and in a fit state of mind. During cross-examination, he admitted that he had learnt through investigation that when there was a discussion between deceased and the appellant (PW-2), the deceased had stated that he would be doing something drastic; and that there were no witnesses who had seen the deceased entering the house of the private respondents on the relevant day.

25. Those statements of Santa Bahadur Gurung (PW-12) and Sameer Pradhan (PW-13) which are result of their investigation but unsubstantiated by evidence cannot be accepted.

26. The above evidence of witnesses who had seen the fire take place does not confirm the charges framed against the private respondents. Besides the above, Dr. Chedup Lepcha (PW-3) was the



Senior Resident, Department of Forensic, Medicine and Toxicology, SMIS, who conducted the post-mortem examination of the deceased on 16.01.2014. He deposed that the deceased was admitted to the Central Referral Hospital with a history of burn injuries at around 7 p.m. on 15.01.2014 and died on 16.01.2014 at around 9:29 a.m. According to him, the deceased died due to shock following dermo epidermal burns during life, involving about 90 to 95% of the body surface area. He confirmed having prepared the autopsy report (exhibit-4). During his cross-examination, Dr. Chedup Lepcha (PW-3) confirmed that the hands (interior and exterior) of the deceased were found burnt during post mortem examination. He also confirmed that it is also possible that the voice of the person who had sustained such burn injuries involving the trachea, bronchi and larynx would not be distinct and clear.

27. Sangey Doma Bhutia (PW-4), the Analyst-cum-Assistant Chemical Examiner in the Chemistry Division of RFSL Saramsa, was the Forensic Expert who examined the material objects seized during investigation. She confirmed that the partially burnt shoes, partially burnt pieces of cloth, partially burnt black wallet and partially burnt plastic jar gave positive test for presence of kerosene. The bottle which had some liquid substance gave positive test for ethyl alcohol and negative for presence of kerosene.

28. There is evidence to confirm the fire and the fact that kerosene oil was used in the fire. However, the investigation could not gather enough evidence to answer the most vital question as to who caused it and what was the *mens rea*. The evidence led by the prosecution therefore makes it evident that besides the dying declaration there is no credible evidence to establish the prosecution case against the



private respondents. We are examining an appeal against acquittal. Before reversing any finding of acquittal, each ground on which the order of acquittal was based must be examined and considered and it is also incumbent upon this court to record those grounds and subscribing to the view expressed by the learned Sessions Judge that the private respondents were entitled to an acquittal. The presumption of innocence is still available in their favour and in view of the acquittal the presumption of innocence is further fortified. The finding of the learned Sessions Judge that the prosecution has not put forward any convincing evidence seems correct.

29. The learned Sessions Judge had also disbelieved the dying declaration. Kapil Meena (PW-16) was the Additional District Collector-cum-Additional District Magistrate, East Sikkim at Gangtok, who recorded the dying declaration of the deceased. According to him, he recorded it on 15.01.2014 at about 10:25 p.m. as per the direction of the District Collector who had received an application from the Sadar Police Station (exhibit-9). Umesh Pradhan (PW-6) Sub-Inspector of Police had sent a requisition dated 15.01.2014 (exhibit-9) for recording the dying declaration. Kapil Meena (PW-16) deposed that he had recorded the dying declaration at the Central Referral Hospital. When he reached there he saw the deceased was seriously burnt but somehow able to speak. After verifying from the concerned doctor about his condition, he proceeded to record his statement. The deceased stated that the mother of his girlfriend had thrown kerosene oil on him at their residence and the brothers of his girlfriend prevented him from coming out of the residence and lit the match stick. He exhibited the dying declaration as exhibit-10 and identified his signature thereon.



According to Kapil Meena (PW-16), since the deceased was not in a condition to put his signature due to burn injuries, his thumb impression was taken in the dying declaration. He also identified the signature of Dr. Ajay Chettri (PW-21), the concerned doctor, who was also there with him. He thereafter, forwarded the dying declaration to the Superintendent of Police on 18.01.2014 vide his forwarding letter (exhibit-17).

30. In cross-examination, he stated that he did not remember in which room he had recorded the dying declaration. He confirmed that he had asked questions in Hindi and the deceased had also replied in Hindi; that the deceased did not state the name of the brother who lit the matchstick; that Dr. Ajay Chettri (PW-21) had not issued any certificate stating that the deceased was in a fit state of mind when he gave his dying declaration; that he had not endorsed that the deceased was in a fit state of mind when he gave his dying declaration; that the only question that he asked to the deceased was as to how and what had happened; that he had nowhere mentioned either in the dying declaration or in the forwarding letter (exhibit-17) that he had asked the doctor as to whether the deceased could speak and the doctor had replied in the affirmative, after which he had waited for some time to record the dying declaration; that the deceased had sustained 90% burn injuries; that he did not remember whether the father, relatives and friends of the deceased were in the same room where he recorded the dying declaration; that the dying declaration was not in a question answer format; and he had not mentioned in the dying declaration as to when the deceased had regained consciousness after the incident.



31. On 23.09.2021, I.A. No. 1 of 2021 under section 391 of the Code of Criminal Procedure, 1973 (Cr.P.C.) preferred by the appellant was considered, allowed and pursuant thereto Dr. Ajay Chettri (PW-21) was examined. He deposed that the deceased was admitted at Emergency Ward of Central Referral Hospital on 15.01.2014 with 90% burn injuries which was severe. He deposed, under objection, that he had personally asked the deceased about the reason of the burn injuries. According to him, as the injuries was serious in nature he informed the police. The police arrived some time later who then called one Magistrate or an Officer required for recording dying declaration. He did not remember the name and designation of the officer. The officer arrived after some time and recorded the dying declaration of the deceased. The deceased stated that he had gone to attend Mela somewhere at Ranipool where he met his girlfriend. Thereafter, he went along with his girlfriend to her house. There, some verbal altercation took place between him and the family members of the girlfriend. One of the family members then poured kerosene on him and lit matchstick due to which fire was spread out and he sustained burn injuries. He identified his signature on the dying declaration and also stated that the deceased had affixed his left thumb impression on it. He also deposed that the officer as well as the police had also affixed their signatures thereon.

32. During cross-examination, Dr. Ajay Chettri (PW-21) admitted that he was not a burn specialist; that he was not a Medico Legal Expert; that the deceased had given his statement in Nepali; that the condition of the deceased was not stable; that he had not mentioned or noted the mental status of the deceased nor made any declaration to that effect in the dying declaration; that there was no certification



by him at the end of the dying declaration that the victim was conscious while executing the dying declaration; that in the absence of medical certification that the victim was in a fit state of mind the dying declaration is not a complete document; that the case records of the deceased is not in the file; that he had not mentioned that the deceased was mentally and physically fit to make the dying declaration; that apart from him there is no signature of any other doctor or Medico Legal Expert; the dying declaration was scribed by one police officer; that he had not heard the statement made by the deceased; that he had not mentioned in the dying declaration that the deceased was mentally and legally sound; that he could not say clearly whether the fingers including the ridges were burnt at the time of examination of the deceased; that he had not mentioned that the deceased was conscious and in a fit state of mind in the dying declaration; that there is nothing on record to show what were the exact words spoken by the deceased in Nepali at the time of recording of dying declaration; that the deceased had been given pain killer; that there is no document on record except the post mortem report with regard to the level of burn on the skin of the deceased; that he did not remember as to whether the dying declaration was recorded in the presence of the appellant (PW-2) and other relatives of the deceased; that he had not mentioned the age and the nature of injuries in the dying declaration; that his statement was not recorded by the police during the course of investigation; that he had not mentioned that he had found or smelled kerosene on the body of the deceased; that he had not prepared the wound certificate of the deceased; and officially his duty was over at 8 to 8:30 p.m. on the



relevant day when the patients including the victim were admitted in Central Referral Hospital.

33. Dr. Ajay Chettri (PW-21) also deposed that he had examined Bhola Sharma on 15.01.2014 with alleged history of burn at around 7:58 p.m. and found that he had burn injury over face, left hand, right leg anterior region, left leg anterior region, left leg posterior region and they were grievous in nature. He examined Ashish Sharma on the same day at 7:59 p.m. and found that he had burn injury over face and neck, both hands and both the feet which were grievous in nature. He also examined Shiv Shanker Sharma (private respondent no.3) on the same day at 8:00 p.m. and found burn injury over face, both hands and feet and the injuries were grievous in nature. He prepared the medical reports of the above persons (exhibit-14, exhibit-13, exhibit-12). He also identified the signature of Dr. Rekha Sharma, a Junior Resident of Central Referral Hospital in the medical reports of Sheela Sharma (private respondent no.2) and Madhu Sharma (private respondent no.4) (exhibit-15 and exhibit-16 respectively).

34. The prosecution has heavily relied upon the dying declaration. The cross-examination of Kapil Meena (PW-16) and Dr. Ajay Chettri (PW-21) has created serious dents in the prosecution case. It is highly doubtful as to whether the dying declaration was recorded in the manner required. The safeguards laid down by the Supreme Court in its various renditions have not been kept in mind. There is no certification by Dr. Ajay Chettri (PW-21) or Kapil Meena (PW-16) that deceased was mentally and physically fit to make the dying declaration. The records also does not provide any evidence on this aspect. Although, Dr. Ajay Chettri (PW-21) was examined at the



appellate stage even then the prosecution has failed to establish that the dying declaration was made by the deceased when he was fit to make such a statement. The medical evidence led by the prosecution makes us believe that his hands both interior and exterior had been severely burnt and there was surgical bandage all over the body except the face and neck. With such evidence, it is difficult to fathom how Kapil Meena (PW-16) took the left thumb finger print of the deceased on the dying declaration. Keeping in mind that the dying declaration is only a piece of untested evidence, we are not satisfied that what is stated therein is the unalloyed truth and that it is absolutely safe to act upon it. There are sufficient reasons which have been brought out by defence which cast dark clouds on the genuineness of the prosecution case. We cannot agree with the submission of the learned public prosecutor that merely because a doctor on duty allowed the Magistrate to record the dying declaration it must necessarily be believed.

35. On 08.06.2018, Shiv Shanker Sharma (private respondent no. 3) through his counsel moved a written application before the learned Sessions Judge stating that he would want to give his evidence as a defence witness for himself as well as on behalf of the other two accused persons, i.e., his mother and his younger sister. The learned Sessions Judge considered the application under section 315 of the Cr.P.C. and allowed the same. Pursuant thereto, Shiv Shankar Sharma (private respondent no.3) was examined as defence witness no.1. He deposed that he knew the deceased since 2011 when his younger sister Madhubala Sharma (private respondent no.4) was studying in class-VIII, as he used to follow her. In the year 2012, the deceased had taken away Madhubala Sharma (private respondent



no.4) to Uttar Pradesh following which he lodged an FIR against the deceased at Sadar Police Station. Thereafter, he along with the police went to Uttar Pradesh and brought back Madhubala Sharma (private respondent no.4). The deceased came back to Gangtok after few weeks. Shiv Shankar Sharma (private respondent no.3) reported the matter to the police and the deceased was arrested. Police filed charge-sheet against the deceased. The appellant (PW-2) - father of the deceased, lodged a complaint against the father of Shiv Shankar Sharma (private respondent no.3) for forgery of birth certificate of his younger sister and a criminal case was filed against him. When the father of Shiv Shankar Sharma (private respondent no.3) met the appellant (PW-2), he told Shiv Shankar Sharma (private respondent no.3) that he would ruin their family. The appellant (PW-2) told him the same thing in the court premises when he came as a witness. Sometime in 2014, he was called by the deceased and his father at their residence where they assaulted him. After which they filed a complaint against him pursuant to which he was arrested and a criminal case initiated. On the day of the incident, he along with his younger sister, mother and wife of Shambhu Prasad (PW-20) had gone to the Mela at Ranipool. At the Mela, he saw the deceased along with his friend. He told his mother that they should leave for home. They reached home at 5:30 p.m. and entered his house around 6:30 p.m. After few minutes someone knocked at the door, he asked his younger brother to open the door. As his younger brother opened the door, the deceased entered their home and started pouring kerosene oil over his younger brother Asish Sharma which he had brought in a 5 litre fevicol jar. As he was entering, he closed the door and somebody from outside latched the door. On seeing the deceased



pouring kerosene oil, his brother tried to catch hold of him but he continued doing so and lit a lighter following which fire broke out. Thereafter, he entered the kitchen where his mother and younger sister were and poured kerosene oil on them as well. He entered the kitchen to help his mother and sister but the fire was already out of control. Their father also came to the kitchen but due to the fire they all got stuck in the kitchen. He later came to know that his younger brother had entered another room and through the window asked for help from people outside. The people who had gathered outside their house after seeing the fire opened the door and helped them come out. Thereafter, they were taken to Manipal Hospital and admitted. His sister and mother were discharged after about two weeks. Thereafter, his father and younger brother were discharged. He was discharged after about a month. He had to go for dressing at Manipal Hospital for about three months.

36. Shiv Shankar Sharma (private respondent no.3) was crossed examined by the public prosecutor. He deposed that he did not know that his sister Madhubala Sharma (private respondent no.4) and the deceased used to love each other. He also did not know whether Madhubala Sharma (private respondent no.4) fled away from their house with the deceased to Uttar Pradesh. Although, Shiv Shankar Sharma (private respondent no.3) volunteered to state that the deceased had taken her away by threatening her, he clarified that by threat he did not mean blackmail or coercion or by showing gun or any other means to force her. He admitted that when he had gone to Uttar Pradesh along with the police to search for his sister he found her in the house of the deceased at Buxa village at Gazipur. He admitted that his relationship with the family of the deceased was not



cordial since the time the deceased used to follow Madhubala Sharma (private respondent no.4).

37. Ashish Sharma (DW-3) was also examined as a defence witness. According to him, his mother is Sheela Sharma (private respondent no.2) and the other two private respondents are his siblings. He also knew the deceased. According to him, on 14.01.2014 the private respondents had gone to attend a Mela. They came back around 6 to 6:30 p.m. After which Sheela Sharma (private respondent no.2) went to the kitchen to prepare food. After some time, someone knocked at the main door. When he opened it he saw the deceased. He wanted to come inside their house. He told the deceased that there was no one else there. Suddenly, he saw him carrying a round shaped container on one hand and lighter on the other. He started forcing himself in. Although, he tried to stop him, he could not. He then sprinkled the contents of the container. When he tried to grab him, he lit the lighter and set him on fire. He tried to douse the fire and was somewhat disorientated. After some time, when he went to the main sitting room he saw that it was on fire and there was nobody around. He cried for help through the window. The deceased had come to their house thereafter. Suddenly, the deceased came there and landed on the nearby bed. He was already on fire. He then somehow managed to come out of the house. The private respondents and his father were already outside the house. Later they were taken to Central Referral (Manipal) Hospital. He sustained burn injuries on his neck, hands and other parts of his body and he received treatment there. Nothing substantial was brought out during his cross-examination by the public prosecutor.



38. Shiv Shankar Sharma (private respondent no.3) and Ashish Sharma (DW-3) were apparently inside the place of occurrence when the fire took place. They were also injured witnesses. *Sans* any credible and cogent evidence to establish the prosecution case against the private respondents, their evidence seems the only evidence brought out before the court to show what actually happened. Their cross-examination has not elicited any evidence to suggest that they were lying.

39. Mohan Kumar Sharma (DW-2) was also examined as a defence witness. He knew the private respondents since 2013 as well as the deceased. In 2013, he was posted as a Constable at the Sadar Police Station. He deposed that in September 2013, Shiv Shankar Sharma (private respondent no.3) had lodged a missing complaint regarding his sister Madhubala Sharma (private respondent no.4) at the Sadar Police Station. He confirmed that he had gone with other police officer and Shiv Shankar Sharma (private respondent no.3) to Buxar District Uttar Pradesh as they had source information that Madhubala Sharma (private respondent no.4) had been taken there by the deceased. He also confirmed that he had gone to the house of the deceased and although initially they could not find her when they managed to unlock the door of the house with the help of the local police, she was found and rescued from there. The deceased and his father managed to escape. They brought back Madhubala Sharma (private respondent no.4) to Gangtok. Later, when he contacted the deceased over phone and asked him to come to Gangtok, he threatened him with dire consequences. He also threatened the entire family of the private respondents. After a few months the deceased was arrested and while on bail, he visited the Sadar P.S. for his



attendance. At that time he threatened him to cause harm to him as well as the family of the private respondents.

40. During cross-examination, Mohan Kumar Sharma (DW-2) admitted that he could not say for sure whether the deceased and his father had managed to escape from their house at Buxar when they reached there. He also could not say whether the local police at Buxar had obtained any warrant for breaking into the house of the deceased. He admitted that he did not lodge any FIR regarding the threat given by the deceased to them.

41. In a criminal case, it is upon the prosecution to prove their case beyond reasonable doubt. It is for the prosecution to establish with cogent evidence that it was the accused persons who were responsible for the alleged act and to establish every ingredient of the alleged offences. Section 315 Cr.P.C. provides that an accused person shall be a competent witness for the defence and may give evidence on oath in disproof of the charges made against him or any other person charged together with him at the same trial. Once an accused person volunteers to give evidence by a written request and enters the witness box, he subjects himself to all the liabilities of an ordinary witness. Shiv Shankar Sharma (private respondent no.3) decided to be a witness for the defence to give evidence on oath in disproof of the charges made against him as well as the other private respondents. He was also extensively cross-examined. The prosecution failed to discharge the burden of proving the case against the private respondents beyond reasonable doubt. The deposition of the defence witnesses seems consistent. No contrary evidence has been put forth by the prosecution.



42. For all the above reasons, we are of the firm view that the impugned judgment of acquittal passed by the learned Sessions Judge need not be interfered with. The appeal fails and is rejected.

43. Copy of this judgment shall be transmitted to the learned Trial Court for information.

44. Trial court records be remitted forthwith.

(Bhaskar Raj Pradhan)
Judge

(Meenakshi Madan Rai)
Judge

Approved for reporting : **Yes**
Internet : **Yes**

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