

NARENDER KUMAR

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v.

STATE OF NCT OF DELHI

(Criminal Appeal No. 447 of 2010)

DECEMBER 16, 2015

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**[FAKKIR MOHAMED IBRAHIM KALIFULLA AND
UDAY UMESH LALIT, JJ.]**

Penal Code, 1860: s.302 r/w s.34 – Prosecution case was that the victim-deceased was picked up by the appellants police officials and illegally confined in police post and was beaten severely to extract confession from him that he was involved in stealing of some properties and thereafter kerosene was poured on him and set on fire by appellants by throwing ignited matchstick – Dying declaration was recorded by magistrate in the presence of doctor – Conviction by courts below on the basis of dying declaration – Challenged on the ground that the identity of the deceased was not verified by the magistrate before recording dying declaration and thus dying declaration was not reliable – On appeal, held: The dying declaration was recorded by the magistrate after doctor noted the condition of the patient and after ensuring that the patient was fully conscious and capable of making statement – There was no reason to disbelieve the version of the doctor and the magistrate – Further, dying declaration is not liable to be rejected on mere omission of getting thumb impression or signature of the deceased – No interference with the order of conviction.

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Dismissing the appeals, the Court

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HELD: 1. It was contended that the identity of the deceased was not verified by the Metropolitan Magistrate PW-7. The evidence of PW-7 the Magistrate was to the effect that PW-12, the doctor identified the patient to him

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A though he had not obtained the identification of the patient in writing from PW-12. That apart, in the initial part of the evidence he has narrated as to how PW-2 the ASI approached him to record the dying declaration of the deceased, that he was accompanied by PW-2 to the hospital, that he was taken to the patient thereafter, namely, the deceased and after satisfying himself that the patient was fully conscious and was capable of making the statement and making an endorsement and also after getting it endorsed by PW-12 he proceeded to record the dying declaration of the deceased. Having regard to the said statement of PW-12, which was also corroborated in every respect by PW-7 who has made an endorsement in the dying declaration itself that the patient was fully conscious and capable of making his statement and the said witnesses are official witnesses one of whom, namely, PW-12 is an expert witness, there is no reason to disbelieve their version and, therefore, the submission on that footing is liable to be rejected. [Paras 9 and 13] [189-A-D; 190-D-E]

E 2. It was then contended that the dying declaration did not contain either the signature or thumb impression of the deceased which is in violation of the guidelines issued by the High Court of Delhi in regard to the recording of dying declaration. In the first place, it must be stated that it was only a guideline. The guidelines were issued by the High Court in order to ensure that any defect in regard to the identity of the deceased or the veracity of the contents of the dying declaration are not doubted on the ground that the concerned patient himself could not have made such a statement in order to implicate someone in the offence. Merely because there was a defect in following the said guideline, which, is of a trivial nature and when the dying declaration

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recorded is otherwise proved by ample evidence, the whole of the dying declaration cannot be thrown out. In the case on hand, the dying declaration was recorded by PW-7 who was summoned by PW-12 the doctor who noted the condition of the patient and PW-7 was brought to the hospital by PW-2, the ASI and before recording the dying declaration PW-12 endorsed the capability of the deceased to make the statement apart from PW-7 himself ensuring that the deceased was in a fit condition to make the statement and thereafter the said statement was recorded by PW-7 a responsible judicial Officer. It cannot be held that simply because PW-7 omitted to get the thumb impression or signature of the deceased the dying declaration should be rejected. The dying declaration was proved in the manner known to law and, therefore, there was no scope to reject the same. [Paras 14 and 15] [190-F-H; 19-A-F]

3. PWs-17 and 18 stated that on 5.8.1980 appellant-A-3 was in the Excise office at about 10.30 or 11 a.m. and remained there till 2 p.m. According to the deceased, he was burnt at the instance of the appellants just about 10.30 a.m. in the quarters of police post. Therefore, prior to 10.30 a.m. the whereabouts of the accused-A-3 were not surely stated. He was assigned the task of taking the sample at 9.40 a.m. Therefore, between 9.40 a.m. and 10.30 a.m. the location of the said accused was not shown to have been in a different place other than the place of occurrence. That apart, the trial Court noted that the excise laboratory at battery line was just 5-6 minutes drive from the police post. The trial Court made a detailed analysis of this issue and found that there was no truth in the claim of alibi of the appellant-A-3. [Para 17] [192-D-H]

A CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 447 of 2010.

From the Judgment and Order dated 06.03.2009 of the High Court of Delhi at New Delhi in Criminal Appeal No. 33 of 1993.

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Criminal Appeal No. 484 of 2010.

C R. S. Sodhi, Sr. Adv., Mrs. Manisha Bhandari, Omkar Shrivastava, Divyadeep Chaturvedi, Ankit Kushwaha, Mrs. Nipush Mola Joshi, Mrs. Sarla Chandra, Sanjay Jain, Advs. for the Appellant.

S. K. Dubey, Sr. Adv., Subhash Kaushik, Yogesh Tiwari, Yash Pal Dhingra, P. K. Dey, Ms. Sadhana Sandhu, R. S. Nagar, S. S. Rawat (for D. S. Mahra), Advs. for the Respondent.

D The Judgment of the Court was delivered by

E **FAKKIR MOHAMED IBRAHIM KALIFULLA, J.** 1. The appellant in Criminal Appeal No.447 of 2010 is A-1 and the appellants in Criminal Appeal No.484 of 2010 are A-2 and A-3. Both these appeals are directed against the common judgment rendered by the Division Bench of Delhi High Court in Criminal Appeal No.33 of 1993 dated 06.03.2009 preferred by the appellants in both these appeals.

F 2. At the very outset it must be stated that the appellants were Police Constables. The appellant in Criminal Appeal No.447 of 2010 was Head Constable and the other two appellants in Criminal Appeal No.484 of 2010 were Constables. The appellant in Criminal Appeal No.447 of 2010 was convicted for the offence under Section 302 read with Section 34 along with the appellants in Criminal Appeal No.484 of 2010 and was sentenced to undergo life imprisonment apart from fine of Rs.5000/- each and in default of the payment of fine to undergo rigorous imprisonment for four months. The appellants in Criminal Appeal No.484 of 2010 were also convicted for the offence under Section 330 read with Section

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34 IPC and sentenced to undergo rigorous imprisonment for a period of two years along with fine of Rs.1000/- each and in default of payment of fine to undergo rigorous imprisonment for one month. All the sentences were to run concurrently.

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3. The case of the prosecution was that on 01.08.1980 the deceased Laxman Singh alias Hanuman was picked up from the railway station of Subzi Mandi by the Police and was illegally confined in Andha Mughal Police Post till 05.08.1980. While in such custody, in order to extract confession from him he was beaten severely and on 05.08.1980 he suffered burn injuries at quarters No.4 of police post Andha Mughal from where he was taken to Hindurao Hospital and then to LNJP Hospital by PW-1 ASI. At LNJP Hospital PW-12 Doctor asked PW-2 to procure the services of Magistrate as the deceased wanted to make a declaration when he was in the last spell of his life time. After the above occurrence initially a case was registered at Subzi Mandi Police Station vide FIR No.763 of 80 for the offence under Section 309 IPC. Thereafter, a dying declaration was recorded in the presence of PW-7 Metropolitan Magistrate around 2.30 p.m. on 05.08.1980. After the recording of the dying declaration another FIR was registered under Section 307 IPC. The deceased breathed his last on 06.08.1980 whereafter the case was converted to one under Section 302 IPC. The dying declaration of the deceased revealed that he was brought to Andha Mughal Police Post by the appellants in Criminal Appeal No.484 of 2010 along with one other person by name Tyagi on 01.08.1980 from the railway station of Subzi Mandi and after bringing him to the police post he was beaten severely to extract a confession from him to the effect that he was involved in the stealing of some properties. According to the prosecution as the deceased was pleading ignorance, ultimately on 05.08.1980 around 10.30 a.m. kerosene was poured on him by the appellant in Criminal Appeal No. 447 of 2010 while he was set on fire by the appellants in Criminal Appeal No.484 of 2010 by throwing ignited matchstick.

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A 4. In support of the case of the prosecution as many as
26 witnesses were examined and none was examined on
behalf of the appellants. In 313 questioning the appellants
denied their involvement and the appellant Om Prakash A-3
took the stand that he was not present at all at the place of
B occurrence on 05.08.1980. The appellant in Criminal Appeal
No.447 of 2010 took the defence that since because the
brother of the deceased, one Sher Singh was arrested by him
and was fined Rs.30 for the offence under Section 112/117 of
C the Delhi Police Act, to wreck vengeance on him he was
implicated. PW-4/A was the duty register for the period
01.08.1980 to 05.08.1980 of Andha Mughal Police Station
which disclosed that all the three were on duty between
01.08.1980 to 05.08.1980. PW-2 ASI who was in the police
D station at that relevant time confirmed that he heard the cries
of the deceased and when he rushed to quarter No.4 he found
him in a burning condition. He also confirmed that the said
quarter was in the name of A-2 Vijay Kumar the first appellant
in Criminal Appeal No.484 of 2010 who was residing there
along with others. He also confirmed that a kerosene stove
E was lying there in the quarters at the time when he saw the
deceased in a burning condition. PW-10/A is the seizure memo
for the seizure of burnt clothes, stove and a match box from
quarters No.4 which was confirmed by the independent witness
PW-16 who also witnessed the deceased in a burning
F condition. The dying declaration of the deceased was recorded
by PW-7 a Metropolitan Magistrate who after receiving the
certificate of fitness certified from PW-12 Doctor that the
deceased was fit to make a statement recorded his dying
G declaration. The Trial Court having analysed the evidence
rejected the plea of the appellant in Criminal Appeal No.447
of 2010 that he was implicated falsely to wreck vengeance on
him and also rejected the plea of alibi taken by the second
appellant in Criminal Appeal No.484 of 2010. The Trial Court
found the dying declaration recorded by PW-7 in exhibit PW-
H 7/C as truthful and unassailable and by relying upon the other

corroborative material evidence convicted the appellants as directed above. The High Court again analysed the entire evidence threadbare and found that there was no infirmity in the analysis of the evidence made by the Trial Court in particular the truthfulness and the reliability of the dying declaration recorded by PW-7 and declined to interfere with the conviction and sentences imposed on the appellants. We heard Mr. Dubey learned Senior Counsel for the appellant in Criminal Appeal No.447 of 2010, Mr. Sanjay Jain, learned counsel for the first appellant-Vijay Kumar in Criminal Appeal No.484 of 2010 and Mr. Sodhi, learned Senior Counsel for the second appellant-Om Prakash in Criminal Appeal No.484 of 2010.

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5. The submissions of the learned counsel for the appellants were that the dying declaration was wholly unreliable for the reason that admittedly after the deceased was admitted to the hospital on 05.08.1980 around 11.20 a.m. as he was writhing in pain, pathedine injection was applied and, therefore, he would not have been in coherence state of mind to make the dying declaration at 2.30 p.m. It was then contended that PW-7 did not make proper identification of the deceased, that the Magistrate did not obtain any certificate about the fitness of the deceased, that the thumb impression of the deceased was not secured in the dying declaration as per the guideline of the Delhi High Court Rules, that the dying declaration was not read out to the deceased and that the doctor did not certify the dying declaration which was also in violation of the Delhi High Court Rules. On behalf of the appellant in Criminal Appeal No.447 of 2010 it was contended that because a case was filed by the said appellant against the brother of the deceased, the family of the deceased had a grudge against him and, therefore, he was falsely implicated, that, therefore, the evidence of PW-5 who was the brother of the deceased could not have been relied upon by the Courts below, that the dying declaration was not recorded in the question and answer form and that the Magistrate did not ascertain as to whether the deceased was fit to make a statement at that point of time

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A and that since the deceased was visited by his close relatives
in the hospital he was tutored to make a statement against the
appellants. On behalf of the second appellant Om Prakash, it
was contended that between 11 a.m. to 2 p.m he was in the
Central Excise Laboratories in connection with a chemical test
B to be carried out which work was assigned to him and,
therefore, he was not present at all at the place of occurrence,
that the S.I. of Police Mr. Ram Kishan who was also present at
the place of occurrence was not examined and that the
deceased did not tell the name of Om Prakash to PW-14 and
C that the Tyagi whose name was referred to by the deceased
was not named in the FIR. On behalf of the first appellant in
Criminal Appeal No.484 of 2010 it was also contended that
there was no evidence for any motive to kill the deceased, that
the family member of the deceased were all involved in some
D crime or other and since the appellants were all constables
they were falsely implicated in the case.

6. As against the above the above submissions, learned
counsel for respondent State Mr. D.K. Dey submitted that the
dying declaration exhibit P-7/C was rightly relied upon by the
E trial Court as well as the High Court, that there was no deficiency
or defect in the recording of the dying declaration by PW-7 the
Metropolitan Magistrate, that the said document was truthful
recording of the statement of the deceased and, therefore,
certain minor defects relating to non-compliance of the
F guidelines issued by the High Court would not vitiate the said
document. Learned counsel also submitted that the presence
of the appellant in the Police Station on the relevant days and
on the crucial date, namely, 5.8.1980 was not in dispute, that
the evidence of the police officer PW-4 and PW-2 confirmed
G the said fact, that the plea of alibi by Om Prakash one of the
accused was not fully established and when once the plea of
alibi failed then there was no defence for the said accused.
The learned counsel submitted that the trial Court and the High
Court having examined all the above facts in detail, before

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finding the appellants guilty of the offence the conviction and sentence imposed upon them does not call for interference. A

7. Having heard the respective learned counsel and having examined the material evidence placed before us and having perused the judgment of the trial Court as well as that of the High Court, we are also convinced that the conviction and sentence imposed upon the appellants do not call for interference. B

8. Having perused the materials on records, we find the following facts are not in dispute, namely: C

a. The deceased Laxman Singh @ Hanuman s/o Huba Singh was picked up by two of the appellants along with one Tyagi on 1.8.1980 and confined in Andha Mugal police post till 5.8.1980. D

b. On 5.8.1980, at about 10.30 a.m. on hearing the hue and cry of the deceased who was kept in quarter No.4 which was in occupation of Vijay Kumar along with some other police constable, PW-2 ASI rushed to the spot along with PW-16 who is an independent witness, both of whom witnessed the deceased in a burning condition. E

c. The deceased was shifted to Hindu Rao Hospital from where he was again shifted to LNJP hospital by PW-2. F

d. The deceased was attended by PW-12 Doctor who on seeing the condition of the deceased asked PW-2 ASI to summon a Magistrate for recording the dying declaration. G

e. FIR 763/1980 was registered at Subzi Mandi police station for an offence under Section 309 IPC. H

f. At the instance of PW-2, PW-7 the Metropolitan Magistrate arrived at the Hospital on 5.8.1980 to

- A record the dying declaration of the deceased. The dying declaration was recorded by PW-7 at 2.30 p.m.
- g. After the recording of the dying declaration the offence was altered as one under Section 307 IPC.
- B h. On 6.8.1980, the victim died. Thereafter, the offence was altered as one under Section 302 IPC.
- i. After the alteration of the charge of the offence under section 302 IPC the investigation was handed over to crime branch by the local police.
- C j. As per exhibit PW-4/A, duty register for the period 1.8.1980 to 5.8.1980, the appellants were all on duty. This was also spoken to by PW-4 Sub Inspector of Police.
- D k. As per exhibit PW-10/A seizure memo, burnt cloth, stove and match box were recovered from quarter No.4 which was also spoken to by PW-16.
- l. In 313 statement the appellants admitted their posting at Andha Mugal police post.
- E m. As per the dying declaration after the deceased was taken into custody on 1.8.1980, he was severely beaten time and again by the accused, that on 5.8.80 at 10.30 a.m. while he was taking his food in the police post, Narender Kumar, Head Constable gave him beatings, that while beating him he opened a stove lying nearby and poured the kerosene oil over the
- F • deceased while the other two accused Om Prakash and Vijay Singh, constables who were also present there lit a matchstick and threw the same on his body.
- G n. The deceased died on 6.8.19-80.

9. Having noted the above uncontroverted facts, when we examine the defence canvassed on behalf of the appellants, according to them PW-7/C the dying declaration

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cannot be relied upon for various defects. It was contended that the identity of the deceased was not verified by the learned Metropolitan Magistrate PW-7. Insofar as the said stand is concerned, when we peruse the evidence of PW-7 the learned Magistrate, we find that he has stated that PW-12 Dr. Nayar identified the patient to him though he had not obtained the identification of the patient in writing from PW-12. That apart, in the initial part of the evidence he has narrated as to how PW-2 the Assistant Sub-Inspector of Police approached him to record the dying declaration of the deceased, that he was accompanied by PW-2 to the hospital, that he was taken to the patient thereafter, namely, the deceased Laxman Singh s/o of Huba Singh and after preliminary orientation and after satisfying himself that the patient was fully conscious and was capable of making the statement and making an endorsement vide PW-7/D and also after getting it endorsed it by PW-12 he proceeded to record exhibit PW-7/C, the dying declaration of the deceased.

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10. Having noted the above detailed statement made by PW-7 learned Metropolitan Magistrate, we have no doubt in our mind about the verification of the identity of the patient/deceased and, therefore, we do not find any substance in the said submission.

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11. It was then contended that the patient was administered pathedine injection for the pain and suffering that he was undergoing by around 11.30 a.m. and that the effect of pathedine would remain at least for four hours and, therefore, the deceased could not have been in a position to give evidence coherently. As far as the said submission was concerned, we must go by the expert opinion, namely, the doctor who was present and who permitted PW-7 to record the dying declaration. The doctor was examined as PW-12. The Doctor in his evidence stated that when he examined the patient at 12.15 p.m. he found the deceased in a fit condition to make statement and thereafter he called upon PW-2 to summon the

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A Magistrate. Subsequently, he made another entry under exhibit PW-12/A at 2.30 p.m. finding the patient again in a fit condition to make a statement and he also put his signatures under exhibit PW-1/C.

B 12. The doctor PW-12 also explained that normally the effect of pathedine injection would last for 3-4 hours depending upon the severity of the pain. He further stated that the deceased had suffered 80% burn injuries as per the entries in the MLC, that he was given medicines at 12.50 p.m. and if the pain was severe the effect of pathedine injection may not last for more than two hours. He reiterated that according to him when the dying declaration was recorded by PW-7 the deceased was in a fit condition to make a statement.

D 13. Having regard to the said statement of PW-12, which was also corroborated in every respect by PW-7 who has made an endorsement in the dying declaration itself that the patient was fully conscious and capable of making his statement and the said witnesses are official witnesses one of whom, namely, PW-12 is an expert witness, we have no reason to disbelieve their version and, therefore, the submission on that footing is also liable to be rejected.

F 14. It was then contended that the dying declaration did not contain either the signature or thumb impression of the deceased which is in violation of the guidelines issued by the High Court of Delhi in regard to the recording of dying declaration.

G 15. When we consider the said submission, in the first place, it must be stated that it was only a guideline. The guidelines were issued by the High Court in order to ensure that any defect in regard to the identity of the deceased or the veracity of the contents of the dying declaration are not doubted on the ground that the concerned patient himself could not have made such a statement in order to implicate someone in the offence. The issuance of the guidelines is for the purpose of

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ensuring and for testing the genuineness of the dying A
declaration of person who is in the last moment of his life.
Merely because there was a defect in following the said
guideline, which, as is now pointed out, is of a trivial nature
and if the dying declaration recorded is otherwise proved by
ample evidence, both oral as well as documentary, on the B
ground of such trivial defects, the whole of the dying declaration
cannot be thrown out. In the case on hand, we have noted that
the dying declaration was recorded by PW-7 who was
summoned by PW-12 the doctor who noted the condition of
the patient and PW-7 was brought to the hospital by PW-2, C
the ASI and before recording the dying declaration PW-12
endorsed the capability of the deceased to make the statement
apart from PW-7 himself ensuring that the deceased was in a
fit condition to make the statement and thereafter the said
statement was recorded by PW-7 a responsible judicial Officer. D
It cannot be held that simply because PW-7 omitted to get the
thumb impression or signature of the deceased the dying
declaration should be rejected. As has been noted by the High
Court in its judgment where it has reached a conclusion that
the recording of the dying declaration was established and E
found to be truthful and the statement contained therein was
made voluntarily and recorded correctly, there is no reason to
doubt the said document PW-7/C for the reason that the
signature or thumb impression was not obtained on the said
document. Therefore, we hold that the dying declaration was F
proved in the manner known to law and, therefore, there is no
scope to reject the same.

16. On behalf of the second appellant in Criminal Appeal
No.484 of 2010, a plea was raised to the effect that between G
11 a.m. and 2 p.m. on 5.8.1980 he was in the Central Excise
Laboratory as he was directed to deposit a substance for test
in the said laboratory where he had to stay back between 11
a.m. to 2 p.m. The plea of alibi was raised on the above basis
and in fact the prosecution themselves examined PW-20 one
A.S. Negi, LDC of Excise Department who in his deposition H

- A stated that on 5.8.1980 he was working as LDC in Excise laboratory, he knew Om Prakash the accused, that the accused met him at 11 a.m. to deposit a sample, that thereafter he asked him to come after 2 p.m. as they used to receive samples only between 2 and 4 p.m. and that one Har Lal, UDC was also sitting in the same room in which PW-20 was sitting and that accused Om Prakash brought the sample only after 2 p.m. which was deposited by Har Lal, UDC. It is quite apparent that the appellant Om Prakash himself being a police constable the prosecuting agency wanted to support the appellant and, therefore, came forward to examine PW-20 whose version has otherwise nothing to do with the case of the prosecution, on the other hand it was detrimental to the case of prosecution. PWs-17 to 19 were also examined to support the above version.
- D 17. PWs-17 and 18 also stated that on 5.8.1980 appellant Om Prakash was in the Excise office at 2, Battery Lane, Rajpur Road, Delhi at about 10.30 or 11 a.m. and remained there till 2 p.m. As was noted by us earlier, the evidence of PWs-17, 18, 19 and 20 were all wholly unnecessary to speak about the case of the prosecution. We can understand if they had been examined on the side of Om Prakash. In any event, even going by the version of those witnesses he was found in the office of excise laboratory after 10.30 a.m. until 2 p.m. According to the deceased, he was burnt at the instance of the appellants just about 10.30 a.m. in the quarter No.4 of police post of Andha Mughal. Therefore, prior to 10.30 a.m. the whereabouts of the accused Om Prakash were not surely stated. He was assigned the task of taking the sample at 9.40 a.m. Therefore, between 9.40 a.m. and 10.30 a.m. the location of the said accused was not shown to have been in a different place other than the place of occurrence. That apart, the trial Court has noted that the excise laboratory at battery line was just 5-6 minutes drive from the police post. The trial Court made a detailed analysis of this issue and has found that there was no truth in the claim of alibi of the second appellant Om Prakash.

18. Having regard to the above factors noted by the trial Court as well as by the High Court, we are also of the view that there is no substance in the said plea made on behalf of the said appellant.

19. On behalf of Narender Kumar, the appellant in Criminal Appeal No. 447/2010, it was faintly suggested that he had earlier booked the brother of deceased one Sher Singh for an offence under Delhi Police Act for which the said Sher Singh came to be fined the sum of Rs.30 and, therefore, to wreck vengeance on him he was falsely implicated. As was rightly rejected by the trial Court as well as the High Court the said defence appears to be a very remote one as compared to a very solid evidence in the form of dying declaration contained in exhibit PW-7/C in which the deceased categorically referred to the specific role played by the said appellant Narender Kumar that he poured the kerosene from a stove which was lying in the quarters No.4 which was also recovered later on under exhibit PW-10/A. Therefore, it is too late in the day for the appellant to raise such a flimsy ground by way of defence. We do not find any scope to accede to such a plea raised on behalf of the appellant in Criminal Appeal No.447/2010.

20. Having regard to our above conclusions, we do not find any merit in both the appeals. The appeals fail and the same are dismissed.