BHAGWAN

v.

STATE OF MAHARASAHTRA THROUGH SECRETARY HOME, MUMBAI, MAHARASHTRA

(Criminal Appeal No. 385 of 2010)

AUGUST 07, 2019

[SANJAY KISHAN KAUL AND K.M. JOSEPH, JJ.]

Penal Code, 1860:

s.302 – Prosecution u/ss. 302 and 326 – For causing death of his wife and injuries to two children by setting them ablaze after pouring kerosene on them – Dying declaration of the deceased – Conviction u/s.302 and acquittal u/s. 326 by courts below – Appeal to Supreme Court – Held: Cause of death is proved to be homicidal author whereof was the accused – The dying declaration is amply proved by the evidence of the officer who recorded it and the medical officer – Defence version of getting burn due to accidental fall of lamp not acceptable – Conviction upheld.

Dismissing the appeal, the Court

HELD: 1. The post mortem report reveals that death was caused due to septicaemia shock due to extensive burns. The deceased suffered 92% burn injuries. The incident in question took place in the mid-night of 20.4.1999. The deposition of P.W.13 doctor makes it clear that the victim was admitted at hospital on 21.4.1999 at 3.10 a.m. Prior to that the victim had been taken to Primary Health Centre. Therefore, the victim, was taken to hospital immediately after the incident. [Paras 11 and 12] [143-G; 144-B-C]

Kalu Ram v. State of Rajasthan **(2000) 10 SCC 324 – distinguished.**

2.1 The medical officer (PW14) examined the patient. He asked 2-3 questions to her. He had given certificate that she is fit to give statement. She was found conscious throughout and the certificate that she was conscious throughout came to be made. It is true that in the cross examination he has stated that the

patient while is conscious may not be mentally and physically fit. But after making the statement he has volunteered and stated that in the present case the patient was fit. He said that he had not mentioned that mentally and physically fit in the certificate but he had stated fit for dying declaration. A perusal of the dying declaration would bear out the aforesaid statement by the medical officer. The fact that PW 14 was not able to remember the pulse rate cannot militate against the credibility and acceptability of PW 14 in regard to the medical condition of the patient being such that she was fit for making the dying declaration. That apart PW. 7 who had recorded the dying declaration also spoke about asking the medical officer to give the fitness certificate and corroborates the medical officer. Therefore, in the facts of the present case, continued consciousness of the patient is certified by PW 14 at the foot of the dying declaration and circumstances brought by the evidence of PW 7 and PW 14 will not militate against the validity and acceptability. [Paras 15, 16 and 17] [147-A-E; 148-G]

Laxman vs. State of Maharashtra **(2002) 6 SCC 710 – followed.**

Khushal Rao vs. State of Bombay **AIR 1958 SC 22 : [1958] SCR 552 – referred to.**

2.2 The mere fact that the patient suffered 92% burn injuries as in this case would not stand in the way of patient giving a dying declaration which otherwise inspires the confidence of the Court and is free from tutoring, and can be found reliable. [Para 19] [149-E]

Vijay Pal v. State (Government of NCT of Delhi) **(2015) 4 SCC 749 : [2015] 3 SCR 394 – relied on.**

2.3 The absence of any thumb impression of the deceased is not fatal. PW-7 who recorded the dying declaration has categorically deposed that both the thumb and both the hands were burnt and therefore her thumb impression could not be taken. This deposition is borne out by the statement in the dying declaration. [Para 20] [149-F]

2.4 The degree of the burn is not clear in the present case. However, once the dermis is completely affected when there is

third degree burn there would be no pain for the reason that the pain receptor found in the dermis would die. In fact P.W.14 doctor in his deposition has stated that it is not necessary in severe burn that there must be pain. It is true that the pain killer may have been given as was stated by the doctor as burns may not have evenly impacted the skin. But what is important is whether despite the extensive burn, the patient was conscious and mentally and physically in a condition to understand the questions put to her and to give answers to the same. [Para 22] [150-H; 151-A-B]

2.5 A dying declaration if it otherwise inspires confidence of the Court can be the sole basis for conviction. If it is otherwise it may certainly require corroboration. P.W.7. who had recorded the Dying Declaration, speaks about receipt of memo of police station for recording the dying declaration. He speaks about going to the hospital and about interacting with the doctor and about asking questions. There was no definite case put to him that it was not he who recorded the dying declaration and that it was someone else. There is no reason to hold that it was not PW 7 who recorded the dying declaration. However, the casualness in the matter of recording of the dying declaration is disapproved. The dying declaration as it is which stands amply proved by PW 7 and also by the evidence of PW 14 medical officer. [Paras 23, 25] [151-C-F-H; 152-A-B-G]

3. Not sending of the can containing kerosene was to the forensic examination at FSL cannot cast a reasonable doubt, in view of the dying declaration. The statement of PW 1 does not reveal the seizure of the can and what is more PW 1 has stated that it is not true that the police seized the plastic container under the panchnama. Evidence of PW 1 who was witness to the panchnama shows that the aforesaid witness was got declared hostile and the aforesaid statement about there being no seizure of the plastic container was made during the cross examination by the prosecutor. However, PW 4 is another witness to the Panchnama who categorically stated that it is true that police seized one plastic container from the room of the appellant. [Para 26] [153-A-D]

4. The dying declaration if it is accepted points to the cause of the death being homicidal and the author of the crime being the appellant. The case of the accidental fall of the lamp does not appeal. DW 1 has not been believed by two courts. The version of DW2 is also not believed. No doubt from the evidence of PW9, it appears that Exh. 64 MLC information accidental burn history is mentioned. It would not show that such statement was made by the deceased and it would have ordinarily emanated from those accompanying her. [Paras 28, 29, 31 and 32] [154-B-D-G; 155-D-E]

5. The burn injuries suffered by the appellant and the two sons are reconcilable with the prosecution version of homicide committed by the appellant. The appellant was drunk, he poured kerosene. The deceased in a natural response to the injuries would be frantic and her reaction would bring her into close contacts with others in a small room including the appellant and their children. No doubt the trial Court has reasoned that the appellant might have tried subsequently for extinguishing the fire. The appellant stands squarely implicated by the dying declaration. The unambiguous words came from the mouth of his deceased wife who cannot be expected to lie as she would be conscious, that she would have to meet her maker with a lie in her mouth. [Para 33] [155-F-H]

Case Law Reference

[1958] SCR 552	**referred to**	**Para 8**
(2000) 10 SCC 324	**distinguished**	**Para 12**
(2002) 6 SCC 710	**followed**	**Para 14**
[2015] 3 SCR 394	**relied on**	**Para 18**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 385 of 2010.

From the Judgment and Order dated 19.04.2006 of the High Court of Judicature at Bombay, Nagpur Bench in Criminal Appeal No. 488 of 2002.

A. Sirajudeen, Sr. Adv., Ms. Manjeet Chawla, Advs. for the Appellant.

Nishant Ramakantrao Katneshwarkar, Anoop Kandari, Advs. for the Respondent.

The Judgment of the Court was delivered by

K. M. JOSEPH, J.

1. This appeal maintained by special leave granted by this Court is directed against the judgment of the High Court dismissing the appeal and confirming the conviction and sentence imposed by the Additional Sessions Judge Pusad under Section 302 of the Indian Penal Code, 1860 ('IPC' for short). In brief the prosecution case is as follows:

The appellant was married on 12.05.1995 with the deceased. Out of the wedlock, two sons were born. The appellant was alleged to be having illicit relations with one lady. He was also drinking liquor. He would quarrel and ill treat his wife. On 19.4.1999 at about 12 o'clock in the night he came to the house in a drunken position and beat his wife and thereafter he poured kerosene oil and set her on fire. The deceased was shifted to the Hospital at Arni on 21.4.1999 at about 2.00 a.m. along with two sons who also suffered burn injuries. The appellant also sustained burn injuries. On 22.4.1999 Ram Audare recorded the dying declaration of the deceased. In the dying declaration the appellant was implicated as having, being drunk, pore kerosene on her and set her on fire. The deceased succumbed to burn injuries on 23.4.1999. The appellant came to be arrested on 5.6.1999. After investigation, a charge sheet came to be filed for offences under Section 302 and 326 of the IPC. A charge under Section 326 for voluntarily causing burn injuries to his sons was framed and the trial Court as already noticed found the appellant guilty under Section 302 IPC. In regard to charge under Section 326 IPC, the appellant was acquitted.

2. We have heard the learned senior counsel for the appellant also the learned counsel for the State.

3. Learned senior counsel for the appellant would submit that first of all, the High Court has gone wrong in finding that the deceased was admitted in the hospital only after 2 days after the date of incident. He took us through the deposition of PW 8, the police officer where he says "as per documents, the patient was taken to hospital on 19.4.1999. Firstly, she was taken to Arni Hospital and then to Yavatmal". He complains that in the teeth of this statement by the police officer, the finding rendered by the High Court that the deceased was taken to the hospital only after 2 days is palpably wrong.

A 4. The case, no doubt, which has been set up by the appellant, is that the burn injuries which were caused to the deceased, to him and the two sons were as a result of accidental falling down of an oil lamp. This version is sought to be probabilised by the fact that the appellant himself suffered burn injuries. This was nearly 25%. His two minor sons also sustained burn injuries to the extent of 20% and 10%. This aspect is B irreconcilable with the alleged deliberate act on the part of the appellant in pouring kerosene and setting his wife on fire. In other words, if he has set her on fire after pouring kerosene, how he and sons could suffer burn injuries, runs the argument. It is further submitted that the non-examination of the mother-in-law is not explained. Next, he pointed out C that PW 7 who was Naib Tehsildar who allegedly recorded the dying declaration has stated that relative of the patient were in the hospital. If that is so, he points out that deceased would have made a dying declaration to relatives. No such dying declaration is forthcoming.

5. Coming to the sheet anchor of the prosecution case namely the D dying declaration of PW 7, he would submit that it is unreliable. PW.7 is one Shriram Bhanu Das Audre. The said witness who is supposed to have recorded the dying declaration has stated in his deposition that "dying declaration form is a printed form and the name of Vaidya appearing. In short, his argument is that, P.W.7 on the one hand states that he recorded the dying declaration while on the other hand he himself E admits that the dying declaration is in the name of another person namely Vaidya. Next, he would turn to the deposition of the doctor-PW 14 who has allegedly examined the deceased as to ascertain whether she was fit. According to the statement it is not certain that deceased was mentally and physically fit and conscious. In order to make good this submission F he relied on the statement of P.W.14 wherein he says "It may be possible patient is conscious but may not be mentally and physically fit". It is brought to our notice that the doctor has given evidence that he could not say as to what was the pulse rate of the patient. He further says that he is not able to say who is the Tehsildar at the time of recording dying declaration. This last statement from the doctor is sufficient to G establish his case that the dying declaration is unreliable as even the doctor is not able to state with certainty as to who had recorded the dying declaration, whether it is P.W.7 or another one whose name is taken by P.W. 7 himself and shown in the dying declaration. Again, the deposition of the doctor is attacked by pointing out that it is not H accompanied with the solemnity that it deserved. The doctor says that

he has not mentioned in the certificate which questions were put to the patient to test the condition of the deceased while making the statement. The doctor also says that he does not know who is the incharge of the Burn Unit on that day. He has deposed that he has asked 2-3 questions before he gave the certificate that she is fit to give statement. Still further, it is pointed out that the deceased could not be in the condition to give dying declaration attributed. She had suffered 92% burns.

6. Appellant has examined two witnesses as DW 1 and DW 2. In fact, DW 2 would say in chief examination that on the way while going to Arni in a Jeep at the hospital at Arni, the doctor who treated the patient, asked the deceased as to how she was killed. She allegedly said that the lamp had fallen and she was burnt. In fact, we notice that the witness would say that even in the referred hospital namely, Yavatmal, Doctor asked the deceased how she was killed. Deceased at that time also said it was due to fall of lamp that she burnt, DW 2 also deposed that appellant told him that while extinguishing fire he suffered burn injury.

7. Per contra learned counsel for the State countered the submissions. he began with pointing out that the place where the incident took place was a room in which the appellant, the deceased and the two sons were residing. The burn injuries suffered by the appellant and the sons in the context of a small room and when the deceased suffered extensive burn injuries, it was entirely compatible with homicide and some burn injuries could be inflicted on the husband and sons in the course of her natural reactions with her running around and those in the vicinity also catching fire. Learned counsel for the State would point out that the contention of the appellant, that the deceased was taken to the hospital on the same day namely 19.4.1999 is not correct. He would point out that the deceased was first taken to the Hospital Agni only on 21.4.1999 as found by the High Court. As far as the contention that the name of Vaidya is shown in the dying declaration, it is submitted before us that dying declaration is recorded in a printed form. All that would have happened is the name Vaidya was printed on the top of the page. The significance is that of PW-7. He has given evidence that he recorded the dying declaration. Learned counsel for the state pointed out that dying declaration was, not recorded by Mr. Vaidya but it was actually recorded by P.W.7 himself namely Shriram Audare. Nothing therefore turns on the name of Vaidya appearing in the printed form.

A 8. It is contended by appellant that the evidence as to the ill treatment of his wife on account of addiction to liquor and illicit relationship cannot give rise to the presumption of *mens rea* for causing the death of his wife. The charge is not one of suicide or causing cruelty. It is further contended that dying declaration must be subjected to very close scrutiny. Reliance is placed on judgment of this Court in *Khushal Rao vs. State of Bombay* AIR 1958 SC 22, to contend that if the dying declaration suffers from an infirmity then, without corroboration, it cannot form the basis for conviction. Tutoring and prompting must be ruled out (see AIR 1976 SC 1994). The deceased suffered 92% burn injuries and except her head, neck and face on all other parts of the body, she lost her whole skin. The burn injuries would have caused her maximum pain, loss of fluid and consciousness. She was administered pain killers according to the evidence of P.W.14. It is contended that there was no signature or impression of the hand or leg of the deceased in the declaration. The FIR registered on the basis of dying declaration should have been forwarded to the Magistrate along with FIR but the signature of the Magistrate not being available in the FIR and dying declaration creates doubt. In the FIR which was registered before the death Section 302 has been written. Reliance was placed on the deposition of the witnesses namely (PW3, PW7, PW11, PW 12 and PW 13) to point out that the date of occurrence based on which the High Court drew adverse inference, in that though the date of occurrence is 19th, the deceased was admitted only on 21st is incorrect. The incident took place in the mid night of 20th. Within an hour, it is contended, the injured was taken to Arni Hospital at about 1.00 a.m. and then shifted to Yavatmal Hospital immediately and admitted at 3.30 a.m.. The incident, admission and shifting took place on the same night and there is no delay. Regarding the recovery of can containing kerosene, it is submitted as follows:

Exhibit 57 is the report given by the FSL. This report reveals that though prosecution sent the burnt clothes of the deceased and the quilt for forensic examination, the can was not at all sent. P.W.1 witness to panchnama has deposed that Police seized one lamp and one quilt. Police did not seize plastic container. P.W.1 has deposed that in the room quilt, lamp and pieces of saree were lying. The Police did not remove any article in his presence. He cannot say what is written in the panchnama. Failure to examine independent witnesses is complained of. Reliance is placed on the deposition of the defence witnesses. It is further contended that failure to examine the neighbour Shankar Talwari and mother-in-

law as witnesses creates doubt. As to how the injured was shifted to hospital is not established through evidence. The witnesses who shifted the injured to the hospital were not examined. The failure to examine D.W. 2 by the prosecution who had got the deceased admitted in the hospital and was a material witness and whose statement under Section 161 Cr.P.C. had also been recorded by the police is questioned. The extensive burn injury suffered by the appellant and his admission in the hospital on the same day along with the explanation of the appellant in his statement under section 313 is relied upon. In Exhibit 64, it is stated accidental burn injury.

9. Per contra, the counsel for the State in the written submission would state that by minute observation of the document on record it appears that the incident took place in the mid night of 20/04/1999. On 21/4/1999 the victim was shifted to the Primary Health Centre, Arni and thereafter, she was referred to Vasant Rao Malik Medical Hospital, Yavatmal. The evidence of P.W.13, Dr. Vasudhar Sudhakar Dehankar shows that the victim was admitted in the general hospital at Yavatmal on 21/4/1999 at 3.10 a.m.. Dying declaration was sought to be made the main support for the prosecution case. The spot panchnama Exhibit 28 show that the appellant, victim and children were residing in a very small room. The spot panchnama mentions empty can of kerosene (Rocket) and the glass lamp. It is contended that had the glass lamp fell as claimed by appellant, it would be broken into pieces and the spot of occurrence would have shown broken pieces of glass.

ANALYSIS AND DECISION

10. In the first place we must remind ourselves that this is an appeal maintained by special leave. The appeal is directed against concurrent findings namely that of the trial court as approved by the High Court. Even after grant of leave, limitations on the power of this Court as it existed at the time of grant of special leave, continue to haunt the court.

THE CAUSE OF DEATH

11. The post mortem report reveals that death was caused due to septicaemia shock due to extensive burns. The deceased suffered 92% burn injuries in fact.

A THE DATE OF INCIDENT

12. It is true that as far as the date of occurrence is concerned, the High court has proceeded on the basis that the occurrence took place on 19.4.1999 and the appellant deliberately delayed the admission of his wife for 2 days. In view of the written submission on behalf of the B State, this aspect must be held in favour of the appellant as it is stated in the written submission of the State that the incident in question took place in the mid-night of 20.4.1999. The deposition of P.W.13 doctor makes it clear that the victim was admitted at Yavatmal on 21.4.1999 at 3.10 a.m.. Prior to that the victim had been taken to Primary Health C Centre, Arni. Therefore, the victim, it must be found was taken to hospital immediately after the incident. No doubt while not applying the judgment of this court in *Kalu Ram v. State of Rajasthan* 2000 (10) SCC 324, the High Court has relied on the circumstance that the deceased and the children were lying without any medical attention from 19.4.1999 to 21.4.1999 which is erroneous. The High Court notes that in the said D case it was a case where the accused therein wanted to inflict burn to the deceased and to frighten her but unfortunately it slipped out of control and death ensued. Even the perusal of the written submission would show that the appellant perseveres in the case of the occurrence being accidental and does not lay store by the judgment in 2000 (10) SCC 324.

E DYING DECLARATION

(A) CONSCIOUSNESS AND FIT STATE OF MIND

13. The appellant would urge that the deceased was having 92% burn injuries. Except her head, neck and face, on all other parts of the F body she had lost the whole skin. There would be loss of fluids and consciousness. The doctor (PW 14) is unable to depose what was the pulse rate of the patient. In the dying declaration certified by the medical officer, what is certified is that the patient is conscious throughout. P.W. 14 was the medical officer. He has deposed that he examined her and she was conscious throughout. Learned senior counsel for the appellant G would point out that in the cross examination, the medical officer deposed that it may be possible that the patient is conscious but he may not be mentally and physically fit. He also says that pain killer was given to the patient but unable to tell which pain killer was given. He has not mentioned in the certificate which questions were put to patient. It is not necessary H that the pain killer contains situ drug, PW-14 deposed.

14. It is true that in the dying declaration the medical officer P.W. 14 has only certified that patient was conscious. The question as to whether a dying declaration which otherwise inspires confidence of the court should meet with disapproval for the reason that all that is certified is that the patient was conscious and that it is further not certified that she was physically and mentally fit is no longer res integra. A constitution Bench of this Court in Laxman vs. State of Maharashtra; 2002 (6) SCC 710 had this to say:

> "4. Bearing in mind the aforesaid principle, let us now examine the two decisions of the Court which persuaded the Bench to make the reference to the Constitution Bench. In *Paparambaka Rosamma* v. *State of A.P.* [(1999) 7 SCC 695 : 1999 SCC (Cri) 1361] the dying declaration in question had been recorded by a Judicial Magistrate and the Magistrate had made a note that on the basis of answers elicited from the declarant to the questions put he was satisfied that the deceased is in a fit disposing state of mind to make a declaration. The doctor had appended a certificate to the effect that the patient was conscious while recording the statement, yet the Court came to the conclusion that it would not be safe to accept the dying declaration as true and genuine and was made when the injured was in a fit state of mind since the certificate of the doctor was only to the effect that the patient is conscious while recording the statement. Apart from the aforesaid conclusion in law the Court had also found serious lacunae and ultimately did not accept the dying declaration recorded by the Magistrate. In the latter decision of this Court in *Koli Chunilal Savji* v. *State of Gujarat* [(1999) 9 SCC 562 : 2000 SCC (Cri) 432] it was held that the ultimate test is whether the dying declaration can be held to be a truthful one and voluntarily given. It was further held that before recording the declaration the officer concerned must find that the declarant was in a fit condition to make the statement in question. The Court relied upon the earlier decision an in *Ravi Chander* v. *State of Punjab* [(1998) 9 SCC 303 : 1998 SCC (Cri) 1004] wherein it had been observed that for not examining by the doctor the dying declaration recorded by the Executive Magistrate and the dying declaration orally made need not be doubted. The Magistrate being a disinterested witness and a responsible officer and there being no circumstances or material to suspect that the Magistrate had any animus against the accused

A or was in any way interested for fabricating a dying declaration, question of doubt on the declaration, recorded by the Magistrate does not arise.

5. The Court also in the aforesaid case relied upon the decision of this Court in *Harjit Kaur* v. *State of Punjab* [(1999) 6 SCC 545
B : 1999 SCC (Cri) 1130] wherein the Magistrate in his evidence had stated that he had ascertained from the doctor whether she was in a fit condition to make a statement and obtained an endorsement to that effect and merely because an endorsement was made not on the declaration but on the application would not
C render the dying declaration suspicious in any manner. For the reasons already indicated earlier, we have no hesitation in coming to the conclusion that the observations of this Court in *Paparambaka Rosamma* v. *State of A.P.* [(1999) 7 SCC 695 : 1999 SCC (Cri) 1361] (at SCC p. 701, para 8) to the effect that

> D "in the absence of a medical certification that the injured was in a fit state of mind at the time of making the declaration, it would be very much risky to accept the subjective satisfaction of a Magistrate who opined that the injured was in a fit state of mind at the time of making a declaration"

E has been too broadly stated and is not the correct enunciation of law. It is indeed a hypertechnical view that the certification of the doctor was to the effect that the patient is conscious and there was no certification that the patient was in a fit state of mind especially when the Magistrate categorically stated in his evidence indicating the questions he had put to the patient and from the
F answers elicited was satisfied that the patient was in a fit state of mind whereafter he recorded the dying declaration. Therefore, the judgment of this Court in *Paparambaka Rosamma* v. *State of A.P.* [(1999) 7 SCC 695 : 1999 SCC (Cri) 1361] must be held to be not correctly decided and we affirm the law laid down by this Court in *Koli Chunilal Savji* v. *State of Gujarat*(1999)9
G SCC 562 ."

(emphasis supplied)

15. In this case the medical officer has given evidence before the court. We cannot be oblivious to the entirety of his evidence. He has
H deposed that at about 5 p.m, Tehsildar came to the hospital and told him

that he has to record a dying declaration. The patient was there. The Tehsildar asked him (PW-14) to examine the patient whether she was fit for examining. He examined the patient. He asked 2-3 questions to her. He had given certificate that she is fit to give statement. The tehsildar recorded the statement of the patient in question and answer form and PW 14 was asked again by the Tehsildar to examine her and PW 14 examined her and she was found conscious throughout and the certificate as noted by us that she was conscious throughout came to be made. It is true that in the cross examination he has stated that the patient while is conscious may not be mentally and physically fit. But after making the statement he has volunteered and stated that in this case the patient was fit. He says that he has not mentioned that mentally and physically fit in the certificate but he has stated fit for dying declaration. A perusal of the dying declaration would bear out the aforesaid statement by the medical officer as it is indeed stated that the patient is fit for DD (short form for 'Dying Declaration'). The fact that PW 14 was not able to remember the pulse rate cannot militate against the credibility and acceptability of PW 14 in regard to the medical condition of the patient being such that she was fit for making the dying declaration.

16. That apart PW. 7 who has recorded the dying declaration also speaks about asking the medical officer to give the fitness certificate and corroborates the medical officer. P.W. 7 has spoken about the questions put to the patient. She asked her name and age and what she was doing. It would be appropriate that we extract the DD:

"Certificate given by the Medical Officer

Patient is fit for D.D.

Sd/-xxillegiblexx

Dt/-22/4/99

17.05 hours

Full name of Medical Officer

With Signature and date

Date and hour of 22/4/99 at 17.05 hours commencing dying declaration

Questions asked:-

1. What is your name? :- Sarla Bhagwan Shrirame
2. What is your age? :- 28 years
3. What is your occupation? :- Household work
4. What is your place of residence? :- Dabhdi
5. State briefly how and when did the said incident occur? :- On Monday at about 12.00 o'clock in the night. My husband beat me. Thereafter he poured kerosene on my person and set me of fire. At that time he was under the influence of liquor.
6. What are the names of the person in whose presence the said incident took place? :- Husband and mother-in-law.
7. Do you suspect anybody? :- My husband Bhagwan set me on fire.
8. Do you want to say anything more?:- My both sons also sustained burns.

Time of Concluding the dying declaration. :- 17.15 hours.

Besides the doctor none else was present at the time of recording dying declaration (It was) read over and admitted to be correct.

Signature/ Thumb impression	Sd/- S.B. Audarya
Since there are burns	Full name & Signature
on both Hands,	Executive Magistrate
thumbs-impression could	Yavatmal.
Not be obtained	

Certificate given by the Medical x Officer patient is conscious throughout.

Sd/- Full name of Medical Officer with Signature and date."

17. Therefore, in the facts of this case we are of the view that continued consciousness of the patient is certified by PW 14 at the foot of the dying declaration and circumstances brought by the evidence of PW 7 and PW 14 will not militate against the validity and acceptability.

18. Can a person who has suffered 92% burn injuries be in a condition to give a dying declaration? This question is also no longer *res*

integra. In Vijay Pal v. State (Government of NCT of Delhi) 2015 (4) SCC 749, we notice the following discussion:

> "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: 1992 SCC (cri) 810* 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.
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> 24. In *State of M.P. v. Dal Singh; (2013) 14 SCC 159: (2014) 4 SCC (Cri) 141,* 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."

19. Therefore, the mere fact that the patient suffered 92% burn injuries as in this case would not stand in the way of patient giving a dying declaration which otherwise inspires the confidence of the Court and is free from tutoring, and can be found reliable.

Whether the absence of any thumb impression of the deceased is fatal?

20. PW-7 who recorded the dying declaration has categorically deposed that both the thumb and both the hands were burnt and therefore her thumb impression could not be taken. This deposition is borne out by the statement in the dying declaration to the fact that since there are burn on both the hands, thumb impressions could not be obtained.

EFFECT OF PAIN KILLERS

21. The post-mortem report would show that both upper limbs and lower limbs, that is, about 54% were burnt. It shows that the chest[trunk on the front] and back constitute another 36% and it is burnt. It is only in the HNF portion that it was not completely burnt. As far as pain in regard to a burn injury, we would rely on what is produced by the

A appellant himself along with the written submission namely, 'Burn-Brittanica Online Encyclopaedia'.

> "The damage in a second-degree burn extends through the entire epidermis and part of the dermis. These injuries are characterized by redness and blisters. The deeper the burn the more prevalent
B the blisters, which increase in size during the hours immediately following the injury. Like first-degree burns, second-degree injuries may be extremely painful. The development of complications and the course of healing in a second-degree burn depend on the extent of damage to the dermis. Unless they become infect4ed, most superficial second-degree burns heal without complications and
C with little scarring in 10 to 14 days.
>
> Third-degree, or full-thickness, burns destroy the entire thickness of the skin. The surface of the wound is leathery and may be brown, tan, black, white or red. There is no pain of the wound is leathery and may be brown, tan, black, white, or red. There is no
D pain, because the pain receptors have been obliterated along with the rest of the dermis. Blood vessels, sweat glands, sebaceous glands, and hair follicles are all destroyed in skin that suffers a full-thickness burn. Fluid losses and metabolic disturbances associated with these injuries are grave.
>
E XXXX
>
> Surgeons measure the area of a burn as percentage of the body's total skin area. The skin area on each arm is roughly 9 percent of the body total, as is the skin covering the head and neck. The
F percentage on each leg is 18, and the percentage on the trunk is 18 on the front and 18 on the back. The percentage of damaged skin affects the chances of survival. Most people can survive a second-degree burn affecting 70 percent of their body area, but few can survive a third-degree burn affecting 50 percent. If the area is down to 20 percent, most people can be saved, though
G elderly people and infants may fail to survive a 15 percent skin loss."

22. The degree of the burn is not clear in this case. However, once the dermis is completely affected when there is third degree burn there would be no pain for the reason that the pain receptor found in the
H dermis would die. In fact P.W.14 doctor in his deposition has stated that

it is not necessary in severe burn that there must be pain. It is true that the pain killer may have been given as was stated by the doctor as burns may not have evenly impacted the skin. But what is important is whether despite the extensive burn, the patient was conscious and mentally and physically in a condition to understand the questions put to her and to give answers to the same.

NAME OF VAIDYA IN FORM FOR DECLARATION

23. Another aspect which is seriously argued before us was that in the DD form, the name that appears is of one Vaidya. Learned senior counsel was at pains to emphasise that it is not Vaidya, who has recorded the DD but PW 7 namely, Shriram Bhanudas Audre who has allegedly recorded the declaration. A dying declaration if it otherwise inspires confidence of the Court can be the sole basis for conviction. If it is otherwise it may certainly require corroboration. It was argued that when on the face of the dying declaration it appears that it is Vaidya who has recorded the statement how can the conviction under Section 302 IPC be maintained on the basis of such a dying declaration which according to PW 7 he has recorded and not Vaidya. Though at first blush, it appears attractive we do not think, on a careful examination of the circumstances it merits acceptance. As pointed out by the learned counsel for the State the name of Vaidya appears on the top of the printed form for dying declaration being recorded but the question is whether it is Vaidya who recorded it or it is Audre who recorded it. Shriram Bhanudas Audre has been examined as P.W.7. He speaks about receipt of memo of police station for recording the dying declaration. He speaks about going to the hospital and about interacting with the doctor and about asking questions. It was in chief examination itself he has stated that in the dying declaration the name of Vaidya is appearing. No doubt, he deposed that he does not know that who was incharge of the ward or the name of the doctor who examined the patient. There is no column for writing the details such as name of the medical doctor. He deposed that he is unable to say which part of the patient was burnt. He denies that patient was unable to speak. Equally, he denies that he prepared the declaration at the instance of the relative of the patient. There is no definite case put to him that it was not he who recorded the dying declaration and that it was Vaidya. As pointed out to us by the learned counsel for the State, the signature appears to be that of PW 7, having referred to what is written by way of signature in terms of the

A similarity to the name. We therefore see no reason to hold that it was not PW 7 who recorded the dying declaration. We, however, totally disapprove of the casualness in the matter of recording of the dying declaration unnecessarily giving rise to an occasion for raising an argument surrounding the genuineness of a document as solemn as a dying declaration.

B

24. Appellant has case that the evidence of PW 7 who recorded the dying declaration would show that the relatives of the deceased were present at the hospital. If that be so, it would be unnatural to not expect the patient to make a dying declaration to her relative, and none is forthcoming, it is contended. However, we notice that PW 3 who is

C the b rother of the deceased has spoken about being at the hospital at Yavatmal. He deposed in chief examination that when they asked her, she told that her husband went on Arni Bazar and came to the house buying some liquor and beaten her and he poured kerosene on her and on the person of the two children and set them on fire. She also told that

D he has come to the house at 11 to 11.30 at night. In cross-examination it is true that he says that he had stated to the police that his sister has told that the accused poured kerosene on two sons also. He was unable to explain the reason for omission (apparently of such statement taken from him by the police). He says, undoubtedly also that when he saw her sister, she was burnt completely. His wife asked deceased and then

E the deceased has told as aforesaid. He was present and they all heard what she stated. He would state it to be untrue that the deceased was not in a position to talk. The face of the deceased was not burnt. He further denies that the deceased has not told that the appellant has poured kerosene and burnt. It is true that the appellant stands acquitted by the

F trial court for the offence under Section 307 in regard to pouring of kerosene on his sons for which the evidence of PW 3 may have been pressed into service by the prosecution but we find assurance in the fact that this is not a case where there is total dearth of any evidence apart from the dying declaration.

G 25. At any rate we see no reason at all to not act on the dying declaration as it is which stands amply proved by PW 7 and also by the evidence of PW 14 medical officer.

ABOUT THE CAN CONTAINING KEROSENE

26. Another argument raised is regarding the availability of can

H containing the kerosene using which the accused apparently poured

kerosene on the deceased. In this regard the contention taken is that the can was not at all sent to the forensic examination at FSL as can be seen at Exhibit 57 report. This cannot cast a reasonable doubt in a case like the present in view of the dying declaration. We have also noticed the statement of PW 1 which does not reveal the seizure of the can and what is more PW 1 has stated that it is not true that the police seized the plastic container under the panchnama. Evidence of PW 1 who was witness to the panchnama shows that the aforesaid witness was got declared hostile and the aforesaid statement about there being no seizure of the plastic container was made during the cross examination by the prosecutor. However, we notice that PW 4 is another witness to the Panchnama. He states that in the room quilt, lamp and pieces of saree were there. He further states that the police prepared the panchnama and he admitted his signature. He further states that the police seized the articles as per the panchnama and with permission he was allowed to be cross examined. In the cross examination PW 4 has categorically stated that it is true that police seized one plastic container from the room of the appellant. He stated that he could identify the seized articles shown to him and he got identified the container as Article 'B'. In cross examination by the defence counsel, it reads as under:

> "Cross by defence counsel
>
> Police had not come to call me at my house. When I had been to the spot, police had already removed the articles. Police had not read over the contents panchnama. I cannot say what is written in the panchanama. Police had taken my signatures not affixed the labels on articles in my presence. When police had taken measurements I was not present in room. It is not true to say that, police had not seized anything in my presence and, I only signed the panchanama.
>
> Re-examination: Nil ROAC
>
> Sd/- A.D. Uphadye
>
> ASJ Pusad 28/8/01"

27. The deposition of PW 4 would reveal that he admits the police preparing the panchnama and it containing the signature and that police seized the articles. In cross examination he admits the seizure of plastic container of kerosene from the room of appellant.

A THE CASE OF ACCIDENTAL FALL OF A LAMP AND THE EVIDENCE OF DEFENCE WITNESSES

28. That the deceased died due to burning is indisputable. That the appellant was in the said room along with the deceased and their two children is not open to question. The room appears to have been a small B room. The dying declaration if it is accepted points to the cause of the death being homicidal and the author of the crime being the appellant. In his statement under Section 313, appellant pleaded as follows:

> "Myself, wife and two sons were sleeping in the house and that time how lamp fallen, I do not know. Due to burn of guilt there C was flame and therefore myself, wife and two sons sustained burn injuries. I went to extinguish the fire at my sons and wife. I also sustained burn injury, my both legs and hands having burn injuries. Thereafter all of us went to hospital by jeep. Thereafter what happened I do not know."

D 29. The case of the accidental fall of the lamp does not appeal to us. It is no doubt true that the case of the State that if the glass lamp has fallen on the deceased then it would have broken into pieces and there would be evidence of the same may not be as such acceptable. It is quite possible that a glass lamp if it fell on the deceased, by mere falling on a person it is certainly not necessary that glass would break. If it E were to be brushed off it can land on the quilt. Only if it hits on hard object the lamp would be broken. In fact the lamp is not broken. At this stage we may also examine the evidence of DW 1 and DW 2 examined by the appellant. DW 1 has stated that there was hue and cry and people were talking to the victim and he went there. She was saying F lamp fallen down and the quilt was burnt and therefore she was burnt. In cross examination the witness says that he had gone to the house of the accused. He admits that the appellant was previously working on his tractor. More importantly, he would say that he has not stated to the police that the deceased had told him that the lamp has fallen and due to which she burnt. The trial Court has not reposed confidence in this G evidence. Likewise, the High court did not find it fit to repose confidence in his evidence. DW 1 has not been believed by two courts. Coming to DW 2, the cousin brother of the appellant, he also stated in chief examination that the doctor asked how the deceased was burnt. The deceased mentioned that the lamp had fallen and the quilt burnt and then H she burnt. Even when they went to the referred hospital this version

was repeated in his evidence. He also stated that both the arms of the appellant were burnt and the sons also sustained burn injuries. Further he deposed that appellant mentioned that while extinguishing fire he sustained burn injuries. In his cross examination he stated that there are 15 houses between his house and appellant. His house is in another lane. In the jeep it is stated that the deceased did not tell anything to anybody.

30. He says it is not true that neither he nor anybody else were not along with the deceased at the time of treatment given by doctor. He further says that at that time there was smell of kerosene and burning of clothes from the body of the deceased. He says that it is not true that he had told the police that the deceased told him that she burnt due to fall of lamp. In cross examination by the prosecutor he says that at the time of statement he has not stated that the deceased told him that she burnt due to the fall of lamp.

31. The version of this witness is also not believed. Undoubtedly, he is relative of the appellant.

32. No doubt from the evidence of PW9, it appears that Exh. 64 MLC information accidental burn history is mentioned. It would not show that such statement was made by the deceased and it would have ordinarily emanated from those accompanying her.

BURN INJURIES ON APPELLANT AND HIS SONS

33. Then there remains only one aspect to be considered namely the burn injuries suffered by the appellant and his two sons. We are of the view that the burn injuries suffered by the appellant and the two sons are reconcilable with the prosecution version of homicide committed by the appellant. The appellant was drunk, he poured kerosene. The deceased in a natural response to the injuries would be frantic and her reaction would bring her into close contacts with others in a small room including the appellant and their children. No doubt the trial Court has reasoned that the appellant might have tried subsequently for extinguishing the fire. The appellant stands squarely implicated by the dying declaration. The unambiguous words came from the mouth of his deceased wife who cannot be expected to lie as she would be conscious, that she would have to meet her maker with a lie in her mouth. We see no merit in the appeal. The appeal will stand dismissed. As the appellant has been released on bail under orders of this Court, we direct that the bail bond

A of the appellant be cancelled and appellant shall be taken into custody to serve out the remaining sentence.

Kalpana K. Tripathy Appeal dismissed.