

Criminal Appeal (DB) No. 264 of 2014

[AGAINST THE JUDGMENT OF CONVICTION AND ORDER OF SENTENCE DATED 13.03.2014 PASSED BY SRI DEEPAK NATH TIWARI, THE LEARNED ADDITIONAL SESSIONS JUDGE-II, JAMSHEDPUR IN SESSION TRIAL NO. 240 OF 2012]

1. Amir Mallick
2. Gudia @ Guria.APPELLANTS

-Versus-

1. The State of Jharkhand
2. Ali HussainRESPONDENTS

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For the Appellants : M/s Amit Kr. Das and Sankalp Goswami, Advocates.
For the State : Mr. Pankaj Kumar, A.P.P.
For the Informant : M/s Asif Khan and Alok Anand, Advocates.

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P R E S E N T

**SRI ANANDA SEN, J.
SRI SUBHASH CHAND, J.**

.....
J U D G M E N T

C.A.V. On: 13.03.2024

Pronounced On: 24/05/2024.

Ananda Sen, J: This appeal is directed against the judgment of conviction and order of sentence dated 13.03.2014 passed by Sri Deepak Nath Tiwari, the learned Additional Sessions Judge-II, Jamshedpur in Session Trial No. 240 of 2012, arising out of Mango (Azadnagar) P.S. Case No. 97 of 2012, whereby and whereunder, appellant No. 1 has been punished to undergo rigorous imprisonment for life for committing the offence punishable under Section 302/34 IPC and further pay a fine of Rs.10,000/-, whereas, appellant No. 2 has been punished to undergo rigorous imprisonment for life and to pay a fine of Rs.5,000/-. In default of payment of fine, the appellants are liable to undergo rigorous imprisonment for further period of six months and three months respectively.

2. Learned counsel appearing on behalf of the appellants-convicts submitted that the main witness P.W. 1, who is the husband of the deceased, has not supported the prosecution case. As per the *Fardbeyan* of the deceased, which is dying declaration of the deceased, her husband was not in the house and had gone for morning walk, but this fact was

demolished by the statement of P.W. 1 himself, who has stated that he was present in the house and was sleeping. Counsel for the appellants also submitted that as per the dying declaration, the deceased was preparing her children to send them to school, but this fact has also been demolished from the evidence of the defence witness i.e. son of the deceased who stated that the school was closed on that day, due to some holiday. He further submitted that Ext.-A, exhibited on behalf of the appellants would suggest that the school was closed, thus the statement of the deceased, which is supposed to be dying declaration cannot be believed. He also submitted that the Doctor, who had conducted the post-mortem report, suggests that the percentage of burn injury was 96% and no smell of kerosene oil was found and as per him, he could not even say that the burn was suicidal or homicidal. As per the appellants, when the percentage of burn injury is 95-100%, it can be easily presumed that the deceased was not in a position to give any statement. He also submitted that considering the percentage of burn injury and the above discrepancies in the statement of the deceased, a doubt is created as to whether the deceased had actually stated the correct fact or not and what was her mental state. It is the contention of the appellants that the deceased while giving her dying declaration before P.W.9, stated that her *Devar* had caught her hands, her mother-in-law sprinkled kerosene oil upon her body and Sister-in-law set her ablaze, which is not in consonance with the statement given before the Magistrate, where she stated that her *Devar* and mother-in-law put kerosene oil over her and set her ablaze and she had not stated anything about her sister-in-law. He further submitted that in fact from the evidence, it is quite clear that the deceased committed suicide. He further argued that her two statements; one which is *fardbeyan* and another is the statement given before Magistrate creates doubt. Further doubt is created as to why two different doctors were assigned at the time of recording both the statements i.e. one at the time of *fardbeyan* and another at the time when Magistrate recorded her statement. He further submitted that since there are two different types of statement of the deceased and her statement is the sole basis of conviction, the same

needs to be set aside. In support of the case of the appellants, he referred several judgments of the Hon'ble Supreme Court reported in the case of **2019(4) SCC 739 (Sampat Babso Kale and Anr. V. State of Maharashtra)**, **2005(9) SCC 769 (State of Punjab V. Parveen Kumar)** and **2023 SCC OnLine SC 1358 [Abhishek Sharma Vs. State (Govt. of NCT of Delhi)]**.

3. Counsel appearing on behalf of the State as well as informant submitted that the evidences are clinching and contradiction, which the appellants are trying to put forth are immaterial in nature and the same does not have any impact on the conviction. He further submitted that this cannot be said a material contradiction and both the doctors have clearly testified that the deceased was in a fit mental status to give her statement and a Judicial Magistrate has also recorded the statement, which cannot be doubted. He further submitted that so far as defence witness and statement of P.W. 1 is concerned, the same cannot be relied upon as naturally they were giving false statement saving the accused, who are blood relation and thus, he prayed that the judgment is fit to be upheld.

4. We have gone through the Trial Court Records and have perused the evidences, both oral and documentary.

5. In this appeal, the appellants have been charged and convicted under Section 302/34 of the Indian Penal Code. Appellant No. 1, Amir Mallick, is the brother-in-law of the deceased and brother of P.W.1, appellant No. 2 i.e. Guria is the sister-in-law (*Nanad*) of the deceased and sister of P.W.1. The prosecution case is based on the statement given by the deceased- Shabana Parveen, aged about 28 years, wife of Anwar Mallick. Her statement was recorded on 5.3.2012 in the morning. She stated that she was preparing her children for school and her husband had gone for morning walk, then suddenly, her mother-in-law (Mariyam Bibi), brother-in-law (Amir Mallick) and her sister-in-law (Guria) had put kerosene oil upon her and lit fire, as a result of which, she got burn injury. She further stated that her brother-in-law caught hold her hands and mother in-law sprinkled kerosene oil upon her and sister-in-law lit the fire. She started screaming and after

sometime, the people of the locality came and so her husband and took her to Gurunank Hospital, thereafter MGM Hospital and lastly in TMH for her treatment. The reason for the aforesaid incident is that the house was in the name of the husband of the deceased, where she used to reside with the accused and she was demanding that her name also be incorporated in the records. The *fardebayan* was recorded in presence of doctor who had certified that the patient was fit to give her statement and her statement was recorded in their presence. In *fardebayan*, it was also recorded that her hands were burn, thus the impression of toe was taken. Initially the *fardebayan* was registered under Sections 307/34 of the Indian Penal Code against three accused, but later on, the case was converted into Sections 302/34 of the Indian Penal Code. As one of the accused i.e. mother-in-law of the deceased (Mariyam Bibi) died, the proceeding against her was dropped vide order dated 19.01.2013.

6. As per *fardebayan*, the occurrence had taken place on 05.03.2012 and the deceased died on 10.03.2012. To prove the prosecution case, the prosecution has produced eleven witnesses, who are P.W.-1 Anwar Mallik, P.W.2 Md. Gulam Sarwar, P.W. 3 Dr. J. Srinivas Rao, P.W. 4 Dr. Amit Kumar Sinha, P.W. 5 Ali Hussain, P.W. 6 Sajda Parveen, P.W.7 Nazir Hussain, P.W. 8 Dr. Saurabh Srivastava, P.W. 9 Bholu Prasad Yadav, P.W. 10 Akbar Ali Khan and P.W. 11 Taufique Ahmad. The prosecution has also proved and exhibited several documents to substantiate its case.

7. After closure of prosecution evidence, the statement of the appellants were recorded under Section 313 Cr.P.C. Four defence witnesses were also examined namely, D.W. 1 Abrar Ahmad, D.W. 3 Hasnain Mallick, D.W.3 Salma Parveen and D.W. 4 Md. Halim Asraf. The defence has also exhibited the attendance register of Class -VA for the month of March of M.O. Academy for Sessions 2011-12, which has been marked as Ext.-A to prove that on the date of occurrence, there was holiday in the said school.

8. The trial court after appreciating the evidences of both sides, held that the appellants are guilty for committing the offence under Section 302/34 of the Indian Penal Code and sentenced them to undergo rigorous

imprisonment for life.

9. The prosecution has examined eleven witnesses to prove its case, which are as follows:-

P.W.1, Anwar Mallik, who is the husband of the deceased deposed that at the time of occurrence, he was sleeping in the house, thus he was declared hostile as he resiled from the earlier statement given under Section 161 Cr.P.C. He denied that he had given statement before the police that there was quarrel between the deceased and other family members and on the next day, he opened the door, the deceased was burning and the deceased had told him that it is these appellants who set her ablaze.

P.W.2- Gulam Sarwar is a neighbour, who deposed, that he heard hue and cry and he went to the place of occurrence i.e. the house of the appellants when he saw that the deceased was in burning condition and P.W. 1 who is her husband stated that the deceased herself put on fire. He was also declared hostile.

In cross-examination, he admitted that the house was in the name of P.W. 1- Anwar Mallick. He denied that often these appellants and the mother-in-law used to quarrel with the deceased on the ground that the house is in the name of Anwar Mallick only. He also admitted that on hearing hue and cry, he went to the place of occurrence when he saw that the wife of Anwar Mallick was lying in burn condition.

P.W.3- Dr. J. Srinivas Rao; who deposed that on 10.3.2012 he conducted the post-mortem of the deceased and he found that the deceased was burnt and percentage of burn was 96%. His findings are as follows:

(1) *Dermo Epidermal deep injuries burn on whole body except parts of both legs and both feet.*

Percentage of burn about 96%.

(2) *On dissection of head, scalp was normal, mild contusion on right parietal lobe of the brain seen.*

Opinion:- 1. *Burn was ante-mortem,* 2. *Injury noted above was ante-mortem and caused by hard and blunt object and* 3. *Death was due to septicemia and toxemia due to burn.*

Time since death: *24 hours to 36 hours approximately from the time of*

postmortem.

In cross-examination, he stated that he did not get smell of kerosene oil from the body of the deceased nor he stated that the burning was suicidal or homicidal, but from percentage of burning, he opined that the burning is not accidental.

P.W.4- Dr. Amit Kr. Sinha; who deposed that he was posted in the Burn Unit of TMH on 6.3.2012 where the deceased, in injured condition was admitted. The Judicial Magistrate, Mr. Tafique Ahmad came to the hospital and recorded the statement of the deceased. He stated that at that point of time, Shabana Parveen was medically fit to give her statement. He stated that the statement of the deceased was recorded in his presence and Shabana Parveen was medically fit also. He stated that he endorsed that the statement of the deceased was recorded in his presence and the patient was medically fit and he had signed the said endorsement, which is marked as Ext.-2.

In cross-examination, nothing could be extracted by the defence, but he stated that he could not remember that what was the question which was put to the injured Shabana Parveen by the Judicial Magistrate.

P.W.5-Ali Hussain, the father of the deceased, stated that the deceased was married with Anwar Mallick 12 years ago. He stated that the mother-in-law of the deceased was the step mother of the husband of the deceased. Often there was quarrel between the deceased and her in-laws and the deceased died because of property dispute. He stated that on 4.3.2012, he went to the house of his daughter when all the accused started quarrelling with the deceased and also assaulted her. He tried to make them understand. On next day, i.e. on 5.3.2012 he sent his elder son to the house of his sister and when he reached there he saw a crowd, when he came to know about the incident that the appellants have burned the deceased. He went to the hospital where the deceased told him that the appellants have set her on fire. He also stated that deceased told them that appellant No. 1 had caught hold her hands, Mother-in-law put kerosene oil upon her and sister-in-law lit the flames.

In cross-examination, nothing could be extracted from his evidence. But

he stated that he talked with her daughter in MGM hospital and not in TMH. He denied that his daughter committed suicide.

P.W.6- Sajda Parveen, who is the sister of the deceased, stated that she received information on 5.3.2012 that her sister was burnt then she went to MGM Hospital where was found Shabana Parveen in burnt condition and she was screaming. On query, she told this P.W that Amir Mallick caught hold her hands Mariyam Bibi sprinkled kerosene oil upon her and Guria with match stick burnt her. From there, she was taken to TMH where she died after 4-5 days. She stated that the occurrence took place because of land dispute.

In cross-examination, he stated that the appellant had not questioned her. She denied the defence suggestion that there was no enmity between the deceased and her family members.

P.W. 7- Nazir Hussain, who is the brother of the deceased, stated that on 4.3.2012, his father went to the house of the deceased to bring her back but Anwar Ali did not allow her to go by telling that she will go on the next day. On 5.3.2012 his father told him to go to the house of the deceased to bring her. When he went there, he came to know that her sister was burnt and she was taken to hospital. He went to Hospital and thereafter returned and narrated the story to his father. He went to MGM Hospital when her sister told that it is these appellants who set her on fire. Seeing her situation, she was immediately taken to TMH Hospital where she died after 4-5 days.

In cross-examination, he stated that he went to Gurunank Hospital because some people told him that his sister was taken to Gurunank Hospital. In MGM Hospital she was kept in emergency ward but thereafter within half hour, she was taken to TMH Hospital. He could not give the number of the emergency bed where his sister was admitted.

P.W.8: Dr. Saurabh Srivastava, was on duty in TMH in burn ward on 5.3.2012. He stated that in burnt condition, Shabana Parveen was admitted in hospital in Burn Care Unit Bed No. 2. He stated that the *fardbeyan* was recorded by the Police Officer B.P. Yadav of Mango Police Station in his presence. He stated that the patient was fit for giving statement thus this

P.W. had given certificate of fitness for recording the statement of the patient. He stated that endorsement given in fardbeyan is in his own handwriting. The said certificate was marked as Ext.-3. He also stated that as the thumbs of the deceased were burnt, the great toe impression of right leg was taken on the fardbeyan.

In cross-examination, he stated that from the record, he could say that who were other patients admitted in Burn Ward. He stated that after going through the record, he is giving the name of Police Officers who were present. From the record, he is saying the date and time. He stated that the police officer has asked as to whether the patient was in fit condition to give her statement or not. In cross-examination, he stated that he has not mentioned in the certificate that the patient was fit to give clear statement but had written that the patient was fit for giving statement. He stated that in the certificate, he has not written that the patient was not in a position to give her thumb impression thus her toes impression was taken. He further stated that he has not mentioned as to how he found that the patient is fit for giving the statement. He denied the suggestion that the statement was recorded earlier and thereafter he put his signature.

P.W.9, Bhola Prasad Yadav, Sub-Inspector, who deposed that on 5.3.2012 while he was posted at Mango Police Station he went to TMH Jamshedpur on direction of Officer-in-Charge Mango and he recorded the statement of injured, who was admitted in burn ward in presence of doctor on duty. He further deposed that he has proved the fardbeyan of Shabana Parveen and put his signature, which has been marked as Ext.-3/1. He also deposed that he took impression of her right toe on fardbayan as her both thumbs were in burnt condition.

P.W. 10 Akbar Ali Khan, the Sub-Inspector, who deposed that on 5.3.2012 he was posted at Azadnagar Police Station as Sub-Inspector and on that day at 10:45 a.m, Officer in-charge received a telephone call to the effect that a lady sustained serious burn injuries and is being treated in TMH, Jamshedpur. He went there and saw that Police Sub-Inspector, Bhola Prasad Yadav of Mango Police Station has recorded the fardbeyan of the

injured, which was handed over to him. He has proved the forwarding report as Ext. 3/2. He has also proved the endorsement of fardbeyan and put his signature, which has been marked as Ext.3/3. He also proved the formal FIR as Ext. 4. He further deposed that he took the charge of investigation of this case and recorded the statement of informant, Dr. Saurav Srivastava and other witnesses and inspected the place of occurrence. He further deposed that on his prayer, on 6.3.2012 the statement of the informant was recorded under Section 164 Cr.P.C by the Judicial Magistrate. He further deposed that the fact i.e. the Marrium Bibi was the step mother of the husband of deceased, which finds mentioned in the case diary, but he has no proof of it. He lastly deposed that he had not seized any clothes of the deceased.

P.W.11, Sri Taufique Ahmad, the Judicial Magistrate, 1st Class, Jamshedpur, deposed that on 6.3.2012 he was posted as Judicial Magistrate, 1st Class at Jamshedpur and on that day, he recorded the statement of Shabana Parveen under Section 164 Cr.P.C in burn unit of TMH in presence of Dr. Amit Kumar Sinha, who declared that the injured was mentally fit and capable to give statement, thereafter he recorded the statement. He deposed that the impression of right toe of the injured was taken on the statement because her both thumbs were seriously burnt and she was not capable to put thumb impression for which he as also given a certificate to this effect. He has proved the statement of the injured recorded under Section 164 Cr.P.C. as Ext.2/1.

In cross-examination, he deposed that he had not taken the certificate of medical officer in writing before recording of the statement of the injured rather the medical officer orally stated that the victim is fit and capable to give her statement, but has not mentioned this fact in the statement.

Defence Witnesses

D.W. 1, Ebrar Ahmad, who deposed that on the day of occurrence Amir Mallick informed him telephonically that his *bhabhi* sustained burn injuries and thereafter his mother and his elder brother taken the injured to Hospital and thereafte Amir arrived at his house then he and Amir both went to Gurunanak Hospital, where he came to know that deceased was sent to

TMH. Thereafter they went to TMH, where he came to know that there was no burn case in TMH and finally they came to MGM and found that victim was crying and she was not able even to speak. In para 5, he deposed that Amir Mallick had given this information to the parents of the deceased.

In cross-examination, he denied about any dispute between the deceased and accused persons.

D.W.2, Hasnain Mallick, aged about 12 years, deposed that the injured was his mother. He deposed that at present, he is a student of Class VII in M.O. Academy and on the date of occurrence, his school was closed due to festival and he had informed about this holiday to his mother. In Para 4, he deposed that his maternal grand father had instructed him to depose in court that her mother was ablazed.

In cross-examination, in para 8, he deposed that his mother died due to burn injuries and at the time of occurrence, he was sleeping. In para 9, he stated that due to land dispute, altercation used to occur between her mother and grand mother.

D.W.3, Salma Parveen, who deposed that on 5.3.2013, upon hue and cry, she went to the house of Anwar Mallik and found the door of his house closed from outside and she saw Sabana Parveen was running in courtyard engulfed in flames and Anwar, Hasnain and her husband Arif had extinguished the fire and at that time Marrium Bibl was calling her neighbours from a room situated at 1st floor, while Guria (*nanad*) had gone outside of the house to work and her *devar* Aman was sleeping with deceased's mother-in-law (Marrium Bibi).

In cross examination, she admitted that the house was purchased in the name of the husband of the deceased by his father.

D.W.4- Md. Halim Asraf, the Head Master of M.O. Academy, where D.W. 2 was studying at that time, has proved the attendance register, upon which the name of Hasnain Mallick was figured as SI No. 28 and he has proved the page of register, which shows that on 5.3.2012 was holiday and the same was marked as Ext. A. In paragraph 10, he has stated that he do not give written information of holidays to the students. They only affix information on

Notice Board.

10. In this case, as mentioned earlier, eleven witnesses have been examined on behalf of the prosecution. Out of eleven witnesses, P.Ws. 1, 2, 5, 6 and 7 are the family members of the accused or their neighbours. P.Ws. 3, 4 and 8 are the doctors. P.W.3 is the Doctor, who conducted the postmortem of the deceased and P.Ws. 4 and 8 are the Doctor in whose presence, the FIR by way of dying declaration and the statement under Section 164 Cr.P.C were recorded. P.Ws.-9 & 10 are the police officials:- P.W.-9 recorded that fardbeyan where P.W.-10 is the Investigating Officer of this case. P.W.-11 is the Judicial Magistrate in whose presence statement under Section 164 Cr.P.C. has been recorded. These are the categories of the witnesses who are produced to prove the prosecution case.

11. The main pillar on whose basis the appellants have been convicted is the dying declaration of the deceased. The statement of the deceased was recorded twice; one when the F.I.R. was instituted i.e. on the basis of fardbeyan of the deceased and the second is the statement of the deceased recorded under Section 164 Cr.P.C. The entire prosecution is based on the dying declaration, corroborated by the medical evidence. The Hon'ble Supreme Court in the case of ***Purshottam Chopra & Anr. Vs. State (Government of NCT of Delhi)*** reported in **(2020) 11 SCC 489**, at para-21 and 21.8 has held as under:-

“21. For what has been noticed hereinabove, some of the principles relating to recording of dying declaration and its admissibility and reliability could be usefully summed up as under:-

21.8. If after careful scrutiny, the court finds the statement placed as dying declaration to be voluntary and also finds it coherent and consistent, there is no legal impediment in recording conviction on its basis even without corroboration.”

12. As stated earlier, the statement of the deceased was recorded twice. Thus, there are multiple dying declarations. The Hon'ble Supreme Court in the case of ***Abhishek Sharma Vs. State (Govt. of NCT of Delhi)*** reported in **2023 SCC OnLine SC 1358** has summarised the cases where there are multiple dying declarations. Para-9 of the aforesaid judgment needs to be quoted, which is as follows:-

9. Having considered various pronouncements of this court, the following principles emerge, for a Court to consider when dealing with a case involving multiple dying declarations:

9.1 The primary requirement for all dying declarations is that they should be voluntary and reliable and that such statements should be in a fit state of mind;

9.2 All dying declarations should be consistent. In other words, inconsistencies between such statements should be 'material' for its credibility to be shaken;

9.3 When inconsistencies are found between various dying declarations, other evidence available on record may be considered for the purposes of corroboration of the contents of dying declarations.

9.4 The statement treated as a dying declaration must be interpreted in light of surrounding facts and circumstances.

9.5 Each declaration must be scrutinized on its own merits. The court has to examine upon which of the statements reliance can be placed in order for the case to proceed further.

9.6 When there are inconsistencies, the statement that has been recorded by a Magistrate or like higher officer can be relied on, subject to the indispensable qualities of truthfulness and being free of suspicion.

9.7 In the presence of inconsistencies, the medical fitness of the person making such declaration, at the relevant time, assumes importance along with other factors such as the possibility of tutoring by relatives, etc.

13. From the judgment of the Hon'ble Supreme Court in the case of *Purshottam Chopra (supra)*, a dying declaration can be sole basis of conviction even without corroboration, if the same inspire confidence. The Hon'ble Supreme Court in the case of **Madan Vs. State of Maharashtra** reported in **(2019) 13 SCC 464**, has held as under;

“Moreover, this Court has consistently laid down that a dying declaration can form basis of conviction, if in the opinion of the Court, it inspires confidence that the deceased at the time of making such declaration, was in a fit state of mind and there was no tutoring or prompting”.

14. In the case of **Ravikumar Vs. State of T.N.**, reported in **(2006) 9 SCC 240**, the Hon'ble Supreme Court has held as follows;

“Once the court is satisfied that the declaration was true and voluntary, it undoubtedly, can base its conviction on the dying declaration without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it

is corroborated. The rule requiring corroboration is merely the rule of prudence”.

15. In the case of **Jai Karan Vs. State of Delhi (NCT)**, reported in **(1999) 8 SCC 161**, the Hon'ble Supreme Court has also held as under;

“in order that in order that a dying declaration may form the sole basis for conviction without the need for independent corroboration it must be shown that the person making it had the opportunity of identifying the person implicated and is thoroughly reliable and free from blemish. If, in the facts and circumstances of the case, it is found that the maker of the statement was in a fit state of mind and had voluntarily made the statement on the basis of personal knowledge without being influenced by others and the court on a strict scrutiny finds it to be reliable, there is no rule of law or even of prudence that such a reliable piece of evidence cannot be acted upon unless it is corroborated. A dying declaration is an independent piece of evidence like any other piece of evidence – neither extra strong nor weak – and can be acted upon without corroboration if it is found to be otherwise true and reliable”.

16. Considering all these judgments, now let us delve into the aspect as to whether the dying declaration is very voluntary, given in a fit state of mind and there was no tutoring and prompting and is reliable or not. The first we are dealing with the state of mind of the informant, who had given the dying declaration. The first statement of the deceased is the Fardbeyan, wherein, she stated that she was burnt by these appellants. Her fardbeyan was recorded by Bhola Yadav, the then Sub-Inspector who was posted at Mango Police Station, who stated that the statement of the deceased was recorded in Burn Ward in presence of Doctors, who were present on duty. He stated that he had taken the right toe impression on the fardbeyan as both thumbs of the deceased were in burnt condition. The Doctor, in whose presence, the said statement was recorded is P.W.8, who stated that he was on duty on 5.3.2012 when Shabana Parveen was admitted in hospital in Burn Unit Bed No. 10. He further stated that Fardbeyan was recorded by Police Officer, B.P. Yadav of Mango Police Station (P.W.9) in his presence. The said doctor P.W. 8 stated that the patient was fit for giving her statement, thus he had given the certificate of fitness of the informant, for recording the statement of the deceased. He also stated that he has

endorsed in the fardbeyan in his own handwriting of the aforesaid fact.

17. When we go through the fardbeyan, we find that the same has been marked as Ext.-3/1. In the said fardbeyan, the doctor has given his endorsement that the patient is fit to give her statement. The Statement is recorded in his presence. This endorsement was recorded and marked as Ext.-3. This clearly suggests that the doctor found the deceased mentally fit to give her statement and her statement was recorded in his presence by P.W.9.

18. The second statement is the statement recorded under Section 164 Cr.P.C on the very next day by the Judicial Magistrate (P.W.11). He deposed that on 6.3.2012, he recorded the statement under Section 164 Cr.P.C of the deceased in Burn Unit in TMH in presence of Doctor Amit Kr. Sinha (PW.4). He stated that the said Doctor had declared the injured to be medically fit and capable to give her statement and thereafter he recorded the statement. He also stated that right toe impression of the deceased was taken as the thumbs were burnt. Doctor also deposed that in the Burn Unit on 6.3.2012 the Judicial Magistrate (PW.11) came to the hospital and got the statement of the injured recorded and at that point of time, the victim/injured was medically fit to give her statement. He also stated that the statement was recorded in his presence and he had endorsed that the statement was recorded in his presence and the patient was medically fit to give her statement.

19. When we look into the statement recorded under Section 164 Cr.P.C, which is marked as Ext.-2/1, we find that the Doctor i.e. Amit Kr. Sinha had endorsed that the statement was recorded in his presence and the patient is medically fit to give her statement. The entire statement was also exhibited.

20. Thus, from the aforesaid two statements and the evidences read together, it is clear that the deceased was in the fit state of mind to give both the statements and the same were recorded in presence of doctors by the Police and thereafter by the Judicial Officer. Further, we find that two different doctors on two different dates i.e. on 5.3.2012 and 6.3.2012

separately had given their opinion that the deceased was in a fit state of mind to give her statement. Both these two doctors have separately endorsed that both the statements were recorded in their respective presence. The Police Official, who had recorded the fardbeyan and the Judicial Magistrate, who had also recorded the statement under Section 164 Cr.P.C also independently stated that respective doctors were present when they recorded the statement and in their presence and the same were recorded. They also stated that the doctors had endorsed that the deceased was in fit state of mind to give her statement. When there are four different persons stating in similar line that the deceased was medically fit to give the statement and the statements were recorded in presence of doctors, there is no room to doubt about the mental status of the deceased at the time when she gave her statement. Further from the evidence, we do not find any material to suggest that the said statement was tutored or the statement was not voluntary.

21. Be it noted that the statements of the deceased were recorded by independent persons. Further we find that both statements of the deceased were recorded immediately without any delay and in absence of any relative of the deceased. Thus, there is no room to influence the informant emotionally or physically, which could have led to any doubt about the quality of dying declaration. Thus, we hold that the deceased had given her statements in a fit state of mind without there being any influence, coercion or pressure.

22. The defence has tried to discard the dying declaration on the basis of evidence of P.W. 1 in which he stated that he was sleeping in the room when the accident had occurred whereas, in the dying declaration, the deceased stated that her husband went out on morning walk. This is also not a major discrepancy as the fact remains that from the dying declaration, as per the deceased, her husband was not present and has not seen the occurrence of setting her ablaze. So far as evidence of defence witness is concerned, there is nothing much to discredit the dying declaration. Thus, we hold that there is no doubt about the dying declaration.

23. A point was raised that the deceased was burnt to the extent of approximately 95-100%, as opined by the Doctor, who had conducted the postmortem, thus the deceased was not in a fit state of mind to give her statement. We do not agree with the aforesaid submission. As held earlier, both the doctors on two different dates, had endorsed and stated before the Court also that the deceased was in a fit state of mind to give her statement. Further in the case of **Purshottam Chopra** (Supra), due to burn injury which was upto 100%, the Hon'ble Supreme Court accepted the dying declaration. In paragraph 25.2 it has been held as under;

“**25.2.** Another emphasis laid on behalf of the appellants is on the fact that the victim Sher Singh had suffered 100% burns and he was already in critical condition and further to that, his condition was regularly deteriorating. It is, therefore, contended that in such a critical and deteriorating condition, he could not have made proper, coherent and intelligible statement. The submissions do not make out a case for interference. As laid down in Vijay Pal case [Vijay Pal v. State (NCT of Delhi), (2015) 4 SCC 749 : (2015) 2 SCC (Cri) 733] and reiterated in Bhagwan case [Bhagwan v. State of Maharashtra, (2019) 8 SCC 95 : (2019) 3 SCC (Cri) 289] , the extent of burn injuries — going beyond 92% and even to 100% — would not, by itself, lead to a conclusion that victim of such burn injuries may not be in a position to make the statement. Irrespective of the extent and gravity of burn injuries, when the doctor had certified him to be in fit state of mind to make the statement; and the person recording the statement was also satisfied about his fitness for making such statement; and when there does not appear any inherent or apparent defect, in our view, the dying declaration cannot be discarded.”

Thus we discard the contention of the appellant that since the deceased was 100% in burnt condition and she was not in a fit state of mind to give her statement.

24. In this case, as held earlier, we find that there are two dying declarations, thus it is a case of multiple dying declaration and in case of multiple dying declaration, the Court has to be very cautious and see whether the same is voluntary and reliable and whether there is inconsistency or not. Each dying declaration should be scrutinised on its own merit. Further, as per the judgment of Hon'ble Supreme Court in the case of **Abhishek Sharma** (Supra), if at all there are discrepancies, the statement

recorded by the Magistrate or higher official can be relied on, subject to the indispensable qualities of truthfulness and being free of suspicious.

25. Now let us see the contents of the dying declaration and come to the conclusion as to whether there are any discrepancies in both the statements or not. The first is the dying declaration, which is the fardbeyan dated 5.3.2012 in which, it is stated that when the deceased woke up and she was preparing to send the child to School and her husband had gone for morning walk, mother-in-law (Mariyam Bibi), brother-in-law (Amir Mallick-appellant No.1) and *Nanad*- Gudia (Appellant No. 2) came and sprinkled kerosene oil on her body and set her on fire. She stated that Amir Mallick was holding her hands and mother-in-law sprinkled kerosene oil on her body whereas sister-in-law lit the fire. When she started shouting, after some time people of the locality as well as her husband reached the place of occurrence and thereafter she was taken firstly to Gurunank Hospital then MGM and thereafter TMH, where the fardbeyan was recorded. She had also stated about the motive of this act, that the land and building was recorded in the name of her husband, in which, she was also claiming and was asking to get the same in her name included.

26. Now the second statement is the statement recorded under Section 164 Cr.P.C wherein, she stated that she was in her house and she came down from stairs when her mother-in-law and brother-in-law burnt her. She also stated that the entire incident occurred because there was some dispute in respect of properties. Thus from these two statements, we find that there is only one discrepancy in her statement; before the police in the fardbeyan, she had taken the name of her sister-in-law (*Nand*) who had participated in the occurrence but in the statement recorded under Section 164 Cr.P.C, she has not taken the name of her sister-in-law. In both statements, she has stated that she was burnt in the morning and the reason for this act is that the land the property was in the name of her husband. Thus from both statements, we conclude that there is one minor deviation, i.e. not naming the sister-in-law in the second dying declaration.

27. As per dying declaration, the deceased was burnt to death. The

fact that the deceased was burnt is corroborated from the evidence of Doctors, who conducted the postmortem of the deceased, who found antimorten burn injuries. The two doctors i.e. P.Ws 4 and 8 in whose presence, the statements of the deceased were recorded also stated about burnt injury. Further, P.Ws. 1, 2, 5, 6 and 7 also stated that the deceased was burnt.

28. Though P.W. 1 has been declared hostile. He stated that he had not narrated before the police what has been stated by the wife to him after she was burnt, yet the I.O in his examination has categorically stated that P.W.1 had narrated before him that there was dispute between in-laws and the deceased on 4.3.2012 i.e. a day before the incident. On the next day when he opened the door, he saw her wife set ablaze and running towards courtyard and she fell. Then P.W.1 went near her when she stated before him that it is the appellants i.e. mother-in-law and sister-in-law who had poured kerosene oil upon her and thereafter burnt her to death and her brother-in-law (appellant No. 1) caught hold of her hands. P.W.2, who is a neighbour, deposed that when he went to the house of P.W.1, he saw the deceased in burnt condition in the courtyard. He also admitted in paragraph 1 that the house was in the name of Anwar Mallick i.e. the husband of the deceased. Thus it is proved that the deceased was burnt.

29. The defence has also tried to point out the discrepancies and tried to create doubt about the statement of the deceased by referring to the defence witnesses. It is the case of the defence that the school of her child was closed on the date of occurrence, thus the deceased who stated that she was getting ready to send the child to school on that day, when the accident occurred, is not correct. As per the appellants, the entire dying declaration thus be discarded. We do not find much force in the aforesaid submission even if the school was closed. The fact which is immaterial is that she in both statements stated that she was burnt by the appellants. Thus, it cannot be said that there is inherent defect in the dying declaration for which, the entire dying declaration can be discarded.

30. So far as motive is concerned, there is consistent evidence that the

house and property was in the name of the husband of the deceased only which the deceased also wanted to be recorded jointly in her name. P.W. 5 also corroborated the fact that the dispute was in respect of house and property. It has also come in evidence that the mother-in-law, brother-in-law and sister-in-law were step mother, step brother and step sister of the husband of the deceased and the relationship was not cordial. Thus the motive has been proved.

31. The next important question is involvement of these two appellants. As stated earlier, the case hinges on the dying declaration of the deceased. There are two dying declarations. In paragraph 9.6 of the judgment of **Abhishek Sharma** (supra), the Hon'ble Supreme Court has held that when there are inconsistencies, the statement that has been recorded by a Magistrate or like higher officer can be relied on, subject to the indispensable qualities of truthfulness and being free from suspicion. As held earlier, there is one small discrepancy in both the statements, i.e. in the fardbeyan, she has taken the name of appellant No. 2- Gudia, appellant No. 1 and mother-in-law who were involved in commission of the offence, but while giving her statement under Section 164 Cr.P.C, she had taken the name of mother-in-law and brother-in-law and has not taken the name of Gudia (Appellant No.2), but from these statements, how she was burnt is consistent. The name of appellant No. 1 and his act is reflected in both statements consistently, which gives us no room but to conclude that Amir Mallick (Appellant No.1) was involved in the entire occurrence and the prosecution has been able to prove the guilt of appellant No. 1 beyond all reasonable doubt.

32. The Hon'ble Supreme Court in the case of **Jumni and Others with Prem Nath and Another Vs. State of Haryana** reported in **(2014) 11 SCC 355** has held that in law there is no difficulty in segregating the role of two sets of the accused persons, if the dying declaration is severable.

Thus, from the aforesaid judgment, we understand that if the role of two accused can be segregated, it has to be done. Thus, on conjoint reading of the above judgment and the case of **Abhishek Sharma** (Supra), the Hon'ble

Supreme Court has held that if there are two dying declarations and there is some inconsistency between them, the statement, which has been recorded before the Magistrate or the higher official, can be relied upon. Thus, we conclude that since in the dying declaration, given by the deceased before the Judicial Magistrate, the deceased has not taken the name of appellant No. 2 (Gudia @ Guria), there is some element of doubt about her involvement.

33. Thus we hold that there is no infirmity in the dying declaration and the same is without any pressure, fear and coercion and the same is also voluntary, genuine and being free from suspicion and further the same is not tutored and prompted. In that view, the dying declaration, in view of the judgment of Hon'ble Supreme Court, discussed above, can be the sole ground of conviction.

34. As per the dying declaration, we hold that the prosecution has been able to prove the involvement of appellant No. 1 (Amir Mallick) in the commission of this offence beyond all reasonable doubt. Thus the conviction of appellant No. 1 (Amir Mallick) is upheld. Accordingly, this Criminal Appeal, so far appellant No. 1, namely, **Amir Mallick** is concerned, the same is **dismissed**.

35. So far as appellant No. 2 is concerned, by giving benefit of doubt, as she was not named by the deceased in her dying declaration, recorded by the Judicial Magistrate under Section 164 Cr. P.C, we acquit her. Accordingly, this Criminal Appeal, so far appellant No. 2, namely, Gudia @ Guria is concerned, the same is **allowed**. Thus, appellant No. 2- **Gudia @ Guria** be released forthwith from custody, if not required in any other case.

36. In the result, this appeal is partly **allowed**. Let the Trial Court Records be sent back to the Court concerned forthwith, along with a copy of this judgment.

(ANANDA SEN, J.)

SUBHASH CHAND, J. - I agree.

(SUBHASH CHAND, J.)

Jharkhand High Court, Ranchi.

Dated: 24/05/2024.

AFR/Anu/Cp.-3.