**SUPREME COURT OF INDIA**

Shudhakar

Vs.

State of M.P

Crl.A.No.2472 of 2009

(Swatanter Kumar and Fakkir Mohamed Ibrahim Kalifulla, JJ.)

24.07.2012

**JUDGMENT**

**Swatanter Kumar, J.**

1. An important question of criminal jurisprudence as to in a case of multiple variable dying declarations, which of the dying declaration would be taken into consideration by the Court, what principles shall guide the judicial discretion of the Court or whether such contradictory dying declarations would unexceptionally result in prejudice to the case of the prosecution, arises in the present case.

2. The facts as brought out in the case of the prosecution are that the accused Shudhakar was married to the deceased Ratanmala and they used to live at Ganesh Chowk Seoni, Tehsil and District Seoni, Madhya Pradesh. They were living in the house of one Krishna Devi Tiwari. The accused was suspicious about the character of his wife Ratanmala. On the date of occurrence, i.e., 25th July, 1995, there was argument between the husband and the wife in consequence to which the accused assaulted Ratanmala. Thereafter, he poured kerosene oil on her and put her ablaze by lighting a match stick due to which there was smoke in the house. The people living nearby gathered around the house upon seeing the smoke and finding Ratanmala in burning condition, took her to the hospital wherein she was admitted by PW8, Dr. M.N. Tiwari and was occupying bed No.10 of the surgical ward of the district hospital. Except the upper portion, her entire body had been burnt. Her body was smelling of kerosene. The injuries were fresh. According to the medical evidence, they were caused within five hours and the burn injuries were fatal for life. As per the statement of PW4, Dr. H.V. Jain, one Dr. Smt. A. Verma, lady doctor, gynaecologist had accompanied him for the post mortem of the dead body of the deceased which was brought by Constable Bhoje Lal from Seoni. Statement of PW4 clearly shows that upon post mortem examination, Rigor Mortis was found on the entire dead body. Both the eyes were closed, superficial burns were present on the entire body. The skin had separated at a number of places. The body was burnt

between 97 per cent to 100 per cent. There were burn injuries on the skull and occipital region. The cause of death was shock and hipobolamar which was caused due to severe burn injuries and due to fluid loss.

3. It is the case of the prosecution that Ratanmala had told the people gathered there that the accused had burnt her by pouring kerosene oil on her. When she reached the hospital, the doctor had informed the police. The doctors also informed the Naib Tehsildar, DW1, who came to the hospital and recorded the first dying declaration (Exhibit D/2) of the deceased Ratanmala at 4.35 p.m. on 25th July, 1995. In her first dying declaration, she did not implicate her husband and stated that she received the burn injuries from a stove while cooking food. Before her death, two more dying declarations were recorded in the hospital. One (the second) declaration (Exhibit P-12) was recorded by Rajiv Srivastava, Tehsildar (PW9) at 6.30 p.m. on the same date. In relation thereto, Dr. Jain had endorsed the certificate of fitness of the deceased to make the statement. The third dying declaration (Exhibit P-6) was recorded by Sub-Inspector D.C. Doheria, (PW7) in presence of two independent witnesses, Bharat Kumar and Abdul Rehman. In these two subsequent dying declarations recorded by PW9 and PW7, respectively, the deceased had specifically implicated the accused by clearly stating that he had put kerosene oil on her and set her on fire. The reason for not implicating her husband in her first dying declaration was that there was every likelihood that his husband would lose the job.

4. Unfortunately, she succumbed to the burn injuries and died in the hospital itself. Inquest proceedings were carried out. The Investigating Officer prepared the site plan and the body of the deceased was subject to post mortem which was performed by PW4, Dr. H.V. Jain. The Investigating Officer recovered matches as well as burnt match, broken mangalsutra and burnt saree from the place of occurrence. Among certain other articles recovered from the site, one can was also recovered in which about one litre of kerosene oil was still remaining.

5. Now, we may discuss some of the prosecution witnesses. PW1, Krishna Bai Tiwari is the landlady in whose house the accused and the deceased used to live. According to her, quarrels used to take place between the husband and the wife and even cooked food used to be left behind in their house. The accused frequently used to be under the influence of liquor. About 4-6 days prior to the date of occurrence, she had been called by the deceased to request the accused to have food. According to this witness, on the date of occurrence, the deceased had requested her to accompany her to the bank for opening an account, which she had done and a bank account in the name of the deceased was opened. Thereafter, she went upstairs but after some time, the boys of the locality told her that smoke was coming out from the room upstairs. When she went upstairs along with other people, she saw the deceased in flames.

They doused the flames in the mattress in an attempt to save the deceased. On being asked, Ratanmala told her that she had been burnt by the accused by pouring kerosene oil on her.

6. PW3, Gunwant, father of the deceased, is another witness who stated that the deceased often told him that the accused, after drinking liquor, used to beat her. The sister of the accused had come and informed him that the deceased had received burn injuries and was admitted to the hospital.

7. PW5, Rajender Dubey, is a witness who was present near the house of the accused at the time of the occurrence and after seeing the fire, he had gone up to the house of the accused and saw that smell of kerosene was coming from the room. The deceased's body was burnt and she told him that her husband had poured kerosene on her body and set her on fire. To similar effect is the statement of PW6, Mohan Lal Yadav. This witness, however, added that the accused was trying to extinguish the fire. Further, as already noticed, PW7, D.C. Daharia, had recorded her statement (Exhibit P-6). Even the accused was stated to be present at the time of recording of the third dying declaration and she clarified that she had not received burn injuries from the stove, as said by her earlier. We have already noticed the evidence of the doctors.

8. It is evident that the defense had examined two witnesses, namely, DW1, Sumer Singh, Naib Tehsildar and DW2, Dr. S.L. Multani. DW1 had recorded the first dying declaration of the deceased. According to this witness and as per Exhibit D2, the statement recorded by him, it is clear that he did not take the certification of the doctor prior to the recording of the statement to the effect that she was in a fit state of mind to make the statement. Exhibit P12 was the second dying declaration that was recorded and Kamat Prasad Sonadia, the witness was present at the time of recording of this dying declaration. DW2, Dr. S.L. Multani who was examined by the defense also stated that if a person tries to burn another and the burnt person pushes, then it is possible to suffer such injuries as had been suffered by the accused.

9. It is a settled principle of law that the prosecution has to prove its case beyond any reasonable doubt while the defence has to prove its case on the touchstone of preponderance and probabilities. Despite such a concession, the accused has miserably failed to satisfy the court by proving his stand which itself was vague, uncertain and, to some extent, even contradictory.

10. Exhibit P12, the second declaration of the deceased can be usefully referred to at this stage as under:

> "Certified that Ratnabai W/o Sudhakar admitted in FSW is fully conscious to give her statement.Sd/-25.7.95.6.30 P.M.What is your name :- Ratna Time 6.30 Husband's

name : Sudhakar Age and place of : 21 Years Ganesh Residence : Chowk.What happened : My husband Sudhakar burnt me. Shy burnt : Today I had gone along with mother to get passbook prepared. After returning back, my husband quarreled with me and gave filthy abuses and said that you are a bad character and that you have illicit relationship. After that my husband pour kerosene oil over me and set me on fire. Earlier I had given wrong statement on tutoring of my husband. Sd/- 25.7.95 Time 6.30 P.M. Certified that Pt was conscious to giver her statement. Sd/- 25.7.95 Time 6.45"

11. To similar effect is the third dying declaration, however, in some more detail, which was recorded in presence of witnesses by the Investigating Officer. After the prosecution evidence was concluded, the statement of the accused under Section 313 of the Code of Criminal Procedure, 1973 (CrPC) was recorded wherein the accused admitted the fact that the deceased was his wife and she died because of burn injuries. Rest of the incriminating circumstances and evidence put to him were disputed and denied by the accused. However, in answer to question number 13, as to whether he would like to say something in his defence, he stated that his wife Ratanmala died in a fire incident and he had made efforts to save her and in that process he also suffered some injuries. The accused denied that he had put her on fire and deposed that he was innocent.

12. The learned Trial Court found that the prosecution had been able to prove its case beyond reasonable doubt and, thus, held the accused guilty of an offence under Section 302 IPC and punished him to undergo imprisonment for life and to pay a fine of Rs.5,000/-, in default thereof to undergo one year's rigorous imprisonment.

13. Upon the appeal preferred by the accused, the High Court affirmed the judgment of conviction and order of sentence and dismissed the appeal, giving rise to the present appeal.

14. The main argument advanced by the learned counsel appearing for the appellant, while impugning the judgment under appeal, is that the deceased had made various dying declarations. The first dying declaration had completely absolved the accused. Recording of subsequent dying declarations (Exhibit D2) could not be made the basis of conviction keeping in view the facts and circumstances of the present case. Reliance was placed upon the judgment of this Court in the case of Laxman v. State of Maharashtra [(2002) 6 SCC 710] to contend that the first dying declaration should be believed and accused be acquitted as it was not necessary that there should be due certification by the doctor as a condition precedent to recording of the dying declaration. It has also been argued that the prosecution concealed from the Court and did not itself produce the first dying declaration which has been proved by DW1. Thus, presumption under Section 114 of the Indian Evidence Act,

1872 (for short the 'the Evidence Act') should be drawn against the prosecution and benefit be given to the accused. The first dying declaration should be preferred as it is the most genuine statement made by the deceased and in the present case will entitle the accused for an order of acquittal by this Court. Reliance has been placed upon the judgment of this Court in the case of Muthu Kutty v. State [(2005) 9 SCC 113] in that regard.

15. To the contrary, the argument on behalf of the State is that the first dying declaration is based on falsehood and was made under the influence of the family members of the accused. The second and third dying declarations had been recorded after due certification by the doctor and are duly corroborated by other prosecution evidence. The deceased herself has provided the reason why she had made the first dying declaration which was factually incorrect. While placing reliance upon the judgment of this Court in the case of Lakhan v. State of M.P. [(2010) 8 SCC 514], it has been contended that in the case of contradictory dying declarations, the one which is proved and substantiated by other evidence should be believed. Since Exhibit P12 is the true dying declaration of the deceased, the accused has rightly been convicted under Section 302 IPC and the present appeal is liable to be dismissed.

16. We may, now, refer to some of the judgments of this Court in regard to the admissibility and evidentiary value of a dying declaration. In the case of Bhajju @ Karan v. State of M.P. [(2012) 4 SCC 327], this Court clearly stated that Section 32 of the Evidence Act was an exception to the general rule against admissibility of hearsay evidence. Clause (1) of Section 32 makes statement of the deceased admissible, which has been generally described as dying declaration. The court, in no uncertain terms, held that it cannot be laid down as an absolute rule of law that dying declaration cannot form the sole basis of conviction unless it is corroborated by other evidence. The dying declaration, if found reliable, could form the basis of conviction. This principle has also earlier been stated by this Court in the case of Surinder Kumar v. State of Haryana (2011) 10 SCC 173 wherein the Court, while stating the above principle, on facts and because of the fact that the dying declaration in the said case was found to be shrouded by suspicious circumstances and no witness in support thereof had been examined, acquitted the accused. However, the Court observed that when a dying declaration is true and voluntary, there is no impediment in basing the conviction on such a declaration, without corroboration.

17. In the case of Chirra Shivraj v. State of Andhra Pradesh [(2010) 14 SCC 444], the Court expressed a caution that a mechanical approach in relying upon the dying declaration just because it is there, is extremely dangerous. The court has to examine a dying declaration scrupulously with a microscopic eye to find out whether the dying declaration is voluntary, truthful, made in a conscious state of mind and without being influenced by other persons and

where these ingredients are satisfied, the Court expressed the view that it cannot be said that on the sole basis of a dying declaration, the order of conviction could not be passed.

18. In the case of Laxman (supra), the Court while dealing with the argument that the dying declaration must be recorded by a Magistrate and the certificate of fitness was an essential feature, made the following observations. The court answered both these questions as follows:

> "3. The juristic theory regarding acceptability of a dying declaration is that such declaration is made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the man is induced by the most powerful consideration to speak only the truth. Notwithstanding the same, great caution must be exercised in considering the weight to be given to this species of evidence on account of the existence of many circumstances which may affect their truth. The situation in which a man is on the deathbed is so solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason the requirements of oath and cross-examination are dispensed with. Since the accused has no power of cross-examination, the courts insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The court, however, has always to be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. The court also must further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Normally, therefore, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration looks up to the medical opinion. But where the eyewitnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a Magistrate or a doctor or a police officer. When it is recorded, no oath is necessary nor is the presence of a Magistrate absolutely necessary, although to assure authenticity it is usual to call a Magistrate, if available for recording the statement of a man about to die. There is no requirement of law that a dying declaration must necessarily be made to a Magistrate and when such statement is recorded by a Magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement

necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the Magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise."

19. In Govindaraju @ Govinda v. State of Sriramapuram P.S. Anr. [(2012) 4 SCC 722], the court inter alia discussed the law related to dying declaration with some elaboration: -

"23. Now, we come to the second submission raised on behalf of the appellant that the material witness has not been examined and the reliance cannot be placed upon the sole testimony of the police witness (eyewitness). It is a settled proposition of law of evidence that it is not the number of witnesses that matters but it is the substance. It is also not necessary to examine a large number of witnesses if the prosecution can bring home the guilt of the accused even with a limited number of witnesses. In Lallu Manjhi v. State of Jharkhand (2003) 2 SCC 401, this Court had classified the oral testimony of the witnesses into three categories:

"(a) Wholly reliable;

(b) Wholly unreliable; and

(c) Neither wholly reliable nor wholly unreliable. In the third category of witnesses, the court has to be cautious and see if the statement of such witness is corroborated, either by the other witnesses or by other documentary or expert evidence. Equally well settled is the proposition of law that where there is a sole witness to the incident, his evidence has to be accepted with caution and after testing it on the touchstone of evidence tendered by other witnesses or evidence otherwise recorded. The evidence of a sole witness should be cogent, reliable and must essentially fit into the chain of events that have been stated by the prosecution. When the prosecution relies upon the testimony of a sole eyewitness, then such evidence has to be wholly reliable and trustworthy. Presence of such witness at the occurrence should not be doubtful. If the evidence of the sole witness is in conflict with the other witnesses, it may not be safe to make such a statement as a foundation of the conviction of the accused. These are the few principles which the Court has stated consistently and with certainty. Reference in this regard can be made to Joseph v. State of Kerala (2003) 1 SCC 465 and Tika Ram v. State of M.P. (2007) 15 SCC 760. Even in Jhapsa Kabari v. State of

Bihar (2001) 10 SCC 94, this Court took the view that if the presence of a witness is doubtful, it becomes a case of conviction based on the testimony of a solitary witness. There is, however, no bar in basing the conviction on the testimony of a solitary witness so long as the said witness is reliable and trustworthy. In Jhapsa Kabari (supra), this Court noted the fact that simply because one of the witnesses (a fourteen-year-old boy) did not name the wife of the deceased in the fardbeyan, it would not in any way affect the testimony of the eyewitness i.e. the wife of the deceased, who had given a graphic account of the attack on her husband and her brother-in-law by the accused persons. Where the statement of an eyewitness is found to be reliable, trustworthy and consistent with the course of events, the conviction can be based on her sole testimony. There is no bar in basing the conviction of an accused on the testimony of a solitary witness as long as the said witness is reliable and trustworthy. In the present case, the sole eyewitness is stated to be a police officer i.e. PW 1. The entire case hinges upon the trustworthiness, reliability or otherwise of the testimony of this witness. The contention raised on behalf of the appellant is that the police officer, being the sole eyewitness, would be an interested witness, and in that situation, the possibility of a police officer falsely implicating innocent persons cannot be ruled out. Therefore, the first question that arises for consideration is whether a police officer can be a sole witness. If so, then with particular reference to the facts of the present case, where he alone had witnessed the occurrence as per the case of the prosecution. It cannot be stated as a rule that a police officer can or cannot be a sole eyewitness in a criminal case. It will always depend upon the facts of a given case. If the testimony of such a witness is reliable, trustworthy, cogent and duly corroborated by other witnesses or admissible evidence, then the statement of such witness cannot be discarded only on the ground that he is a police officer and may have some interest in success of the case. It is only when his interest in the success of the case is motivated by overzealousness to an extent of his involving innocent people; in that event, no credibility can be attached to the statement of such witness. This Court in Girja Prasad (2007) 7 SCC 625 while particularly referring to the evidence of a police officer said that it is not the law that police witnesses should not be relied upon and their evidence cannot be accepted unless it is corroborated in material particulars by other independent evidence. The presumption applies as much in favour of a police officer as any other person. There is also no rule of law which lays down that no conviction can be [pic]recorded on the testimony of a police officer even if such evidence is otherwise reliable and trustworthy. The rule of prudence may require more careful scrutiny of their evidence. If such a presumption is raised against the police officers without exception, it will be an attitude which could neither do credit to the magistracy nor good to the public, it can only bring down the prestige of the police

administration."

20. The 'dying declaration' is the last statement made by a person at a stage when he in serious apprehension of his death and expects no chances of his survival. At such time, it is expected that a person will speak the truth and only the truth. Normally in such situations the courts attach the intrinsic value of truthfulness to such statement. Once such statement has been made voluntarily, it is reliable and is not an attempt by the deceased to cover up the truth or falsely implicate a person, then the courts can safely rely on such dying declaration and it can form the basis of conviction. More so, where the version given by the deceased as dying declaration is supported and corroborated by other prosecution evidence, there is no reason for the courts to doubt the truthfulness of such dying declaration.

21. Having referred to the law relating to dying declaration, now we may examine the issue that in cases involving multiple dying declarations made by the deceased, which of the various dying declarations should be believed by the Court and what are the principles governing such determination. This becomes important where the multiple dying declarations made by the deceased are either contradictory or are at variance with each other to a large extent. The test of common prudence would be to first examine which of the dying declarations is corroborated by other prosecution evidence. Further, the attendant circumstances, the condition of the deceased at the relevant time, the medical evidence, the voluntariness and genuineness of the statement made by the deceased, physical and mental fitness of the deceased and possibility of the deceased being tutored are some of the factors which would guide the exercise of judicial discretion by the Court in such matters. In the case of Lakhan (supra), this Court provided clarity, not only to the law of dying declaration, but also to the question as to which of the dying declarations has to be preferably relied upon by the Court in deciding the question of guilt of the accused under the offence with which he is charged. The facts of that case were quite similar, if not identical to the facts of the present case. In that case also, the deceased was burnt by pouring kerosene oil and was brought to the hospital by the accused therein and his family members. The deceased had made two different dying declarations, which were mutually at variance. The Court held as under:

> "9.The doctrine of dying declaration is enshrined in the legal maxim nemo moriturus praesumitur mentire, which means "a man will not meet his Maker with a lie in his mouth". The doctrine of dying declaration is enshrined in Section 32 of the Evidence Act, 1872 (hereinafter called as "the Evidence Act") as an exception to the general rule contained in Section 60 of the Evidence Act, which provides that oral evidence in all cases must be direct i.e. it must be the evidence of a witness, who says he saw it. The dying declaration is, in fact, the statement of a person, who cannot be called as witness and, therefore, cannot be cross-examined. Such statements themselves are

> relevant facts in certain cases. This Court has considered time and again the relevance/probative value of dying declarations recorded under different situations and also in cases where more than one dying declaration has been recorded. The law is that if the court is satisfied that the dying declaration is true and made voluntarily by the deceased, conviction can be based solely on it, without any further corroboration. It is neither a rule of law nor of prudence that a dying declaration cannot be relied upon without corroboration. When a dying declaration is suspicious, it should not be relied upon without having

corroborative evidence. The court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased must be in a fit state of mind to make the declaration and must identify the assailants. Merely because a dying declaration does not contain the details of the occurrence, it cannot be rejected and in case there is merely a brief statement, it is more reliable for the reason that the shortness of the statement is itself a guarantee of its veracity. If the dying declaration suffers from some infirmity, it cannot alone form the basis of conviction. Where the prosecution version differs from the version given in the dying declaration, the said declaration cannot be acted upon. (Vide Khushal Rao v. State of Bombay1, Rasheed Beg v. State of M.P., K. Ramachandra Reddy v. Public Prosecutor, State of Maharashtra v. Krishnamurti Laxmipati Naidu, Uka Ram v. State of Rajasthan, Babulal v. State of M.P., Muthu Kutty v. State, State of Rajasthan v. Wakteng and Sharda v. State of Rajasthan.) XXX XXX XXX. The second dying declaration was recorded by Shri Damodar Prasad Mahure, Assistant Sub-Inspector of Police (PW 19). He was directed by the Superintendent of Police on telephone to record the statement of the deceased, who had been admitted in the hospital. In that statement, she had stated as under:

> "On Sunday, in the morning, at about 5.30 a.m., my husband Lakhan poured the kerosene oil from a container on my head as a result of which kerosene oil spread over my entire body and that he (Lakhan) put my sari afire with the help of a chimney, due to which I got burnt. She had also deposed that she had written a letter to her parents requesting them to fetch her from the matrimonial home as her husband and in-laws were harassing her. The said dying declaration was recorded after getting a certificate from the doctor stating that she was in a fit physical and mental condition to give the statement. As per the injury report and the medical evidence it remains fully proved that the deceased had the injuries on the upper part of her body. The doctor, who had examined her at the time of admission in hospital, deposed that she had burn injuries on her head, face, chest, neck, back, abdomen, left arm, hand, right arm, part of buttocks and some part of both the thighs. The deceased was 65% burnt. At the time of admission, the smell of kerosene was coming from her body. XXX XXX XXX.

Undoubtedly, the first dying declaration had been recorded by the Executive Magistrate, Smt Madhu Nahar (DW 1), immediately after admission of the deceased Savita in the hospital and the doctor had certified that she was in a fit condition of health to make the declaration. However, as she had been brought to the hospital by her father-in-law and mother-in-law and the medical report does not support her first dying declaration, the trial court and the High Court have rightly discarded the same. XXX XXX XXX Thus, in view of the above, we reach the following inescapable conclusions on the questions of fact:

(c)The second dying declaration was recorded by a police officer on the instruction of the Superintendent of Police after getting a certificate of fitness from the doctor, which is corroborated by the medical evidence and is free from any suspicious circumstances. More so, it stands corroborated by the oral declaration made by the deceased to her parents, Phool Singh (PW 1)father and Sushila (PW 3), mother."

22. In the case of Nallam Veera Stayanandam and Others v. Public Prosecutor, High Court of A.P.[(2004) 10 SCC 769], this Court, while declining to except the findings of the Trial Court, held that the Trial Court had erred because in the case of multiple dying declarations, each dying declaration has to be considered independently on its own merit so as to appreciate its evidentiary value and one cannot be rejected because of the contents of the other. In cases where there is more than one dying declaration, it is the duty of the court to consider each one of them in its correct perspective and satisfy itself which one of them reflects the true state of affairs. Similarly, in the case Sher Singh Anr. v. State of Punjab [(2008) 4 SCC 265], the Court held that absence of doctor's certification is not fatal if the person recording the dying declaration is satisfied that the deceased was in a fit state of mind and the requirement of doctor's certificate is essentially a rule of caution. The Court, while dealing with the case involving two dying declarations observed that the first dying declaration could not be relied upon as it was not free and voluntary and second statement was more probable and natural and mere contradiction with the first will not be fatal to the case of the prosecution. The Court held as under:

"16. Acceptability of a dying declaration is greater because the declaration is made in extremity. When the party is at the verge of death, one rarely finds any motive to tell falsehood and it is for this reason that the requirements of oath and cross- examination are dispensed with in case of a dying declaration. Since the accused has no power of cross-examination, the court would insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The court should ensure that the statement was not as a result of tutoring or prompting or a product of imagination. It is for the court to ascertain from the evidence placed on

record that the deceased was in a fit state of mind and had ample opportunity to observe and identify the culprit. Normally, the court places reliance on the medical evidence for reaching the conclusion whether the person making a dying declaration was in a fit state of mind, but where the person recording the statement states that the deceased was in a fit and conscious state, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of mind of the declarant, the dying declaration is not acceptable. What is essential is that the person recording the dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the Magistrate that the declarant was fit to make the statement without there being the doctor's opinion to that effect, it can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certificate by the doctor is essentially a rule of caution and, therefore, the voluntary and truthful nature of a statement can be established otherwise.

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

though with some minor inconsistencies. The third dying declaration was recorded after the doctor certified that she was in a fit state of mind to give the statement."

23. Examining the evidence in the present case in light of the above- stated principles, we have no hesitation in holding that the first dying declaration was not voluntary and made by free will of the deceased. This we say so for variety of reasons:

"1) When the deceased was brought to the hospital, she was accompanied by the accused and other relations. While her statement Exhibit D-2 was recorded by DW1, Naib Tehsildar, the accused and his relations were present by the side of the deceased.

2) DW1, though mentions in his statement that the deceased was fully conscious, chose not to obtain any fitness certificate from the doctor on duty. In spite of it being a rule of caution, in the peculiar facts of the present case where the deceased had suffered 97 per cent burn injuries, DW1 should have obtained the fitness certificate from the doctor.

3) The statement of the deceased was totally tilted in favour of her husband and the version put forward was that she had caught fire from the stove while cooking. This appears to be factually incorrect inasmuch as if she had caught fire from the stove, the question of the mattress and other items catching fire, which were duly seized and recovered by the Investigating Officer, would not have arisen.

4) Furthermore, within a short while, after her first statement, she changed her view. Exhibit P12, the second dying declaration, was recorded at 6.30 p.m. on the same day after due certification by the doctor that she was conscious and in a fit condition to make the statement. This statement was recorded by PW9, the Tehsildar. In his statement, PW9 has categorically stated that he was directed by the SDM to record the dying declaration. He had even prepared memo, Exhibit P-13, and sent the same to the Police Station. He specifically stated that the deceased was in a great pain and was groaning. She was not even fully conscious. According to him, he was not even informed of recording of the fact of the previous dying declaration. He had carried with him the memo issued by the SDM for recording the statement of the deceased. No such procedure was adhered to by DW1. All these proceedings are conspicuous by their very absence in the exhibited documents and the statement of the said witnesses.

5) The third dying declaration which was recorded by PW7, Sub-Inspector, was also recorded after due certification and in presence of the independent witnesses Bharat Kumar and Abdul Rehman. Furthermore, PW6 gave the complete facts right from the place of occurrence to the recording of dying declaration of the deceased. He

categorically denied the suggestion that the deceased had stated to him that she caught fire from the stove. Rather, he asserted that the deceased had specifically told him that the accused had put her on fire.

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

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

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

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

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

11) In addition to the above, another significant aspect of the present case is that the deceased had also made a dying declaration, even prior to the three written dying declarations, to PW1, the landlady and PW6. She had categorically stated to these witnesses when death was staring her in the eyes that she was burnt by her husband by pouring kerosene oil on her. Both these witnesses successfully stood the subtle cross-examination conducted by the counsel appearing for the accused. We see no reason to disbelieve these witnesses who were well known to both, the deceased as well as the accused."

24. Thus, in our considered view, the second and third dying declarations are authentic, voluntary and duly corroborated by other prosecution witnesses including the medical evidence. These dying declarations, read in conjunction with the statement of the prosecution witnesses, can safely be made the basis for conviction of the accused.

25. The argument that the first dying declaration recorded by DW1 had not been produced on record by the prosecution and, therefore, an adverse inference should be drawn against the prosecution in terms of Section 114 of the Evidence Act, is without any merit. This document has not only been produced but has even been critically examined by the Trial Court as well as the High Court. It is a settled principle of law of evidence that the question of presumption in terms of Section 114 of the Evidence Act only arises when evidence is withheld from the Court and is not produced by any of the parties to the lis.

26. As a result of the above discussion, we find no infirmity in the appreciation of evidence and law in the concurrent judgments of the courts. Hence, we dismiss this appeal.

*Judgment Referred*