(2013) 11 DEL CK 0071

Delhi High Court

Case No: Criminal A. 634 of 1999

Wilson		APPELLANT
	Vs	
State		RESPONDENT

Date of Decision: Nov. 11, 2013

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 161, 313, 374
- Penal Code, 1860 (IPC) - Section 302, 307

Hon'ble Judges: Kailash Gambhir, J; Indermeet Kaur, J

Bench: Division Bench

Advocate: Jaspreet Gogia, for the Appellant; Sunil Sharma, APP for the State, for the Respondent

Final Decision: Dismissed

Judgement

Kailash Gambhir, J.

By this appeal filed u/s 374 of the Code of Criminal Procedure, 1973 (hereinafter referred to as Cr.P.C.), the appellant herein seeks to challenge the judgment and order dated 30.09.1999 and 01.10.99 respectively passed by the Court of Ld. Additional Sessions Judge, Shahdara, Delhi, thereby convicting the appellant for committing an offence u/s 302 of India Penal Code, 1860 (hereinafter referred to as IPC) and sentencing him to undergo imprisonment for life together with fine of Rs. 2,000/- and in default thereof to undergo further rigorous imprisonment for a period of one year. Crime against women is not just a crime against an individual but against humanity that makes one lose its faith in humans and relationships. These days it has become a routine affair. Not even a day passes when unspeakable crimes like rape, murder, bride burning etc are not committed against women. This violence is not just restricted to the streets or alleys; but it often travels through the walls and into one''s house. There is no empathy left even towards a women living with a man after marriage for several years under the same roof.

2. The case in hand also relates to one such unfortunate woman who became a victim of the aggression of her drunkard husband, who under the influence of alcohol went on to commit such horrendous act of burning his own wife. In the present case deceased was just 30 years of age and had a boy child of fourteen years from her first husband. She was attacked by accused when he came back home in a drunk condition. The exact prosecution story as it unfolds in the charge-sheet is as under:-

On 28.11.1987 at 5:50 p.m. an information was received from an unknown person through telephone PCR vide DD No. 41-B that a lady has been burnt by pouring kerosene oil at 1?485, Khichripur colony, some officer be sent. On this information, after recording report of the same was sent to SI Dharmender Kumar through constable Om Prakash, who went to the spot and said SI was told at the spot that the lady Smt. Harjeet has been taken to hospital, SI tried to ascertain the hospital and in the meantime, at 07:25 p.m. vide DD No. 15, constable Jai Prakash was informed from safdarjung hospital on telephone that Smt. Harjeet has been admitted in the hospital in the burnt condition. On this S.I. reached safdarjung hospital and received MLC No. 69629 pertaining to injured Smt. Harjeet. The SI seeing the condition took the SDM, Shahdara, Shri Parimal Rai and reached the hospital. A separate permission to record the statement of the victim was sought by the police vide application dated 28.11.1987 on which the doctor made the endorsement to the effect "patient is fit to give statement" allegedly at 08:30 p.m. in the dying declaration made to the SDM, the victim named her husband as offender. On the statement of the victim a case was registered u/s 307 IPC.

3. After supplying the copies of the charge sheet to the accused as per law, case was committed to the Court of Sessions. Arguments on the point of charge were heard and charge u/s 302 IPC was framed against the accused, to which he pleaded not guilty and claimed trial. To prove its case, the prosecution had examined 25 witnesses. The statement of accused was recorded by the learned Trial Court u/s 313 Cr.P.C. and the accused pleaded his innocence and false implication.

4. Addressing arguments on behalf of the appellant, Ms. Jaspreet Gogia, Advocate, vehemently contended that the appellant has been falsely implicated in the present case based on an uncorroborated and unreliable dying declaration of the deceased. Counsel for the appellant also argued that the appellant who is presently 45 years of age was 19 years of age, at the time of commission of the offence while Smt. Harjeet was 30 years of age at the time of her death with a child of 14 years of age from her previous marriage. The contention raised by the counsel for the appellant was that the appellant was maintaining very cordial and affectionate relationship with the deceased Harjeet and there could not have been any reason for the appellant to have killed her. Counsel for the appellant also argued that at the time of the incident even the appellant was not present at the house and therefore, also the appellant could not have committed the said crime. Making a serious challenge on the

credibility of the alleged dying declaration made by the deceased, the counsel for the appellant contended that as per the MLC proved on record, the deceased had suffered 85% burn injuries over whole of her body and even her both the lips and hands were also burnt and therefore, such a condition of the deceased could not have permitted her to give such a lengthy statement to the SDM or to affix thumb mark on the dying declaration. Counsel for the appellant also argued that even the SDM did not satisfy himself before recording the statement as to whether she was in a sound condition to give her statement or not. Counsel for the appellant further submitted that even no fitness certificate was obtained from the doctor certifying that the deceased remained conscious, oriented and mentally alert till the end of recording of her statement.

5. Placing reliance on a judgment of the Apex Court in the case of Surinder Kumar Vs. State of Haryana, , counsel for the appellant submitted that ratio of this judgment is squarely applicable to the facts of the present case, as in the facts of the said case also, the dying declaration made by the deceased did not carry a certificate by the Executive Magistrate to the effect that it was a voluntary statement made by the deceased and that he had read over the statement to her. The said dying declaration was also not attested by the doctor, and the Hon''ble Supreme Court took a view that such a dying declaration without corroboration cannot form the basis of conviction.

6. The next submission made by the counsel for the appellant was that there was no eye witness to the incident of the crime and all the three prime witnesses produced by the prosecution, i.e., PW-4, PW-6 and PW-12 turned hostile. Inviting the attention of this Court to the deposition of PW4-Dharmender who is son of the deceased from her previous marriage, counsel for the appellant submitted that this witness in his examination-in-chief clearly stated that the appellant was having cordial relationship with his mother and no quarrel took place between his mother and the accused. He also deposed that he did not witness any incident of quarrel or threatening by accused to his mother. He also deposed that when he returned to the house he did not see the accused Wilson present at the house. The contention raised by the counsel for the appellant was that this witness was the son of the deceased from her previous marriage and had the accused been involved in the commission of the said crime then at least this witness would have strongly supported the prosecution case instead of coming to the rescue of the appellant. Counsel for the appellant also apprised the Court that the appellant had already undergone more than 7 years of incarceration for an offence which he had never committed and is presently leading a happy married life with his wife along with three children. Counsel for the appellant also submitted that the wife of the appellant who is about 38 years of age is suffering from Cancer, Carcinoma Cervix III B and presently she is undergoing Chemo Therapy involving huge expenses and besides his ailing wife, the appellant has also to look after his old aged mother. Based on the above submissions, counsel for the appellant prayed for acquittal of the appellant.

7. Mr. Sunil Sharma, learned APP for the State, on the other hand fully supported the reasoning given by the learned Trial Court in convicting the appellant u/s 302 IPC and as per him, the same does not warrant any interference by this Court in exercise of its appellate powers. Learned APP for the State submitted that the dying declaration in the present case was recorded by the Magistrate and there is no reason to challenge the credibility and independence of the Magistrate, in truthfully and correctly recording the last statement of the deceased. Learned APP for the State also submitted that the dying declaration of the deceased was recorded by the Magistrate after she was declared medically fit by Dr. V.P. Arya who was examined by the prosecution as PW-19. Learned APP for the State also argued that in the post mortem report of the deceased, proved on record as Ex. PW-20/A, there is no mention about the hands of the deceased being affected by any burn injuries, and therefore, the deceased could have easily affixed her thumb mark on the dying declaration proved on record as Ex. PW-15/A. Learned APP for the State also argued that even the appellant had also received burn injuries on the back side of his right hand, and therefore, he cannot set up the plea of alibi that he was not present at the time of the commission of the crime. Learned APP for the State has drawn attention of this Court to the MLC of the appellant proved on record as Ex. PW-19/A. Based on the above submissions, learned APP for the State prayed for upholding the order of conviction and sentence passed by the learned Trial Court.

8. We have heard learned counsel for the parties at a considerable length. We have also gone through the Trial Court record before taking a final view in the matter.

9. In the present case, deceased Smt. Harjeet was unsuccessful in her first marriage, which had taken place about 15 years ago with one Mr. Ram Narain. A son, namely, Dharmender was born out of her first wedlock and she was devoting her life in the upbringing of her son. The present accused entered in her life and without formally marrying the deceased as per their customs and traditions, they started living together as husband and wife. On the evening of 28th November, 1987, she was allegedly burnt by the present accused after some quarrel had taken place between them. The deceased was rushed to Safdarjung hospital in the burnt condition where her dying declaration was recorded by the Sub Divisional Magistrate and on 30.11.1987 she succumbed to burn injuries. The text of the said dying declaration is reproduced as under:-

My husband Wilson had returned back in the drunken condition, immediately thereafter he started quarrelling. He asked me to go away from the house, at which, I retorted that it is you only who repeatedly moves out of the house and why I should leave. He had vigorously fought with me and thereafter angrily he had poured kerosene oil on me and said that if I do not leave then he will eliminate me. He thereafter with the help of match box ignited fire. Wilson is resident of Jalandhar. This was my second marriage. About 15-16 years have passed after my first marriage. His name was Ram Narain. He left me about 12-13 years back from today.

Since for the past 4 years I started living with Wilson. I did not marry him as per customs and tradition. My son, who is from my previous husband, is about 16 years of age. Wilson used to beat me. Earlier I used to reside at Jahangir Puri. Wilson wanted to get rid of me. Even about two weeks back, Wilson had made an attempt to burn me after pouring kerosene oil on me as well as on him and today also he threatened to put an end to my life. It has happened in the evening. He burnt me with the intention to kill me. He should be apprehended and not allowed to run away. He is resident of Jalandhar and his House number is 122. The said dying declaration was recorded by the Sub Divisional Magistrate at about 08:45 p.m. in the Safdarjung hospital.

10. As per the MLC report of Safdarjung hospital, the deceased was admitted in the hospital at 6.30 p.m. on 28th November, 1987. The MLC also records the name of Mrs. Bohti, mother of the deceased, who had accompanied the deceased at the time of her admission in the hospital. The history of assault as is recorded in the MLC would also be relevant and the same is reproduced as under:-

Alleged history of sustaining burns at about 4.30 p.m. on 28.11.1987 at her house in Block No. 9, Khichripur, New Delhi, when her husband came home drunk and started abusing her. Then he allegedly poured kerosene oil over her and set her on fire with a matchstick. She rushed out of the house shouting when her neighbour came and poured water over her and brought to hospital.

O/E GC critical, smell of kerosene oil. sh

Patient fully conscious, oriented.

Pulse not palpable

Heart rate-40/min

Resp. rate-28/min

Tough dug, week veins, collapsed, capitrany ratio poor dehydration &

Rest crs & Resp. system NAB

L/E Fresh superficial to deep burns over whole of the body except back of head, both treada

Part of both lower limbs & groin 85% burns

11. The MLC also records that the patient was fully conscious and oriented. It further records that the burn injuries suffered by the victim were over 85% and also that the general condition of the victim was critical and smell of kerosene oil was coming from her body. The said MLC was proved on record as Ex. PW-21/A in the testimony of PW-21, Mr. J.B. Bhardwaj, Medical Record Technician of Safdarjung hospital. PW-20, Dr. L.T. Ramani, Lok Nayak hospital, Delhi, had conducted the post mortem of the deceased. As per the post mortem report proved on record as Ex. PW-20/A,

the deceased had suffered the following burn injuries on her person:

There are 2nd degree deep burns (... over the face), 3rd degree burn over neck all around, chest & abdomen all around except back of the left forearm, all around the right thighs, portem medical aspect of left thighs and back of both legs. ...all around both upper. mere is _____ cut open on the left _____ and evidence of vital reaction. Scalp hair show signing at margins. No smell of kerosene oil is directed in the scalp hair. There is no other mark of violence on the body

12. In the present case, the counsel for the appellant first challenged the credibility and truthfulness of the said dying declaration made by the deceased. The Counsel for the appellant contended that the dying declaration made by the deceased is uncorroborated and unreliable and therefore the conviction of the accused cannot be made solely on the basis of said dying declaration. Apparently, the deceased was admitted in the hospital at 07:25 p.m. on 28th November. 1987. At 08:30 p.m. the police officer made an application to the Doctor, requesting him to allow the recording of statement of the victim. The said application made by the police officer is proved on record as Ex. PW-24/A. On the application made by the police officer, Dr. Ankur Sarkar made an endorsement (Ex. PW-25/F), stating that the victim is fit to make the statement. Thereafter, the SDM recorded the statement of the victim, which concluded at 08:45 p.m. PW-15, Shri Parimal Rai in his court deposition fully supported the said facts. He deposed that before recording the statement of Harjeet, police had obtained the opinion of doctor as to whether Harjeet was fit to make statement or not and on which doctor opined her to be fit to make statement at about 8.30 PM. He further deposed that he finished recording the statement of the victim at about 8.45 PM. The evidence of this witness remained uncontroverted as he was not cross-examined by the defence. From the above factual matrix, it is clear that the dying declaration was recorded immediately after the victim was admitted in the hospital and after the fitness certificate was obtained from the concerned doctor. Thus the chances of it being embellished or tutored do not arise. Further a dying declaration made by a person on the verge of his death has a special sanctity as at that solemn moment a person is most unlikely to make any untrue statement. The shadow of impending death is by itself guarantee of the truth of the statement of the deceased regarding circumstances leading to his death.

13. It shall also be noted that the SDM is an independent and an impartial witness. It will be useful here to refer the judgment of the Hon''ble Apex Court in Harjit Kaur Vs. State of Punjab, , wherein the Court took a view that Sub Divisional Magistrate, being an independent witness holding high position had no reason to do anything which was not proper and therefore genuineness of dying declaration recorded by him could not be easily doubted and conviction recorded on that basis could not be faulted with. The germane portion of the judgment is extracted below:

5. It was submitted by the learned counsel for the appellants that about hundred persons had approached the District Magistrate for getting the Dying Declaration of

Parminder Kaur recorded and that some of the relative of the deceased had even accompanied the S.D.M. (P.W.-7) while he was going to the hospital for recording her Dying Declaration. He also submitted that the evidence of this witness discloses that three to four persons were present in the room where Parminder Kaur was kept. According to the learned counsel these two circumstances clearly indicate that P.W. 7 had recorded the Dying Declaration under pressure and in presence of those persons who were interested in Parminder Kaur. We do not find any substance in this contention because this witness has categorically stated in his Examination-in-Chief that when he was recording her statement, nobody was present in the room and even the Nurse attending on her was asked to get out of that room. What he has stated in cross examination is that when he had reached that place, three or four persons were seen sitting in the room. Therefore, it is not correct to say that the Dying Declaration was recorded in presence of some relatives of the deceased. The other circumstances that there was an agitation by the relatives of Parminder Kaur for recording her statement cannot lead to an inference that P.W.-7, who was an I.A.S. Officer and holding high position of Sub-Divisional Magistrate had recorded it under pressure and as desired by the relatives of the deceased. There was no reason for him to do so. As regards the condition of Parminder Kaur, the witness has stated that he had first ascertained from the doctor whether she was in a fit condition to make a statement and obtained an endorsement to that effect. Merely because that endorsement was made not on the Dying Declaration itself but on the application, that would not render the Dying Declaration suspicious in any manner. The said endorsement made by the Doctor was produced by him and it has become evidence in the case.

6. It was further submitted by the learned counsel that the statement of Parminder Kaur was not recorded by the witness in question and answers form. The evidence of the witness is that she narrated the incident and therefore the Dying Declaration is not in the question-answer form. It was then contended by the learned counsel that the Dying Declaration bears her thumb mark but according to the medical evidence, the skin over the two thumbs was burnt and, therefore, the S.D.M. could not have obtained her thumb impression on it. Whatever impression could be taken was taken by the S.D.M. The medical evidence in this case does not disclose that she could not have put her thumb mark on the Dying Declaration. We fail to appreciate how this circumstance can create any doubt regarding the evidence of this witness or genuineness of the Dying Declaration. P.W. 7 was an independent witness and was holding a high position and had no reason to do anything which was not proper or correct. Except a bare suggestion made to him that the Dying Declaration was manufactured by him after her death, we do not find anything in his cross-examination as would create any doubt regarding truthfulness of what this witness has deposed. We fully agree with the finding recorded by the courts below that the Dying Declaration was voluntarily made by Parminder Kaur and that it was correctly recorded by P.W.-7."

14. It is also fairly well settled legal position that once the Court is satisfied that dying declaration made by the victim was true and voluntary without being tutored or prompted by any interested person, the conviction of the accused undoubtedly can be based on such a dying declaration without any further corroboration. The rule requiring corroboration is merely a rule of prudence. The principles governing the dying declaration were eloquently summed up long back by the Hon''ble Apex Court in the matter of Smt. Paniben Vs. State of Gujarat, . The same are reproduced as under:-

(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration.

(ii) If the court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration.

(iii) The court has to scrutinize the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had opportunity to observe and identify the assailants and was in a fit state to make the declaration.

(iv) Where dying declaration is suspicious it should not be acted upon without corroborative evidence.

(v) Where the deceased was unconscious and could never make any dying declaration, the evidence with regard to it is to be rejected.

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction.

(vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected.

(viii) Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth.

(ix) Normally the court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration has to look to the medical opinion. But where the eye-witness has said that the deceased was in a fit conscious state to make this dying declaration, the medical opinion cannot prevail.

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon.

(xi) Where there are more than one statement in the nature of dying declaration, one first in point of time must be preferred. Of course, if the plurality of dying declaration could be held to be trustworthy and reliable, it has to be accepted.

15. In the background of the aforesaid legal position, we do not find any force in the contention raised by the counsel for the appellant that the dying declaration made

by the deceased is untrustworthy and does not inspire confidence and therefore conviction cannot be based on the same.

16. The other contention raised by the learned counsel for the appellant was that the deceased had suffered 85% burn injuries over whole of her body and even both of her lips and hands were burnt and therefore in such a condition, the deceased could not have been in a position to give such a lengthy statement to the Sub Divisional Magistrate and she could not have affixed her thumb impression on the dying declaration. This contention of the learned counsel for the appellant is also devoid of any force and is totally unsupported by the medical evidence on record. Neither in the MLC of the deceased nor in the post mortem report there is any specific mention of the lips or the hands of the deceased affected by the burn injuries rendering her incapable to give her statement and affix her thumb mark on the dying declaration. Even otherwise, impartiality and independence of the Sub Divisional Magistrate in recording the statement of the victim cannot be questioned unless the defence is able to place on record such material evidence clearly demonstrating some personal interest of the Sub Divisional Magistrate or that for some other extraneous reasons he would go to the extent of fabricating such an important piece of evidence. As already stated above, the testimony of PW-15 remained uncontroverted and unrebutted and the same is the position with the medical evidence proved on record. Therefore, we do not find any force in the said argument raised by learned counsel for the appellant that the deceased was not in a position to record her such a lengthy statement and affix her thumb mark at the end of the dying declaration.

17. On the judgment of the Apex Court in the case of Surender Kumar (supra), where the court took a view that where the dying declaration is suspicious, it could not be acted upon without corroborating evidence. The court also held that where the deceased was unconscious and could not make any declaration, the evidence with regard to it has to be rejected. There can hardly be any dispute with the legal principles as discussed in the said judgment and in fact there is only a reiteration of the legal principles, settled by the Apex Court in a catena of judgments. The facts of the case before the Apex Court were also clearly distinguishable as in the said case the deceased had suffered 97% burn injuries and she was under constant sedatives and in such a situation, the court found that she could not be expected to make a statement at a stretch. The court also found that the dying declaration made by the deceased in the said case was totally in conflict with the version of the prosecution and in such a situation, dying declaration was found totally unacceptable and untrustworthy. In the facts of the present case, we do not find any such infirmity in the dying declaration, made by the deceased, which is fully supported by the medical evidence and the evidence of PW-15, SDM.

18. Another contention raised by learned counsel for the appellant was that the SDM did not satisfy himself before recording the statement as to whether the victim was

in a sound condition to give the statement or not. In the present case at 08:30 p.m. the police officer made an application to the Doctor, requesting him to allow the recording of statement of the victim. The said application made by the police officer is proved on record as Ex. PW-24/A. On the application made by the police officer, Dr. Ankur Sarkar made an endorsement (Ex. PW-25/F) stating that the victim is fit to make the statement. Thereafter the SDM recorded the statement of the victim which was concluded at 8.45 PM. Thus before recording the statement of the victim, she was declared fit for making the statement by the concerned doctor and therefore, it was not required that once again the SDM would obtain the fitness certificate from the doctor despite the fact that the same has already been obtained by the police officer in his presence. Further during the examination-in-chief, the SDM was categorical that before he recorded the statement of the victim, the police got an endorsement from the concerned doctor that the victim is fit to make the statement. However, it is pertinent to mention that the accused brazenly failed to cross-examine PW-15-SDM on this fact. Thus, through the unimpeachable testimony of the SDM the prosecution sufficiently proved on record that the victim was fit to make statement.

19. It will also be significant to refer to decision of the Constitution Bench of the Apex Court in the case of Laxman Vs. State of Maharashtra, wherein also the Hon''ble Apex Court had an occasion to consider the similar aspect regarding veracity of dying declaration, where doctor certification regarding the fitness of a victim had not been taken and the Court took a view that if a person recording the statement is satisfied that the person was fit then the veracity of the declaration will not be questioned. The Court further held that 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. The Court also took a view that there is no requirement of law that the dying declaration must necessarily be made to a Magistrate and when such statement is recorded by the Magistrate there is no specified statutory form for such recording. The Court also held that a certification by the doctor is essentially a rule of caution and, therefore, voluntary and truthful nature of the declaration can be established otherwise. The relevant para of the said judgment is reproduced as under:-

3. The justice 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 death bed 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 court

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 to always be on guard to see that the statement of the deceased was not as a result of either tutoring or promoting 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 look 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 in 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 is 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.

20. Reiterating the same principles the Apex Court in Sher Singh and Another Vs. State of Punjab, also took a view that certification by the doctor is essentially a rule of caution and, therefore, the voluntary and truthful nature of the declaration can be established otherwise. Relevant para of this judgment is reproduced as under:-

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.

21. Thus in the view of the above legal position and the factual matrix of this case, we are not persuaded by the contention of the counsel for the appellant that the SDM did not satisfy himself about the state of mind of the deceased before recording the statement.

22. Next contention raised by the counsel for the appellant was that at the time of the incident even the appellant was not present at the house and therefore, also the appellant could not have committed the said crime. It is a settled legal position that the plea of alibi postulates the physical impossibility of the presence of the accused at the scene of offence by reason of his presence at another place. The plea therefore succeeds only if it is shown that the accused was so far away at the relevant time that he could not be present at the place where the crime was committed. Apparently, the accused has not placed anything on the record to show that at the time of the alleged incident he was not present at the place of the incident or that he was present at some other place so far away from the place of the incident that he could not be present at the place of incident at the same time. Apart from this, the evidence placed on record clearly show the presence of the accused at the place of incident, at the alleged time, as history of assault as is recorded in the MLC of the accused (Ex. PW-19/A) is "alleged injury sustained in saving his wife on 28.11.1987". We therefore, do not find any merit in the argument of the Ld. Counsel for the appellant that at the time of the incident even the appellant was not present at the house.

23. Another contention raised by learned counsel for the appellant was that that neither there was any eye witness of the alleged incident nor the three prime witnesses produced by the prosecution i.e. PW-4, 6, and 12 supported the case of the prosecution. Learned counsel for the appellant also submitted that PW-4, Dharmender who was the son of the deceased form her previous marriage also took a stand that the appellant was having cordial relations with his mother.

Undoubtedly, these witnesses did not stand firm in their court depositions and spoke contrary to their initial statements made u/s 161 of Cr.P.C. However it is a matter of common knowledge that the relationship between husband and wife is totally a private affair and sometime it may happen that the other family members may not even come to know about the exact relationship. Further it is pertinent to note that none of these witnesses were present on the spot at the relevant time, thus they cannot state any fact as to what would have had happened at the time when the accused burnt his own wife and had these witnesses not turned hostile, the evidence of all these witnesses, at its best, could have supported the case of prosecution only to the extent that it could prove the relation between the accused and the deceased. Thus even if these witnesses have turned hostile, their evidence will in no way affect the prosecution version that on the alleged day, the accused had burnt his own wife.

24. In the light of the aforesaid discussion we find ourselves fully satisfied that the said dying declaration was made by the deceased voluntarily and truthfully, free from any kind of tutoring or prompting, and it was duly recorded by the SDM.

25. There lies no merit in the present appeal. The learned Trial Court has rightly convicted the appellant for the offence committed by him u/s 302 IPC. Hence, the order on conviction and sentence dated 30.09.1999 and 01.10.99 respectively passed by the learned Sessions Judge is upheld. The present appeal accordingly stands dismissed. A copy of this order be sent to the concerned Jail Superintendent for information and necessary compliance.