

Before Mehtab S. Gill & Ram Chand Gupta, J

SONU—Appellant

versus

STATE OF PUNJAB—Respondent

Crl. Appeal No. 455/DB of 2005

12th November, 2009

Indian Penal Code, 1860—Ss. 302/376—Evidence Act, 1872—S.32—Death of a girl aged about 13-14 years due to burn injuries—Dying declaration recorded by police officer after doctor declaring her fit to make statement—Deceased holding responsible owner of house for setting her on fire—Statement silent on point of rape allegedly committed upon deceased by accused—Version of occurrence trustworthy and credible one—Merely because statement of deceased was not got recorded from Magistrate, it cannot be said that no reliance can be placed upon same—Prosecution failing to prove offence of rape—Conviction and sentence u/s 376 IPC set aside while maintaining u/s 302 IPC.

Held. that dying declaration of Deepika was recorded by ASI Sawinder Singh on 15th February, 2004 after she was declared fit to make statement by Dr. Chander Mohan. Dr. Chander Mohan specifically deposed that Deepika was examined by him on 15th February, 2004, on the application of police and he found that she was fit to make the statement and he accordingly gave his report. There is no cross-examination of this witness on the point that Deepika was fit to make statement on 15th February, 2004. Hence certificate given by Dr. Chander Mohan that Deepika was fit to make statement on 15th February, 2004 is sufficient to prove that Deepika was conscious and was in a fit state of mind to give statement. Moreover, Dr. Chander Mohan was acting in discharge of his official duty. He is an independent witness. There is nothing as to why he should have deposed falsely.

(Para 35)

Further held, that dying declaration of the deceased cannot be the result of tutoring or prompting on the part of the parents of the deceased, rather had the same been the result of tutoring and prompting, she would have implicated all the accused. Moreover, her statement is also silent on the point of alleged rape having been committed upon her by the accused. Hence the version of the occurrence as given by the deceased in her statement before the ASI appears to have been made by her voluntarily. The same is trustworthy and credible one. The version has been given by her on her attaining consciousness after she sustained burn injuries on 12th February, 2004. Merely on the ground that statement of the deceased was not got recorded from the Magistrate, it cannot be said that no reliance can be placed upon the same on the ground that the same was recorded by ASI.

(Para 37)

Further held, that prosecution has failed to prove that offence of rape was committed upon Deepika before she was set on fire by accused Sonu. As per chemical examination report, Spermatozoa was not found in vaginal smear and vaginal swab. However, the dying declaration of Deepika is reliable piece of evidence as the same was made by her voluntarily without any tutoring and in conscious state of mind, according to which the only inference, which can be drawn, is that she was set on fire by none else than accused Sonu, as there was nobody else in the room except Sonu accused and the deceased when she was put on fire.

(Paras 39 & 40)

Munish Bahl, Advocate, *for the petitioner*.

Ms. Gurvin H. Singh, Additional Advocate General, Punjab.

RAM CHAND GUPTA, J.

(1) This is an appeal filed against judgment of conviction and order of sentence, dated 6th June, 2005 passed by the then learned Additional Sessions Judge, Amritsar, *vide* which the present appellant-accused Sonu was convicted for offences punishable under Sections 302/376 of the Indian Penal Code (for short 'IPC') and sentenced to undergo life imprisonment and to pay fine of Rs. 5000 and, in default of payment of fine, to further undergo rigorous imprisonment for two months for offence under Section

302 IPC and further sentenced to undergo rigorous imprisonment for ten years and to pay fine of Rs. 2000 and in default of payment of fine to undergo rigorous imprisonment for a period of one month for offence under Section 376 IPC. However, both the sentences were ordered to run concurrently.

(2) Briefly stated the case of the prosecution is that on 12th February, 2004 at about 12.00 noon, Deepika (deceased) daughter of Rajbir Singh, complainant, sustained burn injuries. She was removed to Guru Nanak Dev Hospital, Amritsar. She was examined there by Dr. Chander Mohan (PW10). However, she was not conscious and was not fit to make any statement.

(3) Sawinder Singh, ASI (PW7) while posted at Police Post Kot Khalsa, visited hospital on receiving information about admission of Deepika (deceased) in the hospital with burn injuries. He visited the hospital and made application Ex.PF seeking opinion of Dr. Chander Mohan (PW10), if she was fit to make the statement. However, the doctor opined, *vide* opinion Ex.PF/1 that she was not fit to make the statement.

(4) Rajbir Singh, father of Deepika (deceased) met the ASI in the hospital and his statement was recorded by the ASI, *vide* Ex.PG in which he stated that his daughter Deepika sustained burn injuries accidentally when she was preparing tea on the stove and that nobody was responsible for the said act and that he was not having suspicion on anybody.

(5) On the next day as well, Deepika was declared unfit to make the statement when learned Magistrate visited the hospital to record the statement of Deepika.

(6) On 15th February, 2004 Deepika was found fit to make the statement when she was examined by Dr. Chander Mohan (PW10). He gave his opinion Ex.PH/1 on the application of police Ex.PH to the effect that she was fit to make the statement. Hence ASI Sawinder Singh (PW7) recorded her statement Ex.PJ, which was read over to her and she thumb marked the same in token of its correctness. On 18th February, 2004 Deepika succumbed to injuries.

(7) After the death of Deepika her statement Ex.PJ was relied as her dying declaration, wherein she stated that she alongwith her mother and

father used to live as tenant of Sohan Lal, r/o Gurdwara Wali Gali, Inderpur, Kot Khalsa Islamabad. She gave her age as 13 to 14 years. Further according to her on 12th February, 2004 at about 12.00 noon or 1.00 p.m., after preparing meal, she deputed her brother Komal and Sonu to take the meal for her father and, thereafter she asked Sonu son of late Sohan Lal (accused), i.e., owner of the house, that as her one ear was already plucked, he may pluck her second ear. She consumed four tablets given to her by Sonu so that her second ear may be plucked by him and he had also taken one tablet. Sonu accused asked his younger brother Angrej to bring milk from the shop of Bhajan. Deepika started preparing tea and later on milk was added. She put the tea in four glasses, which was taken by her, Sonu accused, his brother Angrej and one tenant Mohinder and one lady and her brother Shakil. Thereafter they had a talk. Sonu told her to get her ear plucked and he sent his younger brother Angrej and Mohinder outside the room. While plucking her ear Sonu started misbehaving with her and touched her stomach and thereafter she did not know as to what happened and as to when she was put on fire. She raised alarm. She was taken to hospital in a tempo by Vijay, brother-in-law of Sonu, Sonu and Angrej. Her parents also reached the hospital.

(8) On the initial statement of Rajbir Singh, father of deceased, only daily diary report, dated 13th February, 2004, was entered and as the statement of Deepika was contrary to the statement earlier given by her father, only daily diary report was recorded by the police and the FIR was not registered. The FIR Ex.PC was registered by ASI Malook Singh, on the statement of Rajbir Singh, father of the deceased, Ex.PD, which was recorded by ASI Satwant Singh, (PW6) on 4th March, 2004.

(9) In statement Ex.PD of Rajbir Singh, which was recorded on 4th March, 2004, it was stated that his daughter Deepika was 13 years of age. On 12th February, 2004, he and his wife left the house for their work, as per routine, and had gone to their shop situated in a Khoka. His sons had come to the shop with meals. Her daughter was set on fire by owner of his house Sonu (accused), Angrej son of Sohan Lal, Rajni daughter of Shori Lal and her husband Vijay and she was admitted in the hospital in an unconscious condition. According to him, his daughter told him that she was given tablets to eat by Sonu accused for plucking her ear and they had also taken tea. Rosy accused confined Deepika alongwith Sonu, Angrej

and Vijay in a room and the room was locked from the outside. Rape was committed upon her by all the three accused, turn by turn. When Deepika regained consciousness she told the accused that they would narrate the entire incident to her parents and hence, she was set on fire by sprinkling kerosene oil on her body. From this statement, FIR for offences under Sections 307/376 IPC was recorded. After the death of Deepika, offence under Section 302 IPC was added.

(10) After completion of the investigation, report under Section 173 of the Code of Criminal Procedure (for short 'the Cr.P.C. ') was filed only against Sonu for offences under Section 302/376 IPC and the case was committed to the Court of Sessions by the then learned Judicial Magistrate 1st Class, Amritsar, *vide* order, dated 16th August, 2004.

(11) Learned Additional Sessions Judge, Amritsar, charged accused Sonu for offence under Section 302 IPC, *vide* order, dated 15th October, 2004. However, after recording statement of Rajbir Singh and on the application of the State under Section 319 Cr.P.C., accused Angrej Singh, Vijay and Rajni were also summoned to face trial for offences under Sections 302/376(2)(G) read with Section 34 IPC by learned Additional Sessions Judge, Amritsar, *vide* order, dated 17th March, 2005, to which they did not plead guilty and claimed trial.

(12) In order to substantiate the allegation against the accused, prosecution has examined as many as 10 PWs.

(13) PW1 is HC Daljit Singh to whom dead body of Deepika was entrusted by ASI Surinder Singh, and he got conducted post mortem examination on the dead body.

(14) PW2 is Rishi Ram, Draftsman, District Courts, Amritsar, who prepared scaled site plan Ex.PB of the place of occurrence on 22nd July, 2004 at the instance of Rajbir Singh

(15) PW3 is Constable Jawahar Lal, who had delivered special report of this case to Illaqa Magistrate on 4th March, 2004.

(16) PW4 is Rajbir Singh son of Budh Singh, complainant and father of deceased Deepika. He deposed that his daughter was unconscious when he visited hospital on 12th February, 2004, on coming to know that

his daughter was burnt. He further deposed that she regained consciousness on 15th February, 2004 at about 7.00 p.m. when she told them that Sonu accused wanted to make hole in her ear and that Sonu suggested her to take four tablets so that she may not feel pain, hence she had taken tablets. However, according to him, his daughter told him that she was sent inside the room to bring utensils for preparing tea and that when she entered the room, Sonu, Angrej and Vijay followed her and Rajni accused bolted the door of the room from outside and that thereafter Sonu, Angrej and Vijay committed rape upon her, turn by turn. He, however, deposed that his daughter also told him that when she raised threat to complain about this fact to him, the accused sprinkled kerosene oil on her clothes and set her on fire and that later on, she succumbed to burn injuries on the night of 17th/18th February, 2004.

(17) PW5 is Ram Roshni wife of Rajbir Singh, i.e. mother of deceased. She corroborated the version of her husband and she also deposed that her daughter was unconscious on 12th February, 2004 when they visited her in the hospital and that she gained consciousness on 15th February, 2004 at about 7.00 or 8.00 p.m. and that on her asking she told that she was given tablets by Sonu to make hole in her ear so that she may not feel pain and that she alongwith accused Sonu, Vijay and Angrej was locked in a room by accused Rajni and that rape was committed upon her by Sonu, Vijay and Angrej, turn by turn, and that when she threatened to inform her parents, she was set on fire by sprinkling kerosene oil on her body by the accused. She had given the age of her daughter as 13 years.

(18) PW6 is ASI Satwant Singh, who recorded statement of Rajbir, father of deceased on 4th March, 2004, Ex.PD. He had also prepared site plan of the place of occurrence, Ex. PE.

(19) PW7 is ASI Sawinder Singh, who recorded initial statement of Rajbir Singh on 12th February, 2004, Ex.PG and obtained opinion of the medical officer that Deepika was not fit to make the statement. On 15th February, 2004, he recorded statement of Deepika (deceased), Ex.PJ, when she was declared fit by the doctor. After the death of Deepika on 18th February, 2004, he visited the hospital and prepared inquest report, Ex.PK in the presence of Rajbir Singh and Raj Kumar.

(20) PW8 is Dr. Manpreet Kaul, who alongwith Dr. Parmod Kumar Goel, had conducted post mortem examination on the dead body of Deepika *alias* Dipi, daughter of Rajbir Singh on 18th February, 2004. She had proved copy of post mortem report as Ex.P1.. She deposed that, in their opinion, cause of death in this case was septicemia, as a result of ante mortem burns which were sufficient to cause death in ordinary course of nature and that the extent of burns were 85%. They had also taken two vaginal swabs and two vaginal smears for sending the same to chemical examiner for examination. She had also proved copy of report Ex.PM, which reveals that no spermatozoa was seen in the vaginal smear and vaginal swab of the deceased sent for examination.

(21) PW9 is Inspector Sukhwinder Singh, who had arrested accused Sonu in this case and filed report under Section 173 Cr.P.C., after completion of the investigation.

(22) PW10 is Dr. Chander Mohan of Guru Nanak Dev Hospital, Amritsar, who had examined Deepika on 12th February, 2004 and opined as per Ex.PF/1 that she was unconscious and not fit to make the statement. He declared her fit to make the statement on 15th February, 2004 on an application of the police, Ex.PH.

(23) Statement of accused under Section 313 Cr.P.C. was recorded, in which they denied the version of the prosecution witnesses and claimed to be innocent. However, they did not lead any evidence in defence.

(24) Learned trial Court,---*vide* impugned judgement acquitted accused Vijay Kumar, Rajni and Angrej Singh of the charges by giving them benefit of doubt, however, the present appellant-accused Sonu was convicted for offences under Sections 302/376 IPC and sentenced, as aforementioned, against which the present appeal had been filed.

(25) We have heard learned counsel for the appellant-accused, learned Additional Advocate General, Punjab, and have gone through the whole record carefully.

(26) It has been argued by learned counsel for the appellant-accused that three different versions regarding the occurrence had come on the record, hence, the case of prosecution is highly doubtful, benefit of

which should go to the accused. It has further been argued that no reliance can be placed upon testimony of Rajbir Singh (PW4) and his wife Smt. Ram Roshni (PW5). It is further contended that statement of the deceased allegedly recorded by the ASI cannot be treated as dying declaration and that no reliance can be placed upon the same as the version is a tutored one. It is further contended that even as per statement of the deceased, there is no allegation regarding committing rape upon her. It is further contended that there was some dispute between father of deceased and the present appellant-accused Sonu as father of deceased was tenant of Sonu and that a civil suit was also pending, hence he was falsely implicated in this case.

(27) On the other hand, it has been stated by the learned Additional Advocate General, Punjab, that the occurrence had taken place in the room in occupation of Sonu accused. It is further contended that Rajbir, father of the deceased had clarified in the cross-examination that earlier statement was made by him as told to him by sister of accused Rajni, as deceased was unconscious. It is further argued that deposition of ASI Sawinder Singh (PW7) and Dr. Chander Mohan (PW10), who declared the injured fit to make statement, is consistent and that there is no cross-examination on material points and hence, the same can be taken as dying declaration of deceased Deepika and can be relied upon, on the basis of which offence under Section 302 IPC is made out against accused Sonu. Hence, it is argued that he was rightly convicted and sentenced by learned trial Court.

(28) So far as deposition of father of deceased, Rajbir Singh, (PW4) and mother of deceased, Smt. Ram Roshni (PW5) implicating the present appellant-accused alongwith Angrej, Vijay and Rajni for offences of committing rape and murder is concerned, the same is an after thought version and hence, no reliance can be placed upon the same. As per their deposition, the occurrence was told to them by deceased on 15th February, 2004 at about 7.00 p.m. when she gained consciousness and when her statement was also recorded by the ASI. However, they remained silent till 4th March, 2004 when version Ex.PD was given, on the basis of which FIR was recorded. The version is also contrary to one given by Rajbir to police on 12th February, 2004. Though he had explained that earlier version of the occurrence was given by him on the asking of sister of accused- Sonu, namely, Rajni, however, the delay in giving subsequent version remained unexplained. Hence, learned trial Court rightly acquitted accused Angrej.

Rajni and Vijay by not relying upon statements of PW4 Rajbir and PW5 Smt. Ram Roshni. Moreover neither PW 4 Rajbir nor PW 5 Smt. Ram Roshni witnessed the occurrence, as they were not present at the time of the occurrence.

(29) However, case of prosecution against the present appellant-accused is based on dying declaration of the deceased Deepika given before ASI Sawinder Singh (PW 7) on 15th February, 2004, when she regained consciousness, which is Ex.PJ, on the basis of which present appellant-accused was convicted by learned trial Court and hence, we are to see as to whether reliance can be placed upon dying declaration of deceased Deepika Ex.PJ.

(30) In recent judgment rendered in **Jaishree Anant Khandekar versus State of Maharastra (1)** Hon'ble Apex Court reiterated the principles for accepting the dying declaration under Section 32 of the Indian Evidence Act. Relevant paragraph of the same reads as under :

“The judicially evolved rules of caution for acceptance of dying declaration have been stated by this Court in Paniben (Smt.) (*supra*), and in para Nos. 18 and 19 of the said report, this Court has formulated several principles for accepting dying declaration, which have been laid down in various judgments of this Court in the last few decades. The principles stated in Paniben (Smt.) (*Supra*) have been again repeated by this Court in **Shakuntla (Smt.) versus State of Haryana** 2007 (3) RCR (Criminal) 925: 2007 (4) RAJ 216: (2007) 10 S.C.C. 168. The said principles are so salutary and cardinal in nature that they deserve to be reiterated and this Court does so herein below :

- “(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. [*See Munu Raja versus State of M.P.*, (1976(3) S.C.C. 104).
- (ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration [*See State of U.P. versus Ram Sagar Yadav*

and Ramawati Devi *versus* State of Bihar. 1985 (1) R.C.R. (Criminal) 600 (SC).

- (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 an opportunity to observe and identify the assailants and was in a fit state to make the declaration. [*See* K. Ramachandra Reddy *versus* Public Prosecutor. (1976 (3) S.C.C. 618].
- (iv) Where dying declaration is suspicious, it should not be acted upon without corroborative evidence. [*See* Rashed Beg *versus* State of M.P., (1974) (4) S.C.C. 264].
- (v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. [*See* Kake Singh *versus* State of M.P. (1981 Supp. S.C.C. 25].
- (vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. [*See* Ram Manorath *versus* State of U.P., (1981 (2) S.C.C. 654].
- (vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected. [*See* State of Maharashtra *versus* Krishnamurti Laxmipati Naidu, (1980 Supp. S.C.C. 455].
- (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. [*See* Surajdeo Ojha *versus* State of Bihar. (1980 Supp. S.C.C. 769].
- (ix) Normally the court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up the medical opinion. But where the eyewitness said that the deceased was in a fit and conscious state to make the dying declaration, the medical opinion cannot prevail. [*See* Nanhau Ram *versus* State of M.P., (1988 Supp. S.C.C. 152)].

- (x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. [See *State of U.P. versus Madan Mohan*, (1989 (3) S.C.C. 390)].
- (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. [See *Mohan Lal Ganga Ram Gehani versus State of Maharashtra* (1982 (1) S.C.C. 700)].”
13. In the light of the above principles, the acceptability of the alleged dying declaration in the instant case has to be considered. The dying declaration is only a piece of untested evidence and must, like any other evidence, satisfy the court that what is stated therein is the unalloyed truth and that it is absolutely safe to act upon it. If after careful scrutiny, the court is satisfied that it is true and free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal impediment to make it the basis of conviction, even if there is no corroboration. (See *Gangotri Singh versus State of U.P.*, *Goverdhan Raoji Ghyare versus State of Maharashtra*, *Meesala Ramakrishan versus State of A.P. and State of Rajasthan versus Kishore*).
14. There is no material to show that the dying declaration was the result or product of imagination, tutoring or prompting. On the contrary, the same appears to have been made by the deceased voluntarily. It is trustworthy and has credibility.”

(31) In **P.V. Radhakrishna versus State of Karnataka**, (2) law on evidentially value of dying declaration under Section 32 of Evidence Act was summed up by Hon'ble Apex Court as indicated in **Smt. Paniben versus State of Gujarat**, (3) and the relevant paragraph of the same reads as under :

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- (2) 2003 (3) RCR (Cr.) 869
(3) 1992 (3) RCR (Cr.) 552 (SC)

“Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross-examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the Court also insists that the dying declaration should be of such a nature as to inspire full confidence of the Court in its correctness. The Court has to be on guard that the statement of deceased was not as a result of either tutoring, or prompting or a product of imagination. The Court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailant. Once the Court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as 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 a rule of prudence. This Court has laid down in several judgments the principles governing dying declaration, which could be summed up as under as indicated in **Smt. Paniben versus State of Gujarat**, 1992(3) R.C.R. (Crl.) 552 (S.C.): A.I.R. 1992 S.C. 1817.

- (i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. [See *Munna Raja and another versus The State of Madhya Pradesh*, (1976(2) S.C.R. 764].
- (ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration [See *State of Uttar Pradesh versus Ram Sagar Yadav and others*, 1985 (1) R.C.R. (Crl.) 600 (S.C.): A.I.R. 1985 S.C. 416 and *Ramavati Devi versus State of Bihar*, A.I.R. 1983 S.C. 164].
- (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 an opportunity to observe and identify the assailants and was in a fit state to make the declaration. [See *K. Ramachandra Reddy and another versus The Public Prosecutor*, A.I.R. 1976 S.C. 1994].

- (iv) Where dying declaration is suspicious, it should not be acted upon without corroborative evidence. [*See Raheed Beg versus State of Madhya Pradesh, (1974 (4) S.C.C. 264*].
- (v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. [*See Kake Singh versus State of M.P. AIR 1982 S.C. 1021*].
- (vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. [*See Ram Manorath and others versus State of U.P., 1981 (2) S.C.C. 654*].
- (vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected. [*See State of Maharashtra versus Krishnamurti Laxmipati Naidu, A.I.R. 1981 S.C. 617*].
- (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. [*See Surajdeo Ojha and others versus State of Bihar, A.I.R. 1979 S.C. 1505*].
- (ix) Normally the court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up the medical opinion. But where the eyewitness said that the deceased was in a fit and conscious state to make the dying declaration, the medical opinion cannot prevail. [*See Nanahau Ram and another versus State of Madhya Pradesh, A.I.R. 1988 S.C. 912*].
- (x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. [*See State of U.P. versus Madan Mohan and others, A.I.R. 1989 S.C. 1519*].
- (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. [*See Mohan Lal Gangaram Gehani versus State of Maharashtra A.I.R. 1982 S.C. 839*].

(32) In the light of above principles, we are to see as to whether alleged dying declaration of deceased Deepika in this case recorded by A.S.I. Sawinder Singh (PW7) can be accepted or not.

(33) In **P.V. Radhakrishna's** case (*supra*) as well, dying declaration was recorded by the police officer and there was no other evidence except dying declaration and the accused was convicted on the basis of dying declaration alone, and however, it was found that as the dying declaration was not a result of product of imagination, tutoring or prompting, and the same appeared to have been made by the deceased voluntarily, the same was relied upon and the contention that the Magistrate was not called and that the deceased could not be fit to make statement for 100% burn injuries was repelled.

(34) The Constitution Bench of Hon'ble Apex Court in **Laxman versus State of Maharashtra**, (4) observed that where medical certificate indicated that the patient was conscious, it would not be correct to say that there was no certification of state of mind of declarant.

(35) In the present case, dying declaration of Deepika was recorded by A.S.I. Sawinder Singh (PW7) on 15th February, 2004, after she was declared fit to make statement by Dr. Chander Mohan (PW10). Dr. Chander Mohan specifically deposed that Deepika was examined by him on 15th February, 2004, on the application of police Ex.PH, and he found that she was fit to make the statement and he accordingly gave his report, Ex.PH/1. There is no cross-examination of this witness on the point that Deepika was fit to make statement on 15th February, 2004. Hence certificate given by Dr. Chander Mohan (PW10) that Deepika was fit to make statement on 15th February, 2004 is sufficient to prove that Deepika was conscious and was in a fit state of mind to give statement. Moreover Dr. Chander Mohan (PW10) was acting in discharge of his official duty. He is an independent witness. There is nothing as to why he should have deposed falsely.

(36) PW7 A.S.I. Sawinder Singh also specifically deposed that after getting the opinion of the medical officer, he recorded statement of Deepika, Ex.PJ, which was read over to her and she thumb marked the same after duly understanding its contents in token of its correctness and

he made endorsement Ex.PJ/1 over the same in this regard. No question was put to this witness as well in the cross-examination that statement of Deepika Ex.PJ was not correctly recorded by him. No question was also put to him that she was not in a fit state of mind to give the statement. He was also acting in discharge of his official duty. Hence, there is no force in the argument of learned counsel for the accused that merely on the ground that the A.S.I. did not approach the Magistrate to record the statement of Deepika, no reliance should be placed upon his testimony.

(37) Dying declaration Ex.PJ of the deceased cannot be the result of tutoring or prompting on the part of the parents of the deceased, rather had the same been the result of tutoring and prompting, she would have implicated all the accused. Moreover her statement is also silent on the point of alleged rape having been committed upon her by the accused. Hence the version of the occurrence as given by the deceased in her statement Ex.PJ before the A.S.I. appears to have been made by her voluntarily. The same is trustworthy and credible one. The version has been given by her on her attaining consciousness after she sustained burn injuries on 12th February, 2004. Hence, in view of observation of Hon'ble Apex Court in **P.V. Radhakrishna's case** (*supra*), merely on the ground that statement of the deceased Deepika, Ex.PJ was not got recorded from the Magistrate, it cannot be said that no reliance can be placed upon the same on the ground that the same was recorded by A.S.I. Sawinder Singh (PW7)

(38) As per statement of Deepika deceased Ex.PJ, which was treated as dying declaration, as already discussed above, present appellant-accused-Sonu started misbehaving with her and touched her stomach, when she and Sonu were alone as Sonu was to pluck her ear and thereafter, she did not know what happened and as to when she was put on fire. Hence, deceased and Sonu were alone when she caught fire. Hence it was for Sonu to explain as to how she caught fire. Tea was already prepared by her and the same was also served and was already taken by the accused and other persons. She also stated that she was removed to Hospital by Sonu and some other persons. The occurrence had taken place in the room in occupation of Sonu, as per site plan prepared by the Investigating Officer and the Draftsman. Hence, in the absence of any other explanation on the

part of Sonu accused as to how Deepika was put on fire, the only inference which can be drawn is that when she did not allow Sonu to misbehave with her, she was put on fire by him. Stove was not on at that time. The tea was already prepared. Sonu had taken the deceased inside on the plea that he would pluck her ear. Sonu had also given her some tablets. Hence she was not fully conscious. Motive for the offence in this case is obvious as Sonu misbehaved with Deepika and touched her stomach and on her refusal to allow Sonu to have his way, she was set on fire by Sonu so that she may not disclose the fact of his misbehaving with her to her parents and other people present outside.

(39) However, prosecution has failed to prove that offence of rape was committed upon Deepika before she was set on fire by accused Sonu. As per chemical examination report Ex.PM, Spermatozoa was not found in vaginal smear and vaginal swab. No question was put of PW8 Dr. Manpreet Kaul as to whether deceased was subjected to rape before sustaining burn injuries. Merely on the ground that vagina of deceased admitted two fingers and hymen was found torn by Dr. Manpreet Kaul, PW8, at the time of her post mortem examination, it cannot be said that she was subjected to rape, as there is no such definite finding given by Dr. Manpreet Kaul, PW8.

(40) However, we are of the view that the dying declaration of Deepika, Ex.PJ, is reliable piece of evidence as the same was made by her voluntarily without any tutoring and in conscious state of mind, according to which the only inference, which can be drawn, is that she was set on fire by none else than accused Sonu, as there was nobody else in the room except Sonu accused and the deceased when she was put on fire.

(41) The prosecution has been able to prove offence under Section 302 IPC against accused Sonu beyond any shadow of reasonable doubt. Hence except for the modification with regard to setting aside of conviction and sentence under Section 376 IPC, the present appeal is dismissed maintaining conviction and sentence under Section 302 IPC, as passed by learned trial Court.