

**(1982) 02 MP CK 0019**

**In the Madhya Pradesh High Court**

**Case No : Criminal Appeal No. 51 of 1976**

Chandra Sen Bhikarilal and another

APPELLANT

Vs

State of Madhya Pradesh

RESPONDENT

**Date of Decision : 10-02-1982**

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 374(2)  
Penal Code, 1860 (IPC) — Section 302, 34

**Citation :** (1983) JLJ 73 : (1982) MPLJ 772

**Hon'ble Judges :** R. C. Shrhastava, J; A. R. Navkar, J

**Bench :** Division Bench

**Advocate :** P. Gupta, for the Appellant; M. A. Shah, Deputy Govt. Advocate, for the Respondent

**Final Decision :** Allowed

## Judgement

A. R. Navkar, J.

This is an appeal u/s 374(2) of the Code of Criminal Procedure against the order of conviction recorded by the First Additional Sessions Judge, Bhind, in Sessions Trial No. 48 of 1975, convicting appellant No. 1 u/s 302 of the Indian Penal Code and appellant No. 2, u/s 302 of the Indian Penal Code read with section 34 of the Indian Penal Code and sentencing them to imprisonment for life, by his judgment dated 20-2-1976.

The facts of the case, which are not disputed, are that Ram Beti, appellant No. 2, is wife of Rajendra Kumar, deceased. Ram Beti, along with her husband, was staying at Agarwal Coloni, Bhind. The said house was taken on rent by Chandra Sen who is appellant No. 1.

It is further alleged by the prosecution that there was illicit intimacy between Chandra Sen and Ram Beti and this fact was resented by her husband Rajendra Kumar. It has further come in evidence that Rajendra Kumar asked his wife not to be in company with Chandra Sen and she should stop talking to him also. But,

the wife Ram Beti (appellant No. 2) did not pay any heed to these instructions. The matter came to the extreme, so that the husband had to report the matter to police officer, but the Police Officer showed his inability, as the house was taken on rent by Chandra Sen. It has further also come in evidence that as his wife was not listening to him, Rajendra Kumar used to weep and this fact was known to the neighbours, who were residing near the portion which Rajendra Kumar occupied along with his wife. Rajendra Kumar had a son who was about 5 to 6 years old when the incident took place.

On 3-8-1975, Sub Inspector Shiv Shankar Sharma (P. W. 5) received an information from Hospital that one patient (Rajendra Kumar-husband of Ram Beti) has been admitted in the Hospital, who has got hundred per cent burns on his body and that his dying declaration may be taken as soon as possible. This information was sent by Dr. J. P. Arora (P. W. 3). On this information, he went to the hospital and saw Dr. J. P. Arora. The doctor informed that the condition of the patient is serious. Therefore, Shiv Shankar Sharma (P. W. 5) requested Dr. J. P. Arora (P. W. 3) to record the dying declaration of Rajendra Kumar. On his request, Dr. J. P. Arora (P. W. 3) took down the dying declaration of Rajendra Kumar, which is Ex. P/I. After recording of the dying declaration by the Doctor, Shiv Shankar Sharma (P. W. 5) also recorded the dying declaration of Rajendra Kumar for the second time, which is Ex. P/3. After this, Rajendra Kumar died.

After death of Rajendra Kumar, Ram Sanahi Lai Dubey (P. W. 13) started investigation of the death and he prepared Panchayatnama Lash and it is Ex. P/14. This was done in the presence of Prem Chand, Nerai Chand, Puran Chand and Kapur Chand. The dead body was photographed and the photographs are Exs. P/2 to P/7. They were taken by one Ramesh Arora. After taking the photographs, the dead body was sent for post-mortem. A site plan was also prepared and the articles which were found on the spot of the incident were also seized. The accused were arrested and challan was filed before the Chief Judicial Magistrate, Bhind. The case was committed for trial to the learned Sessions Judge u/s 209, Criminal Procedure Code.

The accused have denied the guilt. The defence taken by the accused is that because of malice, they have been falsely implicated in this case. The learned trial Court framed two points for decision as under :-

Whether Rajendra Kumar is dead?

Whether the acts of the accused are responsible for the death of Rajendra Kumar?

The trial Court has decided these two points by taking into consideration the evidences of eye-witnesses of the incident and the dying declarations given by Rajendra Kumar. Before us, it was not disputed that Rajendra Kumar is dead. The only point which is disputed before us is that the appellants are not responsible for the alleged murder by burning.

In para 10 of its judgment, the learned trial Court has considered the evidence

erf Shiv Kumar (P.W. 1), the eye-witness who is a child witness. The learned Judge has further said that the statement given by Shiv Kumar (P.W. 1) supports the story put forward by the prosecution. He has stated in his statement that Chandra Sen put fire to the clothes of his father. Further, he has-stated that before doing so, the deceased was tied by a rope. The probative-value of the statement given by Shiv Kumar (P. W. 1) is seriously challenged by the learned counsel for the appellants and we will consider it afterwards.

The other aspect, which is taken into consideration is about the dying declarations given by deceased Rajendra Kumar. Dr. J. P. Arora (P. W. 3) has recorded the dying declaration of Rajendra Kumar and the learned trial Court has found that the statement corroborates the story put forward by prosecution. On the day of incident Dr. J. P. Arora (P. W. 3) was on duty and at about J2.20 in the night, Rajendra Kumar came to the Hospital with burns on his body and his dying declaration was recorded as was requested by Sub- Inspector Shiv Shankar Sharma (P. W. 5). The dying declaration, recorded by Dr. J. P. Arora (P. W. 3) is Ex. P/I. The said dying declaration, it is held by the learned trial Court, completely supports the story put forward by the prosecution. Further, he has stated that Rajendra Kumar said that after his clothes were put on fire, he tried to run and, on asking him as to who has done this he sard that his enemy put fire to his clothes. He has also stated in the dying declaration that Chandra Sen sprinkled Kerosene oil on him. There is also a certificate by Dr. J. P. Arora (P. W. 3) that the condition of the deceased was such that he could give the dying declaration and that is Ex. P/2. The incident further is corroborated by the statements of Vidya Devi (P.W. 2) and Shivram Singh (P.W. 4). Vidya Devi (P. W. 2) has stated that Rajendra Kumar was admitted to the Hospital because of his burns and his condition was serious and when he was admitted, Dr. J. P. Arora (P. W. 3) enquired about the incident and when the Doctor enquired about the incident, the deceased stated that he was put to fire by Chandra Sen, who is paramour of his wife. Further, he has stated thai: Chandra Sen and Ram Beti were sleeping on one cot and he was sleeping on the floor. The other dying declaration, which is Ex. P/3, recorded by Shiv Shankar Sharma (P. W. 5), is considered by the learned trial Court in para 16 of its judgment, in which Shiv Shankar Sharma has stated that when he enquired from Rajendra Kumar as to who has burnt him, he, in his dying declaration, said that Chandra Sen sprinkled Kerosene oil on him and then he was put to Sire. Further, he has stated that in putting fire to him, his wife Ram Beti assisted Chandra Sen. Therefore, taking these two dying declarations into consideration and holding them to be truthful, the learned trial Court has held that the appellants are responsible for the murder of the deceased.

Furtlier, lie has considered the evidence of Prema Bai (P. W. 8) and Sukhalai (P. W. 9), who are next door neighbours and they heard the deceased crying. They also saw the deceased burning. The learned trial Court has held that this evidence corroborates the story put forward by the prosecution and holding so, it has convicted and sentenced the appellants, as mentioned above

The learned counsel for the appellants has put forward some additional factors to show that it is not a case of murder, but it is a case of suicide. The first circumstance, he has submitted before us is that the appellants, as soon as they saw Rajendra Kumar ablaze, tried to put down the fire by throwing water on him. The next circumstance submitted by him is that Chandra Sen opened the door of the room in which the incident took place and allowed the neighbours to rush in for help. Not only this, but he himself went out to bring a rickshaw so that he could carry Rajendra Kumar to the hospital. The third circumstance is that as the house was taken on rent by Chandra Sen himself, his presence in the room is not unnatural. The next circumstance is that the son of the deceased Shiv Kumar (P. W. 1) who has given the statement on behalf of prosecution, was sleeping by the side of his father and if he was sleeping by the side of his father Rajendra Kumar, the deceased, it is very difficult to understand as to why there was no kerosene on the clothes of the child or any burning of the clothes of the child. The next circumstance is that when the Sub-Inspector Shiv Shankar Sharma (P. W. 5) very well knew that the condition of the deceased is precarious and when the Magistrate, who could have recorded the dying declaration, was at a distance of 100 yards, why the Magistrate was not called to record the dying declaration, is not understood. Further, he submitted that the view taken by the Supreme Court in such cases is that the dying declaration recorded by the investigating officer should not be accepted as true as the investigating officer is interested in seeing that the accused is convicted and that being the case, unless the Court comes to the conclusion that the statement recorded by the investigating officer is free from all infirmities, no conviction should be based on it. The next circumstance, according to the learned counsel for the appellants, is that the dying declaration, recorded by Dr. J. P. Aroxa (P. W. 3) does not mention as to what was the condition of the deceased when the dying declaration was recorded. The other circumstance is that in the dying declaration, there is improvement and addition. Therefore, the Court should not believe such a dying declaration. It will be better to mention what are the improvements pointed out by the learned counsel for the appellants. Ex. P/1 is in question and answer form and questions Nos. 5 and 6 along with their answers read as under:

Q. Tumhare yeh hal raise huwa ?

A. Main jamin par bachhe ke sath so raha tha tatha meri aurat apne yar chandrasen ke sath khat par so rahi thi ek dam mujhe ag lagi aur main idhar udhar bhagne laga.

Q. Ag kisne lagai ?

A. Chandrasen hamara dushman tha usine mitti ka tel dal kar ag lagai."

In this statement, there is no mention of Ram Beti taking part in the incident. The other dying declaration which is Ex. P/3, recorded by Shiv Shankar Sharma (P. W. 5), states:

Mere upar chandrasen va meri aurat ne mitti ka tel dal kar ag laga kar mujhe

jalaya hain.

There is one more piece of evidence which is Ex. P/12 in which, it was submitted that there is one more dying declaration of Rajendra Kumar to Bhagchand, which is as under :-

Rajendra kumar ne bhagchand ko bataya tha ki use khat se chandra sen va rambeti ne mitti ka tel dal kar jalaya hain." But, the prosecution has not produced Bhagchand as a witness.

First of all, we will consider the statement of the child witness Shiv Kumar (P. W. I) and whether his statement should be believed or not. There is no dispute that Shiv Kumar is aged six and the voire dire conducted by the trial Court, in our opinion, does not indicate that Shiv Kumar (P. W. I) was in a position to understand the meaning of giving a statement before the Court. The note which is made by the learned trial Court says that Shiv Kumar (P. W. I) calls Chasma as Chashma; Unguthi as Anguthi; Pen as Pen and Ghanti as Ghanti and further, it has stated that the child witness is in a position to answer the questions put to it. But, from this, we are not in a position to understand as to what is the intelligence quotient of the witness and whether he understands the implications of giving a statement in a murder case regarding the incident. Furthermore, if we take into consideration the evidence of the child witness, we are of the opinion that his statement is not worth believing. He was asked as to how his father was put to fire. To this, he has answered that first he was tied and then his father was put to fire by putting burning match stick to his clothes. He was further asked that when he woke up. To this he has answered that when his father started shouting, he woke up. Further he was asked that whether any talk took place before the Advocate before he came to the Court to give the statement. We may quote the exact wordings of the question and answer as under :-

Q. Tumko bade kaka aaj vakil saheb ke yahan le gaye the ?

A. Han.

Q. Vakil saheb ke yahan aaj yeh batchit hui thi ki use machis laga kar jalaya ?

A. Han.

Furthermore, he has also admitted that from the date of the incident, he is staying with Bhagchand. One thing clearly emerges from his statement and that is that he was sleeping by the side of his father, who is dead and secondly, he has not implicated his mother Ram Beti in the alleged incident. Lastly, there is a possibility that the witness might have been tutored by the Advocate when Bhagchand took him to the Advocate. One more aspect of the case also is made clear by the statement of the child witness that the doors of the room were opened when Rajendra Kumar was ablaze by Chandra Sen and Chandra Sen also said that he is going out to bring the rickshaw, so that Rajendra Kumar might be taken to the hospital.

How the evidence of a child witness is to be weighed was considered in Manni v. Emperor A I R 1930 Oudh 406, in which it is held as under:-

There is no more dangerous witness than young children. Any mistakes or discrepancies in their statements are ascribed to innocence or failure to understand, and undue weight is often given to what is merely a well taught lesson. Children have good memories and no conscience. They are easily taught stories and live in a world of make-believe so that they often become convinced that they have really seen the imaginary incident which they have been taught to relate. The evidence of a child should therefore be accepted with great caution." The same point when came before the Supreme Court, the Supreme Court in Caetano Piedade Fernandes and Another Vs. Union Territory of Goa, Daman and Diu Panaji, Goa, held as under. In that case also the age of the child witness was about six years and it is held therein as under: - "5. Turning first to the evidence of Xavier, it may be pointed out straightway that he was a child witness aged only 6 years at the time when he gave evidence. His evidence is, therefore, to be approached with great caution. He was, according to the prosecution, the only eye-witness to the crime. We have carefully gone through his evidence, but we are constrained to observe that even after making the utmost allowance in his favour in view of the fact that he is a child witness, we find it difficult to accept his testimony. There are several contradictions from which his evidence suffers, such as who had which weapon, but it is not merely on account of these contradictions of a minor character that we are inclined to reject his evidence. There are serious infirmities affecting his evidence and of them, the most important is that he is supposed to have given the name of appellant No. 2 as the assailant of the deceased even though he had never seen him before the date of the incident. He stated in his evidence that when on seeing the appellants dragging the body of the deceased after attacking him he ran towards the village, he met his father Antonio on the way and on being questioned by Antonio, he said that the deceased had been cut by Lundi and Jacki Chaddo. that is appellants Nos I and 2. However, in cross-examination, he admitted that he had not seen appellant No. 2 earlier and it was only at the time when appellant No. 2 attacked the deceased that he saw appellant No. 2 for the first time. Apprehending that the answer given by him in cross-examination may be the result of some confusion or misunderstanding, the learned Sessions Judge gave another opportunity and asked him whether he was knowing appellant No. 2 from before, to which he answered by saying that he had not seen appellant No. 2 at any earlier point of time. Now if this witness had never seen appellant No. 2 before, it is impossible to understand how he could give his name as the assailant of the deceased when he met Antonio on the way to the village. How could he say that Jacki Chaddo had participated in the attack on the deceased when he had never seen Jacki Chaddo before. This answer given by Xavier clearly impairs the value of his evidence and casts a serious doubt on his veracity. It shows that he had been prevailed upon by the prosecution to falsely implicate appellant No. 2 and if his evidence in regard to the presence of

appellant No. 2 cannot be accepted, it must react adversely against his evidence in regard also to appellant No. 1. There is also one other contradiction of a serious nature in the evidence of Xavier. He stated in his evidence that each of the two appellants dealt one blow: appellant No. 2 cut the throat of the deceased first with the coita and then appellant No. 2 cut his neck with the knife. Now, if only one blow was delivered by each of the appellants, there would be two injuries on the deceased, but the medical evidence shows that the deceased had received as many as nine injuries, which would mean that more than two blows were given to him. Then again, according to Xavier, his father Antonio sent him back home with Santana Costa and alone proceeded to the place where the body of the deceased was lying. That was also the evidence of Antonio. But it is difficult to believe that Antonio would send Xavier home with Santana Costa and proceed alone to find out the dead body of the deceased when he did not know the place when the offence was committed nor was he informed by Xavier as to where the dead body of the deceased was lying. Would he take Xavier with him in order that Xavier may show him the place where the deceased had been killed, instead of going on a chase for hunting out the dead body of the deceased in the forest ? Would he also not prefer to take Santana Costa with him rather than go alone to the spot where his father had been done to death ? The only explanation given by Antonio for not taking Santana Costa with him was that Santana Costa was afraid of going with him, but that is hardly an explanation which can carry conviction. Santana Costa was his servant and it is difficult to believe that he would refuse to go with his master. However, turning back to the evidence of Xavier, we find that in the committal court Xavier narrated an entirely different story. There he stated that he accompanied his father Antonio back to the scene of offence and showed him the place where the deceased had been assaulted and then Antonio walked to the place where the dead body of the deceased was lying. When Xavier was confronted with this statement made by him in the committal Court, he first refused to admit that he had made such a statement, but then he accepted it. This contradiction is again of a very serious nature and we do not think it would be safe at all to rely on the testimony of Xavier.

The evidence by the child witness is not corroborated by any other independent evidence. Therefore, it will not be safe to rely on the evidence of Shiv Rumar (P. W. 1).

The learned Deputy Government Advocate, when faced with this difficulty of corroboration, referred us to the statement of Prema Bai (P. W. 8) and Sukhlal (P. W. 9). But, before assessing their evidence, it will be better to mention that Sukhlal (P. W. 9) wanted to get the tenant (Chandra Sen) evicted and to get vacant possession of the portion in which Rajendra Kumar was staying. Therefore, it can safely be said that the relations between Chandra Sen and these two witnesses were not cordial. From the statement of Prema Bai (P. W. 8) it is further clear that there used to be quarrels between Rajendra Kumar and his wife and as helpless husband, he used to weep. The exact statement is to this effect:

Ye bhi sahi hain ki rajendra kumarki patni chandra sen se bolhi thi isliye rajendra ka uski patni se jhagda hota tha. kintu yeh sahi hain ki rajendra kumar is jhagde par se rota rahta tha.

In her statement, she has stated that she woke up after hearing the cries of Rajendra Kumar and after waking up, she saw Rajendra Kumar ablaze. Further, she states that Rajendra Kumar was shouting:

Hay bairi ne bar diya. hay chandra sen ne bar diya.

But, if her statement is taken into consideration, it becomes clear that she did not see as to who actually sprinkled kerosene on the body of the deceased. So also, she is not in a position to state as to who put fire to the clothes of the deceased. But one thing is clear from her statement that as soon as her husband shouted as to what has happened, the doors were opened by Chandra Sen and after him, Rajendra Kumar came out and immediately after Rajendra Kumar, his wife Ram Beti followed him. Chandra Sen, after coming out of the room, said that he wanted to bring rickshaw, but before he could bring rickshaw, Rajendra Kumar went on foot towards hospital. Rajendra Kumar was followed by his wife Ram Beti. It is also said by her that to put out fire, wife of Rajendra Kumar sprinkled two bucket-fulls of water on Rajendra Kumar and sprinkling of this water extinguished the fire. The other aspect which the learned counsel for the appellant wanted to bring to our notice is that the witness did not disclose the name as to who put Rajendra Kumar to fire to anyone. Neither this fact was disclosed by her husband to anyone. She further had to admit that she did not ask either Chandra Sen or wife of Rajendra Kumar as to how the deceased Rajendra Kumar caught fire.

The other witness Sukhlal (P. W. 9) has stated that he and his wife and his children were asleep and when they heard the commotion, he woke up. His wife told him that there is some light in the court-yard of Shambhu Dayal. After hearing this, he saw Rajendra Kumar ablaze, through the window. When he shouted that Chandra Sen should open the door, the door was opened and he heard Rajendra Kumar saying that he was put to fire by Chandra Sen and his wife Ram Beti. Further, he has stated that Chandra Sen and Ram Beti sprinkled water on the deceased and fire was extinguished. They saw how the fire was extinguished. After that, the door of the room was opened and from the room, first Chandra Sen came out and Rajendra Kumar followed him and after them, Ram Beti and her children came out and they went towards the hospital. In cross-examination, he had to admit that he gave statement to the Police regarding the incident and his statement is Ex. D/4. But, in Ex. D/4, he has not mentioned the name of the wife of Rajendra Kumar who put fire to Rajendra Kumar. If his statement is also considered, it will be difficult to say that he could see the incident right from the beginning. Neither he has stated to that effect. Only thing which he has stated is that he heard Rajendra Kumar implicating Chandra Sen and his wife Ram Beti in the incident. In our opinion, this will not mean that these two witnesses have corroborated the statement given by Shiv Kumar (P. W.

1). On the contrary, they have stated certain actions of the accused, relying on which the learned counsel for the appellants submitted that it cannot be a case u/s 302, Indian Penal Code, but it is a case of suicide committed by a helpless husband, whose miseries, no one was willing to listen. We will consider this aspect in the light of the rulings cited by the learned counsel for the appellants in support of his submission. The discussion so far leads us to an inference that the evidence of child witness is not truthful and cannot be accepted for convicting the appellants. So also, the evidence of Prema Bai (P. W. 8) and Sukhlal (P. W. 9) does not inspire the confidence so as to hold that their evidence corroborates the story put by the child witness. So also ignoring the evidence of the child witness, we cannot hold, taking into consideration the evidence of these two witnesses, that the prosecution has proved the story as alleged.

Now remains the question whether we can convict the appellants on the basis of the dying declarations given by the deceased Rajendra Kumar. The nature of the evidence of dying declaration was considered in *Tapinder Singh v. State of Punjab* and another 1970 J L J 128 in which it is held as under:-

The dying declaration is a statement by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death and it becomes relevant u/s 32(1) of the Indian Evidence Act in a case in which the cause of that person's death comes into question. It is true that a declaration is not a deposition in Court and it is neither on oath nor in the presence of the accused. It is, therefore, not tested by cross-examination on behalf of the accused. But a dying declaration is admitted in evidence by way of an exception to the general rule against the admissibility of hearsay evidence, on the principle of necessity. The weak points of a dying declaration just mentioned merely serve to put the Court on its guard while testing its reliability by imposing on it an obligation to closely scrutinise all the relevant attendant circumstances. In order to pass the test of reliability a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused who had no opportunity of testing the veracity of the statement by cross-examination. But once the Court has come to the conclusion that the dying declaration was the truthful version as to the circumstances of the death and the assailants of the victim, there is no question of further corroboration. If on the other hand, the Court after examining the dying declaration in all its aspects, and testing its veracity, has come to the conclusion, it is not reliable of itself, and that it suffers from an infirmity, then, without corroboration it cannot form the basis of a conviction. Thus, the necessity of corroboration arises not from any inherent weakness of a dying declaration as a piece of evidence, as held in some of the reported cases but from the fact the Court, in a given case, has come to the conclusion that that particular dying declaration was not free from the infirmities referred to above or from such other infirmities as may be disclosed in evidence in that case. In the instant case, considering the nature and the number of injuries suffered by the deceased and the natural anxiety of his father and others present at the spot to

focus their attention on efforts to save his life, the Court was unable to hold that the deceased had within the short span of time between the occurrence and the making of the dying declaration been tutored to falsely name the appellant as his assailant in place of the real culprit and also to concoct a non-existent motive for the crime. *Khushal Rao Vs. The State of Bombay*, , *Harbans Singh v. State of Punjab* (1962) Supp, IS C R 104, relied on.

The same point was considered in *Munnu Raja and Another Vs. The State of Madhya Pradesh*, and it was observed therein as under:-

It is well settled that though a dying declaration must be approached with caution for the reason that the maker of the statement cannot be subjected to cross examination, there is neither a rule of law nor a rule of prudence which has hardened into a rule of law that a dying declaration cannot be acted upon unless it is corroborated. Thus Court must not look out for corroboration unless it comes to the conclusion that the dying declaration suffered from any infirmity by reason of which it was necessary to look out for corroboration.

As to corroboration by other evidence, when this point came before the Supreme Court in *Thurukanni Pompiah and Another Vs. State of Mysore*, , it is held as under:-

A dying declaration is relevant and material evidence in the prosecution of the assailants and a truthful and reliable dying declaration may form the sole basis of conviction, even though it is not corroborated. But the Court must be satisfied that the declaration is truthful. The reliability of the declaration should be subjected to a close scrutiny, considering that it was made in the absence of the accused who had no opportunity to test its veracity by cross-examination. If the Court finds that the declaration is not wholly reliable and a material and integral portion of the deceased's version of the entire occurrence is untrue, the Court may, in all the circumstances of the case, consider it unsafe to convict the accused on the basis of the declaration alone without further corroboration.

Therefore, we have to see as to whether the dying declarations made by Rajendra Kumar to the investigating officer and to the Doctor (Dr. J.P. Arora-P. W. 3) and to one Bhagchand are truthful or not and whether they suffer from any infirmity or lacuna, so that we should not believe those dying declarations as truthful.

The first infirmity which was canvassed before us by the learned counsel for the appellants is that the statement was made before the investigating officer and as it is made before the investigating officer, unless the dying declaration is corroborated by other evidence, we should not believe that state-ment. But, we are not in a position to accept such a broad proposition as submitted by the learned counsel for the appellants. He has further stated that the investigating officer is interested in the result of the case in favour of the prosecution and that being the case, the statement made to the investigating officer should not be believed. This point was considered in *Jaswant Singh Vs. State (Delhi*

Administration), and it was held therein as under: - "To sustain a conviction in such cases the circumstantial evidence must be complete and must be incapable of explanation on any other hypothesis than that of the guilt of the accused. It is also true that the dying declaration which is not recorded by a Magistrate has to be scrutinised closely, but it is well settled that if the Court is satisfied on a close scrutiny of the dying declaration that it is truthful, it is open to the Court to convict the accused on its basis without any independent corroboration. *Khushal Rao Vs. The State of Bombay*, , *Lallubhai Devchand Shah and Others Vs. The State of Gujarat*, , *Vithal Somnath Kore Vs. State of Maharashtra*, ., Relied on.

In the instant case the dying declaration recorded by the sub-Inspector in the presence of the duty doctor who also verified its genuineness was truthful and convincing and it could not be brushed aside merely on the ground that it was not recorded by a Magistrate. The testimony of the parents and the report of the chemical examination also lent strong corroboration to the dying declaration. Thus, the evidence inevitably pointed to the conclusion that it was the appellant and the appellant alone who intentionally caused the death of the deceased." Therefore, the submission of the learned counsel for the appellants that as the dying declaration is recorded by the investigating officer, it should be rejected as it is not corroborated, cannot be accepted. Therefore, the dying declaration cannot be rejected on the sole ground that it is recorded by the investigating officer.

As to the dying declaration made to Bhagchand, we have already mentioned that as Bhagchand is not examined by the prosecution even after his being a material witness who could have deposed regarding dying declaration made to him, that dying declaration cannot be accepted and consequently, cannot be acted upon.

Before proceeding further to consider the effect of the dying declaration given by Rajendra Kumar to Dr. J. P. Arora (P. W. 3), we will consider the dying declaration itself, which is Ex. P/I. In this dying declaration, the deceased has stated that he was sleeping on the floor along with his son and his wife Ram Beti (appellant No. 2) and Chandra Sen (appellant No. 1) were sleeping on the cot. Further, he has stated that Chandra Sen is his archenemy and he has put fire to him. When he was asked the reason for doing so, he has stated that because of his wife, this thing has happened. Ex. P/I is in question and answer form and the deceased has put his thumb impression on it and there are two witnesses, namely, Ram Singh and Vidya Devi. There is certificate given by Dr. Arora, which is as under:

Certified that I have taken the above statement in the fully conscious state of mind." The criticism levelled against this statement is that firstly the statement is given by a person who admits that he is giving the statement against his enemy. Further, it does not mention as to what part was played by Ram Beti. It is further said that the statement does not show as to what was the condition of the patient when the statement was recorded. It has mentioned that the patient has cent per cent burns on him. Lastly, it was submitted that between the answer to the last question and the thumb impression of the deceased, there is a blank

space and, therefore, it was submitted that the thumb impression was taken first and the dying declaration was recorded afterwards. But, we are not very much impressed by the submission of the learned counsel for the appellants. On the contrary, from the line which has been drawn between the answer given to the last question and the thumb impression, put by the deceased, it is clear that it was done so to avoid any manipulation. As to the thumb impression, the Doctor has stated that because the deceased was in a precarious condition, he had put his thumb impression at that place.

As to certificate also, we may mention that the Doctor has stated in his statement that when the dying declaration was recorded, the deceased was fully conscious and on cross-examination was directed specifically regarding the certification of the Doctor of the condition of the deceased. Therefore, all the submissions made before us to disbelieve this dying declaration on the above points cannot be accepted. We may mention that in this dying declaration, there are certain things which make us suspicious regarding truthfulness of this dying declaration. The first circumstance is that the deceased was sleeping along with his son on the floor while the appellants were sleeping on the cot. He has not mentioned that he was tied by something before fire was put to his clothes. This fact has been stated by his son Shiv Kumar (P. W. I) in his statement. Dr. N. C. Mishra (P. W. 14) examined the dead body of Rajendra Kumar and in paras 8 and 9 of his statement, he has stated as under:-

.....I have not mentioned the depth and breadth of the ligature marks. On the basis of the writing in the report I say that the person was tightened by the rope. Ligature marks can be caused by string. It cannot be said as to whether the string used was hard or soft.

No acchymosis was mentioned around the ligature marks in the report. If acchymosis or abrasion over the ligature is seen then it is antemortem. I must have forgotten to write word abrasion or acchymosis in the report over the ligature marks. But it is my practice to write these words in the report whenever they are found.

From this statement, it becomes clear that the deceased was tied before he was put to fire. If the deceased was tied before he was put to fire as is stated by the Doctor and the son of the deceased, was sleeping by his side, it is very difficult to accept that he remained quiet till he was tied and then doused with kerosene oil and put to fire. It was submitted before us by the learned counsel that the incident of tying is introduced by the prosecution to rule out the possibility of suicide and to give a colour to the case as if it was a case of murder by the appellants.

The other dying declaration is Ex. P. 3 recorded by Shiv Shankar Sharma (P. W. 5). In this dying declaration, it is mentioned that Ram Beti and Chandra Sen had illicit intimacy and Ram Beti sprinkled kerosene oil on him and after putting to fire, tried to kill him by burning. He saw Chandra Sen as soon as he woke up and

when he woke up, he saw container of kerosene oil in the hand of Chandra Sen. Because of fire, he shouted and two or three other persons came on the spot and afterwards, he came to the hospital alone.

From the above dying declaration, it is seen that the deceased tried to implicate his wife Ram Beti in the incident. From the circumstances of the case, it seems to be but natural that as Ram Beti had illicit intimacy with Chandra Sen and as he could not restrain her from that path, as helpless husband, he had a strong grouse against her. Further, if the kerosene oil is sprinkled on a person who is sleeping, he will immediately wake up. But, that apart, in the second statement, the deceased has tried to implicate his wife and also stated that when he woke up, he saw the container in the hand of Chandra Sen, but this fact is missing in the first dying declaration. It was submitted before us by the learned Deputy Government Advocate that as the question was not put to him, he could not answer regarding the sprinkling of kerosene oil or the container, in which the kerosene oil contained. But, even then, the implication of his wife in the subsequent dying declaration shows clearly that the deceased wanted to improve his first dying declaration and wanted to implicate Ram Beti. That being the position, we will have to consider whether we can believe such a dying declaration, in which there is improvement and implication of a person who was not named in the first dying declaration. If in a dying declaration there are improvements and inclusion of other persons who were not named in the prior dying declaration, Whether such dying declaration can be held to be reliable or not was considered by this Court in *Shashikala and Gulabbai v. State* 1976 WN 292 in which it was held as under :-

The prosecution mainly relied on the evidence of dying declaration. After going through that evidence carefully this Court has come to the conclusion that it is not free from doubt. It is alleged that the deceased had made three dying declarations. The third dying declaration Ex. P. 17 is purported to have been signed by the deceased in English. Dr. Rasiklal Jain (P. W. 14) has deposed that there were burns on the fingers of both sides of the deceased. It is rather difficult to believe that he was in a position to put his signature on the dying declaration and that too just before sometime of his death. In this dying declaration the deceased made improvements in his earlier dying declaration to the effect that the fire was set to him by a match stick by his wife saying that "only the time of that night was available to them". Under these circumstances this Court is firmly of the view that the evidence as regards the dying declarations of the deceased is not at all convincing and trustworthy and hence it cannot be made the sole basis for conviction." The other fact which makes the first dying declaration doubtful is that from the evidence of the Doctor, we feel that the Doctor (P. W. 3) has not put forth correct facts before the trial Court. In para 4 of his statement, he has stated that as soon as the deceased came to the hospital, he fell down. But why it is missing from his statement Ex. P/I given to the Police, he is not in a position to explain. He has also further stated that Rajendra Kumar informed him that Chandra Sen put fire to him, but this also is missing from Ex. P/2 and for

this, the Doctor has stated that usually they do not write the history of the patient. In our opinion, this cannot be said to be the history of the patient. The omission of the fact mentioned above is certainly important and makes the dying declaration, recorded by the Doctor, doubtful and on such dying declaration, we are of the opinion that no conviction can be based.

The last point to be decided which was submitted before us by the learned counsel for the appellants is that there are certain glaring factors which go to show that it is a case of suicide and not a case of murder, as alleged by the prosecution. Especially, he relied on subsequent conduct of the accused after seeing the deceased on fire. The first circumstance he has mentioned is that the prosecution has failed to prove the alleged tying of the deceased before he was put to fire. Further, he has submitted that this fact was introduced to rule out the possibility of commission of suicide.

The other fact which he submitted is that if the deceased was tied before he was put to fire, the evidence regarding his running here and there is nothing, but concoction.

The third circumstance which he submitted before us is that as soon as these two appellants saw Rajendra Kumar ablaze, they sprinkled water on him and also submitted that if the appellants wanted to commit murder of Rajendra Kumar, they would not have sprinkled water, but would have waited for some time to see that he dies of fire.

The next circumstance which was strongly urged before us was that Chandra Sen opened the room which was locked from inside and he allowed other persons to enter in the room and see the circumstances in which Rajendra Kumar was put to fire. It was submitted that this fact alone is sufficient to show that the appellants had no guilty mind and in fact, they wanted to save Rajendra Kumar when they saw him ablaze.

The next circumstance is that it is very difficult to understand as to how Chandra Sen could sprinkle kerosene on the body of the deceased so meticulously as not even a drop of it fell on the body of his son who was just sleeping by the side of his father.

The other circumstance is that Chandra Sen, after opening the door, immediately rushed at the odd hour of the night to bring a rickshaw, so that he could take the deceased to the hospital. If, in fact, they wanted to see Rajendra Kumar murdered, they would not have done all the acts mentioned above as, if Rajendra Kumar would have lived, he could have given evidence against these two appellants. The learned counsel for the appellants had referred to Ashok Kumar Srivastava and Others Vs. The State, in which the case was of murder by burning and for convicting the appellants in that case, the learned trial Judge took the following circumstances into consideration : -

The other circumstances taken into consideration by the trial Judge for accepting

the theory of Meera's murder are as follows :-

- (1) The three appellants alone were inside the house of occurrence when Meera was burnt.
- (2) Sudha and Ashok were inside the room where Meera was found burning.
- (3) Meera was seen lying in between the two rooms which were in Ashok's possession.
- (4) The appellants took no steps to extinguish fire as no injuries were found on their person.
- (5) The time of occurrence is an odd one.
- (6) No Angithi or stove was found inside the room of occurrence.
- (7) There was an empty kerosene oil tin at the place of occurrence.
- (8) Head of Meera's dead body was emitting kerosene oil smell.
- (9) A large number of partly burnt clothes, which were highly inflammable, were found by the investigating officer inside the room of occurrence.
- (10) Stomach of the deceased was empty.
- (11) Tongue of the deceased was protruding.
- (12) The deceased was pregnant.
- (13) Prabhat and Rajendra (P. Ws.) were admittedly present at the time of occurrence.
- (14) The prosecution witnesses had no reason to tell lies.
- (15) The complainant had no reason to falsely implicate the accused.
- (16) The accused falsely denied the alleged torturing of Meera and made uncertain and vague suggestions at different stages about the manner in which Meera caught fire, and,
- (17) Absconding of Ashok after the occurrence.

and these circumstances were considered by the High Court in paras 25 and 26 of its judgment, which read as under :-

We have examined the above circumstances and considered their individual and collective worth. The appellants admit their presence at Ashok's house at the time of OCCURRENCE. That house comprises of only two contiguous and internally connected rooms with a small gallery and verandah attached to those rooms. The occurrence having taken place at about 2.45 o'clock in the night it would not be unreasonable to expect that the appellants were sleeping at different places inside that small accommodation when Meera caught fire. They could be there even if Meera had committed suicide. Their presence inside the

house or the burning of Meera in this room or that cannot necessarily prove the appellants to be her murderers.

The present case is not one where a murder has been quietly committed inside a house and the inmates present at that time keep mum, do not inform the police or anybody, and attempt to stealthily dispose of the dead body. Here the appellants started raising alarm as soon as they got up and saw Meera burning. They opened the main door of the house to facilitate the entry of neighbour in order to help them. Prabhat P. W. has stated that when he saw Meera burning she was raising feeble voice. If the appellants had burnt her they could not allow others to come when Meera was still alive as she could name the appellants as her murderers before them. The appellants themselves sent for the fire brigade unit. They took Meera on the fire brigade vehicle to the Civil Dispensary and Balrampur Hospital when she was still alive. If they were her murderers they could not dare to take her to any doctor when she was still alive because she could name them as murderers before the doctor. As soon as Meera died Rajendra Lai informed the police about it through a first information report (Ex. Kha-1). The appellants also informed J. P. Shrivastava complainant at Varanasi through phone and telegram. Sushi! admitted that telegram about Meera's burning was sent by Ashok. In the face of all this conduct of the appellants their presence inside the house or room of occurrence and the burning of Meera in between the two rooms of the house cannot lead us to the inference that the appellants had burnt her". Somewhat similar position exists in the present case also.

The other case, which the learned counsel for the appellants referred to us in Ram Das Vs. State of Maharashtra, In this judgment, the Supreme Court has held as under in paras 15 and 16 of the judgment:-

The last and the most important circumstance on which reliance was placed by the High Court and which undoubtedly needs explanation was the fact that the accused produced the bottle of poison which had been concealed inside a pit which has been dug in the compound of the house. This bottle was recovered at the instance of the appellant on September 20, 1972 almost a week after the death of the deceased. It is true that while this circumstance may raise an inference of guilt against the accused, it may also be explainable on the ground that after the Investigating officer visited the house on September 12, 1972 and after the deceased had died and the post-mortem revealed that she had died of a poison, the accused may have got frightened that as he was alone with the deceased he might be accused of having administered the poison, to his wife himself. Thus out of fear of being arrested on a charge of murder he may have concealed the both in the pit from where it was recovered. This circumstance, therefore, leads to two equally possible inferences and as one inference goes in favour of the accused, the Court in acting on circumstantial evidence was in law bound to accept that inference. We however, disagree with the finding of the Sessions Judge that the prosecution had not proved that it was parathion poison

which had caused the death of the deceased which has been established beyond reasonable doubt, particularly from the fact that the Godadi having vomit stains of the deceased was found to contain parathion poison which clearly shows whether the deceased was murdered by the accused or committed suicide it must have been through parathion poison.

This is all the evidence that has been produced by the prosecution in support of its case. A consideration of the evidence and the circumstances referred to above, we are satisfied that this is a case in which the circumstantial evidence did not prove the case against the accused conclusively and unerringly, and at any rate two reasonable views were possible. The Sessions judge having taken one view, in the circumstances it was not proper for the High Court to take the other view which also may have been possible, for the purpose of reversing the order of acquittal passed by the Sessions Judge.

We are of the opinion that the evidence which has been produced by the prosecution in this case is not sufficient to prove conclusively and unerringly that the appellants are responsible for committing the crime. On the contrary, two reasonable views are possible and when two views are possible, the one which is favourable to the accused has got to be accepted. Therefore, taking all the facts and circumstances of the case into consideration, we are of the opinion that it is not proved beyond reasonable doubt that the appellants were the authors of the crime, as alleged by the prosecution.

The result, therefore, is that the appeal is allowed and giving benefit of doubt to the appellants, they are acquitted of the charge u/s 302 and Section 302 read with Section 34 of the Indian Penal Code. Appellant No. 2 Ram Beti is already on bail. Her bail bonds shall stand discharged. Appellant No. 1 Chandra Sen be set at liberty forthwith if he is not required in any other case.