

(2009) 09 DEL CK 0118
In the Delhi High Court
Case No : Criminal A. 190 of 1993

Raj Singh	Vs	APPELLANT
The State		RESPONDENT

Date of Decision : 11-09-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 313, 360
Penal Code, 1860 (IPC) — Section 302, 307, 323, 325, 34

Citation : (2010) 1 ILR Delhi 406

Hon'ble Judges : Vidya Bhushan Gupta, J; Badar Durrez Ahmed, J

Bench : Division Bench

Advocate : D.C. Mathur, Rebecca M. John, Vishal Gosain and V. Saharya, for the Appellant; Sunil Sharma, for the Respondent

Judgement

Badar Durrez Ahmed, J.—The appellant Raj Singh and his brother Krishan Lal were charged with the commission of the offence punishable under Sections 325/34 IPC. The nature of the charge was that on 10.11.1990 at about 5.30 a.m. in the gali opposite Jiwan's house in village Shahbad Daulatpur, in furtherance of their common intention, Raj Singh and Krishan Lal had voluntarily caused grievous hurt to Jiwan and Ram Chander by means of a blunt object. In respect of the appellant Raj Singh, further charges were framed under Sections 354 and 302 IPC. Insofar as the offence punishable u/s 354 IPC was concerned, the charge against the appellant Raj Singh was that on 10.11.1990, at about 5.30 a.m. in the said gali opposite to Jiwan's house in village Shahbad Daulatpur, he assaulted or used criminal force against the said Jiwan's daughter Sudesh Kumari intending to outrage or knowing it to be likely that he would thereby outrage her modesty. With regard to the offence punishable u/s 302 IPC, the charge against the appellant Raj Singh was that at the above mentioned date, time and place, he committed the murder of the said Sudesh Kumari. Since both Raj Singh and his brother Krishan Lal pleaded not guilty, the case was taken up for trial before the learned Additional Sessions Judge in Sessions Case No. 25/1991 emanating from FIR No. 285/1990 of police station Samaipur Badli. The

trial culminated in the impugned judgment dated 26.10.1993 passed by the learned Additional Sessions Judge whereby the appellant Raj Singh was convicted for offences punishable under Sections 354 and 302 IPC. By virtue of the impugned judgment, both Raj Singh and his brother Krishan Lal were also convicted under Sections 323/34 IPC.

2. By a separate order on sentence of the same day, i.e., 26.10.1993, the appellant Raj Singh was sentenced to undergo rigorous imprisonment for a period of six months in respect of the offence punishable u/s 354 IPC. He was also sentenced to undergo imprisonment for life and also to pay a fine of Rs 500/- in respect of the offence punishable u/s 302 IPC. In default of payment of fine, the appellant was sentenced to undergo further rigorous imprisonment for a period of two months. Finally, the appellant was also sentenced to undergo rigorous imprisonment for a period of three months in respect of the offence punishable under Sections 323/34 IPC. As regards the appellant's brother Krishan Lal, the learned Additional Sessions Judge, keeping in mind his age, character and antecedents, was of the view that it was expedient that he be dealt with u/s 360 CrPC and consequently directed that instead of sentencing him at once to any punishment, he was directed to be released on probation. The appellant Raj Singh is aggrieved by the impugned judgment and the order on sentence which has been awarded to him.

3. The case for the prosecution is that an information had been received at the police station which was recorded in Exhibit PW-8/A being D.D. No. 23-A at 6.15 a.m. on 10.11.1990 that a quarrel was taking place near the Harijan well at village Shahbad Daulatpur. Five minutes later, another information was received in the same police station that a girl had been set on fire near the Harijan well at village Shahbad Daulatpur. This information is recorded in Exhibit PW-8/B being D.D. No. 24-A dated 10.11.1990. As per the prosecution, on receipt of the said information, ASI Inder Singh alongwith Constable Anil Kumar reached the spot where they found Head Constable Subhash Chand and Constable Naresh Kumar already inquiring with regard to the incident in respect of D.D. No. 23-A. There they found Sudesh Kumari aged about 16 years, daughter of Jiwan, resident of village Shahbad Daulatpur lying in the gali in a burnt condition in front of her house. According to the prosecution, the said Jiwan and his brother Ram Chander were also found at the spot in an injured condition inasmuch as they had been injured in the quarrel referred to in D.D. No. 23-A.

4. As per the prosecution, the said ASI Inder Singh, in view of the serious condition of Sudesh Kumari, took all the three injured to JPN Hospital. Sudesh Kumari was admitted into hospital and after filling the injury sheet in respect of Jiwan and Ram Chander, the said Inder Singh sent them to the emergency ward alongwith Constable Anil Kumar. Thereafter, ASI Inder Singh obtained the MLC (Exhibit-PW-18/DA) in respect of Sudesh Kumari which indicated that she had suffered 75% burns. The said MLC also indicated that Sudesh Kumari had alleged that she was confronted by a neighbour (Raj) who sprinkled kerosene oil over

her and set her alight after an altercation.

5. As per the case of the prosecution, the doctor declared Sudesh Kumari to be fit for a statement and thereupon the statement of Sudesh Kumari was recorded by the ASI Inder Singh in the presence of Dr Rajender Kumar. In that statement, which was taken as the dying declaration, the said Sudesh Kumari stated that she was residing alongwith her parents at village Shahbad Daulatpur and was studying in Class-7. It is further indicated that on that day, i.e., on 10.11.1990, at about 5.00 a.m., she had gone to take a bucket of water from the tap of her neighbour Raj Singh's house. Having collected the said water, she returned to her house. Her mother asked her to bring one more bucket of water whereupon at about 5.30 a.m., she again went to take water from the tap at Raj Singh's house. When she was operating the tap for collecting water, Raj Singh also happened to come at the spot and started taking liberties with her. She raised an alarm and on hearing the noise, her father arrived at the spot and extricated her from Raj Singh. Her father told Raj Singh that he should be ashamed of what he had done. Angered by this, Raj Singh started beating her father. Sudesh Kumari then rushed to call her uncle Ram Chander. In the meanwhile, Raj Singh's brother Krishan Lal also arrived at the scene of conflict. Thereafter, Krishan Lal and Raj Singh started to beat her father and uncle with lathis. As per the said statement, on hearing the noise, neighbours also rushed there and extricated her father and her uncle from the assailants. The statement then goes on to state that she (Sudesh Kumari) was standing outside the door of her house. Raj Singh, while standing on the roof of his house, poured kerosene oil on a gunny bag and set it on fire and threw it on her. As a result of this, her clothes caught fire. When she raised an alarm, the members of her family put out the fire caught by her clothes. It is further stated that Raj Singh having poured the kerosene oil on a gunny bag and having set it on fire had dropped the same on her person with an intention to kill her so that she may not make any statement against him. The statement reveals that she requested that legal action be taken against Raj Singh and his brother Krishan Lal. The right thumb impression of Sudesh Kumari was taken on the said statement. It also bore an endorsement which was signed by Dr Rajender Kumar at 9.25 a.m. on 10.11.1990 to the effect that the statement had been given by the patient in front of him. On the basis of the above statement of Sudesh Kumari, the said ASI Inder Singh made his endorsement (Exhibit PW-5/A) and got the case registered under Sections 307/354/323/34 IPC through Constable Anil Kumar and took up investigation. During the investigation, the said ASI Inder Singh got the site plan prepared. He also had the scene of crime photographed and took into possession the burnt pieces of clothes, ash and the burnt skin and hair. He is said to have recorded the statements of the witnesses and to have taken into possession the weapons used in the commission of the crime.

6. On 15.11.1990, Sudesh Kumari died at JPN Hospital and thereupon the case was converted into one u/s 302 IPC and the investigation was taken up by SI Baljeet Singh. Thereupon the inquest proceedings were conducted as also the

post mortem examination of the dead body of Kumari Sudesh. Samples were sent to the Central Forensic Science Laboratory for their tests and reports. Apparently, the MLCs of Jiwan and Ram Chander were also obtained and the doctor opined the injuries received by Jiwan and Ram Chander as grievous and thereupon Section 325 IPC was added. After completion of the investigation, the challan was filed and the charges were framed as indicated above. Twenty witnesses were examined on the part of the prosecution and three defence witnesses on the part of the accused / appellant. In their statements u/s 313 CrPC both the accused denied the incriminating evidence against them and asserted that they had been falsely implicated by Jiwan and his family due to their enmity with them. While the trial court convicted the appellant, it considered the dying declaration given by Sudesh Kumari as the most material evidence brought on record by the prosecution.

7. According to the learned Counsel for the appellant Raj Singh, the said dying declaration ought not to and cannot be believed for the following reasons:

(1) As per the alleged dying declaration, Sudesh Kumari was standing outside the door of her house when Raj Singh, after pouring kerosene oil on a gunny bag and after igniting the same threw it from the roof of his house, upon her, due to which her clothes caught fire. The scaled site plan (Exhibit-PW-14/A) indicates that there is another house bearing No. 256 of one Inder Singh in between. Thus, according to the learned Counsel for the appellant, it was a physical improbability on the part of Raj Singh to have flung a flaming gunny bag with any degree of accuracy from the roof of his house (No. 255) over house No. 256 and onto the gali. It was further contended that even if such a flaming gunny bag could be thrown onto the gali, this act would not be visible by anybody standing in the gali inasmuch as the gali was only 1.95 metres wide and the wall of the gali, which was essentially the wall of House No. 256, was 2.3 metres in height (a little more than 7 and a half feet). The learned Counsel also submitted that the theory of pouring kerosene oil on the gunny bag and of throwing the same on Sudesh Kumari, as indicated in the dying declaration, is not corroborated inasmuch as there has been no recovery of any container in which the kerosene oil had been kept. No matches or any other lighting implement has also been recovered. It is further contended that if Sudesh Kumari saw Raj Singh flinging the flaming gunny bag, she could have seen it coming towards her and could have easily avoided the same;

(2) It was next contended on the part of the learned Counsel for the appellant that the alleged dying declaration (Exhibit-PW-18/A) was recorded by a police officer, though allegedly in the presence of Dr Rajender Kumar (PW-19). The learned Counsel submitted that Sudesh Kumari died four days later and the question arises as to why a Magistrate was not called for recording the statement when there was ample time to do so. This factor, according to the learned Counsel for the appellant, also creates doubt about the dying declaration (Exhibit-PW- 18/A);

(3) The learned Counsel further submitted that the dying declaration is not of a sterling quality and, therefore, the court must look for corroboration. According to the learned Counsel, it is not corroborated by the testimony of the prosecution witnesses. It was contended that there were two incidents on that date. First, there was the quarrel which is alleged to have taken place in and around the tap in Raj Singh's house at 5.30 a.m. After this incident subsided, there is an incident of burning of Sudesh Kumari at 6.15 a.m. It was contended that the date on which these incidents took place was 10th of November, 1990. The sunrise on that date was approximately around 6.27 a.m. Consequently, there was a possibility that Sudesh Kumari could not have seen clearly because it was yet dark at that point of time.

8. It was then contended that the credibility of PW-1 (Jiwan) is also in doubt. This is so because even the learned Public Prosecutor cross-examined PW-1 (Jiwan). The defence counsel also confronted the said witness extensively in view of the fact that he had changed his stand from what he had stated in his Section 161 statement. According to the learned Counsel for the appellant, PW-1 (Jiwan) is the "kingpin" of the incident and he had every reason to embellish his account in order to secure the conviction of Raj Singh. Since the credibility of PW-1 (Jiwan) is doubtful, this witness, according to the learned Counsel for the appellant, cannot be relied upon for the purposes of corroborating the dying declaration.

9. It was next contended that PW-11 (Ram Chander), who is (PW-1) Jiwan's brother, is also not a credible witness. According to the learned Counsel, he lied about the first incident inasmuch as he did not mention any injury to Krishan Lal, whereas it is a fact that Krishan Lal was injured. It was alleged that PW-1 (Jiwan) and PW-11 (Ram Chander) both sustained injuries, but the MLCs in respect of the said witnesses had not been placed on record. Looking at the testimony of PW-11, it appears that after the first incident, PW-11 (Ram Chander), his brother PW-1 (Jiwan) and Jiwan's wife went to Jiwan's house and sat there. It was stated that Mohinder Singh (PW-17) and Bhoop Singh (PW-9) also came to the said house. After some time, they heard shrieks of Sudesh Kumari upon which the said witness, i.e., PW-11 (Ram Chander) along with his brother PW-1 (Jiwan) and his wife rushed out and saw Sudesh Kumari on fire. The clothes worn by her were said to be burning. It is stated by this witness that Sudesh Kumari told them that Raj Singh had thrown a burning cloth with kerosene oil upon her from the roof of his house. Referring to the said testimony, the learned Counsel for the appellant submitted that the sequence of events indicate that Sudesh Kumari, after the first incident, went back to her house. The accused also went back to their house. The question arises as to at what point of time did Sudesh Kumari go out again and why? The learned Counsel for the appellant also submitted that due weightage ought to be given to the suggestions put by the defence counsel to both PW-1 (Jiwan) and PW-11 (Ram Chander) about them being upset about Sudesh Kumari's alleged illicit relations with the appellant Raj Singh.

10. The same is the position insofar as PW-9 (Bhoop Singh) is concerned, who is a cousin of PW-1 (Jiwan). The learned Counsel submitted that neither PW-1 (Jiwan) nor PW-9 (Bhoop Singh) nor PW-11 (Ram Chander) had seen the incident of burning. In other words, there is actually no eye witness to the actual incident of Raj Singh throwing a flaming gunny bag on Sudesh Kumari. It is only on the basis of the so-called dying declaration that Raj Singh has been convicted.

11. In this context, the learned Counsel for the appellant submitted that the court should also take note of the fact that PW-17 (Mohinder Singh), whose presence has been acknowledged by PW-11 (Ram Chander), has come out with an entirely different account. He was declared as having become hostile and was cross-examined by the public prosecutor. The account given by PW-17 (Mohinder Singh) is that at about 5.30 a.m., he heard the shrieks of Jiwan's wife and his daughter. He ran towards the house of PW-1 (Jiwan) and saw that he had an iron phookni (air blower) and was giving blows with it to his wife and daughter. The said witness stated that he snatched the said phookni from the hands of Jiwan and asked Jiwan as to why he was beating his wife and daughter. On this, Jiwan allegedly told PW-17 (Mohinder Singh) that he was doing so because his daughter had been teased.

12. The learned Counsel for the appellant also stated that the testimony of DW-2 (Jai Narain Saini), who was unrelated to any of the parties must also be given due consideration. This is so because his presence has been acknowledged by the prosecution. The version given by him was entirely different and suggests another possibility. According to him, on the fateful day, when he was returning from the fields after answering the call of the nature at about 6.15 a.m., he saw some people assembled outside Jiwan's house. He enquired about the matter and after some time he heard a voice from inside Jiwan's house - "mujhe jala diya, mujhe bachao" ?eq>s tyk fn;k] eq>s cpkvks?. In the meanwhile, Jiwan's daughter came out from Jiwan's house in a burning condition and fell on the road. The people extinguished the fire. Jiwan and Ram Chander followed the girl. He further stated that both Jiwan and Ram Chander were saying that nobody should inform the police. The said witness stated that Sudesh Kumari said that she had been burnt by her father Jiwan and her uncle Ram Chander. He further suggested that the parents of the girl doubted her character. In cross-examination by the learned APP, DW-2 (Jai Narain Saini) stated that Sudesh Kumari came out of the house first. She was on fire at that time and that her face was partly covered with the gunny bag. The girl had tried to remove the gunny bag. However, the gunny bag remained stuck on her face. She fell in front of her own house. He further stated that besides her father and uncle, he saw Mohinder Singh and Chander Bhan coming out from Jiwan's house. He stated that Sudesh Kumari's mother, who was inside the house, remained there.

13. The learned Counsel for the appellant also contended that nothing turns on the recovery of danda/lathi and jalli. This is so because there is nothing on record to indicate any injuries on the person of PW-1 (Jiwan) or PW-11 (Ram

Chander). Although the case of the prosecution is that their MLCs were prepared, the same have not been produced before court. Despite this, recovery has been shown of the danda/lathi and jalli from the house of Raj Singh. Apparently, the jalli was blood stained, but the same was not sent to the Central Forensic Science Laboratory for determining the blood group, etc. The learned Counsel for the appellant contended that while the recovery of danda/lathi and jalli has been shown, which are irrelevant to establish the cause of death of Sudesh Kumari, on the other hand, there is no recovery of the kerosene oil container or the matches or other lighting implement used or said to have been used by Raj Singh. Even the alleged recovery of the danda/lathi and jalli is very suspect inasmuch as in the cross-examination by the learned APP of PW-1 (Jiwan), it has been revealed that the said witness did not actually accompany the appellant Raj Singh and the police to the house of Raj Singh. He only stated that he had seen the lathi and jalli in the hand of Raj Singh when he came out with the police. He also stated that he did not sign any recovery statement at the spot as his hands were not working properly and that he signed the papers two days after the incident. Coupled with this is the statement of PW-9 (Bhoop Singh). On being cross-examined by the learned APP, he has denied the suggestion that Raj Singh was arrested by the police in his presence and that Raj Singh had produced the lathi and jalli (Exhibits P-1 and P-2) before the police after bringing the same from his house. He denied having made any such statement to the police. Another circumstance, which, according to the learned Counsel for the appellant, greatly diminishes the credibility of PW-1 (Jiwan) and PW-11 (Ram Chander) is the fact that they have not given any explanation in respect of the injuries received by Krishan Lal. In fact, they have completely denied any such injury having been received by him. The learned Counsel for the appellant submitted that the injury received by Krishan Lal was not a minor injury, but was an injury caused to the head. Although the accused have been convicted u/s 323 IPC for having caused injuries to PW-1 (Jiwan) and PW-11 (Ram Chander) without the MLCs in respect of them being on record, there is no explanation forthcoming as to how Krishan Lal received the injuries. While PW-1 (Jiwan) pointedly stated that none of the accused received any injury, PW-11 (Ram Chander) stated that he did not know as to whether Krishan Lal received any injury. The true fact has been acknowledged by PW-18 (Sub- Inspector Inder Singh) who was the investigating officer when he stated that it is correct that accused Krishan was injured on his head but that he did not know if he had received eight stitches or not. The said PW-18, however, stated that he did not consider it fit to make a case against Jiwan or Ram Chander for the injuries on the head of accused Krishan Lal.

14. Lastly, reference was made by the learned Counsel for the appellant to the post mortem report (Exhibit-PW-10/A) and the testimony of PW-10 (Dr George Paul) who conducted the post mortem examination on the body of Sudesh Kumari. A reference was made, in particular, to the statement of the said witness on cross-examination by the defence counsel that the findings suggested that Sudesh Kumari had a previous sexual act. According to the learned Counsel for

the appellant, this is a significant circumstance inasmuch as it shows that there was a possibility that Sudesh Kumari's father and uncle were both angry with her because of this. The learned Counsel for the appellant summed up his arguments by saying that the uncorroborated evidence of PW-1 (Jiwan) and PW-11 (Ram Chander) is wholly unreliable. There was ample opportunity for having called a Magistrate and for having the dying declaration of Sudesh Kumari recorded inasmuch as she remained alive for four days before she finally succumbed to the burn injuries. It was also contended that there were serious doubts with regard to the veracity of the alleged dying declaration (Exhibit-PW-18/A). It was contended that the trial court erred in relying wholly upon the dying declaration and the so- called corroborative evidence of the PWs 1, 9 and 11. Consequently, the learned Counsel for the appellant submitted that this was a case where the accused ought to have been acquitted.

15. Mr Sunil Sharma, appearing on behalf of the state, supported the finding of guilt as returned by the learned Additional Sessions Judge. He contended that the victim and the accused were living near each other. Referring to the rough site plan (Exhibit-PW-18/B), he contended that the place where the incident of burning occurred has not been disputed. The said site plan also indicates mark "B" to be the place on the roof of Inder Singh's house from where Raj Singh threw the gunny bag. Mr Sharma submitted that Inder Singh is Raj Singh's brother. He submitted that the dying declaration (Exhibit-PW-18/A) has been mostly corroborated by the other witnesses. The said dying declaration was recorded in the presence of the doctor PW-19 (Dr Rajender Kumar). The recovery of cloth pieces, hair and ashes clearly indicate the gali outside Jiwan's house to be the place of occurrence. This implies that Sudesh Kumari was not in a position to move away and she fell at the spot and remained there. Referring to the MLC (Exhibit-PW-18/DA), the learned Counsel submitted that, in fact, the first dying declaration before the doctor is recorded in this MLC. He submitted that the name of the assailant is rarely mentioned in the MLC, but in this case, Sudesh Kumari herself has stated that she was put on fire by her neighbour (Raj). According to Mr Sharma, this dying declaration recorded in the MLC (Exhibit-PW-18/DA), has not been disputed by the defence by way of giving any suggestion to the relevant witnesses. He also contended that it is not the defence case that Sudesh Kumari was tutored to make the statement against Raj. The learned Counsel referred to the testimony of PW- 18 (Sub-Inspector Inder Singh) in an attempt to explain as to why the Magistrate was not called for recording Sudesh Kumari's statement. PW-18 stated that the SHO had a talk with the SDM (Mr R.K. Yadav) over the telephone in connection with the recording of the statement of Sudesh Kumari. But, the said Magistrate advised that there was no need to record the statement of Sudesh Kumari once again in his presence inasmuch as Sudesh Kumari's statement had already been recorded in the presence of a doctor, who was an independent person.

16. Mr Sunil Sharma then referred to the testimony of PW-19 (Dr Rajender Kumar), wherein he testified that he had examined Sudesh Kumari in the burns

ward. He also stated that at about 8.45 a.m. on 10.11.1990, he found Sudesh Kumari to be fit for making a statement and that he had made an endorsement at Exhibit-PW-19/A in the MLC (Exhibit- PW-18/DA). He also stated that the police officer, who had approached him, recorded the statement of Sudesh Kumari in his presence and throughout the statement, Sudesh Kumari was fit to make a statement. He also proved his endorsement on the statement, which is Exhibit-PW-19/B) on the dying declaration (Exhibit-PW-18/A). Mr Sharma, therefore, submitted that once the factum of recording of the dying declaration is established and cannot be disputed, the fact that a dying declaration was not recorded before a Magistrate is of no significance or relevance. Mr Sharma also contended that the defence witnesses have contradicted themselves and are, in any event, false witnesses. With regard to conviction being based on a dying declaration, he placed reliance on the decision of the Supreme Court in the case of Kusa and Others Vs. State of Orissa, . In the said decision, the Supreme Court observed that it is manifest that a person on the verge of death is most unlikely to make an untrue statement unless prompted or tutored by his friends or relatives. The Supreme Court observed that if the statement of a dying person passes the test of careful scrutiny applied by the court, it becomes a most reliable piece of evidence which does not require any corroboration. The Supreme Court observed as under:

Suffice it to say that it is now well established by a long course of decisions of this Court that although a dying declaration should be carefully scrutinised but if after perusal of the same, the Court is satisfied that the dying declaration is true and is free from any effort to prompt the deceased to make a statement and is coherent and consistent, there is no legal impediment in founding the conviction on such a dying declaration even if there is no corroboration.

17. At this stage itself, it may be pointed out that there is no dispute with the aforesaid principle that a conviction can be based on a dying declaration alone without the necessity of requiring any corroboration. But, it must be remembered that the dying declaration must of a stellar quality. Two facts have to be established before a dying declaration can be relied upon for basing a conviction. The first is that it must be established that the statement, which is sought to be labeled as "a dying declaration of the deceased person" is a statement actually made by that person without any tutoring or influence from any other person and it must be made by that person in a fit state of mind. The second is that the court must be satisfied that what is stated by the dying person is the truth. When both these facts are established, then the dying declaration is of such a quality and caliber that it can by itself be made the basis of a conviction without requiring any corroboration. However, if there is any doubt with regard to either of the two aspects, then corroboration becomes necessary. Corroboration need not be on every aspect but it is sufficient if there is corroboration on material and crucial aspects.

18. In rejoinder, the learned Counsel for the appellant referred to the decision of

the Supreme Court in the case of *Tori Singh Vs. The State of Uttar Pradesh*, and submitted that the court must consider as to which part of the sketch-map and the plan to scale are admissible. The learned Counsel referred to the rough sketch (Exhibit-PW- 18/B) which had been prepared by Sub-Inspector Inder Singh at the pointing out of PW-1 (Jiwan). The place marked "B" in the said rough sketch is said to be the location from where Raj Singh had, from the roof of the house of his brother Inder Singh, thrown the burning gunny bag upon Sudesh Kumari. According to the learned Counsel for the appellant, the mark "B" and the noting in respect thereof is inadmissible. She submitted that it is inadmissible because it has been indicated on the basis of the pointing out by PW-1 (Jiwan) who was not even an eye witness to the incident. The learned Counsel in this context referred to the observations of the Supreme Court in the case of *Tori Singh* (supra) to the following effect:

In the second place, the mark on the sketch-map was put by the Sub-inspector who was obviously not an eye-witness to the incident. He could only have put it there after taking the statements of the eye witnesses. The marking of the spot on the sketch-map is really bringing on record the conclusion of the Sub-inspector on the basis of the statements made by the witnesses to him. This in our opinion would not be admissible in view of the provisions of S. 162 of the Code of Criminal Procedure, for it is in effect nothing more than the statement of the Sub-Inspector that the eye-witnesses told him that the deceased was at such and such place at the time when he was hit. The sketch-map would be admissible so far as it indicates all that the Sub-Inspector saw himself at the spot; but any mark put on the sketch-map based on the statements made by the witnesses to the Sub-Inspector would be inadmissible in view of the clear provisions of S. 162 of the Code of Criminal Procedure as it will be no more than a statement made to the police during investigation.

19. With regard to the plan drawn to scale (Exhibit-PW-14/A), the learned Counsel for the appellant submitted that the same principles would apply. In addition, she submitted that in *Tori Singh* (supra), the court had observed:

This Court had occasion to consider the admissibility of a plan drawn to scale by a draftsman in which after ascertaining from the witnesses where exactly the assailants and the victims stood at the time of the commission of offence, the draftsman put down the places in the map. In *Santa Singh Vs. The State of Punjab*, , it was held that such a plan drawn to scale was admissible if the witnesses corroborated the statement of the draftsman that they showed him the places and would not be hit by Section 162 of the Code of Criminal Procedure.

20. In this context, the testimony of PW-14 (Sub-Inspector Manohar Lal), the draftsman who prepared the scaled site plan (Exhibit-PW-14/A) was referred to. He stated that on 03.12.1990, he had visited the place of incident and had taken notes and measurements of the place of incident at the pointing out of ASI Inder Singh on the basis of which he prepared the scaled site plan.

21. Therefore, the learned Counsel for the appellant submitted that the mark B" shown in both the rough sketch and the scaled map is inadmissible in evidence. She submitted that the prosecution case is also that the burning gunny bag was thrown from the roof of Raj Singh's house on Sudesh Kumari. In fact, even the question put to the appellant Raj Singh, while recording his statement u/s 313, CrPC was that: "It is further in evidence against you that you after soaking a gunny bag with kerosene oil and after igniting it threw the same from the roof of your house on Sudesh Kumari due to which her clothes caught fire. What have you to say?

22. The learned Counsel for the appellant further submitted that even the purported dying declaration (Exhibit-PW-18/A) indicates that the flaming gunny bag was thrown from the roof top of Raj Singh's house. PW-1 (Jiwan) also stated that the same was thrown from the roof of Raj Singh's house. In the course of cross-examination by the learned APP, no suggestion was given by him that it was thrown from the roof of Inder Singh's house and not Raj Singh's house. PW-9 (Bhoop Singh) has only stated that the gunny bag was thrown from the roof. He did not mention as to the roof of which house. PW-11 (Ram Chander) also stated that the gunny bag was thrown by Raj Singh from the roof of his house.

23. On the basis of the aforesaid, the learned Counsel for the appellant submitted that no witness has corroborated the point marked "B" in the rough sketch (Exhibit-PW-18/B) to be the place from which the gunny bag was thrown. On the other hand, it has been the consistent case of the prosecution that the gunny bag had been thrown from the roof of Raj Singh's house. It was consequently submitted that the dying declaration (Exhibit-PW-18/A) cannot be construed as a truthful one because of the sheer improbability of a flaming gunny bag being hurled from the roof of Raj Singh's house over Inder Singh's house onto the gali and upon Sudesh Kumari who happened to be standing there.

24. The learned Counsel for the appellant referred to the Supreme Court decision in the case of P. Mani v. State of Tamil Nadu 2006 (1) JCC 447 to submit that indisputably conviction can be recorded on the basis of a dying declaration alone, but the same must be wholly reliable. The Supreme Court observed that in a case where suspicion can be raised as regards the correctness of the dying declaration, the court, before convicting an accused on the basis thereof, would look for some corroborative evidence. It was further observed that suspicion, it is trite, is no substitute for proof and that if evidence brought on record suggests that a dying declaration did not reveal the entire truth, it may be considered only as a piece of evidence in which event, conviction may not be rested only on the basis thereof.

25. The learned Counsel for the appellant also referred to the Supreme Court decision in the case of Jagga Singh v. State of Punjab 1994 SCC (Cri) 1798, wherein the Supreme Court observed that:

It is a settled law that for a dying declaration to provide the basis for conviction, the same has to be beyond any reproach. As the present dying declaration is not of such a status at all, we are of the view that the conviction of the appellant cannot be based on what has been recorded in the dying declaration.

26. The learned Counsel for the appellant also submitted that even if the defence has faltered, it is for the prosecution to prove its case and that a false defence by itself cannot lead to conviction. The defence has only to probabilise its case and not to prove it beyond doubt. On the other hand, the prosecution has to prove its case beyond reasonable doubt. The learned Counsel further submitted that when two views are probable, then the one contended by the accused ought to be accepted.

27. Finally, with regard to the contention that the MLC (Exhibit-PW- 18/DA) of Sudesh Kumari also contains a dying declaration and that the same has not been challenged, the learned Counsel submitted that the MLC itself has not been proved because the scribe of this document is Dr Anjali who was not produced. Consequently, no opportunity was afforded to the accused to cross-examine the said Dr Anjali. No witness has been produced who stated that he knew her writing or recognized her writing. Therefore, according to the learned Counsel for the appellant, it cannot be construed that the MLC (Exhibit-PW-18/DA) has not been challenged. No occasion for such challenge arose inasmuch as Dr Anjali had not been produced and her recording has not been proved by any other witness. Consequently, the learned Counsel for the appellant urged this Court to set aside the impugned judgment and order on sentence and to acquit the appellant.

28. Upon a consideration of the entire evidence on record and the submissions made by the learned Counsel for the parties, we are of the view that the impugned judgment and the order on sentence are liable to be set aside and the appellant is entitled to an order of acquittal. This is so because the appellant would get the benefit of doubt which exists in our minds. We have already noted that the learned Additional Sessions Judge placed a significant amount of reliance on the dying declaration (Exhibit-PW-18/A) of Sudesh Kumari. As indicated in the course of recording the arguments made by the counsel for the parties, the law on dying declarations is well established. First of all, a conviction can be founded solely on the basis of a dying declaration. But for doing so, the dying declaration must be of an impeccable character. Secondly, where a dying declaration is not of such a sterling quality, conviction can still be founded on the basis of such a dying declaration provided it finds corroboration from other evidence on record. Thirdly, where a dying declaration is neither truthful nor correct, no amount of corroboration would lead to the conviction of anybody on the basis of such a dying declaration.

29. Keeping these principles in mind, let us examine the dying declaration (Exhibit-PW-18/A). As per the said statement, Sudesh Kumari was standing in the narrow gali outside her house. The walls of the gali were between 7-8 feet height. She stated that Raj Singh was on the roof of his house. She stated that

Raj Singh poured kerosene on a gunny bag, ignited it and threw it upon her from the roof of his house. A portion of the site plan (Ex. PW- 14/A), which is to scale, is as under:

30. The scaled site plan (Exhibit-PW-14/A) clearly indicates that in between the gali where Sudesh Kumari was said to be standing and the house of Raj Singh (No. 255), there was the house of Inder Singh (No. 256). The site plan indicates the total width of the two houses on an East-West direction to be 6.85 metres. From the scaled plan, it appears that the two houses bearing Nos. 256 and 255 were of equal width on the East-West direction. This means that Raj Singh's house was at least about 3.42 metres away from the wall of the gali over which the flaming gunny bag is said to have been thrown. The wall of the gali being between 7-8 feet height (actually, 2.30 metres as per the site plan), would have certainly prevented Sudesh Kumari from getting a clear view of Raj Singh on the roof of his house, if at all. The angle of vision would definitely be a steep incline in view of the fact that Sudesh Kumari was only 145 cms tall as per the Inquest Report (Exhibit PW-20/A). This would be apparent from figure 1 below which shows Sudesh Kumari standing in the gali and Raj Singh standing on the east-most portion of the roof of his house No. 255. Sudesh Kumari's angle of vision would be obstructed by the 2.30 m wall. Consequently, she would not be able to see anything below the line ABC in figure 1. In other words, the shaded portion would be shielded from her vision by the 2.30 m wall. [Figure 1]

31. Figure 2 is derived from figure 1. "A" is the point, 145 cms from the surface of the gali representing the height of Sudesh Kumari as shown in Figure 1. "B" is the top of the Western wall of the gali which is at a height of 230 cms. "D" indicates the measure by which the wall is higher than Sudesh Kumari's height. BD is 85 cms (230 cms - 145 cms). Since Sudesh Kumari is assumed to be standing in between the two walls of the gali. "AD" = 97.5 cms (half of the width of the gali, i.e., half of 195 cms). "BE" is the distance between the top of the Western wall of the gali and the Eastern-most edge of House No. 255. Thus, even if Raj Singh were to have flung the gunny bag from the Eastern-most part of the roof of his house, he would be at point "E" and the distance "BE" would be 342.5 cms (as per the site plan). is the angle of vision of Sudesh Kumari over the Western wall of the gali.

32. We know that in both the triangles ABD and BCE is the same. We need to know the measure of CE. Because this will tell us the minimum height of objects at point E which could be visible to Sudesh Kumari, standing in the gali, CE can be easily derived mathematically as follows:

Thus, if Raj Singh were to be visible to Sudesh Kumari, he would have to be 299 cms tall (approximately 10 feet tall)! It is obvious, going by the evidence on record, Sudesh Kumari could not have seen Raj Singh standing on the roof of his house.

33. Apart from this, we find merit in the submission of the learned Counsel for

the appellant that it would be highly improbable on the part of Raj Singh to have thrown a flaming gunny bag over a distance of about 3 and a half metres onto a gali where Sudesh Kumari was standing with any degree of accuracy. This is aside from the question that if Sudesh Kumari would not be in a position to see Raj Singh on the roof of his house, it is obvious that Raj Singh would equally not be in a position to see Sudesh Kumari standing in the gali. The factors of poor visibility are further heightened by the fact that the incident is alleged to have occurred at around 6.15 a.m. on the 10th of November, 1990, when the sunrise on that day was at about 6.27 a.m. This certainly casts serious doubts on the veracity of the statement (Exhibit-PW-18/A).

34. Another important circumstance is the fact that in the MLC (Exhibit- PW-18/DA), it is indicated that Sudesh Kumari herself was the informant and she had alleged as under:

Pt. alleges that she was confronted by a neighbour (Raj) who sprinkled kerosene over her & set her alight after an altercation.

While the learned Counsel for the appellant, as noted above, stated that this MLC could not be looked into inasmuch as the scribe, Dr Anjali, has not been produced as a witness and, therefore, the defence was not given an opportunity to cross-examine her, even if we assume that the said MLC stands proved and established, we find that the version given in the same is different and distinct from the statement of Sudesh Kumari recorded in (Exhibit-PW-18/A). The version given in the MLC is that she was confronted by Raj who sprinkled kerosene over her and set her alight after an altercation. However, the version in (Exhibit-PW-18/A) and which is also the prosecution case is that Raj Singh poured kerosene oil on a gunny bag, set it on fire and then threw the same from the roof of his house onto Sudesh Kumari who was standing in the gali. It is apparent that the two versions, if what is recorded in the MLC can be regarded as the first dying declaration, are at variance. This circumstance has also given rise to doubt about the veracity of the statement contained in (Exhibit-PW-18/A).

35. Thus, even if we assume that (Exhibit-PW-18/A) was a statement which had been correctly recorded by PW-18 on the basis of what Sudesh Kumari actually said, there are serious doubts with regard to the veracity or truthfulness of what she said. In such a situation, as noted in the course of discussing the arguments advance by the counsel for the parties, corroboration becomes necessary. While looking for corroboration, we find that the same is not forthcoming. Both PW-1 (Jiwan) and PW-11 (Ram Chander) have veered away from the prosecution case and were, therefore, subjected to cross-examination by the learned APP. The said witnesses have not been truthful about injuries caused to Krishan Lal. In any event, these witnesses were not the eye witnesses to the actual incident. Furthermore, there has been no recovery of any container from which the kerosene oil is said to have been poured onto the gunny bag. No matches or any other material, which may have been used for igniting the gunny bag, have been recovered from the roof of Raj Singh's house or at his instance. What have

allegedly been recovered are the lathi and jalli which are irrelevant for the purposes of the offence u/s 302 IPC which was allegedly caused by the burning gunny bag. It is also of significance that PW-17 (Mohinder Singh) whose presence has been acknowledged by the other prosecution witnesses, has given a completely different version and has been termed as "hostile" by the prosecution. Jai Narain (DW-2), whose presence has also been acknowledged by the prosecution, has given a version entirely different from that of the prosecution.

36. We accept the argument of the learned Counsel for the appellant that the mark "B" shown in the rough sketch and the scaled map as being the place from where the gunny bag was thrown would not be admissible in view of the decisions referred to and relied upon by the learned Counsel for the appellant. The rough sketch had been prepared on the pointing out of PW-1 (Jiwan), who was not an eye witness and who, in any event, in his testimony, stated that the gunny bag was thrown from the roof of Raj Singh's house. He did not say that the gunny bag was thrown from point "B", which is the roof of Inder Singh's house. Same is the position with regard to PW-11 (Ram Chander). We have already indicated that PW-9 (Bhoop Singh) did not indicate as to from which house the gunny bag was thrown, but he has only stated that it was thrown from the roof. Therefore, the point marked "B", which is indicated on the roof of Inder Singh's house in both the rough sketch and the scaled map, cannot be taken as the point from which the gunny bag was thrown because the same is not corroborated by the testimonies of PW-1 (Jiwan) and PW-11 (Ram Chander) in particular, both of whom stated to the contrary that the gunny bag was thrown from the roof of Raj Singh's house. We have already indicated how that would also be an improbability.

37. We may also note that the prosecution has not been able to make a convincing argument with regard to the motive on the part of Raj Singh. The only motive indicated by the prosecution is that in order to prevent Sudesh Kumari from testifying against him, with respect to the earlier incident at the tap of Raj Singh's house, Raj Singh thought it fit to put an end to Sudesh Kumari's life. This reasoning does not impress us. The first incident which took place had, even as per the prosecution case, been settled by the intervention of the people, who had gathered there. PW-1 (Jiwan) and PW-11 (Ram Chander) had returned to Jiwan's house. Sudesh Kumari had also returned to the same house. Raj Singh and Krishan Lal had stayed back at their house No. 255. Thus, there was no occasion for Raj Singh to further aggravate the situation by deciding to commit the murder of Sudesh Kumari. We do not think that the motive for committing the murder of Sudesh Kumari has been established by the prosecution. Although in cases involving eye witnesses, the question of motive is not of prime importance, but in cases based entirely on circumstances and where the dying declaration is of doubtful quality, the existence of a motive becomes a very important circumstance. In this backdrop also, we find that the prosecution has not been able to establish its case beyond reasonable doubt.

38. In view of the foregoing, we find that there are serious doubts with regard to the prosecution case. The benefit of such doubts, insofar as the offence punishable u/s 302 IPC is concerned, would have to be given to the appellant. Insofar as the conviction under Sections 323 and 354 IPC is concerned, no serious arguments were advanced by the learned Counsel for the appellant. Perhaps, because the accused has already been imprisoned for over three years and the sentences awarded for the said offences were six months rigorous imprisonment and three months rigorous imprisonment respectively. In the result, we set aside the conviction and sentence of the appellant for the offence punishable u/s 302 IPC. The conviction of the appellant under Sections 323/34 IPC and Section 354 IPC are maintained. It is apparent that the appellant has already served out the sentences for the latter offences. The appellant is on bail. Consequently, the bail bond stands cancelled and the surety stands discharged. The appellant stands acquitted and is set at liberty insofar as the offence u/s 302 IPC is concerned. With regard to the offences under Sections 354 IPC and 323/34 IPC, the appellant has already served out the sentences there for.

The appeal stands allowed to the extent indicated above.