
(1998) 12 RAJ CK 0017
In the Rajasthan High Court
Case No : Criminal Appeal No. 182 of 1997

Sagir Khan	Vs	APPELLANT
State of Rajasthan		RESPONDENT

Date of Decision : 08-12-1998

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 173(2)
Evidence Act, 1872 — Section 32
Penal Code, 1860 (IPC) — Section 302

Citation : (1999) CriLJ 1705 : (1999) 3 RLW 1597 : (1999) 1 WLC 638

Hon'ble Judges : M.A.A. Khan, J; Arun Madan, J

Bench : Division Bench

Advocate : N.C. Choudhary, for the Appellant; G.D. Parwal, Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

1. At about 5 pm. on September 6, 1996, Smt. Kamla deceased was brought to the casualty ward of the JLN Hospital, at Ajmer. She was having burn injuries on her person. The House Staff in the Casualty Ward informed PW/ 1 Dr. P. K. Saraswat, Medical Jurist at that hospital to examine the injured Smt. Kamla. Dr. Saraswat examined the deceased for her injuries at about 5.40 and 5.50 pm. He found superficial burns on her face, neck, front chest, patches on back, upper limb and patches on lower limb. Dr. Saraswat further noted singeing of scalp hair, eye brow & eye lashes of the deceased. Smell of kerosene oil was coming from the body of the deceased. Dr. Saraswat, therefore, sent the deceased to the family surgical ward of the said hospital. Simultaneously, he informed Biram Singh, AST, at Police Station Christanganj because it was a burn injury case. It is alleged that on receipt of wireless message from the hospital PW/12 Panna Lal, who was Station House Officer at Police Station, Christanganj reached the hospital along with his subordinate staff. He contacted the Duty Doctor, PW2 Dr. Paritosh Das Agrawal resident doctor and enquired of him as to whether the deceased was in a fit state of mind to give a statement. On having been certified

by Dr. Agrawal that the deceased was in a fit condition to give statement, PW/12 Panna Lal, SHO is said to have recorded her statement, which runs as under :-

ipkZ c;ku Jherh deyk ifRu Lo- Jh izHkq tkfr jkor mez 40 lky fuoklh xkao gkFkh[ksM+k gky iksLVh QkeZ Jh "kehj fLFkr Qk;lkxj dhiky ds ihNs ih-,l-fdf"p;uxat gky tsj bZykt fQesy lftZdy okMZ , csM uaa 14 fnukad 6-9-1996 le; 6-40 ih-,e- ts-,y-,u- gksLihVy vtesj cflyflys tkap jiV la- 237 fn 6-9-1996 Fkkuk fdf"p;uxat vtesj A

us nfj;kQr iqfyl ij c;ku fd;k fd esjs vkneh dks xqtjs ikap N% lky gks pqds gSa A esjs nks yMds o ,d yMdh gS A fiNys djhcu nks lky ls eS A "kxhj eqlyeku tks iqfyl pkSdh vkuklkxj ds lkeus pquk HkVVk djrk gS] ds iksYVh QkeZ ij etnwjh djrh gwa o cky cPpksa lfgr iksYVh QkeZ ds ,d dejs esa jgrh gwa A vkt "kke djhcu 3&4 cts eS iksYVh QkeZ ij Fkh ml oDr QkeZ ekfyd "kqxhj us eq>s dgk fd eqxhZ dh lCth cuk rks eSus eqxhZ dh lCth cukus ls euk dj fn;k vkSj eSa Hksal dk pkjk ykus tkus yxh rks "kxhj us okfil cqyk;k o dgk fd jksVh rks cuk rks eSusa jksVh cukbZ fQj eSa cSB x;h A "kxhj us ukjkt gksdj vksyok fn;k fd rw gj jkst b/kj m/kj jksrh fQjrh gS eSa vkt rsjs dks lcd fl[kk gh nsrk gwa bruk dgej "kxhj ls dejs esa iMh ? kklysV dh ikh dks esjs mij Mky fn;k A ?kklysV esjs mij fxjk vkSj "kxhj ls ekfpl dh frYyh ls vkx tykdj eq>s vkx ls tyk fn;k ftlls esjs lkjs diMs ty x;s iwjk cnu vkx ls ty x;k A "kxhj ds Hkh gkFk vkx ls ty x;s A eq>s eksVjlkfbZfdy ij cSBkdj lQk[kkuk yk;k eksVjlkfbZfdy ij eq>s idMs gq,s esjh tsBwrh Hkh cSBh Fkh A eq>s tykus dh ? kVuk 4-15 4-30 cts "kke dh gS A fQj esjh cfgun :dek Hkh lQk[kkuk esa vk xbZ A

mijksDr dFku i<dj et:ck dks o ekStwnk mldh cfgu :dek dks lquk;s x;s A lqu o le> lgh ekudj vaxwBk fu"kkuh fd;s A

vaxwBk fu"kkuh

deyk g- ih-,l-fdf"p;uxat vtesj

vaxwBk fu"kkuh dsEi ts-,y-,u- gksLihVy] vteesj :dek 6-9-96 le; 7-00 ih-,e-**

2. The statement of the deceased as recorded by PW/12 Panna Lal was forwarded to the Police Station for registration of a case. PW-7 Mahavir Singh Constable handed over the statement Ex. P/3 to PW/10 Musteam Khan at the Police Station and, a case u/s 302, IPC was registered. At the hospital, PW/12 Panna Lal commenced investigation. It is further alleged that at 1.30 am. during the intervening night of 6th and 7th September, 1996, the present appellant was also produced before PW/1 Dr. B. K. Mathur, for examination. On examination of the appellant, Dr. Mathur noted the following injuries on his, person :-

1. Partly burn at 3 places with blister formation. Hand dorsum & distal. Part of forearm sup. to deep.

2. Partly burn on it forearm lower 1/3 and palmar surface near base of finger with blister formation.

3. 1 x 1 cm burn sup. deep with blister formation on lower lip.

4. 2 x 2 cm burn at It. cheek

5. Singing of scalp hairs.

3. Smt. Kamla succumbed to her injuries at 5.30 am on 7th September, 1996. The Doctor opined that the deceased had died as a result of shock and toxemia of extensive autemostean dry burns. In the course of investigation. PW/12 Panna Lal inspected the place of occurrence which was a room at the poultry farm of the appellant. Panna Lal, SHO noted that a kerosene stove was also there in the room; that a container of kerosene oil was also placed there. He further found a piece of burnt ghaghara and chunni of the deceased in that room. He seized all these articles and some articles were examined by him in the course of investigation and after having completed the investigation, a report u/s 173(2), Cr. P.C. was submitted by PW/12 Panna Lal to the concerned Magistrate. The learned Magistrate committed the case to the learned Sessions Judge at Ajmer. The learned Sessions Judge framed a charge u/s 302, IPC against the appellant and the appellant pleaded not guilty and claimed trial. Whereupon the prosecution examined 12 witnesses to support the charge against the accused. The plea taken by the appellant in his defence was that he used to carry on a brick kiln also at Ajmer; that he had to pay convenience fee of Rs. 1,700/- per month to the Police Officer concerned in order to bring wood to the kiln; that PW/12 Panna Lal raised the aforesaid convenience fee to Rs. 5,000/- in order to facilitate the running of kiln by him; that he declined to pay the sum of Rs. 5,000/- to PW/12 Panna Lal, SHO, whereupon he felt annoyed with the appellant. Regarding the incident, the appellant stated that Smt. Kamla deceased was in employment in his poultry farm. That on the date of occurrence at about 4.30 pm. he heard an alarm being raised by Smt. Kamla from her room, whereupon he reached there and found Smt. Kamla in burnt condition; that he immediately poured water upon Smt. Kamla and with the help of one Awanlki, who was a relative of the deceased, took the deceased on-motor-cycle to the hospital for immediate and necessary medical help to her. The appellant further stated that due to annoyance with him, PW/12 Panna Lal had falsely implicated him in the present case. The appellant did not produce any evidence in support of his plea.

4. On completion of the trial, the learned Sessions Judge held the appellant guilty of the offence u/s 302, IPC and convicted him as such and sentenced him to undergo imprisonment for life and also to pay a fine of Rs; 500/-. The judgment and order passed by the trial Judge on 29th April, 1997 is under challenge in the present appeal.

5. Shri N. C. Chaudhary, learned counsel for the appellant vehemently urged that there was no reliable and convincing evidence on the record of the trial Court to connect the present appellant with the death of the deceased. On the contrary, he took us through the entire evidence recorded by the trial Court to show that the injuries found on the body of the deceased as well as of the appellant clearly support the defence plea. Shri Chaudhary further submitted that all the relevant material witnesses in the case, who include Smt. Rukma (PW/4) - elder sister of

the deceased, her husband PW/5 Bhairu and PW/6 Bhagchand - teen-aged son of the deceased, have turned hostile and they have not at all supported the prosecution case. Shri Chaudhary further submits that the sole testimony of PW/12 Panna Lal SHO was not at all reliable and he had given out clearly a sworn statement that he had ante-dated FIR in the present case. Shri Chaudhary further submitted that the medical evidence on record clearly suggests that Smt. Kamla could have caught fire from the stove and that the injuries found on the hands of the appellant clearly supported the plea and hence accidental death could not be ruled out.

6. Shri Chaudhary, thus, submitted that the dying declaration proved as Ex. P/3 and on the basis of which the FIR in this case was registered was a bundle of lies and was not given by the deceased as she was not at all in a fit condition to give such a statement. In this behalf, Shri Chaudhary referred to the letters written by the Investigating Officer to the Doctor wherein the Doctor had certified that Smt. Kamla was not in a fit condition to give any statement.

7. On the other hand, Shri G. D. Parwal, learned Public Prosecutor heavily relied upon the dying declaration of the deceased proved as Ex. P/3 and further submitted that such a statement of the deceased clearly and fully incriminates the present appellant. It was further submitted by the learned Public Prosecutor that there were no cogent reasons to disbelieve the dying declaration of the deceased wherein she has clearly stated that having annoyed with her, the appellant had poured kerosene oil on her. It was, thus, submitted that the learned trial Judge had correctly appreciated the evidence on record and the conviction and sentence of the appellant was fully justified on the merits of the present case.

8. We have given our thoughtful consideration to the rival submissions made by the parties and have perused the evidence on the record of the trial Court.

9. In so far as the cause of death of the deceased Smt. Kamla is concerned, there is no dispute that she had sustained 60 to 70% burn injuries and such injuries had resulted in her death. We agree with and accept the testimony of the Doctor that the injuries sustained by Smt. Kamla were caused by kerosene oil and that such injuries were sufficient to cause death in the ordinary course of nature. We are, thus, satisfied that Smt. Kamla had died of burn injuries. The serious question for consideration further is whether the burn injuries had been caused to the deceased accidentally or it was an intentional act of the present appellant to have sprinkled the kerosene oil on the clothes of the deceased and then set her clothes to fire as is the case of the prosecution.

10. Before we proceed to appreciate the evidence and the circumstances attending on the causing of injuries to Smt. Kamla, we would like to refer to the oral evidence recorded during the trial of the case. PW/1 Dr. B. K. Mathur had examined the appellant at 1.30 am during the intervening night of 7th September, 1996 and had found burn injuries on his person particularly his palm

and both hands. He has further conducted the post-mortem examination on the dead body of the deceased at 12 noon on 7th September, 1996: The evidence of this witness on death is not disputed by either of the parties before us.

11. PW/2 Dr. Paritosh Das Agrawal is the witness who had made an endorsement on the application of the Investigating Officer regarding the condition of the deceased and her ability to give a statement. The evidence of this witness is quite material and we shall discuss the same at a later stage.

12. PW/3 Liyakat Ali was a labourer on the poultry farm of the appellant. The prosecution has examined him to prove that it was the appellant who had sprinkled the kerosene oil on the deceased. But this witness did not support such a case and was declared hostile. Nothing incriminating against the accused and beneficial to the interest of the prosecution could be extracted by effecting cross-examination on him by the learned Public Prosecutor.

13. PW/4 Rukma (42) is the elder sister of the deceased. She was examined to prove that the appellant had caused the burn injuries to the deceased. But this witness as also her husband PW/5 Bhaira did not support the prosecution case and were declared hostile. On being cross-examined by the defence counsel both, her sister and husband had categorically admitted that on being asked by them Smt. Kamla had told them that when she was preparing food on the stove when her hand had caught fire. PW/6 Bhag Chand is a boy of 10-12 years old and is son of the deceased. He was also examined to prove the prosecution case. But this child witness did not support the accusation against the appellant. He was also declared hostile.

14. It may be appreciated that PW/4 Rukma, PW/5 Bhaira and PW/6 Bhag Chand were the closest relatives of the deceased, and though they had arrived at the place of the occurrence at the time Smt. Kamla had sustained burn injuries, yet they did not support the prosecution case against the appellant. Rukma (PW/4) and Bhaira (PW/5) had come from some neighbouring poultry farm being run by one Shrivastava. PW/6 Bhagchand had also reached there at the time of occurrence. The presence of these witnesses can hardly be doubted. They had no friendship with the present appellant and therefore, there was no reason to make a statement for his benefit. Though, they had been declared hostile, but their hostile testimony gives clue to such facts which obviously gives support to the defence theory in this case. Thus, even if the testimony of PW/3 Liyakat Ali, who was an employee of the appellant and that of PW/6 Bhag Chand, who is a child witness, be excluded from consideration, there appears to be no good reasons to discard the testimony of PW/ 4 Rukma and her husband Bhaira (PW/5) on the point, which go to support the defence case.

15. Proceeding further we find PW/7 Mahaveer Singh, who is the constable, had accompanied PW/12 Panna Lal to the JLN Hospital, Ajmer and from hospital to the police station. PW/10 Musteam Khan, ASI had registered the case. PW/8 Shankar Singh and PW/9 Pratap Kumar are the witnesses to the site map Ex. P16

and seizure memo of the kerosene container.

16. Both these witnesses though declared hostile have stated that they had been called to the police station to sign certain documents prepared by the police..

17. That brings us to the testimony of PW/11 Dr. P. K. Shrivastava and PW/12 Panna Lal SHO - the Investigating Officer in the present case. As stated above, Smt. Kamla had been brought to the casualty ward of JLN Hospital at Ajmer at about 5.40 or 5.50 p.m. The prosecution did not disclose as to who had brought the deceased to the hospital. Further it was also not disclosed as to how Panna Lal PW/12, SHO had got the information about the admission of a burn case in the casualty ward of the hospital. In order to arrive at the conclusion, we examined the case diary at Sr. No. 1.2 and 3 drawn on 6th September, 1996. PW/12 Panna Lal has not mentioned any time of the receipt of the wireless message by him, but in the following proceeding, Panna Lal had mentioned the time of writing the case diary. The report written in the general diary on the receipt of the wireless message was not produced at the trial. This position of the case diary diverts our attention to the endorsement of PW/11 Dr. P. K. Saraswat on his report Ex. P/28. Dr. Saraswat has specifically mentioned on the back of the office report that the case referred to him by the house staff of the female surgical ward and that he had informed Biram Singh ASI of the Police Station, Christanganj and that at the Police Station, ASI Police Station. Christanganj had already been informed of the admission of the case at 5.30 pm. This clearly suggests that the deceased had been admitted in the hospital by her relatives or some other persons. The case of the prosecution further is that PW/12 Panna Lal had reached the hospital and recorded the statement of the deceased. The statement of the deceased, as allegedly given by her, has been reproduced above.

18. The question arises as to whether this statement was actually given by the deceased, or it was prepared later on.

19. On the above point, we examined the testimony of PW/12 Panna Lal very closely and minutely. In cross-examination PW/12 Panna Lal has stated that he had himself recorded the dying declaration of the deceased. He further stated that other memos particularly Ex. P.6 and Ex. P.9 were also prepared by him. But when he was cross-examined on the point, he stated that neither parcha bayan nor memo Ex. P6 to Ex. P9 were written in his handwriting. He stated that the dying declaration Ex. P/ I1 was written in the handwriting of Rajpal Singh, ASI who has not been examined at the trial and no explanation for his non-examination has also been offered by the prosecution. Panna Lal SHO has further stated that after having recorded the dying declaration Ex. P/ I1, he had requested the CJM, Ajmer to record the dying declaration of the deceased and the CJM had deputed his Magistrate to do the needful. According to Panna Lal SHO, the Magistrate had accompanied him to the hospital, who on being contacted, the Duty doctor had told them that the deceased was not in a fit condition to give any statement. The Duty Doctor Shri Agrawal was again contacted at 11.30 pm vide Ex. P5 and he again reported that the deceased was

not in a fit condition to give any statement. It, thus, comes out that Panna Lal SHO had made two more efforts at 11.00 pm and 11.30 pm vide Ex. P/4 and Ex. P/5 respectively to record the statement of Smt. Kamla, deceased. But on both the occasions, she was reported to be not in a fit condition to give any statement. This state of affairs requires the version of the prosecutrix recorded as the dying declaration Ex. P/ 11 at 6.30 pm vide application Ex. P/3 at 6.30 pm, corroboration. PW/2 Dr. P. D. Agrawal has certainly stated that at 6.30 pm, he has certified that the deceased was in a fit condition to give a statement. The question is whether such a statement was at all recorded by PW/12 Panna Lal or any other responsible person and the endorsement was made by Dr. Agrawal at 6.30 pm on Ex. P/3. The dying declaration Ex. P 11 is stated to have been recorded at 7.00 pm, meaning thereby that half an hour had been consumed in recording the statement of Smt. Kamla, deceased. During this period of half an hour, the Investigating Officer or for that matter the Police Officer deputed to record the dying declaration of the deceased could have procured any of the Doctor from the hospital or even a Magistrate as the Magistrate was stationed at that very place which cannot be lost sight of. When the question about recording of the statement Ex. P/11, PW/11 Panna Lal though first tried to convince the Court that he must have recorded that statement, yet on being cross-examined, on the point, he had to admit that the same was not written in his handwriting and instead it was written in the handwriting of Rajpal Singh ASI. If the ascribe of the dying declaration Ex. P/ 11 was Rajpal Singh, ASI, he was the best person to have deposed about the facts stated by Smt. Kamla, deceased. On Ex. P/ 11 we notice that the same statement has also been thumb marked by PW/4 Rukma. Rukma in her statement at that time has denied that any statement was ever recorded in her presence. It is, thus clear that the fact that the deceased had actually made any declaration to PW/12 Panna Lal or for that matter Police Officer is shrouded in a great mystery. The facts pointed out by us above, clearly speak that PW/12 Panna Lal SHO was not a truthful witness and instead he has tried to manufacture the evidence against the present appellant. This finding is strengthened by the fact that had a dying declaration of the deceased been recorded at 6.30 pm in the manner stated by PW/ 12 Panna Lal there would have hardly been any " occasion for presenting applications Ex. P4 and Ex. P/5 before Dr. Agrawal at 11.00 pm and 11.30 pm. Further it can also be not lost sight that Smt. Kamla had given up the struggle for life as late as at 5.30 am. in the morning.

20. Be that as it may, the law governing the recording of dying declaration is that it must have been truthful and must have been voluntarily made. The conviction of an accused can certainly be based on dying declaration provided such dying declaration inspires confidence in the Court. In appreciating and evaluating a dying declaration, it has to be seen as to who is the maker of the statement, what was his or her condition at the time of making such statement and what were the facts and circumstances at the time of recording of such a statement, and who had recorded such dying declaration. In so far as the main ingredient of

the dying declaration being of a truthful character is concerned, even if we take the dying declaration Ex. P/11 on its face value, it would be seen that it was not truthful. In such a statement, Smt. Kamla deceased is alleged to have stated that the appellant had asked her to prepare the meat, but she had declined to cook meat for the appellant. A perusal of the site map and particulars given there in discloses that at the time of inspection of the place of occurrence by PW/12 Panna Lal, a container having meat had been found in the room occupied by Smt. Kamla. If the container contained meat, the statement of Smt. Kamla that she had declined to prepare meat for the appellant is rendered untruthful. Thus, proceeding further, Smt. Kamla is alleged to have stated that the appellant then asked her to prepare food for him and she had prepared such food. Again, the statement discloses that in another container there was some "ata" and no "roti" had been prepared. Proceeding further, we find that in Ex. P/11 it has been mentioned that once Smt. Kamla had not prepared food for the appellant, the appellant had lost temper and poured kerosene on her. Smt. Kamla was admittedly an employee of the appellant and if she had prepared food on the instructions of the appellant, then naturally she would have prepared food for the appellant. But in normal course, he should have gone to the room of Smt. Kamla to take meat there. But what we find on the record is that the entire incident had taken place in the room occupied by Smt. Kamla. Again, we further notice that Smt. Kamla was putting on ghaghra and chunni on her person. The entire ghaghra leaving some part of it had been burnt. PW/12 Panna Lal had shown the seizure of ghaghra and chunni on having presented before us by PW/5 Bhaira. In the relevant memo he had shown the seizure of those burnt clothes from the room occupied by the deceased. There is no evidence on record to show that before removing Smt. Kamla from her Morn to the hospital, her clothes had ever been changed. Necessarily, therefore, Smt. Kamla might have been removed to the hospital in the clothes she was putting on at the time of the incident and that is what Dr. Saraswat has mentioned in the injury report prepared by him at the hospital. It is, thus, clear that Ex P 11, the so-called dying declaration is not truthful document.

21. Now, reading the so-called dying declaration in the totality of the circumstances it is not difficult to conclude that the prosecution had not been able to prove the same against the appellant beyond reasonable doubt. In this behalf, we would like to refer to the injuries found on the person of the appellant, whereas burn injuries had been found on the upper part as well as lower part of the body of the deceased, particularly her forehead, her eyelashes, face, neck. Burn injuries were found on the hands and arms of the appellant. Skin on arm were also found burnt. This factual position, as mentioned in the relevant memo clearly shows that the theory advanced by the appellant was not highly probable but also quite convincing. The principle governing the trial of a criminal is that the prosecution is required to prove the guilt of the accused by cogent and reliable evidence and beyond all reasonable doubt. The accused is not required to prove his innocence with the same standard of proof. In the instant case, we are

satisfied that not only the factual position of the injuries but also the facts and circumstances attending on causing of burn " injuries to Smt. Kamla support the conclusion that the theory advanced by the appellant was quite plausible and convincing as against the doubtful evidence produced by the prosecution in the present case.

22. The report appears to be most natural and probable in having lost no time in having rushed Smt. Kamla deceased to the nearest hospital available in the locality where she was admitted as per the bed head ticket and there the treatment also commenced by the concerned Doctor who was attending on her.

23. As regards the deceased having sustained 60-70% burns while preparing food in the room on the stove which was found containing kerosene. It has come in evidence that she was at the relevant time wearing terricotton ghaghara which had got shrunk and burnt to a great extent. We are of the view that in all probability, it is a case of accidental death as a result of which Smt. Kamla deceased having got burn injuries which proved fatal consequent upon the pouring of kerosene from the stove while preparing poultry, which cannot be ruled out and the law is well settled that where two views are possible one which favours the accused should not be brushed aside. From the perusal of the injury report, prepared by Dr. P. K. Saraswat vide Ex. P/20, it is specifically indicated there in that she had sustained 60% bums which in the opinion of the Doctor were dangerous to life and its duration is indicated as "fresh" within 0 to 6 hours. (kerosene burns).

24. If the appellant had any complicity in the crime, then the prosecution has failed to dispel the evident doubt which arises in our mind as to why the appellant had not immediately escaped from the place of occurrence and instead rushed Smt. Kamla deceased to the hospital on the pillion of his own motor cycle where she was admitted in casualty ward and later on succumbed to the burn injuries.

25. As regard the admissibility of the evidence of the hostile witnesses we are of the view that where the witnesses are supporting the defence version, there is no reason why their testimony should altogether be discarded. In this case, nothing incriminating has come from the evidence of the witnesses examined by the prosecution which would indicate or suggest the complicity of the accused-appellant in the alleged crime. From a perusal of the parcha bayan of the deceased Smt. Kamla Ex. P/I1 though, she has implicated the appellant by stating that on the fateful day at about 3-4 pm when she was at the poultry farm of the appellant when she was told to prepare the meat and on her refusal, he got annoyed, consequent upon which the container containing kerosene oil poured over her person by the appellant resulting in burn injuries. Thus, the version of the prosecution case has not been supported altogether in its material particulars by other witnesses cited by the prosecution i.e. PW/ 3 Liyakat Ali. PW/4 Rukma, PW/5 Bhag Chand and PW/6 Bhaira. Unless the dying declaration is corroborated in material particulars by other, independent witnesses. It is not

safe to rely upon the sole testimony (Parcha-bayan) of the prosecutrix for maintaining the conviction of the accused-appellant. There is no other cogent and reliable evidence in the instant case to suggest that the appellant had poured kerosene oil on the person of the deceased Smt. Kamla and thereafter caused ignition resulting in her sustaining burn injuries. On the contrary, there is ample evidence to suggest the innocence of the appellant. In the matter of Bithal Prasad v. State of Rajasthan (1992) 1 Rajasthan LR 232, the question arose for consideration before the Division Bench of this Court was as to whether it could be safe to rely upon the parcha bayan of the deceased recorded by three SHO/IO for the purpose of registering a case notwithstanding the availability of sufficient proof for recording the statement of the deceased in the presence of the Magistrate, but not availed by the prosecution. It was held that the conviction cannot be maintained on the basis of such dying declaration notwithstanding the availability of Doctor in the hospital namely JLN Hospital, Ajmer. No reason has been explained as to why the concerned Doctor could not be requested for recording the statement of the prosecutrix Kamla deceased or any other doctor who was at that relevant time available with said hospital.

26. We would like to observe the time taken in recording the dying declaration is very relevant which apparently has been lost sight of by the trial Court. The time when Smt. Kamla was admitted in the hospital is recorded as 4.15 to 4.34 pm in her version recorded by the Investigating Officer when she was brought and admitted in the hospital. From the perusal of Ex. P/11 this fact is fully borne out. During this period, the prosecution had failed to record the statement of Smt. Kamla when particularly in the instant case where a patient had been brought with 60-70% burns. The possibility of the injured succumbing to the injuries in such a state at any moment cannot be ruled out. The prosecution has failed to explain what were those sparing reasons in not recording the dying declaration of Smt. Kamla which could have been done with utmost promptitude during the aforesaid period. On the contrary, that valuable time was lost by the Investigating Officer and instead her statement by way of "parcha-bayan" was recorded.

27. As regards the admissibility of the parcha-bayan Ex. P/11 "dying declaration" is concerned, we are of the view that the prosecution has miserably failed to explain what were those sparing reasons for not recording the statement of Smt. Kamla soon after she was admitted in the hospital which has all adequate facilities for giving medical treatment to the injured. Instead the statement of Smt. Kamla was allegedly recorded belatedly at the point of time i.e. 7 pm on the fateful day. This creates strong suspicion as to the manner in which the dying declaration was recorded, but apart from the factors which are most relevant for observing safeguards which the prosecution should observe in recording a dying declaration have altogether been ignored in the instant case. We are also fortified in our observation from the judgment of the Supreme Court in the matter of K. Ramachandra Reddy and Another Vs. The Public Prosecutor, wherein the apex Court has laid down the safeguards which should be observed by the prosecution

more particularly where the statement of the deceased has been recorded by the investigation officer, instead by the Doctor attending on the deceased. The Apex Court has observed that" the dying declaration is undoubtedly admissible u/s 32 of the Indian Evidence Act and not being a statement on oath so that its truth could be tested by cross-examination, the Courts have to apply the strictest and the closest circumspection to the statement before acting upon it. While great solemnity and sanctity is attached to the words of a dying man because a person on the verge of death is not likely to tell lies or to concoct a case so as to implicate an innocent person, yet the Court has to be on guard against the statement of the deceased being a result of either tutoring, prompting or a product of his imagination. The Court must be satisfied that the deceased was in a fit state of mind to make statement after the deceased had a clear opportunity to observe and identify his assailants and that he was making the statement without any influence or rancour. Once the Court is satisfied that the dying declaration is true and voluntary it can be sufficient to found the conviction even without any further corroboration." Applying the ratio of the aforesaid decisions of the Apex Court to the instant case, we are of the view that the manner in which dying declaration of Kamla (deceased) has been recorded fails to meet the requirements as laid down hereinabove in R.K. Reddy's case 1992 (1) RajLR 232 (supra) and cannot be safely relied upon to sustain conviction of the appellant for offence punishable u/s 302, IPC.

28. In the instant case, notwithstanding the availability of Doctors who were present in the said hospital, which is a very prominent hospital (JLN Hospital, Ajmer) situated in the heart of city of Ajmer as to what were the sparing reasons in not recording the statement of Smt. Kamla by the Doctor who had attended Smt. Kamla (deceased) have not been explained. On the contrary, the Investigating Officer in his cross-examination has stated that since Doctor was not available, at the relevant time, when she breathed her last at 5.30 a.m. on the following day i.e. 7th September, 1996, hence, the Investigating Officer himself took up the task of recording her dying declaration particularly when what purpose would have been served when Kamla (deceased) was lying-in "coma" in a semi-conscious state when her statement was so recorded. From the perusal of Ex. P/3 it is borne out that at 6.30 p.m. Smt. Kamla-deceased was certified by the Doctor attending on her, as in a fit condition to make statement. While at 11.05 on the fateful day i.e. 6th September, 1996 she was reported to be not fit for giving statement. This obviously goes to show the delay on the part of the prosecution in having altogether ignored the time factor in recording the dying-declaration of Smt. Kamla at 6.30 p.m. itself when she was reported to be in a fit condition to have made the statement, which could have been done with utmost promptitude, but the same has been altogether ignored.

29. As regards the conduct of the appellant, we would like to observe that from the evidence which has come on record, nothing incriminating has emerged which would have adverse impact on his prior and subsequent conduct after the mishap. As regards the evidence which has come on record in this behalf, it is

noteworthy to indicate that the appellant had taken all possible steps to rush Smt. Kamla - the injured on his own motor cycle to the nearest available hospital i.e. JLN Hospital, Ajmer so that no time should be lost in getting her best possible medical aid. Hence, the conduct of the appellant cannot be said to be blame-worthy in any respect.

30. In the result, the appeal is allowed. Judgment and order dated 29th April, 1997, passed by the Sessions Judge", Ajmer in Sessions Case No. 129/1996 is set aside and the accused-appellant is acquitted of the charge u/s 302, IPC. He shall be set at liberty, if not wanted in any other case.