
(2018) 02 RAJ CK 0061
In the Rajasthan High Court
Case No : 398 of 1993

State of Rajasthan

APPELLANT

Vs

Okha Bharti s/o Patta Bharti & Anr

RESPONDENT

Date of Decision : 05-02-2018

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 313](#), [Section 378](#) - Power to examine the accused - Appeal in case of acquittal
[Indian Penal Code, 1860](#), [Section 176](#)

Citation : (2018) 02 RAJ CK 0061

Hon'ble Judges : Sangeet Lodha, Manoj Kumar Garg

Bench : Division Bench

Advocate : C.S.Ojha, Rajesh Choudhary

Judgement

1. This criminal appeal under Section 378 of the Code of Criminal Procedure, 1973 (for short "Cr.P.C.") has been filed by the State aggrieved by

the judgment and order dated 16.2.93 passed by Session Judge, Jalore in Session Case No. 32/92, acquitting the accused Okha Bharti of the

charges for offences under Sections 302 & 498A IPC and accused Smt. Dariya of the charges for the offences under Sections 302/114 & 498A

IPC.

2. Briefly the prosecution case is that on 27.3.92, Smt. Babi, the wife of accused respondent no.1 herein was admitted to Primary Health Centre,

Sanchore in severely burnt condition. On receiving information in this regard on wireless, SHO, Police Station, Sanchore, vide requisition dated

27.3.92 (Ex P/1) enquired from the Medical Officer, Primary Health Centre, Sanchore about the fitness of Smt. Babi to make a statement which

was received by the Medical Officer on 27.3.92 at 2 P.M.. On the Medical Officer

certifying by way of endorsement on the requisition regarding fitness of Smt. Babi to make a statement, the SHO, Police Station, Sanchore, requested Tehsildar-cum-Executive Magistrate, Sanchore vide application dated 27.3.92 (Ex.P/2) to record the statement of Smt. Babi at the hospital. The Medical Officer again made an endorsement on the application (Ex.P/2) in the following terms: ""Smt. Babi w/o of Okha Bharti, age 22 yrs., caste Swami, R/o of Village Bichhawar is in position to give statement at time of admission"". Accordingly, Moola Ram (PW 5), Tehsildar-cum-Executive Magistrate, Sanchore reached hospital and recorded the statement of Smt. Babi (Ex.P/7) on the same day at 2.30 P.M.

3. Smt. Babi in her statement (Ex.P/7) revealed that she had entered into marriage 5-6 years back. Her husband had illicit relations with his elder brother's wife Smt. Dariya. When she objected to it, on being tutored by Smt. Dariya, while she was sitting in her hut, her husband came with the jerrycan containing kerosine, poured the kerosine on her body, lit the match-stick and set her on fire. Thereafter, some people came there and extinguished the fire. On account of burn, she lost visibility and therefore, she could not identify the persons extinguishing the fire. She reiterated that on being asked by her Jethhani (husband's elder brother wife), her husband with an intention to kill her, poured the kerosine and set her on fire. She further alleged that her husband has poured kerosine and set her at fire with an intention to kill her on the asking of her Jethhani. The statement recorded as aforesaid was read over by the Tehsildar-cum-Executive Magistrate to the victim Smt. Babi, she accepted the same as correct, affixed her left hand thumb impression taken on the statement and Tehsildar-cum-Executive Magistrate also subscribed his signature. The statement recorded was forwarded by Tehsildar, Sanchore to SHO, Sanchore, who in his turn forwarded the same to the SHO, Police Station, Sarwana through Bajrang Singh, Constable. On the basis of the statement of Smt. Babi recorded as aforesaid, SHO, Police Station, Sarwana registered the FIR for commission of offences under Section 498A, 307 IPC and investigation commenced.

4. During the investigation, necessary memos were drawn and the statements of witnesses were recorded. On 29.3.92 at 2.15 A.M. Smt. Babi expired. The dead body of Smt. Babi was subjected to autopsy. The accused

Okha Bharti and Smt. Dariya were arrested. At the instance of accused Okha Bharti, the jerrycan of kerosine was recovered.

5. After completion of the investigation, police filed the charge sheet against the accused appellants for offences under Sections 302/109 & 498A

IPC before the Judicial Magistrate, First Class, Sanchore. The matter was committed to the Session Judge, Jalore for trial. The trial Judge framed

the charges against the accused appellants for offences under Sections 302, 302/114 & 498A IPC. The accused appellants denied the charges

and claimed trial.

6. The prosecution in support of its case got examined 13 witnesses (PW1 to PW13) and also produced the documentary evidence (Ex.P/1 to

P/25). The accused appellants did not lead any evidence in defence.

7. The accused appellants were examined u/s 313 Cr.P.C., they denied their presence at the place of occurrence and involvement in the

commission of the offences. Accused Okha Bharti stated that Smt. Babi has committed suicide inasmuch as, his mother did not accede to her

request for separate living.

8. Learned trial court after considering the evidence available on record and the rival submissions, acquitted the accused appellants. Hence, this

appeal by the State.

9. We have heard the learned counsel for the appellants, learned Public Prosecutor and carefully scanned the evidence adduced at the trial.

10. Learned Public Prosecutor contended that it is well settled that the dying declaration may form sole basis for conviction without independent

corroboration if it is shown that person making had an opportunity to identify the person implicated and the same is thoroughly reliable and free

from blemish. Learned Public Prosecutor drawing the attention of the court to Ex.P/1 and Ex.P/2 submitted that the Medical Officer had certified

in clear terms that Smt. Babi was in position to give statement and thereafter, relying on the certification made, the Tehsildar-cum-Executive

Magistrate has recorded the statement. Nothing turns on the question that the Tehsildar-cum- Executive Magistrate did not record the statement on

his own and the same was recorded under his dictation by somebody else. The doctors having certified about the fitness of the victim to give

statement on the requisition made as also on the application of the SHO requesting the Tehsildar-cum-Executive Magistrate to record the

statement is sufficient compliance of the requirement and therefore, the same cannot be discarded merely because the statement recorded does not

bear certification of the doctor. As a matter of fact, certification by doctor being essentially a rule of caution, the voluntary and truthful nature of the

declaration can be established even otherwise. It is submitted that there is no specified statutory form for recording the dying declaration and

therefore, its acceptability cannot be questioned solely for the reason that it is recorded in narrative form. It is further submitted that merely because

the witnesses who reached at the place of occurrence and extinguished the fire have turned hostile, the reliability of the dying declaration is not

affected in any manner. It is submitted that the learned trial Judge without there being any substantial infirmity, has committed grave error in

discarding the dying declaration as not reliable, which as a matter of fact stands corroborated by the testimony of Moola Ram (PW 5) and Dr.

R.L. Modi (PW 9). It is submitted that the dying declaration further stands corroborated by the recovery of jerry can at the instance of accused

Okha Bharti vide recovery memo (Ex.P/25) and thus, the guilt of the accused stands proved beyond reasonable doubt.

11. On the other hand, the counsel appearing for the respondents submitted that as per prosecution case, deceased Smt. Babi had made

declaration before the witnesses Veerma (PW 2), Vasa (PW 3), Vajaram (PW 4), Bhura (PW 6) and Uksingh (PW 8) that she has been set

ablaze by her husband and Jethhani Dariya after pouring kerosine. All these persons, who are alleged to have reached at the place of occurrence

and attempted to extinguish the fire, have turned hostile and did not support the prosecution case. Learned counsel would submit that the dying

declaration alleged to have been recorded by the Tehsildar-cum- Executive Magistrate (Ex.P.7) suffers from serious infirmity inasmuch as, the

Executive Magistrate has not recorded his satisfaction as to fitness of the victim to give a statement. That apart, at the time of recording the

statement, the doctor has not certified that Smt. Babi was fit to give a statement rather, the certification made was that at the time of admission

Smt. Babi was fit to make a statement. Learned counsel drawing the attention of this court to the post mortem report (Ex.P/13), submitted that the

cause of death of Smt. Babi is opined to be shock due to extensive burn which is more than 90% and thus, in no manner she could have been

certified to be fit for giving a statement. It is submitted that the dying declaration suffers from serious and substantial infirmity inasmuch as the same

has not been recorded by the Executive Magistrate himself after recording his satisfaction about the fitness of the maker and it is not in the question

and answer form either. Learned counsel submitted that the infirmities crept in recording the dying declaration are substantial and therefore, no

conviction can be based on such uncorroborated dying declaration. Learned counsel submitted that it is well settled that courts have to apply the

strictest scrutiny and the closest circumspection to the dying declaration before acting upon it. Learned counsel submitted that the dying declaration

recorded is neither in the form of questions and answers and nor recorded in the words of the maker of the declaration should not be relied upon

without there being any corroboration. In support of the contention, learned counsel has relied upon the decisions of Supreme Court in the matters

of ""K.Ramachandra Reddy and Another vs. The Public Prosecutor"", 1976 Cri.L.J. 1548 and ""Rajinder Singh ALIAS Kada vs. State of Punjab"",

1993 Supreme Court Cases (Cri.) 135.

12. We have considered the rival submissions and scanned the evidence on record carefully.

13. The Medical Board consisting of three members namely; Dr. R.L.Modi (PW 9), Medical Officer, CHC, Sanchore, Dr. B.S.Shergil and Dr.

S.D. Bora conducted autopsy over the dead body of Smt. Babi. As per the Post Mortem Report (Ex.P/13) and deposition of Dr. R.Lmodi (PW

9) before the learned trial Judge following ante mortem burn injuries were found on the body of the deceased Smt. Babi:-

Stout, rigor mortis is present in all four limbs, footes is come out from both nostrils mouth is open.

Burn-whole face is burn including both eyes, forehead, anterior & posterior aspect of neck, Anterior & Posterior aspect chest wall are burn, upper

part of abdominal wall is severely burn, lower abdomen below the umbilicus skin is peeled off. Whole of the back is burn. Both lower limbs are

burn except soles of both foot. Private part is burn except, perianal region, both upper limb are burn except palm. Whole skin of body is blackish

in colour.

The cause of death of Smt. Babi w/o Okha Bharti is opined as shock due to extensive burn which is more than 90%. Thus, the death of Smt. Babi

is concededly homicidal in nature.

14. Precisely, the prosecution case is that on the fateful day when Smt. Babi was sitting in lobby (vksljh) of her hut, the accused Okha Bharti

accompanied by the wife of his elder brother Smt. Dariya came there and on instigation of Smt. Dariya, Okha Bharti poured kerosine on the

person of Smt. Babi, lit the match stick and set her on fire. On hearing her cry, Veerma (PW 2), Vasa (PW 3) and Bhura (PW 6) reached the

place of occurrence and saw Smt. Babi burning. They poured the water on her body and extinguished the fire. The accused Okha Bharti and Smt.

Dariya were also present there and later, Vajaram (PW 4) and Uksingh (PW 8) also reached there. According to the prosecution on being asked,

Smt. Babi revealed to Veerma (PW 2), Vasa (PW 3), Bhura (PW 6) and Uksingh (PW 8) that her husband and Jethhani have set her ablaze after

pouring kerosine. The statement of Smt. Babi (Ex.P/7) was recorded by the Tehsildar-cum-Executive Magistrate Shri Moola Ram (PW 5),

wherein she inter alia stated that her Jethhani Smt. Dariya instigated her husband who poured kerosine on her, lit the match stick and set her on

fire. That apart, as per the prosecution, at the instance of accused Okha Bharti kerosine jerrycan was recovered vide recovery memo (Ex.P/25).

15. Admittedly, Veerma (PW 2), Vasa (PW 3), Vajaram (PW 4), Bhura (PW 6) and Uksingh (PW 8) have turned hostile and not supported the

prosecution story.

16. As per deposition of Veerma (PW 2), Vasa (PW 3) and Vajaram (PW 4) when on hearing the cry, they rushed to the place of occurrence

smoke was emitting out of the hut, which was found bolted from inside, they opened the door by breaking the bolt and extinguished the fire by

pouring water on the body of Smt. Babi. Veerma (PW 2) and Vasa (PW 3) and Vajaram (PW 4) have further deposed that on asking Smt. Babi

revealed that she was not set ablaze by anybody rather she had burned herself. On being contradicted with their statement recorded by the police

under Section 161 Cr.P.C., they specifically denied to have stated that on being asked Smt. Babi revealed that she has been set ablaze by her

husband and Jethhani Smt. Dariya. Bhura (PW 6) and Uksingh (PW 8) denied to have any conversation with Smt. Babi. None of them has

deposed that accused Okha Bharti and Smt. Dariya were present at the place of occurrence rather, Veerma (PW 2) has stated that nobody was

present at the house of Pata Bharti (father of Okha Bharti) at the relevant time. Vasa (PW 3) and Bhura (PW 6) have deposed that Okha Bharti

and Dariya were not present there. Uksingh (PW 8) has deposed that he had not seen either Okha Bharti or Smt. Dariya at their house at the

relevant time.

17. The witnesses Veerma (PW 2), Vasa (PW 3), Vajaram (PW 4), Bhura (PW 6) and Uksingh (PW 8) having turned hostile, concededly, the

prosecution case rests on the dying declaration (Ex.P./7) recorded by the Tehsildar-cum-Executive Magistrate Moola Ram (PW 5) and the

recovery of kerosine jerrycan made at the instance of accused Okha Bharti.

18. The dying declaration (Ex.P/7) recorded as aforesaid reads as under:
""VERNACULAR MATTER OMITTED

19. Before examining the question whether the dying declaration recorded as aforesaid can be held to be true, voluntary and reliable or it deserves

to be excluded from consideration for the infirmities crept in, it would be beneficial to refer the legal position settled by various decisions.

20. In Khushal Rao vs. State of Bombay, 1958 Cr.L.J. 106, the Supreme Court summarized the principles governing evidentiary value of the

dying declaration thus:

(1) that it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is

corroborated;

(2) that each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made;

(3) that it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other piece of

evidence;

(4) that a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding

circumstances and with reference to the principles governing the weighing of evidence;

(5) That a dying declaration which has been recorded by a competent magistrate in the proper manner, that is to say, in the form of

questions and answers, and, as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than a

dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character,

and

(6) that in order to test the reliability of a dying declaration, the Court has to keep in view the circumstances like the opportunity of

the dying man for observation, for example, whether there was sufficient light if the crime was committed at night; whether the

capacity of the man to remember the facts stated had not been impaired at the time he was making the statement, by circumstances

beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying declaration

apart from the official record of it; and that the statement had been made at the earliest opportunity and was not the result of tutoring

by interested parties." (emphasis supplied)

21. In *Tapinder Singh vs. State of Punjab*, 1970 Cr.L.J. 1415, the Supreme Court while considering the admissibility of dying declaration in

evidence in context of provisions of Section 32 (1) of the Indian Evidence Act, 1872, observed:

5. 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 under Section 32(1) of the India Evidence Act in a case in which the cause of that person's death comes into

question. It is true that a dying declaration is not a deposition in court and it is neither made on oath nor in the presence of the accused. It is,

therefore, not tested by a 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, imposing on it an obligation to closely scrutinise all the relevant attendant

circumstances.

22. In *Smt. Paniben vs. State of Gujarat*, 1992 Cr.L.J. 2919, the Supreme Court summarized the principles governing dying declaration thus:

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

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

(iii) This Court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring,

prompting or imagination. The deceased had opportunity to observe and identify the assailants and was in a fit state to make the

declaration.

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

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

rejected.

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

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

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

guarantees truth.

(ix) Normally the court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to

the medical opinion. But where the eye witness has said that the deceased was in a fit and conscious state to make this dying

declaration, the medical opinion cannot prevail.

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

upon.

23. In *Uka Ram vs. State of Rajasthan*, AIR 2001 SC 1814, while discussing the principle upon which the admissibility of dying declaration rests,

observed:

6. Statements, written or verbal of relevant facts made by a person who is dead, or who cannot be found or who has become incapable of giving

evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to

the court unreasonable, are themselves relevant facts under the circumstances enumerated under sub-sections (1) to (8) of Section 32 of the Act.

When the statement is made by a person as to cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in

cases in which the cause of that person's death comes into question is admissible in evidence being relevant whether the person was or was not, at

the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death

comes into question. Such statements in law are compendiously called dying declarations. The admissibility of the dying declaration rests upon the

principle that a sense of impending death produces in a man's mind the same feeling as that of a conscientious and virtuous man under oath- *Nemo*

meritorius praesumuntur mentiri. Such statements are admitted upon consideration that their declarations made in extremity, when the maker is at

the point of death and when every hope of this world is gone, when every motive to falsehood is silenced and the mind induced by the most

powerful consideration to speak the truth. The principle on which the dying declarations are admitted in evidence is based upon the legal maxim

Nemo meritorius praesumitur mentiri i.e. a man will not meet his maker with a lie in his mouth. It has always to be kept in mind that though a

dying declaration is entitled to great weight, yet it is worthwhile to note that as the maker of the statement is not subjected to cross-examination, it

is essential for the court to insist that dying declaration should be of such nature as to inspire full confidence of the court in its correctness. The

court is obliged to rule out the possibility of the statement being the result of either tutoring, prompting or vindictive or product of imagination.

Before relying upon a dying declaration, the court should be satisfied that the deceased was in a fit state of mind to make the statement. Once the

court is satisfied that the dying declaration was true, voluntary and not influenced by any extraneous consideration, it can base its conviction without

any further corroboration as rule requiring corroboration is not a rule of law but only a rule of prudence." (emphasis supplied)

24. In *Laxman Vs. State of Maharashtra*, 2002 (6) SCC 710, the Supreme Court while discussing the law relating to dying declaration observed:

3. The justice theory regarding acceptability of a dying declaration is that such declaration is made in extremity, when the party is at the point of

death and when every hope of this world is gone, when every motive to falsehood is silenced, and the man is induced by the most powerful

consideration to speak only the truth. Notwithstanding the same, great caution must be exercised in considering the weight to be given to this

species of evidence on account of the existence of many circumstances which may affect their truth. The situation in which a man is on death bed is

so solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason the requirements of oath and cross-

examination are dispensed with. Since the accused has no power of cross-examination, the court insist that the dying declaration should be of such

a nature as to inspire full confidence of the court in its truthfulness and correctness. The court, however, has to always be on guard to see that the

statement of the deceased was not as a result of either tutoring or promoting or a product of imagination. The Court also must further decide that

the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Normally, therefore, the court in order to

satisfy whether the deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eye

witnesses state that deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that

since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration

can be oral or in writing and any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication

is positive and definite. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a

Magistrate or a doctor or a police officer. When it is recorded, no oath is necessary nor is the presence of a Magistrate absolutely necessary,

although to assure authenticity it is usual to call a Magistrate, if available for recording the statement of a man about to die. There is no requirement

of law that a dying declaration must necessarily be made to a Magistrate and when such statement is recorded by a Magistrate there is no specified

statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the

facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied

that the deceased was in a fit state of mind. Where it is proved by the testimony of the Magistrate that the declarant was fit to make the statement

even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful.

A certification by the doctor is essentially a Rule of caution and therefore the voluntary and truthful nature of the declaration can be established

otherwise." (emphasis supplied)

25. In *Muthu Kutty and Anr. Vs. State by Inspector of Police, Tamil Nadu*, AIR 2005 SC 1473, the Supreme Court observed :

15. Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross-examination. Such a

power is essential for eliciting the truth as an obligation of oath could be. This is the reason the Court also insists that the dying declaration should

be of such a nature as to inspire full confidence of the Court in its correctness. The Court has to be on guard that the statement of deceased was

not as a result of either tutoring, or prompting or a product of imagination. The Court must be further satisfied that the deceased was in a fit state of

mind after a clear opportunity to observe and identify the assailant. Once the Court is satisfied that the declaration was true and voluntary,

undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying

declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence.

26. In *Ongole Ravikanth Vs. State of Andhra Pradesh*, (2009) 13 SCC 647, the Supreme Court held :

28. It is well settled and needs no restatement at our hands that dying declaration can form the sole basis for conviction. But at the same time due

care and caution must be exercised in considering weight to be given to dying declaration inasmuch as there could be any number of circumstances

which may affect the truth.

29. It has been repeatedly held by this Court that the courts have always to be

on guard to see that the dying declaration was not the result of either tutoring or prompting or a product of imagination. It is the duty of the courts to find that the deceased was in a fit state of mind to make the dying declaration. In order to satisfy itself that the deceased was in a fit mental condition to make the dying declaration, the courts have to look for the medical opinion." (emphasis supplied)

27. In *Atbir Vs. Government of NCT of Delhi*, (2010) 9 SCC 1, the Supreme Court after due consideration of the earlier views summarized the principles governing admissibility of dying declaration as under:

22. The analysis of the above decisions clearly shows that:

(i) Dying declaration can be the sole basis of conviction if it inspires the full confidence of the court.

(ii) The court should be satisfied that the deceased was in a fit state of mind at the time of making the statement and that it was not the result of tutoring, prompting or imagination.

(iii) Where the court is satisfied that the declaration is true and voluntary, it can base its conviction without any further corroboration.

(iv) It cannot be laid down as an absolute Rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The Rule requiring corroboration is merely a Rule of prudence.

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

(vi) A dying declaration which suffers from infirmity such as the deceased was unconscious and could never make any statement cannot form the basis of conviction.

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

(viii) Even if it is a brief statement, it is not to be discarded.

(ix) When the eyewitness affirms that the deceased was not in a fit and conscious state to make the dying declaration, medical opinion cannot prevail.

(x) If after careful scrutiny, the court is satisfied that it is true and free from any effort to induce the deceased to make a false

statement and if it is coherent and consistent, there shall be no legal impediment

to make it the basis of conviction, even if there is no corroboration.

28. In *Ramesh & Ors Vs. State of Haryana & Ors.*, AIR 2016 SC 5554, the Supreme Court has observed :

27. Law on the admissibility of the dying declarations is well settled. In *Jai Karan v. State of N.C.T., Delhi* reported in (1999) 8

SCC 161, this Court explained that a dying declaration is admissible in evidence on the principle of necessity and can form the basis

of conviction if it is found to be reliable. In order that a dying declaration may form the sole basis for conviction without the need for

independent corroboration it must be shown that the person making it had the opportunity of identifying the person implicated and is

thoroughly reliable and free from blemish. If, in the facts and circumstances of the case, it is found that the maker of the statement was

in a fit state of mind and had voluntarily made the statement on the basis of personal knowledge without being influenced by others

and the court on strict scrutiny finds it to be reliable, there is no Rule of law or even of prudence that such a reliable piece of evidence

cannot be acted upon unless it is corroborated. A dying declaration is an independent piece of evidence like any other piece of

evidence, neither extra strong or weak, and can be acted upon without corroboration if it is found to be otherwise true and reliable.

There is no hard and fast Rule of universal application as to whether percentage of burns suffered is determinative factor to affect

credibility of dying declaration and improbability of its recording. Much depends upon the nature of the burn, part of the body

affected by the burn, impact of the burn on the faculties to think and convey the idea or facts coming to mind and other relevant

factors. Percentage of burns alone would not determine the probability or otherwise of making dying declaration. Physical state or

injuries on the declarant do not by themselves become determinative of mental fitness of the declarant to make the statement (See

Rambai v. State of Chhatisgarh : (2002) 8 SCC 83).

28. It is immaterial to whom the declaration is made. The declaration may be made to a Magistrate, to a Police Officer, a public

servant or a private person. It may be made before the doctor; indeed, he would be the best person to opine about the fitness of the

dying man to make the statement, and to record the statement, where he found that life was fast ebbing out of the dying man and

there was no time to call the Police or the Magistrate. In such a situation the Doctor would be justified, rather duty bound, to record

the dying declaration of the dying man. At the same time, it also needs to be emphasised that in the instant case, dying declaration is

recorded by a competent Magistrate who was having no animus with the accused persons. As held in *Kushal Rao v. State of*

Bombay : 1958 SCR 552, this kind of dying declaration would stand on a much higher footing. After all, a competent Magistrate has

no axe to grind against the person named in the dying declaration of the victim and in the absence of circumstances showing anything

to the contrary, he should not be disbelieved by the Court (See *Vikas and Ors. v. State of Maharashtra* : (2008) 2 SCC 516).

29. No doubt, the victim has been brought with 100% burn injuries. Notwithstanding, the doctor found that she was in a conscious

state of mind and was competent to give her statement. Thus, the Magistrate had taken due precautions and, in fact, Medical Officer

remained present when the dying declaration was being recorded. Therefore, this dying declaration cannot be discarded merely going

by the extent of burns with which she was suffering, particularly, when the defence has not been able to elicit anything from the cross-

examination of the doctor that her mental faculties had totally impaired rendering her incapable of giving a statement." (emphasis

supplied)

29. In the backdrop of the principles governing the evidentiary value and acceptability of dying declaration settled by the Apex Court as aforesaid,

we proceed to scrutinise as to whether at the time of making a statement the deceased Smt. Babi was in a fit state of mind and that the statement

recorded is true and voluntary so as to form basis for conviction of the accused without any further corroboration.

30. Indisputably, the incident occurred on 27.3.92 at 12 P.M. As per prosecution, SHO, Sanchore on receiving the information on wireless to the

effect that one Smt. Babi has burned and the arrangements are to be made for her treatment at hospital. It is noticed that the person who gave the information on wireless and the time of the information being received is not disclosed by the prosecution. Madho Singh (PW 1) has deposed that he does not remember whether the message received was entered into Rojnamcha or not. Further, it is also not disclosed by Madho Singh (PW 1) in his deposition as to when after receiving the wireless message, he reached the place of occurrence or hospital. Be that as it may, on the information being received as aforesaid, SHO, Madho Singh (PW 1) sent a requisition (Ex.P/1) to the Medical Officer, Government Hospital, Sanchole to examine Smt. Babi w/o Okha Bharti and also to apprise whether she is in condition to give a statement. On the Medical Officer Dr. R.L.Modi (PW 9) endorsing on the requisition that Smt. Babi who is admitted in the hospital at 2 P.M. on 27.3.92 is in position to give statement, the SHO, Madho Singh (PW 1) made an application to the Tehsildar, Sanchole to reach to the hospital and record the statement of Smt. Babi. On the application made, the Medical Officer Dr.R.L.Modi (PW 9) made an endorsement in terms that ""Smt. Babi w/o of Okha Bharti Age 22 yr. Caste Swami, R/o village Bichhawan is in position to give statement at time of admission"". It is pertinent to note that it has not been clarified by the prosecution as to who had taken Smt. Babi to the hospital and when she was admitted to the hospital. But immediately after the incident on hearing the cry of Smt. Babi, Veerma (PW 2), Vasa (PW 3), Vajaram (PW 4), Bhura (PW 6), Uksingh (PW 8) reached the place of occurrence. As per deposition of Veerma (PW 2) and Vajaram (PW 4) after extinguishing the fire, Smt. Babi was taken in a jeep and admitted to the hospital. It has come on record that in the first instance Smt. Babi was taken to Community Health Centre (CHC), Sanchole and was examined by the Medical Officer, Dr.R.L. Modi (PW 9) and injury report (Ex.P/12) was prepared at 2 P.M. and thus, obviously, Smt. Babi was admitted to CHC, Sanchole on 27.3.92, sometime before 2 P.M. As per the endorsement made on the injury report, after preparation of the injury report, for treatment and management Smt. Babi was referred to Surgeon at higher centre. There is nothing on record as to when Smt. Babi was shifted to District Hospital, Jalore. However, as per the prosecution, the statement of deceased Smt. Babi (Ex.P/7) was recorded by Tehsildar cum-

Executive Magistrate, Sanchore on 27.3.92 at 2.30 P.M.

31. As per deposition of Moola Ram (PW 5), the statement (Ex.P/7) was given by Smt. Babi voluntarily which was recorded under his directions,

which bears his own signature as also the left thumb impression(LTI) of Smt. Babi inasmuch as, her right hand thumb had got burned. In cross

examination, he has stated that in the first instance, he made inquiry from Smt. Babi and thereafter, the statement given by her was recorded under

his directions by Narain Singh, ASI. He further stated that before recording the statement (Ex.P/7) he did not prepare any separate "parcha" that

the statement is being given by her voluntarily, however, he had obtained the certification of doctor separately and the factum of statement being

given by her voluntarily was not mentioned in Ex.P/7. He deposed that at the time of recording the statement, one attendant was sitting nearby who

was not known to him. He did not obtain signature of the doctor on dying declaration (Ex.P/7) as doctor was not present at the relevant time and

he did not consider it appropriate to take compounder and nurse as witness. He further stated that at the time when the statement was recorded,

the medicines were being administered to Smt. Babi through drip. According to him, he did not record the dying declaration in the question answer

form as it is not necessary. He deposed that he had taken the statement (Ex.P/7) on oath but in Ex.P/7, it is not mentioned.

The statement recorded was not sent to the concerned court but the same was sent to the Police Station with the police personnel who came to

inquire about it.

32. It is noticed that requisition (Ex.P/1) and application addressed to the Tehsildar, Sanchore (Ex.P/2) bearing the certification of the doctor as

aforesaid, were not produced by the prosecution alongwith the charge sheet. As a matter of fact, the same were produced by the police during the

trial on 20.7.92, the day on which the statements of the witnesses inter alia Madho Singh (PW 1) were recorded. As noticed above, on the

application (Ex.P/2), the endorsement made by the doctor is to the effect that at the time of admission Smt. Babi was fit to give statement. It is not

disputed that just before recording the statement of Smt. Babi, the certification of doctor regarding she being in position to give a statement was not

obtained. It stands well settled by various decisions of the Supreme Court

noticed hereinabove that merely because certification of the doctor as to fitness of mind of declarant, is not obtained, the dying declaration cannot be held to be not acceptable. But then, the Magistrate recording a dying declaration must satisfy himself that the declarant was in fit state of mind. In the instant case though Moola Ram (PW 5) in his deposition before the court has stated that Smt. Babi at the time of taking statement was conscious but neither the statement (Ex.P/7) reflects that the factum of her being in fitness of mind to give a statement was ascertained by the Executive Magistrate nor in his deposition before the court he has categorically deposed that at the time of recording the statement he had ascertained whether Smt. Babi was mentally capable of giving a statement. Ex.P/7 also does not reflect that any question was put by the Executive Magistrate to elicit answer from the declarant Smt. Babi with a view to know her state of mind. Further, it is pertinent to note that Dr. R.L. Modi (PW 9) has deposed that when the victim was admitted to the Hospital, she was conscious and was in position to give the statement. He further deposed that after primary treatment, she was referred to District Hospital, Jalore. In cross-examination, he categorically deposed that when Smt. Babi was admitted to the Hospital, she was administered injection Analgin, Fortwin & Stamatin as also Pethidine, which causes intoxication for 2-3 hours. However, later on his own improving the statement made as aforesaid, he stated that the injections were given after statement being recorded. But the fact remains that even during the time when the statement was recorded, Smt. Babi was being administered medicine through drip. In this view of the matter, it becomes suspicious as to whether at the time of recording the dying declaration (Ex.P/7), Smt. Babi was in fitness of mind or not.

33. As noticed hereinabove, the statement of Smt. Babi has not been recorded by Moola Ram (PW 5) in question and answer form. It has not been taken down in the words of declarant either. Further, he himself did not record the statement and as deposed by him the statement given was recorded under his dictation by the ASI, Narain Singh. Regarding the attestation of doctor being not obtained on the statement recorded he deposed that no doctor was available in the Hospital, which is also not acceptable inasmuch as the Hospital where Smt.Babi was admitted is a Community Health Centre, number of doctors are posted. It has come on record

that the statement recorded as aforesaid, was not sent by the

Executive Magistrate to the court concerned while keeping a copy thereof with him rather same was handed over to the police personnel present

there, who alleged to have handed over the same to the SHO, Police Station Sanchore.

34. In view of the infirmities noticed as above, we find it difficult to accept the dying declaration (Ex.P./7) as true, voluntary and wholly reliable without corroboration.

35. There is yet another aspect of the matter. As per prosecution, in the first instance hearing the crying of Smt. Babi, Veerma (PW 2), Vasa (PW

3) and Bhura (PW 6) reached the place of occurrence and later Vaja Ram (PW 4) and Uksingh (PW 8) joined them. It is true that all the five

witnesses who reached the place of occurrence immediately after the incident and extinguished the fire, have turned hostile. But then, they have

deposed that on being asked Smt. Babi revealed that she has not been set ablaze by anybody rather she has burned herself. In the considered

opinion of this Court, on the facts and in the circumstances of the case, noticed above, the deposition of the said witnesses as aforesaid also cannot

be ignored altogether.

36. Coming to the recovery of kerosine jerrycan at the instance of accused Okha Bharti, the place from where the jerrycan is alleged to have been

recovered had already been visited by the Investigating Officer and the site inspection was also made prior to recovery. Further, no finger prints on

the jerrycan were obtained and such jerrycans are easily available in the market and thus, the conclusion arrived at by the trial Judge that recovery

of jerrycan in no manner connects the accused with crime also appears to be just and proper.

37. Regarding the charge for the offence under Section 498A IPC, after examining the evidence on record objectively, the learned trial Judge has

arrived at the conclusion that the offence under Section 498A is not found proved against the accused respondents also cannot be said to be

erroneous so as to warrant interference by this Court. Moreover, findings recorded by the trial Judge in this regard is not even questioned by the

learned Public Prosecutor before this Court.

38. In view of the discussion above, the impugned judgment passed by the trial

Judge acquitting the accused Okha Bharti of the charges for offences under Sections 302 & 498A IPC and accused Smt. Dariya of the charges for the offences under Sections 302/114 & 498A IPC does not warrant any interference by this Court.

39. In the result, the appeal fails, it is hereby dismissed.