

concerned, they are in jail, hence, no order is required regarding them.

66. Record of proceedings of the Trial Court along with a copy of this judgment be transmitted to the Trial Court within two weeks.

(2025) 4 ILRA 862
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.04.2025

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE PRAVEEN KUMAR GIRI, J.

Criminal Appeal No. 1226 of 1983

Ashraf		... Appellant
	Versus	
State		...Respondent

Counsel for the Appellants:
 Sri Arvind Kumar Srivastava

Counsel for the Respondent:
 D.G.A.,

(A) Criminal Law - Criminal Appeal - Absconding Accused - Code of Criminal Procedure, 1973 - Section 302 - Appeal can be decided on merits where appellant is absconding and presumed dead, and record is sufficient - If the case is decided on merits in the absence of the Appellant, the higher court can remedy the situation - Accused cannot claim acquittal on the ground of faulty investigation done by the prosecuting agency. (Para - 4,42)

(B) Indian Evidence Act, 1872 - Section 32 - Dying Declaration - Not necessary to be in Q&A form if certified fit by medical officer - Statement must be shown to be voluntary and credible - a truthful and reliable dying declaration may form the sole basis of conviction even though it is not corroborated - Merely because dying declaration was not in question answer

form, the sanctity attached to a dying declaration as it comes from the mouth of a dying person cannot be brushed aside and its reliability cannot be doubted. (Para -35,36,37,43)

Appellant Ashraf and co-accused Santosh Kumar assaulted Nanak Chand - due to prior litigation - victim gave dying declaration naming assailants and died - FIR under S. 307 IPC later altered to S. 302 IPC - eye-witnesses turned hostile - trial court convicted both under Section 302 IPC - Santosh died during appeal - Ashraf absconded since 1990 - appeal heard ex parte with State counsel. (Para - 8,14 to 23)

HELD:- Conviction under Section 302 IPC confirmed on basis of reliable dying declaration and medical/documentary evidence. Hostile witnesses and defective investigation held immaterial. Court permitted to decide appeal on merits in absence of absconding appellant. **(Para - 42,46,47)**

Criminal appeal dismissed. (E-7)

LIST OF CASES CITED: -

1. Surya Baksh Singh Vs St. of U.P., (2014) 14 SCC 222
2. Prem Kumar Gulati Vs St. of Har., (2014) 14 SCC 646
3. Jose s/o Edassery Thomas Vs St. of Kerala, (2013) 14 SCC 172
4. Edakkandi Dineshan alias P. Dineshan Vs St. of Kerala, (2025) 3 SCC 273

(Delivered by Hon'ble Vivek Kumar Birla, J. & Hon'ble Praveen Kumar Giri, J.)

1. List revised. No one is present to press the appeal on behalf of the appellant.

2. Sole appellant, Ashraf, son of Abdul Ghaffar, is being reported to have died as back as in the year 2018 and Amicus Curiae was appointed. After perusal of the entire order-sheet, on 19.3.2025 following order was passed :

"1. List revised.

2. No one is present to press this appeal on behalf of the appellant.

3. After the death of original counsel appearing for the appellant in the year 2014 itself notices were issued to the sole appellant to engage another counsel.

4. As per office report dated 22.05.2024, the sole appellant had shifted to Delhi and has not returned and according to the local residence the appellant (Ashraf) died in Delhi. His report, however, could not be verified. Vide order dated 21.02.2018, Sri Arvind Kumar Srivastava was appointed Amicus Curiae but he is not present.

5. On 24.10.2018, the following order was passed:

"Learned A.G.A. has filed an affidavit of compliance pursuant to the order dated 13.9.2018, the same is taken on record.

The report of the Chief Judicial Magistrate, Budaun dated 11.10.2018 is on record indicating the fact that the appellant's whereabouts could not be known who had left for New Delhi twenty years ago. The enquiry was conducted by recording the statements of the family members of the appellant Ashraf and all have consistently stated about that they cannot say about as to whether he is dead or alive. In this view of the matter we proceed to hear the Amicus Curiae who is representing the appellant Ashraf.

However, at the request of the learned counsel who is appearing in connected Criminal Appeal No. 1238 of 1983 the case is adjourned.

Let the case be listed on 14th November, 2018 for hearing before the appropriate Bench."

6. The above quoted order clearly reflects that the family members are not aware of his whereabouts and they

could not verify as to whether he is dead or alive. The only statement of family members on record is to the effect that the appellant was of criminal nature and had gone to Tis Hazari Court to attend proceedings on 17.09.1990, however, did not return thereafter from the Tis Hazari Court and they have never seen him thereafter. He had also not come to attend the death ceremony of his close relative as well. The informant has also died as per report submitted by Ashok Kumar, Sub Inspector, Police Station Kotwali, District Budaun before the Chief judicial Magistrate, Budaun. It is also on record that Ashraf was facing criminal cases in Delhi as well.

7. On perusal of the report dated 20.02.2024 written by Chief judicial Magistrate to Senior Superintendent of Police reflects that the information regarding sureties was demanded, however, the report is not available on record.

8. Office is directed to send the details of sureties.

9. We have also perused the report dated 29.03.2024. According to which the bail bonds of sureties are not available in the lower court record. The Letter numbers 6499 and 14698A have been sent to Chief Judicial Magistrate, Budaun, to find out the said bail bonds. No further report is on record.

10. Office is directed to send a reminder to the letter number 6499 and 14698 to Chief Judicial Magistrate to trace out the bail bonds and proceed accordingly.

11. List this case on 10.04.2025."

3. Pursuant to the aforesaid order, the office has submitted a report dated 9.4.2025 based on the report of the Chief Judicial Magistrate, Budaun, dated 3.4.2025 according to which, in spite of the best effort, the bail bond could not be traced out.

As such, it is clear that either the accused is absconding or must have died as is being reported since 2015 itself that he had gone to attend court proceeding on 17.9.1990 in Tis Hazari Court, however, thereafter, he was never seen. He was having criminal history and it was reported by his relatives that he had died. By now, the appellant must have aged about 66 to 67 years of age and there was no evidence on record in respect of his death as per the circular issued by this Court.

4. In Surya Baksh Singh vs. State of Uttar Pradesh, (2014) 14 SCC 222, the Hon'ble Apex Court has held that it is always not necessary to adjourn the matter in case both appellants or his counsels/lawyers are absent and the Court can decide the appeal on merits after perusal of the record and the judgement of the trial Court. It has further been observed that if the case is decided on merits in the absence of the appellant, the higher court can remedy the situation. It has also been observed that appointment of Amicus Curiae is also on the discretion of the court. In paragraph 26 of the said judgement, it was held that it is always not essential for the High Court to appoint Amicus Curiae, paragraphs 24 and 26 of the said judgement whereof are quoted as under:

"24. It seems to us that it is necessary for the Appellate Court which is confronted with the absence of the convict as well as his Counsel, to immediately proceed against the persons who stood surety at the time when the convict was granted bail, as this may lead to his discovery and production in Court. If even this exercise fails to locate and bring forth the convict, the Appellate Court is empowered to dismiss the appeal. We fully and respectfully concur with the recent

elucidation of the law, profound yet perspicuous, in K.S. Panduranga v. State of Karnataka, (2013) 3 SCC 721. After a comprehensive analysis of previous decisions our learned Brother had distilled the legal position into six propositions:

"19.1. that the High Court cannot dismiss an appeal for non-prosecution simpliciter without examining the merits;

19.2. that the Court is not bound to adjourn the matter if both the Appellant or his Counsel/lawyer are absent;

19.3. that the court may, as a matter of prudence or indulgence, adjourn the matter but it is not bound to do so;

19.4. that it can dispose of the appeal after perusing the record and judgment of the trial court.

19.5. that if the accused is in jail and cannot, on his own, come to court, it would be advisable to adjourn the case and fix another date to facilitate the appearance of the Appellant-accused if his lawyer is not present, and if the lawyer is absent and the court deems it appropriate to appoint a lawyer at the State expense to assist it, nothing in law would preclude the court from doing so; and

19.6. that if the case is decided on merits in the absence of the Appellant, the higher court can remedy the situation.

25.....

26. Reverting back to the facts of the present case a perusal of the impugned order makes it abundantly evident that the High Court has considered the case in all its complexities. The argument that the High Court was duty-bound to appoint an amicus curiae is not legally sound. Panduranga correctly considers Mohd. Sukur Ali v. State of Assam (1996) 4 SCC 729 as per incuriam, inasmuch as the latter mandates the appointment of an amicus curiae and is thus irreconcilable with Bani Singh vs. State of U.P. (1996) 4 SCC 720.

In the case in hand the High Court has manifestly discussed the evidence that have been led, and finding it of probative value, has come to the conclusion that the conviction is above Appellate reproach correction and interference. In view of the analysis of the law the contention raised before us that it was essential for the High Court to have appointed an amicus curiae is wholly untenable. The High Court has duly undertaken the curial responsibility that fastens upon the Appellate Court, and cannot be faulted on the approach adopted by it. In this respect, we find no error.

(Emphasis supplied)

5. The aforesaid view has been followed by the Hon'ble Full Bench in **Criminal Reference No.1 of 2024, In Re-Procedure To Be Followed In Hearing Of Criminal Appeals vs. State of U.P.**, decided on 22.01.2025, paragraph Nos. 151 and 152 whereof are quoted as under:

“151. The crux of the aforesaid observations of the three celebrated judgments rendered by the Hon'ble Supreme Court in Bani Singh and others Vs. State of U.P. 11, Surya Baksh Singh Vs. State of Uttar Pradesh 12 and K.S. Panduranga Vs. State of Karnataka 13, thus, covers the entire length and breadth of Question No. 5 formulated by the Division Bench at Lucknow for consideration by this Bench and no fresh exercise, in our considered opinion, is required to be undertaken by this Bench, including on one point which has been highlighted by the Division Bench at Lucknow i.e. whether the amicus curiae may be appointed even when the presence of the convict, appellant or accused-respondent may be secured and without his consent.

152. The aforesaid legal precedents would evidently canvass that the emphasis of the Apex Court has been on providing opportunity of being heard to the appellant who is willing to cooperate with the appellate court or his counsel and in this regard a process to cause his presence for the purpose of giving opportunity of being heard is required to be issued to him and when the court is satisfied that such appellant is deliberately avoiding his presence before the court, in such a situation, the court may dispose of the appeal in the manner approved by the Hon'ble Supreme Court in Bani Singh and others Vs. State of U.P. 11, Surya Baksh Singh Vs. State of Uttar Pradesh 12 and K.S. Panduranga Vs. State of Karnataka 13 (i.e. after perusing the record/evidence vis-a-vis judgment of the trial court with the assistance of prosecutor and Amicus, if appointed) and we do not have any reason to deviate from the settled proposition laid down by the Apex Court in the above mentioned cases, moreover, the appointment of amicus is only for the purpose to provide fair trail to the appellant and also for rendering the assistance to the Court.”

6. Under such circumstances, we proceed to consider the present appeal on merits with the help of Sri Anuj Kumar Mishra, learned A.G.A. for the State.

7. The above noted appeal has been filed against the judgment of conviction and order of sentence dated 19.5.1983 passed by IInd Additional Sessions Judge, Budaun, in Sessions Trial No.71 of 1980 (State vs. Santosh Kumar and another) wherein the Trial Court has

convicted the accused-appellant under Section 302 and sentenced him to life imprisonment.

8. **Prosecution story**, in brief, is that prior to the incident, one F.I.R. was lodged by the wife of Chandra Bhan (P.W.1) against the accused-Santosh Kumar and others for assaulting the said lady and a criminal complaint had also been filed against the accused persons, Santosh and others and the case of this criminal complaint was going on in the court of Sri Ram Gopal Vaish, Special Judicial Magistrate, Budaun against Santosh Kumar and others prior to this incident of murder. Prosecution claims that on account of this litigation Santosh Kumar had enmity with Chandrabhan and his son deceased-Nanak Chand, who was also doing pairavi in the said criminal case pending in the court of Special Magistrate. On 16.10.1979 at about 10.00 PM deceased-Nanak Chand alias Sudeshpal was present at the Chha Sarka (6-Road Crossing) in the city of Budaun in the company of Mistri Aftab (PW-2), Rais Mia (PW-3) and Auis (PW-4). Accused Santosh Kumar, Asharaf and two others reached there and took away Nanak Chand towards Prakash Talkies under the pretext that they wanted to have talk with him in seclusion. The said three persons also followed them and when Nanak and the accused persons reached on the road near the Prakash Talkies very close to the shop of Qadir, Santosh Kumar exhorted his companion Asharaf to kill Nanak Chand having stated that he was posing to be a great litigant. The accused Asharaf started giving blows to Nank Chand with his knife, and Santosh Kumar and his two other companions were still standing there surrounding the deceased-Nanak Chand. The said three persons Aftab, Rais Mia and Anis also saw the occurrence. The accused

persons having stabbed fatally the deceased Nanak Chand, ran away. This incident was also seen by Smt. Ram Shree lying on a cot in her house in the vicinity.

9. Two persons, Indal (PW-6) and Bhupal, took the injured-Nanak Chand in a rickshaw to the District Hospital, Budaun where he was medically examined by Dr. K. R. Khan (PW-5) on 16.10.1979 at 10.30 PM and he found following injuries on person of Nanak Chand :

“(1) Stab wound 2 Cm. X 1.5 Cm., 10 Cm. above left out supper iliac spine (depth not noted).

(2) Incised wound 2 Cm. X .75 Cm, 5 Cm. above injury no. 1.

(3) Incised wound 2 Cm. X. 1 Cm. over left iliac crest, 9 Cm from middle off back (depth not noted).

(4) Incised wound 2 Cm. X 6 Cm., 11 Cm. from left out supper iliac spine at 4 0' Clok position (depth not noted). Directed down wards.

(5) Incised wound 1.5 Cm X .5 Cm on outer side of left thigh, 11 Cm., below out supper iliac spine, depth 4 Cm. directed down and forward.”

10. Dr. K.R. Khan (PW-5) has also recorded the **dying declaration of Nanank Chand at 12.50 AM**, in the night of 16/17.10.1979. The Dying Declaration was written by him in his own handwriting and he had also given a certificate to the effect that the deceased was in a fit condition to make statement and he had replied to his questions. The Dying Declaration of Nanak Chand read as under :

“डी०डी० आफ नानक चन्द

मेरा नाम नानक चन्द उर्फ सुदेश पाल पुत्र चन्द्रभान निवासी मु० पनवाडी बदायूँ का रहने वाला हूँ। मुझे अशरफ और उसके साथी संतोष तथा दो और आदमी जिनके मैं नाम नहीं जानता

हूँ अशरफ जोगीपुरा वाले ने जो हाजी सखावत के मकान के पीछे सरदार मठरी वाले के बराबर गली में रहता है इसने चाकू मारा था और संतोष कायस्थ पुत्र रामचन्द्र मु० पनवाडी वाले ने मुझे पकड़ा और कहा कि इसे जाने से मार दो मुझे करीब 10 बजे रात्रि को कदीर अन्नन वाले मिस्त्री की दुकान के सामने मारा गया मुझे छः सड़क से बात करने के लिये बुलाकर ले गये थे। संतोष से मारपीट की मुकदमें बाजी चल रही है। यह घटना शान्ती जो भगत के होटल पर रहता है की माँ ने और कदीर की दुकान के बाहर चारपाई पर कई आदमी बैठे थे तथा और आने जाने वाले लोगों ने यह घटना देखी।

16.10.79

ह० नानक उर्फ सुदेश पाल

17.10.79

Certified that the above statement was written by me as told by the injured in reply to my question.

It is also certified that Sri Nanak Chand was in sound state of mind and fully conscious at the time of above declaration.

Sd. illegible

Sd. illegible

(Dr.

K.R.Khan)

17/10/79

17.10.79

12.50 A.M.”

11. It is not in dispute that this statement was recorded at 12.50 AM in the night of 16/17.10.1979. Looking to the serious condition, Nanak Chand was sent to District Hospital, Bareilly where he succumbed to the injuries on 19.10.1979 at about 11.00 AM.

12. An information was sent to the Police Station -Kotwali on the same day i.e. 19.10.1979 which was entered in the G.D and S.I. Hari Shanker prepared the **Inquest Report/Panchayatnama** of the dead body in presence of witnesses. He also prepared the naksha nazri (Ex.Ka. 16) and sealed the dead body in a piece of cloth and the same was sent for post-mortem.

13. Dr. Mahesh Chandra Sharma (PW-10) conducted the postmortem of the dead body at 11.15 AM on the same day and reported following ante mortem injuries :

(1) *Incised left paramedian wound (stitched operated) - 21 Cm long with stitches well in position.*

(2) *Stitched wound 2½ Cm. long with two stitches on left side of chest, 5 Cm. below injury no.2.*

(3) *Stitched wound 2 Cm. long with two stitches on left side of chest 10 Cm. below left nipple at 5 O'clock position.*

(4) *Stitched wound 2 Cm. long with corrugated drain 5 Cm. below injury no.3 on left side of abdomen.*

(5) *Stitched wound 2 Cm. on outer side of upper of left thigh.*

(6) *Stitched wound 2 Cm. on upper part of left buttock.*

(7) *Incised wound 2 Cm. X ½ Cm. on back of left side, 2 Cm. about iliac crest X muscle deep.*

(8) *Incised wound ½ Cm. X ½ Cm. skin deep, 7 Cm. below injury no 2.*

(9) *Stitched wound on inner side of right leg 1 Cm. X ¼ Cm.*

14. The incident took place on 16.10.1979 at about 10.00 PM. Initially, the First Information Report was registered under Section 307 of IPC on the basis of the complaint made by the father of the deceased (PW-1). Thereafter, when the deceased succumbed to the injuries, the Hospital authority sent information to the police, the offence was converted into Section 302 of IPC.

15. The Investigating Officer after investigation submitted separate **charge-**

sheets against accused, Santosh Kumar and Asharaf under Section 302 of IPC on 5.11.1979 and 8.1.1980 respectively.

16. Thereafter, the learned Judicial Magistrate **took cognizance** on the charge-sheets and **committed** the case to the Court of Sessions after compliance of Section 207 Cr.P.C. and the case was numbered as **S.T. No. 71 of 1980** (State vs. Santosh Kumar and another) under Sections 302 read with 34 of IPC.

17. Learned Sessions Judge **framed charges** against the accused persons and the same were read over to them.

18. The accused persons had not pleaded guilty and claimed trial.

19. The prosecution, in order to prove its case, had examined as many as 10 witnesses namely, Chandra Bhan (PW-1/Complainant), Aftab (PW-2), Rais Mian (PW-3), Anis (PW-4), Dr. K.R. Khan (PW-5), Indal (PW-6), Ram Shri (PW-7), Vishwanath (PW-8), M.P. Bhatnagar (PW-9) & Dr. Mahesh Chandra Sharma (PW-10).

20. In addition to the aforesaid, the prosecution had produced certain documents, namely, (i) First Information Report as Ext. Ka.5 (ii) Recovery memo of blood stained 'Parchajat as Ext. Ka.12 (iii) Injury Report of Nanak Chand as Ext. Ka.1 (iv) Postmortem Report as Ext. Ka.13 (v) Charge-sheet as Ext. Ka.7 & 8 and (vi) Site Plan with Index as Ext. Ka.6 and the Dying Declaration of the deceased.

21. Thereafter, the statements of the accused under Section 313 Cr.P.C. were recorded, in which all the incriminating evidence was put to them. They denied all

the allegations and stated that they were falsely implicated in the present case.

22. The Trial Court vide impugned judgement convicted the accused and sentenced them to life imprisonment as mentioned above. Accused-appellant, Santosh, has died and his appeal has already stood abated. The present appeal has been filed on behalf of accused-appellant, Ashraf.

23. On perusal of the record, we find that PW-1, father of the deceased and informant, admittedly is not an eye-witness. PW-2, PW-3, PW-4 and PW-8 who were stated to be the eye-witness, turned hostile and denied that they have seen the incident.

24. The question of proving the guilt of the accused-appellant, lies on the prosecution to prove the Dying Declaration made before Dr. K.R. Khan (PW-5). The Dying Declaration of Nanak Chand was assailed on the ground that the same was not in the form of question and answer and was given to the doctor and, therefore, no reliance could have been placed thereon.

25. It was further pleaded that the father of the deceased, Chandra Bhan (PW-1), reached the hospital when deceased-Nanak Chand was being medically examined by Dr. K.R. Khan (PW-5) and also had some talk with his son, Nanak Chand, who subsequently died and, therefore, there was every possibility that the words were put in the mouth of the deceased to level allegation against the accused-appellant.

26. It was also pleaded that PW-5, the Doctor, himself had stated that pethidine injection was given to the deceased and the plea taken was that under such

circumstances, the injured must have fallen asleep and was not in a position to make statement and no reliance can be placed on the Dying Declaration.

27. In respect of source of light, it was also pleaded that no source of light on the spot was disclosed whereas the incident had taken place in the night. This was also one of the ground of defence that no blood was shown to have been found on the place of occurrence by the Investigating Officer.

28. On these grounds, the defence has taken a plea that the appellant could not have been convicted and on the same ground as apart from the grounds as taken in the appeal that the conviction of the appellant is against the weight and evidence on record and is against the law and that the sentence is too severe which may be taken into consideration by this Court.

29. Learned A.G.A., by drawing attention to various statements of the witnesses, submits that merely because the eye-witnesses have turned hostile subsequently, it cannot be said that this by itself is sufficient to reverse the judgement of conviction. Attention was also drawn to the statements of Dr. K.R. Khan (PW-5) who had recorded the statement of Nanak Chand (deceased) and the nature of injury as well as it was also submitted that the site plan indicates the source of light and merely because the blood was not found by itself is not sufficient to dislodge the conviction of the appellant as the incident had taken place on a busy road and even if there was a defective investigation that no serious effort was made to collect the blood from the place of incident, this by itself would not affect the judgment of conviction.

30. We have considered the averment on record. On perusal of the record, we find that the first informant (PW-1) who is the father of the deceased had fairly stated that he had not seen the incident and he was informed by Aftab (PW-2) who had accompanied him to the hospital as well. His son was taken to the hospital in a rickshaw and considering the seriousness of his injuries, deceased-Nanak Chand was referred to Bareilly Hospital in the same night where he died on the third day. PW-1 had verified the signatures of his son on his Dying Declaration.

31. We find that he had made statement in most natural way and had fairly admitted that when he reached the hospital with Aftab (PW-2), the Doctor, PW-5, was inspecting his son and, after asking him, he was writing down something. He also stated that though he reached there yet he was asked to go out. He made categorical statement that the injured was taken to the hospital in a rickshaw. We find that the rickshaw puller, Indal, was also produced as PW-6 in the present case and he had categorically stated that he had taken the injured to the hospital and a little blood came out which he wiped off subsequently.

32. In so far as the grounds that are taken in the appeal are concerned, it is very relevant to look into the Dying Declaration. It is not in dispute that the incident had taken place at about 10.00 PM on 16.10.1979 and immediately about 1 hour and 20 minutes, the incident was reported and the distance of police station is four furlong. The First Information Report was registered under Section 307 of IPC. **Thus, a prompt F.I.R. was registered.**

33. PW-1 had clearly stated that he was informed about the incident by Aftab (PW-2) and after taking his injured son to the Hospital, he had come to report the incident. We find that in the Dying Declaration, two dates have been written, one is 16.10.1979 just above the signature of the injured, Nanak Chand, who subsequently died and just below his signature the second date i.e. 17.10.1979 is given. Dr. K. R. Khan (PW-5) has given certificate to the effect that the statement was written by him as told by injured-Nanak Chand in reply to his questions and has also certified that injured-Nanak Chand was in sound state of mind and was fully conscious at the time of making of the above declaration.

34. After signatures, the date 17.10.1979 and time 12.50 AM were given. This timing and difference in dates have been clearly explained by Dr. K.R. Khan (PW-5) in his statement that as he has started writing the statement in the night of 16.10.1979, therefore, both the dates were written and while certifying the Dying Declaration he had put the date and time as after twenty four hours the date had changed.

35. He also stated that he had made endorsement in the bedhead ticket that the police be informed. In so far as the grounds for challenging the correctness of the Dying Declaration that the same was not written in the form of question and answer is concerned, the law is clear that there is no specific proforma for recording such statement in a particular manner or form. Although, in case, it is in the question and answer form, weightage is given to the same. However, the Doctor in the present case, PW-5, has certificated that he had asked questions to the deceased and his

answers were recorded in the form of his statement and, as per law, it cannot be said that Dying Declaration is not worth believing.

36. So far as the proforma of recording the dying declaration and its reliability when it is made to a doctor is concerned, we are supported in our view by the following decisions.

37. In **Prem Kumar Gulati vs. State of Haryana, (2014) 14 SCC 646**, the Apex Court has held as under :

“13. It is well settled that a truthful and reliable dying declaration may form the sole basis of conviction even though it is not corroborated. However, the reliability of declaration should be subjected to close scrutiny and the courts must be satisfied that the declaration is truthful.

16. The submission of Ms. Meenakshi Arora, learned senior counsel appearing for the appellant that the dying declaration is untenable being without mentioning the time when the statement was recorded as also not in the question answer form, cannot be sustained. **Merely because dying declaration was not in question answer form, the sanctity attached to a dying declaration as it comes from the mouth of a dying person cannot be brushed aside and its reliability cannot be doubted.”**

emphasis supplied

38. In **Jose s/o Edassery Thomas Vs. State of Kerala, (2013) 14 SCC 172**, the Apex Court has observed as under :

12. First, we shall consider whether the dying declaration recorded by the doctor should be accepted or is it so

improbable that it deserves to be thrown overboard. The dying declaration was recorded by PW 1 at 8.15 a.m. on 23-12-2012 when the deceased was in ICU in the Burns Ward. The doctor, a plastic surgeon, has signed the dying declaration, Ext. P-3. In the dying declaration, the deceased had stated that on the date of the incident, there was a quarrel between her and her husband alleging that the deceased was having illicit relationship with her son-in-law and he had threatened to kill her. She had clearly stated that her husband was running away and it is he who might have set fire on her. The doctor concerned, in his cross-examination, has stood embedded in his stand that the state of mind of the injured was absolutely clear and she was speaking fluently. He had denied the suggestion of the defence that because of the 92% of the burn injuries, the patient may not be conscious. It is not disputed that the doctor had not endorsed about the condition of the declarant of the dying declaration.

13. In this context, we may refer with profit to the decision in **Laxman v. State of Maharashtra [(2002) 6 SCC 710 : 2002 SCC (Cri) 1491]** wherein the Constitution Bench, while dealing with the concept of dying declaration, the fitness of mind and the necessity of endorsement by doctor, has stated thus : (SCC p. 713, para 3)

“3. ... The situation in which a man is on the deathbed 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 courts 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 always to be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting 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 looks up to the medical opinion. But where the eyewitnesses state that the 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.”

14. In *Babulal v. State of M.P.* [(2003) 12 SCC 490 : 2005 SCC (Cri) 620 : AIR 2004 SC 846] while dealing with the value of dying declaration in evidence, this Court has observed thus : (SCC p. 494, para 7)

“7. ... A person who is facing imminent death, with even a shadow of continuing in this world practically non-existent, every motive of falsehood is obliterated. The mind gets altered by most powerful ethical reasons to speak only the truth. Great solemnity and sanctity is attached to the words of a dying person 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. The maxim is ‘a man will not meet his maker with a lie in his mouth’ (nemo moriturus praesumitur mentiri). Mathew Arnold said, ‘truth sits on the lips of a dying man’. The general principle on which the species of evidence is admitted is that they are declarations 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 mind induced by the most powerful consideration to speak the truth; situation so solemn that law considers the same as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice.”

17. The ample of evidence on record indicates that the deceased was conscious and hence, we are inclined to accept the dying declaration which would reveal the cruel treatment meted out by the husband to the wife, the suspicion harboured by him and the threats given. True it is, she had stated that she had suspected that her husband might have set her ablaze but to prove the said aspect, there are numerous circumstances which the trial Judge as well as the High Court has taken into consideration. The circumstances which lead singularly to the guilt of the accused are that the accused was sleeping in the bedroom on the eastern side of the room where she was sleeping and it was a small house; that the bedroom was not having any shutters; that PW 3 woke up on hearing the cries of the deceased; that the accused had purchased petrol from the petrol pump belonging to PW 5 in a bottle; that Ext. P-15, chemical analysis report, has clearly mentioned that kerosene was not detected in any of the material objects sent for chemical analysis; that the accused was seen running away from the house by PW 3 and PW 7; that it has been clearly deposed by PW 3, the daughter; that the father used to demand that mother should sleep with him, but she could not oblige him; and that he had threatened to kill her. The elder daughter has deposed that the father was doubting the husband of PW 3 of having an illicit relationship with the mother. She had also deposed that the mother was 52 years of age and was infirm and not in a position to

cater to the desire of her husband. All these circumstances appreciated in the context of the dying declaration clearly establish the involvement of the accused in causing burn injuries on the deceased.

39. In so far as the presence of father of deceased (PW-1) is concerned, it is not in dispute that the father was present in the hospital and had seen Dr. K.R. Khan attending his son, however, he had categorically stated that he was sent outside when the statement was being recorded. To the same effect, the Dr. K.R. Khan stated in categorical terms and nothing came out in his cross examination against the same.

40. It is also not in dispute that the settled law is that it is not necessary that the Dying Declaration must be recorded by the Magistrate only. In some of the cases when the injured/attending person is expecting immediate death of the injured, the statement can be recorded and even statement under Section 161 Cr.P.C. are may be at times treated as a Dying Declaration although its trustworthiness has to be seen on their own facts.

41. It is also not in dispute that the statement of injured was recorded on the same night after about two hours of the incident and was prompt in nature whereas he died after three days. It is not a case where the statement was subsequently recorded which could have been an after thought.

42. In so far as the argument that the blood was not found at the place of occurrence, it has come on record that it was a busy road in the heart of the city and the incident had taken place at about 10.00 PM and the Investigating Officer visited the place of occurrence in the morning and did

not find any blood there. As the blood was not shown in the site plan, therefore, this could have been a reason for the Investigating Officer to make statement that he did not find the blood on the spot just to save himself from the allegation of conducting a defective investigation and statement of the IO to that effect does not go to the root of the case to demolish the conviction of the appellant herein. We are supported in our view by the decision in **Edakkandi Dineshan alias P. Dineshan vs. State of Kerala, (2025) 3 SCC 273** wherein the Apex Court has held as under :

“26. A cumulative reading of the entire evidence on record suggests that the investigation has not taken place in a proper and disciplined manner. There are various areas where a properly investigation could have strengthened its case. In the case of Paras Yadav & ors. vs. State of Bihar, the Apex Court observed as under:(SCC P.130, Para 8)

“Para 8 - ..the lapse on the part of the Investigating Officer should not be taken in favour of the accused, may be that such lapse is committed designedly or because of negligence. Hence, the prosecution evidence is required to be examined dehors such omissions to find out whether the said evidence is reliable or not. For this purpose, it would be worthwhile to quote the following observations of this Court from the case of Ram Bihari Yadav v. State of Bihar and others: (SCC pp. 523-24, para 13).

“In such cases, the story of the prosecution will have to be examined dehors such omissions and contaminated conduct of the officials otherwise the mischief which was deliberately done would be perpetuated and justice would be denied to the complainant party and this would obviously shake the confidence of

the people not merely in the law enforcing agency but also in the administration of justice.”

27. Hence, the principle of law is crystal clear that on the account of defective investigation the benefit will not inure to the accused persons on that ground alone. *It is well within the domain of the courts to consider the rest of the evidence which the prosecution has gathered such as statement of the eyewitnesses, medical report etc. **It has been a consistent stand of this court that the accused cannot claim acquittal on the ground of faulty investigation done by the prosecuting agency.***

(emphasis supplied)

43. One of the grounds taken is that the doctor had administered pethidine injection to the injured, therefore, he was not in a state of making any statement and, hence, the Dying Declaration is not worth believing, is concerned, suffice to note that no question was put to the doctor that at what stage pethidine injection was given and, therefore, it cannot be said that pethidine injection was given before he had made the statement.

44. Even otherwise, in ordinary circumstances, when the statement is recorded, no prudent doctor would administer sedative injection to the injured before recording the statement.

45. In so far as the identity of Ashraf that his father's name was not given is concerned, no such effort was made to dislodge the identity of accused-Ashraf as no other person proved to have been living in the locality and in case if there was any such other person, no one was produced to contradict the stand taken by the prosecution and on these footings, we do

not find any legal infirmity in the appreciation of the evidence by the learned Sessions Judge which we have independently reconsidered and re-appreciated.

46. After perusal of the entire evidence, it is found that a prompt F.I.R. was registered under Section 307 of IPC, injury report was prepared, the doctor recorded the dying declaration by giving certificate that the deceased was in a fit state of mind. The injured died, therefore, the F.I.R. was converted into Section 302 of IPC. The prosecution proved the F.I.R., dying declaration, injury report, postmortem report by ocular and documentary evidence.

47. We, therefore, are of the opinion that the present appeal lacks merit and is, accordingly, **dismissed**. The conviction of surviving appellant- Ashraf is confirmed.

48. Since, the accused-appellant is absconding, his bail bonds are cancelled and the sureties are discharged. He shall be taken into custody forthwith to serve the sentence. The Chief Judicial Magistrate and Senior Superintendent of Police/Superintendent of Police concerned shall ensure the arrest of the accused-appellant, Ashraf.

49. Trial court record be sent to the concerned Court forthwith.

50. Let a copy of this order be communicated by the Registrar (Compliance) to the Court concerned for compliance.

51. The Chief Judicial Magistrate shall submit a compliance report after two

months to be placed before the appropriate Court.

(2025) 4 ILRA 874

APPELLATE JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 11.04.2025

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE ANISH KUMAR GUPTA, J.

Criminal Appeal No. 4854 of 2016
Connected with
Crl. Appeal Nos. 4607 of 2016, 5209 of 2016 &
5734 of 2016

Rakesh Singh & Anr. ... Appellants

Versus

State of U.P. ...Respondent

Counsel for the Appellants:

Ashok Kumar Tripathi, Govind Saran Hajela,
Radhey Shyam Shukla, Rajesh Kumar

Counsel for the Respondent:

Arvind Agrawal, G.A.

(A) Criminal Law - Unlawful Assembly - Common Object - Indiscriminate firing by armed accused causing death and injuries - Indian Penal Code, 1860 - Sections 147, 148, 149, 302 & 307 - Arms Act, 1959 - Section 27 - Any lawful assembly may become unlawful at any point of time - Common object may be formed at any stage and liability arises even without overt act if member shares object - Moment indiscriminate firing began in response to objection, assembly became unlawful and common object was formed.(Para -29 to 33,36)

Accused persons consuming liquor and abusing each other were objected to by the informant - Accused retaliated with firearms causing death of two and injuries to five including informant - FIR lodged after delay of six and a half hours due to urgent medical needs - Prosecution justified delay based on circumstances - Trial