out and the finding and punishment is contrary.

32. In view of the decision in ***Patan Jamal Vali (supra)***, the sine qua non is that the victim should be a person, who belongs to scheduled caste or scheduled tribe and that the offence under the Indian Penal Code is committed against such person on the basis that such person belongs to the same caste and the offender does not belong to the same caste. If this is proved, then only conviction under Section 3(2)(V) of the Act, 1989 can be invoked.

33. The evidence goes to show that there was no utterance by accused, which would prove that the ingredients of Section 3(2)(V) of the SC/ST Act are fulfilled. The judgment in ***Patan Jamal Vali (supra)*** applies to facts in this case, and therefore, when the prosecutrix and her witnesses are silent on the factum of the incident occurring due to she being of caste, which falls within the purview of SC/ST Act, the conviction cannot be sustained.

34. We pass the following orders:-

(I) The sentence awarded to the appellant by the learned trial-court for the commission of offence under Section 376 read with Section 506 of IPC is reduced to a period of 8 years with fine of Rs.5,000/- and the default sentence is maintained looking to the poverty of the appellant.

(ii) As far as Section 3(2)(V) read with Section 3(1)XII) of the SC/ST Act is concerned, this Court upturns the sentence both of incarceration and fine and the same is quashed if the fine is deposited, which is a fine under Section 325 IPC, same shall be refunded. The accused is acquitted of the said charges.

(iii) As far as Section 326 IPC is concerned, we lessen the fine to Rs.2000/-, which should be paid to the father of the prosecutrix.

35. The appeal is **partly allowed**. The records be sent back to the court below.

(2022)01ILR A484
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.11.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE VIKAS BUDHWAR, J.

Criminal Appeal No. 2137 of 2015

Smt. Sudha & Anr. ...Appellants
Versus
State Of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Nipun Singh, Sri Manoj Vashisth, Sri Santosh Kumar Tiwari, Sri Santosh Tripathi

Counsel for the Opposite Party:
A.G.A.

Criminal Law – Indian Penal Code, 1860 – Section 304(1) - Allegation-dowry death-burn injuries-husband admitted in the hospital-dying declaration-cause of death-septicimia-accused had no intention to cause death-injuries though sufficient to cause death-hence incident fall under Ex.1 and 4 to section 300 IPC-offence will fall under section 304 (1) IPC-conviction u/s 302 IPC converted into under section 304 (1) IPC.

Appeal partly allowed. (E-9)

List of Cases cited:

1. St. of U.P. Vs Ramesh Prasad Misra & anr. 1996 AIR (Supreme Court) 2766

2. Koli Lakhmanbhai Chanabhai Vs St. of Guj., reported in (1999) 8SCC 624

3. Ramesh Harijan Vs St. ofU.P. 2012(5) SCC 777

4. Prakash & anr. Vs St. of M.P. (1992) 4 SCC 225

5. Laxman Vs St. of Mah. (2002) 4 SCC 710

6. Babulal & ors. Vs St. of M.P. (2003) 12 SCC 490

7. Lakhan Vs St. of M.P. (2010) 8 SCC 514

8. Vijay Pal Vs St. (Government of NCT of Delhi) (2015) 4 SCC 749

9. Mafabhai Nagarbhai Raval Vs St. of Guj. (1992) 4 SCC 69

10. St. of M.P. Vs Dal Singh & ors. (2013) 14 SCC 159

11. Ganga Dass Alias Godha Vs St. of Haryana1994 Supp(1) SCC 534

12. B.N. Kavatakar & anr. Vs St. of Karnataka 1994 Supp(1) SCC 304

13. Jagtar Singh & anr. Vs St. of Punj. (1999) 2 SCC 174

14. Maniben Vs St. of Guj. (2009) 8 SCC 796

15. Bengai Mandal @ Begai Mandal Vs St. of Bihar [(2010) 2 SCC 91

16. Chirra Shivraj Vs St. of Andhra Pradesh (2010) 14 SCC 444

17. Sanjay Vs St. of U.P. (2016) 3 SCC 62

18. Khokan Alias Khokhan Vishwas Vs St. of Chhattisgarh (2021) 3 SCC 337

19. Gujarat High court in Criminal Appeal No.83 of 2008 (Gautam Manubhai Makwana Vs St. of Gujarat) decided on 11.9.2013

20. Criminal Appeal No.1944 of 2014, Ram Prakash Alias Pappu Yadav Vs St. of U.P.

(Delivered by Hon'ble Vikas Budhwar, J.)

1. This appeal has been preferred against the judgment and order dated 8.5.2015 passed by learned Sessions Judge, Meerut in Special Trial No.519 of 2011 (State Vs. Smt. Sudha and another) arising out of Case Crime No.190 of 2000, under Sections 498A, 304B in alternate Section 302 IPC and Section 3/4 the Dowry Prohibition Act, P.S. Partapur, Meerut whereby the appellants have been convicted under Section 302 of the IPC for life imprisonment along with find of Rs.20,000/- each and in default of the payment of fine an additional imprisonment of one year.

2. The brief facts of the case are that a first information report was registered on 19.5.2000 at 15.30 p.m. on the basis of an application moved by the complainant, father of the deceased being Smt. Jaya in police station Partapur, District Meerut alleging that the daughter of the complainant being Smt. Jaya aged about 23 years solemnized marriage with one Sri Raghuvir s/o Dev Dutt Swarnkar r/o Acchrauden, P.S. Partapur, District Meerut on 15.2.1999 after offering expensive gifts such as Shelf, T.V., Cooler, Double Bed, Sofa, Sewing Machine, Cooking ware, Wall Clock, Gas Cylinder, Clothes and Jewellery but neither the accused nor the family members were happy with gifts so offerred to them, whenever Smt. Jaya (Deceased) used to visit her parental house, then she used to make complaint of the appellants being sister-in-laws and Sri Raghuvir s/o Dev Dutt Swarnkar the

husband, that dowry was being demanded them and they used to administer beating.

3. In the FIR, it was further alleged by the complainant that on 5.5.2000, he received information that his daughter being the deceased/victim had sustained burn injuries. Accordingly, he along with his wife rushed to the matrimonial house of his daughter on 6.5.2000 and thereafter, the complainant was apprised that Smt. Jaya, being the daughter of the complainant, has been admitted by her husband namely Sri Raghuvir s/o Dev Dutt Swarnkar and mother-in-law in Jeevan hospital at Modi Nagar, Meerut.

4. Accordingly, the complainant visited the hospital and the daughter of the complainant, however, did not disclose any facts to either the complainant or his wife. Subsequently, the daughter of the complainant being Smt. Jaya wife of Sri Raghuvir s/o Dev Dutt Swarnkar was referred to Safdarjung Hospital Delhi for treatment. The statement of Smt. Jaya being the daughter of the complainant was recorded by the Magistrate on 7.5.2000 in the presence of the complainant, in which, the daughter of the complainant narrated the facts that on 30.4.2000, the appellants, who happened to be her sister-in-laws, used to often quarrel and administer beating upon her and on 30.4.2000, the appellants poured kerosene oil over her and thereafter the appellant no.1 ignited the same. At the relevant point of time, Sri Raghuvir, who happened to be the husband of the deceased/ Smt. Jaya was present, but he allowed her sisters, being the appellant, to push away from the spot, he poured water over the deceased and when request was being made by the deceased for taking her for proper treatment, the husband of the deceased took the deceased to a medical practitioner in village Saidpur, bandage was wrapped over her. In her statement, the deceased also stated that she was not taken anywhere with a view that she may not write a letter to anyone narrating the said incident and she was locked in the room. It was further alleged in the first information report that during the course of the treatment, the complainant's daughter being Smt. Jaya succumbed to burn injuries on 12.5.2000 in Safdarjung Hospital. On the basis of the complaint dated 19.5.2000, the FIR was registered.

5. Consequent to the lodging of the complaint, as noted above, a first information report was lodged under Section 304B IPC, 1860 on 18.5.2000 against the appellants being Case Crime No.190 of 2000 before the police station Partapur, Meerut. S.I. Om Prakash took up the investigation. During the course of the investigation, he recorded the statement of the witnesses, prepared site plan, victim's dying declaration was also recorded by S.D.M. Najafgarh. After the death of the victim, inquest report was prepared and the dead-body was sent for postmortem.

6. After completing the investigation, the Investigation Officer submitted the charge sheet against the accused Raghuvir s/o Dev Dutt Swarnkar (husband) and against the appellants, who were absconding. Hence the investigation was kept pending against them.

7. The file of Sri Raghuvir s/o Dev Dutt Swarnkar being the husband of the victim was committed to the Court of Sessions by the Magistrate concerned and the Sessions Trial No.1095 of 2000 was proceeded with, which culminated into an order passed by the Court of Fast Track/Additional District and Sessions

Judge, Meerut on 14.3.2003. However, the investigation which was pending against the appellants was concluded and given to its logical end while filing of the charge sheet against the appellants for the offences punishable under Sections 498A, 304B of the IPC, 1860 read with Section 3/4 Dowry Prohibition Act. The case being triable by the Court of Sessions was committed by the competent Magistrate to the Court of Sessions.

8. Learned Trial Court framed charges against the appellants under Sections 498A, 304 IPC read with Section 3/4 D.P. Act. Accused denied the charges and claimed to be tried.

9. To bring home the charges, the prosecution produced following witnesses, namely:

1.	Dharmvir Singh	PW1
2.	Prem Narayan	PW2
3.	Arun Kumar	PW3
4.	Dr. Arvind	PW4
5.	Omprakash	PW5
6.	Navneet Singh Sikeria	PW6
7.	Roshan Lal Sharma	PW7

Apart from the aforesaid witnesses the prosecution submitted following documents which were proved by alleging the evidence.

1.	**First Information Report**	Ex.ka1
2.	**Dying Declaration**	Ex.ka2
3.	**Application for postmortem**	Ex.ka3
4.	**Brief facts**	Ex.ka4
5.	**Death report**	Ex.ka5
6.	**Postmortem report**	Ex.ka6
7.	**Medico legal report**	Ex.ka7
8.	**Death summary**	Ex.ka8
9.	**Death report**	Ex.ka9
10.	**Charge-sheet**	Ex.ka10
11.	**Charge-sheet**	Ex.ka11
12.	**Site-plan**	Ex.ka13

10. Heard Sri Santosh Kumar Tiwari learned counsel for the appellants, learned AGA for the State and perused the record.

Learned counsel for the appellants had made manifolds submissions namely:

(a) As the star witness being PW2 and also PW1 have not supported the prosecution case and they have turned hostile so conviction of appellants is not legally justified.

(b) Though dying declaration was recorded when the victim was surviving, but the dying declaration has no corroboration with any prosecution evidence. Therefore, the trial court has committed grave error by convicting the accused on the basis of dying declaration.

(c) Once the accused were acquitted under the offences punishable under Section 3/4 of the Dowry Prohibition Act read with Sections 498A and 304 IPC then there was no occasion to convict the appellants under Section 302 of the IPC particularly when there was a doubt as to whether the deceased succumbed on account an act of suicide or by virtue of the burns sustained while pouring of kerosene by the appellants.

(d) The appellants could not have been convicted under Section 302 of the IPC particularly when the death was on account of septicemia and at maximum the case could have travelled up to the limits of offences under Section 304 IPC.

11. Learned AGA, per contra, vehemently opposed the arguments placed by counsel for the appellant and submitted that conviction of accused can be based only on the basis of dying declaration, if it is wholly reliable. It requires no corroboration. Moreover, testimony of hostile witnesses can also be relied on to the extent it supports the prosecution case. Learned trial court has rightly convicted the appellant under Section 302 IPC and sentenced accordingly. There is no force in this appeal and the same may be dismissed.

12. Learned counsel for the appellants while elaborating his first submission had sought to argue that main prosecution witness has not supported the prosecution case and the witnesses had turned hostile as so far as the PW-1 Sri Dharmvir Singh is concerned, he turned hostile to the prosecution as in his examination-in-chief, he has only stated that he is well-versed with Sri Raghuvir, Sudha and Madubal @ Anuradha accused (appellants) as they were the resident of his village and he is not aware that Raghuvir married to whom. Even in fact in the cross-examination of PW1 Dharmvir has also denied his statement alleged to be recorded under Section 161 Cr.P.C., meaning thereby he did not support the prosecution version.

13. According to the learned counsel for the appellants, the most crucial witness was the complainant, who happens to be the father of the deceased/victim (PW-2), though in his examination-in-chief had admitted lodging of the above noted FIR and the same has also been proved but the PW2 in his statement had come up with the case that the deceased daughter was never harassed for demand of dowry and she never complained about the same. It was further deposed by the PW2 that his deceased daughter denied that the appellants had ever beaten or quarrelled with her or committed the occurrence which culminated into the conviction of the appellants. It has further been argued by the learned counsel for the appellants that once the PW2 has resiled from his statement recorded under Section 161 of the Cr.P.C. while alleging that FIR was prepared under the dictation of some police personnel and was not signed by him then in these circumstances there remained no witness so as to suggest the story so propounded by the prosecution was true and reliable.

14. In nutshell, the submission of learned counsel for the appellants is to the extent that once the prosecution witnesses do not support the prosecution version and they have also been declared hostile then the entire case of the prosecution has no legs to stand and thus the conviction of the appellants is unsustainable in the eyes of law.

15. The argument so raised by the learned counsel for the appellants with

respect to the PW-1 Sri Dharmvir Singh and PW-2 Sri Prem Narayan being declared to be hostile and thus the entire prosecution case has no legs to stand though appears to be attractive but is not liable to be accepted particularly in view of the fact that here in the present case, there is a distinguishable feature that admittedly a first information report was lodged on 19.5.2000 at 15.30 p.m. on an application moved by the complainant Sri Prem Narayan PW2, who happens to be the father of the deceased/victim. PW5 S.I. Sri Om Prakash in his testimony had deposed that while he was posted as head Munshi at Police Station Partarpur District Meerut on 9.5.2000, he lodged Chik No.109 of Case Crime No.190 of 2000, under Section 304B of the IPC upon written report of the complainant. The registration of the case crime number was entered in General Diary No.26 at 15.30 p.m. on 19.5.2000. The said documents were compared and proved also. Even otherwise PW6 I.O. Navneet Singh Sikeria also proved the said document being complaint lodged by the PW1 Prem Narayan. The aforesaid facts itself reveal that it is the complainant being PW2, who had moved complainant which transformed into lodging of an FIR. Thus it is only on the basis of the complaint that FIR was lodged and the motion for conducting investigation commenced. Even spot map was also prepared on the basis of the directions of the complainant Prem Narayan (PW2).

16. Hon'ble Apex Court had the occasion to consider the contingency wherein the witnesses turned hostile and it was held that the evidence of hostile witness can be relied upon to the extent it supports the version of the prosecution and it is not necessary that it should be relied upon or rejected as well as even otherwise it is a settled law that evidences of hostile witness can be relied upon to the extent to which it supports the prosecution version.

17. In the case of **State of U.P. vs. Ramesh Prasad Misra and another 1996 AIR (Supreme Court) 2766,** the Hon'ble Apex Court has held as under:-

"the Hon'ble Apex Court held that evidence of a hostile witnesses would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. Thus, the law can be summarized to the effect that evidence of a hostile witness cannot be discarded as a whole, and relevant part thereof, which are admissible in law, can be used by prosecution or the defence."

18. In the case of **Koli Lakhmanbhai Chanabhai Vs. State of Gujarat, reported in (1999) 8SCC 624, t**he Hon'ble Apex Court in paragraphs-5 and 6 has held as under:-

5. From the aforesaid evidence on record, in our view, it cannot be said that the High Court erred in relying upon some portion of the evidence of P.W. 7 who was cross-examined by the prosecution. It is settled law that evidence of hostile witness also can be relied upon to the extent to which it supports the prosecution version. Evidence of such witness cannot be treated as washed off the record. It remains admissible in the trial and there is no legal bar to base his conviction upon his testimony if corroborated by other reliable evidence. In the present

case, apart from the evidence of P.W.7, the prosecution version that he saw that appellant was having knife in his hand and was quarreling with the deceased gets corroboration from the evidence of P.Ws 11 and 12 to whom he disclosed the incident immediately. On the basis of the said information, within one hour, FIR was lodged disclosing the name of the appellant as the person who has inflicted the knife blow. Number of incised wounds are found as per the Postmortem report. The prosecution version gets further corroboration from discovery of Muddamal knife containing human blood Group 'A' Further the bush-shirt and baniyan which were put on by the accused at the time of incident were having extensive blood stains which were also found containing human blood group 'A'. Learned counsel for the appellant, however, contended that accused is also having blood Group 'A' and that he was having injury on the thigh as per the evidence of the Doctor. In our view there is no substance in his contention because as per the medical evidence, the injuries caused to the accused were minor and that because of such injuries, there would not be extensive bloodstains on the bush-shirt and baniyan put on by the accused. In his 313 statement also, accused has not explained how he got bloodstains on his bush-shirt and baniyan. He has also not denied the recovery of the said bush-shirt and baniyan from his person at the time of his arrest.

6. Hence, considering the above stated evidence on record, it cannot be said that High Court committed any error in convicting the appellant for the offence punishable under Section 302 IPC.

19. Further in the case of **Ramesh Harijan Vs. State of Uttar Pradesh 2012(5) SCC 777 para 23 and 24**, the Hon'ble Apex Court in paragraphs- 23 and 24, has held as under:-

23. It is a settled legal preposition that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross examine him.

24 The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent that their version is found to be dependable on a careful scrutiny thereof.

In the case of Vinod Kumar Vs. State of Punjab (2015) 3 SCC 220, the Hon'ble Apex Court in paragraphs- 31 and 32 has held as under:-

31. The next aspect which requires to be adverted to is whether testimony of a hostile evidence that has come on record should be relied upon or not. Mr. Jain, learned senior counsel for the Appellant would contend that as PW-7 has totally resiled in his cross-examination, his evidence is to be discarded in toto. On a perusal of the testimony of the said witness, it is evincible that in examination-in-chief, he has supported the prosecution story in entirety and in the cross-examination he has taken the path of prevarication. In Bhagwan Singh v. State of Haryana (1976) 1 SCC 389, it has been laid down that even if a witness is characterised has a hostile witness his evidence is not completely effaced. The said evidence remains admissible in the trial and there is no legal bar to base a conviction upon his testimony, if corroborated by other reliable evidence. In Khuji @ Surendra Tiwari v. State of Madhya Pradesh (1991) 3 SCC

627, the Court after referring to the authorities in Bhagwan Singh (supra), Rabindra Kumar Dey v. State of Orissa (1976) 4 SCC 233 and Syad Akbar v. State of Karnataka (1980) 1 SCC 30, opined that the evidence of such a witness cannot be effaced or washed off the record altogether, but the same can be accepted to the extent it is found to be dependable on a careful scrutiny thereof.

32. In this context, we think it apt to reproduce some passages from Rammi @ Rameshwar v. State of Madhya Pradesh (1999) 8 SCC 649, where the Court was dealing with the purpose of re-examination. After referring to Section 138 of the Evidence Act, the Court held thus:

17. There is an erroneous impression that reexamination should be confined to clarification of ambiguities which have been brought down in cross-examination. No doubt, ambiguities can be resolved through re-examination. But that is not the only function of the re-examiner. If the party who called the witness feels that explanation is required for any matter referred to in cross-examination he has the liberty to put any question in re-examination to get the explanation. The Public Prosecutor should formulate his questions for that purpose. Explanation may be required either when the ambiguity remains regarding any answer elicited during cross-examination or even otherwise. If the Public Prosecutor feels that certain answers require more elucidation from the witness he has the freedom and the right to put such questions as he deems necessary for that purpose, subject of course to the control of the court in accordance with the other provisions. But the court cannot direct him to confine his questions to ambiguities alone which arose in cross-examination.

18. Even if the Public Prosecutor feels that new matters should be elicited from the witness he can do so, in which case the only requirement is that he must secure permission of the court. If the court thinks that such new matters are necessary for proving any material fact, courts must be liberal in granting permission to put necessary questions.

20. Accordingly, we are satisfied that the learned trial court had meticulously scrutinized the evidence available on record and after following the proposition of law laid down by the Hon'ble Apex Court in the afore-noted decision had proceeded to consider the statements of the hostile witnesses, in so far as it supports the prosecution version.

21. Learned counsel for the appellants has next contended that the dying declaration of the deceased/victim cannot be relied upon as the same is doubtful and not corroborated by witness of facts, hence it cannot be the sole basis of conviction.

22. As far as the issue of dying declaration is concerned, it has come on record that one Sri Arun Kumar Mishra, the then S.D.M. Nazafgarh and presently posted as Director Delhi Municipal Corporation was examined as PW3. Dying declaration as recorded by PW3 was after obtaining the certificate of medical fitness from the doctor. Even after completion of dying declaration also the doctor as given a certificate that during the course of the statement, fit state of mind of the deceased was not there.

23. The reliability of dying declaration has always been subject matter

of scrutiny before the courts of law and it has been held that dying declaration is in fact the statement of person, who cannot be called a witness and therefore cannot be cross-examined and same cannot be brushed-aside. In case the Court comes to a conclusion that dying declaration is true and reliable and has been recorded by a person at a time when the deceased was physically and mentally fit to make the said declaration then it can be the sole basis for recording conviction.

24. In the case of P**rakash and another Vs. State of Madhya Pradesh (1992) 4 SCC 225,** the Hon'ble Apex Court in paragraph-11 has held as under:-

11. After giving our anxious consideration to the facts and circumstances of the case and the arguments advanced by the counsel for the parties and judgment delivered both by the Additional Sessions Judge and the High Court of Madhya Pradesh, it appears to us that the fatal injuries had been inflicted by Prakash with the gupti. The gupti was recovered at the instance of the accused and such recovery was not otherwise possible if the accused himself had not assisted for such recovery of the gupti. The said gupti was stained with human blood and no reasonable explanation has been given by accused for such blood stain. The injuries found on the person of the deceased could be inflicted by a gupti and complicity of Prakash in inflicting the fatal injuries by gupti has been corroborated by the eye-witness. There may be some minor discrepancies in the evidence of the eye-witness but so far as the complicity of Prakash is concerned, the depositions of the eye-witnesses were consistent. In discarding the evidence of the brother of the deceased namely Ajay Singh the learned Additional Sessions Judge was influenced by the tender age of Ajay (about 14 years) and was of the view that he was likely to be tutored. We do not think that a boy of about 14 years of age cannot give a proper account of the murder of his brother if he has an occasion to witness the same and simply because the witness was a boy of 14 years it will not be proper to assume that he is likely to be tutored. The High Court has given very convincing reasons for accepting the evidence of Ajay Singh as an eye-witness of the murderous act and we do not find any infirmity in the finding made by the High Court. In so far as the dying declaration is concerned, we are inclined to accept the finding of the High Court that the deceased was alive at least up to half an hour after the assault. He had been taken to the hospital where he received some treatment for about 10-15 minutes. It is not borne out from the evidence of the doctor that the injuries were so grave and the condition of the patient was so critical that it was unlikely that he could make any dying declaration. As a matter of fact, on second thought, the learned Additional Sessions Judge has accepted the dying declaration and has convicted Prakash on the basis of dying declaration. The injuries inflicted by Prakash were very serious on vital parts of the body causing death of the deceased within a very short time. In such circumstances, conviction under Section 302, I.P.C. and sentence of life imprisonment of the accused Prakash is justified and no interference is called for. In our view, the High Court has taken a very reasonable view in convicting the other accused namely Shiv Narayan under Section 326 read with Section 34, I.P.C. and has considered his case with such sympathy as the said accused deserved by sentencing him for imprisonment for the

period already undergone by him, for an offence under Section 326 read with Section 34, I.P.C. We, therefore, find no reason to interfere with the conviction or the sentence passed against the accused Shiv Narayan. The appeals therefore fail and are dismissed. The bail bond of the accused Prakash is discharged and he would surrender and serve out the sentence.

25 . In the case of **Laxman Vs. State of Maharashtra (2002) 4 SCC 710,** the Hon'ble Apex Court in paragraph-11 has held as under:-

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 dying declaration look 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. A dying declaration can be oral or in writing and in 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 is 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 record 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.

26 . In the case of **Babulal and others Vs. State of M.P. (2003) 12 SCC 490,** the Hon'ble Apex Court in paragraph-7 has held as under:-

7. The pivotal point which was pressed into service with some amount of vehemence was acceptability of dying declaration . There is no legal bar for the information given by the deceased to be treated as a dying declaration. This position was stated succinctly by this Court in Munnu Raja and Anr. v. State of M.P. 1976CriLJ1718 . Section 32 of the Indian Evidence Act, 1872.

The materials on records clearly established that the deceased was in mentally fit condition, though battered in the physical frame. The High Court has rightly held that presence of PWs 1 and 2 did not result in any presumption of tutoring, when the FIR was recorded. Merely because there was a thumb impression on the FIR, and not the signature as stated by PW-1, that does not falsify the prosecution version. The same has been clarified by the High Court. It has to be noted that PW-16, who had scribed the FIR, stated that the contents were read over to the deceased, who had thereafter put his thumb impression. In fact the defence itself has suggested to PW-1 during cross examination that the thumb impression was taken on the paper first and thereafter the writings were inserted. In other words, there was acceptance of the fact that the thump impression was there but writings were done later which have been denied by PW-1. We do not find any reason to discard the dying declaration only on this ground. The High Court has also found in analyzing the evidence that the plea relating to anti dating or anti timing of the FIR is a myth. Though some of the accused persons have been acquitted by the trial Court, the High Court has carefully analysed the evidence and have sifted the grain from the chaff and disengaged truth from falsehood.. Merely because some persons have not been named in the FIR and have given the benefit of doubt, that cannot be a reason for discarding the dying declaration or the evidence of the witnesses.

27. In the case of **Lakhan Vs. State of Madhya Pradesh (2010) 8 SCC 514**, the Hon'ble Apex Court in paragraphs-18 and 19 has held as under:-

18. In Amol Singh v. State of M.P. (2008) 5 SCC 468, this Court, placing reliance upon the earlier Judgment in Kundula Bala Subrahmanyam and Anr. v. State of Andhra Pradesh (1993) 2 SCC 684, held that it is not the plurality of dying declarations but the reality thereto that aids weight to the prosecution's case. If a dying declaration is found to be voluntary, reliable and made in a fit mental condition, it can be relied upon without any corroboration. If there is more than one dying declaration, they should be consistent. In case of inconsistencies between two or more dying declarations made by the deceased, the Court has to examine the nature of inconsistencies namely, whether they are material or not and in such a situation, the Court has to examine the multiple dying declarations in the light of the various surrounding facts and circumstances.

19. In Heeralal v. State of Madhya Pradesh (2009) 12 SCC 671, this Court considered the case having two dying declarations, the first recorded by a Magistrate, wherein it was clearly stated that the deceased had tried to set herself ablaze by pouring kerosene on herself. However, the subsequent declaration was recorded by another Magistrate and a contrary statement was made. This Court set aside the conviction after appreciating the evidence and reaching the conclusion that the courts below came to abrupt conclusions on the purported possibility that the relatives of the accused might have compelled the deceased to give a false dying declaration. No material had been brought on record to justify such a conclusion.

28. In the case of **Vijay Pal Vs. State (Government of NCT of Delhi) (2015) 4**

SCC 749, the Hon'ble Apex Court in paragraph-22 has held as under:-

22. Thus, the law is quite clear that if the dying declaration dying declaration is absolutely credible and nothing is brought on record that the deceased was in such a condition, he or she could not have made a dying declaration to a witness, there is no justification to discard the same. In the instant case, PW-1 had immediately rushed to the house of the deceased and she had told him that her husband had poured kerosene on her. The plea taken by the Appellant that he has been falsely implicated because his money was deposited with the in-laws and they were not inclined to return , does not also really breathe the truth, for there is even no suggestion to that effect.

29. Another aspect also needs to be considered i.e. the issue of reliability of the dying declaration when the deceased had sustained high degree of injuries. The Apex Court has observed that it is not an abstract principle of law that a dying declaration of a person sustaining high degree of burn injuries cannot be relied upon as the same depends upon facts and circumstances of every individual case.

30. In the matter of **Mafabhai Nagarbhai Raval Vs. State of Gujarat (1992) 4 SCC 69** the Hon'ble Apex Court in paras 3, 4 & 5 have held as under: -

3. The deceased aged about 40 years was the widow of one Savaji and was living in a wooden cabin near the maternity hospital in Harij and she was maintaining herself by doing casual work in the maternity hospital. She developed illicit intimacy with the accused. Her grown-up children were dissatisfied with her character and other members of her community were also dissatisfied. Since then she was living alone in the wooden cabin near the maternity hospital. There was some quarrel between the accused and the deceased. At about midnight on 9.7.78 the accused went to her cabin and sprinkled kerosene oil on her and set fire to her clothes and then fled. The deceased ran from her cabin inside the compound of the maternity hospital raising cries. One Patavala Motibhai came there and put a quilt on her body. The said Patavala Motibhai went and informed the Medical Officer, P.W. 2 of the Government Hospital who immediately ran to the spot and separated the burnt clothes from her body and gave first aid. He questioned as to who had set lire and the deceased replied that the accused was the culprit. P.W. 2 recorded her statement which is the first dying declaration in the case. P.W. 2 shifted her to the hospital and he himself went to the police station and gave a report. The police Jamadar also recorded her statement in the hospital which is yet another dying declaration in the case. By that time information was sent to the Taluka Magistrate with a request to record the dying declaration. P.W. 3, the Taluka Magistrate went to the spot and he also recorded the dying declaration. The deceased died in the early morning of 10.7.78. Inquest was held over the dead body and post-mortem was conducted by P.W. 2. The learned Sessions Judge, in our view, has unnecessarily doubted the veracity of P.W. 2, the Doctor. He observed that the moment the flames had been seen by the deceased on her person she must have received a severe shock and the same must have become "graver and graver" and in that state of mind it is not believable at all that the deceased could keep balance of

her mind and full consciousness so as to make the statement. With this initial doubt the learned Sessions Judge proceeded to examine the evidence of the Doctor. The Doctor stated that in some cases mental shock immediately does . not develop and that in the instant case the deceased developed the mental shock for the first time at 4 A.M. Thereafter it gradually increased. The learned Sessions Judge called it irresponsible statement. It is in the medical evidence that 99% of the body of the deceased was affected by extensive bums and that the clothes of the deceased were also burnt to ashes. Therefore, the learned Judge thought that it was not at all possible to believe that the lady might. have developed the shock only at 4 A.M. and he gave his firm opinion that the moment the deceased had seen the flames she must have sustained mental shock and these circumstances convinced him that right from the very beginning she must have been under a mental shock and on that ground the learned Judge disbelieved the Doctor. Likewise he has pointed out certain circumstances purely based on surmises and on his inferences.

4. On the same process of reasoning the learned Sessions Judge has also doubted the evidence of P.W. 3, the Executive Magistrate. The learned Judge found fault with the procedure . adopted by the Executive Magistrate namely that he did not record the statement in the form of questions and answers. The learned Judge, in our view, without any basis reached the conclusion that the Executive Magistrate did not record the dying declaration dying declaration exactly in the words stated by the deceased. There is third dying declaration recorded by the police Jamadar but we need not consider the same.

5. It must be noted that P.W. 2 recorded the statement within five minutes and noted the time also in the statement. The High Court has rightly pointed out that both the dying declarations are true and voluntary. It is not the case of the defence that she gave tutored version. The entire attack of the defence was on the mode of recording the dying declarations and on the ground that the condition of the deceased was serious and she could not have made the statements. On these aspects as noted above, the evidence of the Doctor is relevant and important. We have gone through the evidence of the Doctor as well as that of the Executive Magistrate. We find absolutely no infirmity worth mentioning to discard their evidence; It therefore emerges that both the dying declarations are recorded by independent witnesses and the same give a true version of the occurrence as stated by the deceased. The dying declarations by themselves are sufficient to hold the appellant guilty. The High Court has rightly interfered in an appeal against acquittal. The appeal is accordingly dismissed.

31. Following the said judgment the Hon'ble Supreme Court in the case of **State of Madhya Pradesh Vs. Dal Singh and others (2013) 14 SCC 159 in paras 14 to 22** have observed as under:-

Whether 100 per cent burnt person can make a dying declaration or put a thumb impression:

14. In Mafabhai Nagarbhai Raval v. State of Gujarat AIR 1992 SC 2186, this Court dealt with a case wherein a question arose with respect to whether a person suffering from 99 per cent burn injuries could be deemed capable enough for the purpose of making a dying declaration. The learned trial Judge thought that the same

was not at all possible, as the victim had gone into shock after receiving such high degree burns. He had consequently opined, that the moment the deceased had seen the flame, she was likely to have sustained mental shock. Development of such shock from the very beginning, was the ground on which the Trial Court had disbelieved the medical evidence available. This Court then held, that the doctor who had conducted her post-mortem was a competent person, and had deposed in this respect. Therefore, unless there existed some inherent and apparent defect, the court could not have substitute its opinion for that of the doctor's. Hence, in light of the facts of the case, the dying declarations made, were found by this Court to be worthy of reliance, as the same had been made truthfully and voluntarily. There was no evidence on record to suggest that the victim had provided a tutored version, and the argument of the defence stating that the condition of the deceased was so serious that she could not have made such a statement was not accepted, and the dying declarations were relied upon. A similar view has been re-iterated by this Court in Rambai v. State of Chhatisgarh (2002) 8 SCC 83.

15. In Laxman v. State of Maharashtra : AIR 2002 SC 2973, this Court held, that a dying declaration can either be oral or in writing, and that any adequate method of communication, whether the use of words, signs or otherwise will suffice, provided that the indication is positive and definite. There is no requirement of law stating that a dying declaration must necessarily be made before a Magistrate, and when such statement is recorded by a Magistrate, there is no specified statutory form for such recording. Consequently, the evidentiary value or weight that has to be attached to such a statement, necessarily depends on the facts and circumstances of each individual 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, and where the same is proved by the testimony of the Magistrate, to the extent that the declarant was in fact fit to make the statements, then even without examination by the doctor, the said declaration can be relied and acted upon, provided that the court ultimately holds the same to be voluntary and definite. Certification by a doctor is essentially a rule of caution, and therefore, the voluntary and truthful nature of the declaration can also be established otherwise.

16. In Koli Chunilal Savji v. State of Gujarat AIR 1999 SC 3695, this Court held, that the ultimate test is whether a dying declaration can be held to be truthfully and voluntarily given, and if before recording such dying declaration, the officer concerned has ensured that the declarant was in fact, in a fit condition to make the statement in question, then if both these aforementioned conditions are satisfactorily met, the declaration should be relied upon. (See also: Babu Ram and Ors. v. State of Punjab AIR 1998 SC 2808).

17. In Laxmi v. Om Prakash and Ors. AIR 2001 SC 2383, this Court held, that if the court finds that the capacity of the maker of the statement to narrate the facts was impaired, or if the court entertains grave doubts regarding whether the deceased was in a fit physical and mental state to make such a statement, then the court may, in the absence of corroborating evidence lending assurance

to the contents of the declaration, refuse to act upon it.

18. In Govindappa and Ors. v. State of Karnataka (2010) 6 SCC 533, it was argued that the Executive Magistrate, while recording the dying declaration did not get any certificate from the medical officer regarding the condition of the deceased. This Court then held, that such a circumstance itself is not sufficient to discard the dying declaration. Certification by a doctor regarding the fit state of mind of the deceased, for the purpose of giving a dying declaration, is essentially a rule of caution and therefore, the voluntary and truthful nature of such a declaration, may also be established otherwise. Such a dying declaration must be recorded on the basis that normally, a person on the verge of death would not implicate somebody falsely. Thus, a dying declaration must be given due weight in evidence.

19. In State of Punjab v. Gian Kaur and Anr. AIR 1998 SC 2809, an issue arose regarding the acceptability in evidence, of the thumb impression of Rita, the deceased, that appeared on the dying declaration, as the trial court had found that there were clear ridges and curves, and the doctor was unable to explain how such ridges and curves could in fact be present, when the skin of the thumb had been completely burnt. The court gave the situation the benefit of doubt.

20. The law on the issue can be summarised to the effect that law does not provide who can record a dying declaration, nor is there any prescribed form, format, or procedure for the same. The person who records a dying declaration must be satisfied that the maker is in a fit state of mind and is capable of making such a statement. Moreover, the requirement of a certificate provided by a Doctor in respect of such state of the deceased, is not essential in every case.

21. Undoubtedly, the subject of the evidentiary value and acceptability of a dying declaration, must be approached with caution for the reason that the maker of such a statement cannot be subjected to cross-examination. However, the court may not look for corroboration of a dying declaration, unless the declaration suffers from any infirmity.

22. So far as the question of thumb impression is concerned, the same depends upon facts, as regards whether the skin of the thumb that was placed upon the dying declaration was also burnt. Even in case of such burns in the body, the skin of a small part of the body, i.e. of the thumb, may remain intact. Therefore, it is a question of fact regarding whether the skin of the thumb had in fact been completely burnt, and if not, whether the ridges and curves had remained intact.

32. In case of **Vijay Pal (Supra)** in paragraphs 23 and 24 the Hon'ble Apex Court has relied upon the judgment in the case of **Mafabhai Nagarbhai Raval (Supra)** and **Dal Singh** has observed as under:-

23. It is contended by the learned Counsel for the Appellant when the deceased sustained 100% burn injuries, she could not have made any statement to her brother. In this regard, we may profitably refer to the decision in Mafabhai Nagarbhai Raval v. State of Gujarat (1992) 4 SCC 69 wherein it has been held a person suffering 99% burn injuries could be deemed capable enough for the purpose of

making a dying declaration. The Court in the said case opined that unless there existed some inherent and apparent defect, the trial Court should not have substituted its opinion for that of the doctor. In the light of the facts of the case, the dying declaration was found to be worthy of reliance.

24. In State of Madhya Pradesh v. Dal Singh and Ors. : (2013) 14 SCC 159, a two-Judge Bench placed reliance on the dying declaration of the deceased who had suffered 100% burn injuries on the ground that the dying declaration was found to be credible.

33. Coming to the facts of the present case while applying the law laid down by the Hon'ble Apex Court as referred to above an inescapable conclusion emerges that the statement of the deceased/victim was recorded on 7.5.2000 by one Sri Arun Kumar Mishra the then S.D.M. Nazafgarh (PW3) at 12.15 p.m. and a certificate of fitness was also obtained from the doctor and thumb impression of the deceased was also taken on the same. The factum of fitness was also certified by Medical Officer as apparent from the deceased Bed Head Ticket which was also proved before the court below. The testimony of Executive Magistrate PW3 Sri Arun Kumar Mishra was found to be fully intact and he was held to be reliable witness having no grudge or motive against any side.

34. As already noticed, none of the witnesses or the authorities involved in recording the dying declaration had turned hostile. On the contrary, they have fully supported the case of prosecution. The dying declaration is reliable, truthful and was voluntarily made by the deceased, hence, this dying declaration can be acted upon without corroboration and can be made the sole basis of conviction. Hence, learned trial court has committed no error on acting on the sole basis of dying declaration. Learned trial court was completely justified in placing reliance on dying declaration Ex. KA-2 and convicting the accused-appellant on the basis of it.

35. Accordingly, we therefore, do not find any error committed by the court below while also taking into consideration, the dying declaration of the deceased as this Court of the opinion that the court is below has scrutinized the issue in detail carefully.

36. Next argument so canvassed by the learned counsel for the appellants is to the effect that once the appellants have not been convicted for the offences under Sections 498A, 304B of the IPC read with Section 3/4 of the D.P. Act then the conviction of the appellants under Section 302 of the IPC is not justified.

37. Having heard arguments of the learned counsel for the parties as well as perusal of the record, it reveals that the appellants have not been convicted under Sections 498A, 304B IPC read with Section 3/4 of the D.P. Act. However, from the perusal of the records, it is undoubtedly clear that the FIR was lodged against the appellants as well as Sri Raghuvir Singh, the husband of the deceased/victim on 19.5.2000 alleging commissioning of the aforenoted offences. Undisputedly, there exist dying declaration also of the deceased which as observed earlier shows the cause of the death of the deceased on account of burn injuries. Though there is a cloud of doubt on the issue as to whether the death

was an act of suicide or by pouring kerosene oil by the appellants or on account of quarrel.

38. However, once there are sufficient evidence on record demonstrating the fact that the deceased sustained burn injuries and there also exist on record the dying declaration of the deceased as well as the testimony of the prosecution witness which also cannot be disbelieved or disregarded in toto then merely because there is doubt with respect to the direct evidence supporting either the version of the prosecution with relation to the cause of death occurring due to pouring of kerosene oil or on account of quarrel, it cannot be said that the deceased did not sustain burn injuries.

39. Hence in totality of the circumstances while considering the testimony of the hostile prosecution witnesses as well as the dying declaration of the deceased, this Court of the firm opinion that the deceased sustained burn injuries which resulted to her hospitalization then ultimately leading to her death.

40. Lastly, learned counsel for the appellants had argued that the actual cause of the death of the deceased/victim was septicemia, thus, the appellants even if are to be convicted then the offence would be punishable under Section 304 Part-1 of the IPC and Section 302 of the IPC. Elaborating the said submission of the learned counsel for the appellants had argued that as per the prosecution case itself the deceased/victim sustained 70% of burn injuries while pouring kerosene oil on 30.4.2000 and she was admitted in the hospital on 6.5.2000 and as per the postmortem report of the Department of Forensic Medicine Safdarjung Hospital New Delhi dated 16.5.2000, the cause of death was shown to be septicemia. Hence the order under challenge convicting the appellants under Section 302 IPC is illegal as at best the present case can be said to be within the four-corners of Section 304 Part-1 of the IPC.

41. The word Septicemia has been defined in **Harrison's Principles of Internal Medicine Volume 1 (14th Edition) Fauci Braunwald Isselbacher Wilson Martin Kasper Hauser Longo** reads as under:-

Septicemia:- Systemic illness caused by the spread of microbes or their toxins via the bloodstream.

42. Further Septicemia has been defined in Merriam Webster dictionary as under:-

potentially life-threatening invasion of the bloodstream by pathogenic agents and especially bacteria along with their toxins from a localized infection (as of the lungs or skin) that is accompanied by acute systemic illness

--called also blood poisoning

Britannica has defined Septicemia as under:

septicemia, formerly called blood poisoning, infection resulting from the presence of bacteria in the blood(bacteremia). The onset of septicemia is signaled by a high fever, chills, weakness, and excessive sweating, followed by a decrease in blood pressure. The typical microorganisms that produce septicemia, usually gram-negative bacteria,

release toxic products that trigger immune responses and widespread blood clotting (coagulation) within the blood vessels, thus reducing the flow of blood to tissues and organs. (For information on the systemic inflammatory condition that occurs as a complication of infection by any class of microorganism,see sepsis.)

43 Here in the present case the deceased/victim undoubtedly sustained burn injuries to the tune of 70%, she was taken to Jevan Hospital Modi Nagar on 6.5.2000 and thereafter admitted at Safdarjung Hospital New Delhi and she succumbed on 12.5.2000. The dates regarding sustaining of burn injuries on 30.4.2000 admission in Jevan Hospital Modi Nagar on 6.5.2000 referring her to be admitted in Safdarjung Hospital New Delhi on 6.5.2000 and succumbing on 12.5.2000 are not disputed. It is also not under dispute that the cause of the death was septicemia as the opinion of the doctors of Department of Forensic Medicine Safdarjung Hospital, New Delhi itself shows that the cause of death was septicemia. The trial court has itself recorded a finding that the deceased was burnt at her matrimonial house in 70% degree and was admitted to the hospital and further she was looked and treated by doctor by way of bandage etc. and which itself shows that the victim was in hospital itself from the period 6.5.2000 till 12.5.2000, when she was expired meaning thereby that the patient was admitted to the hospital for approximately more than six days. Once in the postmortem report the facts of death was found to be septicemia then there is no doubt that the deceased died due to septicemia.

44. The findings of the fact with regard to sustaining of burn injuries on the basis of the testimony of the hospital witnesses as well as dying declaration cannot be faulted with. Death of the deceased was homicidal death. The fact that it was an homicidal death takes this court to most vex question whether it will fall within the four-corners of murder or culpable homicide not amounting to murder.

45. Therefore, we consider the question whether it would be a murder or culpable homicide not amounting to murder punishable under Section 304 IPC. Accused is in jail since six and half years.

46. The Hon'ble Apex Court in the case of **Ganga Dass Alias Godha Vs. State of Haryana1994 Supp(1) SCC 534** in para 6 has observed as under:-

6. We find considerable force in this submission. As stated above the occurrence took place on 18.11.88 and the deceased died 18 days later on 5.12.88 due to septicemia and other complications. The Doctor found only one injury on the head and that was due to single blow inflicted with an iron pipe not with any sharp-edged weapon. Having regard to the circumstances of the case, it is difficult to hold that the appellant intended to cause death nor it can be said that he intended to cause that particular injury. In any event the medical evidence shows that the injured deceased was operated but unfortunately some complications set in and ultimately he died because of cardio failure etc. Under these circumstances, we set aside the conviction of the appellant under Section 302 I.P.C. and the sentence of imprisonment for life awarded thereunder. Instead we convict him under Section 304 Part II I.P.C. and sentence him to undergo

six years' R.I. Accordingly the appeal is partly allowed.

47. The Hon'ble Apex Court in the case of ***B.N. Kavatakar and another Vs. State of Karnataka 1994 Supp(1) SCC 304*** *in paras 9 and 10 have observed as under:-*

9. The next question that comes up for our consideration is what is the nature of the offence that the appellants have committed. The Medical Officer who conducted autopsy on the dead body of the deceased has opined that the death was as a result of septicemia secondary to injuries and peritonitis. As we have indicated above, the deceased died after five days of the occurrence in the hospital. On an overall scrutiny of the facts and circumstances of the case coupled with the opinion of the Medical Officer, we are of the view that the offence would be one punishable under Section 326 read with Section 34 IPC.

10 .In the result, we set aside the conviction under Section 302 read with Section 34 IPC and the sentence of imprisonment for life imposed therefore on each of the appellants. Instead we convict them under Section 326 read with Section 34 IPC and sentence each of the appellants to undergo rigorous imprisonment for a period of three years. With the above modification in the conviction and sentence, the appeal is dismissed.

48. The *Hon'ble Apex Court in the case of* ***Jagtar Singh and another Vs. State of Punjab (1999) 2 SCC 174*** in para 7 has observed as under:-

7. Having given our anxious consideration to the first contention of Mr. Gujral we do not find any substance in it. It is true that Naib Singh died 17 days after the incident due to septicemia, but Dr. M. P. Singh (P.W. 1), who held the postmortem examination, categorically stated that the septicemia was due to the head injury sustained by Naib Singh and that the injury was sufficient in the ordinary course of nature to cause death. From the impugned judgment we find that the above contention was raised on behalf of the appellants and in rejecting the same the High Court observed :--

"It is well settled that culpable homicide is not murder when the case is brought within the five exceptions to Section 300, Indian Penal Code. But even though none of the said five exceptions is pleaded or prima facie established on the evidence on record, the prosecution must still be required under the law to bring the case under any of the four clauses, firstly to fourthly, of Section 300 , Indian Penal Code, to sustain the charge of murder. Injury No. 1 was the fatal injury. When this injury is judged objectively from the nature of it and other evidence including the medical opinion of Dr. M. P. Singh (P.W. 1), we are of the considered view that injury was intended to be caused with the intention of causing such a bodily injury by Harbans Singh appellant on the person of Naib Singh which was sufficient in the ordinary course of nature to cause death ....."

On perusal of the evidence of P.W. 1 in the light of explanation 2 to Section 299, I.P.C. we are in complete agreement with the above- quoted observations of the High Court.

49. The Hon'ble Apex Court in the case of **Maniben Vs. State of Gujarat**

(2009) 8 SCC 796 in paras 18, 19 and 20 have observed as under:-

18-The deceased was admitted in the hospital with about 60% burn injuries and during the course of treatment developed septicemia, which was the main cause of death of the deceased. It is, therefore, established that during the aforesaid period of 8 days the injuries aggravated and worsened to the extent that it led to ripening of the injuries and the deceased died due to poisonous effect of the injuries.

19. It is established from the dying declaration of the deceased that she was living separately from her mother-in-law, the appellant herein, for many years and that on the day in question she had a quarrel with the appellant at her house. It is also clear from the evidence on record that immediately after the quarrel she along with her daughter came to fetch water and when she was returning, the appellant came and threw a burning tonsil on the clothes of the deceased. Since the deceased was wearing a terylene cloth at that relevant point of time, it aggravated the fire which caused the burn injuries.

20.There is also evidence on record to prove and establish that the action of the appellant to throw the burning tonsil was preceded by a quarrel between the deceased and the appellant. From the aforesaid evidence on record it cannot be said that the appellant had the intention that such action on her part would cause the death or such bodily injury to the deceased, which was sufficient in the ordinary course of nature to cause the death of the deceased. Therefore, in our considered opinion, the case cannot be said to be covered under Clause (4) of Section 300 of IPC. We are, however, of the considered opinion that the case of the appellant is covered under Section 304 Part II of IPC.

50. The Hon'ble Apex Court in the case of **Bengai Mandal alias Begai Mandal vs. State of Bihar [(2010) 2 SCC 91** in para 20 has observed as under:-

The appellant has already served rigorous imprisonment for a period of seven years. Considering the facts that the death ensued after twenty six days of the incident as a result of septicemia and not as a consequence of burn injuries, we are of the considered view that the period already undergone by the appellant would be sufficient to meet the ends of justice. We, therefore, partly allow the appeal to the aforesaid extent and direct that the appellant be released forthwith if not wanted in connection with any other case.

51. The Hon'ble Apex Court in the case of **Chirra Shivraj Vs. State of Andhra Pradesh (2010) 14 SCC 444 in paras 3, 4 and 21** have observed as under:-

3. At the time when the deceased was in flames, her husband, Nagabhushanam arrived and upon seeing his wife in flames, he immediately took her to the Government civil Hospital, Nizamabad. Upon police being informed, R. Gangaram, Assistant Sub Inspector (P.W.11) rushed to the hospital and recorded the statement of the deceased. FIR No. 46 of 1999 was filed on the basis of the statement made by the deceased against the appellant for commission of an offence under Section 307 of IPC. Looking to the nature of burn injuries suffered by

the deceased, her dying declaration was recorded by Mr. Narsimha Chary, First Class Judicial Magistrate (Special Mobile Court), Nizamabad (P.W.10) around 8 p.m. The deceased specifically stated in the said statement that she was being abused by the appellant and on that day also, as usual, when she was being abused, she poured kerosene on herself and thereafter the appellant had thrown a lighted match stick on her, because of which she was in flames and she was severely burnt and her husband Nagabhushanam had brought her to the hospital.

4. Because of the burn injuries, the deceased suffered from septicemia and as a result thereof she died on 1st August, 1999. The said fact was brought to the notice of the authorities by the husband of the deceased. The said information was recorded as FIR No. 152 of 1999 on 2nd August, 1999. As a result of the death of the deceased, the appellant was also charged under Section 302 of the IPC. At the time of the trial, most of the witnesses, who are family members of the deceased as well as the appellant, turned hostile. However, on the basis of the dying declaration (Ext.P.12) recorded on 21st April, 1999, which supported the contents of the FIR filed by the complainant, the trial court convicted the appellant for the offence punishable under Section 304 Part II of the IPC and sentenced the appellant to undergo simple imprisonment for five years.

21. 19. Even the learned Counsel for the appellant could not show that the information with regard to the death of the deceased, which was recorded as second FIR No. 152/99 caused any prejudice to the accused. In the aforestated circumstances, we do not agree with the submission made by the learned Counsel for the appellant that merely because second FIR was filed, the entire investigation was defective and that should result into acquittal of the accused.

52. The Hon'ble Apex Court in the case of **Sanjay Vs. State of Uttar Pradesh (2016) 3 SCC 62 in paras 14, 15, 16 and 17** have observed as under:-

14. However, in the instant case, it is apparent that the death occurred sixty two days after the occurrence due to septicemia and it was indirectly due to the injuries sustained by the deceased. The proximate cause of death on 13.10.1998 was septicemia which of course was due to the injuries caused in the incident on 11.08.1998. As noted earlier, as per the evidence of Dr. Laxman Das (PW-9), Roop Singh was discharged from the hospital in good condition and he survived for sixty two days. In such facts and circumstances, prosecution should have elicited from Dr. Laxman Das (PW-9) that the head injury sustained by the deceased was sufficient in the ordinary course of nature to cause death. No such opinion was elicited either from Dr. Laxman Das (PW-9) or from Dr. Gulecha (PW-3). Having regard to the fact that Roop Singh survived for sixty two days and that his condition was stable when he was discharged from the hospital, the court cannot draw an inference that the intended injury caused was sufficient in the ordinary course of nature to cause death so as to attract Clause (3) of Section 300 Indian Penal Code.

15. In Ganga Dass alias Godha v. State of Haryana 1994 Supp (1) SCC 534, the accused gave iron pipe single blow on the head of the deceased and the deceased died eighteen days after the occurrence due

to septicemia and other complications, the conviction of the Appellant Under Section 302 Indian Penal Code was altered by this Court to Section 304 Part II Indian Penal Code. This Court observed as under:

6. We find considerable force in this submission. As stated above the occurrence took place on November 18, 1988 and the deceased died 18 days later on December 5, 1988 due to septicemia and other complications. The Doctor found only one injury on the head and that was due to single blow inflicted with an iron pipe not with any sharp-edged weapon. Having regard to the circumstances of the case, it is difficult to hold that the Appellant intended to cause death nor it can be said that he intended to cause that particular injury. In any event the medical evidence shows that the injured deceased was operated but unfortunately some complications set in and ultimately he died because of cardiac failure etc. Under these circumstances, we set aside the conviction of the Appellant Under Section 302 Indian Penal Code and the sentence of imprisonment for life awarded thereunder. Instead we convict him Under Section 304Part II Indian Penal Code and sentence him to undergo six years' RI. The sentence of fine of Rs. 2000 along with default clause is confirmed. Accordingly the appeal is partly allowed.

16. In the instant case, the Appellants used firearms countrymade pistol and fired at Roop Singh at his head and the accused had the intention of causing such bodily injury as is likely to cause death. As the bullet injury was on the head, vital organ, second Appellant intended of causing such bodily injury and therefore conviction of the Appellant is altered from Section 302 Indian Penal Code to Section 304 Part I Indian Penal Code. The learned Counsel for the Appellant-Sanjay submitted that it was only Narendra who fired at Roop Singh at his head, Appellant-Sanjay fired on Sheela (PW-2) on her neck, stomach and leg. Learned Counsel for the Appellant-Sanjay contended that as Sanjay fired only at Sheela, he could not have been convicted for causing death of Roop Singh Under Section 302 Indian Penal Code read with Section 34 Indian Penal Code. There is no force in the above contention. The common intention of the Appellants is to be gathered from the manner in which the crime has been committed. Both the Appellants came together armed with firearms in the wee hours of 11.08.1998. Both the Appellants indiscriminately fired from their countrymade pistols at Roop Singh-deceased and Sheela (PW-2) respectively. The conduct of the Appellants and the manner in which the crime has been committed is sufficient to attract Section 34 Indian Penal Code as both the Appellants acted in furtherance of common intention. The conviction of the Appellant-Sanjay Under Section 302 Indian Penal Code read with Section 34 Indian Penal Code is modified to conviction Under Section 304 Part I Indian Penal Code.

17. Conviction of the Appellants-Narendra and Sanjay Under Section 302 Indian Penal Code and Section 302 Indian Penal Code read with Section 34 Indian Penal Code respectively is modified to Section 304 Part I Indian Penal Code and Section 304 Part I Indian Penal Code read with Section 34 Indian Penal Code respectively and each of them are sentenced to undergo rigorous imprisonment for ten years and the same

shall run concurrently alongwith sentence of imprisonment imposed on the Appellants. Conviction of the Appellants for other offences and the respective sentence of imprisonment imposed on the Appellants and fine is affirmed. The appeals are partly allowed to the above extent.

53. The Hon'ble Apex Court in the case of **Khokan Alias Khokhan Vishwas Vs. State of Chhattisgarh (2021) 3 SCC 337 in paras 13, 14 and 15** have observed as under:-

13. Now so far as the reliance placed upon the decision of this Court in the case of Sanjay (supra) by the learned Counsel appearing on behalf of the Appellant-Accused is concerned, on considering the said decision, we are of the opinion that in the facts and circumstances of the case, the said decision shall not be applicable to the facts of the case on hand. In the said case, the death occurred 62 days after the occurrence due to septicemia. In between, the deceased was discharged from the hospital in good condition and he survived

14 .However, at the same time, it is also required to be noted that the deceased was admitted to the hospital after 24 hours and thereafter he died within three days due to septicemia. If he was given the treatment immediately, the result might have been different. In any case, as observed hereinabove, there was no premeditation on the part of the Accused; the Accused did not carry any weapon; quarrel started all of a sudden and that the Accused pushed the deceased and stood on the abdomen and therefore, as observed hereinabove, the case would fall under exception 4 to Section 300 Indian Penal Code and neither Clause 3 of Section 300 nor Clause 4 of Section 300 shall be attracted.

15. In view of the above and for the reasons stated hereinabove, the present appeal succeeds in part. The impugned judgment and order passed by the High Court as well as the judgment and order passed by the learned trial Court convicting the Appellant-Accused for the offence Under Section 302, Indian Penal Code are hereby modified to the extent convicting the Appellant-Accused for the offence Under Section 304-I, Indian Penal Code and sentencing him to the period already undergone by him i.e., 14.5 years. Rest of the judgment and order passed by the learned trial Court, confirmed by the High Court, is hereby confirmed.

54. We can safely rely upon the decision of the Gujarat High court in Criminal Appeal No.83 of 2008 (**Gautam Manubhai Makwana Vs. State of Gujarat)** decided on 11.9.2013 wherein the Court held as under:

"12. In fact, in the case of Krishan vs. State of Haryana reported in (2013) 3 SCC 280, the Apex Court has held that it is not an absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused. Where the dying declaration is true and correct, the attendant circumstances show it to be reliable and it has been recorded in accordance with law, the deceased made the dying declaration of her own accord and upon due certification by the doctor with regard to the state of mind and body, then it may not be necessary for the court to look for corroboration. In such cases, the dying declaration alone can form the basis for the conviction of the accused. But

where the dying declaration itself is attended by suspicious circumstances, has not been recorded in accordance with law and settled procedures and practices, then, it may be necessary for the court to look for corroboration of the same.

13. However, the complaint given by the deceased and the dying declaration recorded by the Executive Magistrate and the history before the doctor is consistent and seems to be trustworthy. The same is also duly corroborated with the evidence of witnesses and the medical reports as well as panchnama and it is clear that the deceased died a homicidal death due to the act of the appellants in pouring kerosene and setting him ablaze. We do find that the dying declaration is trust worthy.

14. However, we have also not lost sight of the fact that the deceased had died after a month of treatment. From the medical reports, it is clear that the deceased suffered from Septicemia which happened due to extensive burns.

15. In the case of the B.N. Kavatakar and another (supra), the Apex Court in a similar case of septicemia where the deceased therein had died in the hospital after five days of the occurrence of the incident in question, converted the conviction under section 302 to under section 326 and modified the sentence accordingly.

15.1 Similarly, in the case of Maniben (supra), the Apex Court has observed as under:

"18. The deceased was admitted in the hospital with about 60% burn injuries and during the course of treatment developed septicemia, which was the main cause of death of the deceased. It is, therefore, established that during the aforesaid period of 8 days the injuries aggravated and worsened to the extent that it led to ripening of the injuries and the deceased died due to poisonous effect of the injuries.

19. It is established from the dying declaration of the deceased that she was living separately from her mother-in-law, the appellant herein, for many years and that on the day in question she had a quarrel with the appellant at her house. It is also clear from the evidence on record that immediately after the quarrel she along with her daughter came to fetch water and when she was returning, the appellant came and threw a burning tonsil on the clothes of the deceased. Since the deceased was wearing a terylene cloth at that relevant point of time, it aggravated the fire which caused the burn injuries.

20. There is also evidence on record to prove and establish that the action of the appellant to throw the burning tonsil was preceded by a quarrel between the deceased and the appellant. From the aforesaid evidence on record it cannot be said that the appellant had the intention that such action on her part would cause the death or such bodily injury to the deceased, which was sufficient in the ordinary course of nature to cause the death of the deceased. Therefore, in our considered opinion, the case cannot be said to be covered under clause (4) of Section 300 of IPC. We are, however, of the considered opinion that the case of the appellant is covered under Section 304 Part II of IPC."

16. In the present case, we have come to the irresistible conclusion that the role of the appellants is clear from the dying declaration and other records. However, the point which has also weighed with this court are that the deceased had survived for around 30 days in the hospital and that his condition worsened after around 5 days and ultimately died of septicemia. In fact he had sustained about 35% burns. In that view of the matter, we are of the opinion that the conviction of the appellants under section 302 of Indian Penal Code is required to be converted to that under section 304(I) of Indian Penal Code and in view of the same appeal is partly allowed.

55. A Division Bench of this Court in the case of **Criminal Appeal No.1944 of 2014, Ram Prakash Alias Pappu Yadav Vs. State of U.P.** decided on 12.11.2021 wherein one of the judges (Justice Dr. K.J. Thaker) was a member had the occasion to consider the legal issue as to whether in case of a death on account of septicemia either the provisions contained under Section 302 IPC or 304(1) of the IPC would apply. This Court mandated that once facts of the death is septicemia that conviction under Section 302 IPC to be converted into conviction under Section 304 (1) IPC.

56. Over all scrutiny of the facts and circumstances coupled with the medical evidence and the opinion of the Medical Officer and considering the numbers of law laid down by the courts of law in the above referred cases, we are considered opinion that in the case at hand the offence would be punishable under Section 304(1) IPC.

57. Upshot from the aforesaid discussion and inescapable position emerges that the death caused by the accused of the victim/deceased was on account of septicemia and further accused had no intention to caused the death of the deceased. The injuries were though sufficient in ordinarily course of nature to have cause death however accused had no intention to do away with deceased. Hence the incident falls under Ex.1 and 4 to Section 300 IPC, while considering the Section 299 IPC offence committed will fall under Section 304(1) IPC.

58. In view of the aforesaid discussion, we are of the view that appeal has to be partly allowed. The conviction of the appellants under Section 302 IPC is converted into conviction under Section 304 (Part-I) IPC and the appellants are sentenced to undergo seven years of incarceration with fine of Rs. 10,000/- and in case of default of payment of fine, the appellants shall further undergo simple imprisonment for 1 year.

59. Accordingly, the appeal is partly **allowed.**

(2022)01ILR A508
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.12.2021

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJAI TYAGI, J.

Criminal Appeal No. 2209 of 2019

Smt. Preeti & Anr. ...Appellants
Versus
State Of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Shiv Sharan Tripathi, Sri Noor Mohammad

Counsel for the Opposite Party: