HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

S.B. Criminal Appeal No. 445/1991

1. Man Singh S/o Samantaram, resident of village Bartai Police Station Kumher District Bharatpur.

2. Mohan Singh S/o Jagan Singh, resident of Binarayan Gate outside Bharatpur.

(at present lodged in District Jail, Bharatpur).

----Appellants

Versus

State of Rajasthan through Public Prosecutor.

----Respondents

For Appellant(s) : Mr. Amit Singh Shekhawat,
Mr. Vipul Jain &
Mr. Sunil Jain

For Respondent(s) : Mr. Atul Sharma, PP

HON'BLE MR. JUSTICE ANOOP KUMAR DHAND

Reserved on : 19/03/2024
Pronounced on : 09/04/2024
Reportable

Judgment

1. Having regard to the sensitivity of the allegations levelled in the matter and the nature of the offence complained of, it is imperative to protect the identity of the prosecutrix. Therefore, she has been denoted as “K” in the incident.

2. Convicted of the offences punishable under Sections 376 and 306 of the Indian Penal Code (IPC), vide judgment dated 25.09.1991 passed by the Sessions Judge, Bharatpur, in Sessions Case No.88/1990, the appellants have preferred this appeal.

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3. Vide impugned judgment dated 25.09.1991, the appellants have been directed to undergo rigorous imprisonment (for short 'R.I.') for a period of 10 years for the offence punishable under Section 376 IPC with a fine of Rs.500/- each, and in default, to further undergo six months additional R.I. They have been also sentenced to undergo 5 years RI for the offence punishable under Section 306 IPC with a fine of Rs.500/- each and in default, to further undergo six months additional R.I.

4. Process of law was set in motion on receipt of First Information Report (for short 'FIR') Ex.P5 at Police Station Kumher, District Bharatpur on 12.09.1989 wherein it was alleged by the complainant PW-4 Aasam that in the intervening night of 8th September and 9th September, 1989, when his daughter "K" (aged 13 years) and son Deshraj (aged 10 years) were sleeping at home, then Man Singh and Mohan Singh came and covered the mouth of his daughter and committed rape on her, while she was unconscious. Thereafter "K" poured kerosene oil on her body and lit fire. His son raised hue and cry, whereupon the neighbours arrived on the spot to rescue her. He was working at Delhi with his wife and two sons. After getting information of this incident he came to village around 7.00 pm on 10.09.1989 and "K" narrated to him the whole incident and on 11.09.1989 she was admitted in the Hospital. Mohan Singh was caught by the villagers where he admitted that he had committed the incident.

5. Upon this report Crime No.244/1989 (Ex.P6) was registered for the offence under Section 376 IPC. During the course of investigation, the victim "K" died on 08.10.1989, hence the offence under Section 306 IPC was added. After usual investigation, the appellants were chargesheeted for the offence under Section 376 and 306 IPC.

6. The learned trial Court framed charges against the appellants for the aforesaid offences and upon denial of charge/guilt by them, trial commenced. During the course of trial as many as 11 witnesses were examined and 22 documents were exhibited by the prosecution. Thereafter, an explanation was sought from the accused appellants under Section 313 Cr.P.C. in which they denied the prosecution allegation and claimed to be innocent. Thereafter, statements of three witnesses were recorded in defence and three documents were exhibited by the appellants. Then, after hearing the learned Public Prosecutor as well as learned defence counsel and upon meticulous appreciation of the evidence, the learned Judge convicted and sentenced the appellants in the manner stated above vide judgment dated 25.09.1991, which is under challenge before this Court in the instant appeal.

7. Learned counsel for the appellants conjointly submitted that the date of alleged incident is the intervening night of 8/9.09.1989 while the FIR was lodged after a delay of more than four days. Counsel submits that the alleged incident of rape as well as burning by fire has occurred on the fateful day i.e. in the intervening night of

8/9.09.1989 and the injured "K" was medically examined by the Doctor on 12.09.1989 wherein the duration of burn injuries was found to be within 48 hours. Counsel submits that with no stretch of imagination it can be proved that the incident has occurred in the intervening night of 8/9.09.1989. Counsel further submits that there is no evidence of sexual assault as the injured has not sustained any injuries on her private parts. Counsel submits that clothes of the injured were sent to Forensic Science Laboratory (for short 'FSL') for analysis, but till conclusion of trial, no report of FSL was received. Hence under these circumstances, there was no evidence on record against the appellants to connect them with the alleged incident. Counsel submits that second statement of the injured (Exhibit-D3) was recorded by a Police Officer – Deen Dayal (DW-3), wherein she has not levelled any allegation whatsoever against the appellants rather she has stated that her clothes caught fire because of falling of the lamp from the window. Counsel submits that under these circumstances, the prosecution has failed to prove the allegations against the appellants beyond reasonable doubt. Counsel submits that evidence has come on the record that there was a money dispute between father of the deceased and the appellants and due to that enmity, the appellants have been falsely booked in this case, but while passing the impugned judgment, the learned trial Judge has failed to appreciate all the above facts and circumstances, as narrated before the learned trial Judge. Counsel submits

that under these circumstances, judgment passed by the trial Court is liable to be quashed and set aside.

8. Per contra, learned Public Prosecutor has vehemently opposed the arguments raised by the counsel for the appellants and submitted that the learned trial Judge has passed the impugned judgment, after due appreciation of evidence available on the record as the prosecution has fully established the guilt of the appellants beyond reasonable doubt by producing cogent and clinching evidence, hence, interference in the impugned judgment is not called for in this appeal and the appeal is liable to be rejected.

9. I have considered the submissions advanced by the learned counsel for the appellants and the learned Public Prosecutor and gone through the judgment.

10. Perusal of the FIR and record indicates that the incident occurred in the intervening night of 8th and 9th September, 1989 and the FIR (Ex.P5) was lodged by the father of the victim i.e. PW-4 Aasam on 12.09.1989 and thereafter statements of the victim "K" were recorded under Section 161 of the Code of Criminal Procedure (for short 'Cr.P.C.') on 12.09.1989 (Ex.P16) wherein she alleged that her parents and two brothers were residing at Delhi and she was residing at home with her brother Deshraj. At the time of incident at about 9-10 AM her brother Deshraj was not at home and Man Singh and Mohan Singh came and covered her mouth with a cloth and committed rape on her. Blood was oozing out from her vagina and her 'petticot' was

stained with blood and semen. After taking bath, she washed her clothes but her condition became critical and she was sleeping and her brother Deshraj was sleeping in another room. Around 8-9 PM both of them came again in drunken condition and closed the doors and again committed rape on her and covered her mouth with cloth, hence, she could not raise her voice. After hearing voice, her brother Deshraj came and then both the accused flew away. Then she poured kerosene and set herself on fire. Hearing her hue and cry, the villagers came and saved her. Her clothes were burnt and part of the clothes remained where the semen spots were sustained.

11. On the next day i.e., on 13.09.1989, again the Parcha Bayan statement (Ex.D3) of the victim "K" were recorded by DW-3 Deed Dayal at General Hospital, Bharatpur wherein she stated that her parents were at Delhi and three days before she was at home with her brother and around 7-8 pm in the night when she tried to put off the 'deepak' (lamp) it fell down on her body due to which her clothes caught fire and her body was burnt. Neither anyone had set her on fire nor she herself set on the fire.

12. The victim "K" was medically examined on 12.09.1989 by PW-1 Dr. Banay Singh and he prepared her Medico Legal Report (for short 'MLR') Ex.P1 and he found the following injuries on her body:-

"1. Burn All most Neck Front	deep burn
2. Burn Chest Upper 1/3	deep burn
3. Rt Breast All most.	deep burn

4. Rt Shoulder with blisters 4cm x 3½cm
5. Lt. Shoulder 5cm x 4cm
6. Lt Arm 6cmx5cm, laterally.
7. Rt Arm M. Blisters 6cm-4cm x 5 cm-4 cm
8. Lt lumber region 4 cm x 3 cm
9. Back upper 1/3
10. Rt & Lt thigh middle 1/3
11. Hairs of scalp Burnt.

Duration of Burn within 48 Hrs.

No mark of Abrasion & Bruise on cheek, breast, thighs & other parts of body.

Genetalia:- No mark of ext. injury seen on the genital parts.

for further opinion gynecologist opinion was taken.

P.V. Finding – Gynecologist's opinion is required.

Age of the victim:-

(i) General Configuration – Body parts nourished and short stachered.

Hairs – Pubic, Auxiliary Hairs present.
Voice – Horsed like Male
Menstruation - Regular
Breast - poorly developed.

Teeth Upper Jaw

8 7 6 5 4 3 2 1 | 1 2 3 4 5 6 7 8

Lower Jaw

Age of the victim is above 17 yrs according to the above findings for further age determination Radiologist's opinion is required.
M/I old scar 2cm x 1 ½ cm Lt. Leg lower 1/3 laterally.
Opinion regarding Rape after gynecologist opinion.
Opinion-

Final opinion for intercourse can be given after Chemical Examiner's report."

13. Thereafter, the victim was examined by the Medial Jurist PW.8 Dr. Ashok Kumar Verma who was posted at Primary Health Centre, Kumher, District Bharatpur and he

prepared the MLR (Ex.P1) on 12.09.1989 with regard to the examination of the private parts of the victim. The report by him reads as under:

> "Examination of Genitalia
> Labia Majora & Minora well developed. No any injury seen on genitalia. No tenderness, Hymen not intact admitting one finger easily, pathological discharge present.
> Slide prepared from vaginal discharge & examined under microscope, spermatozoa not seen. One slide sent for chemical exam. for any evidence of semen.
> M.I. - old scar 2 x 1 ½ cm left leg lower 1/3 laterally.
> Opinion – Final opinion regarding intercourse will be given after chemical examiner report."

14. In his cross-examination, he has stated that the hymen of the victim was not found to be intact. Her hymen was admitting one finger easily and no marks of injuries were found on external and private parts of her body. Slide was prepared from vaginal discharge and examined under microscope but spermatozoa was not seen. Hence her vaginal swab was sent to Forensic Science Laboratory (for short 'FSL') for analysis to get opinion about sexual intercourse.

15. When the statements of PW-1 Dr. Baney Singh were recorded, he admitted in his examination in chief that no semen or other spots were found on the body of the victim and duration of all the injuries were found to be within 48 hours and no injuries were found on her cheeks, breast and thighs and other private parts of the body of the

victim and the opinion of the Gynecologist was sought with regard to rape. In his cross-examination this witness PW-1 Dr. Banay Singh has denied the suggestion that the victim was admitted in hospital on 11th but he has admitted that the duration of the burn injuries was within 48 hours.

16. The Post Mortem Report (for short 'PMR') Ex.P4 was prepared by PW-2 Dr. Ajay Kapoor on 09.10.1989 and he found the hymen of the deceased torn and the cause of death was found to be Septicemia due to burn injuries. He admitted in his cross-examination that the percentage of burn was not mentioned in the PMR but the deceased sustained more than 75% burn injuries. Her neck was burnt but she could have spoken inspite of such burn injuries.

17. The Radiologist (PW-5) Dr. Satish Chand Vyas has conducted ossification test of the victim and he prepared his report Ex.P10 which indicates that the age of the victim was above 14 years and below 16 years.

18. The investigation of the incident was done at the instance of the FIR (Ex.P5) lodged by the father of the victim / deceased on 12.09.1989 who took her to hospital on 12.09.1989. As per the Court statements of this witness (PW-4) Aasam, he was residing at Delhi and a person from his village, gave a letter at their house at Delhi about the offence of rape being committed on his daughter. Then he came to the village Bartai on 10-11.9.1989 date and inquired about the incident from his daughter about the incident and she narrated the entire incident to him wherein she told her father that Mohan Singh and Man Singh have

committed rape on her and she set herself on fire. Then, he took his daughter to Kumher on 12th and lodged the report of incident to the Police. In his cross-examination, he has denied the suggestion that he borrowed Rs.900/- from Mohan Singh and lodged the report to avoid the re-payment to him. He has admitted that he came to his village on 11th at 6.00 pm but he did not take his daughter to Police Station and Hospital for her treatment. He took her to the Hospital next day in the morning and lodged the report Ex.P5. He has denied the suggestion in his cross-examination that his brother Ganeshi, Khajani and his neighbours Sultan, Pali and Hari Singh told him that his daughter caught fire while turning off the lamp. He has admitted that 2-3 years back he gave his field to Man Singh for cultivation and he took Rs.6,000/- from him. He returned the said amount to Man Singh with interest and got his land back.

19. PW-3 Deshraj, brother of the victim is the star witness of the incident. He has stated that he and his sister were sleeping in different rooms and hearing the voice of his sister, he came and saw that both Man Singh and Mohan Singh were there and they ran away and after some time his sister poured kerosene and set herself on fire. Her sister was wearing ‘petticot’ and white spots were there on her clothes. His sister told him that both Man Singh and Mohan Singh have committed rape on her. He has admitted in his cross-examination that Ganeshi and Khajani were his real

uncles and they were in the village but they did not take his sister to Police Station and hospital.

20. This witness is not eye-witness of the incident and he is tale-tell witness of the incident which was narrated to him by his sister "K".

21. PW-6 - Lal Singh is the witness of site plan and seizure of the clothes of the victim but he has not supported the case of prosecution and turned hostile. He has denied the seizure of the clothes of the victim in his presence.

22. PW-9 Heeralal was Assistant Sub Inspector (ASI) posted at Police Station Kumher who got the investigation and recorded the statement (Ex.P16) of the victim. He has admitted in his cross-examination that except recording the statements of the witnesses Deshraj and Aasam, he had not recorded the statements of any other witnesses. He seized the 'petticot' of the victim from the spot.

23. Ex.P8 is the seizure memo of the clothes of the victim prepared on 12.09.1989 by the witness PW-9 Heeralal. It is worthy to mention that spots were marked and the seized 'petticot' was sent to FSL for analysis vide Ex.P15. Thereafter PW-7 Hari Singh has deposited the seized material with FSL, but the Malkhana Incharge was not produced by the prosecution.

24. The FIR (Ex.P5) was lodged by PW-10 Ram Sanehi Lal on 12.09.1989. This witness admits in his cross-examination that after lodging of the FIR, he did not go to spot and hospital and he is not aware about the talks of

compromise going on between the accused and the complainant.

25. PW-11 Murarilal received an information about death of the victim on 08.10.1989 and thereafter he conducted the proceedings under Section 174 Cr.P.C. (Ex.P20) and further conducted the proceedings of PMR of the deceased. In his cross-examination he has admitted that DW-3 Deen Dayal Sharma was posted as Chowki Incharge at Chobuja on 13.09.1989 but he was not aware about any Parcha Bayan of the victim "K" recorded by him.

26. After completion of the prosecution evidence, when the statements of the appellants were recorded under Section 313 Cr.P.C., they have denied their participation in the incident. Both of them have submitted that owing to money dispute with PW-4 Aasam, they have been falsely booked in the case.

27. In defence, three witnesses have been examined by the appellants including DW-1 Banwari Singh and DW-2 Hari who have categorically stated that on the fateful day, after hearing the hue and cry from the house of Aasam, they went at his house and "K" told them that she caught fire from the lamp, when she was trying to put it off and her clothes were burnt. Both of them further stated that there was money dispute between Aasam and the appellants.

28. DW-3 Deen Dayal has stated that on 13.09.1989 he was posted as Incharge at Chobuja checkpost and he recorded the Parcha Bayan (Ex.D3) of the victim "K" wherein she stated that her clothes caught fire when she

was putting off the 'deepak' / lamp. He further stated that whatever was stated by the victim, he recorded in the Parcha Bayan (Ex.D3). Though he admitted in his cross-examination that he has not taken the opinion of the Doctors posted in the Hospital about mental fitness of the victim or about her state to make the statement. He has stated that though a requisition Ex.P22 was sent to Parmanand, ASI to record the Parcha Bayan of the victim but he was not available at the relevant point of time, hence this task was assigned to him telephonically and accordingly the statements were recorded by him.

29. The entire prosecution story centres around the multiple dying declarations of the deceased "K". There are two dying declarations of the deceased i.e. Ex.P16 recorded on 12.09.1989 and Ex.D3 recorded on 13.09.1989. The trial Court has relied on the dying declaration Ex.P16 and disbelieved the second dying declaration Ex.D3 only on the technical ground that it was recorded without taking opinion of the treating Doctor, regarding medical fitness of the injured to make the statement. It is worthy to note here that even, no such opinion of the Doctor was obtained, when the first statement (Ex.P16) was recorded regarding physical/mental state of the victim as to whether she was in a fit state to make such statement. At the time when both these dying declarations were recorded, the certificate was neither taken by the Police Officer from the Doctor, on both the occasions, that the victim/injured was medically fit to give statements, nor these statements were recorded by or

in the presence of any Judicial Magistrate, hence there was violation of the provisions contained under Rule 6.22 of the Rajasthan Police Rules, 1965.

30. In the case of **Munnu Raja V/s State of Madhya Pradesh** reported in **1976 (3) SCC 104,** the Hon'ble Apex Court has specifically ruled out in para No.11 as under:

> "We might, however, mention before we close that the High Court ought not to have placed any reliance on the third dying declaration. Ex. P-2, which is said to have been made by the deceased in the hospital. The investigating officer who recorded that statement had undoubtedly taken the precaution of keeping a doctor present and it appears that some of the friends and relations of the deceased were also present at the time when the statement was recorded. But, if the investigating officer thought that Bahadur Singh was in a precarious condition, he ought to have requisitioned the services of a Magistrate for recording the dying declaration. Investigating officers are naturally interested in the success of the investigation and the practice of the investigating officer himself recording a dying declaration during the course of investigation ought not to be encouraged. We have therefore excluded from our consideration the dying declaration, Ex. P-2, recorded in the hospital."

31. The aforesaid view was followed by the Division Bench of this Court in the case of **Bashir Shah vs. State of Rajasthan** reported in **1994 SCC OnLine (Raj) 173** and it was ruled out, in para 25 and 26 as under:

"25. The aforesaid observations of the Hon'ble Supreme Court are the ratio of the aforesaid decision, which is binding to all courts in India as contemplated under Article 141 of the Constitution of India. In the present case, although in the aforesaid case, the Supreme Court held that the investigating officers are naturally interested in the success of investigation and the practice of the investigating officer himself recording a dying declaration during the course of investigation, are not to be encouraged but the learned Addl. Sessions Judge recorded a finding of guilt against the present appellants holding in his judgment that PW-11 Manikant Head-constable is a policeman and he should not be believed to have any grudge against the present appellants, therefore, he is an independent witness and his testimony should be treated as of an independent witness without any bias and ill-will. In fact, the judgment of the learned Addl. Sessions Judge recording conviction and sentence, which is being impugned before us, if allowed to stand, it will encourage recording of dying declaration by the investigating officers. From the judgment cited before us of our own High Court, we found as a matter of fact, that invariably the investigating officers had, recorded a dying declaration, upon which, the judgment of the learned Sessions Judges were passed and after challenged before this Court, all such dying declarations were put to strict scrutiny of this Court and after analytical discussion, almost the conviction solely based on the dying declaration recorded by the investigating officer were set aside except in two cases. There are catena of judgments of this Court reported and unreported, where the veracity of such dying declaration recorded by the investigating officer, are brought to the notice of this Court in order to check such practice of recording the dying declaration by the

investigating officer against the mandatory provisions as contemplated under Rule 6.22 of Chapter VI of the Rajasthan Police Rules, 1965 (for short 'the Rules of 1965') we are formulating the test of reliability, which will guide the investigating officers and subordinate courts to take care of such kind of dispute, which are often raised regarding dying declaration recorded by the investigating officers as to when and how the dying declaration can be made the sole basis of conviction and sentence without corrobora-tion and when and how it should be recorded either by a Magistrate or by a doctor or by an investigating officer. In our humble opinion, the following should be test of reliability of the dying declaration by courts of law:

A. Ordinarily, whenever an injured is in a precarious condition, the investigating officer should requisition the services of a Magistrate for recording the dying declaration. In fact, the investigating officers are naturally interested in the success of investigation and practice of the investigating officer himself recording a dying declaration during the course of investigation ought not to be encouraged.
AIR 1976 SC 2199 : (1976 Cri LJ 1718) : (1976) 3 SCC 104.
B. There is neither rule of law nor a prudence that the dying declaration cannot be acted upon without corroboration.
AIR 1976 SC 2199 : (1976 Cri LJ 1718) : (1976) 3 SCC 104.
C. If the court is satisfied that the dying declaration is true and voluntary it can base conviction on it without corroboration.
(V S Mour v. State of Maharashtra, 1978 (1) SCC 622 : AIR 1978 SC 519 : 1978 Cri LJ 644).

D. For this purpose, the court has to apply strictest scrutiny and has to be on guard to ensure that the declaration is not the result of tutoring, prompting or imagination and that the deceased had opportunity to observe and identify the assailants and was in fit state of mind to make declaration. AIR 1976 SC 2194 (sic).

E. Where dying declaration is suspicious, it should not be acted upon without corroborative evidence.

1974 (4) SCC 264 : AIR 1974 SC 332 : 1974 Cri LJ 361.

F. In a criminal case, muchless a murder case, the investigation should be conducted in such a manner that there is no room for entertaining a doubt about a fair investigation. The fair investigation is a fundamental principle which may enhance the reliability of a dying declaration and may reduce its reliability if court is not satisfied about its fairness.

G. Suspicion about truthfulness should never be substituted as evidence in case of dying declaration keeping in view the fact that the statement of the deceased made in the precarious condition of his health, is made in the absence of the accused-appellants, who had no opportunity of testing the veracity of the statement called in legal terminology as "dying declaration by cross-examination".

H. While making the dying declaration, the sole basis of conviction and sentence by the courts of law, it must be kept in view that the prosecution story may not only be true but it must be true and between may be true and must be true, there is a large gap, which is to be travelled by the prosecution agency by adducing unimpeachable and reliable evidence.

I. The Rajasthan Police Rules, 1965 are quite elaborate in laying down the procedure for recording the FIR and consequent investigation. Under these Rules, Chapter V of the Rules of 1965 prescribes for recording of the FIR. Chapter VI deals with investigation. Chapter VII deals with arrest, escape and custody. Chapter VIII deals with prosecution and court duties. Similarly, in Chapter VI of the Rules of 1965, a complete procedure is given as to how the dying declaration is to be recorded. The relevant Rules regarding dying declaration find place in Chapter VI of the Rules of 1965, which are being reproduced below:

> "Rule 6.22 Dying Declaration :
> (1) A dying declaration shall, whenever possible be recorded by a Magistrate.
> (2) The person making the declaration shall, if possible be examined by a medical officer with a view to ascertaining that he is sufficiently in possession of his reason to make a lucid statement.
> (3) If no Magistrate can be obtained the declaration shall, when a Gazetted Police Officer is not present, be recorded in the presence of two or more reliable witnesses unconnected with the police department and with the parties concerned in the case.
> (4) If no such witnesses can be obtained without risk of the injured-person dying before his statement can be recorded, it shall be recorded in the presence of two or more police officers.
> (5) A dying declaration made to police officer should, under Section 162, Code of Criminal Procedure, be signed by the person making it."

26. We have given our anxious thought-full consideration to the aforesaid Rules of 1965 and we are fully satisfied that these Rules

> are self-contained procedure, which is to be followed by all investigating officers while recording the dying declaration. In our humble opinion, these Rules are just, fair and reasonable,'therefore, its strict compliance in letter and spirit must be ensured wherever the dying declaration is taken to be sole basis of conviction and sentence."

32. It is settled position of law that whenever there are multiple dying declarations, then each dying declaration has to be considered independently based on its own merits, as to its evidentiary value and one cannot be rejected because of certain variation in the other. The Court has to consider each of them in correct perspective and satisfy itself which one of them reflects the true state of affairs. Each dying declaration has to be separately assessed and evaluated on its own merits.

33. The Hon'ble Supreme Court in **Bhadragiri Venkata Ravi vs Public Prosecutor High Court of Andhra Pradesh** reported in **2013 (14) SCC 145,** while dealing with a case where there were three dying declarations and each one was giving a different version of prosecution story, held that conviction of the appellants was unsafe on such evidence. It was held in para 22 to 24 as under:

> "22. It is a settled legal proposition that in case there are apparent discrepancies in two dying declarations, it would be unsafe to convict the accused. In such a fact-situation, the accused gets the benefit of doubt. (Vide: Sanjay v. State of Maharashtra, (2007) 9 SCC

148; and Heeralal v. State of Madhya Pradesh, (2009) 12 SCC 671).

23. In case of plural/multiple dying declarations, the court has to scrutinise the evidence cautiously and must find out whether there is consistency particularly in material particulars therein. In case there are inter-se discrepancies in the depositions of the witnesses given in support of one of the dying declarations, it would not be safe to rely upon the same. In fact it is not the plurality of the dying declarations but the reliability thereof that adds weigh to the prosecution case. If the dying declaration is found to be voluntary, reliable and made in a fit mental condition, it can be relied upon without any corroboration. But the statements should be consistent throughout.

24. In case of inconsistencies, the court has to examine the nature of the same, i.e. whether they are material or not and while scrutinising the contents of various dying declarations, the court has to examine the same in the light of the various surrounding facts and circumstances. In case of dying declaration, as the accused does not have right to cross-examine the maker and not able to elicit the truth as happens in the case of other witnesses, it would not be safe to rely if the dying declaration does not inspire full confidence of the court about its correctness, as it may be result of tutoring, prompting or product of imagination. The court has to be satisfied that the maker was in a fit state of mind and had a clear opportunity to observe and identify the assailant (s).

(Vide: Smt. Kamla v. State of Punjab, AIR 1993 SC 374; Kishan Lal v. State of Rajasthan, AIR 1999 SC 3062; Lella Srinivasa Rao v. State of A.P., AIR 2004 SC 1720; Amol Singh v. State of Madhya Pradesh, (2008) 5 SCC 468; State of Andhra Pradesh v. P. Khaja Hussain, (2009) 15 SCC 120; and Sharda v. State of Rajasthan, AIR 2010 SC 408).”

34. No doubt, the Police statement (Ex.P16) of the victim was recorded on 12.09.1989 wherein the victim has alleged that the appellants committed the offence of rape twice on her in the intervening night of 8th-9th of September, 1989 and then she poured kerosene on her body and set herself on fire. This fact is not in dispute that on the very next day, her second Parcha Bayan (Ex.D3) was recorded wherein she has not levelled any allegation against anyone and has specifically stated that it was an accidental fire and she caught the fire when she was putting off the 'deepak' / lamp and her clothes caught fire. Both these dying declarations are contrary to each other.

35. As per the case of prosecution, the incident of rape and fire occurred around 9.00 PM in the intervening night of 8th and 9th September, 1989 when the prosecutrix "K" was all alone at her house and her brother PW-3 Desh Raj was sleeping in the next room. The father of the prosecutrix (PW-4) Aasam got the information of the incident through a letter sent by some villager of his village on 10.09.1989. Thereafter, he lodged FIR (Ex.P6) on 12.09.1989 at 8.45 am. As per the FIR, he came to village on 10th September and his daughter narrated to him the entire incident on 10th September itself, still he kept mum for two good days and he did not bother to take his daughter to hospital for treatment and he did not lodge FIR for two days.

36. It is worthy to mention here that as per the statements of the medical jurist PW-2 Dr. Ajay Kapoor, the

deceased sustained more than 75% burn injuries. Even in such condition of the injured she was not taken to hospital for treatment by her father. The prosecution has failed to give any reasonable explanation for not admitting the injured in hospital from 09.09.1989 to 12.09.1989.

37. The record indicates that the injured "K" was medically examined on 12.09.1989 at about 8.00 PM i.e. after four days of the incident, at the Primary Health Centre, Kumher. The Medical Officer (PW-1) Dr. Banay Singh found 11 burn injuries on the body of the injured and the duration of these injuries was within 48 hours. No mark of abrasion and bruise on cheek, breast, thighs and other parts of the body was found on her body.

38. It is worthy to note here that if 48 hours of duration of the injuries were to be counted from 12.09.1989 8.00 PM, then the injured might have sustained these burn injuries on 10.09.1989 while the alleged incident has occurred in the intervening night of 8th and 9th of September, 1989. It is worthwhile to mention here that as per the case of prosecution, the incident occurred around 9 PM in the intervening night of 8th and 9th September, 1989, meaning thereby if the incident occurred on 8th September, 1989 around 9 PM in the night, then how the duration of burn injuries was found to be within 48 hours on 12.09.1989 by the Doctor when the injured was examined at about 8 PM in the night. A man / woman can speak lie but circumstances never speak lie. In the instant case, it remains unexplained by the prosecution that when duration

of burn injuries was within 48 hours at 9 PM on 12.09.1989, then how the injured "K" sustained the burn injuries at 9 PM on 08.09.1989. This inconsistency is difficult to reconcile. These circumstances indicate the hollowness in the prosecution story. Such situation creates serious doubts on the story of the prosecution.

39. When the Gynecologist PW-8 Dr. Ashok Kumar Verma examined the injured on 12.09.1989, her hymen was found to be old torn and the same was not found to be intact. No opinion with regard to sexual assault was given. The final opinion regarding intercourse was kept reserved till receipt of Chemical Examination Report.

40. It is worthy to note here that no Chemical Examination Report is available on the record to prove whether any sexual intercourse happened or not. The entire record indicates that the Investigating Officer has sent the clothes of the injured and vaginal swab to the FSL. This fact has been mentioned in the MLR (Ex.P1) of the injured that one slide for Chemical Examination for any evidence of semen was sent, but no FSL report is available on the record. Hence, under these circumstances the linking and corroborative evidence regarding sexual intercourse is not available on the record to prove the prosecution case against the appellants beyond reasonable doubt.

41. The father of the injured i.e. PW-4 Aasam received the information on 10.09.1989 by way of letter delivered by a villager to him at Delhi. But neither that letter has been brought on record nor that villager has been

produced in the witness box. The father of the injured is not aware about the name of the said villager. Inspite of receiving the information of rape and fire on 10.09.1989, PW-4 Aasam kept mum for two days and he did not bother to take his injured burnt raped daughter to hospital for treatment and lodge report of such heinous incident to Police. Not taking the injured / burnt / raped daughter to Hospital and not lodging report to the Police for more than two days creates serious doubts on the correctness of the story of the prosecution.

42. As per the FIR (Ex.P6) the prosecutrix was admitted in Hospital on 11.09.1989 while no such Admission / Discharge ticket is available on the record to prove that the injured "K" was admitted on 11.09.1989 while the MLR (Ex.P1) indicates that it was prepared on 12.09.1989 at 8.00 PM and as per PMR Ex.P4, she was admitted in Hospital on 13.09.1989 at 7.25 pm.

43. The FIR (Ex.P6) further indicates that the appellant Mohan Singh was caught by the villagers on the same day immediately after the incident. Had it been so, why any report of the incident was not given to Police and why the appellant Mohan Singh was not handed over to the Police. There is no such evidence available on the record. While the record indicates that the appellants were arrested on 15.11.1989 vide Ex.P17 and P18 i.e. after two months of the incident. Hence, under these circumstances also, the story of prosecution appears to be doubtful.

44. Considering the evidence in the present case it is found that prosecution case is not natural, consistent and probable to sustain the conviction of the appellants of the alleged offence, said to have been committed by them. The trial Court should have appreciated the evidence on the record with regard to the delay in lodging of the FIR, delay in admitting the injured to Hospital, the duration of the fire injuries sustained by the injured, absence of the corroborative evidence of FSL report with regard to sexual intercourse with the prosecutrix. Non production of the villagers who caught the accused Mohan Singh on the spot and informed the complainant PW-4 Aasam about the incident, and the unnatural conduct of the father of the victim, in keeping his injured / burnt / raped daughter at home for considerable time and not lodging the matter with Police till 12.09.1989 has created reasonable doubt on the whole of the prosecution case. The story created by the prosecution does not inspire any confidence.

45. The next question to be considered is whether the offence under Section 306 is attracted against the appellants. The whole prosecution case is that the appellants committed rape on “K”, consequent to which she committed suicide and therefore, whether the appellants are guilty of the offence under Section 306 IPC. As this Court has held that the prosecution has miserably fails to establish on the record about the offence of rape being committed by the appellants, therefore, conviction on the appellants under Section 306 IPC will also go.

46. Dealing with the similar issue whether any accused can be convicted for the offence under Section 306 IPC when the prosecution has failed to prove the charge against such accused under Section 376 IPC, the Delhi High Court has held in para 5 of the judgment in the case of **Ram Swaroop vs. State of Delhi** reported in **2017 SCC OnLine Del 8600** which reads as under:

> "5. The two issues raised in the present appeal i.e. whether the commission of offence of rape would amount to abetment of suicide and whether the dying declaration of the deceased was admissible in evidence and sufficient to base the conviction for offence punishable under Section 376 IPC came up for consideration before this Court in Sandy @ Ved Prakash (supra) wherein this Court on the first issue held: -
>
> "31. Thus, we first proceed to consider whether the offenders (whoever committed the rape) could be held guilty for abetting the suicide of the deceased. While discussing this aspect we would be proceeding on the assumption that the deceased told that she was raped by the appellants and due to shame she decided to end her life. We may not be understood to mean that we have returned a finding against the appellants at this stage that they had raped the deceased. We shall be discussing this aspect at the next stage of our decision when we discuss the contours of Section 32(1) of the Evidence Act, 1872 and the evidence brought on record.
> 32. The word "suicide" in itself is no where defined in Indian Penal Code, however its meaning and import is well known and requires no explanation. "Sui" means "self" and "cide" means "killing", thus implying an act of self-killing. In short a person committing

suicide must commit it by himself, irrespective of the means employed by him in achieving his object of killing himself.

33. Suicide by itself is not an offence under either English or Indian criminal law, though at one time it was a felony in England. In England, the former law was of the nature of being a deterrent to people as it provided penalties of two types namely:

> (i) Degradation of corpse of deceased by burying it on the highway with a stake through its chest; (ii) Forfeiture of property of deceased by the State. At present, there is no punishment for suicide under English law.

34. In India, suicide in itself is not an offence for successful offender is beyond the reach of law, however attempt to commit suicide is an offence punishable under Section 309, IPC.

35. The offence of abetment of suicide is made punishable by Section 306, IPC which reads as under:

> "If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable for fine."

36. Section 306 does not define the expression "abet" nor is the expression defined in Chapter II of Code, which deals with general explanations. However, Chapter V of Code makes provisions with respect to abetment. Section 107 in this Chapter defines "abetment" in following terms:

> "A person abets the doing of a thing, who--
>
> First--Instigates any person to do that thing; or Secondly--Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in

order to the doing of that thing; or Thirdly--Intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation 1--A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.

Explanation 2--Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act.

37. As per the prosecution the deceased was raped in the fields. She returned home and decided to take poison as she thought that the humiliation heaped upon her has blackened her face and she had no face to show in the society. With this feeling of dejection, despair, humiliation and frustration she fed a sulphas tablet to her infant daughter and consumed sulphas tablets herself. The rapists have not been alleged to have conspired with the deceased for the doing of the act of consuming sulphas. The rapists have not been alleged of doing any act in conspiracy or any illegal omission. The rapists have not been alleged to aid, much less intentionally aid the deceased in consuming sulphas. Thus, the second and the third limb of Section 107, IPC are just not attracted. The question would be whether the first limb is attracted i.e. whether can it be said that the rapists instigated the deceased by their act of rape to consume sulphas.

38. The Madhya Pradesh High Court and the Andhra Pradesh High Court have taken diametrically opposite views. In the decisions Mohd. Hafeez v. State of M.P., MANU/MP/ 0238/ 2009 and Kokkiligadda Veeraswamy v. State of A.P., 2005 Cri. L.J. 869 it has been held that an accused by raping a girl

instigates her to commit suicide if there is a proximate and live link between the offending act of the accused and the commission of suicide by the girl. Two Judges of the same Court have taken the opposite view in the decisions Battula Konadulu v. State of A.P., MANU/AP/0833/2006 and Deepak v. State of M.P., 1994 Cri. L.J. 767 where the aforesaid question was answered in negative.

39. What is the meaning of the word "instigation" occurring in Section 107 of the IPC?

40. The answer to the aforesaid question can be found in the following observations of Supreme Court in the decision Chitresh Kumar Chopra v. State, (2009) 11 SCALE 24:

> "Thus, to constitute "instigation", a person who instigates another has to provoke, incite, urge or encourage doing of an act by the other by "goading" or "urging forward". The dictionary meaning of the word "goad" is "a thing that stimulates someone into action: provoke to action or reaction" (See Concise Oxford English Dictionary); "to keep irritating or annoying somebody until he reacts" (See: Oxford Advanced Learner's Dictionary--7th Edition). Similarly, "urge" means to advise or try hard to persuade somebody to do something or to make a person to move more quickly and or in a particular direction, especially by pushing or forcing such person. Therefore, a person who instigates another has to "goad" or "urge forward" the latter with intention to provoke, incite or encourage the doing of an act by the latter. As observed in Ramesh Kumar's case (supra), where the accused by his acts or by a continued course of conduct creates such circumstances that the deceased was left with no other option except to commit suicide an "instigation" may be inferred. In other words, in order to

prove that the accused abetted commission of suicide by a person, it has to be established that: (i) the accused kept on irritating or annoying the deceased by words, deeds or wilful omission or conduct which may even be a wilful silence until the deceased reacted or pushed or forced the deceased by his deeds, words or wilful omission or conduct to make the deceased move forward more quickly in a forward direction; and (ii) that the accused had the intention to provoke, urge or encourage the deceased to commit suicide while acting in the manner noted above. Undoubtedly, presence of mens rea is the necessary concomitant of instigation.

In the background of this legal position, we may advert to the case at hand. The question as to what is the cause of a suicide has no easy answers because suicidal ideation and behaviours in human beings are complex and multi-faceted. Different individuals in the same situation react and behave differently because of the personal meaning they add to each event, thus accounting for individual vulnerability to suicide. Each individual's suicidability pattern depends on his inner subjective experience of mental pain, fear and loss of self- respect. Each of these factors are crucial and exacerbating contributor to an individual's vulnerability to end his own life, which may either be an attempt for self-protection or an escapism from intolerable self. (Emphasis Supplied)"

41. In the decision Gangula Mohan Ready v. State of A.P., 2010 (1) SCALE 1, the Supreme Court observed as under:

"Abetment involves a mental process of instigating a person or

> intentionally aiding a person in doing of a thing. Without a positive act on the part of the accused to instigate or aid in committing suicide, conviction cannot be sustained.
> The intention of the Legislature and the ratio of the cases decided by this Court is clear that in order to convict a person under Section 306, IPC there has to be a clear mens rea to commit the offence. It also requires an active act or direct act which led the deceased to commit suicide seeing no option and this act must have been intended to push the deceased into such a position that he committed suicide."
> (Emphasis Supplied)

42. A similar view was taken by Supreme Court in the decision Sanju @ Sanjay Singh Senger v. State of M.P., (2002) 5 SCC 371, wherein it was observed as under:

> "The word "instigate" denotes incitement or urging to do some drastic or unadvisable action or to stimulate or to incite. Presence of mens rea, therefore, is the necessary concomitant of instigation." (Emphasis Supplied)

43. The ratio of the aforenoted decisions is that in order to convict an accused for an offence punishable under Section 306, IPC, in respect of the act of instigation, it has to be proved by the prosecution that the accused had the "intention" to instigate the deceased to commit suicide.

44. In the instant case, can it be said that the rapists had the "intention" to instigate the deceased to commit suicide?

45. The answer to the aforesaid question is an emphatic "no" for the reason there is no material on the record wherefrom it could be inferred that the rapists raped the deceased with an intention to instigate her to commit suicide.

46. Thus, we hold that in the facts of the instant case, the rapists of the accused

cannot be held liable for the offence of having abetted the suicide of the deceased."

47. Analyzing the facts in the present case on the touchstone of the law laid down by the Hon'ble Apex Court, Delhi High Court and by this Court in the judgments cited above, it can be safely held that there was no abetment / instigation by the appellants.

48. In view of the evidence led by the prosecution and the evidence of the defence, the conviction of the appellants for the offences punishable under Sections 376 and 306 IPC cannot be sustained and the same is liable to be quashed and set aside.

49. In view of the above discussions, the present appeal deserves to be succeeded and is hereby allowed. Impugned judgment dated 25.09.1991, passed by the trial Court is set aside and the appellants are acquitted of both the offences punishable under Section 376 and 306 IPC.

50. The bail bonds and surety bonds of the appellants are discharged.

51. Record of the trial Court be returned back.

52. The copy of this judgment be sent to the Superintendent, Central Jail, Bharatpur for updation of the jail record.

53. Keeping in view the provisions of Section 437-A Cr.P.C, the appellants are directed to furnish personal bond in the sum of Rs.50,000/- each and one surety bond each in the like amount before the Registrar (Judicial) of this Court,

which shall be effective for a period of six months, undertaking that in the event of Special Leave Petition being filed against this judgment or on grant of leave, they on receipt of the notice thereof, shall appear before the Hon'ble Supreme Court.

(ANOOP KUMAR DHAND),J

KuD/3