

(2014) 03 CHH CK 0045
In the Chhattisgarh High Court
Case No : Criminal Appeal No. 431 of 1997

Sheikh Mohammad (In Jail)

APPELLANT

Vs

State of Madhya Pradesh (Now Chhattisgarh)

RESPONDENT

Date of Decision : 06-03-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161 175 313 437A
Penal Code, 1860 (IPC) — Section 302 307 449 452

Citation : (2014) 3 CGLJ 1 : (2014) 3 MPHT 17

Hon'ble Judges : Yatindra Singh, C.J.; Prashant Kumar Mishra, J

Bench : Division Bench

Advocate : K.A. Ansari, Mr. A.K. Shukla and Mr. Devesh Kela, for the Appellant;
Ravindra Agrawal, Panel Lawyer, for the Respondent

Final Decision : Allowed

Judgement

1. Hindus and Muslims have lived in our country for centuries but our relationship is tricky and gets trickier if there is a love affair between a girl and a boy of the two communities. This is evident in this appeal, where the main question is, Whether the Hindu girl Karuna (the Deceased) committed suicide because of the failure of the approval of her love with the Muslim boy Sheikh Mohammad (the Appellant); or

The Appellant burned her because she had gone to another village Chirmiri to tie rakhi on her brother.

The aforesaid question arises in this criminal appeal against the order of conviction and sentence dated 29.01.1997 passed by the Additional Sessions Judge, Surajpur, District Surguja (the ASJ) in Sessions Trial No. 431 of 1993, ? Convicting the Appellant u/s 302 Indian Penal Code (IPC); and

? Awarding life imprisonment with fine of Rs. 3000/- and in default of payment fine, further rigorous imprisonment for three months.

THE FACTS

2. The Deceased was seen ablaze in an incident at 21:45 hours on 03.08.1993.
3. Dr. Nirmal Kumar Jain, a doctor (PW-15) (the Informant) was called. He recorded the oral dying declaration (Ex. P-10) of the Deceased and sent a report to the Town Inspector, Police Station Surajpur, requesting to draw appropriate proceedings.
4. On the basis of the aforesaid report, a first information report (the FIR) (Ex. P-14) was recorded on 04.08.1993 at about 00:30 hours. It was registered as crime number 163/1993 u/s 307 and 452 IPC at police station Surajpur, District Surguja.
5. The FIR (Ex. P-14) records the fact that it was being registered on the basis of the report received from the Informant (PW-15) and then reproduces the report sent by the Informant.
6. The allegations in the report of the Informant (Ex. P-10) that were reproduced in the FIR (Ex. P-14) are as follows:
 - (a) The Informant (PW-15) had treated the Deceased in the burned condition at 10:15 hours on 03.08.1993;
 - (b) The Deceased informed the Informant (PW-15) that:

The Appellant had entered the house and said that he will not leave her alive, because she had gone to Chirmiri to tie rakhi on her brother.

Then, the Appellant beat her and set her ablaze by cigarette after pouring kerosene oil;
 - (c) The report be lodged and appropriate proceedings be taken.
7. The Deceased was first taken to Primary Health Centre, Devnagar (the PHC). She was given first aid and was referred to the District Hospital, Ambikapur (the Hospital). She expired at 03:00 hours on 04.08.1993 in the Hospital.
8. The police submitted the police report alongwith charge-sheet against the Appellant u/s 452 and 302 IPC.
9. The case was committed to the Sessions Court for trial and was registered as Sessions Trial No. 431 of 1993.
10. The ASJ framed charge on 15.12.1993 charging the Appellant under sections 449 and 302 of IPC.
11. Among others, the prosecution has filed the following documents in support of its case. In these documents exhibit number is written by pen. This number is circled by blue pencil and another number is written. In the details mentioned below, the number written by pen is mentioned. The documents are as follows:

Notice u/s 175 Cr.P.C. (Ex. P-1);

Inquest (Ex. P-2);

Memorandum of seizure of kerosene lamp, glass bottle, bidi, match box etc. (Ex. P-3);

Memorandum of seizure of clothes and body parts of the Deceased (Ex. P-4);

Intimation by the Dr. CK Rai (PW-8) to the Police that a female in 100% burnt condition was brought at 00:20 hours on 04.08.1993 and was referred to district hospital, Ambikapur at 00:40 hours (Ex. P-5);

Spot map prepared by the Patwari (PW-9) (Ex. P-6);

Post-mortem report (Ex. P-7);

Report of the Doctor (PW-8) regarding death of Deceased (Ex. P-8);

Morgue intimation (P-9);

Report sent by the Doctor (PW-15) to the Town Inspector (Ex. P-10);

Dying declaration of the Deceased (Ex. P-11);

MLC report of the Deceased (Ex. P-12);

MLC report of Smt. Dhanraso (PW-1) (Ex. P-13);

First Information Report (Ex. P-14);

Memorandum of statement of Rajendra Prasad (PW-16) (Ex. P-15);

12. In order to prove its case, the prosecution examined the following witnesses:

(a) Dhanraso Bai (PW-1): She is the mother of the Deceased. She stated that:

When she was sleeping in the other room, she heard the Deceased shouting that the Appellant had burned her.

She went to the room where the Deceased was burning, she saw that the Appellant was running away.

She tried to catch hold of him, but he pushed her because of which she sustained some injuries;

(b) Nanhak Ram (PW-2): He stated that the Deceased was her granddaughter in relation and he was woken up by the mother of the Deceased, who informed him that the Appellant had run away after setting the Deceased on fire;

(c) Manoj Kumar (PW-3): He is the witness of notice u/s 175 Cr.P.C. (Ex. P-1) and inquest (Ex. P-2);

(d) Anita Kujur (PW-4): She works as Lady Health Visitor (the LHV). She stated that:

She had gone to the house of the Deceased on being called by the doctor.

The Deceased said that the Appellant had burned her.

The Deceased was first taken to the Surajpur hospital and thereafter, to the Ambikapur hospital and she died in the hospital;

(e) Vishwanath Prasad (PW-5): He is the Sarpanch of the village. He stated that he had gone to the house of the Deceased on being called by Goverdhan and was informed by the Deceased that she was burnt by the Appellant.

(f) Brijmohan (PW-6): He is the witness of memorandum of seizure of clothes and body parts of the Deceased (Ex. P-4);

(g) Gayatri (PW-7): She is the younger sister of the Deceased. She stated that she woke up after hearing the cries of the Deceased, who was shouting that she was burnt by the Appellant;

(h) Dr. CK Rai (PW-8): She is a doctor in the Community Health Centre, Surajpur. She stated that:

The Deceased was brought at around about 00:20 hours on 04.08.1993 and she had 100% burns.

Her condition was very serious and she was referred to the District Hospital, Ambikapur.

She also lodged a report (Ex. P-5);

(i) Vanshdhari Singh (PW-9): He is the Patwari who prepared the spot map;

(j) Dr. Ajay Kumar Jaiswal (PW-10): He was posted as Assistant Surgeon in the District Hospital, Ambikapur. He conducted the post mortem of the Deceased;

(k) I Kespotta (PW-11): He is the Assistant Sub Inspector, who recorded the morgue intimation (Ex. P-9) on the basis of the information given by the Informant;

(l) Kanti Prasad (PW-12): He is the Head-constable, who received the clothes and Viscera of the Deceased (Ex. P-4);

(m) Raj Kumar Kashyap (PW-13): He is the Constable, who carried the dead body for post-mortem;

(n) BS Khuntiya (PW-14): He is the Sub Inspector who had conducted the inquest (Ex. P-2) and had recorded the statements of some of the witnesses u/s 161 Cr.P.C. (the first IO);

(o) Dr. Nirmal Kumar Jain (PW-15) (the Informant): He is the doctor who reached the spot first and had also sent the MLC report (Ex. P-10) to the police station. The FIR (Ex. P-14) was recorded on the basis of the report sent by him. He also recorded the dying declaration (Ex. P-11);

(p) Rajendra Prasad Gupta (PW-16): He also reached the spot and had taken the

Deceased on his jeep to the PHC and thereafter to the Hospital;

(q) Ramesh Kumar Singh Parihar (PW-17): He is the Station House Officer and had recorded the FIR (Ex. P-14);

(r) GL Shrivastava (PW-18): He is the Assistant Sub Inspector. He prepared the memorandum of seizure of clothes and body parts of the Deceased (Ex. P-3). He also recorded statement of some of the witnesses u/s 161 Cr.P.C. (the second IO). Statement u/s. 313 Cr.P.C.

13. The statement of the Appellant u/s 313 Cr.P.C. was recorded on 29.12.1995. The Appellant expressed his ignorance to most of the questions and denied some of them. He denied that Dhanraso Bai (PW-1), the mother of the Deceased, had caught hold of him or he pushed her because of which she fell down and received injuries.

14. The Appellant also stated that:

No person other than Rajendra Prasad Gupta (PW-16) had come over;

The family members of the Deceased used to humiliate and misbehave with the Deceased by calling her "miyain - miyain" as they doubted about illicit relationship between the Deceased and the Appellant;

The Deceased had gone to Chirmiri to tie rakhi on her brother, but he had refused to get rakhi tied by her and humiliated her.

When the Deceased came back to the house, her parents and other family members humiliated and misbehaved with her. It is because of humiliation and ill-treatment of the family members and others that the Deceased burned herself;

When the Deceased was ablaze, the mother of the Deceased started shouting "run-run the Deceased is burning". It is on hearing this that the Appellant reached on the spot. Thereafter, Rajendra Prasad Gupta (PW-16) also reached there;

The Appellant asked for the blanket to cover the Deceased and had tried to extinguish the fire. The mother of the Deceased brought a quilt (Godra) by which he covered the Deceased. When he was trying to extinguish the fire, his hands and legs were also burned;

He has been falsely implicated by the family members of the Deceased in order to save themselves.

15. The Appellant got the statements of Dhanraso Bai (PW-1), Anita Kujur (PW-4) and Gayatri Baghel (PW-7) u/s 161 Cr.P.C. exhibited as Exhibits D-1, D-2 & D-3, and D-3A respectively but did not examine any witness.

16. After considering the evidence on record, the ASJ convicted the Appellant on 29.01.1997 and awarded punishment as detailed in the opening paragraph of the

judgment. Hence, the present appeal by the Appellant.

POINTS FOR DETERMINATION

17. We have heard counsel for the parties. The following points arise for determination in this case:

- (i) Whether the Appellant and the Deceased were having an affair;
- (ii) Whether there is any motive for the crime;
- (iii) Whether reliance can be placed upon the dying declaration of the Deceased;
- (iv) Whether there is any corroboration of the dying declaration;
- (v) Whether the Appellant is guilty.

1ST POINT: APPELLANT & DECEASED--HAVING AFFAIR They Had Opportunity

18. Dhanraso Bai (mother of the Deceased) (PW-1), Nanhak Ram (PW-2), Vishwanath Prasad (PW-5), Gayatri (younger sister of the Deceased) (PW-7) and Rajendra Prasad Gupta (PW-16) have stated that the Appellant and the Deceased were studying together in a college at Surajpur.

19. Dhanraso Bai (PW-1) is mother of the Deceased; Gayatri (PW-7) is the younger sister of the Deceased; Rajendra Prasad Gupta (PW-16) had taken the Deceased on his Jeep first to the PHC and then to the Hospital--they stated that the Appellant and Deceased used to study in the same class in the college at Surajpur.

20. Dhanraso Bai (PW-1) is the mother of the Deceased. She stated that the Appellant was their neighbour.

21. Dharaso Bai (PW-1) and Gayatri (PW-7) have denied that there was any love affair between the Appellant and the Deceased. Nanhak Ram (PW-2) and Vishwanath Prasad (PW-5) have expressed their ignorance about any love affair between the Appellant and the Deceased. However, Rajendra Prasad Gupta (PW-16) stated that:

Surajpur is seven kilometers from Kaluwa (Krishnapur), which is three kilometers from Devnagar;

There are direct buses from Devnagar to Surajpur and one can go to Surajpur by changing a bus at Kaluwa;

The Appellant and the Deceased used to go to the college by bus and sometimes they used to go on one cycle;

There was illicit relationship between the Appellant and the Deceased.

22. It is clear from the evidence on record that the Appellant and the Deceased had ample time to meet and spend time together.

Panchayat Because of Love Affair

23. A suggestion was put to Dhanraso Bai (PW-1) and Nanhak Ram (PW-2) that there was a panchayat of Hindus and Muslims because of the love affair between the Deceased and the Appellant.

In her cross-examination at one place PW-1 denied the holding of panchayat (paragraph 4) and the other place expressed her ignorance (paragraph 5);

PW-2 stated that he had no knowledge about the said panchayat.

The replies are not definitive and are vague.

24. Rajendra Prasad Gupta (PW-16) has stated that in this regard three panchayats were held and he was also present in one of them. In the said panchayat, it was said that:

The Deceased could not be married because of the scandal of the love affair with the Appellant;

The Appellant's father should get the Appellant married at the earliest, so that the Deceased may also get married.

No Forceful Entry

25. The prosecution case is that the Appellant had made a forceful entry in the house of the Deceased and thereafter set her on fire after pouring kerosene oil. It is for this reason that the ASJ had framed charge u/s 449 as well.

26. The ASJ had framed four points for determination in the case. The fourth point was relating to offence u/s 449 IPC and was as follows:

27. The offence u/s 449 IPC relates to house-trespass in order to commit offence punishable with death. The trial court has acquitted the appellant u/s 449 IPC holding that:

There was an affair between the Appellant and the Deceased;

The Appellant had entered inside the house with the consent of the Deceased;

Thereafter, some dispute arose between the two; and

The Appellant poured kerosene oil on the Deceased and burned her.

28. The State has not filed any appeal against that part of the judgment by which the Appellant was acquitted u/s 449 IPC. The finding that there was an affair between the two is not challenged before us.

29. Considering the entire prosecution case, the evidence on record, and the unchallenged finding of the trial court--we have no reason to doubt that there was a love affair between the Appellant and the Deceased.

2nd POINT: MOTIVE FOR THE CRIME

30. There is difference between the stand taken by the prosecution and the defence as to why the incident occurred. It is the prosecution case that: The Deceased had gone to Chirmiri to tie rakhi and had come back in the morning on 03.08.1993. This is also so stated by Dhanraso Bai (PW-1) and Gayatri (PW-7), the mother and sister of the Deceased.

31. The aforesaid part of the prosecution case is not disputed by the defence and the disputed part is as follows:

The brother refused to get the rakhi tied by the Deceased as she was having an affair with a muslim boy, the Appellant;

The Appellant set the Deceased ablaze for the reason that she had gone to tie rakhi on her brother;

PW-1 has caught hold of the Appellant and she fell down, when the Appellant pushed her;

She received injuries when she fell down.

32. There is an injury on the body of Dhanraso Bai (PW-1) and it is mentioned in the MLC report (Ex. P-13), as simple abrasion (superficial injury) 2 x 3 inches on back of the left forearm.

33. The defence case has been stated u/s 313 Cr.P.C. It is mentioned under sub-heading "Statement u/s. 313 Cr.P.C." under the heading "THE FACTS". The defence case has further come as suggestion to different prosecution witnesses as follows:

The Deceased had also gone to house of the Appellant's in laws at Chirmiri. This infuriated Dhanraso Bai (PW-1) the mother of the Deceased;

There was some altercation between PW-1 and the Deceased. PW-1 received injuries in this altercation and not because the Appellant had pushed her;

It was because of the ill-treatment and insult by the family members that the Deceased committed suicide;

The Appellant came inside the house after he heard the noise that the Deceased was burning. He also received burn injuries, when he tried to extinguish the fire;

He ran away from the place of the incident because there was tension and if he had stayed there, he would have been killed.

34. The injuries on Dhanraso Bai (PW-1) are consistent with both cases.

35. GL Shrivastava (PW-18), the second IO, arrested the Appellant. He stated that at the time of the arrest, the hands and legs of the Appellant were found to be burned. He also send the Appellant to Assistant Surgeon, Community Health Centre, Surajpur for medical check-up.

36. Dr. K.N. Sharma, MD has examined the Appellant on 04.08.1993 at 19:00

hours and had given MLC. The aforesaid two documents (namely the letter sending the Appellant for examination and the MLC of the Appellant) are not exhibited but are on the record. These documents have been relied upon by the trial court.

37. In the MLC by Dr. K.N. Sharma, it is mentioned that the duration of the injuries was between 12 to 24 hours. It coincide with the time of the incident. The following injuries are mentioned in the MLC:

Burn over little, ring, middle and index finger of right hand;

Blisters present;

Burn restricted to finger only;

Hairs burned;

Burn over right heel. Blister present.

38. The aforesaid documents were the prosecution documents that were in favour of the Appellant. They should have been proved by the prosecution and they should have also explained as to how the Appellant had received the burn injuries.

39. Considering the aforesaid facts and in the circumstances of the case, there is no question of doubting these documents or the injuries of the Appellant.

40. There is difference in the case how the Appellant received the injuries:

According to the prosecution case, the Appellant entered the room and got burn injuries when he was trying to set the Deceased ablaze;

According to the defence case, the Appellant came when he heard the mother of Deceased (PW-1) shouting that the Deceased was burning and received burn injuries, when he was trying to save the Deceased.

41. The burn injuries on the Appellant are also consistent with both the cases.

42. Nonetheless, considering the finding that the Appellant and the Deceased were having a love affair, it seems odd that the Appellant would burn her for the reason that she had gone to Chirmiri to tie rakhi on her brother: tying rakhi on a brother, is neither a matter of objection by a lover, nor can it be.

43. It is admitted case of the prosecution that the Appellant's in-laws live in Chirmiri {paragraph 18 of the cross-examination of Dhanraso Bai (PW-1)}. The defence case is that the mother of the Deceased became angry as to why she had visited in laws place of the Appellant at Chirmiri. This has come as a suggestion to different witnesses. This may be true; there can be objection by the family members of the Deceased as to why she had gone to the Appellant's in-laws house at Chirmiri.

44. The counsel for the State submits that:

The Appellant did not enter the house on hearing the shout given by mother of the Deceased;

The Appellant was already present when the Deceased was set ablaze;

A cigarette was found on the spot (Ex. P-3). It shows that someone else was also in the room alongwith the Deceased and it was the Appellant;

The Deceased was set on fire by the Appellant by the cigarette.

45. It is possible that both versions may not be fully true and the truth lies in between. It is said that truth is stranger than the fiction.

46. The ASJ has held that the Appellant was in the room with consent of the Deceased. It is possible that they were caught by the mother (PW-1) and were humiliated. The Deceased who was already insulted, humiliated, and subjected to ill-treatment by the family members, set fire on herself by the burning cigarette. And the Appellant got injuries in this process or in trying to save her.

47. Nevertheless, irrespective of the version, or the motive for the incident--the most important prosecution evidence is the dying declaration of the Deceased. If it is believed, then the appeal is to be dismissed and conviction is to be upheld. Let us discuss, whether dying declaration should be believed or not.

3rd POINT: DYING DECLARATION--NOT CREDIBLE

48. The oral dying declaration (Ex. P-11) of the Deceased is recorded by the Informant Dr. Nirmal Kumar Jain (PW-15). He is the doctor, who had come to treat the Deceased and is an independent witness. It is also mentioned in the FIR (Ex. P-14).

49. The dying declaration has also been stated by Dhanraso Bai (PW-1), Anita Kujur (PW-4), Vishwanath Prasad (PW-5), Gayatri (PW-7), Raj Kumar Kashya (PW-13) as well as Rajendra Prasad Gupta (PW-16).

50. Dhanraso Bai (PW-1) and Gayatri (PW-7) are the mother and sister of the Deceased. But, Anita Kujur (PW-4) and Raj Kumar Kashyap (PW-13) and Rajendra Prasad Gupta (PW-16) are independent witnesses. They have also stated about the dying declaration though PW-16 has given another version as well in his cross-examination that the Deceased stated on the Jeep that the Appellant did not burn her.

51. Rajendra Prasad Gupta (PW-16) is the cousin of Vishwanath Prasad (PW-5). It was on his jeep that the Deceased was taken to the PHC and thereafter, to the Hospital.

52. The counsel for the Appellant placed reliance on the cross-examination of Rajendra Prasad Gupta (PW-16) and submitted that:

PW-16 has stated that the Deceased had committed suicide and she set fire on herself;

As PW-16 is the prosecution witness, the Appellant cannot be convicted u/s 302 IPC.

53. It is correct that in the cross-examination, Rajendra Prasad Gupta (PW-16) has stated that the Deceased was saying that she had set fire on herself, but in examination-in-chief, PW-16 has stated that the Deceased had stated that the Appellant set fire on her.

54. Rajendra Prasad Gupta (PW-16) was asked in the re-examination by the prosecution as to why he had given contradictory statement, he explained it by saying that in examination-in-chief, he had stated that the Deceased had informed that she was set fire by the Appellant because he was afraid of Ram Narayan who was present in the court room. The trial court has not accepted the said explanation.

55. Considering the facts and circumstances of the case,

It appears that the Deceased might have given dying declaration, at the place of the incident, that the Appellant burned her, but when she was being taken to the hospital on the Jeep, she stated otherwise that she burned herself;

Rajendra Prasad Gupta (PW-16) might be rightly stating in his cross-examination that when the Deceased was being taken on Jeep to the Hospital, she had said that she burned herself;

The dying declaration given at the place of the incident could well be tutored, may be involuntary, and because of prompting and no reliance can be placed on the same.

Our reasons for saying this are as follows.

Reasons for Not Placing Reliance on the Dying Declaration

56. The injuries mentioned in the post-mortem report of the Deceased are as follows:

The body was wearing bluish underwear and salwar, which was burned in some areas. Abdomen distended, face oedematous. Rigor mortis was passing off. Smell of kerosene from the clothes. The body was in pugilistic posture. Forth degree burn present over the following area. Burned area:

Whole of the head and neck;

Whole of the anterior and posterior trunk;

Both sides of the right thigh and anterior side of the left thigh;

Anterior and posterior side of the right leg (upper half);

Left leg is totally safe;

Both palm and sole were safe;

Total 90% burn was present.

57. Dr. CK Rai (PW-8) is the Assistant Surgeon at the PHC. She stated that:

At about 00:20 hours, on 04.08.1993, the Deceased was brought to her and she had 100% burn injuries;

Her condition was very serious and she was referred to the Hospital and also sent a report (Ex. P-5).

58. Dr. CK Rai (PW-8) is the first doctor, who medically examined the Deceased. According to her, there were 100% burn injuries, though, in the post-mortem, it is mentioned as 90% burns.

59. The incident is said to have happened at around 21:45 hours on 03.08.1993 and the Deceased died at 03:00 hours of 04.08.1993, that is to say, she died in five hours time after the incident. It is clear that the burns were very severe.

60. A person who has so many burn injuries cannot be in a fit mental condition to say and she could easily be influenced by the situation prevailing. Let us consider, the situation prevailing at that time.

Situation Prevailing

61. Dr. Nirmal Kumar Jain (PW-15) in his examination-in-chief has stated that:

At that time, the Deceased was shouting "doctor sahab, please save me, please save me";

When he reached the place of incident, Dhanraso Bai (PW-1), the mother of the Deceased was shouting that the Appellant had burned the Deceased and then ran away.

62. In the cross examination, Dr. Nirmal Kumar Jain (PW-15) stated that the Deceased was speaking, however, her mother (PW-1) was definitely speaking in between. This indicates that the Deceased was being prompted by her mother and she could be influenced.

63. The affair between a Hindu girl and a Muslim boy generates emotions, passions, and heat. Generally, it is a matter of great tension and often has led to riots.

64. Ramesh Kumar Singh Parihar (PW-17) stated that in case the Appellant was not arrested in the intervening night of 03/04.08.1993, then there would have been Hindu-Muslim riots.

65. GL Shrivastava (PW-18) has stated that police force was called as there was apprehension of Hindu-Muslim riots.

66. Dr. Nirmal Kumar Jain (PW-15) in his cross-examination has stated that:

At that time, the entire atmosphere was tense and it was natural; and

Every one was shouting where is the Appellant, let us catch him and beat him.

67. The situation on the spot was as follows:

The atmosphere is very tense and there were chances of Hindu-Muslim riots;

The entire crowd is shouting for catching and beating the Appellant;

The Deceased had about 100% burns. She was not in fit mental condition and she was not strong enough.

In such a situation, the thinking of the Deceased could be clouded; she could be easily influenced.

68. At this stage, we would like to remind ourselves the principles governing dying declaration:

(a) Truthfulness of a dying declaration cannot be tested by means of cross-examination, yet it is admitted in evidence on the legal maxim "Nemo moriturus proesumitur mentiri" or "a man will not meet his maker with a lie in his mouth Babu Lal and Others Vs. State of Madhya Pradesh, P.V. Radhakrishna Vs. State of Karnataka, Muthu Kutty and Another Vs. State by Inspector of Police, Tamil Nadu, Sunder Lal Vs. State of Rajasthan, Dashrath @ Champa and Others Vs. State of Madhya Pradesh, Vikas and Others Vs. State of Maharashtra, Sham Shankar Kankaria Vs. State of Maharashtra,

(b) A dying declaration made by person voluntarily in a fit mental condition can be basis of conviction without any corroboration Kanaksingh Raisingh Rav Vs. State of Gujarat, Atbir Vs. Govt. of N.C.T. of Delhi, ; Vinod Solanki Vs. Union of India (UOI) and Another, ; State of Uttar Pradesh Vs. Ram Sagar Yadav and Others, Ramawati Devi Vs. State of Bihar,

(c) A dying declaration has to be voluntary and uninfluenced by prompting before any reliance can be placed on the same P.V. Radhakrishna Vs. State of Karnataka, This proposition is also approved in the cases mentioned in fn-2

(d) Conviction on the basis of suspicious dying declaration cannot be made without corroboration Rasheed Beg and Others Vs. State of Madhya Pradesh, ; Ranjit Singh and Others Vs. State of Punjab,

(e) Each case of dying declaration is to be decided on its own facts keeping in view the circumstances in which the dying declaration was made Khushal Rao v. State of Bombay, AIR 1958 SC 22 : 1958 CrLJ 106

(f) A dying declaration stands on the same footing as any other piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence Khushal Rao Vs. The State of Bombay,

(g) In a case of suspicious circumstances, a certificate by doctor regarding fit mental condition to make the dying declaration may not be sufficient. It has to

be judged in the light of the attending circumstances K. Ramachandra Reddy and Another Vs. The Public Prosecutor,

69. Considering the injuries, pain, and death within five hours, it is probable that the Deceased would be influenced by the surrounding circumstances, the suggestion of her mother, and the opinion of the crowd present on the spot.

70. The fact that the Deceased stated that the Appellant burned her, may not be her free and wilful statement; especially considering that she stated otherwise in the Jeep, when she was being taken as stated by Rajendra Prasad Gupta (PW-16). The dying declaration on the spot could well be influenced by the attending circumstances on the spot.

71. In our opinion, it will not be safe to convict the Appellant merely on this statement without there being any corroboration. Let us see, if the dying declaration is corroborated by any other circumstances or not; or the other circumstances favour the version of the Defence that the Deceased committed suicide.

4th & 5th POINTS: NO CORROBORATION-- ENTITLED TO BENEFIT OF DOUBT

72. In this case, the circumstances support the version of the defence case rather than corroborating the dying declaration. These circumstances are as follows:

1st Circumstance: Palm is safe

73. The post-mortem report (Ex. P-7) states that both palm and sole of the Deceased were safe. Dr. Ajay Kumar Jaiswal (PW-10) conducted the postmortem of the Deceased. In his cross-examination he stated that if a person is burned by some other person, then it is natural that the person who is being burnt would try to save himself and in that condition, the hands and palm of that person would also be burned.

74. The trial court has disregarded the cross-examination of Dr. Ajay Kumar Jaiswal (PW-10) on the basis of the following statement mentioned in the "Modi - A Text Book of Medical Jurisprudence and Toxicology. In 24th Edition, 2011" this is as follows:

When a body has been exposed to great heat, it gets cooked and becomes so rigid with the limbs flexed, arms fixed and fingers hooked like claws that it assumes an attitude of defence, called the "pugilistic" or "fencing" posture

75. It is for the aforesaid excerpt that the trial court has held that in case the palm are not burned, then it is not unnatural. In fact, the Modi's comment is to the contrary.

76. According to the comment, if the fingers are looking like claws, it does not mean it was done in defence. The above statement has nothing to do with the opinion of the doctor (PW-10) that if a person tries to save herself, her palm

should also be burnt. This observation by the trial court is not correct.

77. The statement of Dr. Ajay Kumar Jaiswal (PW-10) is consistent with the case put up by the defence that the Deceased committed suicide because of humiliation as well as insult by the family members and it is for this reason she never tried to save herself.

78. In our opinion, there is another reason to suggest that the dying declaration was because of prompting and was tutored. Our reasons for saying so are as follows.

2nd Circumstance: Different Versions? Whether Petrol or Kerosene Used

79. The statement of the father of the Deceased was also recorded u/s 161 Cr.P.C. He had stated that the Deceased had said that the Appellant poured petrol on her and set her on fire. This is admitted by GL Shrivastava (PW-18).

80. The statement of Anita Kujur (PW-4) was recorded twice: firstly on 04.08.1993 and secondly on 11.08.1993. On 04.08.1993, she had stated that the Deceased said that the Appellant had poured petrol on her. She changed her statement u/s. 161 Cr.P.C. on 11.08.1993 as well as before the court and stated that the Deceased had informed her that kerosene was poured on her.

81. The other witnesses namely Gayatri (PW-7) and the Informant (PW-15) have stated that the Deceased had said the Appellant had poured kerosene oil.

82. The trial court has explained the difference by reasoning that this is irrelevant as intention or purpose should be seen. In our opinion, this factor is relevant. It shows that the Deceased was saying different things at the place of incident. This is consistent with the probability that her dying declaration could be involuntary and because of prompting.

83. There are no eyewitnesses. No one had seen how the Deceased was set ablaze. Everyone was guessing and saying things. It appears to us that as the Deceased was not in fit mental condition, she was merely repeating, what the crowd at the spot was saying. It is for this reason that different words petrol or kerosene were used. This indicates that the dying declaration was not of free will but influenced by what the crowd wanted her to say.

84. In our opinion,

It is possible that the Appellant got burn injuries, while he was trying to save the Deceased considering that: the motive is weak as a person, who loves, does not burn the loved one;

The Appellant also received burn injuries in the same incident; and

No explanation has been given by the prosecution for the burn injuries of the Appellant.

CONCLUSIONS

85. Our conclusions are as follows:

The oral dying declaration is not free and wilful statement of the Deceased. It is not corroborated by any other evidence and on the contrary the circumstances suggest otherwise. We do not place reliance on the same;

The prosecution has not been able to prove its case beyond reasonable doubt; and

The Appellant is entitled to the benefit of doubt.

86. In view of above, the appeal is allowed. The conviction of the Appellant u/s 302 IPC is set aside and he is acquitted of the charge framed against him. The Appellant is on bail. His bail bonds are not discharged at this stage and the bonds shall remain operative for a period of six months in view of section 437A of the Cr.P.C.