

Neutral Citation No. - 2023:AHC:158497-

Court No. - 46

Case :- CAPITAL CASES No. - 3809 of 2015

with

Reference No.10 of 2015

Appellant :- Jugal

Respondent :- State of U.P.

Counsel for Appellant :- From jail, A.K.Dwivedi(Ami.Curiae), Rajrshi
Gupta A.C.

Counsel for Respondent :- Govt.Advocate

Hon'ble Ashwani Kumar Mishra,J.

Hon'ble Syed Aftab Husain Rizvi,J.

1. Additional Sessions Judge, Fast Track Court, Lalitpur has made a reference to this Court on 13.08.2015 under Section 366 of the Code of Criminal Procedure, consequent upon death sentence awarded to the accused Jugal on the charge that he has poured petrol on his mother-in-law and brother-in-law and set them ablaze. The reference has been registered as Reference No. 10 of 2015. An appeal has also been filed at the instance of accused being Capital Criminal Appeal No. 3809 of 2015. The appeal and the reference have been heard together and are being disposed of by this common judgment.

2. Dinesh (PW-1)is the first informant in the present case, who happens to be the son of deceased Chameli Bai wife of Udaiya and brother of Deepchand, who too has died, stating that on 17.06.2013 at about 4.00 in the afternoon his brother-in-law Jugal son of Kashi belonging to Chamar caste came to the house and enquired about his wife Meena and daughter Seema. The family members informed that these two

have not come to the house. For this reason, the accused started abusing them and kept roaming in the village and at about 1.00 in the night, he poured petrol and set ablaze the deceased. On hearing the commotion of villagers, Tiju (PW-2) and Karan Singh (not produced) came on the spot and tried to douse the fire. Deceased Chameli Bai and Deepchand were sleeping in the dallan (kind of a verandah attached to the house). Both the persons were taken for treatment to the hospital where the informant's mother has died and the brother was in injured condition. Appropriate action was requested to be taken in the matter. On the basis of such written report (Ex.Ka.1), a First Information Report came to be lodged at PS Banpur, District Lalitpur at about 12.30 PM on 18.06.2013. The distance between the place of occurrence and the police station is five kilometres.

3. Record reveals that prior to lodging of F.I.R. inquest was started on 18.06.2013 at about 10.30 AM and concluded at around 11.30 AM at the mortuary situated in District Hospital. As per the inquest, the information was given by the ward-boy and the deceased died during the course of treatment. The inquest specifically records that information with regard to death was received at 6.20 in the morning itself. The inquest witnesses included the first informant also. In the opinion of the inquest witnesses, the deceased died on account of burnt injuries and for ascertaining the correct cause of death the postmortem was necessary. The body was ultimately sealed and the postmortem was conducted on 18.06.2013 at 4.30 PM. As per the opinion of the autopsy surgeon, the deceased was 44 years old female with average body built and rigor mortis had passed from neck towards lower limbs. The cause of death as per postmortem is shock as a result of ante-mortem burn injuries. Following ante-mortem injuries have been noticed in the postmortem:-

“Whole body mixed burn present except in lateral aspect of left thigh.”

4. Investigation proceeded in the matter and the place of occurrence was inspected by the Investigating Officer, who collected a two litres plastic container, wherein smell of petrol was present. A lamp was also found near the place of occurrence. Ashes and plain earth etc. were also collected in a separate bag vide Ex.Ka.2 by the Investigating Officer. This recovery has been proved by the independent witness Shanker Singh, who appeared as PW-3.

5. Deepchand, who allegedly was sleeping close to his mother and had also sustained burnt injuries was hospitalized in the District Hospital, Lalitpur where his dying declaration has been recorded by the concerned Naib Tehsildar Awadhesh Kumar Nigam, who has appeared as PW-5. Before recording such dying declaration the Emergency Medical Officer Dr. Pawan Sood (PW-9) certified that the injured is in fit mental state to make his declaration. The dying declaration is in the question answer form and is extracted hereinafter:-

“ बयान दीपचन्द एस/ओ श्री ऊदई, उम्र लगभग 15 साल
निवासी-ग्राम अजनौरा, थाना- बानपुर, ललितपुर

दि० 18.6.2013, समय 16.55 पी०एम०

प्रश्न- क्या नाम है, कहाँ के हो

उत्तर- दीपचन्द, अजनौरा के

प्रश्न- कैसे जल गये?

उत्तर- रात को मैं अपनी माँ के साथ सो रहे थे। जुगले जो मेरे जीजा लगता है उसने हम दोनो के ऊपर पेट्रोल फेंक कर आग लगा दी।

प्रश्न- जीजा ने क्यों जलाया।

उत्तर- क्या पता सहाब, जुगला ने जलाया।

प्रश्न- जुगला कहाँ रहता है।

उत्तर- खोंखरा रहता है।

प्रश्न- जुगला से झगड़ा हुआ था?

उत्तर- मैं खेल रहा था उसने एक बार मेरे गले में लात रखी थी।

प्रश्न- तुम्हारी माँ से उसकी लड़ाई हुयी थी

उत्तर- क्या पता सहाब

प्रश्न- तुम्हे किसने बचाया?

उत्तर- जब आग लगी तो मैं उठकर आंगन में भागा, पानी बरसा था इसलिये आंगन में पानी भरा था, मैं उसमें कूद गया खुद बचा।

प्रश्न- जब जलाया उस समय घर में कौन-कौन था।

उत्तर- हम, दिनेश मेरा भाई, डबला जो मेरा भइया लगता है, तथा मेरी माँ तथा मेरे बड़े भाई आशा का? लड़का नीलेश

प्रश्न- जलते हुये किसने देखा

उत्तर- मैं टी०वी० देखने माँ के कमरे में गया था वही उनके पास लेट गया था, जब वह मेरी माँ के ऊपर पेट्रोल डाल रहा था तो मैंने देख लिया, मैंने कहा तू यह क्या कर रहा तो उसने मेरे ऊपर भी पेट्रोल डालकर आग लगा दी।

प्रश्न- ओर कुछ कहना है?

उत्तर- नहीं क्या करे? उसने मेरी माँ को मार डाला साहब, उसे सजा दो।"

6. The investigation further proceeded in the matter and statement was recorded of Deepchand under Section 161 Cr.P.C. The statement in that regard has not been exhibited but its contents have been disclosed by the Investigating Officer, who has appeared during the course of trial as PW-13. He has disclosed that Deepchand informed him that he could identify the accused from his voice.

7. The other deceased, namely, Deepchand remain hospitalized with superficial and deep facial burn up to an extent of 60 %. Deepchand also died later, on 30.06.2013 in respect of which inquest was prepared and the postmortem was also conducted, wherein his age has been assessed as 17 years. The autopsy surgeon has found that the cause of death is septicaemic shock due to ante-mortem burn injuries and found following injuries on the deceased:-

“Burn injury on face, neck all over the back, front and back of abdomen. Both upper limb, part of hip and right foot,

superficial to deep, slough present. Pus present in plural cavity and pus pocket present in left lung and abdominal cavity.”

8. Statement was also recorded of the wife of the accused, namely, Meena PW-4, whereafter a charge-sheet came to be submitted against the accused under Sections 302, 504 IPC. The Magistrate took cognizance and committed the case to the court of Sessions where it got registered as Sessions Trial No. 109 of 2013. Charges were framed under Sections 302 and 504 I.P.C. and read out to the accused and explained in Hindi. The accused pleaded not guilty and claim to be tried. The charge framed by the court reads as under:-

“

CHARGE

I, Shyam Sunder, Sessions Judge, Lalitpur hereby charge you : Jugal son of Kashi, resident of village Khokhra, P.S. Kotwali Lalitpur, District Lalitpur as follows:-

FIRSTLY:- That on 17.6.2013 at about 4.00 p.m. at the house of complainant Dinesh, situated in village Ajnora, P.S. Banpur, District Lalitpur, you intentionally insulted and thereby gave provocation to Dinesh intending or knowing it to be likely that such provocation would cause him to break the public peace or to commit any other offence and thereby committed an offence punishable u/s 504 IPC and within the cognizance of this court.

SECONDLY:- That in the intervening night of 17/18.6.2013 at about 1.00 at the aforesaid place, you did commit murder by intentionally or knowingly causing the death of Smt. Chameli Bai and Deep Chandra and thereby committed an offence punishable u/s 302 IPC and within the cognizance of this court.

And I hereby direct that you be tried by this court on the said charge.”

9. Trial proceeded in the matter in which the prosecution has produced following documentary evidence:-

“1. Written Report Ext.Ka.1

2. Recovery memo of Plastic 'Katti', Ash, Cot and Plain Earth as Ext.Ka.2
3. Dying Declaration of Deep Chand Ext.Ka.3
4. P.M. Report of Chameli Bail Ext.Ka.4
5. P.M. Report of Deep Chand Ext.Ka.5
6. Medical Examination Report of Deep Chand Ext.Ka.12
7. Inquest Report of Chamil Bai and Autopsy related papers Ext.Ka.13 to Ka.18
8. Chik F.I.R. Ext.Ka.19
9. Copy of G.D. Ext.Ka.20
10. Inquest Report of Deep Chand and Autopsy related papers. Ext.Ka.21 to Ka.25
11. Site Plan Ext.Ka.26
12. Charge-sheet Ext.Ka.27"

10. In addition, informant Dinesh has appeared as PW-1, wherein he has disclosed that the accused came at around 4:00 to his house on 17.06.2013 and enquired about his wife and daughter from him and his mother. Accused was informed that they have not come, on which accused left, hurling abuses to them. On the same night when the two deceased were sleeping in the verandah whereas informant alongwith Ravi and Nilesh were sleeping in a room at a little distance. The witness heard screams of his mother and brother. Accused had poured kerosene on the two deceased and set them on fire and fled from the place of occurrence. This incident has been seen by Tiju and Karan Singh. PW-1 also saw the accused fleeing in the light on account of fire caused by him. The fire was doused with the help of the villagers and the witness took his mother and brother to the hospital where his mother died at about 4.00 in the morning. Brother was sent for treatment to Gwalior. He died 10-12 days later. This witness has proved the written report which is exhibited as Ex.Ka.1. PW-1 has been cross-examined, wherein he admitted that he studied up to class 9. He has disclosed that the written report was not scribed by him but was got scribed by someone else. He had not written the report as he was perplexed. He had reached the police station at about 12:00-1:00 in the

afternoon and Tiju and Karan Singh had accompanied him. He has admitted that in the written report he has not disclosed that Tiju and Karan Singh had seen the accused fleeing in the light of fire. He has also denied that his statement is based upon the advice received later. As per him, the accused got married to his sister long back and out of such wedlock three children were born. Accused used to harass his sister, however, no complaint was ever made to police about such harassment. In reply to a specific query, PW-1 has stated that till date, he has not been able to know as to on the date of incident where were the wife and daughter of the accused. He has also feigned ignorance about the fact that his bhanji (sister's daughter) was getting married on that day. At the time when the accused came to the house, the deceased mother as well as Deepchand (deceased brother) were at home and that the accused came in their presence at the house. This witness has specifically stated that there are two rooms in the house and there is no television in the house. In the further cross-examination, this witness has stated that his mother and brother were sleeping on the same cot and that there is no lock put on the door on account of which anyone could come inside the house, particularly, as the height of wall is only 4 feet. He has also disclosed that it was raining when the incident occurred. He has also stated that he had tried to douse the fire by putting the cloth on his mother and brother. He has specifically stated that fire was not doused by water. The house of Tiju and Karan Singh is in front of his house. He has also stated that when he arrived at the place of occurrence by then Tiju and Karan Singh were already present at the dallan. He has also stated that dying declaration of his brother was recorded in his presence. He has also stated that the accused was arrested at about 8-9 in the morning itself. He has also stated that from the hospital he had gone straight to the police station at about 8-9. He has also admitted that he had not seen accused coming with the petrol can. He has denied the suggestion that because there was a

matrimonial dispute between his sister and the accused on account of which a false report is being lodged against him.

11. Teeju son of Gorelal is PW-2 and has supported the prosecution case. As per this witness, daughter of accused got married at Amjhara Temple during summers of the previous year. On the same day at about 4:00 the accused came to his in-laws house and finding that his wife and daughter were not present, the accused hurled abuses and also extended threats to the deceased. The accused thereafter kept roaming in the village. As per this witness, he came out of the house at about 12 in the night to ease himself when he saw the accused coming out of the house of the deceased. The witness could hear screams and that he saw alongwith Karan Singh the accused coming out of the house. When he entered the house, the witness saw Chameli Bai engulfed in fire and her son Deepchand was also in fire. PW-2 and Karan doused the fire. He claims to have been informed by Chameli Bai and Deepchand that Jugal had entered the house and had poured petrol upon them. There was a burnt kuppi at the place of occurrence and he could smell petrol from it. In the cross-examination, PW-2 has stated that the IO recorded his statement on the next morning. The police had come at about 10:00 and the accused was already arrested by then. He has been confronted with his statement under Section 161 Cr.P.C., wherein he has not disclosed the IO that accused was roaming around the well or that he had come out of the house at 12:00 to ease himself. He has also been confronted with his previous statement, wherein there is no reference of the accused coming out of the house. On the date of incident wife and daughter of accused were at home and that only Asha Ram (another son of deceased Chameli Bai) alone had gone to Amjhara Temple in the marriage. Deceased had also not attended the marriage. PW-2 has stated that there was nobody at home at 4:00 PM as Chameli Bai had gone to the well which is at a distance of about half a kilometre from his house. Accused came to the house first and when he found none, he went towards the well and that he had not seen the accused

thereafter. He has stated that at the time of incident informant was sleeping in the house and he arrived after PW-2 had reached the place of occurrence. He has also stated that there is no wall around house of Chameli Bai. He has emphatically stated that there is no television in the house of the informant. He has also stated that it was raining and there was no electricity.

12. PW-3 is Shanker Singh, who has also supported the prosecution case. He claims that the accused had come to the village at 4:00 when his wife had gone for the marriage of her daughter at Amjhara Temple. Accused enquired from the deceased Chameli Bai about the incident and when he could elicit no reply, he started abusing his mother-in-law. Several persons came on the spot and the accused was forced to flee from the house. As per this witness, accused came at about 1:00 in the night carrying petrol in kuppi from Banpur. He claims that there was a burnt kuppi near the place of occurrence which smelt of petrol. He also claims to have seen accused fleeing from the place of occurrence. As per this witness also, he arrived inside the house and saw the two deceased in a burnt state. This witness has also proved the recovery memo Ex.Ka.2. In the cross-examination, PW-3 has stated that his statement was recorded at about 7:00-8:00 in the next morning. This witness has been confronted with his previous statement under Section 161 Cr.P.C., wherein there is no reference to the fact that daughter of accused was getting married at Amjhara Temple or that the accused was forced to flee from the house or that he kept roaming around the house of Chameli Bai; or that he saw the accused fleeing from the house of the deceased. As per this witness, his house is at 50-60 paces from the house of Chameli Bai. In his further cross-examination, PW-3 has stated that he saw the accused crossing from his house and as he was trying to save the injured he could not apprehend the accused. He claims that accused fled from the front of his house. As per him, he had seen the accused in the light of electricity as well as fire. He has stated that the informant came at the place of occurrence after

hearing the screams/commotion. As per this witness also, the accused was arrested at about 10:00-11:00 in the morning. The witness has further stated that a five litre plastic can was recovered from the place of occurrence, which smelt of petrol.

13. PW-4 is Smt. Meena, who happens to be the wife of the accused. She has stated that his eldest daughter is already married. She claims that the accused used to say that he would keep her daughter and would often beat them on account of which he started residing in Lalitpur city. She had also married her daughter in Lalitpur. She has alleged that her daughter got married at Amjhara Temple and she was present on the date of marriage. It was on the same day that the accused came to her mother's house and abused her after she was not found there. She has also supported the prosecution case of the accused pouring petrol upon the two deceased. This witness has been cross-examined as per which her statement was recorded at the hospital two days after the incident. The witness has been confronted with his previous statement, wherein she has not disclosed the I.O. that accused wanted to keep her daughter. She has also been confronted with her previous statement where she had not alleged that on account of torture, she had started living at Lalitpur. She stated later that she was assaulted by accused two days prior to the incident, whereafter she came to Lalitpur. She has also alleged that the accused alleged about two days prior to the incident that he would keep her daughter. The witness also could not correctly disclose the name of her son-in-law.

14. Awadhesh Kumar Nigam (Naib Tehsildar) has appeared as PW-5, who has proved the dying declaration of Deepchand. He has alleged that he had removed the family members from the place where the deceased was kept in the hospital before recording the dying declaration. He also feigned ignorance about the fact that the family members were talking to the deceased when he came to the hospital. This witness has proved the dying declaration (Ex.Ka.3).

15. PW-6 is Dr. D.K. Raj, who has proved the postmortem of Chameli Bai. This witness has not alleged existence of thermal burn on the deceased and as per him the deceased had sustained about 93% burnt injuries. The witness has proved the postmortem report.
16. PW-7 is Dr. Rajesh Tripathi, who has proved the postmortem report of deceased Deepchand. Deepchand had sustained 70 % burnt injuries.
17. Dr. Shailesh Ranjan has appeared as PW-8, who had examined Deepchand when he was brought to the hospital. As per him, the injured was in a serious condition and he was administered vobvaran to subside the pain. He has also proved the injury report of Deepchand. According to injury report Ext.Ka12 Deepchand was brought to hospital by Dinesh (brother) and was examined on 18.06.2013 at 3:05 AM. There was superficial to deep facial burn about 60%.
18. PW-9 is Dr. Pawan Sood, who has certified that Deepchand was in fit, physical and mental state for making his declaration.
19. PW-10 is Man Singh Pal, who was posted as Sub-Inspector and has proved the inquest of Smt. Chameli Bai. He has also proved other police papers. This witness in the cross-examination has stated that the inquest was conducted between 10:30 to 11:30 in the morning and that the informant had not disclosed the fact that the accused had poured petrol on the deceased or that he had seen any such incident.
20. PW-11 is also a police personnel, who has proved the chik FIR. As per him, the informant came alone at 12:30 at the police station and had given the written report, which was incorporated in the GD. This witness has denied the suggestion that the F.I.R. was written on the dictates of the SHO or that the F.I.R. was written with the consultation and advice of the SHO.
21. PW-12 is Sub-Inspector, Gajraj Prasad, who has proved the inquest of Deepchand.

22. PW-13 is the Investigating Officer. As per him, on 18.06.2013 the case was registered in his presence at police station on the written report of complainant Dinesh that his mother and brother have been set on fire by his brother-in-law Jugal and his mother has died. He has alleged that the accused was arrested at about 6:00 in the evening. Statement of Deepchand was recorded by him on 19.06.2013, whereas the statement of PW-4 was recorded on 20.06.2013. Statement of Karan Singh and Tiju Kushwaha was recorded on 29.06.2013. In the cross-examination, PW-13 has stated that the informant is not an eye-witness and his statement was recorded at the police station. He has clearly disclosed that Karan Singh and Tiju Kushwaha had disclosed the informant of having seen the accused running from the place of occurrence in the fire. He has denied the suggestion that the statements of witnesses were recorded on the next day and has reasserted that the statement of PW-2 was recorded on 29.06.2013. I.O. has proved the site plan and has admitted that there is no electricity pole shown therein. It is also admitted that from the statement of witnesses any source of light had not surfaced. He has further stated that the kuppi mentioned as 'kutti' in the cross-examination of PW-13, denotes a can. As per him, the can was of two litres and not of five litres. He has also admitted that PW-4 never disclosed him that the accused had asserted of keeping her daughter with him.

23. The evidence produced during trial by the prosecution has been confronted to the accused for recording his statement under Section 313 Cr.P.C. The accused has denied his implication and has stated that at the instance of the in-laws, he has been falsely implicated. No defence witness, however, has been produced.

24. Trial court on the basis of evidence led in the matter has come to the conclusion that the accused had poured kerosene on the deceased and had killed them. The motive for such a ghastly act is alleged to be the desire of the accused to keep his daughter, which was objected to by her in-laws and the wife. The wife of the accused had got her daughter

married on the date of incident and apparently the accused was enraged by such act on account of which he committed the ghastly act resulting in brutal death of two persons. The trial court, therefore, found the charges under Sections 302, 504 IPC to have been proved against the accused-appellant. The severity of the offence has been considered while awarding sentence of death penalty upon the accused. It is in that context that the reference has been made by the trial court for confirmation of death sentence. The appeal preferred by the accused is thus being considered alongwith the confirmation proceedings.

25. Shri Rajrshi Gupta, Advocate has been appointed as Amicus Curiae in the present case to represent the accused-appellant. Learned counsel for the accused-appellant submits that the court below has grossly erred in returning a finding of conviction against the accused, inasmuch as the evidence on record do not justify such conclusion and consequential conviction of the accused. Learned counsel for the accused-appellant has further urged that the dying declaration of deceased Deepchand is tutored and is not reliable, particularly as the facts narrated therein are contrary to the admitted material available on record. He further submits that there is a contradiction in the other dying declaration recorded by the I.O. under Section 161 Cr.P.C. Various contradictions in the statements of witnesses have been highlighted, which shall be dealt with while analysing the evidence on record. Learned counsel for the accused-appellant submits that the only material on record against the accused-appellant would at best justify a suspicion against him and in view of the settled law that suspicion howsoever strong cannot be a substitute for evidence to establish the guilt of the accused, the conviction and sentence cannot be sustained. Learned counsel for the accused-appellant has also placed reliance upon the judgment of the Supreme Court in *Motilal & Others Vs. State of Rajasthan 2009 (8) SCR 303* in order to submit that the inquest of Smt. Chameli Bai shows that police was made aware of the incident much prior to registration of the FIR and the delay in lodging of the FIR

has not been explained. Observations of the Court contained in para 6 have been referred to in order to discredit the prosecution case. So far as the motive for commissioning of the offence is concerned, learned counsel for the accused-appellant submits that the allegation against the accused of wanting to keep his daughter is a clear improvement and a result of afterthought inasmuch as none of the witnesses have made any such disclosure to the police during recording of their statements under Section 161 Cr.P.C. and it is only when PW-4 appeared in the witness box that such a case has been set up. It is further argued that the motive in that regard has not been confronted to the accused for recording his statement under Section 313 Cr.P.C. and, therefore, this circumstance cannot be read against the accused. Reliance is placed upon a Division Bench judgement of this Court in *Surendra Singh Vs. State of U.P.; 2019 1 Allahabad Law Journal 290* in order to submit that the dying declaration is not reliable in the facts of the present case. So far as the testimony of eye-witnesses are concerned, learned counsel for the accused-appellant straneously urges that their presence at the place of occurrence or their statements of having seen the accused fleeing from the place of occurrence is not reliable. It is lastly urged that the accused-appellant has already suffered enough on account of being kept in a solitary confinement for ten years and that he is entitled to be set free by granting him the benefit of doubt.

26. Ms. Archana Singh appearing for the State, on the other hand, submits that this is a case of brutal murder of a lady and her son by her son-in-law, who wanted to keep his daughter as his mistress. It is submitted that this is one of those rarest of rarest cases where the father enraged by marriage of his daughter against his wishes and has ultimately killed his mother-in-law and brother-in-law and that the conclusion of guilt recorded by the court below is clearly borne out from the evidence on record. Learned A.G.A., therefore, submits that this being a case of rarest of rare nature justifies the award of death punishment on the

accused and that such punishment is liable to be confirmed by this Court by rejecting the appeal of the accused.

27. We have heard learned counsel for both the parties and have carefully perused the records including the records of the trial court. The prosecution case has already been noticed by us, according to which, the deceased Chameli Bai and her son Deepchand both were burnt alive by the accused-appellant, as he was annoyed with them. As per the prosecution case an incident occurred prior in the day at 4.00 PM, when the accused came to the house of the deceased Chameli Bai and enquired about his wife (PW-4) and daughter. The accused was informed that they have not come to the house of the deceased thereafter the accused hurled abuses and taking advantage of the night ultimately poured petrol upon the two deceased and set them ablaze.

28. The prosecution case is apparently in two parts. The first part relates to the incident at 4.00 PM, when the accused came to the house looking for his wife and daughter and not finding them got annoyed and hurled abuses upon his mother-in-law and other family members. The second part relates to the actual offence of pouring kerosene upon the two deceased and setting them ablaze. We propose to deal with the two distinct parts of the prosecution case with reference to the evidence on record.

29. So far as the incident occurred at 4.00 PM on the fateful day is concerned, the written report of PW-1 states that the accused came from his village Khokhra and enquired about his wife Meena and daughter Seema. The family members informed that these two are not there after which the accused started abusing the family members. This part of the prosecution case is supported by the testimony of PW-1, which merely states that the accused came to the house of the deceased and enquired about the whereabouts of his wife and children. On being informed that they have not come to the house of the deceased, the accused abused them

and left. Similar statements have been made by PW-2 and PW-3. PW-4 has also supported the prosecution case in that regard. We have carefully examined the testimony of these witnesses in order to decipher as to what exactly was the conversation made by the accused, which ultimately enraged the accused to such an extent that he went on to commit the second part of the offence.

30. The testimony of witnesses is limited to the statement of fact about the accused coming to the house of the deceased and making inquiries about his wife and daughter. What exactly transpired at this stage or what was the contents or exchange of words between the witnesses and accused has not been elaborated. From the evidence on record, this much is clear that the wife and daughter of accused were not traceable to the accused. The testimony of witnesses have been examined by us in order to ascertain as to what exactly may have happened. P.W.-1 who is the first informant and is the son of the deceased has categorically stated that till date he does not know where was the wife and daughter of the accused. This witness says nothing about the marriage of the daughter of P.W.-4 on that day. In the cross-examination, he emphatically denies any knowledge of the marriage of the daughter of accused and P.W.-4. We find it somewhat difficult to accept the testimony of P.W.-1 about his not knowing the whereabouts of his sister or her daughter. This is particularly shown, as P.W.-2 who is the neighbour of the deceased has specifically disclosed that on the date of incident the daughter of P.W.-4 got married at Amjhara Temple. If the P.W.-2 who is the neighbour is aware that the daughter of accused was getting married on the date of incident, it is difficult to accept that such fact was not within the knowledge of P.W.-1. P.W.-2 has further stated that only Asharam had attended the marriage of daughter of accused. Asharam is brother of P.W.-1 but has not been produced by the prosecution. Asharam is elder to P.W.-1 and had gone to Vanpur as per P.W.-1. P.W.-3 has also supported the prosecution case but his name neither figures in the first information report nor has his

presence been disclosed by the other two prosecution witnesses i.e. P.W.-1 and P.W.-2. P.W.-3 is the primarily the witness of recovery of articles seized from the place of occurrence. On the aspect relating to marriage of the daughter of the accused, P.W.-3 has not disclosed much. The only other person who has thrown some light on the cause of annoyance of accused or render evidence on the aspect of motive or cause of the incident is P.W.-4. P.W.-4 has for the first time stated during her statement in Court that the accused wanted to keep his daughter. She has not disclosed such fact even in her statement under Section 161 Cr.P.C. The I.O. has also admitted that such facts have not been disclosed by P.W.4 to him.

31. Having analyzed the evidence led by the prosecution with regard to first part of the incident we, therefore, find that neither the genesis is proved by the prosecution nor the exact reason for discord has been placed on record. We also find substance in the contention of Sri Rajarshi Gupta about admissibility of evidence on the point of motive inasmuch as the accused has not been confronted with the statement of P.W.-4 about his stated wish to keep his own daughter. We also find substance in the contention of Sri Gupta that this part of the evidence was later introduced to portray a horrific picture of the accused as being a person who wanted to keep his own daughter and thereby to suggest that he could go to any extent to commit a brutal and barbaric act. The evidence on this aspect of the matter, however, is absolutely sketchy and does not inspire the confidence of the Court. None of the witnesses except P.W.-4 has disclosed the desire of the accused to keep his own daughter. Even the statement of P.W.-4 in that regard surfaces for the first time when she appeared in the witness box. The statement of P.W.-4 has also not been confronted to the accused for recording his statement under Section 313 Cr.P.C. We, therefore, disbelieve the prosecution case founded on the premise that the accused wanted to keep his daughter and as the daughter

got married elsewhere he committed the barbaric act of killing the deceased.

32. The prosecution has otherwise not disclosed as to what exactly transpired when the accused went to her-in-law's house at 4 O'clock. The substance of conversation has not been narrated by any of the witnesses. Even if we accept the prosecution case that the wife and daughter of the accused were missing and he suspected them to present in the house of the deceased and having not found them there, he felt annoyed yet this part of the evidence would not lead to an inference that the accused felt so enraged as to have committed the kind of act as has been attributed to him in the second part of the incident.

33. Before proceeding to second part from the evidence led by the prosecution on the second part of the incident, we would like to refer to some features of the present case which have material bearing upon its outcome. It is not in issue that the incident occurred at around 12:30-1:00 in the night intervening 17/18 June, 2021. The injured were taken to the district hospital on the same night. It also transpires that Smt. Chameli Devi died at around 4 O'clock. Information with regard to death of Smt. Chameli Devi reached the police at 6:30 in the morning through the wardboy. SI Man Singh Pal (PW-10) in his statement has stated that he conducted the inquest at about 6:20 in the morning. The inquest report (Ext.23Ka) has been proved by this witness. In the cross-examination, the witness claims that inquest commenced at 10:30 and concluded at 11:30. It is, therefore, quite apparent from the evidence brought on record that the police had received information with regard to incident much prior to the time when the F.I.R. itself was lodged.

34. According to prosecution, the accused was arrested at 6 P.M. in the evening. However, the prosecution witnesses have taken a different stand in their deposition made before the Court. P.W.-1 has stated that he came to the police station from the hospital at 8-9 in the morning. He has also

stated that accused was arrested at 8-9 in the morning. Similarly, P.W.-2 has asserted that the I.O. came at about 10 along with the accused. P.W.-3 has also stated that the I.O. had arrested accused in the morning. From the weight of evidence on record, it is quite clearly established that accused was already arrested in the morning even prior to lodging of the F.I.R. There is another aspect which needs special mention at this stage. According to prosecution, the written report was made by P.W.-1 at 12:30 P.M. on 18.06.2013. P.W.-1 states that he had not scribed the written report and that it was got scribed through someone else. P.W.-11 has however stated that the F.I.R. was lodged on the basis of written report given by P.W.-1. He has also stated that P.W.-1 came all alone with written report. A specific suggestion has been given to P.W.-11 that in fact the written report was got written on the instructions of the S.H.O. at police station. The written report allegedly has been signed by P.W.-1. P.W.-1, however, admits that he has not written the report. It is, therefore, not clear as to who is the scribe of the written report. This fact assumes significance inasmuch as the record clearly shows that the police had received information with regard to the unfortunate death of Smt. Chameli Devi early in the morning hours. The accused was also arrested in the morning hours. Once that being the situation, the subsequent lodging of F.I.R. was expected to have contained narration with regard to such steps already taken that is preparation of inquest or arrest of accused etc. The Investigating Officer, however, has been produced as P.W.-13 and as per his statement the first entry in the case diary is after the registration of the F.I.R. No details/ records have been produced to the police with regard to receiving of information; steps taken by the prosecution during course of inquiry; arrest of accused etc. Had these facts been placed by the prosecution, it could have been ascertained as to what exactly was the manner in which the police received information about the incident and the manner in which the inquiry and latter investigation proceeded. The fact that such facts have been suppressed and concealed by the

prosecution, creates doubt upon the authenticity of the prosecution case itself. The prosecution version that accused was arrested at 6 PM is not believable in view of the consistent case of prosecution witnesses P.W.-1 to P.W.-3, all of whom have testified about arrest of the accused prior to the registration of F.I.R. This Court, therefore, views the prosecution version with some circumspection.

35. So far as night incident is concerned, the prosecution has relied upon oral testimony of P.W.-1 to P.W.-3 in addition to the dying declaration recorded of Deep Chand.

36. P.W.-1 in his written report has referred to the presence of P.W.-2 and Karan Singh soon after the incident at the place of occurrence. In the written report, P.W.-1 has not shown his presence. He has also not stated about any receipt of information regarding the incident either from Deep Chand or from Smt. Chameli Devi. Investigating Officer has also categorically admitted that P.W.-1 had not informed him that he was a witness to the incident. P.W.-1, P.W.-2 and P.W.-3, who are the witnesses of fact, have consistently asserted that they saw the accused running from the place of occurrence in the light of fire. P.W.-1 in his statement under Section 161 Cr.P.C. has not alleged that he had seen the accused fleeing from the place of occurrence in the light of fire along with Tiju and Karan Singh. What has been stated by him under Section 161 Cr.P.C. is that on hearing the commotion, he came out of the room and saw his mother and brother burning. P.W.-1 has also admitted that when he came to the place of occurrence, P.W.-2 was already present. P.W.-1 has not disclosed in his initial statement that he saw the accused pouring petrol on the deceased. P.W.-1 is the son of the deceased and his presence in the house cannot be doubted. However, it transpires that P.W.-1 was sleeping at different location when the incident occurred. P.W.-1, therefore, came much later on hearing the commotion and his subsequent version that he saw the accused fleeing from the place of occurrence is a clear improvement from what was disclosed earlier by him to the police. P.W.-1 although had taken

his mother and brother to the hospital but has not alleged that he received any information from his mother or brother about the culprit of crime. We, therefore, are not inclined to attach much weight to the testimony of P.W.1 as he is neither a eye-witness nor his version of having seen the accused fleeing from the place of occurrence is consistent and the testimony in that regard is an apparent improvement.

37. So far as P.W.-2 is concerned, he is a neighbour and claims that he had come out of the house only to ease himself when he claims to have seen the accused coming out of the house and he could hear the screams from inside the house. P.W.-2, therefore, states that he came inside the house and made attempts to douse the fire. P.W.-2 admits that P.W.-1 came to the place of occurrence after he had already reached. So far as the statement of P.W.-2 is concerned, we find that his version with regard to first part of the incident is at variance from the statement of other witnesses. He came out of the house to ease himself is an improvement over what was disclosed by him to police under Section 161 Cr.P.C. The Investigating Officer has also admitted that such a disclosure was not made by him. P.W.-2 has also not disclosed in his statement under Section 161 Cr.P.C. that he saw the accused coming out of house in the light of fire. This part of the statement is also an improvement over what was disclosed by him earlier. The statement of P.W.-2 has been recorded by the I.O. for the first time on 29th June, 2013 which is after 11 days of the incident. No reason whatsoever has been disclosed for the delayed recording of the statement of P.W.-2. The I.O. has also not given any plausible explanation for the delay occurred in recording of the statement of P.W.-2 who otherwise is the first to know this. In the context of various improvements and enhancements made by P.W.-2, the delay of 11 days in recording of his statement lends credence to the defence argument that his testimony is not entirely reliable. P.W.2 has also stated that none of the family members of Chameli Bai had accompanied her to the hospital and that there were three other Karan Singh, Raja Babu and Bal Kishan who

have taken the injured to the hospital. This statement of P.W.-2 is also found incorrect in view of the admitted evidence on record which shows that it was the first informant who had taken his injured brother to the hospital. Viewed in context of above discussions, we do not deem it appropriate to attach much weight to the testimony of P.W.-2. We have fortified in taking such view from the observation of Supreme Court contained in Para 6 of the judgment in *Motilal (supra)* which is extracted hereinafter:-

“6. It is true as observed by the High Court that if the FIR is timely lodged and investigation is undertaken immediately, in a given case, the delayed receipt of the report by the Elaqa Magistrate would not be fatal to the prosecution. It would depend upon the facts of each case. There cannot be any generalisation. There is a purpose behind the enactment of Section 157 of the Code of Criminal Procedure, 1973 (in short the 'Code'). The statutory requirement that the report has to be sent forthwith that itself shows that the urgency attached to the sending of the report. In a given case it is open to the prosecution to indicate reasons for the delayed despatch or delayed receipt. This has to be established by evidence. Apart from that, the unexplained discrepancy in the timings as recorded in the inquest report and the FIR has to be kept in view. It is prosecution version that the FIR was lodged at 10.50 a.m. If was so it was required to be explained by investigating officer by plausible evidence on record, as to how the inquest was undertaken at 10.30 a.m. at a point of time when the FIR was not in existence. The High Court has lightly brushed aside the plea of the appellants that it may be the lapse on the part of the investigating officer. It is true that a faulty investigation cannot be a determinative factor and would not be sufficient to throw out a credible prosecution version. But in the instant case there is no explanation offered even to explain the discrepancies cumulative effect of the factors highlighted above would show that the prosecution has miserably failed to establish the

accusations. The appeal succeeds. The bail bonds executed to give effect to the order of bail dated 12.7.2004 shall stand discharged.”

38. So far as P.W.-3 is concerned, his presence is neither mentioned in the F.I.R. nor his presence is referred to in the testimony of P.W.-1 or P.W.-2. He is merely a witness to the recovery i.e. Ext. Ka-2 and Ka-3. In the statement of P.W.-3 recorded in the case diary, P.W.-3 is only mentioned as a witness to the recovery and is not shown to be an eye-witness. Even in the charge-sheet, P.W.-3 is described as the witness of the recovery. The statement of P.W.-3 that he saw the accused fleeing from the place of occurrence is something which has surfaced only at the stage of recording of statement before the Court. The Investigating Officer has also admitted that P.W.-3 is merely a witness of recovery and not of the incident.

39. So far as P.W.-4 is concerned, we have already noticed that she is not claiming to be a witness of fact but her testimony is only on the aspect of motive which cannot be read or relied upon as the accused has not been confronted on that aspect of the matter. The deposition of P.W.-4, on the aspect of motive, is otherwise a clear improvement to what was disclosed earlier by her to the I.O. while recording her statement. The testimony of witnesses of fact, therefore, does not lend much support to the prosecution case. We may also note that P.W.-1 while supporting the prosecution case on the aspect of recovery has specified the plastic can containing petrol to be of 5 liters whereas the prosecution claims plastic can to be of 2 liters. The testimony of P.W.-3, on the aspect of recovery of plastic can in which petrol was allegedly kept, is also not much inspired.

40. This leads us to the dying declaration of deceased Deep Chand. The contents of the dying declaration have already been extracted above. The doctor has clearly certified his physical and mental condition for recording of his declaration. The declaration, otherwise, is recorded by the Naib Tehsildar who was vested with magisterial powers. There is, thus, no

deficiency in the recording of dying declaration on the procedural aspect. It is otherwise settled that in the event dying declaration is found trustworthy then we can consider at the sole basis for recording conviction of the accused in appropriate manner. The Apex Court in the case of *Sharda vs. State of Rajasthan, 2010 (68) ACC 274 (SC)* has held that “a dying declaration made by a person on the verge of his death has a special sanctity as at that solemn moment a person is most unlikely to make any untrue statement. The shadow of impending death is by itself guarantee of the truth of the statement of the deceased regarding the circumstances leading to his death. But at the same time, the dying declaration like any other evidence has to be tested on the touchstone of credibility to be acceptable. It is more so, as the accused does not get an opportunity of questioning the veracity of the statement by cross-examination.”

41. In order to evaluate the credit-worthiness of the dying declaration, we have examined its contents with the attending circumstances and the evidence on record. The first and foremost it is to be noticed that the deceased Deep Chand had mentioned that he went to the room of his mother to watch television and lied there on the cot next to her. The Investigating Officer has not found any television set at the place where the incident occurred. P.W.-1 who is the son of the deceased has categorically admitted that there was no television in his house. P.W.-2 who is the neighbour has also admitted that there was no television in the house. We have also seen the site plan in which no television is shown to exist. In fact the place of incident is not a room but is a *verandah*. The photograph of the place of incident is available in the original records of the case which also shows the place of incident to be a *verandah* and not a room. The last answer of Deep Chand in his dying declaration that he had gone to her mother's room to watch T.V. is, therefore, contradicted by the weight of evidence on record.

42. The deceased Deep Chand was specifically asked as to whether any quarrel took place with the accused in response to which he stated that

once while playing the accused had kept his feet on his neck. The deceased has not stated anything about the first part of the incident which allegedly occurred. This assumes significance inasmuch as the prosecution case is that Deep Chand was also present when the accused came to his in-laws house. A specific question was then posted to Deep Chand as to whether any quarrel occurred with his mother to which he answered that he does not know. The deceased Deep Chand has also stated that after he was set on fire, he ran towards the court yard and jumped into a pool of water. This part of the testimony of the statement in the dying declaration is contradicted by the prosecution witnesses of fact P.W.-1 & 2, as per which the fire was doused by putting cloth on the deceased and the injured and not by pouring water. None of the witnesses have stated that Deep Chand had jumped in the pool of water. The statement of Deep Chand is, therefore, contradicted on this part also. So far as the version of Deep Chand in response to the first question is concerned, the deceased has admitted that he was sleeping with his mother. He has stated that accused happens to be his brother in law who poured petrol on them and set them ablaze. There is nothing on record to indicate that there was any light or electricity in the house. In the last question also Deep Chand has claimed that when the accused was pouring petrol on his mother then he saw him. We view with some suspicion, the statement of Deep Chand inasmuch as it is not clear as to how he knew that the liquid, poured upon him or his mother was petrol. There is not even an iota of evidence on record to show that the deceased were burnt by the use of petrol. It is difficult to conceive that as to how Deep Chand could know about the identity of inflammable substance. It is in that context that we attach some importance to the argument of defence that infact the dying declaration was a result of tutoring inasmuch as P.W.-1 has admitted that he was present when the statement of his brother was being recorded. Although P.W.-5 has stated that he had removed all family members present near Deep Chand yet the inference of tutoring

cannot entirely be eliminated as the presence of family members prior to the recording of statement is admitted. P.W.-1 has otherwise stated that he was present when the statement of his brother was recorded. P.W.-5 has also stated that he does not remember when he arrived at the hospital to record the declaration whether family members of Deep Chand were talking to him. There is also a material contradiction in the dying declaration recorded by the Magistrate viz-a-viz the statement recorded by the Investigating Officer inasmuch as the Investigating Officer has stated that the Deep Chand informed him that from the voice of accused, he could identify him whereas in the dying declaration made to the Magistrate, there is no such disclosure.

43. The Apex Court, in the case of *State of Gujarat v. Jayrajibhai Puniabhai Varu AIR 2016 SC 3218 (PARA 10 & 11)*, has laid down that, “courts have to be extremely careful while dealing with a dying declaration as the maker thereof is not available for the cross-examination which poses a great difficulty to the accused person. The Court has to examine a dying declaration scrupulously with a microscopic eye to find out whether the dying declaration is voluntary, truthful, made in a conscious state of mind and without being influenced by the relatives present or by the investigating agency who may be interested in the success of investigation or which may be negligent while recording the dying declaration. The Court has to weigh all the attendant circumstances and come to the independent finding whether the dying declaration was properly recorded and whether it was voluntary and truthful. Once the court is convinced that the dying declaration is so recorded, it may be acted upon and can be made a basis of conviction. The courts must bear in mind that each criminal trial is an individual aspect. It may differ from the other trials in some or the other respect, and therefore a mechanical approach to the law of dying declaration has to be shunned. A mechanical approach in relying upon a dying declaration just because it is there, is extremely dangerous.”

44. The dying declaration made to the Magistrate, therefore, does not appear to us to be entirely reliable inasmuch as the factual assertion made therein with regard to Deep Chand having gone to the room of his mother to see TV and other facts being contradicted by the evidence on record. Deep Chand has otherwise feigned ignorance about the reason for which the accused had poured petrol and set him and his mother ablaze. In the totality of the facts and circumstances, we are therefore not inclined to rely upon the dying declaration so as to record the conviction of the accused appellant.

45. We find in the facts of the case that the court below has not subjected the testimony of witnesses to a careful scrutiny and has accepted the prosecution case on its basis. The law with regard to evaluation of the dying declaration has also not been applied correctly in the facts of the present case.

46. Considering the fact that the accused appellant has already undergone incarceration of more than 10 years, we are of the view that he is entitled to benefit of doubt. The finding of the court below that the guilt of the accused appellant has been established beyond reasonable doubt is, therefore, reversed. The reference is answered accordingly. The accused appellant shall be released unless he is wanted in any other case subject to compliance of section 437 A Cr.P.C.

47. Before parting the record, our appreciation for a sincere effort made by the Amicus Curiae, Shri Rajrshi Gupta in highlighting the facts of the case which has enabled us to arrive at our above conclusion. We also record our appreciation for the gesture showed by learned Amicus Curiae in not accepting any fee.

Order Date :- 7.8.2023
RA/ Zafar/ SP/ C. MANI

(Syed Aftab Husain Rizvi, J.) (Ashwani Kumar Mishra, J.)