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IN THE HIGH COURT OF DELHI

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Judgment Reserved on : 30th April, 2009

Judgment pronounced on : 12th May, 2009

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CRL.A.228/2001

GOKAL

..... Appellant

Through: Ms. Ritu Gauba, Advocate

versus

STATE

..... Respondent

Through: Mr. Pawan Sharma, Advocate

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE ARUNA SURESH

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether judgment should be reported in Digest? Yes

: PRADEEP NANDRAJOG, J.

1. Vide impugned judgment and order dated 22.03.2001, the appellant has been convicted for the offence of having murdered Rekha (herein after referred to as the "Deceased").
2. Case of the prosecution is that the appellant and the deceased were residing as husband and wife, as tenants, in a single room on the second floor in a building owned by Shashi PW-1 who lived on the ground floor of the building and that on 13.11.1998, the appellant poured kerosene oil on the

deceased and set her on fire. Shashi heard voices that the deceased had been burnt and she moved upstairs. She saw the appellant coming down. On seeing Shashi, the appellant stopped his forward movement and returned upstairs. The deceased was found on the floor in a burnt condition. Shashi and the appellant removed the deceased to G.T.B.Hospital where Dr.R.Dayal PW-10 recorded her MLC Ex.PW-10/A on which he noted the history of the alleged burn as under:-

“Alleged H/o being burnt by husband Gokul by pouring kerosene oil Informant self.

O/E Conscious
Oriented

.....

Fit for statement 100% burns superficial to deep
in nature.....”

The deceased died as a result of burn injuries. On being apprehended and interrogated, the appellant had made a confessional statement admitting his guilt and disclosed to the police that he had kept the match box, match sticks and the can of kerosene oil used by him for setting the deceased on fire in the room where the deceased was found burnt. That thereafter he led the police to the said room and got recovered the match box, match sticks and a can of kerosene oil from the said room.

3. To put it in a nutshell, the incriminating evidence sought to be proved by the prosecution, to bring home the guilt of the appellant, was:-

I Dying declaration of the deceased as recorded by Dr.R.Dayal on the MLC Ex.PW-10/A, which if proved, would have directly implicated the appellant.

II Evidence of Shashi PW-1 to the effect she had seen the appellant descend from the second floor at the time the deceased was found burnt i.e. appellant being present in his matrimonial house along with the deceased and his attempting to flee.

III Recovery of articles; namely, match box, match sticks and can of kerosene oil at the instance of the appellant.

4. Vide impugned judgment and order dated 22.03.01, convicting the appellant, the learned Trial Judge has held that the testimony of Dr.R.Dayal PW-10, that the deceased had informed him that the appellant had poured kerosene oil on her and thereafter set her on fire is trustworthy; that the evidence of Shashi PW-1 to the effect she had seen the appellant descend from the floor where the room where the deceased was found burnt was situated, soon after the occurrence, is a circumstance which strongly points towards the guilt of the appellant.

5. Machinery of law was put into motion when Const. Rishipal PW-17, duty constable at GTB Hospital, informed the duty officer at police post Mandawli that a lady named Rekha has been admitted in the hospital in a burnt condition by her husband Gokul, based whereon, SI Keir Singh recorded DD No.22, Ex.PW-18/A at 12.15 P.M. on 13.11.98; noting the said information.

6. Taking along a copy of the afore-noted DD Entry, SI Vijay Pal PW-16, accompanied with Const. Narayan Singh PW-14, went to GTB hospital where they were informed that the deceased is fit for making a statement. No eye witness was found present at the hospital. SI Vijay Pal telephonically contacted Mr.Ravi Dhadich PW-3, Sub-Divisional Magistrate, and requested him to come to the hospital for recording the statement of the deceased, whereupon Ravi Dhadich reached the hospital and started recording the statement Ex.PW-3/A of the deceased. However, the deceased was not able to make a complete statement and the same i.e. Ex.PW-3/A remains an inchoate statement.

7. Thereafter SI Vijay Pal PW-16 and Const. Narayan Singh PW-14, proceeded to the spot where Rekha was burnt. From the place of the occurrence, SI Vijay Pal, made an endorsement Ex.PW-16/A on copy of the DD Entry Ex.PW-18/A

and handed over the same to Const. Narayan Singh PW-14, for registration of an FIR. Const. Narayan Singh took Ex.PW-16/A to police station Trilok Puri where HC Brahm Singh PW-5, recorded FIR No.944/98, Ex.PW-5/A at 6.05 P.M. on 13.11.98. SI Vijay Pal prepared the rough site plan Ex.PW-16/B of the place of the occurrence at the instance of Shashi PW-1, the landlady of the house; in which statement, Shashi informed SI Vijay Pal that when she heard of the deceased being burnt, as she was going up she saw the accused coming down, but at her instance he went up with her and at her instance took the deceased to the hospital.

8. Since the conduct of the appellant was suspicious, SI Vijay Pal returned to the hospital and arrested the appellant.

9. The deceased succumbed to her injuries the same day i.e. on 13.11.1998 at around 11:30 PM. Constable Rishipal PW-17, informed HC Brahm Singh PW-5, about the said fact, on receipt whereof HC Brahm Singh recorded DD No.25, Ex.PW-5/C, noting the said information.

10. On the next day i.e. 14.11.1998 the appellant was interrogated by SI Vijay Pal PW-16, in the presence of Const. Lekh Raj PW-15 and Const. Narayan Singh PW-14. The appellant made a disclosure statement Ex.PW-14/B wherein he admitted his guilt and stated that he can get recovered the

can of kerosene oil and the matchsticks used by him for setting the deceased on fire. Pursuant thereto, he led the afore-noted police officers to the room where the deceased was found burnt and got recovered a can of kerosene oil, a match box containing about 20 match sticks, some used match sticks and burnt ash from the said room which were seized vide memo Ex.PW-7/A.

11. The body of the deceased was seized and sent to the mortuary of G.T.B. Hospital, where Dr.Gaurav Vinod Jain PW-4, conducted the post-mortem and made the report Ex.PW-4/A recording as under:-

“External ante-mortem injuries: - Superficial to deep burns, involving 98% of the body surface area, and spacing the soles, parts of palms, and occipital area over the scalp. Pinna on both sides and tips of nose shrunk. Singeing of body and scalp hair present. Facial, pubic and axillary hair burnt and show singeing. Sooty blackening present all over. The underlying tissues in the burnt area show erythema. No other external ante mortem injury could be ascertained.”

12. He opined that the cause of the death was shock resulting on account of ante mortem flame burn involving 98% of the total body surface area.

13. After conducting the post-mortem, the doctor preserved the scalp hair and blood of the deceased on gauze piece for

forensic examination which were taken possession of by SI Vijay Pal PW-16, vide memo Ex.PW-16/E.

14. At the trial, Const. Mahavir PW-18, proved that DD Entry No.22, Ex.PW-18/A was recorded by SI Keir Singh. Inspector Satyapal Singh PW-12, deposed that he had taken over the investigation of the present case from SI Vijay Pal on 15.11.98. SI Mahesh Kumar PW-10, a draftsman proved the site plan to scale Ex.PW-10/A and deposed that he had prepared the same on 10.12.98 with the assistance of Inspector Satyapal Singh. (It be noted here that two witnesses of the prosecution namely SI Mahesh Kumar and Dr.R.Dayal have been marked as PW-10). Dr.Gaurav Vinod Jain PW-4, proved the post-mortem report Ex.PW-4/A. Const. Kuldeep Singh PW-9, a photographer, deposed and proved that the photographs Ex.PW-9/7 to Ex.PW-9/11 of the place of occurrence; negatives whereof were Ex.PW-9/1 to Ex.PW-9/6 were taken and developed by him. Ravi Dhadich PW-3, Sub-Divisional Magistrate, proved that he had recorded the statement Ex.PW-3/A of the deceased and that the said statement was the partial statement of the deceased as she was not able to speak properly during the course of her statement and midway the doctor declared her unfit for statement.

15. We ignore the testimony of the formal police witnesses as also the witnesses to the recovery of the kerosene oil can, the burnt matchsticks and the matchbox containing matchsticks pursuant to the disclosure statement of the appellant. We do so for the reason, the police had already accessed the room where the deceased had been burnt prior to the disclosure statement made by the appellant and had noted the presence of said articles in the room, i.e. the police had knowledge about the presence of said articles in the room before the disclosure statement of the appellant was recorded. We shall be noting the testimony of Shashi PW-1, Sharda PW-2, Rajender Singh PW-7 and Suresh PW-13 in respect of which testimonies, submissions were made during arguments in the appeal.

16. Shashi PW-1, the landlady of the house, deposed that she and her husband had inducted the appellant as a tenant in a room situated on the second floor of their house 3½ months prior to the incident and that the appellant used to live with his wife Rekha (deceased) in the said room. That on the day of the incident, at around 6.00 A.M., four persons who claimed themselves to be the maternal uncle, mother, wife and male child respectively of the appellant had come to the house and had gone to the room where the appellant used to live with

the deceased. At about 10.30 A.M. when she was present at the ground floor of her house she heard voices to the effect that 'the deceased has been burnt' coming from the room where the appellant used to live with the deceased, whereupon she went upstairs to the second floor where the said room was situated and found that the deceased had been badly burnt. While going upstairs she had seen the appellant coming down from the second floor, but he thereafter removed the deceased to the hospital.

17. Sharda PW-2, a neighbour of the appellant, deposed that the appellant used to live with his wife whose name was Rekha (deceased) in the house in question since about three months prior to the incident. That on hearing noises she went to the room where the deceased was found burnt and found that the said room was locked. She deposed that the deceased used to remain sick and was depressed because of her sickness and that the deceased had told her that she was contemplating suicide.

18. Since PW-2 introduced facts helpful to the appellant, she was declared hostile by the Court at the request of the learned public prosecutor and was cross-examined by the learned public prosecutor. On being cross examined, with reference to her statement that the door of the room was locked, Sharda

PW-2 stated: *'when I heard the noise coming out from the room of the accused the door whereof was closed from inside, I had called the accused Gokul who was on roof. When I called Gokul from the roof, the mother, father, his earlier wife who had the child were sitting there with the accused Gokul on the roof.'*

19. Relevant would it be to note that the witness changed the expression of the door being 'locked' to the door being 'closed'.

20. Rajender Singh PW-7, the landlord of the house, deposed that some persons who claimed themselves to be the relatives of the deceased had made enquiries from him about the whereabouts of the deceased in the morning of the day of the incident. That, on being pointed out by the appellant, the police had recovered a can of kerosene oil, some used match sticks and a matchbox from the room where the appellant used to live with the deceased.

21. Suresh PW-13, deposed that he is working as a manager in a brothel and that the deceased used to work there some months prior to the incident. That the deceased used to remain tense because of her illness.

22. Examined under Section 313 Cr.P.C., the appellant denied everything and pleaded false implication. He stated

that the deceased was ill since a long time; that he used to live with the deceased but that she was not his wife; that the persons who had made enquiries about his whereabouts on the day of the incident were his maternal uncle, mother, wife and child respectively; that on the day of the incident he was present with his relatives on the terrace of his house when he heard a noise made by the deceased, whereupon he came down to his room and found that the deceased was badly burnt; that the recording '*alleged H/o being burnt by husband Gokul by pouring kerosene oil Informant self*' contained in the MLC Ex.PW-10/A of the deceased was not made on the basis of the information given by the deceased as she was not fit for making a statement; that the deceased used to remain depressed because of her illness and hence committed suicide.

23. In defence, the appellant examined Dr.Amit Gupta DW-1, to prove the factum of illness of the deceased. He deposed that the deceased had undergone Fine Needle Aspiration Cytology (FNAC) at GTB Hospital two days prior to the incident.

24. As already noted herein above, treating the recording '*alleged H/o being burnt by husband Gokul by pouring kerosene oil Informant self*' contained in the MLC Ex.PW-10/A

of the deceased as the dying declaration of the deceased; believing the testimony of Dr.R.Dayal PW-10, that he had made the said recording in the MLC on the basis of the information given by the deceased to be trustworthy; holding further that the testimony of Shashi PW-1 evidenced the conduct of the appellant attempting to walk away and not helping the deceased was suggestive of a guilty mind, the learned Trial Judge has convicted the appellant. We note that the learned Trial Judge has rightly ignored the recoveries made from the room as meaningless because they were made from a place which had been accessed by the police and were from open place inside the room.

25. At the hearing, following submissions were advanced by the learned counsel for the appellant:-

A The first submission advanced by the learned counsel for the appellant was that the evidence on record probablizes the defence of the appellant that the deceased had committed suicide. The first limb of the said argument was that the evidence on record shows that the room where the deceased was found burnt was locked from inside which rules out the possibility that the appellant had set the deceased on fire, inasmuch as the appellant was found present outside the said room soon after the occurrence. Drawing our attention to the

photograph Ex.PW-9/11 which shows the inside of the room where the deceased was found burnt. The photograph depicts a door on the ground with the latch pushed upwards. The second piece of evidence pointed out by the counsel to urge that the room in question was locked, is the testimony of Sharda PW-2, that when she had gone to the room in question soon after the incident she found that the door of the room in question was locked from inside. Counsel urged that this shows that the deceased had committed suicide. The submission was attempted to be made good with reference to the testimony of PW-13, DW-1 and PW-2 pertaining to the sickness of the deceased; it was urged that there was every possibility of the deceased committing suicide.

B The second submission was that Dr.Gaurav Vinod Jain PW-4, the doctor who conducted the post-mortem, during cross examination said that the burn injuries could be self inflicted. Hence, counsel urged that even this evidence did not rule out the possibility of a suicide.

C The third submission advanced by the learned counsel was predicated upon the testimony of Sharda PW-2. The counsel urged that the testimony of Sharda that she saw the appellant on the roof i.e. the terrace when she went to the

place of occurrence establishes that the accused was not present in the room when the deceased was on fire.

D The fourth submission advanced by the learned counsel was that the MLC Ex.PW-10/A of the deceased cannot be relied upon for the reason it does not contain the thumb impression of the deceased. Learned counsel placed reliance upon the decision of Orissa High Court reported as Niru Nanhar Becck v State of Orissa 1995 Cri LJ 2412.

E The fifth submission advanced by the learned counsel for the appellant was, that a dying declaration is to be tested on the touchstone of following two tests namely, (i) whether version stated by the deceased is intrinsically sound and accords with probability, and (ii) whether any material part of the dying declaration is proved to be false by other reliable evidence. Counsel urged that the MLC records that the appellant was the husband of the deceased, a fact which was incorrect as the evidence on record establishes that the lady and the child who had visited the house in the morning along with two other persons, were the wife and the child of the appellant.

F The sixth submission advanced by the learned counsel was that the staff of GTB hospital was inimically disposed towards the appellant inasmuch as two quarrels had taken

place between the staff of GTB hospital and the appellant prior to the incident. The first quarrel had taken place between the appellant, one Manoj and one Dharmender on one side and staff of GTB hospital on other side few days prior to the incident and that the second quarrel had taken place between the appellant and nurses of GTB hospital just two days prior to the incident.

G The seventh submission advanced by the learned counsel pertained to the medical condition of the deceased soon after she was burnt. Counsel urged that the deceased had sustained extensive burn injuries on her person. The doctor who performed the post-mortem of the deceased stated that the injured had sustained 98% burn injuries. Counsel argued that having sustained such serious injuries, it is highly improbable that the deceased was conscious and in a fit medical condition to make a voluntary disclosure of the incident soon after sustaining said injuries. Counsel placed reliance upon the decisions of the Supreme Court reported as Paparambaka Rosamma v State of AP 1999 SCC (Cri) 1361 and Smt Laxmi v Om Prakash 2001 Cri LJ 3302.

H The eighth submission advanced by the learned counsel was again predicated upon the decision of the Supreme Court in Laxmi's case (supra). Counsel contended that a similar

statement made by the deceased to the attending doctor in the said case was not considered as a dying declaration by Supreme Court.

I The ninth submission advanced by the learned counsel pertained to the conduct of the appellant in removing the deceased to the hospital. Counsel urged that the factum of removal of the deceased to the hospital by the appellant is a pointer indicating towards the innocence of the appellant.

J The tenth submission advanced by the learned counsel was that there is a serious contradiction in the evidence of Const. Narayan Singh PW-14 and SI Vijay Pal PW16, with regard to the investigation conducted by them on the day of the occurrence. Counsel pointed out that Const. Narayan Singh had deposed that he along with SI Vijay Pal had first gone to the spot after the receipt of the information of the incident whereas SI Vijay Pal deposed that they had first gone to GTB hospital.

K The eleventh submission advanced by the counsel was that the prosecution has failed to establish the motive of the appellant for committing the murder of the deceased which is a serious lacuna in the case of the prosecution.

L The last submission advanced by the learned counsel was that the failure of the prosecution to examine the

relatives of the appellant who had come to meet him on the day of the occurrence creates a serious dent in the case of the prosecution inasmuch as the said persons were material witnesses for the reason the evidence on record has established that they were present at the place of occurrence at the time of the incident and thus could have thrown some light on the incident.

26. The argument advanced by the learned counsel pertaining to the photograph Ex.PW-9/11 which shows the inside of the room where the deceased was found burnt, at first blush, seems attractive inasmuch as a door can be seen on the floor, with the latch pushed upwards. It certainly suggests, as if, the door fell on the floor after it was pushed from outside and that the latch was locking the door. But, a closer look at the photograph reveals something more, which concludes that the door did not fall on the floor on being pushed from outside. A utensil is seen on the door. This could not have happened if the door was pushed and had to be broken to gain access to the room. It shows that the door was being used as a plank to keep articles thereon. It has to be noted that the appellant and the deceased were residing in a single room which served not only as their living room but

even the kitchen. It appears that the door in question was being used as a kind of a slab for placing utensils.

27. Pertaining to the fact that Sharda PW-2 had deposed that the room was locked when she reached the room, suffice would it be to note that on being cross examined by the learned public prosecutor she stated that the room was closed from inside. It is apparent that the witness used a wrong expression while deposing in examination-in-chief. It is not out of place to note that it is not the case of the appellant that the door had to be broken to gain access into the room. No such suggestion was given to PW-1 or PW-2. No suggestion was given to the investigating officer that the topology of the room showed a forced entry.

28. The submission advanced by the counsel that the testimony of the witnesses of the prosecution and the defence that the deceased was ill; that she used to remain depressed because of her illness and was contemplating committing suicide, would merit consideration only if the dying declaration of the deceased is not accepted by us. For if the same is accepted, the question of the deceased committing suicide would itself be ruled out. Of course, the conduct of the appellant who was found to be leaving the house by PW-1 is strongly indicative of his guilty mind.

29. That the doctor who conducted the post-mortem stated that the burn injuries could be self-inflicted, is neither here nor there, for the reason in every case of burning, the injuries can always be classified as either suicidal or homicidal. Inasmuch as somebody can pour kerosene on the victim and set the victim on fire, the same act can be done by the victim himself. Said evidence, would therefore, be neutral evidence.

30. The plea that Sharda PW-2 had deposed that she had seen the accused on the terrace of the house and this shows that the appellant could not have set Rekha on fire merits not much deep consideration because of the fact that no eye witness has spoken about having seen the appellant set Rekha on fire. The case of the prosecution is based on the dying declaration of Rekha and the conduct of the appellant. We note that Sharda PW-2 is a hostile witness and has attempted to bail out the appellant. PW-1 Shashi has categorically stated that as she proceeded from the ground floor to go upstairs when she heard noises, she saw the appellant descending the stairs.

31. Since the next few submission pertained to the credibility of the history recorded in the MLC of the deceased by Dr.R.Dayal that the burns were caused by the husband Gokul of the deceased who poured kerosene oil, as disclosed by the

patient herself, we note the law relating to dying declarations before dealing with the submissions urged.

32. The admissibility of a dying declaration as a piece of evidence is an exception to the general rule of exclusion of hearsay evidence. 'A person will not meet his Maker with a lie in his mouth' is the philosophy underlying admissibility of dying declaration as a piece of evidence. Apart from an implicit faith in the intrinsic truthfulness of human character at the dying moments of one's life, admissibility of dying declaration is also based on the doctrine of necessity. In many cases victim is the only eye witness to a crime on him/her and in such situations exclusion of the dying declaration, on hearsay principle, would tend to defeat the ends of justice. The judicially evolved rules of caution for acceptance of dying declaration are being enumerated herein under:-

(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration.

(ii) The dying declaration is only a piece of untested evidence and must, like any other evidence, satisfy the court that what is stated therein is the unalloyed truth and that it is absolutely safe to act upon it. If after careful scrutiny, the court is satisfied that it is true and free from any effort to induce the

deceased to make a false statement and if it is coherent and consistent, there shall be no legal impediment to make it the basis of conviction, even if there is no corroboration.

(iii) The court has to scrutinize the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had an opportunity to observe and identify the assailants and was in a fit state to make the declaration.

(iv) Where a dying declaration is suspicious, it should not be acted upon without corroborative evidence.

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected.

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction.

(vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected.

(viii) Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth.

(ix) Normally, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration looks up to the medical opinion. But where the eyewitness said that the deceased was in a fit and conscious state to make the dying declaration, the medical opinion cannot prevail.

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon.

(xi) Where there are more than one statements in the nature of dying declaration, the one first in point of time must be preferred. Of course, if the plurality of the dying declaration could be held to be trustworthy and reliable, it has to be accepted.

(xii) The law does not provide that a dying declaration should be made in any prescribed manner or should be in the form of questions and answers. Only because a dying declaration was not recorded by a Magistrate, is no ground to disbelieve a dying declaration.

33. There is no universal rule that unless the thumb impression of the patient is obtained on the MLC, the fact of a

statement recorded on the MLC, by the doctor concerned is of no value. The rule that the signatures or thumb impression of the patient should be obtained is not a rule of prudence but a rule of caution. The decision of Orissa High Court in Niru Nanhar's case (supra) cited in support of the plea that if the MLC does not contain the thumb impression of the patient, the same has to be rejected, nowhere states so. The facts of the said case were that the prosecution had alleged that the appellant had poured kerosene oil on the body of the deceased and set her on fire while the deceased was sleeping. The deceased had made a dying declaration before succumbing to her injuries. The High Court had acquitted the appellant on account of infirmities in the dying declaration made by the deceased as also in the other evidence on record. A similar contention was urged on the behalf of the appellant therein that the dying declaration made by the deceased therein should be discarded, for the reason no signatures or thumb impression of the deceased was obtained on the said declaration. The said contention did not find favor with the court which held that the doctor had satisfactorily explained the absence of signatures or thumb impression of the deceased on the said declaration. A perusal of the said decision thus shows that the dying declaration was not

rejected on the ground that the signatures or thumb impressions of the deceased was not obtained on the MLC, but on account of various other infirmities.

34. The plea that the deceased falsely disclosed herself to be the wife of the appellant, as recorded in the MLC requires her dying declaration as recorded in the MLC to be discarded was predicated with reference to the testimony of Shashi PW-1, Shashi PW-2 and Rajender Singh PW-7 who have deposed that on the day of the incident four persons, two of whom were the wife and the child of the appellant had visited the house. Thus, the appellant could not be the husband of the deceased. It was urged that if the deceased could lie with reference to her relationship, there was every possibility that she lied even on qua the remainder. The plea is neither here nor there for the reason Shashi PW-1 has categorically deposed that the deceased and the appellant were living as husband and wife. It is not the case of the appellant that the lady who came to his house on the day of the incident was living with him as his wife. It is obviously a case where the appellant had abandoned his wife and his child and was living with Rekha, holding out to the world at large that Rekha was his wife.

Obviously, Rekha was also holding herself out to be the wife of the appellant. We find no lies spoken by Rekha.

35. The plea that the staff of GTB hospital was inimically disposed towards the appellant is without any factual foundation as there is no evidence on record that on two previous occasions a quarrel involving the appellant and the staff at G.T.B. Hospital had taken place. We note that a vague suggestion has been given to Dr.R.Dayal, PW-10 during cross examination that he i.e. Dr.R.Dayal, falsely recorded on the MLC that the deceased had informed him that the appellant had poured kerosene oil on her and set her on fire at the behest of the nurses. We note that no names of any nurse was suggested to the witness.

36. Pertaining to the medical condition of the deceased at the time she was brought to the hospital, we note that Dr.R.Dayal PW-10, who had prepared the MLC of the deceased, has categorically deposed that the deceased was conscious and oriented at the time of the preparation of the said MLC. The appellant has not been able to show that the said doctor had any animus towards the appellant. There was no occasion or reason for the said doctor to falsely implicate the appellant. The fact that the deceased was suffering from severe burn

injuries does not necessarily lead to a conclusion that she was not in a position to inform the doctor about the said incident, particularly in the light of the deposition of the doctor who had conducted the post-mortem of the deceased that a patient who has sustained 98% burn injuries can remain conscious for sometime after sustaining the injuries.

37. Pertaining to decisions of the Supreme Court relied upon by the learned counsel in support of the contention that the extent of injuries suffered by the appellant makes it highly improbable that she had informed the doctor about the incident, we note that the facts of Rosamma's case (supra) were that the dying declaration made by the deceased who had sustained 90% burn injuries was sought to be proved by the evidence of the Magistrate who had recorded the said statement and the Medical Officer who was present at the time of the recording of the said statement. The certificate given by the doctor at the end of dying declaration merely stated that the deceased was conscious and a note was made by the Magistrate recording the said declaration that the deceased was fit to make the statement. It was held by Supreme Court that the certification given by a doctor should not only be about consciousness of the deceased but should also record

that the deceased was in a fit state of mind at the time of the recording of the dying declaration since the consciousness and fitness of the mind are two distinct conditions. In the absence of doctor's certification about the fitness of the mind of the deceased at the time of the recording of the dying declaration, said declaration was rejected by Supreme Court. In Laxmi's case (supra) the Supreme Court rejected the dying declaration made by the deceased who had sustained 85% burn injuries on the ground that there was no medical evidence to show that the deceased was in a fit state of mind and physical condition at the time of the recording of the statement. The said two decisions are clearly distinguishable from the present case as in the present case the MLC of the deceased clearly records that the deceased was conscious, oriented and fit to make a statement at the time when she informed the doctor about the incident. The doctor who prepared the said MLC namely, Dr.R.Dayal PW-10, also clearly deposed about the said fact.

38. It is no doubt true that the deceased was removed to the hospital by the appellant. But, the fact that when PW-1 went upstairs she saw accused going down, indicates that the first attempt of the appellant was to remove himself from the

scene. We note that Shashi PW-1 has categorically deposed: *at about 10:30 AM on hearing the noise that Rekha jal gayi hai I went upstairs and found Rekha lying burnt and the accused Gokul going down.* The conduct of the appellant of not making any attempt to rescue his wife and joining in the rescue only after Shashi reached the place cannot be ignored by us.

39. The testimony of SI Vijay Pal PW-16, that he along with Const Narayan Singh had first gone to GTB hospital on the receipt of the information of the incident is duly corroborated by the contemporaneous document prepared by him particularly the endorsement Ex.PW-16/A which clearly records the same. That Const. Narayan Singh deposed that they first went to the spot and thereafter the hospital, is neither here nor there. In fact the very submission is baseless. What turns whether the police first went to the spot or the hospital. It is not the case of the appellant that the evidence has been planted upon him. As noted hereinabove, the only evidence used against the appellant is the dying declaration of the deceased and his conduct emerging from the testimony of Shashi.

40. That the prosecution has failed to establish the motive on the part of the appellant to murder the deceased, suffice

would it be to state that it is settled law that failure to establish motive of the accused is not fatal to the case of the prosecution when there is clinching evidence establishing the guilt of the accused as held in the decision of the Supreme Court reported as Mulak Raj v Satish Kumar 1992 Cri LJ 1529.

41. That the prosecution did not examine the four persons who as per the testimony of PW-1 and PW-2 had visited the house in the morning, does not entitle the appellant to any benefit of doubt for the reason there is no evidence that said four persons had witnessed the incident. The prosecution is not supposed to examine useless witnesses.

42. Having dealt with the submissions advanced by the learned counsel for the appellant, we hold that the appellant has not been able to demolish the testimony of Dr.R.Dayal PW-10, that the deceased had informed him that the appellant had set her on fire after pouring kerosene oil on her body. The evidence of Shashi PW-1, that she had seen the appellant coming down from the floor where the room in which the deceased was found burnt was situated soon after the occurrence is indicative of the fact that the appellant was attempting to leave the place of occurrence so as to ensure that no suspicion would fall upon him; a conduct which is an incriminating fact.

43. In view of above discussion, the appeal is dismissed.

44. The appellant is on bail. His bail bond and surety bond are cancelled. The appellant is directed to surrender and the remaining sentence of imprisonment for life.

PRADEEP NANDRAJOG, J.

ARUNA SURESH, J.

May 12, 2009
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