

GAHC010211952019



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : CRL.A(J)/62/2019

SANJIB MURAH @ LODHA
S/O. LT. THULA MURAH, R/O. UKANIMORIA BENGALI GAON, P.S.
TINSUKIA, DIST. TINSUKIA, ASSAM.

VERSUS

THE STATE OF ASSAM
REP. BY PP, ASSAM.

Advocate for the Petitioner : MR. K GOSWAMI, AMICUS CURIAE

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MR. JUSTICE LANUSUNGKUM JAMIR
HONOURABLE MR. JUSTICE MRIDUL KUMAR KALITA

For the Appellant : Mr. K. Goswami, Amicus Curiae
: Ms. A. Neog, Adv.

For the Respondent : Ms. S. Jahan,
Additional Public Prosecutor

Date of Judgment : **09.02.2024**

JUDGMENT & ORDER

1. This criminal appeal (Jail) has been registered on the basis of an appeal petition filed by the appellant, namely, Sanjib Murah @ Lodha through the Superintendent, District Jail, Tinsukia, where he has been presently lodged, impugning the judgment dated 08.03.2019 passed by the learned Sessions Judge, Tinsukia in Sessions Case No. 128(T)/2016 whereby the present appellant was convicted under Section 302 of the Indian Penal Code and was sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs.25,000/- (Rupees Twenty Five Thousand) and in default of payment of fine to undergo further imprisonment for six months.

2. The facts relevant for consideration of this jail appeal, in brief, are as follows:-

(i) That on 21.05.2015, one Kailash Urang lodged an FIR (*First Information Report*) before the Officer-in-Charge of Tinsukia Police Station, *inter alia*, stating that his sister, namely, Rita Mura was married to the present appellant about three years prior to the lodging of the FIR and out of the said wedlock one girl child was also born who was aged about 2½ years at the time of lodging of the FIR. It was alleged in the FIR that after the marriage, the appellant used to physically and mentally torture the sister of the first informant which she was tolerating for the sake of saving her marriage. However, on 15.04.2015, the appellant poured kerosene oil on the sister of the first informant and set her ablaze. On hearing hue and cry, some neighbours gathered there and rescued her and sent her to Dibrugarh for treatment. On receipt of the said FIR, Tinsukia P.S. Case No. 679/2015 was registered under Section

498(A)/326/307 of the Indian Penal Code. However, thereafter on 26.06.2015, the sister of the first informant succumbed to her injuries and by order dated 07.08.2015, Section 304B of the Indian Penal Code was added to this case.

(ii) After completion of the investigation, the charge-sheet was laid against the appellant, namely, Sanjib Murah @ Lodha under Section 304B of the Indian Penal Code. Though, the charge-sheet was laid under Section 304B of the Indian Penal Code, however, by order dated 16.09.2026, the learned Sessions Judge, Tinsukia after going through the materials on record and after hearing both the sides, framed charge under Section 302 of the Indian Penal Code against the present appellant. When the charge was read over and explained to the present appellant, he pleaded not guilty to the same and claimed to be tried. The appellant faced the trial remaining on bail.

(iii) During the trial, the prosecution side examined as many as ten prosecution witnesses. The appellant was examined under Section 313 of the Code of Criminal Procedure, 1973 during which he denied the truthfulness of the testimony of the prosecution witnesses and pleaded his innocence. The appellant also examined himself as defence witnesses No. 1 in support of his case. However, by the judgment which has been impugned in this appeal, the learned Sessions Judge, Tinsukia convicted and sentenced the present appellant in the manner as described in paragraph No. 2 hereinbefore.

3. We have already heard Mr. K. Goswami, learned Amicus Curiae for the appellant as well as Ms. S. Jahan, learned Additional Public Prosecutor for

the State of Assam. We have also gone through the written argument submitted by Ms. A. Neog, learned counsel who had assisted the learned Amicus Curiae as well as by the Additional Public Prosecutor, Assam.

4. Before considering the submissions of learned counsel for both the sides, let us go through the evidence which is available on record.

5. PW-1, Dr. Biswajit Saikia, who had conducted the post-mortem examination on the dead body of Rita Murah, has deposed that on 26.06.2015, he was working as Medical & Health Officer No. 1 at Tinsukia Civil Hospital and on that day he conducted the post-mortem examination on the dead body of Rita Murah, 30 years female in connection with Tinsukia P.S. Case No. 679/2015. The dead body was brought and identified by UBC/693, Bhairab Mech. The P.W.-1 has deposed that on examination of the dead body, he found following: -

“External Appearance:- Medium built 5'6" height. Swarthy complexion, wearing no clothes. Rigor mortis present over lower limbs. Old burn injury with pus and signs of infection present on the mouth, forehead, chest, both hands and arms. Burnt area approximately 35% of body surface area.

The pleurae, larynx, trachea, right lung, left lung, pericardium, heart were congested. Peritonoum, mouth, pharynx, oesophagus were congested. Stomach was empty and only fluid present. Small intestine was also empty and fluid present. Large intestine empty and fluid present. The brain and membrane were congested. Liver, spleen and kidneys were congested. Bladder was empty.

Opinion:- In my opinion, the death was due to septicemia, as a result of more than 35% of burn body surface area with infection. All the injuries were ante mortem in nature. Approximate time since death is 24 to 36 hours.

Ext.1 is the P.M. report and Ext.1(1) is my signature.

Deceased died due to septicemia as a result of burn injury."

6. During cross-examination, he has deposed that it cannot be asserted if proper treatment was provided to the victim whether she would have survived or not. He has also deposed that sustaining more than 25% of burn injury in the adult is always considered as serious.

7. PW-2, Sri Kailash Urang, has deposed that the deceased Rita Murah was his sister and one day she informed the PW-2 over telephone asking him to take her back from her matrimonial home. When, PW-2 went to her house, he found her in a burnt condition. PW-2 has further deposed that his sister told him that the appellant, namely, Sanjib Murah had burnt her by pouring kerosene over her. Thereafter, PW-2 took her sister to St. Lukes Hospital and got her admitted there and thereafter he lodged an FIR which is exhibited as Exhibit- 2. It is also deposed by PW- 2 that after about a month of her admission in the hospital, her sister expired.

7.1 During cross-examination, PW-2 has deposed that at the time of the incident he was in his home and the deceased used to reside at Ukonimoria Gaon. He has also deposed that immediately after the incident, his sister was first taken to Assam Medical College & Hospital, Dibrugarh and after about one month of her release from AMCH, Dibrugarh, she made telephone call

to PW-2. He has answered in negative to certain suggestive questions put to him by the learned defence counsel.

8. PW-3, Sri Dipak Urang, has also deposed that the deceased Rita Murah was his sister and the present appellant is the husband of the deceased Rita Murah. PW-3 has also deposed that after the marriage of her sister with the appellant, there used to be frequent quarrel in between them. It is deposed by PW-3 that one day the wife of PW-3 received a phone call from the deceased Rita Murah that she got burnt and was required to be taken to the hospital. Thereafter, she was taken to St. Lukes Hospital. PW-3 has also deposed that she also went to see his sister at St. Lukes Hospital where she told him that she was burnt by the appellant. It is also deposed by PW-3 that prior to taking to St. Lukes Hospital the sister of PW-3 was first taken to Assam Medical College & Hospital, Dibrugarh by the appellant and from there she was taken back by the appellant without getting fully cured due to shortage of money. It is also deposed by the PW-3 that the deceased remained admitted at St. Lukes Hospital for about one month and thereafter she died during the treatment.

8.1. During cross-examination, PW-3 has deposed that the deceased, at the time of the incident, was residing at Ukonimoria Gaon. He has also deposed he did not visit Assam Medical College & Hospital, Dibrugarh to see the deceased as at that time he was not aware about the incident. He has reiterated during cross-examination that the deceased told him at the St. Lukes Hospital that the appellant had set her on fire.

9. PW-4, Sri Krishna Urang, has deposed that the deceased Rita Murah was his sister-in-law and on 15.04.2015 one of his relative informed him that Rita Murah had sustained burned injuries on her, chest face and hand.

Accordingly, PW-4 accompanied by Sri Kailash Urang (PW-2) another family members went to the house of the deceased where they found Rita Murah lying on a bed. PW-4 has also deposed that when he asked the injured as to how she sustained those injuries, initially she was reluctant to disclose the truth. However, later on she told him that her husband (*i.e., the appellant*) poured kerosene on her and set her ablaze. It is also deposed by the PW-4 that when, on 15.04.2015 they went to the house of Rita Murah already 15 days had elapsed when she was set ablaze on fire. PW-4 has further deposed that thereafter Rita Murah was taken to St. Lukes Hospital at Tinsukia where after about ten days of her treatment she succumbed to her injuries.

9.1. During cross-examination, PW-4 has deposed that Police never recorded his statement. He has also deposed that on 15.04.2015, he saw the victim in a bandaged condition and he was told by the victim that immediately after the occurrence she was taken to AMCH. He has further deposed that when the victim stated to him that she was burned by the accused, at that time Jiten Orang, his son Sawan Orang, wife of Jiten Orang and the sister of the injured was present.

10. PW-5, Sri Sawan Urang has deposed that Kailash Urang is his maternal uncle and the deceased Rita Murah was the sister of the said Kailash Urang. He has deposed that his mother informed him that Rita Murah was admitted in St. Lukes Hospital. It is also stated by PW-5 that his mother also informed him that Rita Murah had a quarrel in the house and she was burned. However, he stated that he do not know who burned her. He has also stated that immediately after she was burned, she was taken to AMCH, Dibrugarh. He has also stated that his parents also went to the house of accused and took Rita to St. Lukes Hospital where she died after one week. PW-5 has also deposed that when Rita was in

the hospital, he visited her, however, she did not tell him who caused burn injuries to her. He has also stated that the Police conducted inquest over the dead body in his presence and he also exhibited the inquest report as Exhibit-3.

10.1. During cross-examination PW 5 has deposed that before her marriage to the accused, Rita was married to another person. He has also deposed that he does not know when Rita was admitted in the Assam Medical College & Hospital. However, after her return from AMCH, she stayed in her house for about two months and thereafter she was admitted to the St. Lukes Hospital. He has also stated that he is not aware as to for how much time Rita was admitted in AMCH.

11. PW-6, Sri Lengra Mura has deposed that he does not know Kailash Urang, however, he knows Sanjib Mura as his house is near the house of PW-6. He has deposed that he had heard that wife of Sanjib Mura was burn to death. He has also deposed that after she sustained burn injuries, Rita was taken to AMCH and after that she was again brought back to home by the appellant as he ran out of money.

11.1 This witness was declared as a hostile witness and during cross-examination by the prosecution side, he has denied the fact that he had stated before Police that on 15.04.2015 at about 6.00 PM, occurrence took place and he had stated that the accused and his wife had an argument and commission was created and when he when the PW-6 came out of his house, he saw at the doorstep of the accused, Rita Mura was lying in burnt state.

11.2 During further cross-examination by prosecution side, he has also stated that he did not state before the Police that neighbours dosed the fire on the body of Rita Murah and thereafter, ambulance came and took Rita Murah to hospital. During cross-examination by the defence side, PW-6 has deposed that

he does not know as to how Rita sustained burned injuries and he also does not know as to for how many days she stayed in AMCH.

12. PW-7, Sri Durga Munda has deposed that at the time of the occurrence of incidents, he was not at his residence and when he came back to his residence, he came to know that Rita Mura sustained burn injuries and she was taken to Tinsukia Civil Hospital and thereafter to AMCH Dibrugarh. This witness was also declared as hostile and during cross-examination by the prosecution side, he denied that he made a statement before the Police on 15.04.2015 at about 6.00 PM, the occurrence took place and at that time he was passing by the house of the accused when he heard that accused and his wife were arguing and after some time, he came to know that Rita Murah had sustained burned injuries and villagers called an ambulance and Rita Murah was taken to hospital by the accused and some other people. His cross-examination was declined by the defence side.

13. PW-8, Sri Suresh Mura has deposed that although the wife of Sanjib Mura died, he does not know as to how she was killed and he only knows that she was taken to hospital where she died. The cross-examination of PW-8 was also declined by the prosecution side.

14. PW-9, Bhaiya Mura was declared as hostile witness and during cross-examination by the prosecution side he has denied that he had stated before the Police that on 15.04.2015 at about 6.00 p.m., there was a quarrel in the house of the accused and he came to know that during the quarrel Rita Mura caught fire and later on villagers doused the fire and called an ambulance. His cross-examination was declined by the defense side.

15. PW-10, Sri Mukul Hazarika, S.I. of Police has deposed that on

21.05.2015 he was working as In-charge of Panitola Police outpost and on that day Kailash Urang had lodged in an FIR in the Tinsukia Police Station alleging that his sister was burned by her husband and on receipt of the said FIR, Tinsukia PS Case No. 679/15 was registered under Sections 498(A)/326/307 of the Indian Penal Code and PW-10 was entrusted with the investigation of the case. PW-10 has further deposed that thereafter he visited the place of occurrence on that day at about 12.30 p.m. and recorded the statement of witnesses, prepared the sketch map of the place of occurrence. He has also stated that on the same day he came to St. Lukes Hospital and recorded the statement of victim at St. Lukes Hospital. PW- 10 has further deposed that on 26.06.2015, he received the information that the victim died in the hospital and thereafter he made an application to add Section 304(B) of IPC to the case and the said prayer was allowed by the Court. PW-10 has further deposed that after completion of the investigation, he laid the charge-sheet against the present appellant. PW-10 has further deposed that during investigation, he recorded the statement of Sri Lengra Mura (PW-6), who had stated before him that on 15.04.2015 at about 6.00 p.m., the accused and his wife had an argument and a commotion was created and after about half an hour later, when PW-6 came to his house, he saw that at the doorstep of the house of the accused, Rita Mora was lying in a burnt state. He exhibited the statement of Langra Mura as Exhibit-6. PW-10 has further deposed that during investigation, the witness Durga Munda (PW-7) has also stated that the occurrence took place on 15.04.2015 at 6.00 p.m. and at that time he was passing by the house of the accused when he heard that the accused was having argument with his wife and sometime later when he returned home he heard that there was a commotion in the house of the accused and he came to know that Rita Murah

sustained injuries and later on Rita Murah was taken to the hospital. The statement of PW-7 was exhibited by PW-10 as Exhibit- 7. PW-10 has further deposed that witness Bhaiya Mura (PW-9) has stated before him during investigation that on 15.04.2015 at about 6.00 p.m., there was a quarrel in the house of the accused and during quarrel the body of the Rita Murah caught fire and later on the villagers doused the fire and Rita Mura was taken to hospital. The accused, Sanjib Lodha @ Sanjib Mora, also accompanied the injured to the hospital.

15.1. During cross-examination, PW-10 has deposed that the Panitola outpost is about 6 km. away from the place of occurrence and prior to 21.05.2015, PW-10 did not have any information about the occurrence of the incident. He has also deposed that the incident occurred on 15.04.2015, an FIR was lodged on 21.05.2015 and in this regard, the Investigating Officer has not received any information from any hospital regarding the treatment given to Rita Murah during this period for sustaining burn injuries. PW-10 has also deposed that he was told that Rita Mora was given treatment for about 15 days at AMCH, Dibrugarh, however, he did not visit AMCH Dibrugarh to collect any medical documents pertaining to treatment given to Rita Murah. PW-10 has also deposed that he recorded the statement of the victim Rita Murah at 12.30 p.m. on 21.05.2015 and he took permission from the hospital authority for recording the statement of Rita Murah. He has also stated that he has not mentioned in the case diary as to who else was present at the time of recording the statement of Rita Murah by him in the hospital. He has also stated that witness Kailash Urang (PW-2) and witness Dipak Urang (PW-3) did not state before him that the deceased informed them that the accused had set her on fire.

15.2. PW-10 was further examined on 26.09.2018 and during his further examination he has stated that, on 21.05.2015, when Rita Murah was alive, he recorded the statement of Rita Mura at 12.30 p.m. on 21.05.2015 and he recorded her statement at St. Lukes Hospital and at the time of recording her statement Smt. Shanti Orang, the mother of the Rita Murah was present there and there was also one staff nurse present, however, her name was not recorded. It is also stated by PW-10 that what Rita Mura had stated to her to him that the accused had poured one bottle kerosene oil on her and with the help of a burning wick lamp she was burned. It is also stated by PW-10 that Rita Murah also told him that thereafter she was immediately engulfed by fire and one Lodha pushed her out of her house. It is also stated by PW-10 that victim also told him that she shouted for help, however she lost consciousness. The statement of Rita Murah was exhibited by the PW-10 as Exhibit 9.

15.3. During further cross-examination, PW-10 has deposed that on 21.05.2015 at about 12.00 noon, he went to St. Lukes Hospital for recording statement of the victim who had died later on 25.06.2015. He has also deposed that at the time of recording the statement of victim Rita Murah except her face remaining part of her body was covered. PW-10 has also deposed that he did not took any certificate from the doctor certifying that the victim was in a sound state of health and was fit to give statement. He has also stated that he took verbal permission from the doctor for recording the statement of the victim. He has denied the suggestion given by learned defence counsel that he had deposed falsely and Rita Murah did not give any statement as described by him in his examination-in-chief.

16. The appellant examined himself as DW-1 and during examination-in-chief, he has deposed that the deceased Rita Mura was his wife. He has also

stated that on the day of incident in the year 2014, while he was out of his house for his daily wage work, his wife was cooking food in the house and she caught fire and sustained burn injuries. He has also stated that his neighbours informed him about the occurrence and thereafter he came to the house and on reaching the home, he saw that his wife Rita Murah was lying in the courtyard of the house. It is also stated by the DW-1 that his wife sustained burn injuries on her body and thereafter she was taken to the hospital in an ambulance. It is further stated that the appellant also accompanied his wife to AMCH, Dibrugarh and his wife was admitted in the hospital for about one month and thereafter due to financial incapability as he was unable to pay for the treatment of his wife, his wife was discharged from the hospital and thereafter the brother of his wife took her to St. Lukes Hospital for treatment. He has also stated that he paid Rs.3000/- to them for treatment of his wife. He has also stated that while his wife was under treatment at St. Lukes Hospital, he was arrested by the Police and during judicial custody he came to know that his wife had died.

17. DW-1 has also stated that he never had any quarrels with his wife and he was having a cordial relationship with his wife. During cross-examination he has also deposed that he is also known as Lodha Murah and the occurrence took place at the time of "*Bohag Bihu*". It is also stated by the DW-1 that his wife died after sustaining burn injuries however, he had denied the suggestion that on the day of occurrence he had mercilessly beaten his wife and thereafter burned her after pouring kerosene on her. He has also denied that he had deposed falsely in the Court.

18. During his examination under Section 313 of the Code of Criminal Procedure, 1973 he has stated that there used to be occasional quarrels between him and his wife Rita Murah. However, he has denied that he had

poured kerosene on her.

19. Learned *Amicus Curiae*, defending the cause of the appellant, has submitted that the entire prosecution case is based on testimonies of PW-2, PW-3, PW-4 as well as PW-10 and the oral dying declaration made by the victim to the PWs-2, 3 and 4 as well as the dying declaration recorded by PW-10. It is submitted by the learned *Amicus Curiae* that the Trial Court has rightly rejected the testimony of PW-2 and PW-3 as what they had stated before the Court were not stated in their earlier statement before the Investigating Officer and hence their testimony was correctly not relied upon by the learned trial court. It is also submitted by the learned *Amicus Curiae* that the trial court has based its conviction of the appellant on the basis of testimonies of PW-4 as well as PW-10. However, as per submissions made by the learned *Amicus Curiae* neither the testimony of PW-4 is reliable nor the testimony of PW-10 is safe to convict the present appellant. Learned *Amicus Curiae* has submitted that though PW-4 has stated in his testimony that the deceased told him that her husband poured kerosene oil upon her and set her ablaze however he has also stated that at the time of making such statements by the deceased before him, Jiten Orang, Sawan Urang and wife of Jiten Orang, and the sister of the injured were also present there. However, Sawan Urang (PW5), in his testimony, has stated that the deceased Rita Urang did not tell him as to who caused burn injuries to her. He has also not stated anything regarding disclosing of the facts by deceased before PW-4 i.e., Krishna Urang. Learned *Amicus Curiae* has also submitted that the other three persons who are stated to be present when the deceased was making her dying declaration before PW-4 were not examined by the prosecution side and, therefore, there is no corroboration of the fact as to whether the deceased had actually made any dying declaration before PW-4 or

not.

20. Learned *Amicus Curiae* has also submitted that PW-4 has also deposed that Police has recorded the statement of the victim after three days of their going to the residence of the appellant on 15.04.2015. However, it is submitted by the learned *Amicus Curiae* that the testimony of PW-4 in this regard is also not reliable as the Police came to the victim only after lodging of the FIR on 21.5.2015 which is about more than one month after PW-4 visited the deceased on 15.04.2015. Learned *Amicus Curiae* has also submitted that there was no certification from any doctor or any Medical Officer regarding the soundness or fitness of the victim before recording her dying declaration which raises concern regarding the reliability of the dying declaration made by the victim. It is also submitted by the learned *Amicus Curiae* that there is no reason mentioned by the Investigating Officer i.e., PW-10 as to why the dying declaration of the deceased/victim was not recorded by a Magistrate or by a doctor. It is submitted by the learned *Amicus Curiae* that the practice of Investigating Officer himself recording dying declaration during course of investigation is not to be encouraged and in this regard the Apex Court has also observed in many of its rulings that though the dying declaration recorded by Investigating Officer is admissible under Section 32 of the Indian Evidence Act, however, the practice of the Police Officer himself recording dying declaration ought not to be encouraged and in the instant case no reason has been mentioned as to why the dying declaration was not recorded by a competent Magistrate or by a doctor which would have stood on a much higher footing than the dying declaration recorded by a Police Officer. To substantiate his submissions, learned *Amicus Curiae* has cited a ruling of the Supreme Court of India in the case of "**Dalip Singh v. State of Punjab,**" reported in **(1979) 4 SCC 332.**

21. Learned *Amicus Curiae* has further submitted that the testimony of the prosecution witnesses are weak and that apart from inconsistencies in their testimony, there is no clear evidence which indicates that the present appellant was responsible for burning of his wife and the entire prosecution case rests on circumstantial evidence, however, the circumstances from which the guilt of the present appellant was drawn by the learned trial court has not been fully established and does not points only towards the guilt of the present appellant, hence, it is submitted by the learned *Amicus Curiae* that the prosecution side has failed to prove the charges under Section 302 of the Indian Penal Code against the present appellant beyond all reasonable doubt and therefore, the impugned judgement is liable to be interfered with and set aside and the appellant may be acquitted.

22. On the other hand Ms. S. Jahan, learned Additional Public Prosecutor has submitted that though the statement relating to dying declarations of the victim before PW-2 and PW-3 stood contradicted by the Investigating Officer and, therefore, same may not be relied upon, however, the testimony of PW-4 remains unimpeached and the PW-4 has categorically stated that when he met the deceased on 15.04.2015 she was initially reluctant to state, however, later on she informed that it was the appellant who had set her on fire. Learned Additional Public Prosecutor has cited a ruling of Apex Court in "**Lakhan -Vs- State of Madhya Pradesh**" reported in "**(2010) 8 SCC 514**" to emphasize the point that in case of burning incident the victims normally do not accuse their husband initially but later they do so and in the instant case also the testimony of PW-4 clearly shows that the victim was initially reluctant, however, she later on disclosed before PW-4 that it was the present appellant who had set her on fire. Learned Additional Public Prosecutor has also submitted that if in a case it

is apparent that the victim was in proper senses then the certificate of fitness by a doctor is not mandatorily to be produced and such a dying declaration may be relied upon even in the absence of a certificate of fitness of the victim by the doctor and to emphasize this point the submission learned Additional Public Prosecutor relied on a ruling of the Apex Court in "**Laxman -Vs- State of Maharashtra**" reported in "**(2002) 6 SCC 710**". Further learned Additional Public Prosecutor cited a ruling of the Apex Court in "**Ramawati Devi -Vs- State of Bihar**" reported in "**(1983) 1 SCC 211**" and has submitted that the recording of dying declaration by a Magistrate is not mandatory and even a dying declaration which is not recorded by a Magistrate may be relied upon if it is otherwise trustworthy. Learned Additional Public Prosecutor has submitted that in the instant case as the victim had died after a long time after getting burned injuries and she was under treatment, the Investigating Officer never thought that the injuries would lead to death and as such there was no endeavor made on his part for getting the statement of the victim recorded by a Magistrate or a doctor. Learned Additional Public Prosecutor has also fairly submitted that as since the death of the victim was caused after around two months of the date of incident in the instant case the conviction may perhaps be converted under Section 304 or under Section 326 of the Indian Penal Code instead of section 302 of the Indian Penal Code

23. We have considered the submissions made by learned counsel for both the sides and have gone through the materials on record meticulously.

24. If we go through the evidence of prosecution witnesses, it appears that three of the prosecution witnesses were dictated hostile i.e., PW-6, PW-7 and PW-9 and their testimony is of no use for the prosecution side. Out of the

remaining prosecution witnesses, which were examined by the prosecution side, none of the witnesses have mentioned about seeing the present appellant at the place of occurrence of alleged incident on the date of alleged incident. Therefore, there is no eyewitness to the incident, to implicate the present appellant to the alleged burning of the deceased, Rita Murah by the present appellant.

25. It appears that the PW-2, PW-3 and PW-4 have deposed before the trial court that the victim Rita Murah had told them that the present appellant had burned her by pouring kerosene over her. However, as regards the evidence of PW-2 and PW-3 is concerned, they have stated for the first time before the Court while deposing as prosecution witnesses regarding the fact that the victim had told her about the appellant pouring kerosene over her and burning her and the testimony of PW-10 who is the Investigating Officer of this case shows that the PW-2 and PW-3 have not stated so before the Investigating Officer during the course of investigation when their statements were recorded. Hence, the statement of PW-2 and PW-3 was not relied upon by the trial court and in our opinion the trial court correctly refused to rely on the testimony of PW-2 and PW-3 as they had not stated during the Investigating Officer regarding the fact that they were told by the deceased that the appellant had burned her by pouring kerosene over her and this amount to a material contradiction in the testimony of PW-2 and PW-3 which makes their testimony unsafe for reliance.

26. As regards the testimony of PW-4 is concerned though PW-4 has stated that on 15.04.2015 when they went to the house of the appellant the victim Rita Murah told him that she was set ablaze by the appellant after

pouring kerosene over her. However, during cross-examination, he has stated that while the deceased was making statement before him, implicating the present appellant, at that time Sawan Urang, Jiten Orang, wife of Jiten Orang, and the sister of the victim were present. However, it appears from the testimony of Sawan Urang (PW-5) that he has not mentioned anything regarding making any such statement as stated by PW-4 by the victim before the PW-4 in his presence which also appears that other persons who were stated to be present while such statement while the victim was making dying declaration namely Jiten Orang, wife of Jiten Orang and sister of the victim were not examined. Hence, it appears that the evidence of PW-4 has not been corroborated by other witnesses.

27. One pertinent fact to be noted herein is that PW-4 has deposed that the victim told him that the present appellant poured kerosene over her and set her ablaze on 15.04.2015. However, it appears that the FIR in this case was lodged after more than one month of the said date without any justification for such delayed lodging of FIR. Hence, it appears that had the victim had told PW-4 on 15.04.2015 itself that she was burned by the appellant, there was no reason for delayed lodging of FIR on 21.05.2015. Therefore, we are of the considered opinion that the testimony of PW-4 may not be safe to arrive at the conclusion of guilt of the present appellant when there is no eyewitness or any other reliable evidence on record showing that the appellant was present in the place of occurrence of offence when the alleged incident had occurred.

28. It is also pertinent to mention herein that though the appellant had adduced defence evidence by examining himself as DW-1, however same has not been discussed in the impugned judgment by the trial court and not even a

whisper has been made as to why the testimony of DW-1 was not relied upon by the Trial Court. DW-1 has stated that on the day of incident he was out of his residence for his daily wage work and he was informed by his neighbors about occurrence of the incident and when he reached home, he found his wife lying in the courtyard of the house and, thereafter, he accompanied his wife in an ambulance to the hospital. When the appellant has deposed on oath as DW-1 that he was not present in his residence when his wife caught fire, it was incumbent on the prosecution side to adduce evidence either direct or circumstantial to show that it was the appellant only who had burned his wife after pouring kerosene over her. However, we are of the considered opinion that apart from Exhibit-9 which is the statement of deceased Rita Murah recorded by PW-10 under Section 161 of the Code of Criminal Procedure, 1973, there is no other credible material on record, which conclusively establishes that the appellant was present at the place of occurrence when the incident happened.

29. As regards the Exhibit-9 is concerned, which is the statement of victim Rita Murah recorded by the Investigating Officer i.e., PW-10, it appears that the Exhibit-9 was recorded by PW-10 on 21.5.2015 i.e., on the date of lodging of FIR and the victim expired after more than one month after the said recording i.e., on 25.06.2015. The Apex Court has observed in the case of "**Dalip Singh v. State of Punjab**,"(Supra) as follows: -

“8. We may also add that although a dying declaration recorded by a police officer during the course of investigation is admissible under Section 32 of the Indian Evidence Act in view of the exception provided in sub-section (2) of Section 162 of the Code of Criminal Procedure, 1973, it is better to leave such dying declaration out of consideration until and unless the prosecution satisfies the court as to why it was

not recorded by a Magistrate or by a doctor. As observed by this Court in Munnu Raja v. State of M.P. [(1976) 3 SCC 104 : 1976 SCC (Cri) 376 : (1976) 2 SCR 764] the practice of the Investigating Officer himself recording a dying declaration during the course of investigation ought not to be encouraged. We do not mean to suggest that such dying declarations are always untrustworthy, but what we want to emphasize is that better and more reliable methods of recording a dying declaration of an injured person should be taken recourse to and the one recorded by the police officer may be relied upon if there was no time or facility available to the prosecution for adopting any better method."

30. Thus, we have seen that though, the dying declaration recorded by the Police Officer during the course of investigation is admissible under Section 32 of the Indian Evidence Act. However, it is better to leave such dying declaration out of consideration unless and until the prosecution satisfy as to why it was not recorded by Magistrate or a doctor and we are unable to convince ourselves with the submissions made by the learned Additional Public Prosecutor that as the victim was under a long treatment, the Police never thought that the injury would lead to death and as such, no endeavor was made on the part of the Police to get the dying declaration recorded by Magistrate or a doctor. Rather, we are of the opinion that where a person has been subjected to 35 percentage of burn and the patient is undergoing treatment for a long period of time, it was incumbent upon the Investigating Officer to get her statement recorded by a doctor or by a Magistrate and this is not a case where no time or facility was available to the Investigating Officer to get the statement of the injured recorded by either doctor or Magistrate as ample opportunity was there for the Investigating Officer to get the same recorded by the Magistrate or the doctor. Hence, we are of the considered opinion that under the facts and

circumstances of this case, the evidence of PW-10 who is himself the Investigating Officer is not corroborated by any other evidence available on record and hence, under such circumstances, the appellant is entitled to get the benefit of doubt.

31. For the reasons stated hereinabove, the conviction and sentence imposed on the present appellant by the impugned judgment, by the trial court is, therefore, liable to be interfered with. We accordingly set aside the conviction and sentence imposed on the appellant by the impugned judgment.

32. This appeal is accordingly allowed.

33. Let the appellant be set at liberty forthwith, if he is not required in connection with any other case.

34. Let the case record of Sessions Case No. 128(T)/2016 along with all connected file and a copy of this judgment be sent back to the learned trial court.

JUDGE

JUDGE

Comparing Assistant