

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CRIMINAL APPEAL NO. 485/2012**

% **Reserved on:** 14th October, 2015
Date of Decision: 11th February, 2016

LAXMI @ LACCHO AND ANOTHERAppellants
Through Mr. Joginder Tuli, Mr. Ashu Kumar Sharma and
Ms. Pooja Arora, Advocates.

Versus

STATE NCT OF DELHI ...Respondent
Through Ms. Aashaa Tiwari, APP along with Inspector
Rakesh Kumar, P.S. Adarsh Nagar, Inspector Mahavir
Kaushik, AHTU/South District and ASI Kuldip (retired).

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.K. GAUBA

SANJIV KHANNA, J.

1. Laxmi and her adopted daughter Jyoti, impugn their conviction vide the judgment dated 16th December, 2011 for having murdered Asha. By order on sentence dated 22nd December, 2011, the appellants have been sentenced to imprisonment for life, fine of Rs.5,000/- each and in default of payment of fine, to undergo rigorous imprisonment for six months for the offence under Section 302 read with Section 34 of the Indian Penal Code, 1860 (IPC, for short).
2. Asha had got married to Sanjay Rathore (PW-2), son of Laxmi in the year 1997. On 1st May, 2010 at about 9-9.30 A.M., Asha suffered extensive burns at her matrimonial home at B-114A, Majlis Park, Adarsh Nagar, Delhi. She was taken first to the Bubu Jagivan Ram

Memorial Hospital at about 10.10 A.M on 1st May, 2010 as per the MLC (Ex. PW13/A) and then on the same day at about 11.54 A.M. shifted to the Lok Nayak Jai Prakash Narain Hospital. Asha died in the same hospital on 6th May, 2010 at about 5.15 P.M. The Post Mortem report, Ex.PW 6/A, records approximate area of burns as 90% and that smell of kerosene was present. Infected Dermo-epidermal burns were present all over the body except upper half of face, back of upper limbs, front of upper abdomen and both feet. Both palms were burnt. Cause of death was septicaemia consequent upon infected burn injuries. All injuries were anti-mortem and caused by flames of fire.

3. As per the charge sheet, at that time of occurrence, Laxmi and Jyoti were present with Asha at B-114, Majlis Park, Adarsh Nagar, Delhi. Sanjay Rathore (PW-2), along with his four children was not present, having taken his ailing children to a doctor. The scaled site plan, marked Exhibit PW-17/A, illustrates that the accommodation consisted of two rooms in front and two rooms on the back side with an open courtyard with bath, WC, kitchen and a store in the middle portion. The burns were suffered in the big room at the back side of the said property, where a plastic bottle with kerosene, match sticks, match box and burnt clothes (*pallu* of a saree) were found.
4. The charge against Laxmi and Jyoti was that they had poured kerosene oil on Asha and had set her ablaze. Motive and cause was failure and inability of Asha to meet and arrange for Rs. One Lac, which Laxmi and Jyoti were demanding for purchasing a new house.
5. To prove and establish the case, the prosecution and the impugned judgment relies on dying declarations made by Asha and recorded by

SI Kuldeep Singh (PW-21) at about 2.05 P.M. on 1st May,2010 at the Lok Nayak Jai Prakash Hospital and statements of two neighbours, Munna (PW-1) and Lata (PW-4), who had interacted and spoken to Asha in the street outside the house, immediately after the occurrence. The impugned judgment also relies upon the dying declaration recorded on a mobile chip and deposed to by Deepak, brother of Asha. Deepak has appeared as a court witness CW-1, in terms of the order dated 17th March, 2011, which mentions that Deepak had made a prayer to appear as a witness which was allowed. The application, if any, moved by Deepak (CW-1) is not on the trial court record. Mohan Lal (PW-10) and Jatender Kumar (PW-14) father and other brother of Asha have also deposed about their conversation and version given by Asha to them while she was in the hospital.

6. We begin by examining the testimony of the neighbours, Munna (PW-1) and Lata (PW-4). Munna (PW-1) has testified that on 1st May,2010 at about 9 A.M. after visiting the urinal, he was returning to his barber shop, when he saw Asha coming out of her house ablaze with fire on her back side and shouting “save me save me” (“*bachao bachao*”). PW-1 had used his hands to extinguish the fire on the back side of Asha's blouse and had torn the blouse but the fire had engulfed her. He ran and had brought a cover from a motorcycle. In the meantime, someone had put a bed-sheet around Asha. PW-1 heard Asha was telling Jyoti “tumne muje jalaya hai” (you have put me on fire). Jyoti had questioned and had asked Asha to take oath and swear by her children. Asha did not take oath. Munna (PW-1) had made a call at No. 100. The appellant-Laxmi, mother-in-law of Asha, was present. Munna voluntarily added that he seen a match box in the hands of Asha, which

had fallen and later on taken into custody by the police. Asha was removed to the hospital in the police control room van. Joyti had accompanied Asha.

7. Munna (PW-1), on a leading question put to him by the public prosecutor, affirmatively reiterated that in his presence, Jyoti had asked Asha to take oath of her children and ascribe that Jyoti had set her on fire and on this Asha had kept mum.
8. Munna (PW-1) was cross examined by the public prosecutor but stuck to his version that Asha had had never stated on oath that she had been burnt by Jyoti and her mother in law (i.e. Laxmi). PW-1 however did accept that he had not told the police that he had seen a match box in Asha's hands, professing that he had forgotten this fact. It was suggested that he had been won over, but Munna (PW-1) strongly refuted the impute. Interestingly, in his short cross examination on behalf of the appellants, PW-1 has deposed that he had not seen Laxmi or Jyoti putting a bed-sheet or save Asha. Voluntarily, adding that he was told by others that Jyoti had wrapped a bed sheet on Asha.
9. Lata (PW-4), the second neighbour has deposed that she was washing clothes at about 9.30 A.M., when she had heard someone shout “fire fire” (“*aag aag*”). She had seen Asha running from her courtyard to the street, with her *pallu* on fire and some persons were trying to extinguish the fire. She had witnessed this, from her balcony. PW-4 had heard Asha stating that she was put on fire by her mother-in-law and sister-in-law and had identified the two appellants who were present in the court. In her cross-examination, PW-4 somewhat relented and altered her statement accepting that she had not heard correctly. On court question

in view of her allude, Lata (PW-4) averred that she had heard Asha telling her sister in law (nanad) "tumnay jalaya hai"(you have burnt me) and she had not heard Asha state that she was burnt by her mother-in-law and sister-in-law. PW-4 had voluntarily stated that that she was a tenant in the same house on the first floor. PW-4 did accept that Asha had made a complaint against the landlord and that she had visited the police station and given a statement in favour of the landlord.

10. Having examined the police file and scrupulously perused testimonies of the two witnesses, we have grave doubts whether the versions given by Munna (PW-1) or Lata (PW-4) would truly implicate and establish that Laxmi and Jyoti had ignited the fire and set Asha ablaze. PW-1 had primarily implicated the appellant-Jyoti and not Laxmi. The Public Prosecutor had confronted PW-1 with a portion of his statement recorded under Section 161 Cr.P.C. (Exhibit PW-1/A) but Munna (PW-1) had insisted and repeatedly affirmed that Asha became quite and was silent. Asha would not vow and troth that Jyoti had set her on fire. PW-1 even professed that he had seen a match box in the hands of Asha. This statement under Section 161 Cr.P.C., Exhibit PW-1/A, was recorded by the second Investigating Officer, Inspector Mahavir Kaushik (PW-22), who had taken over the investigation on 7th May, 2010 after Asha's death on 6th May, 2010. Munna (PW-1) had earlier participated in the investigation on 1st May, 2010, when the rough/unscaled site plan marked Exhibit PW21/B, was prepared. The rough site plan was prepared by the first Investigating Officer SI Kuldeep Singh (PW-21) in the presence of Munna (PW-1). This fact stands duly recorded in the police case file dated 1st May, 2010. A latter noting in the said police case file on 1st May, 2010, records that a

statement of Munna (PW-1) was separately recorded under Section 161 Cr.P.C. The gist or content of the statement was not reproduced in the noting portion. This statement of Munna (PW-1) recorded under section 161 Cr.P.C. was never filed with the charge sheet and is not available in the police file. The statement of Munna (PW-1) under Section 161 Cr.P.C. dated 7th May, 2010 shows that it was treated as the first statement made by him during the investigation as the word 'tatema' is not mentioned thereon. The statement of Munna (PW-1) recorded by the police on 1st May, 2010 has disappeared and vanished. We do not know, what was narrated and stated by Munna at that time. In this context, Munna (PW-1)'s assertion that Asha had refused to take oath and affirm that Jyoti her Sister-in-law had burnt her is significant and compelling. As per Munna (PW-1), Jyoti had immediately and unbendingly protested and objected to Asha's assertion that she had been set ablaze by her. Jyoti, who was presented, had asked Asha to take oath and swear by her children and state that she (Jyoti) had set her (Asha) on fire. Asha did not respond and kept quite. Jyoti had accompanied and had gone to the hospital with Asha.

11. Lata's (PW-4) statement under Section 161 Cr.P.C. was recorded on 9th May, 2010 i.e. 9 days after the occurrence. No explanation is forthcoming to explain this delay, at least after 6th May, 2010 when Asha had died. Examination of the police file reveals a signed undated written statement given by Lata (PW-4) acknowledging that on 1st May, 2010 at about 9.30 P.M. she had seen Asha on fire, running from the courtyard of her house to the street. Lata (PW-4) had then proceeded to her canopy and saw that several persons had gathered on the street. Some of them had tried to douse the fire. After some time, Jyoti had

draped a blanket around Asha. The police vehicle came thereafter and Asha was taken to the hospital. Jyoti had accompanied Asha to the hospital, while Laxmi had stayed behind at their residence. Lata (PW-4) did not aver that she had heard Asha implicating Jyoti or Laxmi.

12. Noticing the aforesaid inscrutable and unfathomable gaps and discrepancies, vide order dated 13th October, 2015 we had directed SI Kuldeep Singh (PW-21) and Inspector Mahavir Kaushik (PW-22) to appear in person on 14th October, 2015. SI Kuldeep Singh (PW-21) who has retired from service, professed that he did not know and cannot state as to why statement of Munna (PW-1) recorded on 1st May, 2010 or copy thereof is not available on record. Inspector Mahavir Kaushik (PW-22) has accepted that the signed statement of Lata (PW-4) was given to him by Lata herself, but he had also recorded a separate statement of Lata (PW-4) under Section 161 Cr.P.C. on 9th May, 2010. PW-22 accepts that there was divergence on facts in the signed statement of Lata(PW-4) and the statement recorded by him on 9th May, 2010. We have noted the court deposition of Lata (PW-4) and have pointed out that Lata (PW-4) in the cross-examination had initially stated that she had not correctly heard Asha stating that her mother-in-law and sister-in-law had put her on fire. Subsequently, PW-4 asserted that she had heard Asha telling her sister-in-law (Jyoti) that she had set her on fire, but did not hear Asha stating that her mother-in-law had put her on fire.
13. At this stage, it would be relevant to reproduce Section 172 Cr.P.C. after its amendment with effect from 31st December, 2009. Post amendment with incorporation of Sub-Sections 1A and 1B, Section 172Cr.P.C. reads as under:-

“Section 172 Diary of proceeding in investigation

(1) Every police officer making an investigation under this Chapter shall day by day enter his proceeding in the investigation in a diary, setting forth the time at which the information reached him, the time at which he began and closed his investigation, the place or places visited by Mm, and a statement of the circumstances ascertained through his investigation.

(1A) The statements of witnesses recorded during the course of investigation under section 161 shall be inserted in the case diary.

(1B) The diary referred to in subsection (1) shall be a volume and duly paginated.

(2) Any Criminal Court may send for the police diaries of a case under inquiry or trial in such Court, and may use such diaries, not as evidence in the case, but to aid it in such inquiry or trial.

(3) Neither the accused nor his agents shall be entitled to call for such diaries, nor shall he or they be entitled to see them merely because they are referred to by the Court; but, if they are used by the police officer who made them to refresh his memory, or if the Court uses them for the purpose of contradicting such police officer, the provisions of section 161 or section 145, as the case may be, of the Indian Evidence Act, 1872 (1 of 1872), shall apply.”

Section 172 Cr.P.C. mandates writing and maintenance of the case diary. Sub-section (1) stipulates that police officer making investigation shall, on each day, enter proceedings relating to investigation in the diary including the time at which he began and closed his investigation, the place or places visited by him and a statement of circumstances ascertained during

his investigation, i.e. record of the proceedings. There were judgments that hold that 'record of proceedings' would not include statements recorded under Section 161 Cr.P.C., for the reason that the said statements are not protected, whereas the case diaries are made available to the accused only when pre-conditions are satisfied. (See page 813 of Sarkar's *Code of Criminal Procedure*, Tenth edition, 2012). Amendment made by the Code of Criminal Procedure (Amendment) Act, 2008, w.e.f. 31st December, 2009, inserting Sub-section (1A), therefore, assumes significance. The Sub-section mandates that statement of witnesses recorded during the course of investigation under Section 161 Cr.P.C. shall be inserted in the case diary. The said Sub-section has to be read along with Sub-section (1B) which mandates that the case diary would be a volume and duly paginated. The phrase, "shall be a volume and duly paginated" ensures sanctity and purity of the case diary. The word, 'inserted' used in Sub-section (1A) does not refer to physical insertion by placing copies of the statements recorded under Section 161 Cr.P.C. in the case diary. The expression 'inserted' mandates incorporation of the statement itself in the case diary, rather than a mere mention that a statement under Section 161 Cr.P.C. of a particular person has been recorded. What the person had stated and alluded to in his statement under Section 161 Cr.P.C. must be inserted and recorded in the case diary itself. The case diary has to be a volume and paginated, and cannot be a loose-leaf diary from which papers can be removed, changed or interpolated. This is the unambiguous legislative mandate of Sub-section (1B). The aforesaid legislative amendments, w.e.f. 31st December, 2009, reveal the importance and relevance of the case diary as they assure solemnity and inviolability of the record as to the manner in which the investigation was conducted. The court can ascertain that the case as projected is true and false or misleading statements are not made. It reflects the line of

investigation. In *Bhagwant Singh versus Commr. of Police* (1983) 3 SCC 344, importance of recording entries in the case diary with promptness and sufficient details mentioning of relevant facts in chronological order with complete objectivity is highlighted. In *Khatri & Ors. versus State of Bihar* (1981) 2 SCC 493), the following passage from *Queen Empress versus Mannu* ILR (1897) 19 All 390 was quoted:

"The early stages of the investigation which follows on the commission of a crime must necessarily in the vast majority of cases be left to the police, and until the honest, the capacity, the discretion and the judgment of the police can be thoroughly trusted, it is necessary, for the protection of the public against criminals, for the vindication of the law and for the protection of those who are charged with having committed a criminal offence that the magistrate or judge before whom the case is for investigation or for trial should have the means of ascertaining what was the information, true, false, or misleading which was obtained from day to day by the police officer who was investigating the case and what such police officer acted."

14. In *Khatri* (supra), the Supreme Court has observed that the case diary cannot be used as evidence, but is an aid in the trial or inquiry. This is for the reason because the case diary can be referred to by the Court but the accused or his agents are not entitled to call for such diary and are not entitled to see it except when the case diary is used by the police officer to refresh his memory or the court uses it for contradicting a police officer in the trial or inquiry, and provisions of Section 145 or 161 of the Indian Evidence Act apply. The bar under Sub-section (2) to Section 172 Cr.P.C. is a limited bar and does not apply to civil proceedings or proceedings under Articles 32 and 226 of the Constitution of India, particularly when the party calling for the case diary is neither an accused nor an agent. Rejecting the contention that the principle behind Section 172 Cr.P.C. is to exclude the report of investigation altogether in other proceedings for it would jeopardize

secrecy of investigation, the Supreme Court affirmatively observed that for truth to emerge, all relevant facts to the inquiry must be brought before the court and nothing should be shut out, otherwise the opinion formed may be distorted or incomplete, which might result in injustice. A judgment should not be founded on partial or speculative presentation of facts as it would affect the integrity of the judicial system and public confidence. In exceptional cases, where weighty and compelling competing interest requires withholding or secrecy, legislature has provided for exceptions but the exclusion should be strictly interpreted and not expansively construed.

15. Statements under Section 161 Cr.P.C. are not evidence. The depositions of witnesses on oath in the court are evidence under the Evidence Act. Under Section 172(2) of the Cr.P.C., a criminal court is empowered to send for the case diary and the diary can be used by the court not as evidence in the case but to aid it in such inquiry or trial. Under sub-section (3) to Section 172, neither the accused nor his agents are entitled to call for diaries or nor they entitled to see them, but where the police officer makes use of the case diary to refresh his memory or the court uses them for purposes of contradicting the police officer, provisions of Section 161 or 145 of the Evidence Act apply. Therefore, we would not use the signed but undated statement of Lata (PW-4) available on the police file as evidence to negate or erase Lata (PW-4)'s testimony in the court especially when she was not confronted and questioned. Possibly, the Court was not aware and never noticed this statement. However, issue would certainly arise as to fairness and transparency in investigation. In *Manu Sharma versus State (NCT of Delhi)*, (2010) 6 SCC 1, reference was made to

Section 172 Cr.P.C. and several earlier judgments, to elucidate that the right of an accused in relation to the police file and general diary is a limited and a controlled one, but still the accused has been provided with definite rights under the provisions of Cr.P.C. and the constitutional mandate to face the charge against him by a fair investigation and trial. Fairness in action on both accounts is essential. Reference was made to Section 91 of the Evidence Act, which empowers the court to summon a document or thing and Section 207 Cr.P.C., which requires that the court without delay and free of cost should furnish to the accused copies of the police report, first Information report, statements and confessional statements of persons recorded under Section 161 Cr.P.C. whom the prosecution wishes to examine as witnesses, of course, excluding any part of statement or documents as contemplated under Section 173(6) Cr.P.C. It was observed:-

“220. The right of the accused with regard to disclosure of documents is a limited right but is codified and is the very foundation of a fair investigation and trial. On such matters, the accused cannot claim an indefeasible legal right to claim every document of the police file or even the portions which are permitted to be excluded from the documents annexed to the report under Section 173(2) as per orders of the court. But certain rights of the accused flow both from the codified law as well as from equitable concepts of the constitutional jurisdiction, as substantial variation to such procedure would frustrate the very basis of a fair trial. To claim documents within the purview of scope of Sections 207, 243 read with the provisions of Section 173 in its entirety and power of the court under Section 91 of the Code to summon documents signifies and provides precepts which will govern the right of the accused to claim copies of the statement and documents which the prosecution has collected during investigation and upon which they rely.

221. It will be difficult for the Court to say that the accused has no right to claim copies of the documents or request the Court for production of a document which is part of the general diary subject to satisfying the basic ingredients of law stated therein. A document which has been obtained bona fide and has bearing on the case of the prosecution and in the opinion of the Public Prosecutor, the same should be disclosed to the accused in the interest of justice and fair investigation and trial should be furnished to the accused. Then that document should be disclosed to the accused giving him chance of fair defence, particularly when non-production or disclosure of such a document would affect administration of criminal justice and the defence of the accused prejudicially.

222. The concept of disclosure and duties of the Prosecutor under the English system cannot, in our opinion, be made applicable to the Indian criminal jurisprudence stricto sensu at this stage. However, we are of the considered view that the doctrine of disclosure would have to be given somewhat expanded application. As far as the present case is concerned, we have already noticed that no prejudice had been caused to the right of the accused to fair trial and non-furnishing of the copy of one of the ballistic reports had not hampered the ends of justice. Some shadow of doubt upon veracity of the document had also been created by the prosecution and the prosecution opted not to rely upon this document. In these circumstances, the right of the accused to disclosure has not received any setback in the facts and circumstances of the case. The accused even did not raise this issue seriously before the trial court.”

16. On the question when the lapses in investigation are inconsequential or mere irregularities and when the lapses would result in dislodging the substratum of the prosecution case, reference can be made to the decision in *C. Muniappan & Ors. Vs. State of Tamil Nadu* (2010) 9 SCC 567, which succinctly expounds the law on this issue. An order of acquittal or benefit of doubt need not ensue, when evidence *de hors* such lapses is reliable, credible and sufficient to convict the accused. Of course, extra caution and prudence is required while evaluating the

evidence. The Court should examine as to whether the lapses or defects in investigation, be it in the form of negligence or omission etc., had affected the object of finding out the truth. This is the litmus test, which should be applied in each case.

17. In *Ganga Singh Vs. State of M.P.*, (2013) 7 SCC 278, it was observed that court should not acquit the accused on the ground that there were some defects in investigation, but if the defects in the investigation were as such as to cast a reasonable doubt about the prosecution case, then the accused is entitled to acquittal because of such doubt.
18. In *Surjit Sarkar Vs. State of West Bengal*, (2013) 2 SCC 146, after referring to several earlier decisions, it has been held that deficiencies in investigation by way of omission and lapses by the investigating agency cannot themselves justify total rejection of the prosecution case and where prosecution evidence *de hors* such lapses, when carefully scrutinised and evaluated, does not affect the object of finding of truth. At the same time, it cannot be accepted as a broad proposition that in no case shoddy or defective investigation would not result in acquittal. Investigation must be precise and should not be having glaring loopholes, which create doubt as to whether the offence was committed by the person charged or not. This is impermissible.
19. We have referred to the police case file and the deposition of Munna (PW-1) and Lata (PW-4) for it is apparent that the investigation in the present case is apparently discoloured and shrouded. This is unfortunate for this contrite has dented and debased the prosecution

case. Incertitude and discordant investigation has affected the credibility of the assertions made by the two witnesses against the appellants. It is obvious that for some reason, SI Kuldeep Singh (PW-21) and Mahavir Kaushik (PW-22) has failed to maintain the purity, sanctity and integrity of the police case file. To what extent this has culled and disintegrated the dying declaration recorded by SI Kuldeep Singh (PW-21) at 2.05 P.M on 1.05.2010 and the prosecution case has to be examined.

20. It is pertinent at this stage to notice the defence put up by the two appellants; the burns caused were self inflicted by Asha. It is a case of self victimizing action. Asha and her husband Sanjay Rathore, who has appeared as PW-2, were pressurising and compelling Laxmi to part and give them money, for Laxmi had sold her immovable property in February, 2010. Our attention was drawn to two complaints; one from Sanjay Rathore (PW-2) dated 26th April, 2010, Exhibit PW-2/J, received in different offices of the Delhi Police on 27th April, 2010 and another by deceased Asha herself dated 28th April, 2010, Exhibit PW-14/B received and recorded as DD No. 47B dated 30th April, 2010. The said complaints typed in Hindi and are apparently drafted by a legal person. The two complaints as well as dying declaration of Asha pontificate that Laxmi and Jyoti were insisting and demanding Rs.1 lac from Sanjay Rathore (PW2) and the deceased Asha, for buying a new house. These assertions it was submitted are per-se false and manifest manipulation and coercive mechanisms adopted by Sanjay Rathore(PW-2) and Asha to extract money from Laxmi. Asha in her complaint (Exhibit PW14/B) had asked the police authorities to protect her and her children's life.

Asha had insisted that Laxmi and Jyoti wanted to kill her or would compel her to commit suicide.

21. The appellants' submit that Asha and her husband, needed money and were residing in a rented accommodation. They wanted their "share" in the sale consideration, whereas Laxmi was not willing for she did not want to part with the sale consideration. Our attention is drawn to the photographs marked Exhibit PW-3/A-1 to Exhibit PW-3/A-10. It is highlighted that the half filled plastic bottle of kerosene oil can be seen in an upright position on the floor. A match box can also be seen on the ground, along with three cups. One cup has fallen down, whereas two cups are upright. It is submitted that there is no indication that there was jostling and struggle at the place where the prosecution alleges that the deceased Asha was set ablaze after kerosene oil was poured on her.
22. SI Kuldeep Singh (PW-21) professes having recorded the dying declaration of Asha in the LNJP Hospital at about 2.05 PM on 01.05.2010 after she was declared fit for statement by Dr. Shalini (PW-19). Noticeably, Dr. Shalini (PW-19) was not present when the dying declaration was recorded. She has testified having declared Asha fit for the statement as the patient was conscious and well-oriented in time, place and person and the endorsement was made in the MLC report, marked Exhibit PW-13/A by her. The dying declaration of Asha, marked Ex.PW20/A, became substratum of the FIR marked Exhibit PW-15/A and reads as under:-

"I live with my family and I am a house wife. My mother-in-law Laxmi Devi and sister-in-law Jyoti are living in my house for last two months, their rooms are separate. My mother-in-law Laxmi

Devi and my sister-in-law Jyoti have been demanding Rs. 1 lacs from me in these two months. They everyday fight with me and my husband on this issue and say that I don't allow him (Sanjay) to give Rs. 1 lacs to them with which they could buy a new house. Today at 9 PM, my husband had gone to meet the doctor and get medicine for children. At 9:30 PM Laxmi Devi and Jyoti came to my room and immediately thereafter Jyoti had poured kerosene oil on me. I had questioned Jyoti as to what she was doing. At that very moment Laxmi Devi caught hold of me. I got stunned. Jyoti lit the match stick and burnt my saree. Fire engulfed my whole body. I shouted "*bachao bachao*" and came out of the house. Neighbour and others had tried to extinguish the fire and I became unconscious. When I regained conscious I found myself in the hospital. My mother-in-law Laxmi Devi and sister-in-law Jyoti have done this, with the intention to kill me as I and my husband were not giving them Rs.1 lac. Both of them had put kerosene oil and had lighted the fire and tried to kill me. Please take legal action against Laxmi Devi and Jyoti. You have recorded my statement as I've told you. Whatever I have heard, understood and read is correct."

23. As per the said dying declaration, Jyoti had poured kerosene oil on Asha and Laxmi caught hold of her while Jyoti had set her on fire. Asha was then having tea. The photographs marked Exhibit PW-3/A-1 to Exhibit PW-3/A-10 do not show any sign of struggle or Asha had put up any physical resistance. The kerosene oil plastic bottle was found standing upright, half filled with bluish liquid. Kerosene cannot be spilled on the floor. The cap of the bottle can be also seen. This part of the house and other belongings lying in the room where Asha had caught fire, had not suffered burns.
24. The trial court record includes the police control room (PCR) forms. The PCR form record that Jyoti had made a call to the Police Control Room at about 9.44 P.M. that her sister-in-law had set herself on fire. Communications received and recorded in writing thereafter, do

indicate that Jyoti had made an identical statement to the police officers who had visited the place of occurrence. As noticed above, the presence of Jyoti is affirmed and not denied by both Munna (PW-1) and Lata (PW-4).

25. ASI Anil Kumar (PW-8), one of the first police officers to arrive at the spot has testified that at about 9.43 P.M. he had learnt about fire in house No. 114, Gali No. 1, Adarsh Nagar and had reached there and had taken Asha to the hospital in a PCR van, along with Jyoti (whose name he could not recollect). The last sentence of ASI Anil Kumar (PW-8) examination-in-chief reads:-

“...I asked her as to how she caught fire and she told that she herself had put her on fire.”

The aforesaid sentence though somewhat ambiguous, can be read as Asha had told PW8 that the fire was self ignited. PW-8's testimony would negate the dying declaration recorded by SI Kuldeep Singh (PW-21).

26. There is one more aspect, which dents the credibility of the dying declaration purportedly recorded by SI Kuldeep Singh (PW-21). SI Matadin (PW-11), in-charge of mobile crime team, has stated in his examination-in-chief that ASI Kuldeep (obviously the reference is to SI Kuldeep Singh (PW-21)) had told him that one lady had set herself on fire and she had already been removed to the hospital. PW-21 on visiting the scene of crime had observed a strong smell of kerosene oil in the room and had noticed a two litre plastic bottle with a small quantity of oil. He had also seen a match box and burnt pieces of saree lying outside the house. A photographer had taken photographs.

27. SI Matadin (PW-11) had visited the scene of crime at about 10.30 A.M. to 11.05 A.M. Till then SI Kuldeep Singh (PW-21) was of the belief that Asha had herself set on fire and it was not a case of culpable homicide but suicide. We agree that the statement of SI Matadin (PW-11) would have reference to the period, before the dying declaration of Asha was recorded by SI Kuldeep Singh (PW-21) at 2.05 P.M. on 1st May, 2010. Further, first impression need not be correct, and truth may be different and could have been uncovered. Albeit this was required to be brought out and established succinctly and clearly for otherwise, doubts would persist as to the true and truthful version. Testimony of SI Matadin (PW-11) and ASI Anil Kumar (PW-8) do reflect that the three police officers including SI Kuldeep Singh (PW-21) when they had first visited the place of occurrence, were of the belief that it was a case of self-inflicted injury/ suicide and not culpable homicide committed by the appellant. Thus the relevance of the first statement of Munna (PW-1) recorded under Section 161 Cr.PC on the date of the occurrence itself i.e. 1st May, 2010, which has gone missing.
28. We have gone through the statement of Deepak (CW-1) and have played the video CD produced by him in the Court, inspite of the fact that there is no certificate under section 65B of the Evidence Act. He has testified that he was with Asha in LNJP Hospital at about 8 P.M., a day after she had received the burns. She had implicated and stated that her sister-in-law and mother-in-law had caught hold of her hair, poured kerosene oil and set her ablaze. He had learnt from the doctor that Asha had suffered 90% burns and had no chance of survival. At that time, CW-1 had spoken to Sanjay Rathore (PW-2), husband of Asha, who was insisting that Asha should be asked and compelled to

change her statement. Fearful and perturbed CW-1 had, therefore, made a video clipping. At that time Sanjay Rathore (PW-2) and Asha's mother and maternal aunt (mausi) were also present in the room, as is apparent from the video itself. CW-1 had questioned Asha for recording the video and the video was saved/stored on a memory stick marked CW-1/1 and the CD marked CW-1/2. On court questioning, CW-1 professed that he had not edited the video clipping. The Additional Public Prosecutor had cross-examined CW-1 and had put a specific question; whether CW-1 had asked Asha as to who was the person who had deceived her and broken her trust. CW-1 had then accepted that he had not made this query and reiterated that Asha had not revealed name of the said person. CW-1 has accepted that Sanjay Rathore (PW-2) was present in the room when the video was shot.

29. We have played the video in the Court. It consists of three parts. In part one, a male person possibly Sanjay Rathore (PW-2) is clearly visible and can be seen. There are two other parts, recorded at different times. What is discernible and a matter of concern is the apparent rehearsed and measured manner in which the recording was made. Direct and well thought out questions were put to Asha, who has responded and answered with precision, making categorical assertions. This has effected the spontaneity, which is missing and absent. Questions and doubts persist, whether this recording was induced and motivated? In his cross-examination, CW-1 has stated that this video was made on 2nd May, 2010 between 7 and 8 P.M. We are also somewhat perplexed, why and for what reason this video was made and then held back. Was the video withheld to prevent scientific examination to rule out modification and interpolation? CW-1

professes that Sanjay Rathore (PW-2) wanted Asha to change her statement and save his mother and adopted sister. We do not find any such indication or concern reflected in the video. On the contrary, we have on the trial court record, an application filed by Sanjay Rathore (PW-2) dated 10th May, 2010 seeking direction to the police to arrest Jyoti, who was at that time absconding. She was arrested on 23rd May, 2010 as per the police version on identification by Sanjay Rathore (PW-2). It is also the prosecution case and it is not denied that Jyoti had accompanied Asha to the hospital in the PCR van and had not absconded after the occurrence. The reason given by CW-1 for recording the video, therefore, is obscured. Why did he keep the video and not reveal and hand over to the police is unfathomable. It is possible that CW-1 may have recorded the said video for using the said evidence, but knew the limitations and drawbacks. Having played the aforesaid video a number of times, we have doubts and cannot say with certainty that the answers given by the deceased Asha were not prompted or tutored.

30. Jitender Kumar (PW-14), the other brother of the deceased Asha has accepted that he used to reside with her sister Asha, his brother-in-law, Sanjay Rathore (PW-2) and their four children at B-114A, Majlis Park, Delhi. He had resided with them for about 5-6 years. He proclaimed that the appellants used to torture and beat Asha though he would urge and request them not to harass Asha. Jyoti would warn that she would tear her clothes and falsely implicate PW-14. Due to threats, Asha asked PW-14 to shift to another accommodation. PW-14 had made allegations against Sanjay Rathore (PW-2) and referred to a letter marked Exhibit PW-14/A written by Asha in the year 1999 to her

parents, complaining against Sanjay Rathore (PW-2). PW-14 has testified that on 27th April, 2010, he had left for Karnataka in connection with a job and on 28th April, 2010, he had received a call from Asha, who had complained that Sanjay Rathore (PW-2) and the appellants were torturing and harassing her. Asha had again called him and complained to him on 30th April, 2010 stating that there was a dispute between her and Sanjay Rathore (PW-2), and the appellants. Next day on 1st May, 2010, he received a SMS from his brother to call him urgently. However, due to lack of balance, he had not made any call. He returned to Delhi on 3rd May, 2010 and had met Asha in LNJP Hospital where Sanjay Rathore (PW-2) was also present. Initially, Asha was hesitant and did not say anything in the presence of Sanjay Rathore (PW-2). Only when Sanjay Rathore (PW-2) had gone outside, Asha had told him that Sanjay Rathore (PW-2) had been pressurizing her to change her statement. In his cross-examination, PW-14 tried to explain that he was not in his full senses when the police had recorded his statement and consequently had not stated the full facts.

31. Mohan Lal (PW-10), father of the deceased Asha implicated Sanjay Rathore and claimed that he would harass Asha for not bringing dowry. He has accepted that the appellant-Laxmi along with Jyoti had sold her house and started living in the rented premises with Sanjay Rathore and Asha. PW-10 claimed that on 1st May, 2010 at about 8 A.M. to 8.30 P.M. he and his wife had spoken to Asha on the telephone, when she had informed them that the night before Asha had gone to the police station at Adarsh Nagar to make a complaint against the appellants (accused).

32. We have referred to the complaint made by the deceased Asha and Sanjay Rathore on 28th and 26th April, 2010, respectively and noticed that Asha's complaint was not directed against Sanjay Rathore (PW-2), but was directed against the two appellants after recording the fact that appellant-Laxmi had sold the immovable property. Sanjay Rathore (PW-2) has stated that he was residing with his wife, children and the two appellants in a tenanted property. Laxmi and Jyoti had started residing with them about two-three months back. PW-2, however, in his testimony had claimed that there was no dispute between them and her mother had never asked for dowry. On 1st May, 2010, PW-2 had gone to the clinic to bring medicine for his two sons. However, the four children had accompanied him. When he came back, PW-2 came to know that his wife had suffered burn injuries, while the two appellants were at home. He received a call from Jyoti, who had informed that Asha had been shifted to Irwin Hospital (LNJP Hospital) from BJRM Hospital. He claimed that Asha had told him that she had suffered burn injuries due to LPG gas leakage. PW-2, however, categorically denied that the appellants had demanded Rs.1 lac or any other amount from his wife thereby contradicting his earlier complaint dated 26th April, 2010. PW-2 was extensively cross-examined by the Public Prosecutor, but did not support the prosecution version.
33. Mohan Lal (PW-10) in his cross-examination has accepted that Sanjay Rathore (PW-2) was in debt and was asking his landlord to pay him Rs.30,00,000/- for vacating the tenanted premises. He has accepted that his son Jatinder used to have meals with Asha and has given the address of Asha as his postal address. He has affirmed that for about 8-

10 years, deceased Asha and Sanjay Rathore (PW-2) were staying separately i.e. they were not living with Laxmi and Jyoti.

34. Similarly, Jatinder (PW-14) in his cross-examination had admitted that after Asha's death, he had stayed in the Asha's house for about one month and would look after her four children. Sanjay Rathore (PW-2) would meet him daily in the evening. After one month, PW-14 had asked Sanjay Rathore (PW-2) whether he could take the children to Rajasthan, so that they could live in a different environment. Sanjay Rathore (PW-2) had refused and had given threats.
35. Deepak (CW-1) has accepted that he had remained in Delhi for about 17 days after the death of Asha at the residence of Sanjay Rathore (PW-2). The aforesaid evidence would necessarily reflect that before and immediately after the death of Asha, the relationship between the family members of Asha and Sanjay Rathore (PW-2) was cordial and close. Differences arose subsequently, about a month after Asha's death.
36. In these circumstances, we cannot accept , Deepak (CW-1), Jatinder (PW-14) and Mohan Lal (PW-10)'s assertion that Sanjay Rathore (PW-2) was downright inimical to Asha and was supporting and biased towards Laxmi and Jyoti or that he was compelling Asha to change her version given to the police. Differences between Sanjay Rathore (PW-2) and the family members of Asha arose about 30 days after her death.
37. Asha and Sanjay Rathore(PW-2) were married for 13 years and had for several years a separate residence. As per the prosecution version, Asha's two brothers were earlier residing with her and Sanjay Rathore (PW-2). Laxmi is a widow and Jyoti was earlier married, but had

separated. Jitender Kumar(PW-14) in his examination in chief has accepted that Laxmi and Jyoti use to reside somewhere at Kewal Park, but they had sold their house and had started living with "us" at B-114,A. Majlis Park, Delhi. Mohan Lal (PW-10) has similarly stated that in March,2010 Laxmi had sold her house and started living with Sanjay and Asha in their rented premises. The fact that Laxmi had recently sold her house and having received the sale consideration was flushed with funds cannot be doubted. Motive and allegation that Laxmi and Jyoti wanted Rs.1 lac and were mistreating and torturing Asha for this reason does appear to be out of place and some-what unusual. The two complaints Ex.PW14/B and Ex.PW10/D are rather peculiar. Both Asha and Sanjay Rathore(PW-2) had raised a common grievance, apparently predicated on money matters. Obviously they had sought and taken legal advice. The aforesaid exhibited documents, it can be urged with some merit, prodigally expose the parsimony and pressure tactics resorted and adopted by Asha and Sanjay Rathore (PW-2) to extract from Laxmi a portion of her money. Was the episode and occurrence a consequence of this perfidy in which the victim had possibly attempted para-suicide with minimal self harm, but accidentally the fire had engulfed her and caused serious injuries?, is a difficult question to answer with certainty and certitude. We are unable to repel and negate the said contention that Asha attempted "cry wolf" and the wolves had showed up.

38. Dying declarations are an exception to the rule of hearsay and have been recognised and accepted as admissible and when found reliable can be of great value. Dying declaration when true can form the sole basis for conviction even without corroboration. Dying declarations

are received and admitted in evidence for otherwise a premium would be held out for commission of crime, as sometimes only direct testimony against the accused is to be found in the dying declaration. The dying declaration is also predicated on the principle that when a person reaches the point of death and every hope has come to an end, then motive to speak falsehood is silenced. The sense of impending death has the same effect on a person's mind as when a conscientious and a virtuous person makes a statement on solemn affirmation. At the same time, we cannot hold that all dying declarations state the truth and nothing but the truth. The court must make a careful and detailed scrutiny to rule out any possibility of tutoring, prompting or imagination and when the dying declaration is suspicious, it should not be acted upon without corroborative evidence. This is required and necessary as the credibility and veracity of the dying declaration attributed to the maker, who has died, cannot be tested through the tool of cross-examination.

39. Dying declarations relied upon by the prosecution, in our opinion, in the present case are not completely reliable. We perceive and believe that there are unanswered and incipient doubts, which makes it difficult to ascertain and state with certainty that the dying declarations are not besmirched and untrue being a product of imagination, prompting and tutoring. In our opinion, it would be unsafe to rely upon the dying declarations as the sole basis for convicting Laxmi and Jyoti in the light of somewhat balancing and equipoise evidence. For conviction, we must form a decisive opinion, and when we are unsure and indecisive, benefit of doubt should be given.

40. In view of the aforesaid discussion, we allow the present appeal and set aside the conviction of Laxmi and Jyoti awarded by the impugned judgment, for they are entitled to benefit of doubt. They shall be released forthwith unless they are required to be detained in accordance with law in any other case.

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(SANJIV KHANNA)
JUDGE

-sd-

(R.K. GAUBA)
JUDGE

FEBRUARY 11, 2016
VKR/ssn