

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

Judgment reserved on: 25th November, 2017

Judgment pronounced on: 08th December, 2017

+ CRL.A. 1388/2013

FIRASAT HUSSAIN

..... Appellant

Through Mr. M. L. Yadav, Advocate for
Ms. Saahila Lamba, Advocate

versus

STATE (GNCT OF DELHI)

..... Respondent

Through Ms. Aashaa Tiwari, APP for the
State

CORAM:

HON'BLE MR. JUSTICE S. P. GARG

HON'BLE MR. JUSTICE C.HARI SHANKAR

JUDGMENT

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C. HARI SHANKAR, J.

1. Vide judgment dated 12th April, 2013, the learned Additional Sessions Judge-01, Rohini (hereinafter referred to as the “learned ASJ”), held Firasat Hussain - the appellant before us - guilty of committing the murder of his wife Asma, and accordingly convicted him under Section 302 of Indian Penal Code (hereinafter referred to as the “IPC”). Consequent thereupon, the learned ASJ sentenced the appellant to rigorous imprisonment for life, *vide* separate order dated 26th April, 2013. Needless to say, both orders are assailed in the present appeal.

2. Asma and the appellant were married on 24th March 2009. After marriage, they started residing with the appellant's parents, sister and her husband, at Ghaziabad. The 'Vidai' ceremony of Asma took place about a year after their marriage. On 23rd June 2011, apparently, the appellant visited the house of Asma's parents, Mohd. Yakub (PW-7) and Sahida (PW-3) and informed them that he had quarreled with his family members, and wanted to stay with Asma at her parents house. It appears that Asma's parents expressed, to the appellant, their reluctance to accede to such a plan. Instead, they requested the appellant to bring his parents to meet them, stating that they would send Asma back with him only after his parents assured them that they would take care of her. Thereafter, the appellant left and returned with his parents, sister and brother-in-law, who assured Asma's parents that they would take care of her, whereupon Asma's parents agreed to send Asma, with him, back to their house.

3 Around 2-3 days thereafter, on 26th June, 2011, at around 8.00 AM, a call was received, at P.S. Kanjhawala, from the PCR, informing that Asma had burnt herself. On the basis of the said information, DD No. 8A was recorded, and the case was assigned to SI Om Prakash (PW-18).

4 Following thereupon, SI Om Prakash (PW-18) reached the residence of the appellant, with Constable Rohtash (PW-23) and found Asma in a severely burnt condition. The appellant was also seen to have suffered burns. Asma and the appellant were, therefore, taken to

SGM Hospital, Mangolpuri. As the case could not be managed at SGM Hospital, on the advice of the doctors there, Asma and the appellant, were transferred to Ram Manohar Lohia (RML) Hospital about an hour thereafter.

5. Burnt matchsticks, one yellow plastic bottle, one stove and some burnt clothes were recovered from the spot of occurrence.

6. The SI informed the SHO, Inspector Surender Dhaiya, of PS Kanjhawla, who also reached the hospital, at around 10-10.30 AM. The SHO informed the SDM Saraswati Vihar, Ramphal Singh (PW-11), who also arrived at the spot of occurrence thereupon. The crime team was called, and photographs were taken.

7. SI Om Prakash (PW-18), thereafter, proceeded to SGM Hospital, where Asma was found admitted vide MLC no. 10187/2011 (EX PW-18/A). According to him, the doctor at the spot told him that she was conscious and oriented. The MLC also contained a report by the doctor, to the said effect, besides stating that her general condition, and prognosis was poor. Burns were said to be present “over face, chest, abdomen, back, B/L U/L, perennial area, genitals and upper thigh’. However, the MLC opined that she was ‘fit for statement’.

8. Consequent on the arrival of the SDM, according to the prosecution, the statement of Asma was recorded (Ex.PW-11/A). The statement was not recorded in the handwriting of Asma but bears two

thumb impressions at the foot thereof which had been encircled with an endorsement to the effect that they were Asma's. The statement, which was recorded in vernacular, may be translated thus:

"Statement of Asma wife of Firasat Hussin, R/o A10, J.J. Colony, Delhi 110021, aged 22 years

I stay at the above address. My marriage with Firasat Hussain took place on 12th February, 2011. My mother-in-law, whose name is Sabri, w/o Riyakat, used to live with me. She used to taunt me for not having brought a double bed in my marriage. Because of this, my married life was not progressing smoothly. My mother-in-law left her house 15 days ago. My husband used to doubt me, because of which we often used to quarrel. Yesterday, on 25th June 2011, at about 9 P.M, my husband beat me severely and said that I had mixed some intoxicant in his tea and given it to him to drink. Though I was in poor health, I prepared food but, thereafter, I went off to sleep. When I woke up in the morning on 26th June 2011, at about 7 A.M. my husband Firasat Hussain poured oil on me and set me afire. When I shouted loudly, my husband, in panic, poured water on me. Thereafter, someone dialed 100, whereupon the police arrived and took me and my husband to the hospital, I want my husband be proceeded against legally so that I can secure justice. You had come to the hospital and recoded my statement which I had heard, and it is correct".

9. Apart from the two thumb impressions at the foot of the statement, a recital, stating "statement recorded before me, please take necessary action as per the law" with the official stamp of signature of Ram Pal Singh, SDM (PW-11) is also to be found. Apart from this, the statement has been signed by the SHO, PS Kanjhawala.

10. Consequent to the purported recording of the aforementioned statement of Asma, the SDM directed registration of FIR. Pursuant thereupon, an FIR No. 158/2011 was registered against Firasat

Hussain under Sections 498-A, 307 and 34 of the IPC read with Section 4 of the Dowry Prohibition Act, 1961. The appellant, whose disclosure statement was recorded (Ex PW-18/F), was arrested and sent to police lock-up. He was, thereafter, produced in court on 27th June 2011, and remanded to judicial custody.

11. 18 days thereafter, on 14th July 2011, at about 8.30 P.M, Asma expired. Her body was identified by Rais Ahmed (PW-2) who was their neighbour. Inquest was conducted by the SDM. The cause of death, as per the Death Report, dated 14th July 2011 (EX.PW-18/J), was stated to be “sudden cardio pulmonary arrest due to 77% sup. To deep thermal burns”.

12. The investigation into the case was, thereafter, transferred to Inspector Surender Dahiya (PW-22), who prepared the site plan, got the post mortem done by Dr Manoj Dhingra (PW-5) and Dr. Deepak Sharma, collected the post mortem report and sent the exhibits, recovered from the site to the Forensic Science Laboratory.

13. The post mortem report, which was exhibited as Ex PW-5/A, reads as under:

“P.M. No. 643/11
Dated: 16/07/11
Time: 4 PM
Name of deceased: Smt. Ashma
W/o: Phirasat Hussain
Age: 22 years
Sex: Female
Address: A-110 jj Colony sawada DELHI

Body sent by: SDM Ram phal Singh

Police station: Kanjhawala

FIR No. : 158/dt 26/6/2011

IDENTIFIED/IDENTIFICATION MARKS

1. Rahish Ahmed
2. mohd Ajub

Alleged history

Alleged history of sustaining injuries by Burns on 26/06/11 at about 9:30 AM at her home. She was taken to Sanjay Gandhi hospital where she had been given primary treatment, then patient attendant shifted her to RML Hospital, there she expired on 14/07/11 at 9:30 PM. MLC has been made at Sanjay Gandhi Memorial Hospital MLC No 10187, on MLC it shows 80-85% of body burn.

General appearance

Clothing: Clothes not present

Built: Average built

Face: Burnt.

Eyes: Eyes closed. Eyelids swollen and eyelashes burnt.

Conjunctivae: Conjunctivae were congested.

Mouth: Lips blackened and swollen. Frenulum of upper lip and the lower lip intact.

Tongue: Tongue clenched between teeth.

Hands: Degloving present.

Discharge from natural orifices: Blood present from mouth

Post Mortem changes

Corneae: Had hazy appearance.

Rigor Mortis: Rigor Mortis present. Limbs flexed at elbows and knees and difficult to extend.

Post Mortem staining: Not appreciable due to extensive burn injuries.

Decomposition changes: Not present.

External examination (injuries)

Dermo-epidermal burn injuries present involving the whole body. The skin is blackened with peeling of skin at places exposing reddish base except Scalp hair. Total body surface area involved is 80%.

Internal examination

Head

Scalp: Scalp tissue shows congested appearance on reflection of scalp. No extravasation of blood present in scalp.

Skull bones including facial bones and base of skull: No fractures present.

Brain: Brain weight – 1225 gms. Brain had congested appearance.

Neck

Soft tissue: No extravasation of blood present in subcutaneous tissue and muscles of the neck.

Hyoid bone, Thyroid cartilage, cricoid cartilage: Intact.

Laryngeal mucosa and Tracheal mucosa were congested.

Others: Blood vessels, Nerves, Thyroid gland, esophagus showed no gross abnormality.

Chest

Ribs and Sternum: No fractures present.

Pleurae and pleural cavities: Pleurae had congested appearance.

Lungs: Weight of right lung was 460 gms. Weight of left lung was 430 gms. Both lungs had congested appearance and consolidation present in the lungs.

Heart: Weight of heart was 260 g. Myocardium had congested appearance. Coronary arteries were patent. On cut section no gross findings suggestive of ischaemia were present.

Abdomen

Fluid in Peritoneal cavity: No fluid present in the peritoneal cavity.

Liver and gallbladder: Weight of liver was 1400 g. Congested on cut section.

Spleen: Weight of spleen was 120 g. Congested on cut section.

Kidneys – Both kidneys congested

Pancreas: No abnormality present on gross examination.

Stomach: Empty. Mucosa showed petechial haemorrhages.

Bowels: Small bowels contain fluid and gases and mucosa normal.

Large intestine contained faeces and gases and mucosa was normal.

Pelvis

Urinary bladder empty

Uterus and ovaries: NAD

Genital organs: No abnormality present.

Vertebral column and spinal cord: No abnormality present.

Opinion: Cause of death is shock consequent to burn injuries

Time since death: Consistent with Hospital timing of death.

Total inquest papers: Fifteen (15)”

14. On 16th July 2011, the statements of Sahida (PW-3) and Mohammed Yakub (PW-7) were recorded by the SDM (PW-11), under Section 164 of the Code of Criminal Procedure, 1973 (hereinafter referred to as “the Cr.P.C”). The statements of Sahida (PW-3) and Mohd Yakub (PW-7), as translated from the vernacular, were as under:

(i) Statement of Sahida (PW-3):

“I, Smt. Sahida, wife of Sh. Mohd Yakub, aged 40 years, address C-66, Block-C, JJ Colony, Nangloi, Delhi state that on 23-06-2011, Firasat, husband of my daughter Asma, came to our house and said that I have fought with my family and come to participate in a marriage. He also said that I will not stay with my parents. We told him that we would send our daughter Asma with him only after he brought his family members to us. Whereupon he brought his mother, sister and brother-in-law and returned. In the course of conversation, it was decided that Shakir, the brother-in-law of Firasat took the responsibility that everything would be okay. 3 days thereafter on 26.06.2011, we received information of Asma having been burnt. Asma died on 14.07.2011. I believe Firasat’s mother Sabri, his brother-in-law Shakir, his sister Afsana and Firasat to be responsible for Asma’s death and I am fully convinced that I want all of them to be proceeded against in law so that my dead daughter may secure justice.

Heard the statement it is correct.”

(ii) Mohd Yakub (PW-7):

“I, Mohd Yakub, s/o Shri Mahboob Ilahi, aged 55 years, working as a driver, state that my daughter Asma, aged 22 years, was married to Firasat Hussain on 24-03-2009. And her Vidai took place on 12th February 2011. On 23.06.2011, Asma’s husband Firasat Hussain came to our house in the afternoon, after having fought with his sister, brother-in-law and mother. When we asked him the reason, he told us that they had come to participate in some wedding. He also stated that he had fought with his family and would not stay with them. I told my son-in-law that the Vidai had just taken place. Expenses had been spent on the wedding. How could he bear the burden of my daughter alone, we asked him to bring his family members and that we would talk to them. From his family, his elder sister, brother in law named Shakir and his mother came to our house to talk to us. During conversation, his brother-in-law decided that Asma’s responsibility was his, and told us to send Asma with Firasat. So we sent Asma with Firasat. On 26.06.2011, in the morning between 9:30 AM 10 AM, a neighbour informed us that our daughter Asma had been burnt and was admitted in the Sanjay Gandhi hospital. We were again informed, by phone, that our daughter had been sent to RML hospital. Asma died at 9:30 PM on 14.07.2011. I fully suspect Firasat, his mother Sabri, his brother-in-law Shakir and his sister Afsana as being responsible for her death and desire that they be proceeded against legally, so that my dead daughter would secure justice.

I have read the statement. It is correct.”

15. Charge sheet was, thereafter, filed against the appellant, cognizance was taken by the Magistrate and the case was committed to Sessions for framing charges and trial, if required.

16. On 19th January 2011, charges were framed against the appellant under Sections 302, 304B, and 498A of the IPC. The appellant pleaded not guilty and claimed trial.

Oral Evidence

17. Evidence, was thereafter, recorded by the learned ASJ. 24 witnesses were cited by the prosecution. To the extent they are relevant, the evidence of the witnesses may be distilled as under:

(i) PW1 Mohd. Sakir, uncle of Asma, who used to stay close to their Jhuggi, and was a butcher by profession, deposed, on 25th February 2012, that (a) at about 7-8A.M around 3 months prior to the date of recording of the statement, he heard a noise, and, on opening the door found his niece Asma outside the house in a burnt condition, (b) he immediately called the police by dialing 100 whereupon the PCR arrived at the spot, and (c) the appellant, who was also present there, had also suffered burns on his hands.

(ii) PW-3 Sahida, the mother of Asma stated, in her statement recorded on 25th February 2012, that (a) Asma and the appellant were married on 27th February 2011, (b) she identified the appellant, who was present in the court, (c) no complaint was made by Asma ever after her marriage, (d) one day, around 2-3 months after their marriage (on 23rd June 2011), however, the

appellant arrived at her house with Asma and informed her that he had quarreled with his parents and left their house, (e) she, thereupon, asked the appellant to bring his parents whereafter alone they would send Asma with him, (f) Asma remained with them and the appellant went away, (g) sometime thereafter, the appellant returned with his mother Sabri, sister Afsana and her husband i.e. his brother in law Sakir, (h) on the assurance of Sabri, Afsana and Sakir, that they would keep Asma in good condition, she and her husband sent Asma with the appellant, and (i) thereafter, Asma and the appellant resided at the Jhuggi of the appellant's parents J.J. Colony, Ghevra, (j) around 2-3 days later, she received information that her daughter Asma had been burnt and was in the RML hospital, (k) she, thereafter, immediately reached RML hospital, where, on seeing Asma's condition, she fell unconscious, (l) sometime later, when she came to her senses, Asma told her that she had been burnt by her husband Firasat Hussain, (m) around 18 days after the said incident, Asma died due to her burn injuries, (n) the police conducted their proceedings thereafter, (o) after postmortem, (exhibited as Ex. Pw-5/A) Asma's dead body was handed over to them, and (p) the SDM, thereafter, recorded her statement, which was exhibited as Ex. PW-3/A and bore her signature.

(iii) PW-3 Sahida was cross examined by counsel for the appellant. In cross examination, she deposed that (a) she did not remember the date on which she received information about

the death of Asma, (b) she received information about the death of Asma at 10 AM while she was at Bijnor and arrived at the hospital at about 8-9 PM, (c) she went to the hospital with her sister in law, (d) the police never met her or recorded her statement, (e) neither did the SDM meet her in the hospital, and (f) she remained, throughout, in the hospital with her daughter Asma. At this stage, remaining cross examination was deferred as it was lunch time. After lunch, the cross examination of Sahida continued, wherein she stated that (a) she was unable to talk to Asma as she was unconscious, (b) neither could her husband, Mohd. Yakub talk to Asma for the same reason, (c) Asma was unconscious at the time she (i.e. Sahida) reached the Hospital from Bijnor and remained unconscious throughout till her death, so that, she was not able to talk to her at any time, (d) the relations between the Asma and the appellant were very cordial ever since their marriage and Asma was very happy, (e) Asma never made any complaint against the appellant, (f) neither did the appellant, or any of his family members, ever demand any article from her, or her husband, at the time of marriage, prior thereto or thereafter, (g) she had visited the residence of Asma while she was staying with the appellant, (h) Asma used to prepare food using a kerosene oil stove, (i) the appellant had also received burnt injuries, and (j) it was incorrect to suggest that Asma had accidentally caught fire while preparing food and that the appellant had run to the

kitchen, tried to save her from fire and sustained burn injuries in the process.

(iv) PW-5 Dr. Manoj Dhingra, who was Medical Officer Incharge at the SGM hospital, deposed, on 28th February 2012, that he, along with Dr. Deepak Sharma, had conducted postmortem of Asma and that she was found to have sustained 80% burns with dermo-epidermal burn injuries present, involving the whole body. He further deposed that no injury was found on internal examination and, in his opinion, the cause of Asma's death was shock consequent upon burn injuries. He proved his report as Ex. PW-5/A. He was cross examined by counsel for the appellant, whereupon he stated that Asma had burns on her hands and fingers in a "degloving manner", clarifying that "degloving" meant "peeling of skin".

(v) PW-7, Mohd. Yakub, father of Asma, deposed, in his examination-in-chief on 18th April 2012, that (a) about 4-5 months after marriage, the 'vidai' ceremony had come to their place with Asma and stated that as he had quarreled with his mother, sister, brother in law and that he did not desire to stay with them, (b) he (i.e. Mohd Yakub) told him that they would not send Asma back with him till he brought his family members, (c) that the appellant, thereupon, went away and returned with his family members, who assured that they would take care of Asma, (d) on receiving such assurance, they i.e.

Asma's parents, sent her with them, (e) 2-3 days thereafter, at about 8-9 A.M he got to know that Asma had sustained burns and was admitted in the hospital, (f) on their reaching the hospital, they found Asma admitted there, (g) she succumbed to her injuries about 19 days thereafter and (h) his statement, which bore his signatures, was recorded by the SDM, and was exhibited as Ex PW-7/A.

(vi) During cross-examination by counsel for the appellant, Mohd Yakub (PW-7) deposed that (a) they reached the hospital at about 8-8-30 PM and remained there till 1 AM., (b) no Magistrate came to the hospital in his presence, (c) Asma used to visit his house, to meet her parents, (d) he had visited Asma's matrimonial home only once, on the occasion of the death of the appellant's brother, (e) the relations between Asma and the appellant were very cordial, (f) even on the occasion when, prior to the present incident, Asma had visited their house with her husband, i.e. the appellant, their relations were cordial, (g) the appellant had not demanded anything from them, either before or after the marriage, and (h) the appellant had never misbehaved with him or with any member of his family. He denied the suggestion that he was deposing falsely.

(vii) PW-10, Mohd Ahmed, who was a neighbour of the appellant and worked in a ply factory, deposed, on 21st April 2012, that Asma had caught fire while cooking food, and the

appellant had burnt his hands in the process of trying to save Asma. This assertion was repeated in his cross-examination by the learned APP. The suggestion, put to him, that he was deposing falsely, was denied by him. During his cross-examination by the appellant he further deposed that he had never seen any quarrel, between Asma and the appellant, at any point of time.

(viii) PW-11 Ram Phal Singh, the SDM/Executive Magistrate, deposed, in his examination-in-chief on 19th May 2012, that, on 26th June 2011, he had recorded Asma's statement, which bore her thumb impression at points A and B, and that, after recording her statement, he gave necessary directions to the SHO. He further deposed that the statement, dated 16th July 2011, of Mohd Yakub (PW-7), was recorded before him.

(ix) During his cross-examination by the appellant, PW-11 stated that (a) on arrival at the hospital, he had first met the doctor in the Emergency Ward, and confirmed, from him, that Asma was fit for giving a statement, (b) he had, however, not taken any certificate, from the doctor, to this effect, (c) he did not know the name of the said doctor, (d) he told Asma that he was the SDM and had come there to record her statement, though there was no such recital in the statement of Asma, recorded by him, (e) he satisfied himself, before recording her statement, that Asma was fit for doing so, though this fact was

also not mentioned anywhere, (f) he started recording of the statement at 11:45 AM, and took 15 minutes to record the statement, (g) he had mentioned the time of start of recording of the statement, and end thereof, at the head and foot of the statement respectively, (h) it was true that he had entered the time as 11:45 AM at both places, (i) he was putting questions and Asma was answering the same, (j) he had recorded only the answers given by Asma, and not the questions put by him, (k) Asma was burnt from the chest downward, with bandages on both hands, (l) she was crying in pain at the time of recording of the statement, (m) the doctor was not present when he recorded her statement, (n) he had not certified that the statement had been read over to Asma, and that she certified it to be true and correct, (o) it was correct that he had mentioned, in the statement, that it was recorded before him, (p) he, in his cross-examination, had mentioned that the statement was recorded by him because it was recorded under his directions (q) the I/O had recorded the statement on his directions, though no such certificate was given by him, (r) on 14th July 2011, he received information regarding the death of Asma on his phone, during office hours, which were 10 AM to 5 PM, (s) he came to the hospital, on the 16th July 2011, at about 10:30 to 11 AM and remained there for about 2 hours, (t) the I/O recorded the statement of Mohd Yakub (PW-7) and Sahiba (PW-3) on his directions, and (u) it was correct that, at the foot of the said statements, the date appended below the signature of the

deponent was 15th July 2011, and the date below his signature was 16th July 2011. He denied the suggestion that the thumb impression affixed on Asma's statement was not hers, or that the scale of her whole hand had peeled off. He further denied the suggestion that the statement of Asma had not been recorded before him or under his directions. He accepted the fact that the MLC (Ex PW-11/DX) was received by him on 26th of June 2011, when he reached the hospital, and that, below the certification, thereon, that Asma was fit for recording of her statement, there was no date or time, and no signature of the doctor either.

(x) PW-18 SI Om Prakash deposed, in his examination-in-chief on 28th July 2012, that (a) on 26th June 2011, while he was posted as SI in PS Kanjhawala, he received DD No 8A, (b) thereafter, he, along with Ct Rohtash, reached jhuggi No A-110, JJ Colony, Sawada, (c) there, they came to know that Asma had been burnt and had been taken to the hospital, (d) he noticed the smell of kerosene oil, and found some burnt clothes lying there, (e) he also found one kerosene bottle, one stove, burnt matchsticks and a matchbox, (f) he informed the SHO Surinder Dahiya (PW-22), who also reached the spot, (g) the SHO, thereafter, informed the SDM, whereas he, i.e. Om Prakash, informed the crime team, which came after sometime and inspected the spot, (h) the SHO proceeded to the hospital and he, too, reached the hospital after sometime, where he collected

the MLC of Asma, (i) the SDM, Ram Phal Singh (PW-11) met him there, and recorded the statement of Asma, which was handed over to him, (j) he was also handed over the clothes of Asma, carrying which he returned to the Police Station, (k) he handed over the statement of Asma to the SHO, (l) the SHO entered an endorsement, therein, for registration of an FIR, (m) he, thereafter, went back to the spot of incident, where he seized the matchbox, matchsticks, plastic bottle, burnt clothes and the stove, and prepared the site plan (n) the appellant arrived at the spot, where he was interrogated and arrested, and his personal search conducted, (o) he made a disclosure statement, which was exhibited as Ex PW-18/F, and bore his, i.e. SI Om Prakash's (PW-18) signature, (p) the appellant was, thereafter, sent to police lock-up, after which he recorded the statement of witnesses, (q) on 27th June 2011, the appellant was produced in court and remanded to JC, (r) on the night of 14th July 2011, information, regarding the death of Asma, was received, and recorded *vide* DD No 8A, (s) he reached the SGM Hospital on 15th July 2011, collected the dead body, death report and death summary, sent the dead body to be SGM Hospital Mortuary and informed the SDM, (t) after the SDM had reached, he, i.e. SI Om Prakash, recorded the statements of the I/O and of Rais Ahmed (PW-2), whereafter the SDM conducted the inquest proceedings and got the post-mortem of Asma conducted, (u) the statements of Sahida (PW-3) and Mohd Yakub (PW-7) were recorded by the SDM.

(xi) In his cross-examination, SI Om Prakash deposed that he had recorded the statement of Asma under the guidance of the SDM, though this fact was not mentioned by him anywhere. The suggestion that he had recorded the statement himself and got signed, later, by the SDM, was denied. Regarding the injuries on the body of Asma, he stated that all the visible parts of her body were having burn injuries, and that her hands were also burnt. He further stated, that at first, he had not noticed whether the thumb of Asma was having burn injuries or not and, immediately thereafter, denied the suggestion that the thumbs of both hands of Asma were badly burned and that skin from the thumbs had peeled off. The suggestion that Asma had caught fire while cooking was also denied.

(xii) PW-19, Dr. Brijesh Singh, CMO, SGM Hospital, deposed, in his examination-in-chief on 28 July 2012, that, on 26th June 2011, he had examined Asma, and that the smell of kerosene was present on her. He further deposed that, at the time, she was conscious, oriented and her vitals were stable, and that she was fit for giving statement. He stated that she had superficial to deep burns, to the extent of approximately 60%. He also confirmed that he had prepared the MLC, exhibited as Ex PW-19/A, and signed the same. He further stated that he had examined the appellant on the same day, and found that he had suffered superficial to deep burns on both hands, forearms and

forehead, and that he had prepared the MLC for the appellant, which was exhibited as Ex PW-19/B.

(xiii) In his cross-examination, Dr. Brijesh Singh accepted that he had not put his signature below the “fitness” endorsement of Asma. He further confirmed that he had not mentioned, in the MLC of the appellant, that he was fit for giving statement, as he had already stated, in the MLC, that he was conscious and oriented, and his injury was not serious. He also accepted that the statement, by him, that Asma had suffered 60% burns, as also recorded on the body of the MLC, could also be 85%, as he had only mentioned an approximate percentage on a preliminary examination. He further confirmed that the reference, to Asma, as “conscious and oriented” meant that she could speak properly, and denied the suggestion that a person who had suffered 85% burns would not be in a position to speak clearly.

(xiv) PW-22, Inspector Surinder Dahiya, whose statement was recorded on 22nd October 2012, deposed, during his cross-examination, that he was not present when the SDM (Ram Phal Singh PW-11) was recording the statement of Asma.

18. The statement of the appellant, under Section 313 of the Cr.P.C, was also recorded, on 6th February 2013. Several questions were put to him, all of which he denied. He stated that he was innocent and falsely

implicated in the case. He further stated that while cooking food, the deceased accidentally caught fire and upon hearing her cries, he rushed to her and in the process of extinguishing the fire, he also received burn injuries on his hands and forehead.

Impugned Judgement of learned ASJ

19. Vide the impugned judgement, dated 12th April 2013, the learned ASJ has held the appellant guilty of having committed murder of Asma and, accordingly, has convicted him under Section 302 of the IPC. In so holding, the learned ASJ, relies, extensively, and predictably, on the “dying declaration” of Asma. He also places reliance on the deposition of PW-19 Dr. Brijesh Singh, to the effect that Asma was conscious and oriented and fit to give a statement. He has accepted, as correct, the deposition of PW-11 Ram Phal Singh (the SDM), regarding the recording of the said statement of Asma. As regards the exculpatory statements of Asma’s parents, the learned ASJ holds that, as part of the cross examination of Sahida (PW-3) took place prior to lunch, and part thereafter, there was every chance of her having been won over during lunchtime. He also holds that, though it would have been better if the statement of Asma had been recorded by the SDM himself, or in question answer form, these minor irregularities were not sufficient to discredit the said statement. He has also relied on the fact that the smell of kerosene was present, indicating that kerosene had been “put on” Asma’s clothes. He queries that “if deceased cloth caught fire while cooking food as stated by

accused in the statement under Section 313 Cr.P.C. then how kerosene oil fell on her cloth”, and answers the query by opining that “this is only possible if kerosene oil was poured either by deceased herself or poured by someone else.” On this basis, the learned ASJ has completely rejected the proposal that Asma was accidentally burnt while cooking food. He further relies on the fact that the appellant had himself stated that there were strained relations between Asma and him, and his family members. All these factors, put together, in the opinion of the learned ASJ, lend credibility to be “dying declaration” of Asma, and irremediably damned the appellant. While convicting the appellant under section 302 of the IPC, the learned ASJ proceeded to hold that the case was not one which could be categorised as “rarest of the rare”, warranting the death penalty and, therefore, sentenced the appellant to rigorous imprisonment for life.

Analysis

20. This, again, is an instance in which the case of the prosecution rests, almost solely, on the “dying declaration” of Asma, recorded on 26th of June 2011 at about 11:45 AM. The law, regarding the evidentiary value of dying declarations, is well settled. It is true that dying declarations, if credible and found to be trustworthy, could form the sole basis for conviction. At the same time, the dying declaration not having been recorded under oath, and not being subjected to the safeguard of a cross-examination, it is equally trite that the dying declaration is evidence of a fundamentally weak nature, and has to be

treated with care, caution and circumspection, especially where it is not corroborated by other independent evidence. The philosophy behind the evidentiary value accorded to a dying declaration is about as close to the ecclesiastical as the legal can get, being founded on the premise “*nemo moriturus praesimitur mentire*”, meaning “man will not meet his maker with a lie his mouth”. The fact that the man, who is making the dying declaration, is about to meet his maker would, therefore, appear to be a prerequisite for the statement to be elevated to the status of a “dying declaration”. While it is true that the legislature has, in Section 32 (1) of the Evidence Act, 1872 (which provides statutory imprimatur to the “dying declaration”), specifically cautions that “expectation of death” is not a *sine qua non* for the statement to be regarded as a dying declaration, the Supreme Court has, in **Ramakant Mishra v State of U.P., (2015) 8 SCC 299** (which, also, was, incidentally, a case of alleged “bride burning”) harmonised statutory law with common law, by holding that, even if “expectation of death” is, not a *sine qua non* for Section 32 to apply, “contemplation of death” is we do not, however, propose to venture into this somewhat perilous area that lies between “expectation” and “contemplation”, for the simple reason that, in a case of severe burns, **Ramakant Mishra (supra)**, too, holds both expectation, and contemplation, of death, to, *ex facie*, be present. Para 11 of the report in **Ramakant Mishra (supra)**, however, is important, and is reproduced thus:

“11. The central question, however, remains as to whether the alleged dying declaration attracts authenticity. Since the prosecution has succeeded in showing/proving by preponderance of probability that a

dowry death has occurred, the burden of proving innocence has shifted to the accused. It appears to us to be unexceptionable that whenever a person is brought to a hospital in an injured state which indicates foul play, the hospital authorities are enjoined to treat it as a medico-legal case and inform the police. If the doctor, who has attended the injured, is of the opinion that death is likely to ensue, it is essential for him to immediately report the case to the police; any delay in doing so will almost never be brooked. The police in turn should be alive to the need to record a declaration/statement of the injured person, by pursuing a procedure which would make the recording of it beyond the pale of doubt. This is why an investigating officer (IO) is expected to alert the jurisdictional Magistrate of the occurrence, who in turn should immediately examine the injured. When this procedure is adopted, conditional on the certification of a doctor that the injured is in a fit state to make a statement, a dying declaration assumes incontrovertible evidentiary value. *We cannot conceive of a more important duty cast on the Magistrate, since the life and death of a human being is of paramount importance. We think that only if it is impossible for the Magistrate to personally perform this duty, should he depute another senior official. Non-adherence to this procedure would needlessly and avoidably cast a shadow on the recording of a dying declaration.* The prosecution, therefore, would be expected to prove that every step was diligently complied with. The prosecution would have to produce the doctor or the medical authority to establish that on the examination of the injured/deceased, the police had been immediately informed. The IO who was so informed would then have to testify that he alerted the Magistrate, *on whose non-availability, some responsible person was deputed for the purpose of recording the dying declaration.* We are not in any manner of doubt that where medical opinion is to the effect that a person is facing death as a consequence of unnatural events, *the responsibility of the Magistrate to record the statement far outweighs any other responsibility.* There may be instances where there was no time to follow this procedure, but that does not seem to be what has transpired in the case in hand. *In cases where some other person is stated to be recipient of a dying declaration, doubts may reasonably arise."*

(Emphasis supplied)

21. In the present case, as the only persons present on the spot when the statement of Asma was allegedly recorded were the SDM (PW-11) and the SHO, Kanjhawala (PW-22), the statement of the SDM (PW-11) assumes considerable significance, and, in our view,

the learned ASJ has not considered the said statement in all its aspects. PW-11 firstly states that, on arrival at the hospital, he met the doctor in the Emergency Ward, and confirmed, from him, that Asma was fit for giving statement. At the same time, he could neither remember the name of the doctor, nor had any written certification, to this effect, obtained from him. He further went on to state that he had told Asma that he was the SDM and had come to record her statement, but no such recital is to be found in the statement of Asma. He also deposed that he had satisfied himself, before recording Asma's statement, that she was fit for doing so, but no such satisfaction is to be found, on the body of the statement or elsewhere thereon. He further went on to state that he had started recording the statement at 11:45 AM, and that the recording of the statement took 10 to 15 minutes, and that, further, he had entered the time at which the recording had commenced, and concluded, at the head and foot of the statement respectively; however, a perusal thereof reveals that the time 11:45 AM has been entered both at the head, and the foot, of the statement. Though PW-11 further asserted that he had put questions to Asma and that she was answering the same, he states that he had chosen to record only the answers given by her, and not the questions put by him. This assertion appears, on a reading of the statement itself, to be, *prima facie*, unacceptable, as the statement reads as a continuous recitation, and not as answers to questions which were periodically being put to Asma. PW-11 further stated that Asma was burnt from the chest downward, with bandages on both hands, and was crying in pain at the time. If there were bandages on both hands

of Asma, it is difficult to understand how she could have affixed her thumb impressions on the statement; equally, if she was crying throughout in pain, it is difficult to conceive her having cogently recorded the statement which has been accepted, by the learned ASJ, as her “dying declaration”. In such circumstances, the physical, mental and psychological capacity, of Asma, to give the statement, must necessarily be suspect. Most disconcertingly, PW-11 went on to completely somersault on his earlier assertion, by stating that the statement had, in fact, not been recorded by him, but by the I/O SI Om Prakash (PW-18) and that he had stated that it was recorded by him only because it had been recorded under his instructions. This is obviously, in our view, an entirely unacceptable assertion, as, in the earlier part of the statement, PW-11 has specifically referred to the acts performed by him, and the questions put by him, to Asma, during the supposed recording, by him, of her statement. The said assertions are completely incompatible with PW-11’s subsequent deposition that the statement was actually recorded by the I/O under his instructions, and not by him personally. That apart, there is no explanation as to why, when the SDM was present, he got the statement recorded by the I/O, instead of recording the same himself. Significantly, there is no endorsement, anywhere on the body of the statement, that the I/O / SHO had recorded the statement on the directions of PW-11. If any further material, to doubt the credibility of the deposition of the SDM, were required, it is to be found in his final assertion that, on 14th July 2011, he had received information regarding the death of Asma on his phone, during office hours which, according to him, were 10 AM to 5

PM. This again, is obviously an untrue statement, as Asma's death took place at 9:30 PM on 14th July 2011, as contained in the Death Report (Ex.PW-18/J) and testified by Dr. Manoj Dhingra who was the Medical Officer Incharge on the relevant date (PW-5) in his cross examination on 08th February 2012.

22. The above incongruities and inconsistencies in the statement of PW-11, who claimed, first, to have recorded the "dying declaration" of Asma and, in the next breath, to have had the statement recorded by the I/O under his directions, in our view, erode the evidentiary value of the statement to a considerable extent. In fact, the very fact of recording of the statement may itself be questionable, given that the only witnesses to the recording of the statement were PW-11 and the IO, the statement was not recorded in the handwriting of Asma, and the only indication that the statement might have reflected her deposition, was in the form of the thumb impressions at the foot of the statement which, too, are suspicious, given the fact that, even as per PW-11, both her hands were bandaged. The two times recorded at the head and foot of the statement are discrepant, inasmuch as the commencement, and conclusion, of the statement are both shown to have taken place at 11:45 AM whereas, as per PW-11, the recording of the statement took 10 to 15 minutes. No positive evidence, medical or otherwise, is forthcoming, to indicate that it was possible for Asma to affix her thumb impressions on the statement. In fact, Dr. Brijesh Singh (PW-19), too, in his examination-in-chief, admitted that Asma had suffered superficial to deep burns on both hands, forearms and

forehead. The MLC of Asma also reflects the said position, which stands further fortified by the post-mortem report of Asma (Ex PW-5/A), which clearly opined that Asma had sustained 80% burns with dermo-epidermal injuries covering the whole body. Even more significantly, Dr. Manoj Dhingra (PW-5), who had prepared the said report, testified, in cross examination, that Asma had burns on her hands and fingers in a “degloving manner”, which, he explained, meant that the skin had peeled off. The probability of Asma having been in a position to affix her thumb impression on her statement is, therefore, remote and, at the very least, highly questionable.

23. Quite apart from the above infirmities in the “dying declaration” of Asma, we are also not persuaded to rely upon the same as the sole basis to uphold the conviction of the appellant, in view of the wealth of extenuating material available in his favour. It is trite that, in analysis of evidence in criminal cases, no doctrinaire approach can be adopted, and cumulative and dispassionate evaluation of all facts is of the essence. Of most vital importance, undoubtedly, in this regard, are the statements of Sahida (PW-3) and Mohd Yakub (PW-7), the mother and father, respectively, of the deceased Asma, who could have had no reason, whatsoever, to support the killer of their daughter, far less to be won over by him – despite the somewhat uncharitable insinuation, by the learned ASJ, to the said effect. PW-3, the mother of Asma, categorically stated, in cross examination, that the relations between Asma and the appellant were very cordial and that, since marriage, Asma was very happy. She pointed out, as a matter of fact,

that Asma had never complained about any ill-treatment, by the appellant or his family members, at any point of time. Neither, contrary to the recital in the alleged “dying declaration” of Asma, was, as per her deposition, any demand, for any article, made by the appellant or any of his family members, prior to, or after, his marriage with Asma. Similarly, PW-7, the father of Asma, also deposed, both in his examination-in-chief as well as in his cross-examination, that the relations between Asma and the appellant were very cordial, Asma used to regularly visit them, and the relations continued to remain cordial even when they visited their house 3 days prior to the incident, on 23rd June 2011. He, too, testified that there had been no demand, for any dowry or other article, from them, either by the appellant or by any of his family members, prior to, or after, the marriage. He further clarified the position by stating that the appellant had never misbehaved either with him or with any other member of his family.

24. While it is true that the cross-examination of PW-3 had taken place partly prior to lunch and partly thereafter, it can hardly be believed that, as the mother of the deceased Asma, she could be won over by the appellant or by anyone else. The assumption, by the learned ASJ, to the effect that she might have been won over during lunchtime is, therefore, clearly perverse. That apart, there is no real dissonance, between the deposition of PW-3 before, and after, lunch. The statement of Mohd Yakub (PW-7) was, for its part, recorded at one continuous stretch, so that no allegation of tutoring could, at any rate, be levelled against him.

25. It is, moreover, a conceded factual position that, on 23rd June 2011, the appellant did visit Asma's parents, with Asma, stating that he wanted to reside with them, as he had quarrelled with his folks. It also appears, from the statement of Mohd Yakub (PW-7) that the appellant and Asma were proceeding together to attend a wedding. These facts – which are not traversed or controverted by the prosecution – are completely incompatible with the allegation, contained in the “dying declaration” of Asma, that she had frequent quarrels with the appellant, or that the appellant and his family members were harassing her for dowry. It is, moreover, difficult to accept that the appellant who, on 23rd June 2011, was ready to leave his house and stay with Asma's parents, only because he had quarrelled with his family members could, 3 days thereafter, be so murderously inclined, against his wife Asma, as to set her on fire. The assertion, by PW-7, to the effect that the appellant had informed him that he had come, with Asma, to attend to a wedding, would also indicate that there was no want of cordiality in the relations between Asma and the appellant.

26. The statement of PW-10 Mohd Ahmed – who was a neighbour of the appellant and could not, therefore, be said to be “interested” in any manner – also exculpates the appellant, as he has stated, categorically, that Asma had accidentally caught fire while cooking, and that the appellant, who had tried to save Asma, had burnt his hands in the process. This assertion, which was first given in

examination-in-chief, was repeated in cross-examination, and the suggestion that he had deposed falsely was emphatically denied. He also asserted that he had never, at any point of time, seen any quarrel between Asma and the appellant.

27. Adverting, now, to the initial statements recorded from Sahida (PW-3) and Mohd Yakub (PW-7), a reading of the said statement discloses that they make no allegations, either against the appellant or his family members, except for a suggestion, at the conclusion of the said statements, that they were responsible for Asma's death. The basis, for the appellant's parents harbouring such a view, is not forthcoming from the said statements. Rather, a holistic reading of the statements, especially that of Mohd Yakub (PW-7), would go to indicate that the reluctance, on their part, to send Asma with the appellant was not because they feared that she would be ill-treated by her in-laws, but because they had doubts about whether the appellant, on his own, could look after her and bear her responsibility. The appellant was, therefore, requested to bring his parents to meet them only so that they could be reassured that the responsibility of Asma's well-being would be accepted by the appellant's parents and other family members. Significantly, on the appellant's brother-in-law Shakir agreeing to take on the said responsibility, Asma's parents readily and willingly agreed to send her with the appellant. Such a course of action is entirely incompatible with the theory, sought to be advanced by the prosecution, that there was discord between Asma and the family members of the appellant, and that she was repeatedly

being ill treated by her husband and his family. Significantly, there is nothing to indicate that Asma ever hesitated in going with the appellant and his family, which would have been the natural reaction, if she had, as her “dying declaration” purports to allege, been subjected to repeated ill-treatment, taunts and abuse by the appellant and his family members. The initial statements, recorded from Asma’s parents, i.e. Sahida (PW-3) and Mohd Yakub (PW-7), too, therefore, do not advance the case of the prosecution at all. The mere apprehension, expressed at the conclusion of the said statements, that the appellant and his family members were responsible for the mishap, cannot, in our opinion, render the statements as inculpatory, qua the appellant, in any manner.

28. Our view is supported by the evidence, of PW-3 and PW-7, as it emerged during trial, as well. There is nothing, either in the examination-in-chief, or in the cross examination, of Shahida, or Mohd Yakub, to even remotely hint at any ill-treatment, by the appellant or by his parents, of Asma, after their marriage. Rather, it is clearly stated, by PW-3 as well as by PW-7, that the relations between Asma and in-laws, after marriage, remained cordial till her death. Moreover, the fact that the appellant also sustained superficial to deep burns would also indicate that he intervened *after* Asma had caught fire which, read with the testimony of PW-10 Mohd Ahmed *supra*, would appear to be in an effort to save her.

29. The assumption, by the learned ASJ, that the presence of the smell of kerosene, on and around Asma, would indicate that kerosene had been poured on her is, in our considered view, far-fetched and entirely hypothetical in nature. Kerosene would be bound to be present on the clothes of a person who caught fire while cooking food using a kerosene stove, and the presence of the smell of kerosene, therefore, could hardly be attributed to an attempt, by anyone, to have set her ablaze by pouring kerosene on her. Rather, the fact that the clothes of Asma were also found to contain kerosene, could equally indicate that kerosene had spilled on her clothes, while she was cooking, resulting in her unfortunately being set ablaze. Indeed, it is impossible to comprehend how, in a case where a person cooking food using a kerosene stove, accidentally catches fire, kerosene would be expected not to be present on her clothes.

30. This is a case in which, after recording the initial statements of Sahida (PW-3) and Mohd Yakub (PW-7) under Section 161 of the Cr PC, the prosecution, inexplicably, decided to completely cool its heels. There has not been the remotest effort to obtain any other evidence which could be said to incriminate the appellant. It is strange that, despite the statements of Mohd Shakir (PW-2 – Asma's uncle) and Rahis Ahmed (PW-2 – a neighbor) were recorded under Section 161 of the Cr.P.C, as also before the learned ASJ, they were never questioned regarding the relations of Asma, either with the appellant or with her in-laws. Rather, the one neighbour who was so questioned, i.e. Mohd Ahmed (PW-10) has come forward with the clear statement

that he had never witnessed any quarrel between Asma and her husband at any point of time and that, as a matter of fact, Asma had caught fire while cooking food and the appellant had sustained injuries in his efforts to save. It is clear that the evidence that has emerged in this case, from time to time – except for Asma’s “dying declaration” – goes to indicate that the relations between Asma and her in-laws, as well as her husband, i.e. the appellant, remained cordial throughout, and that her parents, too, never had any misgivings regarding the sentiments of the appellant, or his parents, qua their daughter – as is apparent from the fact that they readily agreed to send her with them, just 2 to 3 days prior to her unfortunately catching fire while cooking food. It is difficult, nay, impossible, for us to believe that, suddenly, within a period of 2 to 3 days, the appellant, and his parents, developed murderous intentions against Asma, and decided to do away with her. There is not even the remotest suggestion of any motive, which would have prompted such action. Even the “dying declaration” of Asma does not really attribute any such motive, to the appellant or his parents. The mere fact that Asma may not have been able to bring a double bed with her as dowry, or that she used to quarrel with her husband on occasion, can hardly be treated as sufficient, in ordinary course to result in such pronounced animosity, as would impel the appellant, and his parents, to murder Asma. The statement, in the alleged “dying declaration”, that the appellant used to doubt Asma, is unsupported by any other evidence; neither does the statement of Asma throw any light on the reason for the appellant to doubt her, if at all.

31. It is trite that, in evaluating, holistically, the circumstances surrounding the alleged commission of a crime, we are required to be guided by the ordinary course of human conduct. Thus guided, we are unable to discern any justification for holding the appellant guilty of murdering his wife Asma, in cold blood, just 2 to 3 days after he had gone with her, to her parents, wanting to stay with them. We are inclined, rather, to believe the possibility that Asma caught fire accidentally while cooking food, and that the burn injuries sustained by the appellant were also attributable to his having tried to save her. In the absence of any supportive corroborative evidence, and given the evidence to the contrary, we are fully convinced that, on the sole basis of the alleged “dying declaration” of Asma, it would be a travesty of justice if the appellant were to be held guilty of having committed her murder, and sentenced therefor. It is well settled, in law, that, unless all circumstances incontrovertibly point towards the guilt of the accused, and are entirely incompatible with his innocence, the scales must tilt in favour of the accused, rather than against him. We are, therefore, unable to concur with the findings of the learned ASJ, to the effect that the appellant was guilty of having committed the offence of murdering his wife Asma, and was, therefore, liable to be prosecuted under section 302 of the IPC.

32. Resultantly, we set-aside the impugned judgement, dated 12th April 2013, convicting the appellant under section 302 of the IPC, as

well as the subsequent order, dated 26th April 2013, sentencing him to rigorous imprisonment for life therefor.

33. The appellant Firasat Hussain is, therefore, acquitted of the charge, against him, of murdering his wife Asma, and is directed to be released forthwith, unless his incarceration is required any other case.

34. The appeal is, therefore, allowed.

35. Trial court records are directed to be sent back.

C.HARI SHANKAR, J.

S. P. GARG, J.

DECEMBER 08, 2017
neelam/gayatri

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