

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRA-D-240-DB-2018(O&M)

Reserved on: 7.9.2022

Pronounced on : 28.9.2022

Fouju Sheikh

...Appellant

Versus

State of Haryana

....Respondent

**Coram : HON'BLE MR. JUSTICE G.S.SANDHAWALIA
HON'BLE MR. JUSTICE JAGMOHAN BANSAL**

Present : Ms. Gagan Mohini, Legal Aid Counsel
for the appellant.
Mr. Hitesh Pandit, Addl. A.G., Haryana

JAGMOHAN BANSAL, J.

1. The appellant-Fouju Sheikh, at present aged about 68 years, through the instant appeal is seeking setting aside of judgment dated 6.1.2018 passed by the Learned Additional Sessions Judge, Gurugram (in short 'trial court') whereby Appellant has been held guilty and consequent thereto convicted for the commission of offence punishable under Section 302 of the Indian Penal Code (in short "IPC") and order dated 10.1.2018 whereby appellant has been sentenced to undergo rigorous imprisonment for life and a fine of Rs.50,000/- and in default of payment of fine to undergo imprisonment of 6 months.

2. The appellant has been convicted for committing murder of his wife-Regina (hereinafter called as 'deceased') by pouring acid

like chemical on her face, hands and breast on 24.7.2015 at 11 PM which led to her last breath on 14.8.2015.

Brief Facts:

3. Brief facts emerging from record and which are necessary to have a hang over the case of prosecution which led to conviction of appellant and present appeal before this court are that police on 25.7.2015 received information that a lady has been burnt by acid attack and is admitted in the Civil Hospital Gurugram from where she was shifted to Safdarjung Hospital, Delhi. On the basis of confirmation by doctors that lady is fit for making statement, police recorded her statement and on the basis of her statement, FIR under Section 326A of IPC was registered.

4. The deceased remained in Safdarjung Hospital from 25.7.2015 to 28.7.2015 and from there she was shifted to Apollo Hospital where she succumbed to her injuries on 14.8.2015. On account of death of deceased, Section 302 of IPC was added in FIR on 24.9.2015.

5. During the course of investigation, Assistant Sub Inspector Hari Singh at the first instance reached General Hospital, Gurugram and collected MLR SP-291-2015. The police team on coming to know that a deceased had been shifted to Safdarjung Hospital visited said hospital where attending doctor declared the deceased as fit for statement. The police officer recorded statement of the deceased. The English translated version of the statement as

reproduced in para 2 of the impugned judgment reads as under:-

" I Regina wife of, Fouju Sheikh, originally resident of West Bangal, aged 35 years, live in village Sikanderpur in Numberdar colony. I work in the nearby houses as maid. I am having dispute with my husband for quite some time as he used to doubt my character. Last night, I was present in my house with my family members, watching television and finally went to sleep at 11 p.m. Now my husband came and threw acid like chemical on my face because of which I received burnt injuries on my hands, chest area and legs. My husband then took money and mobile from the house and ran away. I'm suffering from deep pain due to the burning and necessary action be taken against my husband namely Fouju Sheikh."

6. Lady ASI Kiran visited place of occurrence, prepared the site plan and recorded statement of witnesses. The appellant absconded from the place of incident and reached his native village in West Bengal from where he was arrested on 1.4.2016. On the basis of transit remand, he was brought to Gurugram. During the course of investigation, accused on 6.4.2016 tendered his statement which is reproduced hereinafter and identified the place of occurrence.

7. After completion of investigation, the police in terms of Section 173 of Cr.P.C. filed its report before learned Area Magistrate who as the offence was triable by Court of Sessions, committed the trial to learned Sessions Court. Accordingly, offence was tried by Learned Additional Sessions Judge, Gurugram.

8. Trial Court vide order dated 30.8.2016 framed charges under Section 302 of IPC. It is apt to mention here that FIR was registered under Section 326A and Section 302 was added later on whereas charge was framed under Section 302 of IPC. The relevant extracts of charge sheet dated 30.8.2016 are reproduced as below:-

"That on 25.07.2015 at about 11.00 PM, in the area of SikanderpurNumbardar Colony falling within the jurisdiction of P.S.DLF Phase-I, Gurgaon, you committed murder of your wife Smt. Rejeena by putting acid like chemical on her body due to which her face, hands and breast got burnt and she died on 29.07.2015 and thereby committed an offence punishable under Section 302 IPC and within the cognizance of this Court."

9. During the course of trial, the prosecution examined 15 witnesses and relied upon several documents. Though during the course of trial, 15 witnesses were examined, however, for the sake of brevity, deposition of formal witnesses who are necessary for the adjudication of present appeal, is not hereby dilated.

PW-3 Montu Sheikh, son of the deceased & accused, deposed that his mother was working as maid in the nearby houses. His father was in habit of suspecting character of her mother and use to quarrel with her. On 24.7.2015, he after watching T.V. slept at 11.00 p.m. and at about 12.30 a.m. heard noise of hue and cry of his mother. He woke up and saw that his father had thrown chemical like acid on the body and face of his mother. His father succeeded to run away from the spot with the bottle containing the said acid. He alongwith his younger brother Kalu immediately shifted their mother to General Hospital, Gurugram from where she was referred to Safdarjang

Hospital, Delhi. On 29.7.2015, his mother was further referred to Apollo Hospital where she died on 14.8.2015 at 11.00 a.m. The examination-in chief of PW-3 is reproduced as below:-

“On 24.07.2015 at about 11.00 PM after watching TV, we were sleeping in the room. At about 12.30 AM (night time) I heard the noise of hue and cry of my mother, then I wake up and saw that my father had thrown chemical like Acid on the body and face of my mother. My father had succeeded to run away from the spot along with bottle. I along with my younger brother Kalu shifted my mother to GH Gurgaon and from where she was referred to Safdarjung Hospital, Delhi.

On 29.07.2015 my mother was further referred to Apollo Hospital.

On 14.8.2015 at about 10.00 AM my mother was declared dead in the hospital by the treating doctors. I had gone to my native village at West Bengal for the cremation of the body of my mother. Police recorded my statement.”

PW-4 Kalu @ Sonjam, another son of the deceased stated that on 24.7.2015, he, his mother, brother and father were watching television at home. He left home to visit house of his friend and other family members went to sleep. His father was in the habit of quarrelling with his mother and used to suspect character of his mother. He later came to know that his father had thrown acid on the face and body of his mother who subsequently expired at Apollo Hospital. The examination-in chief of PW-4 is reproduced as below:-

“Stated that on 24.07.2015 I along with my mother, brother and my father watching TV. After watching TV, my brother, mother and father were sleeping in the rented accommodation and I had gone to meet my friends after

watching TV. My father used to quarrel with my mother for the last few days as my father had suspected on her character. Lateron, I came to know that my father had thrown acid on the face and body of my mother. My mother expired in the Apollo Hospital during her treatment.”

PW-12 ASI Hari Singh deposed that he presented application Ex. P-3 before the doctor concerned at Safdarjang Hospital, Delhi to know about the fitness of the patient and doctor found her fit to give statement. He recorded statement of deceased Regina which is Ex. P-4. On the basis of statement, proceedings Ex. P-5 were marked and sent to Police Station, DLF Phase-I Gurugram for registration of FIR. In the meantime, the place of occurrence was visited, rough site plan Ex. P-6 was prepared. As Regina died in the hospital, Section 302 of IPC was added in the case. Accused was arrested from West Bengal on 1.4.2016 and brought back to Gurugram where he demarcated the place of occurrence vide Memo Ex. PG. He identified the accused in Court.

PW-11 Dr. Deepak Vats, Senior Emergency Medical Office, Apollo Hospital, New Delhi deposed that Regina was admitted in the hospital on 29.7.2015 and expired on 14.8.2015. Dr. Shefali had issued death certificate EX. P-2 whose signatures were identified by Dr. Deepak Vats.

PW-8 Dr. Deepak Nanda, Consultant, Department of Plastic Surgery, Safdarjang Hospital, New Delhi tendered his affidavit dated 10.4.2017 Ex. PH in evidence and exhibited his report EX. PH/2. The relevant extracts of affidavit dated 10.4.2017 of PW-8 are reproduced

as below:-

*“1. Patient Razeena (35 y Female) w/o Fouju Sheikh with given address of residence as 87, DLF, Phase I, Sikandarpur was admitted on 25.07.2015 with **approx 25% (TBSA)** chemical burns facial burns & ocular involvement as per our records.*

*2. She left on 29.07.2005 **against medical advice** from our hospital as per our records.”*

[Emphasis supplied]

9.1 On 8.12.2017, the appellant was confronted with evidences led by prosecution during the course of trial, to which appellant simply denied as incorrect.

10. On the basis of dying declaration supported with deposition of elder son of the accused, the trial court came to conclusion that accused is guilty of committing offence of murder punishable under Section 302 of IPC. The Trial Court held that accused had poured acid on the face and body of the deceased which resulted into death of the deceased. In spite of proper treatment, she could not be saved. The prosecution had thus established beyond reasonable doubt that accused has committed offence of murder and it had also established motive of the accused of causing the burn injuries upon the deceased. The accused poured acid with pre-planned motive which caused 40% burn injuries which were sufficient in the ordinary course of nature to cause death as the primary cause of the death was injuries and septicemia was only the secondary cause. The offence committed by accused did not fall in Clause 3 or 4 of Section 300 IPC whereas it fell under Section 299 of IPC i.e. culpable homicide amounting to murder as per the learned trial court who vide

order and judgment dated 6.1.2018 held the appellant guilty of commission of offence of murder. Vide order dated 10.1.2018 it determined quantum of sentence and sentenced the accused to rigorous imprisonment for life with fine of Rs. 50,000/-.

Contention of the appellant:

11. Ms. Gagan Mohini, Legal Aid counsel appeared for the appellant and assailed judgment of Trial Court on three counts i.e. (i) legality of dying declaration (ii) intention of the accused and (iii) onus to prove beyond reasonable doubt.

12. Learned counsel contended that trial court has wrongly and unreasonably placed heavy reliance upon the alleged declaration of deceased which in no manner can be called as a dying declaration because on 25.7.2015 the deceased was injured. She died after the expiry of about three weeks from the date of alleged incident. It was argued that the statement was recorded by police and there is no counter signature of Magistrate or Medical Officer which means the statement was recorded in the absence of Magistrate or doctor. The statement was recorded on 25.7.2015 whereas deceased passed away on 14.8.2015 and in the interregnum there was sufficient time and opportunity to record statement in the presence of Magistrate, and thus, the alleged dying declaration at the most could be treated as a statement under Section 161 of Cr.P.C. As per the evidence, the deceased suffered injuries on hands apart from face and breast, thus, it is doubtful that how deceased put her thumb impression. In support of her contention, learned counsel cited judgments of

Hon'ble Supreme Court in **Jayamma and another v s. State of**

Karnataka 2021(6) SCC 213, Mohan Singh and others etc. vs. State of Punjab 1981 SCC (CH.) 638, Surinder Kumar vs. State of Haryana 2011(10) SCC 173 and Moniben vs. State of Gujrat 2009 (8) SCC 796.

12.1 In support of her second limb of argument, she contended that there was no intention to kill the deceased, thus, case of appellant does fall within four corners of any Clause of Section 300 of IPC rather it falls under Part II of Section 304 of IPC. The deceased was burnt 25% though in few documents as well impugned order it is considered as 40%. The deceased could be saved, had she got proper medical treatment. Except in exceptional circumstances, a 25% burnt or even 40% burnt person dies, especially when no material organ i.e. kidney, heart, brain etc. is injured. The death took place after about three weeks and she died due to septicemia even though cause of septicemia was acid burns. The appellant had no intention to kill the deceased and as per case of prosecution, there was misunderstanding between the couple and quarrel used to take place between both of them. The offence of acid attack is specifically governed by Section 326A of IPC, thus, there was no reason to invoke Section 302 of IPC when appellant did not cause injuries with an intention to cause death of his wife.

12.2 In support of her third line of argument, she contended that prosecution had miserably failed to connect the accused with alleged offence and there are material discrepancies as well contradictions still trial court has wrongly returned a finding that prosecution has proved its case beyond reasonable doubt. The burden to prove lay

upon the prosecution and appellant being a poor person could not lead evidence in his support. She contended that alleged bottle was never recovered, the nature and contents of alleged chemical used were never tested, the statements of both sons are contradictory to the extent of time of incident and carrying away of the deceased to hospital. There was no possibility of the younger son who was just 15 years old to visit house of his friend at late night i.e. 11.00 p.m. especially when other family members were going to sleep. The appellant on account of fear left his home and did not come back from West Bengal.

Contention of the State

13. Per contra, learned State counsel contended on the line of impugned order and findings recorded by trial court. He contended that trial court has not convicted on the sole evidence of dying declaration whereas statement of son of the appellant who was eye witness has been relied upon which corroborates the dying declaration. The appellant threw acid on his wife as he was doubting her character and acid was not poured on one part of the body whereas it was poured on a substantial part of the body which was sufficient to cause death. The appellant caused injuries which were sufficient in ordinary course to cause death, and the deceased died on account of septicemia which was result of injuries caused by acid attack, and thus, the appellant is responsible for causing death of his wife. There was nobody at home when incident took place and had the appellant been bona fide he could have come forward for the rescue and treatment of his wife whereas he opted to leave for West

Bengal and left his wife in a lurch. The statement of son of appellant corroborated the dying declaration, and thus, there was no ground to form any opinion contrary to the order passed by learned trial court.

Discussion and Findings:

14. Having heard the learned counsel for the appellant as well learned counsel for the State and having bestowed our serious consideration to the respective submissions and the material placed on record, in view of case law, we are of the opinion that though appellant is guilty of causing injuries by throwing acid on person of deceased, yet intention to kill is absent. Thus, case of appellant does not fall under different Clauses of Section 300 of IPC. Accordingly, sentence in terms of Part-II of Section 304 read with Section 326A of IPC needs to be reduced to 10 years being minimum sentence.

15. Before dwelling into issue involved, it would be appropriate to look at provisions of IPC and Evidence Act which are relevant for the adjudication of this appeal.

299. Culpable homicide.—*Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.*

300. Murder.—*Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or*

(Secondly) —If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is

caused, or—

(Thirdly) —If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or—

(Fourthly) —If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

302. Punishment for murder.—Whoever commits murder shall be punished with death, or imprisonment for life, and shall also be liable to fine.

304. Punishment for culpable homicide not amounting to murder.—Whoever commits culpable homicide not amounting to murder shall be punished with [imprisonment for life], or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death, or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.,

or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.

[Emphasis supplied]

Section 32 of Indian Evidence Act.

Relevant Extracts

32 Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant. —*Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:—*

(1) when it relates to cause of death. —*When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question."*

Validity/Admissibility of Dying Declaration:

15. There is long line of judgments of Hon'ble Supreme Court on the question of evidentiary value as well admissibility of dying declaration. As cited by learned counsel for appellant, Hon'ble Supreme Court in **Jayamma's case (supra)** has adverted to the question of admissibility of dying declaration. Hon'ble Court in para 14 has noticed the plethora of judgments which is reproduced as

below:-

14. Before we advert to the actual admissibility and credibility of the dying declaration (Ext. P-5), it will be beneficial to brace ourselves of the case law on the evidentiary value of a dying declaration and the sustenance of conviction solely based thereupon. We may hasten to add that while there is huge wealth of case law, and incredible jurisprudential contribution by this Court on this subject, we are consciously referring to only a few decisions which are closer to the facts of the case in hand. We may briefly notice these judgments.

14.1. *In P. V. Radhakrishna v. State of Karnataka [P. V. Radhakrishna v. State of Karnataka, (2003) 6 SCC 443, para 16 : 2003 SCC (Cri) 1679] , this Court considered the residuary question whether the percentage of burns suffered is a determinative factor to affect the credibility of a dying declaration and the probability of its recording. It was held that there is no hard-and-fast rule of universal application in this regard and much would depend upon the nature of the burns, part of the body affected, impact of burns on the faculties to think and other relevant factor.*

14.2. *In Chacko v. State of Kerala [Chacko v. State of Kerala, (2003) 1 SCC 112, paras 3 and 4 : 2003 SCC (Cri) 246] , this Court declined to accept the prosecution case based on the dying declaration where the deceased was about 70 years old and had suffered 80 per cent burns. It was held that it would be difficult to accept that the injured could make a detailed dying declaration after a lapse of about 8 to 9 hours of the burning, giving minute details as to the motive and the manner in which he had suffered the injuries. That was of course a case where there was no certification by the doctor regarding the mental and physical condition of the deceased to make dying declaration. Nevertheless, this Court opined that the manner in which the incident was recorded in the*

dying declaration created grave doubts to the genuineness of the document. The Court went on to opine that even though the doctor therein had recorded "patient conscious, talking" in the wound certificate, that fact by itself would not further the case of the prosecution as to the condition of the patient making the dying declaration, nor would the oral evidence of the doctor or the investigating officer, made before the court for the first time, in any manner improve the prosecution case.

14.3. In Sham Shankar Kankaria v. State of Maharashtra [Sham Shankar Kankaria v. State of Maharashtra, (2006) 13 SCC 165, paras 10 and 11 : (2007) 2 SCC (Cri) 663] , it was restated that the dying declaration is only a piece of untested evidence and must like any other evidence satisfy the Court that what is stated therein is the unalloyed truth and that it is absolutely safe to act upon it. Further, relying upon the decision in Paniben v. State of Gujarat [Paniben v. State of Gujarat, (1992) 2 SCC 474. para 18 : 1992 SCC (Cri) 403] wherein this Court (at SCC pp. 480-81, para 18) summed up several previous judgments governing dying declaration, the Court in Sham Shankar Kankaria [Sham Shankar Kankaria v. State of Maharashtra, (2006) 13 SCC 165, paras 10 and 11 : (2007) 2 SCC (Cri) 663] reiterated:

"11. ... (i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. (See Munnu Raja v. State of M.P. [Munnu Raja v. State of M.P., (1976) 3 SCC 104: 1976 SCC (Cri) 376])

(ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. (See State of U.P. v. Ram SagarYadav [State of U.P. v. Ram Sagar Yadav, (1985) 1 SCC 552: 1985 SCC (Cri) 127] and Ramawati Devi v. State of Bihar

[Ramawati Devi v. State of Bihar, (1983) 1 SCC 211: 1983 SCC (Cri) 169]

(iii) The Court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had an opportunity to observe and identify the assailants and was in a fit state to make the declaration. (See K. Ramachandra Reddy v. Public Prosecutor [K. Ramachandra Reddy v. Public Prosecutor, (1976) 3 SCC 618: 1976 SCC (Cri) 473]

(iv) Where dying declaration is suspicious, it should not be acted upon without corroborative evidence. (See Rasheed Beg v. State of M.P. [Rasheed Beg v. State of M.P., (1974) 4 SCC 264: 1974 SCC (Cri) 426])

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. (See Kake Singh v. State of M.P. [Kake Singh v. State of M.P., 1981 Supp SCC 25 : 1981 SCC (CO 645)];

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. (See Ram Manorath v. State of U.P. [Ram Manorath v. State of UP., (1981) 2 SCC 654: 1981 SCC (Cri) 581]);

(vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected. (See State of Maharashtra v. Krishnamurti Laxmipati Naidu 1980 Supp SCC 455: 1981 SCC (Cri) 364]

(viii) Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth. (See Surajdeo Ojha v. State of Bihar [Surajdeo Ojha v. State of Bihar, 1980 Supp SCC 769: 1979 SCC (Cri) 519]

(ix) Normally the court in order to satisfy whether the deceased was in a fit mental condition to make the

dying declaration look up to the medical opinion. But where the eyewitness has said that the deceased was in a fit and conscious state to make the dying declaration, the medical opinion cannot prevail. (See NanhauRam v. State of M.P. [Nanhau Ram v. State of M.P., 1988 Supp SCC 152: 1988 SCC (Cri) 342]

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. (See State of U.P. v. Madan Mohan [State of U.P. v. Madan Mohan, (1989) 3 SCC 390: 1989 SCC (Cri) 585]

(xi) Where there are more than one statement in the nature of dying declaration, one first in point of time must be preferred. Of course, if the plurality of dying declaration could be held to be trustworthy and reliable, it has to be accepted. (See Mohanlal GangaramGehani v. State of Maharashtra [Mohanlal GangaramGehani v. State of Maharashtra, (1982) 1 SCC 700: 1982 SCC (Cri) 334]"

16. The question of validity of dying declaration in similar facts and circumstances has been examined by a two Judge Bench of Hon'ble Supreme Court in **Pardeep Bisoi alias Ranjit Bisoi vs. State of Odisha, (2019) 11 SCC 500**. In the aforesaid case, the appellant was accused of pouring acid on victim who ultimately died. A police officer recorded statement of the deceased and appellant vehemently contended that statement recorded by police officer cannot be relied upon. Hon'ble Supreme Court, keeping in mind mandate of Section 32 of Evidence Act and Section 162(2) of Cr.P.C., examined the validity of statement recorded by police officer. Hon'ble Court relying upon its previous judgments in **Mukeshbhai Gopalbhai Barot vs.**

State of Gujarat, (2010)12 SCC 224, Sri Bhagwan vs. State of U.P.

(2013) 12 SCC 137 and Najjam Faraghi vs. State of West Bengal

(1998) 2 SCC 45, concluded that this Court has laid down that statement under Section 161 Cr.P.C., which is covered under Section 32(1) of Evidence Act is relevant and admissible. It is apt to mention here that in this case, learned trial court awarded sentence of five years rigorous imprisonment which was upheld by Odisha High Court. The Hon'ble Supreme Court has upheld the sentence of rigorous imprisonment of five years.

17. In the case in hand, the deceased was initially admitted in Civil Hospital, Gurugram from where she was shifted to Safdarjang Hospital. The investigating officer who even though cannot be blindly believed yet needs to be believed, especially in view of the fact that nobody was influential and he had recorded statement at the earliest available opportunity. Thus, there was no reason to record a false dying declaration just to implicate the appellant or sort out the matter at the earliest. Had statement been recorded after few days or doctor had denied the fact of medical fitness of the deceased to tender her statement or there had been documentary or oral evidences to allege partiality on the part of I.O., the action of recording of statement could come under clouds. Whereas the son of the deceased has corroborated dying declaration. Thus, applying the law enunciated by Hon'ble Supreme Court, we find ourselves unable to hold that the trial court has wrongly relied upon the dying declaration.

Onus to prove:

18. The appellant after incident not only left his home but also ran away to his native place in West Bengal from his normal place of work i.e. Gurugram. The appellant was arrested after a long time i.e. expiry of 8 months from the date of incident, thus, it was impossible to recover the bottle of chemical which was used for the commission of alleged offence. The appellant during the course of trial opted to abstain from leading any evidence in support of his defence which virtually amounted to admission of commission of alleged offence. Thus, we do not find that absence of recovery of chemical or bottle was fatal to the case of prosecution. He is a sole accused and prosecution has thus established its case beyond doubt.

Intention:

19. We find force in the argument of learned counsel for the appellant that there was no intention to kill even if it is accepted and accordingly held that appellant is guilty of acid attack. The appellant in view of the dying declaration, corroborated with statement of son of the appellant is guilty of acid attack which caused burn injuries on the person of deceased. The face, breast and hands of deceased were burnt in the aforesaid acid attack. Our opinion that intention part is missing finds support from the following facts and findings:-

(i) The trial court as well we are relying upon dying declaration of deceased as well deposition of son of the accused. From the perusal of both the statements i.e. statement of deceased and son of appellant, it can be easily gleaned that none of them had stated that there was intention of appellant to kill the deceased. Both of them

had disclosed that appellant doubted character of the deceased and quarrel used to take place. The statement of appellant made before IO is almost identical. All these statements collectively prove that appellant had caused injuries by pouring chemical on the person of deceased, however, there was no intention to kill the deceased. There seems that intention of appellant was to deface the deceased because he was doubting the character of the deceased. Though neither counsel for the appellant has pleaded nor are there any findings in the impugned judgment, yet we notice that age of deceased, as per record, was 35 years at the time of incident whereas appellant was more than 60 years old. Thus, there was big age gap and possibilities of quarrel could always be on higher side.

(ii) The appellant was arrested and he made statement Ex. PE before IO which though as per Section 25 of the Indian Evidence Act is not admissible in evidence yet for the purpose of present appeal, is hereby considered and reproduced as below:-

“In the presence of following witnesses in the aforesaid case accused Fouju Shekh suffered disclosure statement while in police custody without any fear, inducement, pressure voluntarily disclosed that I lived with my wife and two children in sikanderpur village, Numberdar Market and I work in Soap Company as a sweeper and my wife Regina used to work in the closet at DLF Ph-I, Gurgaon. I was having dispute with my wife and due to dispute I was used to doubt on my wife Regina. I was used to see her in suspicion, due to this reason we used to quarrel each other and I have make a mind, if she will not agree by this way then I have to make some other arrangement for her. To keep this rage, where I was

working as cleaner in soap factory and brought a bottle of chemical at home secretly which comes for cleaning in the soap factory. On 24/25-07-2015, after having our meal, and after watching T.V., we were lying and as per my planning I had thrown acid on my wife Regina. As she was sleeping, she screamed out loudly as the acid put on her body. My both children also woke up and started crying. I was also very nervous and ran away alongwith bottle of acid and throw the empty bottle in a gutter at Sikanderpur. It was night, I do not know the place. On 25.07.2015, I caught the train and went to the relatives at west Bengal. I do not tell anything to anybody. I came to know later that my wife Regina has expired due to the acid thrown by me during the treatment. I can show the place of occurrence alongwith you, where I thrown the acid on the face, chest and body of my wife Regina. Statement of accused has been written separately. Accused and witness have put their signature on disclosure statement."

Note: [Reproduced verbatim as shown in Lower Court Record.]

As per impugned order, police on the basis of disclosure statement of appellant visited place of incident. The trial court though has noted this fact in the impugned order yet has not placed reliance upon it, however, we find that statement is part of police report, therefore, its contents may be considered especially in view of the fact that appellant has not led any evidence during trial and before us is represented by Legal Services Authority counsel. On perusal of statement of appellant, we find that he has admitted commission of offence but there is nothing in the statement indicating that he had intention to kill the deceased.

(iii) As pointed out by learned counsel for appellant, there is contradiction in different documents qua percentage of burn injuries. As per affidavit dated 10.4.2017 of Dr. Deepak Nanda who immediately after the incident, attended the deceased, in his affidavit dated 10.4.2017 has deposed that there were approximately 25% chemical burns on the person of deceased and she left their hospital on 29.7.2015 against medical advice. As per death summary which was prepared by another hospital i.e. Apollo Hospital, New Delhi, the cause of death was septicemia and septic shock. In the death summary prepared by said hospital, the burn injuries are shown 40%. The relevant extracts of death summary are reproduced as below:-

“Case of burns (40%) deep over entire face and eyes and cornea with whole of neck and chest and abdomen with both arms and forearms and both axilla, back of neck and upper back with both thighs and right leg with ARDS with septicemia and septic shock, with acute renal failure with acute cardiorespiratory arrest.”

There is contradiction between affidavit of Dr. Deepak Nanda, a doctor of Safdarjung Hospital, New Delhi, where deceased was immediately admitted and remained for four days vis a vis death summary prepared by Apollo Hospital, New Delhi where deceased breathed her last. It is important to notice that appellant left a renowned hospital against medical advice.

Quantum of sentence

20. The country has witnessed slew of crimes against women in

different ways and modes, thus, Legislature time and again has enacted laws or amended provisions of IPC, to check menace of dowry deaths, rape followed by murder, acid attacks etc. Different sections have been inserted in IPC which need reference for the adjudication of present appeal and reproduced as below:-

376A. Punishment for causing death or resulting in persistent vegetative state of victim.- *Whoever, commits an offence punishable under sub-Section (1) or sub-Section (2) of section 376 and in the course of such commission inflicts an injury which causes the death of the woman or causes the woman to be in a persistent vegetative state, shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, or with death.*

304B. Dowry death.—(1) *Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death.*

Explanation.—For the purpose of this sub-section, "dowry" shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).

(2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life.

326A: Voluntarily causing grievous hurt by use of

***acid, etc.-** Whoever causes permanent or partial damage or deformity to, or burns or maims or disfigures or disables, any part or parts of the body of a person or causes grievous hurt by throwing acid on or by administering acid to that person, or by using any other means with the intention of causing or with the knowledge that he is likely to cause such injury or hurt, shall be punished with imprisonment of either description for a term which shall not be less than ten years but which may extend to imprisonment for life, and with fine:*

Provided that such fine shall be just and reasonable to meet the medical expenses of the treatment of the victim:

Provided further that any fine imposed under this section shall be paid to the victim.”

From the reading of above quoted sections, it is quite evident that all the above stated sections have been specifically inserted to protect woman from dowry deaths, acid attacks, rape etc. These are specific provisions which are meant to achieve specific object i.e. protection of women from crime. It is hereby made clear that Section 326A of IPC is applicable irrespective of gender.

Section 326A deals with acid attack causing grievous hurt. It prescribes minimum sentence of 10 years which may extend to imprisonment for life. Section 304B deals with dowry death of a women caused by **burns** or bodily injury or unnatural death within seven years of marriage. Minimum sentence prescribed for dowry death is 7 years which may extend to life imprisonment. Section 376 deals with punishment for rape. However, Section 376A was inserted w.e.f.3.2.2013 providing for minimum sentence of 20 years where a

person commits an offence of rape and in the course of such commission inflicts an injury which causes death of a woman.

Section 326A of IPC which is a special provision provides for minimum sentence of 10 years whereas Section 302 of IPC provides for minimum sentence of life imprisonment. Case of appellant is squarely covered by Section 326A of IPC, Section 326A being specific provision needs to be given weightage over Section 302 of IPC which is a general provision. For offence of rape and causing injuries which result into death of a woman, minimum sentence of 20 years is prescribed. In case of dowry death, minimum sentence of 7 years is prescribed. Sections 304B, 326A and 376A are specific provisions which override general provisions like Sections 323, 325 and 302 of IPC. Under Sections 304B and 326A, death is contemplated because there are more possibilities of death on account of dowry and rape whereas Legislature has not contemplated causality of death in case of acid attack, thus, we are of the opinion that Legislature though has inserted Section 326A of IPC like other sections postulating crime against woman but death is not contemplated under Section 326A of IPC and minimum sentence is prescribed 10 years.

21. There are various sections which provide for imprisonment for life and Section 302 of IPC is one of them. In case of different sections other than 302, the sentence may extend to imprisonment for life whereas in case of commission of offence of murder, punishment prescribed is death sentence and in alternative, it may be imprisonment for life for which minimum sentence is

prescribed for commission of offence of murder which is life imprisonment.

22. The Legislature keeping in mind social menace, nature and gravity of offence under Sections 304B, 326A, 376A and 302 of IPC has prescribed different sentences for different modes causing injuries resulting into death. In case of acid attack, there is possibility of death. In case of rape, it may or may not be followed by injuries causing death. In case of harassment for dowry, there may be injuries which may or may not culminate into death of a woman. Legislature has prescribed different sentences for all these offences though result in every case is death of a woman.

23. An appeal involving similar facts and circumstances as in present case came up for consideration of a two Judge Bench of Hon'ble Supreme in **Maniben vs. State of Gujarat, 2009 (8) SCC 796**. Deceased was admitted in hospital with 60% burn injuries which resulted into development of septicemia and further ripening of injuries. The deceased remained in hospital for 8 days and there was allegation that deceased was wearing terylene clothes and mother-in-law had thrown burning wick on deceased. The deceased after struggling for life took her last breath in a hospital. The Hon'ble Supreme Court concluded that there was no intention to kill the deceased, thus, case is not covered by Clause (4) of Section 300 of IPC and it falls under para II of Section 304 of IPC. Accordingly, sentence was reduced to 5 years under Section 304 of IPC. The relevant extracts of aforesaid judgment are reproduced as below:-

14. Having heard the learned counsel appearing for the

parties, we now proceed to analyse the entire material on record so as to ascertain whether or not the conviction and sentence passed against the appellant would and could be upheld

15. *After a careful analysis of the facts and circumstances of the case we find that it is not in dispute that the alleged incident took place in the morning of 29-11-1984 when the deceased was coming back with water pot on her head and her daughter on her waist. The allegation is that the appellant set her on fire with a burning wick made of rags consequent whereupon the deceased suffered burning*

16. *The dying declaration of the deceased, which is produced by Mr Trivedi, Executive Magistrate, as Exhibit 15 indicates that while the deceased was returning home after fetching water, the appellant had set her terylene clothes on fire by means of a burning wick of rags. The factum of recording of the FIR as also the dying declaration is also not disputed. As per the judgment and order of the Additional Sessions Judge, Gondal, the appellant-accused was taken into custody on 15-6-1985 to undergo the sentence and was released on 7-9-1989 on expiry of the sentence.*

17. *The post-mortem report of the deceased was placed on record during the trial and Dr. Tarlikaben, who conducted the post-mortem examination was also examined as a witness in the trial. The said documentary and oral evidence of the doctor, as adduced, that he also treated the patient and conducted the post-mortem examination made it crystal clear that the deceased remained under treatment in hospital for eight days and died after eight days of the incident in question.*

18. *The deceased was admitted in the hospital with about 60 per cent burn injuries and during the course of*

treatment developed septicaemia, which was the main cause of death of the deceased. It is, therefore, established that during the aforesaid period of eight days the injuries aggravated and worsened to the extent that it led to ripening of the injuries and the deceased died due to poisonous effect of the injuries.

19. *It is established from the dying declaration of the deceased that she was living separately from her mother-in-law, the appellant herein, for many years and that on the day in question she had a quarrel with the appellant at her house. It is also clear from the evidence on record that immediately after the quarrel she along with her daughter came to fetch water and when she was returning, the appellant came and threw a burning tinsil on the clothes of the deceased. Since the deceased was wearing a terylene cloth at that relevant point of time, it aggravated the fire which caused the burn injuries.*

20. *There is also evidence on record to prove and establish that the action of the appellant to throw the burning tinsil was preceded by a quarrel between the deceased and the appellant. From the aforesaid evidence on record it cannot be said that the appellant had the intention that such action on her part would cause the death or such bodily injury to the deceased, which was sufficient in the ordinary course of nature to cause the death of the deceased. Therefore, in our considered opinion, the case cannot be said to be covered under clause (4) of Section 300 IPC. We are, however, of the considered opinion that the case of the appellant is covered under Section 304 Part II IPC.*

21. *We find that the view taken by the trial court was a cogent and plausible view and, therefore, we hold that the conviction and sentence imposed by the trial court is justified. Considering the totality of the circumstances and*

the fact that the appellant is of 85 years of age and had undergone the sentence imposed by the trial court under the provisions of Section 304 Part II IPC, we set aside the conviction and sentence of the appellant imposed by the High Court of Gujarat and restore the judgment and order passed by the trial court. Since the appellant has already undergone the sentence imposed by the trial court she shall not be rearrested unless required in connection with any other case. Bail bonds shall stand discharged. This shall not be the precedent for other cases.

22. The appeal is allowed to the aforesaid extent.”

Applying findings of the afore-cited judgment of the Supreme Court to the facts of present case, we are of the considered opinion that case of appellant does not fall within four corners of Clauses (1) to (4) of Section 300 of IPC and learned trial court has wrongly concluded that there was intention to cause death and case of appellant falls under Clauses (1) to (4) of Section 300 of IPC.

Conclusion:

24. In the case in hand, we find that there was no intention to kill the deceased. Statements made by different witnesses and accused as well as medical record especially affidavit of Dr. Deepak Nanda, indicate that there were indisputably burn injuries. However, it cannot be concluded that there was intention to kill the deceased, thus, case of appellant does fall in any of the Clauses of Section 300 of IPC. We find that case of appellant does not fall in any of Clauses (1) to (4) of Section 300 of IPC, thus, appellant cannot be held liable for committing murder of his wife. However, case of appellant squarely falls within the parameter of Part-II of Section 304 and 326A

of IPC and minimum sentence prescribed under Section 326A of IPC is 10 years. Therefore, appellant is liable to suffer sentence of imprisonment of 10 years.

Trial court has wrongly concluded that there was intention to kill the deceased. The trial court more or less was influenced with death summary wherein it had been mentioned that the deceased was suffering from 40% burn injuries and she died because of septicemia. Trial court has considered only the fact that deceased was suffering from 40% burn injuries which were sufficient to cause her death. However, trial court has totally ignored affidavit of Dr. Deepak Nanda disclosing that deceased left Safdarjung Hospital against medical advice and she was suffering from 25% burn injuries. Trial court has further failed to notice that neither the dying declaration nor statements of both sons of deceased as well as other witnesses disclose that there was intention on the part of appellant to kill the deceased.

25. The findings recorded by trial court qua conviction under Section 302 read with Section 300 of IPC deserves to be set aside and is accordingly set aside and it is hereby held that appellant is guilty for commission of an offence punishable under Section 326A of IPC. The appellant is sentenced to 10 years rigorous imprisonment. The sentence already undergone would be reduced from the sentence of 10 years.

Appeal in above terms is partially allowed.

Pending miscellaneous applications, if any, stand disposed of.

(G.S.SANDHAWALIA)
JUDGE

(JAGMOHAN BANSAL)
JUDGE

28.9.2022

PARAMJIT

Whether speaking/reasoned : Yes

Whether reportable : Yes