A.F.R.

[Reserved]

Court No. - 50

Case :- CRIMINAL APPEAL No. - 1197 of 2020

Appellant :- Amar Dayal Sahu
Respondent :- State of U.P.
Counsel for Appellant :- Laxmi Narayan Rathour,Akhilesh Kumar Khare,Noor Muhammad,Yogesh Kumar Srivastava
Counsel for Respondent :- G.A.

Hon'ble Dr. Kaushal Jayendra Thaker,J.
Hon'ble Ajai Tyagi,J.

(Per Hon'ble Ajai Tyagi, J.)

1. This appeal has been preferred against the judgment and order dated 7.1.2020, passed by the learned Additional Sessions Judge, Court No.5, Jhansi, in Session Trail No.55 of 2016 State of UP vs. Amar Dayal Sahu arising out of Case Crime No.202 of 2015 under Section 302 IPC, Police Station-Lahchura, District-Jhansi, whereby the appelant is convicted and sentenced for the offence under Section 302 IPC for life imprisonment with a fine of Rs.60,000/- and in defalut of payment of fine, further imprisonemnt for one year.

2. The brief facts of the case are that first information report of this case was registered on the basis of application moved by complainant, father of the deceased, through the application under Section 156 (3) Cr.P.C. in which it is stated that complainant’s daughter, namely, Jaikali got married with accused Amar Dayal Sahu about 7-8 years before the occurrence. They had two children. Amar Dayal Sahu had illicit relationship with one Kiran Sahu, which was bone of

contention between husband and wife and the accused always got support of his family members. All of them were harrassing his daughter and were giving life-threats. His daughter used to disclose all that matter with him, his wife and relatives. He tried to convince the accused so many times, but accused and his family members did not mend the ways. On 12.5.2015, his daughter Jaikali was in her matrimonial home then mobile phone of accused was rang up, which was took up by his daughter. Accused snatched his mobile from her and abused and gave beating to his daughter. He locked her in the room and in the morning at about 5:00 a.m., on 13.5.2015 accused Amar Dayal Sahu with the help of his family members poured kerosene oil on his daughter and set her on fire with the intention to kill her. Consequently his daughter sustained serious burn injuries. She was admitted in hospital and during treatment on 24.5.2015, she succumbed to injuries.

3. On the basis of above application under Section 156 (3) Cr.P.C., a Case Crime No.202 of 2015 was registered under Section 302 IPC at Police Station-Lahchura, District-Jhansi. SI Sundar Lal took up the investigation. During the coruse of investigation, he recorded the statements of witnesses, prepared site-plan. Victim's dying declaration was recorded by Priti Jain-Nayab Tehsildar. After the death of the victim, inquest report was prepared and dead body was sent for post mortem. Dr. S.N. Kanchan conducted the postmortem and prepared report. After completing the investigation, Investigating Officer submitted charge-sheet against the appellant Amar Dayal Singh under Sections 302, 323, 504, 506 IPC. The case being triable exclusively by the court of session,

was committed by competent Magistrate to the court of session. Learned Trail Court framed charges against the appellant under Section 302 IPC. Accused denied the charge and claimed to be tried.

4. Prosecution examined following witnesses:

1.	Har Prasad	PW1
2.	Pukhan	PW2
3.	Dr. SN Kanchan	PW3
4.	Sundar Lal	PW4
5.	Chandrabhan Dubey	PW5
6.	SI Sanjeev Kumar	PW6
7.	Jitendra Sahu	PW7
8.	Pradeep Sahu	PW8
9.	Laxmi Prasad	PW9
10.	Dr. Mahendra Pal Singh	PW10
11.	Priti Jain	PW11

5. Apart from aforesaid witnesses, prosecution submitted following documentary evidence, which was proved by leading the evidence:

1.	Application U/S 156 (3) Cr.P.C.	Ex.ka1
2.	Inquest Report	Ex.ka2
3.	Postmortem Report	Ex.ka3
4.	First Information Report	Ex.ka6
5.	Site-Plan	Ex.ka4
6.	Charge-Sheet	Ex.ka5
7.	General Diary	Ex.ka7
8.	Dying-Declaration	Ex.ka8

6. Deceased was hospitalised just after the occurrence took place and she died after about 11 days of the incident. In the meantime, she remained under treatment, continuously. Her medical papers were also filed by prosecution, which are on record.

7. Heard Mr.Noor Mohammad, learned counsel for the appelalnt, Shri Vikas Goswami, learned AGA appearing on behalf of the State and perused the record.

8. Learned counsel for the appelant argued in the very beginning that in this case no prosecution witness has supported the prosecution case and all the witnesses of fact have turned hostile. Learned Counsel submitted that Harprasad (PW1) is complainant and father of the deceased, but in his statement before learned trial court, he did not support the prosecution story. He was cross-examined by prosecutor, but nothing was extracted in his cross-examination agaisnt the accused. Similarly, Pukhan (PW2) was examined who was the mother of the deceased. She also did not support the prosecution case. Apart from PW1 and PW2, Jitendra Sahu (PW7), Pradip Sahu (PW8) and Laxmi Prasad (PW9) were also examined. Jitendra Sahu (PW7) and Laxmi Prasad (PW9) are relative of the deceased while Pradip Sahu (PW8) is brother of the deceased. All these witnesses also did not support the prosecution version and they were also declared hostile. On the basis of analysis of all the five witnesses of fact, no guilt against accused appellant is established.

9. Learned counsel for the appellant next submitted that dying declaration of deceased was recorded when she was

surviving, but this dying declaration has no corroboration with any prosecution evidecne. All the witnesses of fact have turned hostile and nobody supported the version which is mentioned in dying delcaration. Therefore, learned trial court committed grave error by convicting the accused on the basis of dying declaration only when it was not corroborated at all.

10. Learned counsel for the appellant additionally submitted that if, for the sake of arugment, it is assumed that appellant has committed the offence, in that case also no offence under Section 302 IPC is made out. Maximum this case can travel up to the limits of offence under Section 304 IPC because the deceased died after 11 days of the occurrence due to developing the infection in her burn-wounds, i.e., septicemia. As per catena of judgments of Hon'ble Apex Court and this Court, offence cannot travel beyond section 304 IPC, in case the death occurred due to septicimia. Learned counsel for the appellant also submitted that postmortem report also shows that cause of death was septicimia. Learned counsel relied on the judgment in the case of ***Maniben vs. State of Gujarat*** *[2009 Lawsuit SC 1380]*, and the judgment in Criminal Appeal Nos.1438 of 2010 and 1439 of 2010 dated 7.10.2017 and judgment of Criminal Appeal No.2558 of 2011 delivered on 1.2.2021 by this Court and several other judgments.

11. No other point or argument was raised by learned cousel for the appellant and confined his arguments on above points only.

12. Learned AGA, *per contra*, vehemently opposed the arguments placed by counsel for the appellant and submitted

that conviction of accused can be based only on the basis of dying declaration, if it is wholly reliable. It requires no corroboration. Moreover, testimony of hostile witnesses can also be relied on to the extent it supports the prosecution case. Learned trial court has righty convited the appellant under Section 302 IPC and sentenced accordingly. There is no force in this appeal and the same may be dismissed.

13. First of all, learned counsel for the appellant has raised the issue relating to the hostality of witnesses. Five witnesses of fact were examined before learned trial court, namely Harprasad, complainant and father of the deceased (PW1), Pukhan, mother of the deceased (PW2), Jitendra Sahu, relative (PW7) and Laxmi Prasad, relative (PW9) and Pradip Sahyu (PW8), brother. All these witnesses have turned hostile, but the testimony of hostile witnesses cannot be thrown away just on the basis of the fact that they have not supported the prosecution case and were cross-examined by the prosecutor. The testimony of the hostile witnesses can be relied upon to the extent it supports the prosecution case. Needless to say that the testimony of hostile witnesses should be scrutinized meticulously and very cautiously.

14. Hon'ble *Apex Court* in ***Koli Lakhmanbhai Chandabhai vs. State of Gujarat*** *[1999 (8) SCC 624],* as held that evidence of hostile witness can be relied upon to the extent it supports the version of prosecution and it is not necessary that it should be relied upon or rejected as a whole. It is settled law that evidence of hostile witness also can be relied upon to the extent to which it supports the prosecution version. Evidence of such witness cannot be treated as washed

off the record. It remains admissible in the trial and there is no legal bar to base his conviction upon his testimony if corroborated by other reliable evidence.

15. In ***Ramesh Harijan vs. State of U.P.*** *[2012 (5) SCC 777],* the Hon'ble *Apex Court* has also held that it is settled legal position that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witness cannot be treated as effaced or washed off the record altogether.

16. In ***State of U.P. vs. Ramesh Prasad Misra and another*** *[1996 AIR (Supreme Court) 2766],* the Hon'ble *Apex Court* held that evidence of a hostile witnesses would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. Thus, the law can be summarized to the effect that evidence of a hostile witness cannot be discarded as a whole, and relevant part thereof, which are admissible in law, can be used by prosecution or the defence.

17. Perusal of impugned judgment shows that learned trail court has scrutinised the evidence on record very carefully.

18. As far as the dying declaration is concerned, it was recroded by Priti Jain, Nayab Tehsildar, who was examined as PW11. Dying declaration as recorded by PW11 after obtaining the certificate of mental-fitness from Dr. Mahendra Pal Singh, who was examined as PW10. After completion of dying

delaration also the said docter has given certificate that during the course of statement, the victim remained conscious.

19. Learned counsel for the appellant has argued that dying declaration is doubtful and not corroborated by witnesses of fact, hence, it cannot be the sole basis of conviction. Legal position of dying declaration to be the sole basis of conviction is that it can be done so if it is not tutored male voluntarily and is wholly reliable. In this regard, Hon'ble *Apex Court* has summarized the law regarding dying declaration in ***Lakhan vs. State of Madhya Pradesh*** *[(2010) 8 Supreme Court Cases 514],* in this case, Hon'ble *Apex Court* held that the doctrine of dying declaration is enshrined in the legal maxim *nemo moriturus praesumitur mentire,* which means, *"a man will not meet his Maker with a lie in his mouth".* The doctrine of dying declaration is enshrined in Section 32 of Evidence Act, 1872, as an exception to the general rule contained in Section 60 of Evidence Act, which provides that oral evidence in all cases must be directed, i.e., it must be the evidence of a witness, who says he saw it. The dying declaration is, in fact, the statement of a person, who cannot be called as witness and, therefore, cannot be cross-examined. Such statements themselves are relevant facts in certain cases.

20. The law on the issue of dying declaration can be summarized to the effect that in case the court comes to the conclusion that the dying declaration is true and reliable, has been recorded by a person at a time when the deceased was fit physically and mentally to make the declaration and it has not been made under any tutoring/duress/prompting; it can be the sole basis for recording conviction. In such an eventuality no

corroboration is required. It is also held by Hon'ble *Apex Court* in the aforesaid case, that a dying declaration recorded by a competent Magistrate would stand on a much higher footing than the declaration recorded by office of lower rank, for the reason that the competent Magistrate has no axe to grind against the person named in the dying declaration of the victim.

21. Deceased survived for 11 days after the incident took place. Her dying declaration was recorded by Priti Jain Nayab Tehsildar and doctor Mahendra Pal Singh appended certificate of mental health of the victim before and after making of dying declaration, which is proved as Ex.ka8. Both the above witnesses PW10 and PW11 are absolutely independent witnesses. In the wake of aforesaid judgments of Lakhan (supra), dying declaraion cannot be disbelived, if it inspires confidence. On reliability of dying declaration and acting on it without corroboration, Hon'ble *Apex Court* held in ***Krishan vs. State of Haryana*** *[(2013) 3 Supreme Court Cases 280]* that it is not an absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused. Where the dying declaration is true and correct, the attendant circumstances show it to be reliable and it has been recorded in accordance with law, the deceased made the dying declaration of her own accord and upon due certification by the doctor with regard to the state of mind and body, then it may not be necessary for the court to look for corroboration. In such cases, the dying declaration alone can form the basis for the conviction of the accused. Hence, in order to pass the test reliability, a dying declaration has to be subjected to a very

close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused, who had no opportunity of testing the veracity of the statement by cross-examination. But once, the court has come to the conclusion that the dying declaration was the truthful version as to the circumstance of the death and the assailants of the victim, there is no question of further corroboration.

22. In ***Ramilaben Hasmukhbhai Khristi vs. State of Gujarat,*** *[(2002) 7 SCC 56],* the Hon'ble *Apex Court* held that under the law, dying declaration can form the sole basis of conviction, if it is free from any kind of doubt and it has been recorded in the manner as provided under the law. It may not be necessary to look for corroboration of the dying declaration. As envisaged, a dying declaration is generally to be recorded by an Executive Magistrate with the certificate of a medical doctor about the mental fitness of the declarant to make the statement. It may be in the from of question and answer and the answers be written in the words of the person making the declaration. But the court cannot be too technical and in substance if it feels convinced about the trustworthiness of the statement which may inspire confidence such a dying declaration can be acted upon without any corroboration.

23. From the above case laws, it clearly emerges that it is not an absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused when such dying declaration is true, reliable and has been recorded in accordance with established practice and principles and if it is recorded so then there cannot be any challenge regarding its correctness and authenticity.

24. In dying delcaration of deceased (Ex.ka8), it is also important to note that it was recorded on 20.5.2015 and the deceased died on 24.5.2015 while the incident took place on 13.5.2015. It means that she remained alive for 4 days after making dying declaration. Therefore, truthfulness of dying declaration can further be evalated from the fact that she survived for 4 days after making it from which it can reasonably be inferred that she was in a fit condition to make the statment at the relevant time. Moreover, in the dying declaration, the deceased did not unnecessarily involved the other family members of the accused appellant. She only attributed the role of burning to her husband.

25. In such a situation, the hostality of witnesses of fact cannot demolish the value and reliability of the dying declaration of the deceased, which has been proved by prosecution in accordance with law and is a truthful version of the event that occurred and the circumstances leading to her death.

26. As already noticed, none of the witnesses or the authorities involved in recording the dying declaration had turned hostile. On the contrary, they have fully supported the case of prosecution. The dying declaration is reliable, truthful and was voluntarily made by the deceased, hence, this dying declaration can be acted upon without corroboration and can be made the sole basis of conviction. Hence, learned trial court has committed no error on acting on the sole basis of dying declaration. Learned trial court was completely justified in placing reliance on dying declaration Ex. KA-8 and convicting the accused-appellant on the basis of it.

27. Now we come to the point of argument raised by learned counsel for the appellant that deceased died due to septicimia, hence this case falls within the ambit of Section 304 IPC and not under Section 302 IPC. In this regard, learned counsel has submitted that deceased died after 11 days of incident due to the poisonous infection developed in her burn injuries, whcih could be avoided by good treatment. There was no intention of the appellant to cause the death of his wife.

28. In order to appreciate the rival contentions advanced by the parties and issues involved, it would be necessary to mention by us that incidence of this case took place on 13.5.2015 when the appellant poured kerosene oil on the body of the deceased and set her ablazed. She was admitted in Medical College, Jhansi, on 13.5.2015 and discharged on 15.5.2015 as suggested by medical papers on record. Doctor has written that she was having 50% burn. Medical papers also show that she was again hospitalized in the same hospital on 19.5.2015 where she succumbed to the injuries on 24.5.2015. In postmortem report, cause of death was found to be septicimia. Hence, there is no doubt that deceaced died due to septicimia and it is very relevant fact that after first hospitalization the deceased was discahrged after 2 days and again she was hospitalized after 4 days of discharge where she died after 5 days of her second admission.

29. The finding of fact regarding the presence of witnesses at the place of occurrence cannot be faulted with. Death of deceased was a homicidal death. The fact that it was a homicidal death takes this Court to most vexed question whether it would fall within the four-corners of murder or

culpable homicide not amounting to murder. Therefore, we are considering the question whether it would be a murder or culpable homicide not amounting to murder and punishable under Section 304 IPC. Accused is in jail for the last more than 14 years.

30. In ***State of Uttar Pradesh vs. Mohd. Iqram and another***, [(2011) 8 SCC 80], the Apex Court has made the following observations in paragraph 26, therein:

> *"**26.** Once the prosecution has brought home the evidence of the presence of the accused at the scene of the crime, then the onus stood shifted on the defence to have brought-forth suggestions as to what could have brought them to the spot in the dead of night. The accused were apprehended and, therefore, they were under an obligation to rebut this burden discharged by the prosecution and having failed to do so, the trial-court was justified in recording its findings on this issue. The High Court committed an error by concluding that the prosecution had failed to discharge its burden. Thus, the judgment proceeds on a surmise that renders it unsustainable."*

31. In ***Bengai Mandal alias Begai Mandal vs. State of Bihar*** *[(2010) 2 SCC 91]*, incident occurred on 14.7.1996, while the deceased died on 10.8.1996 due to septicemia caused by burn injuries. The accused was convicted and sentenced for life imprsonment under Section 302 IPC, which was confirmed in appeal by the High Court, but Hon'ble The Apex Court converted the case under Section 304 Part-II IPC on the ground that the death ensued after twenty-six days of the incident as a result of septicemia and not as a consequence of burn injuries and, accordingly, sentenced for seven years' rigorous imprisonment.

32. In ***Maniben vs. State of Gujarat*** *[(2009) 8 SCC 796]*, the incident took place on 29.11.1984. The deceased died

on 7.12.1984. Cause of death was the burn injuries. The deceased was admitted in the hospital with about 60 per cent burn injuries and during the course of treatment developed septicemia, which was the main cause of death of the deceased. Trial-court convicted the accused under Section 304 Part-II IPC and sentenced for five years' imprisonment, but in appeal, High Court convicted the appellant under Section 302 IPC. Hon'ble The Apex Court has held 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. Accordingly, judgment and order convicting the accused under Section 304 Part-II IPC by the trial-court was maintained and the judgment of the High Court was set aside.

33. In ***Chirra Shivraj vs. State of Andhra Pradesh*** *[(2010) 14 SCC 444]*, incident took place on 21.4.1999. Deceased died on 1.8.1999. As per the prosecution version, kerosene oil was poured upon the deceased, who succumbed to the injuries. Cause of death was septicemia. Accused was convicted under Section 304 Part-II IPC and sentenced for five years' simple imprisonment, which was confirmed by the High Court. Hon'ble The Apex Court dismissed the appeal holding that the deceased suffered from septicemia, which was caused due to burn-injuries and as a result thereof, she expired on 1.8.1999.

34. We can safely rely upon the decision of the Gujarat High court in Criminal Appeal No.83 of 2008 ***(Gautam Manubhai Makwana Vs. State of Gujarat)*** decided on 11.9.2013 wherein the Court held as under:

"12. In fact, in the case of Krishan vs. State of Haryana reported in (2013) 3 SCC 280, the Apex Court has held that it is not an absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused. Where the dying declaration is true and correct, the attendant circumstances show it to be reliable and it has been recorded in accordance with law, the deceased made the dying declaration of her own accord and upon due certification by the doctor with regard to the state of mind and body, then it may not be necessary for the court to look for corroboration. In such cases, the dying declaration alone can form the basis for the conviction of the accused. But where the dying declaration itself is attended by suspicious circumstances, has not been recorded in accordance with law and settled procedures and practices, then, it may be necessary for the court to look for corroboration of the same.

13. However, the complaint given by the deceased and the dying declaration recorded by the Executive Magistrate and the history before the doctor is consistent and seems to be trustworthy. The same is also duly corroborated with the evidence of witnesses and the medical reports as well as panchnama and it is clear that the deceased died a homicidal death due to the act of the appellants in pouring kerosene and setting him ablaze. We do find that the dying declaration is trust worthy.

14. However, we have also not lost sight of the fact that the deceased had died after a month of treatment. From the medical reports, it is clear that the deceased suffered from Septicemia which happened due to extensive burns.

15. In the case of the B.N. Kavatakar and another (supra), the Apex Court in a similar case of septicemia where the deceased therein had died in the hospital after five days of the occurrence of the incident in question, converted the conviction under section 302 to under section 326 and modified the sentence accordingly.

15.1 Similarly, in the case of Maniben (supra), the Apex Court has observed as under:

> *"18. The deceased was admitted in the hospital with about 60% burn injuries and during the course of treatment developed septicemia, which was the main cause of death of the deceased. It is, therefore, established that during the aforesaid period of 8 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 tonsil 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 tonsil 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 of IPC. We are, however, of the considered opinion that the case of the appellant is covered under Section 304 Part II of IPC."*

> *16. In the present case, we have come to the irresistible conclusion that the role of the appellants is clear from the dying declaration and other records. However, the point which has also weighed with this court are that the deceased had survived for around 30 days in the hospital and that his condition worsened after around 5 days and ultimately died of septicemia. In fact he had sustained about 35% burns. In that view of the matter, we are of the opinion that the conviction of the appellants under section 302 of Indian Penal Code is required to be converted to that under section 304(I) of Indian Penal Code and in view of the same appeal is partly allowed.*

35. On the overall scrutiny of the facts and circumstances of the case coupled with medical evidence and the opinion of the Medical Officer and considering the principle laid down by the Courts in above referred case laws, we are of the considered opinion that in the case at hand, the offence would be punishable under Section 304 (Part-I) IPC.

36. From the upshot of the aforesaid discussions it appears that the death caused by the accused was not pre-meditated. Accused had no intention to cause the death of the deceased.

The injuries were though sufficient in the ordinary course of nature to have caused death, accused had no intention to do away with deceased. Hence the instant case falls under the exceptions (1) and (4) to Section 300 of IPC. While considering Section 299 IPC, offence committed will fall under Section 304 (Part-I) IPC.

37. In view of the aforesaid discussion, we are of the view that appeal has to be partly allowed. The conviction of the appellant under Section 302 IPC is converted into conviction under Section 304 (Part-I) IPC and the appellant is sentenced to undergo seven years of incarceration with fine of Rs. 10,000/- and in case of default of payment of fine, the appellant shall further undergo simple imprisonment for 1 year.

38. Accordingly, the appeal is **partly allowed.**

(Ajai Tyagi,J.) *(Dr. Kaushal Jayendra Thaker,J.)*

Order Date :- 12.11.2021
LN Tripathi