Court No. - 44 **A.F.R.**

Case :- CRIMINAL APPEAL No. - 1791 of 2014

Appellant :- Shri Prakash Gupta
Respondent :- State of U.P.
Counsel for Appellant :- Pushkar Srivastava,Akhilesh Kumar
Counsel for Respondent :- Govt. Advocate

Hon'ble Dr. Kaushal Jayendra Thaker, J.

Hon'ble Nalin Kumar Srivastava,J.

(Per: Hon'ble Nalin Kumar Srivastava, J)

1. This criminal appeal is directed against the judgement and order dated 25.2.2014 and sentence dated 27.2.2014 passed by learned Additional Sessions Judge, Court No.6, Deoria in Sessions Trial No. 246 of 2010 arising out of Case Crime No. 221 of 2010 under Section 302 I.P.C., P.S.-Bhatparani, District- Deoria convicting and sentencing the appellant under Section 302 I.P.C. to undergo life imprisonment with a fine of Rs.20,000/- and in default of payment of fine further one year simple imprisonment.

2. The prosecution story as emerged out from the FIR is that Chandni, the sister of the informant was married with Rajan Gupta on 12.12.2006 but the husband was not satisfied with the dowry given in the marriage and always used to quarrel over that. On 8.6.2010, the informant came to know that the in-laws of the deceased had set ablaze his sister. On the next day when the informant went to the District Hospital, Deoria, he found his sister in a bitterly burnt condition and she told that her mother-in-law, Guddi Devi *(Chacheri),* father-in-law Shriprakash Gupta caught hold her and her mother-in-law Guddi Devi, sister-in-law Km. Rani and husband Rajan Gupta set her ablaze. The deceased (then injured) referred to the Medical College, Gorakhpur and during

treatment she died on 12.6.2010. Subsequently FIR, Ex.Ka-3 was lodged on the written report Ex.Ka-1 on 16.6.2010 and G.D. Ex.Ka-4 was also prepared. The inquest of the deceased was performed and autopsy report was also prepared by Dr. Arvind Kumar Gupta, who found injuries as whole on the body of the deceased.

(i) Septic burn all over body except some part of abdomen and scalp. Superficial to deep first layer present at some place.

3. In the injury report the doctor also opined that the death was caused due to septic shock as a result of anti mortem burning. After completion of investigation charge sheet Ex.Ka-16 was submitted by the I.O against the Guddi Devi and Shriprakash Gupta, mother-in-law and father-in-law respectively of the deceased. The I.O. Inspected the spot and prepared site plan Ex.Ka-13, Inspection memo Ex.Ka-14 and submitted charge sheet Ex.Ka16 to the Court.

4. During the trial of the case accused Smt. Guddi Devi died and the case was abated against her.

5. The accused Shriprakash Gupta were charged under Section 498A, 304 B I.P.C. and Section 3/4 D.P. Act. He was also charged under Section 302/34 I.P.C. The accused denied of the charges and claimed to be tried.

6. The prosecution in order to prove its case in oral evidence has relied upon the testimonies of P.W.1 Santosh Kumar Gupta, the informant/ brother of the deceased, P.W.2 Urmila Devi, mother of the deceased, P.W.3 Cons. Kalicharan Yadav, the witness of the inquest, P.W.4 Head Moharir Veer Bahadur Yadav scribe of the FIR, P.W.5 S.I. Amarjeet Singh Yadav, witness of the inquest, P.W.6 Gulab Singh, retired Nayab Tehsildar, witness of the dying

declaration and P.W.7 Dr. Arvind Kumar Gupta, who performed autopsy of the deceased.

7. The prosecution also relied upon documentary evidence and written report Ex.Ka-1, panchayatnama Ex.Ka-2, Chick FIR Ex.Ka-3, Kayami Rapat Ex.Ka-4, papers prepared for the purpose of autopsy as Ex.Ka-5, Ex.Ka-6, Ex.Ka-7, Ex.Ka-8, Ex.Ka-9, Ex.Ka-10, photo nash Ex.Ka-11, dying declaration Ex.Ka-12, site plan Ex.Ka-13, inspection memo Ex.Ka-14, arresting memo Ex.Ka-15 and charge sheet Ex.Ka-16.

8. It is pertinent to mention here that the genuineness of the site plan and charge sheet has been admitted by the defence side, hence the I.O. was not examined during the trial. In his statement under Section 313 Cr.P.C., the accused stated that he has been falsely implicated. The dying declaration is a forged document and the total incident is false. It has also been stated that at the time of the incident, the husband of the deceased Rajan Gupta had gone to the market. When the information of burning was given to him he brought the injured to District Hospital, Deoria and subsequently to the Medical College, Gorakhpur where she was admitted and during treatment she was died. The cremation was also performed by her husband Rajan Gupta. The charge sheet has been filed without any evidence on false grounds and it was not a case of homicidal or dowry death. However, no defence evidence has been adduced by the convict/ appellant.

9. The trial Court after considering the entire evidence on record, recorded the acquittal of the convict/ appellant Shriprakash. Gupta under Section 498A, 304B and 3/4 D.P. Act and at the same time recorded his conviction under Section 302 I.P.C. and sentenced him for life imprisonment and a fine to the tune of Rs.20,000/-

10. Being aggrieved and dissatisfied with the aforesaid judgement and order passed by the learned trial Court, the appellant has preferred the present appeal.

11. Heard Shri Naushad Ahmad Siddiqui, learned counsel for the appellant and Shri N.K. Srivastava, learned A.G.A. for the State.

12. Learned counsel for the appellant has submitted that no offence as alleged has been committed by the accused. It is further submitted that the accused had no motive to do away with the deceased and that the death of the deceased was due to medical negligence and occurred was after a considerable period of time from the date of commission of occurrence.

13. It has been vehemently argued by learned A.G.A. for the State that the offence alleged is gruesome and is conclusively proved by dying declaration. Learned counsel has taken us through the evidence on record. He further submitted that life imprisonment awarded to the accused in the facts and circumstances of the case was the only punishment which could be awarded to the accused-appellant and requested for dismissal of appeal.

14. Before we start considering the evidence which we are not elaborately discussing, the reason being it is proved conclusively that the accused has caused injuries to the deceased and set her ablaze which was primarily responsible for her death. The alternative prayer about lesser punishment is to be considered.

15. After perusal of the impugned judgement, we find that the learned trial Court was not convinced as to the ingredients of Section 304B of Indian Penal Code and fully establishing in the present case on appreciation of the evidence of P.W.1 and P.W.2,

who happened to be the brother and mother of the deceased respectively. The trial Court has opined that the ingredients of Section 304B, 498A I.P.C. and Section 3/4 Dowry Prohibition Act were not established. The impugned judgement leads us towards the definition of Section 304B I.P.C. Necessary ingredients of the offence of dowry death under Section 304B I.P.C. reads as follows:

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.]*

16. From the above definition the following ingredients to establish the offence under Section 304B I.P.C. are follows:

> *(i) the death of a woman must have been caused by burns or bodily injury or otherwise than under normal circumstances;*
>
> *(ii) such death must have occurred within seven years of her marriage;*
>
> *(iii) soon before her death, the woman must have been subjected to cruelty or harassment by her husband or any relatives of her husband;*
>
> (iv) such cruelty or harassment must be for, or in connection with, demand for dowry".

17. The aforesaid ingredients have been reiterated in a catena of decisions of the Hon'ble Apex Court and of this High Court also and very recently in **Devendra Singh Vs. State of Uttrakhand** AIR 2022 SC 2965 also.

18. We have gone through the evidence of P.W.1 and P.W.2 and find that although the factum of demand of dowry and harassment caused to the deceased finds place in their deposition but they have made only general allegations against all the in-laws of the deceased and no specific role of any of the in-laws including the present accused has been stated in their entire testimony. The trial court considering the aforesaid deposition has also held that no case is made out against the accused under Section 498A I.P.C. and Section 3/4 D.P. Act. So far as the offence under Section 304B I.P.C. is concerned the essential ingredients of 'soon before' does not find place any where in the respective testimonies of P.W.1 and P.W.2.

19. The phrase 'soon before' has not been defined any where in the Indian Penal Code rather it has been explained in a catena of decisions of the Hon'ble Apex Court and of this Court.

20. In **Mustafa Shahdal Shaikh Vs. State of Maharashtra,** AIR 2013 SC 851, the Hon'ble Apex Court held that 'Soon before her death' means interval between cruelty and death should not be much. There must be existence of a proximate and live links between the effect of cruelty based on dowry demand and the concerned death. If the alleged incident of cruelty is remote in time and has become state enough not to disturb the mental equilibrium of the woman concerned, it would be of no consequence.

21. Also in **Kaliyaperumal Vs. State of Tamil Nadu** AIR 2003 SC 3828, the Hon'ble Apex Court held that " The expression 'soon before her death' used in the substantive section 304B, I.P.C. and Section 113B of the Evidence Act is present with the idea of proximity text. No definite period has been indicated and the expression 'soon before her death' is not defined. The determination of the period which can come within the term ' soon before' is left to be determined by the courts, depending upon facts and circumstances of each case. Suffice, however, to indicate that the expression' soon before would normally imply that the interval should not be much between the concerned cruelty or harassment and the death in question. There must be existence of a proximate and live-link between the effect of cruelty based on dowry demand and the concerned death. If alleged incident of cruelty is remote in time and has become stale enough not to disturb mental equilibrium of woman concerned, it would be of no consequence.

22. The trial Court has come to the conclusion that since the essential ingredient of 'soon before' is also absent in the testimonies of the witnesses, the death occurred of the deceased cannot be termed as dowry death in the facts and circumstances of this case. It is to be noted here that the formal evidence adduced by the prosecution support the prosecution case in many aspects. P.W.4 Head Moharrir Veer Bahadur Yadav has fully proved the Chick FIR and G.D. of the case as Ex.Ka-3 and Ka-4 and has stated that the FIR was lodged on the basis of the application given by the informant Santosh Kumar, which has been proved by the informant P.W.1 Santosh Kumar as Ex.Ka-1. Like wise the performance of inquest has been proved by Constable Kalicharan P.W.3 and also by P.W.5 S.I. Amarjeet Singh Yadav. P.W.5 has also proved the papers prepared for the purpose of autopsy as Ex.Ka-5,

Ex.Ka-6, Ex.Ka-7, Ex.Ka-8, Ex.Ka-9 and Ex.Ka-10. Both the witnesses have also proved that the inquest was performed on 13.6.2010 at the mortuary house of the B.R.D. Medical College, Gorakhpur.

23. P.W.7 Dr. Arvind Kumar Gupta has performed the autopsy of the deceased and he has proved the autopsy report as Ex.Ka-12 and has found that the death of the deceased was caused due to septic shock as a result of anti mortem burning . The post mortem has been conducted on 13.6.2010 and the deceased died on 12.6.2010.

24. The learned trial Court has relied upon the dying declaration of the deceased (then injured) recorded by P.W.6 retired Nayab Tehsildar Gulab Singh.

25. P.W.6 in his deposition has stated that by order of S.D.M. Sadar, Deoria he had recorded the dying declaration of Chandni Devi on 9.6.2010 in the female ward of District Hospital, Deoria. He has proved the dying declaration as Ex.Ka-11 and has also stated that the dying declaration was prepared by him in his own hand writing and signature.

26. The deceased (then injured) in her dying declaration has stated like this

> *"मैं बयान करती हूँ कि मेरी उम्र 23 वर्ष है मेरे दो बच्चे हैं। मेरे सासु व ससुर जलाये है। मेरे उपर मिट्टी का तेल छिड़क कर जलाये तथा मारे पीटे है मेरे पति गाड़ी से लेकर अस्पताल लेकर देवरिया आये अस्पताल भर्ती कराये। मेरे सासु ससुर मुझे व मेरे पति को घर से निकाल रहे हैं कहते हैं तुम लोगों का हक हिस्सा नहीं है। भसुर मेरा ठीक है। केवल मेरे सासु ससुर ही बदमाश है वही जलाये हैं बयान सुनकर तस्दीक किया।"*

27. P.W.6 in his testimony has stated that the thumb impression of Chandni Gupta was taken over the dying declaration. He has also clarified that at the time of statement, the victim was bitterly burnt but was in a condition to make statement. He had orally taken permission from the doctor concerned who had told him that the victim is in a condition to make statement. He has further stated that the statement of the victim was verified by the duty doctor.

28. The trial Court has examined the veracity of the dying declaration Ex.Ka-11 in detail in the impugned judgement. From the perusal of the whole deposition of P.W.6, we do not find any adversity in his statement. The learned trial Court has made the dying declaration to be the sole basis of the conviction in the facts and circumstances of the present case. We are duty bound to examine the legal position of the dying declaration. The dying declaration to be the sole basis of the conviction.

29. Legal position of dying declaration to be the sole basis of conviction is that it can be done so if it is not tutored, made 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 direct, 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.

30. 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.

31. P.W.6 is absolutely independent witness. In the wake of aforesaid judgment of Lakhan (*supra*), dying declaration cannot be disbelieved, 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.

32. 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.

33. In the present case though the certificate of the doctor was oral, and not in written form but this fact cannot be ignored that P.W.6 has recorded the statement on the instructions of S.D.M. Sadar in his official capacity and he had no grudge or enmity with the accused.

34. There is no possibility of false implication of the accused by this independent witness.

35. From the above precedents, 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.

36. In context of the dying deceleration of the deceased, it is also relevant to note that deceased died after three days of recording it. It means that she remained alive for three days after making dying declaration, therefore, truthfulness of dying declaration can further be evaluated from the fact that she survived for three days after making it from which it can reasonably be inferred that she was in a fit mental condition to make the statement at the relevant time.

37. Thus, the dying declaration in this case is a trust worthy, cogent, reliable and innocent peace of evidence, which has correctly been relied upon by the trial Court.

38. However, the question which falls for our consideration is whether, on reappraisal of the peculiar facts and circumstances of the case, the conviction of the appellant under Section 302 of I.P.C. should be upheld or the conviction deserves to be converted under Section 304 Part-I or Part-II of the Indian Penal Code. It would be relevant to refer Section 299 of the Indian Penal Code, which reads as under:

> "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."

39. The academic distinction between "murder' and "culpable homicide not amounting to murder' has always vexed the Courts. The confusion is caused, if Courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Section 299 and 300 of I.P.Code. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

Section 299	**Section 300**
A person commits culpable homicide if the act by which the death is caused is done-	Subject to certain exceptions culpable homicide is murder is the act by which the death is caused is done.
INTENTION	
(a) with the intention of causing death; or	(1) with the intention of causing death; or
(b) with the intention of causing such bodily injury as is likely to cause death; or	(2) 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;
KNOWLEDGE	**KNOWLEDGE**
(c) with the knowledge that the act is likely to cause death.	(4) with the knowledge that the act is so immediately dangerous that it must in all probability cause death or such bodily injury as is likely to cause death,

	and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

40. From the upshot of the aforesaid discussions, it appears that the death was caused by the accused in unison and it was a homicidal death whether the same was not premeditated or premeditated will have to be seen. From perusal of the dying declaration itself, it is evident that the crime was committed due to the property dispute. It transpires from the evidence of P.W.1 and P.W.2 that on account of property dispute the deceased and her husband were kicked out by the in-laws of the deceased from their house. Under these circumstance, it can be concluded that though the injuries over the body of the deceased were sufficient in the ordinary course of nature to have caused death, the accused had no intention to do away with the deceased, hence the instant case falls under the Exceptions 1 and 4 to Section 300 of IPC. While considering Section 299 as reproduced herein above offence committed will fall under Section 304 Part-I as per the observations of the Apex Court in **Veeran and others Vs. State of M.P. Decided,** (2011) 5 SCR 300 which have to be also kept in mind.

41. On overall scrutiny of the facts and circumstances of the present case coupled with the opinion of the Medical Officer and considering the principle laid down by the Apex Court in the Case of **Tukaram and Ors Vs. State of Maharashtra, reported in** (2011) 4 SCC 250 and in the case of **B.N. Kavatakar and Another Vs. State of Karnataka, reported in** 1994 SUPP (1) SCC 304, we are of the considered opinion that the offence would

be one punishable under Section 304 part-I of the IPC. The deceased no doubt as per the the opinion of the doctor, has died due to septic shock.

42. In Mohd. Giasuddin Vs. State of AP, [AIR 1977 SC 1926], explaining rehabilitary & reformative aspects in sentencing it has been observed by the Supreme Court:

> "Crime is a pathological aberration. The criminal can ordinarily be redeemed and the state has to rehabilitate rather than avenge. The sub-culture that leads to ante-social behaviour has to be countered not by undue cruelty but by reculturization. Therefore, the focus of interest in penology in the individual and the goal is salvaging him for the society. The infliction of harsh and savage punishment is thus a relic of past and regressive times. The human today vies sentencing as a process of reshaping a person who has deteriorated into criminality and the modern community has a primary stake in the rehabilitation of the offender as a means of a social defence. Hence a therapeutic, rather than an 'in terrorem' outlook should prevail in our criminal courts, since brutal incarceration of the person merely produces laceration of his mind. If you are to punish a man retributively, you must injure him. If you are to reform him, you must improve him and, men are not improved by injuries."

43. 'Proper Sentence' was explained in **Deo Narain Mandal vs. State of UP** [(2004) 7 SCC 257] by observing that Sentence should not be either excessively harsh or ridiculously low. While determining the quantum of sentence, the court should bear in mind the 'principle of proportionality'. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically.

44. In **Ravada Sasikala vs. State of A.P.** AIR 2017 SC 1166, the Supreme Court referred the judgments in **Jameel vs State of UP** [(2010) 12 SCC 532], **Guru Basavraj vs State of Karnatak,**

[(2012) 8 SCC 734], **Sumer Singh vs Surajbhan Singh,** [(2014) 7 SCC 323], **State of Punjab vs Bawa Singh,** [(2015) 3 SCC 441], and **Raj Bala vs State of Haryana,** [(2016) 1 SCC 463] and has reiterated that, in operating the sentencing system, law should adopt corrective machinery or deterrence based on factual matrix. Facts and given circumstances in each case, nature of crime, manner in which it was planned and committed, motive for commission of crime, conduct of accused, nature of weapons used and all other attending circumstances are relevant facts which would enter into area of consideration. Further, undue sympathy in sentencing would do more harm to justice dispensations and would undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to nature of offence and manner of its commission. The supreme court further said that courts must not only keep in view the right of victim of crime but also society at large. While considering imposition of appropriate punishment, the impact of crime on the society as a whole and rule of law needs to be balanced. The judicial trend in the country has been towards striking a balance between reform and punishment. The protection of society and stamping out criminal proclivity must be the object of law which can be achieved by imposing appropriate sentence on criminals and wrongdoers. Law, as a tool to maintain order and peace, should effectively meet challenges confronting the society, as society could not long endure and develop under serious threats of crime and disharmony. It is therefore, necessary to avoid undue leniency in imposition of sentence. Thus, the criminal justice jurisprudence adopted in the country is not retributive but reformative and corrective. At the same time, undue harshness

should also be avoided keeping in view the reformative approach underlying in our criminal justice system.

45. Keeping in view the facts and circumstances of the case and also keeping in view criminal jurisprudence in our country which is reformative and corrective and not retributive, this Court considers that no accused person is incapable of being reformed and therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream.

46. During course of argument, learned counsel for the appellant has made an alternative prayer for reduction of the sentence and has submitted that the sentence of life imprisonment awarded to the appellant by the trial Court is very harsh. He has also submitted that the appellant is languishing in jail for the past more than 10 years and at present he is aged about 70 years and the co-accused, the mother-in-law of the deceased died during the course of trial itself. Hence a prayer has been made to reduce the sentence of the convict to 10 years.

47. As discussed above, 'reformative theory of punishment' is to be adopted and for that reason, it is necessary to impose punishment keeping in view the 'doctrine of proportionality'. It appears from perusal of impugned judgment that sentence awarded by learned trial court for life term is very harsh keeping in view the entirety of facts and circumstances of the case and gravity of offence. Hon'ble Apex Court, as discussed above, has held that undue harshness should be avoided taking into account the reformative approach underlying in criminal justice system.

48. We are unable to agree with the submission of learned learned A.G.A. as far as it relates to the finding of the court below

that the death was a premeditated murder and falls within provisions of Section 300 of IPC and the sentence under Section 302 IPC is just and proper. The reason for the same is that the deceased did not die an insistence death; had it been a premeditated murder, the injuries on the body would have caused her immediate death.

49. One more glaring fact is that from the record of the medical papers it is evident that the deceased survived for four days. She was admitted in Medical College, Gorakhpur and thereafter she developed fissure and later on during treatment, she breathed her last due to septicemia. Though we concur with learned Trial Judge that the death was homicidal death we are unable to accept the submission of Sri Vikas Goswami, learned A.G.A.

50. The judgment of the Apex Court in State of Uttar Pradesh Vs. Subhash @ Pappu (supra) and Khokan @ Khokhan Vishwas Vs. State of Chhattisgarh (supra) will ensure for the benefit for the accused-appellant as the death occurred after four days of the occurrence, was not premeditated.

51. We come to the definite conclusion that the death was due to septicemia. The judgments cited by the learned counsel for the appellant would permit us to uphold our finding which we conclusively hold that the offence is not under Section 302 of I.P.C. but is culpable homicide.

52. The accused is in jail for more than 10 years. The Apex Court in such cases has converted the conviction under Section 302 of I.P.C. to Section 304 Part I of I.P.C. which will come to the aid of the accused.

53. In view of the aforementioned discussion, we are of the view that the appeal has to be partly allowed, hence, appeal is **partly allowed.**

54. The conviction of the appellant under Section 302 of Indian Penal Code is converted to conviction under Section 304 (Part-I) of Indian Penal Code and the appellant is sentenced to undergo 10 years of incarceration with remission but the fine and default sentence are maintained.

55. The convict- appellant shall be released on completion of said period, if not required in any other case. The judgement and order impugned in this appeal shall stand modified accordingly.

Order Date :- 17.10.2022
Fhd

(Nalin Kumar Srivastava,J.) **(Dr. Kaushal Jayendra Thaker, J.)**