AFR
Reserved

Jail Criminal Appeal No.6365 of 2008

Sukh Ram.....Appellant
Versus
State of U.P.....Opposite Party.

Hon'ble Vinod Prasad, J.
Hon'ble Rajesh Chandra, J.

(Delivered by Hon'ble Vinod Prasad, J.)

Appellant Sukh Ram has preferred instant Jail appeal challenging his conviction under Section 302 I.P.C. with imposed sentence of life imprisonment with fine of Rs.5000/- recorded by Additional Sessions Judge, Court No. 2,Hamirpur, vide his impugned judgement and order dated 29.8.2003 passed in S.T. No.110 of 2000, State Vs. Sukh Ram, relating to Crime No.175 of 2000,Under section 302 I.P.C., police station Kotwali District Hamirpur.

Shorn of unnecessarily details and stated briefly, prosecution case is that informant Dulichand P.W.1 and his wife Smt. Sarju Devi P.W.2, both resident of

Khalepur locality, Police Station Kotwali, District Hamirpur had four issues including Santosh and Munni Devi, deceased, their third child. She was married to appellant Sukh Ram and had two daughters Sudha and Monu from him. Since the appellant Sukh Ram had developed living relationship with one Guddi, daughter of Kandhi and had two issues from that extra-marital relationship, therefore three or four years prior to the foul incident of her murder, deceased Munni Devi had renounced appellant's house in District Banda and was living with the informant in his house at Hamirpur, in an adjacent room from that of the informant. A month earlier to her murder, appellant Sukh Ram united with her at his in-laws house. Appellant was also demanding Rs.50,000/- from the deceased and was desirous to separate from her as well. In the night of 5.6.2000 at 2 a.m. appellant set ablaze Munni Devi, after pouring kerosene oil upon her inside their room and thereafter, bolted the door from

outside and rushed to the Police Station Kotwali. Shrieks of Munni Devi attracted her parents Sukh Ram and Sarju Devi(PW1 and PW2), who unbolted the door, doused the fire and rushed her to the hospital with the help of neighbours. Doctor P.N. Pariya P.W.6, hospitalised her at 2.15 a.m. and also informed Inspector Kotwali, Hamirpur vide paper number 9-Ka, Ext. Ka-5. Same day informant came to the District court, Hamirpur where he dictated and got typed his written report, Ext. Ka-1, through Balak Ram Pandey, typist and then lodged it at Police Station Kotwali, Hamirpur at 3.10 p.m.

Head Constable Ram Avtar, P.W.7 registered the offences under sections 498A/ 307 I.P.C., prepared the Chik F.I.R. Ext. Ka-7 and relevant GD entry Ext. Ka-8. Investigation of the crime was commenced by S.I. Jiledar Singh P.W.9,who firstly interrogated Head Constable and the informant and then, reaching at the spot, conducted spot inspection and prepared the site

plan Ext. Ka-10.Appellant was arrested same day vide arrest memo Ext. Ka 11, and was lodged in the lock up at 7.45 p.m. Other witnesses, including the mother of the deceased, were interrogated by the I.O. on the following day. Munni Devi lost the battle of her life on 10.6.2000 at 3.15 a.m and therefore doctor S.K. Gupta, at 6.45 a.m. same day informed the police vide Ext. Ka 6, and consequently offences were altered to 498A/304B I.P.C. Subsequently, vide GD no.31, offence was further altered U/S 302 IPC under the orders of the Circle Officer of police. During investigation I.O. had also interrogated *Naib Tehsildar*, Shiv Charan Singh P.W.4, who had recorded deceased dying declaration, Ext. Ka-3, on 5.6.2000 from 5.10 a.m. to 5.25 a.m. and had made it a part of the case diary which he has proved as Ext. Ka-13. Concluding investigation I.O. charge sheeted appellant on 17.7.2000 vide Ext. Ka-12.

Autopsy on the dead body of the deceased was

conducted on 10.6.2000 at 2.45 p.m. by doctor Prem Kumar Gupta P.W.3, who had proved his autopsy report as Ext. Ka-2. The deceased was 30 years of age having an average built body, her eyes were closed and mouth open. Rigor mortis had passed off from head, neck and upper extremities and was present in lower extremities. Skin had peeled off and pus discharge was present at burnt places, membarain, brain, spleen, gallbladder,both the kidneys, all were congested with both lungs having pus discharge oozing out. Chambers of heart contained clotted blood. Stomach contained food materials whereas pasty material and gases were present in the small intestine. Large intestine contained faecal matter and gases. Following ante-mortem burn injuries were detected on the corpse of the deceased:-

"Superficial to deep burnt of grade I to V present all over the body including scalp, soles and hands. Burnt 100%. The skin peeled off at places. Line of redness

present. The scalp hair singed and pus present at places."

In doctor's opinion death was due to septicaemia as a result of ante-mortem burn injuries.

Appellant Sukh Ram was also medically examined vide Ext. Ka-4, by Doctor H.S. Verma P.W.5, on 5.6.2000 at 8.20 p.m., who was brought to him by CP Hriday Kumar Singh of P.S. Kotwali, district Hamirpur. Following injuries were detected on appellant's body:-

"Superficial burnt on the right side face over the dorsal surface of wrist right hand,over the dorsal of thumb and index finger, over the right knee joint over the inner aspect of upper part of left leg. Blister present at places containing serum fluid.

Area of burnt about 15%

All injury caused by dry flame duration about one day.

On the basis of charge sheet, Ext. Ka-12, Chief Judicial Magistrate, Hamirpur summoned the appellant and finding his committed offence Session's triable,

committed the case to the court of Session's ,where it was registered as S.T. No.110 of 2000, State Vs. Sukh Ram.

Sessions Judge, Hamirpur, on 14.12.2000, charged the appellant for offences under Section 302 I.P.C. and, in alternative, under Section 304B/498A I.P.C. Since appellant abjured those charges, therefore trial proceeded against him.

In order to cement the charge and establish appellant's guilt, prosecution in all examined nine witnesses, out of whom informant Dulichand P.W.1, his wife Sarju Devi P.W.2 and Jalil P.W.8 were fact witnesses. Rest of formal witnesses included doctor Prem Kumar Gupta P.W.3 (Autopsy doctor),*Naib Tahsildar* Shiv Charan Singh (who had recorded dying declaration and had got the inquest conducted) P.W.4, Doctor H.S. Verma (Doctor who had medically examined the appellant) P.W.5, Dr. P.N. Paiya (who had admitted the deceased in the hospital and had

appended certificate on the dying declaration) P.W.6, Head Moharrir Ram Avtar(who had registered the FIR and prepared the GD entry) P.W.7,and S.I.Jiledar Singh I.O.P.W.9.

During trial informant Dulichand P.W.1, Sarju Devi P.W.2, both parents of the deceased, besides narrating their allegations contained in the written report Ext. Ka-1 further testified that the appellant had an illicit extra marital relationship with Guddi with whom he had two children. They also testified that the appellant had come to reside in their house at Hamirpur a month prior to the incident. They further deposed that the incident is of 2 a.m. and after hearing the shrieks of their daughter when they reached the spot, they had witnessed appellant bolting the latch of the door from outside.PW1, informant further testified that the room in which the deceased and the informant were residing was adjacent to his bed room. He also deposed that he is a

vegetable grocer and had a meagre earning. His further deposition is that the deceased Munni Devi was residing with him since 2-4 years prior to the incident and Guddi was appellant's concubine. In his cross-examination he had testified that when Dying declaration was being penned down by *Naib Tehsildar* Shiv Charan Singh P.W.4, then only doctor and PW4 were present inside the ward. It was further deposed that at the time when the incident occurred they were sleeping in *Aagan*(court yard) whereas deceased and the appellant were inside their room. Prior to the incident they had dinned together at 8.00 p.m. and had some chat. It was further narrated by the informant that he had got the FIR typed and thereafter had lodged it. He also disclosed that the body of the deceased was badly burnt. He has further testified that, at the time of interrogation of the deceased by the I.O., he was sent outside of the ward where the deceased was fighting for her life. He further deposed

that the two daughters of the deceased Sudha and Monu were aged about four and three years. He has further deposed that no conversation took place between him and the deceased while she was admitted in the hospital. His further deposition is that he did not endeavour to apprehend the appellant, as he was attempting to douse the flames to save the life of his daughter. He has also stated that the room where the incident occurred had caught fire and he has sustained a loss of Rs. Fifteen thousand because of that. He also testified that the appellant used to assault the deceased many a times because of rapacity. This witness categorically denied the suggestion that the deceased had committed suicide and, in an endeavour to rescue her, appellant had also sustained burn injuries.

PW 2 Smt. Sarju, who is the mother of the deceased, also testified those very facts as were stated by her husband PW1 on all material aspects of the

incident. Avoiding repetition and for the sake of brievity, we eschew referring them again and only observe this much that from her cross examination defence has not been able to shake her testimony at all and has failed to elicit any contradiction in her statement from that of PW 1 but for the suggestion given to her wherein it was suggested that a loan was advanced by the appellant to his brother -in-law Santosh(brother of the deceased), which was not being returned by him, inspite of demand being raised by the appellant, and therefore there was fued between brother and sister which resulted in deceased committing suicide by setting herself to fire and, in an attempt to save her, that the appellant had also sustained burn injuries. It was also suggested to her that all the money and ornaments of the appellant were kept with the informant and, pervaded with the intention to usurp it, that the appellant was falsely implicated by them. Both these suggestions have been

emphatically denied by this witness. But for this, as has been recorded above, in respect of all other aspects of prosecution allegations, P.W.2 has fully corroborated the testimony of her husband informant Dulichand P.W.1.

Jalil P.W.8, another witness of fact, has fully supported the couple fact witnesses in all material aspects of the incident. He has deposed that on the date of the incident he had seen the deceased standing in a badly burnt condition and the flames were doused by the witnesses. Because of the inferno, even the room of the house of the informant had caught fire. He further testified that, on inquiry being made by him, deceased had informed him that appellant had set her a blaze. He further deposed that P.W.1 Dulichand and other relatives had carried Munni Devi to the hospital where she was treated but expired. He had further deposed that he is a witness of inquest on the dead body of the deceased, which was conducted in his

presence, and he had signed the inquest memo, which signature he has proved as Ext. Ka-9. From his cross-examination accused has not been able to bring out any significant contradiction or any fact which can diminish credibility of prosecution version. This witness withstood the test of cross-examination and has remained intact.

All the formal witnesses have given supporting evidences as has been referred to above. Doctor Prem Kumar Gupta P.W.3, who had conducted the autopsy had testified the facts found by him and had proved post-mortem examination report,Ext. Ka-2. He was cross-examined but no material has been brought on record to make his testimonies suspect and unbelievable.

Naib Tahsildar Shiv Charan Singh P.W.4 has deposed regarding recording of dying declaration by him and, according to his testimony, he was ordered by SDM to record it, which order was received to him at 4-

4.30 a.m. He had further deposed that he had met the doctor after reaching the hospital at 5 a.m. and he had started recording dying declaration at 5.10 a.m. and finished it 5.25 a.m. He further deposed that he had questioned the injured/deceased but had recorded her answers in a narrative form and not in question answer form. He has further testified that the deceased had informed him that at 2 a.m. appellant had set her to fire after pouring kerosene oil and thereafter had shut the door and had gone out. On shrieks being raised by her, Dulichand P.W.1 and neighbours had saved her and had transported her to the hospital. She had further deposed that the immediate motive of torching her body by the appellant was the illicit extra marital relationship with Guddi. PW4 has proved the dying declaration as Ext. Ka-3. He has also testified that he had taken the certificate of the doctor while recording the dying declaration. He had also narrated that during recording of declaration injured was fully conscious. His

testimony lend credence to the deposition of first informant, when he has testified that, at the time of recording of D/D statement, P.W.1 Dulichand was not present inside the ward. He had denied the suggestion that he had manipulated the dying declaration in connivance with the parental relatives of the deceased and the certificate of the doctor was obtained subsequent to the recording. PW4 has further deposed that he had got the inquest report and other papers of the deceased transcribed through S.I R.C. Verma which papers he has proved as Ext. Ka-9 and other relevant papers prepared simultaneously as Ext. Ka-20 to Ka-23. He has further deposed that after sealing the dead body he had dispatched it for post-mortem examination through Head Constable Brij Pal Singh at 10.30 a.m. He has stated that he had started the inquest on the dead body at 9.30 a.m.

Doctor H.S. Verma P.W.5, who had medically examined the appellant,has testified that he had

examined him on 5.6.2000 at 8.20 p.m. and had mentioned the same injuries as has already been noted above. He has proved the appellant's injury report, as Ext. Ka-4. In his cross-examination he has said that these injuries can be sustained by the appellant while saving an inflamed person.

Doctor P.N. Pariya P.W.6, who had admitted injured Munni Devi in the hospital and has given the certificate on the dying declaration has testified the said facts and had further deposed that on 10.6.2000 at 6.45.a.m. her death intimation, Ext. Ka-6, was sent by doctor S.K. Gupta to Inspector Kotwali, Hamirpur. P.W.6 has also deposed that on 5.6.2000 at 2 a.m. he was on emergency duty, when the deceased was brought to the hospital in a burnt condition by her mother. He has stated nature of burn injuries sustained by the deceased as noted by him in Ext. Ka 19, which were fresh and 100%. Her condition was poor, pulse rate was 80 per minutes and blood

pressure was not recordable. Smell of kerosene oil was emanating from her body. Skin had peeled off and there was excessive loss of water inside the body. He has further deposed that he had sent the message for recording of dying declaration in the night itself and *Naib Tehsildar* had reached the hospital at 5.00 a.m. when he was on duty and he had appended the certificate prior to the recording of dying declaration. He had denied the suggestion that he had appended the certificate in the column after recording of declaration.

Head Moharrir, Ram Avtar P.W.7 has testified regarding registration of first information report lodged by the informant on 5.6.2000 at 3.10 pm vide Ext. ka 7 and preparation of GD Ext. Ka 8. Nothing material has come out in his cross-examination, which can create suspicion regarding prosecution allegations. He had further deposed that informant had reached the police station alone to lodge the F.I.R. when I.O. Jiledar

Singh, S.I. was present. He has also admitted that at 2.40 a.m. an intimation was received from the hospital regarding admission of Munni Devi in a burnt condition.

I.O Jiledar Singh, S.I. P.W.9 has disclosed various investigatory steps taken by him as has already been inked above in the earlier part of this judgement and therefore we do not repeat the same. He has also proved Ext. Ka 17, conversion GD from 498A/307 to 498A/304B I.P.C. prepared by clerk Vishwanath and Ext. ka 18, GD of conversion of crime under section 302 from 498A/304B I.P.C. prepared by him on 11.6.2000. He has also deposed that he had recorded the interrogatory statement of the injured/ deceased, under section 161 Cr.P.C., on 6.6.2000. He has further testified that C.O. had ordered on 10.6.2000 to make further investigation vide Ext. Ka 14.He had denied the suggestion that he had not conducted a fair investigation and had wrongly converted the offence. He has also deposed that the appellant had burn

injuries at the time of his arrest. He has proved his charge sheet Ext. Ka 12 and other relevant documents. This witness was subjected to searching cross-examination but nothing material has come out of the same.

In his statement under Section 313 Cr.P.C., accused took the plea of total denial and had stated that Santosh had taken Rs.2000/- and, because of the fight between brother and sister, deceased had set herself ablaze. In his defence appellant has examined doctor P.N. Pariya(PW6) as DW1 and got the BHT(Bed Head Ticket)of the deceased proved as Ext. Kha-1. DW1 has testified that the deceased had died on 10.6.2000 at 3.15a.m. On being questioned by the court he has informed that when the dying declaration was being recorded then the patient was in a fit mental state and he has appended the certificate in that respect.

Additional Sessions Judge, court no.2, before

whom Session's Trial was transferred meanwhile, believed prosecution case in it's entirety and finding guilt of the appellant established beyond all reasonable doubt convicted him vide his order dated 29.8.2003 for committing offence under Section 302 I.P.C. and sentenced him to imprisonment for life with fine of Rs.5000/-. Hence, the present Jail Appeal in this court by the appellant challenging his conviction and sentence.

Sri V.S. Shrinet was appointed Amicus Curie to argue the appeal on behalf of the appellant and we have heard him at a great length and have perused the entire trial court as well as the record of this appeal. We have also heard Sri Raghuraj Kishore Mishra and Sri Manoj Kumar Dwivedi, learned AGA in opposition.

Assailing the impugned judgement of conviction and sentence it was contended by learned Amicus Curie that the conviction of the appellant is bad in law, as initially the FIR was registered under Section

498A/307 I.P.C., which was altered to 498A/304B I.P.C. and subsequently was further altered under Section 302 I.P.C. Learned counsel submitted that when charge of causing of dowry death failed and was found to be false then the I.O., in connivance with Circle Officer, implicated appellant in a charge of murder and trial court wrongly disbelieved defence theory and passed the impugned judgement and order which is indefensible. It is submitted that the prosecution witnesses are not reliable and they have embellished the allegations by levelling a false charge of causing deceased death and therefore all the fact witnesses cannot be relied upon being wholly untruthful. It was further argued that because the marriage was solemnized more than seven years ago, therefore, charge under Section 304 B I.P.C. could not have been framed against the appellant. It was further suggested that F.I.R. is the outcome of manipulation, consultation and fabrication and is delayed, therefore,

it has got no corroborative value at all. It was also argued that there was no eye-witness account of the actual putting to fire of the deceased, therefore, testimonies of three fact witnesses cannot be believed. It was further argued that the deceased had committed suicide because of the fight between brother and sister and appellant has been falsely implicated. Much argument was harangued on the injuries sustained by the appellant and it was canvassed vehemently that the appellant, in an endevour to save the deceased, had also sustained burn injuries, which unerringly is suggestive of his innocence and falsifies prosecution allegations. It was contended that P.W.1 Dulichand has admitted that when he had reached the police station appellant was already present there, which fact conspicuously supports defence case that appellant had gone to the police station to lodge his report regarding committing of suicide by the deceased but his FIR was not taken down and the police in connivance with the

informant implicated him falsely in a charge of murder. It was further argued that the dying declaration is a sham document and was manipulated in conspiracy with the informant to implicate the appellant in the crime. It was lastly contended that the offence of the appellant will not be covered under Section 302 I.P.C. and since appellant had remained in jail for nine years, since 5.6.2000, therefore, if an order of clean acquittal is not registered, then the charge under Section 302 I.P.C. be altered to one under Section 304 part 1 I.P.C. and sentence be commuted to the period of imprisonment already undergone. It was concludingly submitted that the present jail appeal be allowed and appellant be acquitted of the charge and be set at liberty.

Refuting the harangued contentions by learned amicus curie learned AGA retorted that it is case of blatant murder of his spouse by the appellant because of his lustrous character, all the fact witnesses are

reliable and they have no motive to falsely implicate the appellant. It was further submitted that the incident occurred inside the room where deceased and appellants were residing in the house of the informant and conduct of the appellant itself is indicative of his guilt and establish that but for him nobody else could have committed the murder. Defence of the appellant is so palpably false and absurd that it cannot be given any heed to at all submitted state counsel. It was next contended that when PW-1 was in the witness box no such suggestion was thrown to him that, because of discord with the brother, deceased had committed suicide and, the fact that the defence had no definite plea to raise during trial procedure,is a circumstance against the appellant and consequently trial judge has rightly rejected defence version. Inconsistent defence plea does not inspire any confidence and totality of proven facts surfaced appellant alone to be the perpetrator of the murder. Evidences further indicate

that the appellant at different stages was trying to fish out a defence when he himself was the murderer. Drawing the curtain of the argument it was pleaded by the state counsel that the Jail appeal lacks merits, as the guilt of the appellant is established beyound any shadow of doubt, and therefore appeal of the appellants being without substance be dismissed.

We have cogitated over rival submissions and in that light have perused the entire record and our findings and conclusions are as follows.

The first and foremost aspect of the case set up by the rival sides admit almost entire actual incident of deceased catching fire in the presence of the appellant,inside the room where she was residing with the appellant in informant's house .It is the defence case itself that the appellant was present at the time of the incident occurred and he endeavoured to save the deceased and in that process burnt himself. Since the law in this respect is very clear that the facts admitted

need not be proved , which has also been statutory provided under section 58 of The Evidence Act, therefore we have no hitch is concluding that the appellant alone was present inside the room at the time when the deceased caught fire. Further, time, place and date of the incident is also not disputed by the defence and therefore we take those facts also to be proved beyond any pale of doubt. Deceased was soaked with kerosene oil prior to lighting fire is also not disputed and therefore is an established fact. It is also not in disputed that the deceased died due to burn injuries. On such evidences, since major portion of the prosecution case is admitted to both the sides, what remains for us to be determined is only the contentious issue as to whether the deceased was set a blaze by the appellant because of his unchaste character and therefore she was caused homicidal death or that it is a suicide by her because of dispute with her brother over assets of the appellant.

On summation of evidence critically on contentious issue, we find that the two fact witnesses informant- Dulichand PW-1 and Sarju Devi PW-2 are the parents of the deceased. Their presence at the time of the incident in their house is most natural and highly probable. They have supported each other on all important aspects of prosecution allegations. Defence suggestion to the informant that he was not present at the spot at the time of the incident happened is hollow, without any preceding circumstance and therefore can not be believed. These witnesses had no enimous with the appellant to such an extent as to exonerate real culprit and falsely implicate him. Other wise also in the dead hour of night in the closed walls of a house only inmates can be present. Evidences of father and mother corroborate each other without any significant contradiction to discredit their testimonies. Both have been tested by the defence by searching and lengthy cross examinations but it has failed to elicit any thing

favourable to it. Both have deposed that when they reached the room, after hearing shrieks of their daughter, they witnessed appellant bolting the door from out side and seeing them he rushed out of the house. We have no reason to doubt this version by the parents who have lost their daughter in their own house. Such a conduct by the appellant is incompatible with his innocence, as it can not be a conduct of a husband , who according to his own version, attempted to save life of his wife. Evidence of PW 8 Jalil further lend credence to the prosecution version and supports our conclusion, as his deposition that the deceased, on inquiry being made by him, soon after the incident, when she was standing out side the room in a burnt physical condition, had informed him that appellant had set her to fire remains un-controverted. This disclosure by the deceased is in the nature of her oral dying declaration soon after the incident and is admissible under section 32(1) Of The Evidence Act

and can even be relied upon without corroboration, if believed, which we do. Since we find that the evidences of eye witnesses are unshaky, reliable and inspire confidence, we have no reason to discard it.

Another pointer of appellant's guilt is sustaining of injury by him in that very incident in which deceased has lost her life. Injury report of the appellant indicates that he had sustained dry flame injuries on his right face, right wrist joint, and hand, thumb, index finger and right knee. All these dry flame burns were superficial in nature being on outer surface of skin, may be on dermises. This establish appellant's presence inside the room where incident occurred. Why then appellant did not desist deceased from pouring kerosene oil on her and why he did not attempted to call house inmates and why after fire did not open the room immediately and pulled the deceased out to douse her fire are all circumstances indicating appellants involvement in the crime. It seems that in

an attempt to burn the deceased he got flame burns because of spurt of flame from kerosene combustibility. When we peep inside actual happening of the incident, to separate the grain from the chaff, we find that prosecution version of homicidal death is the likely outcome and defence of the appellant does not stand the test of scrutiny, which, to us, is palpably false. It is because of this reason that in his statement under section 313 Cr.P.C., appellant intentionally eschewed making a statement that he endeavoured to save the deceased when she had caught fire, albeit he made a vain attempt to probablise his such a defence by examining DW1, in which tryst he failed.

Another significant feature of the trial is that defence has failed to bring out any circumstance which may created doubt in our mind regarding the genuineness of the prosecution allegations. The deposition by PW1 and PW2, that they did not attempt to apprehend appellant but immediately open the door

to save life of their daughter is very natural and consistent with human conduct, and makes them natural and truthful witnesses. It was PW2, who had carried the deceased to the hospital. We, thus, find that because of lustrous attitude and extra marital relationship deceased had renounced appellant's company in district Banda and had returned to her parental house in district Hamirpur but the destiny shortened her life even there as well. The prosecution evidence clearly indicates that the parents PW-1 and PW-2 must be apprehending danger to the life of the deceased and therefore, they had given a room besides their own bedroom for her safety in their house. Their apprehensive cogitation must have multiplied also because of the fact that the deceased has two small daughters to foster. In such a view, we find that the deposition and the story set up by the prosecution is convincing and confidence inspiring.

Another important aspect of the prosecution case

is that the defence has not seriously challenged the existence of Guddi and her concubine relations with the appellant. When PW1 and PW 2 were in the witness box defence could not muster any courage to seriously challenge this part of prosecution story and it remains unchallenged. This gives a strong motive to the appellant to commit the charged offence.

Now turning towards dying declaration and criticism levelled against it we find that the evidence of PW-4 Shiv Charan Singh is unblemished. Although dying declaration is not in question answer form,for which it has been criticised by the learned amicus curie, but we find that the same is a silly mistake committed by PW-4 Shiv Charan Singh, who in no uncertain terms has testified that he had questioned the deceased and then had noted her replies. No suggestion was given by the defence to him that the dying declaration was not recorded by him. The case of the appellant is that the dying declaration is a

manipulated one. This suggestion by the appellant accused is bereft of any merit. Even the doctor DW1, who is an independent witness having no axe to grind against the appellant has supported PW-4 Shiv Charan Singh in respect of recording of D/D. He has negated defence suggestion of it being not recorded. He has deposed that during recording of said declaration deceased was in a fit state of mind. Further deposition by *Naib Tahsildar* is countenanced by evidence of PW 8, Jalil, who is also an independent witness belonging to another caste. He too had no motive to depose against the appellant. His evidence that the deceased informed him that the appellant had set her to fire goes unchallenged. More over statement of the deceased recorded by the I.O. under section 161 Cr.P.C. is also her D/D and by virtue of her death is admissible as such under section 32(1) Of The Evidence Act without formal proof. Thus even if PW 4 did not note deceased dying declaration in question answer form and got the

certificate by the doctor in column, that does not discredit prosecution version at all as there are other relevant admissible convincing evidences in that respect on the record. Criticism of Dying declaration recorded by PW4, it seems, was harangued by the learned amicus curie only to be repelled. We also believe the narration of facts mentioned in the dying declaration because the Doctor, who had appended certificate and who according to prosecution case was present at the time of recording of dying declaration by *Naib Tahsildar* was examined as DW1 and he has cemented prosecution allegation of recording of such a declaration by *Naib Tahsildar*. Thus testimonies of PW 4 coupled with those of PW 6, who is also DW 1, goes a long way to anoint charge of murder on the appellant. The contents of the dying declaration further lend credence to the prosecution allegation and indicate that the same is truthful narration of facts.

Some criticism was also levelled by the learned

amicus curie by pointing out that doctor had noted 100% burnt and therefore, thumb impression of the deceased on the dying declaration is a sham impression. This criticism by the learned amicus curie is demolished by his own witness DW-1. The doctor, PW6/ DW1 who had admitted the deceased in the hospital and was present in the ward at the time of recording of Dying declaration had clearly deposed that at the time of making the declaration deceased was in a fit state of mental condition. Defence did not question the doctor on thumb impression of the deceased on the dying declaration at all when he was examined as a prosecution witness. Thus we are not impressed by the argument of learned Amicus Curie that the dying declaration is a sham evidence.

Concluding argument by appellant's counsel regarding dilution of offence and sentence is wholly unmerited. Appellant had burnt alive his own spouse by pouring kerosene oil because of his unchaste

character and then bolted the room door from outside so that the deceased meets her instantaneous death,therefore, his crime can not be diluted to a lesser offence and consequently the last submission of amicus-curie is hereby repelled.

We also reject the argument that charge in alternative cannot be framed. It is trite law that a charge in alternative can always be framed. This aspect of the matter has been cemented by the judgement of the Apex Court, where it has been laid down categorically that a charge in alternative under section 304B/302 IPC can always be framed. More over we find that no prejudice has been caused to the appellant by convicting him of the charge of murder. He knew the allegations against him from the very inception of the trial. When charge was framed in alternative he did not raise any grievance in that respect nor challenged that order in higher forum. Since we find that no prejudice has been caused to the appellant by framing

alternative charge we can not throw entire prosecution case overboard. In this respect we refer and rely upon a representative decision of the apex court in **Balbir Singh and Anr. v. State of Punjab:AIR 2006 SUPREME COURT 3221** wherein it has been held as follows:-

"39. The said decision has also no application in the instant case. As the Appellants had the requisite knowledge of the charges against them, it may or may not be justifiable for the learned Trial Judge to frame an alternative charge, but from what we have noticed herein before evidently they were not prejudiced in any manner whatsoever.

40. Effect of framing of alternative charges vary from case to case. In the peculiar facts of present case, we are of the opinion that Appellants having not raised any grievance at any stage in that behalf, they cannot be allowed to do so at this stage."

Another argument by learned amicus-curie is that

there is no eye-witness account of the incident and the deceased committed suicide is wholly unappealing. We reject it out right as being wholly unmerited. Incident had occurred inside a room where the deceased was present only with the appellant and, since we have come to the conclusion that it is a homicidal death, the only inescapable result is that it was the appellant who had ablazed the deceased. There was no ostensible reason for the deceased to commit suicide, as the suggestion of lending the money and the discord between the brother and the sister is without any prefix and suffix. The bolting of the door from outside is indicative of appellant's guilty mind. He had rushed to the police station to save his skin,if , caught at the spot which also indicates his guilty intention, as he also wanted to feign a defence for his guilt.

On an overall consideration, we find that the recorded conviction of the appellant does not call for any interference by us and therefore, we affirm trial

court's judgement of conviction and sentence. How ever we find that the trial court has committed an error in not passing any sentence to be under gone by the appellant in case of default in payment of fine and therefore we order that besides sentence of life imprisonment to be under gone by the appellant for offence under section 302 I.P.C. he shall under go six months further imprisonment in case of default in payment of fine.

The appeal lacks merit. It is dismissed with above modification in his sentence. Appellant is in jail. He shall remain in jail to serve out remaining part of his sentence.

Let a copy of this judgement be certified to the trial court for it's intimation.

Dt.15.3.2010
Rk/ 6365/08.