

**IN THE HIGH COURT OF MADHYA PRADESH
AT INDORE**

BEFORE

HON'BLE SHRI JUSTICE VIVEK RUSIA

&

HON'BLE SHRI JUSTICE ANIL VERMA

CRIMINAL APPEAL No. 1094 of 2015

BETWEEN:-

**IRFAN S/O MOHD. IQBAL
AGED ABOUT 32 YEARS,
OCCUPATION – LABOUR,
R/O: 9th STREET, CHANDUWALA
ROAD, CHANDAN NAGAR,
INDORE (MADHYA PRADESH)**

.....APPELLANT

(BY SHRI M.K. KHOKAR - ADVOCATE)

AND

**THE STATE OF MADHYA PRADESH
THROUGH P.S. CHANDAN NAGAR,
INDORE (MADHYA PRADESH)**

.....RESPONDENT

(BY SHRI TARUN KUSHWAH – GOVERNMENT ADVOCATE)

Reserved on : 30/11/2023

Pronounced on : 06/12/2023

*This appeal having been heard and reserved for orders, coming on for pronouncement this day, **JUSTICE ANIL VERMA** pronounced the following:*

JUDGMENT

The appellant has preferred the present Criminal Appeal under Section 374 of the Code of Criminal Procedure, 1973 (in short

“Cr.P.C.”) against the impugned judgment dated 30.6.2015 passed by the Special Judge (under SC/ST Prevention of Atrocities Act), Indore in S.T. No.227/2010, whereby the appellant has been convicted for the offence under Section 302 of the Indian Penal Code, 1860 (in short “IPC”) and sentenced to undergo Life Imprisonment with fine of Rs.1,000/-, with usual default stipulation.

2. The prosecution story, in brief, is that marriage of the deceased Jarina Bi was solemnized with the appellant Irfan about two and half years prior to the incident. Appellant often used to consume liquor and committed Marpit with the deceased in drunken condition and threatened her for life. On 18.12.2009 at about 9.00 p.m. when the deceased Jarina was at home at that time appellant Irfan along with co-accused Altaf came there and started quarrel on the issue of preparing dinner. When she told that she wants to get divorce from the appellant, then co-accused Altaf said to appellant that why do not you kill her. Then appellant Irfan poured kerosene oil upon her and set her ablaze and fled away from the spot. Jarina was brought to the District Hospital, Indore in the burnt condition. Dr. B.K. Trivedi after giving some primary treatment, referred her to M.Y. Hospital, Indore. Dying declaration of the deceased has been recorded by Tehsildar Mr. Sudeep Meena (PW-10), in which deceased categorically stated that appellant Irfan set her ablaze after pouring kerosene oil upon her. After some time deceased during the treatment succumbed in the M.Y. Hospital.

3. Further prosecution story is that on the basis of the death information of the deceased, Merg Intimation No.102/2009 has been registered at P.S. Chandan Nagar, Indore. Tehsildar Satyendra Singh

(PW-11) prepared Lash Panchayatnama (Ex.P/3) and sent the dead body of the deceased for postmortem. Dr. N.M. Unda (PW-5) conducted the postmortem of the deceased and found that complete body of the deceased was burnt except some parts and burns were ante mortem. He opined that deceased died due to the respiratory failure as a result of the burn injuries and failure of the heart. Half burnt Salwar, broken pieces of bangles, a Payjeb, broken match stick and a plastic can containing some smell of kerosene has been recovered from the spot through seizure memo (Ex.P/9). Accused was arrested. Hairs and viscera of the deceased along with other seized articles have been sent to the FSL, Sagar for its chemical examination.

4. After completion of the investigation, charge sheet has been filed before the Judicial Magistrate First Class, Indore, who has committed the case to the Court of Sessions. Later on the case has been transferred to the Special Judge (under SC/ST Prevention of Atrocities Act), Indore. The trial Court has framed the charges under Section 302 of IPC against the appellant Irfan and charges under Section 302/34 of IPC has been framed against the co-accused Altaf. After completion of the trial and scrutinizing the evidence available on record, the trial Court has acquitted the co-accused Altaf from all the charges, but convicted and sentenced the appellant Irfan as mentioned herein-above. Therefore, this criminal appeal has been filed.

5. Learned counsel for the appellant submits that the judgment of the trial Court is contrary to the law and facts on record. It is neither legal, nor proper, nor correct. There is no eyewitness in the said incident. Appellant himself brought the deceased to the hospital to save her life.

Jarina was 90% burned and she was not in a fit condition to depose any dying declaration. The dying declaration was not certified by the treating doctor regarding her mental fitness. Therefore, dying declaration cannot be relied upon because at the time of admission in the hospital, Jarina was completely unconscious, but all these aspects were not considered by the trial Court. At the time of incident Jarina was cooking the food and she picked up a can of kerosene oil and while filling the oil in the stove, accidentally the can fell down on the stove and due to this incident, she has been burnt. This fact has been proved by the evidence available on record. There are material contradictions and omissions in the statements of the prosecution witnesses. Prosecution even not proved the motive of the crime. Hence, he prays that the appeal be allowed and the appellant be acquitted from all the charges.

6. Per contra, learned counsel for the State opposes the prayer by submitting that the trial Court after appreciating the entire evidence available on record in detail, has come to the conclusion that the deceased was murdered by her husband/appellant. The trial court has not committed any error, therefore, the present appeal deserves to be dismissed.

7. Learned counsel for both the parties heard at length and perused the entire record of the trial court with due care.

8. We find that the following questions emerge for consideration:-

(i) Whether, the death of the deceased is homicidal in nature or not?

(ii) Whether, the appellant has committed the murder of the deceased or not?

9. Dr. B.K. Trivedi (PW-7), who has conducted the MLC of the victim Jarina, has stated that on 18.12.2009 during the examination of the victim Jarina, he found that smell was coming from her body and clothes. There was 63% superficial burn. There was 9% burn on neck and face, 18% on the abdomen and chest, 18% on the back side of the body and 18% on both the upper limbs. His MLC report is Ex.P/10. After giving primary treatment, he has referred the victim to M.Y. Hospital, Indore for further treatment.

10. In the instant case Dr. N.M. Unda (PW-5), who conducted the postmortem of the deceased, has stated that rigor mortis was present at the initial stage. Face, neck, breast, thigh, legs, both the hands were found burnt except some parts of the breast. Back portion of the right hand, lower portion of the waist, fingers and thumb of both the hands and some other parts were also burnt. The burn was ante mortem. The doctor opined that the deceased died due to the respiratory failure as a result of the burn injuries and failure of the heart. The postmortem report is Ex.P/8. Dr. N.M. Unda (PW-5), in his cross-examination, clarified that the burn was classified from 1 to 3 degree and some infection was found there. The statement of Dr. N.M. Unda (PW-5) is not seriously challenged by the appellant during his cross-examination, therefore, there is no ground to disbelieve the statement of Dr. N.M. Unda (PW-5). Hence, on the basis of the statement of Dr. N.M. Unda

(PW-5) and autopsy report (Ex.P/8), it has been proved that the deceased was 90% burnt and she has been died due to the respiratory failure as a result of deeply burn. Therefore, on the basis of the aforesaid medical evidence, it is found proved that death of the deceased was homicidal in nature.

11. It is noteworthy that there is no eyewitness in the instant case and the case of the prosecution is based upon the dying declaration deposed by the deceased soon before her death. So far as the relation of the appellant with his wife/deceased is concerned, it is admitted fact that deceased got married with the appellant about two and half years prior to the incident. Abdul Aziz (PW-1), who happens to be father of the deceased, categorically stated in his statement that after the marriage of his daughter Jarina with appellant Irfan, some days they lived happily, but thereafter appellant used to beat and tease her, but after reassuring Jarina he sent her back to her husband's home. Abdul Rashid (PW-2), brother of the deceased, also deposed that after the marriage appellant used to make quarrel with Jarina after consuming liquor. Rehana Bi (PW-3), mother of the deceased, also deposed that appellant oftenly commit Marpit with Jarina. Abdul Hafiz (PW-4), another brother of the deceased, deposed that his sister Jarina has been got married with the appellant. Appellant did not examine any neighbours or his family members to establish that the relationship between the Jarina and appellant was happy. Therefore, in absence of the defence evidence, there is no reason to disbelieve the statement of the aforesaid witnesses. From the statement of the parents and brothers of the deceased, it appears that after the marriage relationship of the deceased with the

appellant were very stressful and appellant used to commit Marpit with her after consuming liquor. It may be motive for committing aforesaid offence.

12. Abdul Aziz (PW-1), Abdul Rashid (PW-2), Rehana Bi (PW-3) and Abdul Hafiz (PW-4) all these witnesses deposed in the same manner that when they reached at M.Y. Hospital, Indore, they saw Jarina in burnt condition and Jarina told them that appellant Irfan poured kerosene oil upon her and set her ablaze due to the dispute arising for preparation of the food. There is no material contradictions and omissions in the statements of all these witnesses regarding the narration made by the deceased prior to her death before them. Therefore, there is no reason to disbelieve the aforesaid statement of the prosecution witnesses.

13. It is the settled position of the law that the dying declaration, which inspire confidence, needs no corroboration to sustain itself. The dying declaration of the deceased was corroborated by the Tehsildar Mr. Sudeep Meena (PW-10). He deposed that he got intimation (Ex.P/14) from the P.S. Chandan Nagar for recording the dying declaration of the victim Jarina. After receiving the said information, he went to the M.Y. Hospital, Indore and recorded the dying declaration (Ex.P/15) of Jarina, which starts on 12 p.m. in the afternoon and ends on 12.10 p.m.

14. Learned counsel for the appellant submits that regarding the mental fitness of the deceased Jarina while recording her dying declaration, it was not certified by any doctor. The deceased was

remained unconscious in the hospital for the whole time prior to her death, therefore, she was not in a good condition to depose such dying declaration and in such circumstances, the alleged dying declaration appears to be doubtful and it cannot be relied upon.

15. But from the statements of Abdul Aziz (PW-1), Abdul Rashid (PW-2), Rehana Bi (PW-3) and Abdul Hafiz (PW-4) it appears that Jarina was conscious when she was admitted in the hospital and she talked with them in a proper state of mind. Dr. B.K. Trivedi (PW-7) who has conducted the MLC of the victim Jarina, deposed in para-5 of his deposition that when the victim Jarina was brought before him for examination, she was in a condition to speak and she was not in unconscious condition. Therefore, from the statement of Dr. B.K. Trivedi (PW-7) and other witnesses, it appears that victim Jarina was in mentally fit condition while making such dying declaration.

16. Hon'ble the Apex Court in the case of **Atbir Vs. Government of NCT of Delhi, (2010) 2009 SCC 1** has summarized the principles laid down earlier, as under:

“(i) Dying declaration can be the sole basis of conviction if it inspires the full confidence of the Court.

(ii) The Court should be satisfied that the deceased was in a fit state of mind at the time of making the statement and that it was not the result of tutoring, prompting or imagination.

(iii) Where the Court is satisfied that the declaration is true and voluntary, it can base its conviction without any further corroboration.

(iv) It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence.

- (v) Where the dying declaration is suspicious, it should not be acted upon without corroborative evidence.
- (vi) A dying declaration, which suffers from infirmity such as the deceased was unconscious and could never make any statement cannot form the basis of conviction.
- (vii) Merely because a dying declaration does not contain all the details as to the occurrence, it is not to be rejected.
- (viii) Even if it is a brief statement, it is not to be discarded.
- (ix) When the eyewitness affirms that the deceased was not in a fit and conscious state to make the dying declaration, medical opinion cannot prevail.
- (x) If after careful scrutiny, the Court is satisfied that it is true and free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal impediment to make it the basis of conviction, even if there is no corroboration.”

17. Obviously it is the duty of the investigating officer to obtain the medical certificate regarding mental and physical fitness of the victim Jarina to depose the dying declaration, but the same was not obtained. It is a lapse on the part of the investigating officer, but Dr. B.K. Trivedi (PW-7) has also examined the victim just prior to recording her dying declaration, therefore, such lapse by the investigating officer cannot be a ground for discarding the entire prosecution evidence, which is otherwise credible and cogent. In the case of **Nankaunoo Vs. State of U.P. reported in 2016(3) SCC 317** it has been held that any omission on the part of investigating officer cannot go against the prosecution case and the story of the prosecution is to be examined dehors such omissions by the investigating agency. Otherwise it would shake the

confidence of the people not merely in the law enforcing agency but also in the administration of justice.

18. Therefore, on the basis of the statement of Dr. B.K. Trivedi (PW-7), MLC report of the victim (Ex.P/10), statements of Abdul Aziz (PW-1), Abdul Rashid (PW-2), Rehana Bi (PW-3) and Abdul Hafiz (PW-4) and dying declaration (Ex.P/15) of the deceased, it is proved that at the time of recording the dying declaration Jarina was conscious and mentally fit to give the statement. Dying declaration (Ex.P/15) recorded by the Tehsildar Mr. Sudeep Meena (PW-10) has a corroborative value, therefore, we do not find any irregularity or illegality in the said dying declaration. The dying declaration is a substantive piece of evidence and it may be sole basis for conviction if found reliable as has been held in the case of **Ramesh and others Vs. State of Haryana reported in 2017 Cr.L.J. 352.**

19. It is also noteworthy that although appellant Irfan stated that when the deceased was burning, he tried to save her by extinguishing fire and brought her to the hospital. If actually appellant tried to save the deceased, it is quite natural that he would have got some burn injuries on his hands or any other part of the body, but he did not sustain any burn injuries. Therefore, such defence taken by the appellant cannot be relied upon. It is also to be seen that deceased died within 7 years of her marriage with the appellant, therefore, presumption under Section 114 of the Indian Evidence Act can be drawn against him and the husband must prove that he is not responsible for death of his wife.

20. It is the settled position of law that if the unnatural death of the wife takes place within 7 years of the marriage and she dies in her matrimonial house, where she resides with her husband, then the burden lies upon the husband to explain the unnatural situation in which his wife has been died in his bed room, but he made no attempt to do this. Although appellant has taken defence that co-accused Altaf has murdered his wife, but the presence of Altaf at the time of incident is not proved. Even the deceased Jarina did not mention in her dying declaration regarding any active participation of Altaf at the time of incident. Appellant did not produce any evidence in his rebuttal. Therefore, trial court has rightly reached to the conclusion that appellant has failed to explain the circumstances of unnatural death of his wife. Therefore, the trial court has rightly drawn presumption under Section 106 of Indian Evidence Act against the appellant.

21. Half burnt Salwar, broken pieces of bangles, a Payjeb, match stick and a plastic can of kerosene oil was recovered from the place of incident, which is the house possessed by the appellant. Seizure is made by the DSP Ajay Kaithvas (PW-12). The seized articles were sent to the FSL for its chemical examination and as per the FSL report (Ex.C/1) smell of kerosene oil was found in the half burnt clothes, can and match stick, which also proves involvement of the appellant in the crime.

22. After considering all the facts and circumstances and evidence available on record, we are of the opinion that there is no ground or merit to interfere in the findings of the learned trial court. The learned trial court has rightly convicted the appellant for committing murder of the deceased. Number of the burn injuries, cause of death of the

deceased, recovery of the incriminating articles from the bedroom of the appellant and stressful relationship between the appellant and his wife/deceased, all these facts and evidence clearly establish the intention of the appellant to cause death of his wife/deceased.

23. In view of the foregoing analysis and in the light of the principles laid down by the Hon'ble Apex Court in the aforesaid cases, we find that no case is made out to interfere in the findings of the learned trial court. Hence, this appeal against the conviction of the appellant deserves to be dismissed and accordingly it is dismissed.

24. The order regarding disposal of the property shall be as per the order of the trial Court.

25. Registry is directed to send a copy of this judgment to the trial Court along with the record for information and necessary compliance.

(VIVEK RUSIA)
JUDGE

(ANIL VERMA)
JUDGE