IN THE HIGH COURT OF ORISSA, CUTTACK

JCRLA No.12 of 2014

An appeal under section 374 Cr.P.C. from the judgment and order dated 20.12.2012 passed by the Additional Sessions Judge, Rourkela in Sessions Trial No.132 of 2011.

Sunita Mundari ..... Appellant

-Versus-

State of Odisha ..... Respondent

For Appellant: - Mr. Biswajit Nayak
Advocate

For Respondent: - Mr. Rajesh Tripathy
Addl. Standing Counsel

P R E S E N T:

THE HONOURABLE MR. JUSTICE S.K. SAHOO

AND

THE HONOURABLE MR. JUSTICE CHITTARANJAN DASH

Date of Hearing: 26.06.2024 Date of Judgment: 04.07.2024

S.K. Sahoo, J. The appellant Sunita Mundari faced trial in the Court of learned Additional Sessions Judge, Rourkela in Sessions Trial No.132 of 2011 for commission of offence punishable under

section 302 of the Indian Penal Code (hereinafter 'I.P.C.') on the accusation that on 27/28.06.2011 in village Jhirpani, she committed murder by intentionally causing the death of her husband Mangal Mundari (hereinafter, 'the deceased').

The learned trial Court vide impugned judgment and order dated 20.12.2012 has been pleased to hold the appellant guilty of the offence charged and sentenced him to undergo imprisonment for life.

Prosecution Case:

2. The prosecution case, as per the first information report (hereinafter 'F.I.R.') (Ext.3) presented by Laxmi Badaik (P.W.15), the second wife of the deceased before the Inspector in-charge of Jhirpani police station on 29.06.2011, is that she was married to the deceased since last twenty years. The deceased used to reside with his first wife (appellant) and their children in village Jhirpani. The appellant used to quarrel with the deceased for which the deceased had built a separate house at Tungritola, Jagda where P.W.15 used to reside. At times, P.W.15 used to visit the deceased and his children at Jhirpani. On 27.06.2011, P.W.15 came to the house situated at Jhirpani at about 8.00 p.m. and after having the dinner, she went to sleep with the deceased in the inner room. The son of the deceased,

namely, Siki (P.W.7) slept in the front/passage room adjacent to the spot room while the appellant along with her daughter Binika slept on the outer verandah. Around the midnight, when P.W.15 woke up to urinate, she found the appellant in the front/passage room where P.W.7 was sleeping. Finding the appellant in that room, P.W.15 enquired from her as to why she was standing there but the appellant did not give any reply. While she was returning after passing urine, she heard the shout of the deceased and rushed inside the house and found the appellant coming out of the inner room with severe burnt injuries in a naked condition. In the meantime, P.W.7 woke up and helped the deceased to lie on the ground. P.W.15 along with P.W.7 tried to extinguish the fire from the body of the deceased. P.W.15 then enquired from the deceased as to how he caught fire on his body to which the latter replied that the appellant poured kerosene on his body and set him on fire. P.W.7 called an auto-rickshaw in which he along with P.W.15 took the deceased to Sahu clinic and then to C.W.S. Hospital, however, the doctor referred the deceased to Ispat General Hospital, Rourkela and accordingly, the deceased was admitted in I.G.H., but during the course of the treatment, on 28.06.2011, the deceased succumbed to his injuries. P.W.15 stated in the F.I.R. that the

appellant poured kerosene and set the deceased on fire for which he sustained severe burn injuries which led to his death.

On receipt of the written report of P.W.15, the Inspector in-charge of Jhirpani police station, namely, Anil Kumar Pradhan (P.W.14) registered Jhirpani P.S. Case No.44 dated 29.06.2011 under section 302 of the I.P.C. and he himself took up investigation of the case.

During the course of investigation, P.W.14 examined the informant (P.W.15) and other witnesses and requisitioned the District Scientific Officer for appraisal of crime scene. He visited the spot, seized the half burnt clothes and on 30.06.2011, he arrested the appellant and recorded her statement under section 27 of the Indian Evidence Act and recovered a green colour plastic jerrican containing 300 ml. of kerosene near a brick heap from the backside of the spot house at the instance of the appellant and seized it as per seizure list Ext.5. He held inquest over the dead body of the deceased in presence of the witnesses and prepared the inquest report marked as Ext.1 and sent the dead body for post mortem examination and forwarded the appellant to Court. On 10.07.2011, he received the post mortem examination report marked as Ext.11. On 29.07.2011, he seized the bed head ticket of the deceased from the I.G.H.,

Rourkela as per seizure list marked as Ext.6 and on 26.08.2011, P.W.14 handed over the charge of investigation to the S.I. of Police Anima Sahu (P.W.12). On 01.09.2011, P.W.12 seized the sample packets and the exhibits were sent to R.F.S.L., Sambalpur for chemical examination and received the chemical examination report marked as Ext.10 and on completion of investigation, submitted the charge sheet under section 302 of the I.P.C. against the appellant on 25.10.2011.

Framing of Charges:

3. After submission of charge sheet, the case was committed to the Court of Session after complying due formalities. The learned trial Court framed charge against the appellant as aforesaid and since the appellant refuted the charge, pleaded not guilty and claimed to be tried, the sessions trial procedure was resorted to prosecute her and establish her guilt.

Prosecution Witnesses, Exhibits and Material Objects:

4. During the course of trial, in order to prove its case, the prosecution has examined as many as fifteen witnesses.

P.W.1 Chhotray Mundari is a neighbour of the appellant who stated that there used to be hot exchange of words among the appellant, the deceased and P.W.15. He

further stated to have come to know that the deceased had received severe burn injuries for which he came to the hospital to meet him. Subsequent to the death of the deceased, the police conducted inquest over the dead body of the deceased and he is a witness to the preparation of inquest report vide Ext.1.

P.W.2 Dharam Mundari stated that P.W.15 used to visit the house of the appellant. He also stated that in the evening hours of 28.06.2011, he heard that the deceased received serious burn injuries. He is a witness to the conduct of inquest over the dead body of the deceased.

P.W.3 Saul Lugun is an auto-rickshaw driver, who stated that at about 1.15 a.m. of 27/28.06.2011, P.W.7 came to him and informed that the deceased had received burn injuries and sought for his help. He further stated that he took the deceased being accompanied by P.W.7, P.W.15 and daughter of the appellant Binita to Sahu Clinic at Jhirpani and then to C.W.S. Hospital at Jagda and as advised by the doctor, they took him to I.G. Hospital. He also said that the deceased was semi-conscious at that time. Furthermore, he stated to have learnt from P.W.7 that the appellant had set the deceased on fire. He is a witness

to the seizure of half-burnt blanket and mattress as per seizure list Ext.2.

P.W.4 Prakash Chandra Mundari is the scribe of the F.I.R., who stated that the deceased and the appellant used to stay at village Jhirpani and the P.W.15 used to visit their house. He further stated that there used to be frequent quarrel between the appellant and P.W.15 and also between the appellant and the deceased at times. In the morning of 28.06.2011, he came to know that the deceased had received burn injuries and he had been taken to the hospital.

P.W.5 Karan Mundari is a neighbour of the deceased and the appellant. He stated that in the morning hours of 30.06.2011 at Jhirpani police station, the appellant confessed her guilt and she also revealed that the kerosene was kept inside a jerrycan which she concealed by the side of a brick heap near her house. He also stated that the appellant led him and the police party to the place and gave recovery of the jerrycan.

P.W.6 Archana Mundari is the niece of the deceased. She stated that on being informed about the incident, she went to the house of the deceased where she saw the deceased being shrouded with some clothes and pleading for his life.

P.W.7 is the son the appellant and the deceased. He stated that the deceased used to stay mostly with P.W.15 and occasionally, visited the Jhirpani house. He further stated that on the date of occurrence, the deceased along with P.W.15 came to the house of the appellant and stayed there in the night. During midnight at about 1.00 a.m., he woke up hearing commotion and found the deceased severely burnt and was in a naked condition and then he arranged auto-rickshaw and shifted the deceased to the hospital and got him admitted in I.G.H., Rourkela.

P.W.8 Taramani Mundari is the sister-in-law of the deceased. She stated that in the midnight of the occurrence, P.W.15 came to her house and informed that the appellant had set the deceased on fire. She went to the house of the deceased and found him badly burnt. She further stated that he was pleading for his life but he could not state anything else.

P.W.9 Pahana Oram is a neighbour of the appellant and he did not support the prosecution case for which he was declared hostile.

P.W.10 Giri Gouda expressed his ignorance about the facts which led to the death of the deceased. He is a witness to the preparation of the inquest report vide Ext.1.

P.W.11 Kiran Kumar Nayak was working as the Assistant Sub-Inspector of Police at Jhirpani police station. He is a witness to the seizure of bed-head ticket of the deceased from the I.G. Hospital. He is also a witness to the seizure of samples made by the scientific team as per seizure list Ext.8.

P.W.12 Anima Sahu was working as the Sub-Inspector of Police at Jhirpani police station. She is the second investigating officer in this case and she took over the charge of investigation from P.W.14. Upon completion of investigation, she submitted charge sheet against the appellant on 25.10.2011.

P.W.13 Dr. Sandipana Satpathy was posted as the Medical Officer, S.D. Hospital, Panposh. On police requisition, she conducted post mortem examination over the dead body of the deceased and proved her report vide Ext.11.

P.W.14 Anil Kumar Pradhan was working as the I.I.C. of Jhirpani police station and he is the initial investigating officer of the case. Upon his transfer, he handed over the charge of investigation to P.W.12.

P.W.15 Laxmi Badaik is the second wife of the deceased and also the informant in this case. She was residing at Jagda and she stated that the deceased used to live either with the appellant or with her. She also stated that she and the

appellant were in visiting terms with each other. She stated about the dying declaration made by the deceased implicating the appellant. She is also a witness to the preparation of the inquest report vide Ext.1.

The prosecution exhibited twelve documents. Ext.1 is the inquest report, Ext.2 is the seizure list in respect of half burnt blanket, half burnt mattress and half burnt pati, Ext.3 is the F.I.R., Ext.4 is the statement of the appellant, Ext.5 is the seizure list in respect of jerrycan, Ext.6 is the seizure list in respect of the bed head ticket of the deceased from the I.G.H. Rourkela, Ext.7 is the bed head ticket, Ext.8 is the seizure list in respect of one sealed packet containing the portion of burnt wearing apparel and a match box having match stick and one sealed packet containing portion of burnt blanket, Ext.9 is the forwarding letter to R.F.S.L., Sambalpur, Ext.10 is the spot visit report of Scientific Officer containing rough diagram of the spot house, Ext.11 is the post mortem report and Ext.12 is the examination report of Scientific Officer.

The prosecution also proved three material objects. M.O.I is the half burnt blanket, M.O.II is the packet containing a match box and half burnt portion of wearing apparels and M.O. III is the green coloured jerrycan.

Defence Plea:

5. The defence plea of the appellant is one of denial. Defence has neither examined any witness nor exhibited any document.

Findings of the Trial Court:

6. The learned trial Court after assessing the oral as well as documentary evidence on record, held that the motive of the appellant was clear as she was jealous of P.W.15 for having diverted her husband's affection from her and had nursed grudge for over a decade and thus, the motive for the crime has been established by the prosecution. It was further held that there is no material on record that the appellant had at any point of time attended her dying husband. It was further held that though the occurrence took place in the intervening night of 27/28.06.2011 and the F.I.R. was lodged on 29.06.2011 but since the informant was concerned with the treatment and recovery of the deceased husband and after his demise, it would have taken some time to regain her composure and after spending a night in grief and bereavement, she thought of reporting the matter to the police, it can be said that delay has been properly and satisfactorily explained by the prosecution and it did not affect the prosecution case. Without discussing the evidence on record as to how far

the prosecution has proved each of the circumstances as jotted down in paragraph 9 of the impugned judgment to drag in the appellant in the commission of the crime, the learned trial Court jumped to the conclusion that the appellant is guilty of the offence punishable under section 302 of the I.P.C.

Contentions of the Parties:

7. Mr. Biswajit Nayak, learned counsel appearing for the appellant submitted that the case is based on circumstantial evidence and the main circumstance appearing against the appellant is the dying declaration stated to have been made by the deceased before P.W.15 implicating the appellant to have poured kerosene on him and set him on fire by striking a match stick, but the evidence of P.W.15 is full of contradictions and there are many suspicious feature in her evidence and there was also motive on the part of P.W.15 to implicate the appellant falsely in the crime and therefore, P.W.15 cannot be said to be an absolutely reliable witness. He further argued that P.W.15 stated to have noticed the appellant in the inner room (where she along with the deceased was sleeping) when she woke up at 12.00 midnight and went out to urinate and returned back and heard the dying declaration from the deceased who was in a burnt condition, but the evidence of P.W.7, the son of the

deceased as well as the appellant who was sleeping in the adjacent front/passage room to the spot room at the time of occurrence and also woke up after hearing commotion and called others to the spot, is totally silent regarding any such dying declaration being made by the deceased as deposed to by P.W.15. Learned counsel further argued that the appellant was sleeping outside on the veranda of the house and P.W.7 has stated that hearing the shout, the appellant came from outside and poured water on the deceased and she was also weeping sitting outside the house and this conduct of the appellant proves her non-involvement in the crime in question, which has not been given any importance by the learned trial Court. Learned counsel further argued that even though P.W.8 has stated that P.W.15 came and told her that the appellant set fire to the deceased for which she went to the house of the deceased, but the same is not corroborated by P.W.15 rather P.W.7 has stated that he rushed to the house of P.W.8 and gave the information. Learned counsel further argued that even though P.W.3 has stated that P.W.7 told him in the hospital that the appellant had set fire to the deceased but the same can be stated to be a hearsay evidence inasmuch as neither P.W.7 has stated to have disclosed any such thing before P.W.3 nor P.W.7 has himself

stated to have got any knowledge that the appellant had set fire to the deceased rather he stated that he had no knowledge as to how his father (deceased) received burn injuries. Learned counsel further argued that the jerrican which is stated to have been seized at the instance of the appellant from the backside of the spot house near a heap of bricks is a doubtful feature inasmuch as though P.W.5, a witness to the seizure of such jerrican has stated that it contained 20 to 30 ml. of kerosene, whereas the I.O. (P.W.14) has stated in his evidence that the jerrican was containing 300 mls. of kerosene. It is submitted that since the kerosene jerrican was lying in an open space and not in a concealed condition out of visibility of others in normal circumstances, it cannot be said to be within the exclusive knowledge of the appellant and therefore, it cannot be utilized under section 27 of the Evidence Act against the appellant. It is argued that in view of the suspicious feature available on record and the nature of circumstances proved by the prosecution, it cannot be said that the circumstances taken together form a complete chain so as to irresistibly come to the conclusion that it is the appellant, who is the author of the crime and therefore, it is a fit case where benefit of doubt should be extended in favour of the appellant.

Mr. Rajesh Tripathy, learned Additional Standing Counsel appearing for the State of Odisha, on the other hand, supported the impugned judgment and submitted that since the deceased was spending most of the time with P.W.15, who was the second wife, the appellant being the first wife might have nursed grudge against P.W.15 and she must have also grievance against her husband (deceased), which can be said to be the motive behind the commission of crime. Learned counsel further argued that the evidence of P.W.15 not only establishes the presence of the appellant inside the spot room but also the evidence relating to dying declaration, which is deposed to by her is very clinching and the same finds place in the first information report lodged by P.W.15. Learned counsel further argued that since the appellant did not take any steps to save the life of the deceased and she did not even accompany the deceased to the hospital, this conduct is also very relevant which points towards the guilt of the appellant. Learned counsel further argued that taking advantage of the absence of P.W.15 from the spot room for a short period when P.W.15 had gone to pass urine during the midnight, the appellant committed the crime and poured kerosene on the deceased, who was sleeping and set him on fire and left that place and she was found to be having a

satisfying smile as deposed to by P.W.15, which are also very clinching evidence against the appellant. It is further argued that the wearing apparels of the deceased so also the blanket, which was found in a burnt condition and the jerrycan were seized by the police during course of investigation and those were sent for chemical examination and the report (Ext.12) indicates that kerosene was detected in all the exhibits which supports the prosecution case that kerosene was used for setting fire to the deceased. Learned counsel further argued that the plastic jerrican was seized at the instance of the appellant from near the brick heap by the police from the backside of the spot house and it was within the knowledge of the appellant as there was every possibility on her part to throw the same after committing the crime. Learned counsel further argued that there are clinching circumstances available on record and the conduct of the appellant and the dying declaration evidence form a complete chain and it points out towards the guilt of the appellant and therefore, the learned trial Court has rightly found the appellant guilty of the offence charged and the appeal should be dismissed.

Principles for appreciation of circumstantial evidence:

8. Adverting to the contentions raised by the learned counsel for the respective parties, there is no dispute that there is no direct evidence relating to the commission of murder of the deceased and the case is based on circumstantial evidence. It is the settled principle of law as held in the case of **Sharad Biridhichand Sarda -Vrs.- State of Maharashtra reported in A.I.R. 1984 Supreme Court 1622** that the circumstances from which the conclusion of guilt is to be drawn against the accused should be fully established. The facts so established should be consistent only with the hypothesis of the guilt of the accused and they should not be explainable on any other hypothesis except that the accused is guilty. The circumstances should be a conclusive nature and tendency and they should exclude every possible hypothesis except the one to be proved. There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability, the act must have been done by the accused.

In a case based on circumstantial evidence, there is always a danger that conjecture or suspicion may take the place of legal proof. The Court has to be watchful and ensure that

suspicion howsoever strong should not be allowed to take the place of proof. A moral opinion howsoever strong or genuine and suspicion, howsoever grave, cannot substitute a legal proof. A very careful, cautious and meticulous appreciation of evidence is necessary when the case is based on circumstantial evidence. The prosecution must elevate its case from the realm of 'may be true' to the plane of 'must be true'.

The core principles which need to be adhered to by the Court, while examining and appreciating circumstantial evidence, have been strenuously discussed by the Hon'ble Apex Court in the case of **Devi Lal -Vrs.- State of Rajasthan reported in (2019) 19 Supreme Court Cases 447** in the following words:

> "17…It has been propounded that while scrutinising the circumstantial evidence, a Court has to evaluate it to ensure the chain of events is established clearly and completely to rule out any reasonable likelihood of innocence of the accused. The underlying principle is whether the chain is complete or not, indeed it would depend on the facts of each case emanating from the evidence and there cannot be a straitjacket formula which can be laid down for the purpose. But the circumstances adduced when considered

collectively, it must lead only to the conclusion that there cannot be a person other than the accused who alone is the perpetrator of the crime alleged and the circumstances must establish the conclusive nature consistent only with the hypothesis of the guilt of the accused."

Whether the testimony of the prosecution witnesses implicate the appellant in commission of the crime?:

9. The main attack has been made by the learned counsel for the appellant on the evidence of P.W.15 Laxmi Badaik, who is the informant in the case. She was the second wife of the deceased and the appellant was the first wife. P.W.15 has stated that the appellant used to live at village Jhirpani and on 27.06.2011, she had come to village Jhirpani to the house of her husband on being called by him and after dinner, she along with the deceased slept. She further stated that the house of her husband was having two rooms and in the entrance room, the son of the deceased and the appellant, namely, Siki Mundari (P.W.7) was sleeping and she along with the deceased were sleeping in the inner room. She further stated that the appellant slept on the front veranda. At about 12 midnight, she woke up and found the appellant in the inner room where she (P.W.15)

along with the deceased were sleeping and when she went to urinate outside, she heard screaming of the deceased for which she rushed in and found the deceased with severe burn injuries and he was standing naked at the door and shouting for help. The appellant had come out of the inner house and she was having a satisfying smile. P.W.15 further stated that her deceased husband told her that the appellant poured kerosene on him and set him on fire by striking a match stick. She further stated that the room where they were sleeping was complete dark. Then she wrapped a chadar around the deceased and took him to Sahu clinic at Jhirpani but since the doctor denied to entertain him, she took the deceased to the C.W.S. Hospital at Jhirpani in auto-rickshaw but he was not treated there and then he was taken to the I.G.H., Rourkela where he was treated but during course of treatment, he expired in the afternoon of 28.06.2011 and accordingly, she lodged the report, which was scribed by P.W.4 at Jhirpani police station.

Whether evidence relating to dying declaration as deposed to by P.W.15 can be acted upon?

9-A. P.W.7 was sleeping in the adjacent room where the occurrence in question took place, but his evidence is that when hearing hullah and commotion, he woke up at about 1.00 a.m.,

he found his father (deceased) to be badly burnt and he had no clothes on his body and P.W.15 was near him but he again did not find the appellant anywhere near. P.W.7 stated that he covered the deceased by means of a blanket and in desperation, rushed to the house of P.W.8 and then he came to P.W.3 and took the deceased in an auto-rickshaw to Sahu clinic and then to C.W.S. Hospital and then to I.G.H where the deceased was admitted. The evidence of P.W.7 is totally silent regarding any dying declaration being made by the deceased either at the spot or at any place till he breathed his last.

The spot map so also diagram of spot house prepared by Scientific Officer (Ext.10) indicates that if a person intended to come to the inner room where the deceased and P.W.15 were sleeping, then he has to first enter into the front/passage room where P.W.7 was sleeping from the outer verandah and then there is a single door through which he could enter into the spot room. It is the case of P.W.15 so also P.W.7 that the appellant was sleeping on the outer verandah of the house. P.W.7 has stated that the entrance room, where he was sleeping, was also used as kitchen and that was also a dark room. He further stated that hearing his shout, the appellant came from outside and poured water on the deceased and the

appellant was also weeping outside of the house and P.W.7 further stated that he had no knowledge as to how the deceased received the burn injuries.

Learned counsel for the State argued that since P.W.7 was the son of the appellant, he might have refrained himself from implicating his mother (appellant) in the crime. It is very difficult to accept such a contention inasmuch as P.W.7 has not been declared hostile and his evidence cannot be discarded merely because he is related to the appellant as her son, inasmuch as it cannot be lost sight of the fact that the deceased was his father and there is no proposition of law that relatives are to be treated as untruthful witnesses. It is quite unlikely that close relatives of a deceased person would falsely implicate an innocent person for a heinous crime like murder and let the real culprit escape the clutches of law and gallows of confinement. This view has time and again been adopted and reiterated by the Courts across the nation, including the highest Court of the land. In the case of **Shanmugam -Vrs.- State reported in (2013) 12 Supreme Court Cases 765**, while evaluating the evidentiary value of testimony of related witnesses, the Hon'ble Supreme Court held as follows:

"12. As observed by this Court in **Raju case [(2012) 12 SCC 701 : AIR 2013 SC 983]**, far more important than categorisation of witnesses is the question of appreciation of their evidence. The essence of any such appreciation is to determine whether the deposition of the witness to the incident is truthful hence acceptable. While doing so, the court can assume that a related witness would not ordinarily shield the real offender to falsely implicate an innocent person. In cases where the witness was inimically disposed towards the accused, the courts have no doubt at times noticed a tendency to implicate an innocent person also, but before the court can reject the deposition of such a witness the accused must lay a foundation for the argument that his false implication springs from such enmity. The mere fact that the witness was related to the accused does not provide that foundation. It may on the contrary be a circumstance for the court to believe that the version of the witness is truthful on the simple logic that such a witness would not screen the real culprit to falsely implicate an innocent. Suffice it to say that the process of evaluation of evidence of witnesses whether they are partisan or interested (assuming there is a difference between the two) is to be undertaken in the

facts of each case having regard to ordinary human conduct, prejudices and predilections."

[Emphasis supplied]

P.W.15 has not stated to have seen the appellant holding any jerrycan in her hand containing kerosene either when she (P.W.15) went to urinate after finding the appellant in the inner room during the midnight or when the appellant was found with a satisfying smile afterwards. According to the prosecution, the occurrence has happened during a very short time when P.W.15 stated to have gone to urinate and returned back after hearing the scream of her deceased husband.

Law is well settled that dying declaration should be of such a nature which must inspire full confidence of the Court in its truthfulness and correctness. It is for the Court to ascertain from evidence placed on record that the deceased was in a fit state of mind and had ample opportunity to observe and identify the culprit. In the case in hand, the evidence of P.W.15 as well as P.W.7 indicate that not only the bed room (spot room) of the deceased but also the entrance room where P.W.7 was sleeping was dark and the duration of the occurrence being very short, it creates doubt as to whether the deceased had ample opportunity to observe and identify the culprit correctly as to who poured

kerosene on him and set him on fire striking a match stick so as to make the declaration before P.W.15. P.W.7 has stated that when he woke up, he found the deceased in the room where he was sleeping. If the deceased screamed and P.W.7 woke up so also P.W.15 came inside hearing such screaming from outside where she had gone to pass urine and then both P.W.7 and P.W.15 covered the body of the deceased, who was in a naked condition, with a blanket and thereafter the dying declaration was made, then P.W.7 would also have stated in that respect, but his evidence is totally silent regarding the dying declaration. Therefore, it creates doubt relating to the dying declaration being made by the deceased before P.W.15.

Motive:

10. Learned counsel for the State submitted that since the deceased gave preference to P.W.15, who was his second wife and allowed her to sleep with him in the inner room and thereby the appellant had to sleep on the outer verandah, she might have grievance against her husband (deceased) for which she committed the crime. Such a contention that on that particular day, merely because the deceased slept with P.W.15, the same triggered the appellant so violently that she committed the ghastly crime of killing her husband by pouring kerosene and

striking match stick on his body, is very difficult to be accepted. Needless to say that it is the evidence of P.W.7 that P.W.15 was his 'sana maa', who usually stayed at Tungripali, Jagda and the deceased was staying with P.W.15 most of the times and that he himself along with the appellant was staying in Jhirpani village and occasionally, the deceased visited them. Even P.W.15 has stated that the deceased was living at either of the two places and the appellant and she herself were at visiting terms to each others' houses. Therefore, when the appellant had accepted the second marriage of her husband with P.W.15 which took place twenty years prior to the date of occurrence and they were in visiting terms and merely because on the occurrence night, P.W.15 slept with the deceased in the inner room, it cannot be said to be a strong motive on the part of the appellant to kill her husband (deceased).

Suspicious feature in the prosecution case:

11. The appellant was sleeping on the outer verandah and in the first room her son (P.W.7) was sleeping and in the inner room, her husband (deceased) and P.W.15 were sleeping. It was not known to the appellant as to whether P.W.15 would wake up in the night and go for urination. Therefore, it is quite improbable to even assume that she kept herself well-prepared

to avail the opportunity to pour kerosene on the body of the deceased and set him on fire, particularly when in the adjacent room her son (P.W.7) was sleeping. This is a suspicious feature of the case.

Conduct of the appellant:

12. Learned counsel for the State highlighted that the appellant did not accompany her husband (deceased) when he was shifted to the hospital in the occurrence night in the auto-rickshaw. He placed the evidence of P.W.3, the auto-rickshaw driver, who stated that he took the injured (deceased) being accompanied by P.W.7, P.W.15 and the daughter of the deceased, namely, Binita first to a clinic at Jhirpani and then to C.W.S. Hospital at Jagda. In the accused statement, the evidence of P.W.3 and P.W.15 regarding the shifting of the deceased was put to the appellant and she has stated that she did not accompany because there was no space available in the tempo. The explanation is quite acceptable as it was an auto-rickshaw and apart from the auto driver, there were already four persons including the deceased in it.

The conduct of the appellant as deposed to by P.W.7 that she tried to pour water on the deceased and was weeping is another factor, which goes in favour of the appellant.

Implication of the appellant by other witnesses:

13. P.W.3 has stated that after the deceased was admitted in the I.G.H., P.W.7 told him that the appellant set the deceased on fire, but the evidence of P.W.7 is totally silent in that respect. When P.W.7 has himself stated that he had no knowledge as to how the deceased received the burn injuries and he has also not stated to have made any disclosure before P.W.3 implicating the appellant to be the author of the crime, no importance can be attached to the evidence of P.W.3.

Similarly, P.W.8 has stated that P.W.15 told her that the appellant had set the deceased on fire and then she went to the house of the deceased and found the deceased in a burnt condition and pleading for his life, but most peculiarly P.W.15 has not stated to have gone to the house of P.W.8 and informed the latter anything against the appellant, rather it was P.W.7, who has stated that after covering the deceased with a blanket, in desperation he rushed to the house of P.W.8 and then to the house of P.W.3. Therefore, no importance can be attached to the evidence of P.W.8 that any statement has been made by P.W.15 before her implicating the appellant to be the author of the crime.

Whether the recovery statement given by the appellant can be held admissible U/S 27 of the Evidence Act?:

14. The learned counsel for the State highlighted the evidence relating to leading to discovery of a plastic jerrycan containing kerosene, which is stated to have been kept near a brick heap in the backside of the spot house and was seized by the I.O. (P.W.14) on the basis of information supplied by the appellant, who led the police party to the place of recovery and the jerrycan was seized as per the seizure list Ext.5.

The I.O. has stated that he recovered a green colour plastic jerrycan containing 300 ml. of kerosene kept concealed near a brick heap and prepared the seizure list Ext.5. In the cross-examination, the I.O. has stated not to have measured the kerosene available in jerrycan (M.O.III). P.W.5 is a witness to the said seizure list and he has stated that the jerrycan contained about 20 to 30 ml. of kerosene and jerrycans of that type were available in the open market and it is also a common household item. Therefore, there is also a discrepancy relating to the quantity of kerosene oil found in the jerrycan and it cannot be lightly brushed aside because being a villager, P.W.5 was not supposed to give an incorrect statement relating to the quantity of kerosene found in the plastic jerrycan. Above all, the seizure

list (Ext.5) indicates that the jerrycan was found from the backside of the said house near the heap of bricks at Mundari basti, Jhirpani. It is not mentioned that the jerrycan containing kerosene was found in a hidden state. When the seizure of the jerrycan was made while it was lying in an open and accessible place and it had not remained out of visibility of others, in normal circumstances, it cannot be said that it was within the exclusive knowledge of the appellant and that such jerrycan could not have been recovered without the assistance of the appellant as it was ordinarily visible to others. Against this backdrop, it is germane to borrow credence from the following observations made by the Hon'ble Supreme Court in the case of **Anter Singh -Vrs.- State of Rajasthan reported in (2004) 10 Supreme Court Cases 657**:

> "14…It will be seen that the first condition necessary for bringing this section (section 27) into operation is the discovery of a fact, albeit a relevant fact, in consequence of the information received from a person accused of an offence. The second is that the discovery of such fact must be deposed to. The third is that at the time of the receipt of the information the accused must be in police custody. The last but the most important condition is that only "so much of the

information" as relates distinctly to the fact thereby discovered is admissible. The rest of the information has to be excluded. The word "distinctly" means "directly", "indubitably", "strictly", "unmistakably". The word has been advisedly used to limit and define the scope of the provable information. The phrase "distinctly" relates "to the fact thereby discovered" and is the linchpin of the provision. This phrase refers to that part of the information supplied by the accused which is the direct and immediate cause of the discovery. The reason behind this partial lifting of the ban against confessions and statements made to the police, is that if a fact is actually discovered in consequence of information given by the accused, it affords some guarantee of truth of that part, and that part only, of the information which was the clear, immediate and proximate cause of the discovery."

[Emphasis supplied]

From the aforesaid decision, it is clear that discovery of a fact/ a material object must be preceded by the supply of information by the accused person. In other words, to attract the provision under section 27 of the Evidence Act, it is necessary that the police must have discovered something as per the

information provided by the accused person. If something is quite easily discoverable, even without the assistance of the accused, the same can hardly be called as an 'information' admissible under the section. Not only the police but also the scientific team visited the spot on 29.06.2011 and remained there for hours together and in such scenario, the jerrycan lying near the brick heap would not have gone unnoticed.

It is more than important to clarify that merely because an object is openly accessible to public, the same would not vitiate the evidence under section 27. The real test is not to ascertain whether the object/material is 'openly accessible', rather it is to see whether the same was visible to the bare eyes of the common people passing through the said accessible place. In the case of **State of H.P. -Vrs.- Jeet Singh reported in (1999) 4 Supreme Court Cases 370**, the Hon'ble Supreme Court elucidated the legal position in the following words:

> "26. There is nothing in Section 27 of the Evidence Act which renders the statement of the accused inadmissible if recovery of the articles was made from any place which is "open or accessible to others". It is a fallacious notion that when recovery of any incriminating article was made from a place

which is open or accessible to others, it would vitiate the evidence under Section 27 of the Evidence Act. Any object can be concealed in places which are open or accessible to others. For example, if the article is buried in the main roadside or if it is concealed beneath dry leaves lying on public places or kept hidden in a public office, the article would remain out of the visibility of others in normal circumstances. Until such article is disinterred, its hidden state would remain unhampered. The person who hid it alone knows where it is until he discloses that fact to any other person. Hence, the crucial question is not whether the place was accessible to others or not but whether it was ordinarily visible to others. If it is not, then it is immaterial that the concealed place is accessible to others."

In the present case, the prosecution case is that the kerosene jerrycan was lying near the brick heap. Neither there is any evidence that the brick heap was inaccessible to public nor there is any indication that it was not within the visibility of the others. Thus, when the jerrycan was simply found near the brick heap in an open space, it cannot be said that it is only and only the recovery statement of the appellant which caused the discovery of the jerrycan. In such circumstances, the so-called

recovery statement rendered by the appellant and the consequential recovery of jerrycan cannot be utilized against the appellant as per the contours and mandate of section 27 of the Evidence Act. Moreover, the jerrycan was seized as per seizure list (Ext.5) on 30.06.2011 and it was forwarded to R.F.S.L., Sambalpur through Court on 22.10.2011 vide Ext.9. There is no evidence on record where the jerrycan was kept and in what condition. The prosecution is duty bound to adduce evidence in this respect otherwise the possibility of tampering with it cannot be ruled out which would be also a factor not to place any reliance on the finding of chemical examination report.

Conclusion:

15. In view of the foregoing discussions, I am of the view that there is no clinching evidence against the appellant relating to her involvement in the crime in question. The circumstances which are appearing on record are not clinching and they do not form a complete chain so as to come to a conclusion with certainty that the appellant is the author of the crime. The findings of the learned trial Court against the appellant are not justified and the circumstances which are in favour of the appellant have been ignored and thereby it has resulted in miscarriage of justice.

Accordingly, the impugned judgment and order of conviction of the appellant under section 302 of the I.P.C. is not sustainable in the eye of law and the same is hereby set aside. The appellant is acquitted of the charge. She shall be set at liberty forthwith if her detention is not required in any other case.

In the result, the JCRLA is allowed.

Before parting with the case, I would like to put on record my appreciation to Mr. Biswajit Nayak, learned counsel for the appellant for rendering his valuable help and assistance towards arriving at the decision above mentioned. This Court also appreciates the valuable help and assistance provided by Mr. Rajesh Tripathy, learned Additional Standing Counsel.

The trial Court records with a copy of this judgment be sent down to the learned trial Court forthwith for information.

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S.K. Sahoo, J.

Chittaranjan Dash, J. I agree.

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Chittaranjan Dash, J.