

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Court's order whether the case is or not approved for reporting

(Chapter VIII Rule 32 (2) (b))

Description of the Case.

Criminal Appeal No. 899 of 2001 . decided on 30-8-2003

Mohan Chandra Pujari alias Vs. State

Approved for reporting

~~Not approved for reporting~~

Date of decision 30.8.2003

Initial of Judge

Note- Bench Reader will attach this at the top of the first page of the judgment when it is put up before the Judge for signature.

Criminal Appeal No. 899/2001

Mohan Chandra Pujari alias Manoj Kumar PandeyAppellant.

Versus

StateRespondent.

Hon'ble P.C. Verma, J.

Hon'ble Irshad Hussain, J.

(Delivered by Hon'ble Irshad Hussain, J.)

Accused-appellant (hereinafter referred as accused) was convicted and sentenced to undergo imprisonment for life and to pay a fine of Rs. 10,000/- U/S I.P.C. and imprisonment for life and to pay a fine of Rs. 5,000/- U/S 3(2)(v) of the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, per judgment and order dated 26-8-2000 passed by the then IInd Additional Sessions Judge, Nainital in Session Trial No. 57/99.

The accused was charged for having committed murder of Ms. Rekha aged about 16 years belonging to scheduled caste community by dousing inflammable substance on her person and setting her on fire in her father's house situate near Jhula bridge of village Garjia P.S. Ram Nagar, district Nainital at about 10 P.M. on 10-2-99. Ms Rekha succumbed to her burn injuries on 8-3-99 at Safdarjang Hospital, New Delhi.

The prosecution case is that accused Mohan Chandra Pujari used to visit the house of the informant Hari Ram (P.W.2) the father of the deceased. On the day of occurrence accused visited the house of he informant Hari Ram along-with Kamlesh Forest Guard (P.W.1). Kamlesh and the informant sat together in a room whereas accused went inside another room where Ms. Rekha was busy in making arrangement for the dinner. While the accused and Ms Rekha were together accused poured kerosene oil on her body and set her on fire as a result of which she sustained substantial burn injuries. She was shifted to Government Hospital, Ram Nagar in the night of the occurrence itself. Informant and Kamlesh tried to put-off the fire and meanwhile accused escaped on his scooter taking with him a blanket and a bed spread form the informant's house.

In the hospital Dr. Sandeep Singh, (P.W.3) examined injured Ms. Rekha who was found to have sustained 35 to 40 percent superficial and deep burn wounds. He prepared injury report, Ex.Ka.2 Next morning on 11-2-99 at 10 A.M. informant Hari Ram lodged F.I.R., Ex.Ka.1 at P.S. Ram Nagar. On the basis of the F.I.R. case crime No. 164/99 U/S 307 IPC and Section 3(1) (X) of the S.C. and S.T. Act was registered and the investigation of the case was entrusted to Circle Officer Mrs. Vimala Gunjyal, (P.W.10) . Meanwhile Sub-Inspector Atar Singh, (P.W.9) was deputed to take preliminary steps, therefore he went to the house of the informant and seized one burnt woolen sweater and a plastic container giving kerosene odour, vide memo, Ex.Ka.3

On 11.2.99 at about 11.10 A.M. the dying declaration, Ex.Ka.8 of Ms. Rekha was recorded in Govt. Hospital, Ram Nagar by Sri B.Prasad, (P.W.8) who was then posted as reader of Sub-Divisional Magistrate and was deputed to record the dying declaration by S.D.M. on a message from the hospital. Dr. G.S. Tripathi, (P.W.7) has then certified that Ms Rekha is conscious and in a fit state to make a statement. He also gave certificate that the victim remained conscious even after making her statement.

Ms. Rekha was later-on shifted for better medical treatment to Base Hospital, Haldwani but on deterioration of her condition she had to be sent to Safdarjang Hospital, New Delhi for further management. She remained there till she breathed her last at about 8 A.M. on 8.3.99

According to the prosecution accused Mohan Pujari alias Manoj Kumar Pandey was arrested at about 5.30 P.M. on 12.2.99 by S.I. Atar Singh from near the Taxi Stand of Ram Nagar, vide memo, Ex.Ka.10. Investigating Officer Mrs. Vimala Gunjyal inspected the house of incident on 13.2.99 as well as on 16.3.99 and prepared the site-plan, Ex. Ka.11 and Ex.Ka.13 She also recorded the statement of witnesses and on 26.2.99 recorded the statement of injured Ms. Rekha U/S 161 of the Code of Criminal Procedure(hereinafter referred as Code) at Safdarjang Hospital, New Delhi. (This statement has also been relied upon as another dying declaration of the deceased Ms Rekha). The case against the accused was altered to one U/S 302 I.P.C. vide G.D. report No. 34 of 10-3-1999 when information of the death of Ms Rekha was received. On completion of the

investigation charge sheet, Ex.Ka. 14 was submitted against the accused on 29-3-1999.

At the trial the prosecution examined 12 witnesses. P.W.1, Kamlesh Rawat was declared hostile by the prosecution in view of his denying his visit to the house of the informant with the accused on the ill-fated day of the occurrence and his role in making an attempt to put-off the fire when Ms Rekha was set to fire by the accused. P.W.2, informant Hari Ram narrated the version of the F.I.R. which has been reproduced above. P.W.3, Dr. Sandeep Singh as mentioned above initially medically examined Ms Rekha in hospital at Ram Nagar and prepared injury report, Ex.Ka.2. P.W.4, Krishan Nand Maulkhi a resident from the locality assisted the informant in taking the victim to the hospital at Ram Nagar. He is witness of seizure of kerosene container, Ex.1 and half burnt sweater, Ex.2. P.W.5, Gopal Dutt Joshi is another witness from the locality. He had seen Ms Rekha coming out of her house with burn injuries raising shouts and writhing in pain. P.W.6, Dr. Alexander of Safdarjang Hospital, New Delhi performed post mortem and prepared the post mortem report, Ex.Ka. According to him victim had received 55% burn injuries and she died as a result of septicaemia due to burn injuries. P.W.7, Dr. G.S. Tripathi Medical Officer Ram Nagar Hospital gave certificate when the dying declaration, Ex.Ka.8, of Ms Rekha was recorded. He endorsed certificate that Ms. Rekha was conscious and in a fit state to give the statement, Ex.Ka.5 and another certificate, Ex.Ka.6 that the victim remained conscious even after recording of her statement. P.W.8, B. Prasad recorded the dying declaration, Ex.Ka.8. He gave out that what-ever was told by the victim was written by him and the statement was read over to her and her thumb impression was obtained on it. P.W.9, Sub-Inspector Atar Singh proved the fact of arrest of the accused Mohan Chandra Pujari alias Manoj Kumar Pandey on 12.2.1999. P.W.10, Mrs. Vimala Gunjyal has investigated the case and her evidence in brief has been referred above. P.W.11, Dr. P.C. Fularia of Base Hospital, Haldwani had referred the victim for better management to Delhi on 12.2.1999. P.W.12, constable No. 133, Rajendra Singh formally proved the check F.I.R., Ex.Ka.16 and copy of the G.D. report No. 25 of 10 A.M. dated 11.2.1999 of registration of the case, Ex.Ka.17.

The accused pleaded not guilty and denied accusation of the prosecution. He gave out that a false report was lodged against him by informant Hari Ram who being a Harijan by caste was interested to receive compensation from the Government.

In defence also oral evidence was adduced. D.W.1, Smt. Bhagwati Devi, Pradhan of village Dhikoli P.S. Ram Nagar filed extracts of family register, Ex.Kha-1 to Ex.Kha-5 of all the five different persons named as Mohan. She claimed that accused is not named as a voter or resident of her gram sabha although village Garjia is one of the constituent of her Gram Panchayat. D.W.2, Lalit Mohan Joshi a clerk of M.P. Inter College Ram Nagar filed a character certificate issued by the Principal showing that Manoj Kumar Pandey S/o Sri Puran Chandra Pandey had studied in the college from the year 1988 to 1992. It is Ext.Kha.6. According to the witness no alias of Manoj Kumar Pandey ever find place in school record. D.W.3, Sri Neeraj Shukla S.D.M. Ram Nagar has deputed his reader B. Prasad to record the dying declaration of the victim. According to him peshkar of Ram Nagar Sub-Tehsil has status of Naib Tehsildar and all the duties of Tehsildar are performed by such official. He also gave evidence to the effect that the father of the victim informant Hari Ram was paid a sum of Rs. 75,000/- as compensation.

D.W.4, Yashvir Singh gave out that Ms Rekha was his wife and their marriage was solemnized on 6-6-1997. According to him Ms Rekha remained with him till the month of December 1988 and thereafter she was brought to Ram Nagar by her father. He also filed photographs, Ex.Kha.9 and, Ex.Kha.10 of their marriage.

The accused examined himself as P.W.5 and told his name as Manoj Kumar Pandey claiming that he has no aliases such as Mohan Chandra Pujari or Mohan. He also filed his photograph and his Intermediate pass certificate with his name as Manoj Kumar Pandey S/o Puran Chandra Pandey. He gave out that he has not disclosed any of his alias when his statement was recorded U/S 313 Cr.P.C. in cross-examination he admitted that his father is a pujari in the Garjia temple and that village people knew him by reference of son pujari.

The learned Sessions Judge made an elaborate discussion of the evidence on record and drew an inference that the identity of the accused

was fixed from the evidence and the dying declarations and he was also known by his aliases such as Mohan Chandra Pujari or Mohan and no mistake was therefore made in making his arrest as the nominated culprit. The learned Sessions Judge also found the dying declarations credible and reliable to come to the conclusion that accused poured inflammable substance and set fire to Ms Rekha who succumbed to her burn injuries and accordingly held him guilty of the offences punishable U/S 302 I.P.C. as well as U/S 3(2) (V) of the S.C. & S.T. Act and sentenced him as aforesaid.

Heard Sri R.B.Mehrotra, Senior Advocate, learned counsel for the accused and Sri U.K.Uniyal learned A.G.A and have carefully perused the material on record and considered the facts and circumstances of the case.

Learned counsel for the accused assailed the conclusion of the learned Session Judge and submitted that evidence adduced by the prosecution is wholly unreliable and un-trustworthy and the dying declaration of the deceased, Ex.Ka.8 being also untruthful could not have been relied upon and that the learned Sessions Judge was not legally justified to consider as evidence the statement of the deceased recorded U/S 161 of the Code, under the powers envisaged by section 172(2) of the code and to treat it as another dying declaration and then to place reliance on it to draw an inference that the charges against the accused stand established beyond doubt. The learned counsel also submitted that the identity of the accused as the alleged culprit was wrongly fixed because Manoj Kumar Pandey has no aliases as Mohan Chandra Pujari of Mohan.

On the other hand the learned A.G.A. claimed that dying declarations of the deceased were wholly reliable and trust-worthy and these were rightly made basis of conviction of the accused and therefore no inference is warranted in the judgment and order of the learned trial Judge.

In order to consider the rival submissions we will firstly consider the evidence on record in regard to the identity of the accused as the person nominated in the F.I.R. as well as in the dying declarations. The occurrence took place on 10-2-99 and on the basis of the culprit nominated in the dying declaration, Ex.Ka.8 as well as in the F.I.R., Ex.Ka.1 accused was arrested on 12.2.99 by Sub-Inspector Atar Singh (P.W.9). He made categorical statement that the accused was very well known to him as the accused was

resident of village Garjia within the circle of P.S. Ram Nagra where he was then posted as Sub-Inspector. He denied to suggestion that he was mis-led by the locality people in making the arrest of Mohan Chandra Pujari as being the person nominated as accused by the name of Mohan Pujari or Mohan. It is significant that accused as a defence witness gave out that he is known to the people of the locality as being the son of Pujari of the temple. Considering this any suspicion in the claim of the Sub-Inspector about the identity of the accused cannot therefore be raised and it cannot be believed that the accused was mistakenly taken as the culprit nominated in the F.I.R. and the dying declaration of the deceased.

Although the accused was arrested on 12.2.1999 the plea challenging the identity was not taken at the earliest. The statement of Sub-Inspector was recorded on 25.11.99 as P.W.9 and it appear that for the first time the dispute about the identity was raised by giving him suggestion as mentioned above. However the evidence of the arresting Officer does not come to the rescue of the accused and the attempt to raise a suspicion about the identity of the accused did not bear any favorable result.

It is the case of the prosecution that accused visited the house of the informant with the Forest Guard Kamlesh Rawat on the day of the occurrence and while they were in t house of the informant occurrence took-place. Forest Guard Kamlesh Rawat (P.W.1) did not support the prosecution version about the occurrence but he made categorical statement that accused Mohan Pujari is known to him and the shop of Mohan Pujari is situate near Garjia temple. The statement of the witness was recorded when the accused was present in Court under custody and there can be no doubt that accused was referred by the name Mohan Pujari by him. His claim that he knew the accused very well was not challenged in the cross-examination. Likewise informant Hari Ram (P.W.2) has referred to the accused by the name Mohan and who used to visit to his house. He was also not subjected to cross-examination in regard to the identity either with reference to the personality of the accused or his name as recorded in school records etc. The witness was suggested that his daughter herself set fire to her clothes and false report thereafter was lodged against the accused. The suggestion was denied. The suggestion so made leave no manner of doubt that the defence did not dispute that the person arraigned as the culprit is the same person

who is under detention as the accused and was as such prosecuted for the commission of the offence alleged. The statement of this witnesses was also recorded the same day when P.W.1 was examined in evidence. It is thus obvious that in the presence of the accused in the dock his identity was not challenged in cross-examination of both these witnesses althoughs they have referred the accused by the name Mohan Pujari and therefore it is immaterial if his official name was Manoj Kumar Pandey.

It is also relevant to point out that Krishan Nand Maulekhi (P.W.4) and Gopal Dutt Joshi (P.W.5) are also residents of village Garjia of P.S. Ram Nagar and they reside near the house of the informant. They have seen the victim with burn injures soon after the occurrence and they assisted the informant in taking the victim to the hospital. None of these two witnesses neighbour has never been referred or known as Mohan Chandra Pujari or Mohan. It is also significant that P.W.4 by profession a Pujari of a temple like the father of the accused. The evidence of these witnesses thus become relevant to signify that even though they were examined on 3.11.99 till then there was no challenge to the identify of the accused and as stated above an un-successful attempt for the first time was made on 25.11.99 when P.W.9 was examined.

Further the accused has been referred by the name as Mohan in the dying declaration, Ex.Ka.8 mad by the victim in the hospital on 11.2.99 and the name of Mohan Pujari in the statement recorded by the Investigating Officer on 26.2.99 and which has also been accepted as another dying declaration by the learned trial Judge. The accused has thus consistently been referred and known by the name as Mohan Pujari and Mohan and the evidence of the prosecution fix his identity beyond doubt even though his recorded name in school is Manoj Kumar Pandey.

The learned counsel for the accused referred to the defence evidence to bring home the point of the view that it conclusively establish the Manoj Kumar Pandey has never been known by any alias and it is a case of mistaken identity in making his arrest claiming that he is the accused of the case. At the out set it may be mentioned that the defence evidence falls much too short to displace the evidence of the prosecution and to make any dent in the version of the prosecution and its evidence that the culprit of the crime is

none other than the accused who faced the trial.

The reasons are that Smt. Bhagwati Devi (D.W.1) Pradhan of village Dhikoli gave out that in the family register of her Gram Panchayat there is no entry of the family of Purna Nand Pandey of Kotdwar road Ram Nagar. Purna Nand Pandey is the father of the accused and absence of any entry of his family in the register indicate that it was not properly maintained and it has no evidentiary value to assail the claim of the prosecution about the identity of the accused. The evidence of witness Lalit Mohan Joshi (D.W.2) a clerk of the College where the accused studied is also of no consequence because it is not very un-common that alias of a person is not mentioned against the name in the record of the school. It is the same practice in the case of the accused and at any rate the certificate issued by the Principal, Ex.Kha.6 is also of no import as regards the controversy about the identity of the accused. With reference to the statement of the accused as D.W.5, it is of significance that he made an after-thought claim that he had not told his alias as Mohan Chandra Pujari when his statement was being recorded U/S 313 of the Code. The statement was recorded on 5.5.2000 and it is in the hand writing of the Presiding Officer which falsify the claim made in a belated application dated 3.7.200, paper No. 48-B, submitted by the accused alleging that the reader of the Session Court had filed in the name and address of the accused on the basis of the record of the case itself. The falsity of the claim is also evident from the fact that the accused did not make any specific assertion about his identity while replying to the questions put to him. Moreover his answer to the question No.11 was that since the informant Hari Ram is Harijan by caste he had lodged false report to claim compensation from the Government. As mentioned in the earlier part of the judgment these two prosecution witnesses although of the locality of the accused have said nothing to dispute the identity of the accused as the culprit nominated in the case. In short the name of the accused along with his alias in the statement was in fact written by the Presiding Officer as it was told by the accused himself. The accused in his cross-examination also gave out that he is known in the village with reference to his being to son of the Pujari of the temple and therefore there can be no gain saying that the accused was known and used to be identified by the name as Mohan Chandra Pujari.

It is thus evident that the evidence is sufficient to prove that it is not a case of mistaken identity and the accused is the culprit against whom the F.I.R. was lodged and he was also correctly named as the culprit in the dying declarations relied upon in the case. The learned Sessions Judge made fair and proper appraisal of the material on record to draw similar inference and there are absolutely no reasons to interfere with his conclusion.

The case of the prosecution is that the death of Ms Rekha was homicidal and to prove the same reliance has been placed on the dying declarations. Informant Hari Ram was suggested that his daughter has herself set fire to clothes and a false report was lodged against the accused. First of all it need to be stated that Ms Rekha sustained superficial to deep burn injuries on head, face and anterior and posterior upper trunk, left upper limb and right thigh. The affected parts of the body were marked in the diagram of report, Ex.Ka.2 when she was examined at 11.30 P.M. on 10-2-1999 at Ram Nagar and also in the body diagram in the post mortem report, Ex.Ka.4. The burn injuries were not found on most of the lower part of the body and this aspect of the matter also stand affirmed by the evidence of Medical Officers Dr. Sandeep Singh (P.W.3) and Dr. Alexander (P.W.6). Sustaining of the burn injures on the entire face, head and of upper portion of the trunk and limb make out a strong probability that the injuries could not have been sustained if Ms Rekha was to set fire to her clothes after pouring some inflammable substance on her person. In fact absence of burn injuries on lower parts of the body rule out the possibility of such an exercise and it being a case of suicide. The nature of the burn injures and their seat on the body in fact make out a probability that these could be sustained if other person would throw inflammable substance on the face, head and upper part of the trunk and then set the victim to fire. Another aspect of the matter is that the seat of the burn injures also rules out the possibility of these being sustained accidentally. In a situation like this the defence was not rightly permitted by the learned Sessions Judge to make capital out of the fact that the case of the victim Ms Rekha was recorded in the accidental register by the Medical Officer (P.W.3) when she was admitted there and medically examined. The Medical Officer testified that it is the practice that burn cases are entered in the accidental register maintained at the hospital and therefore it would not mean that it was not a

case of a commission of a crime by another person. There is also nothing in the evidence of the informant, Hari Ram which may suggest that the burning of his daughter was either a case of suicide or an accident.

The learned counsel for the appellant drew attention to the evidence of Krishna Nand Maulekhi (P.W.4) and Gopal Dutt Joshi (P.W.5) in support of the contention that Ms Rekha soon after the occurrence told them that she was not set to fire by some one else but it was a case of either accident or setting fire by herself. The learned Sessions Judge did not accept their claim as true in view of the fact that their evidence was not in conformity with their statement U/S 161 Cr.P.C. as recorded by the Investigating Officer. It is evident from the fact that in the examination-in-chief they were not made to say anything like this or in regard to implication of any culprit in the incident as they were not supposed to support the prosecution version. The learned Sessions Judge went through the case diary to verify this fact as he was legally empowered by virtue of the provision of sub-section (2) of section 172 of the Code and therefore in the totality of the circumstances of the case the evidence of these witnesses was not rightly permitted to be utilized to assail the claim of the prosecution. Considering the circumstances and facts of the case we find no infirmity in the reasoning and conclusion of the learned Sessions Judge.

For the above reasons and the material on record we are of the firm view that it was a case of homicidal death.

. The next question which arises for consideration is as to whether the accused was the author of the homicidal death of the victim and whether the conclusions of the learned Sessions Judge are based on proper appreciation of the evidence and legal aspects of the case relating to dying declarations. Before entering into the discussion on this point it need to be pointed out that a good number of reported decisions were cited at the bar on the principles as to the grounds for acceptance or rejection of dying declaration in evidence. We need not refer to each of those reported decisions in view of the fact that in a recent decision in *P.V. Radhakrishnan versus State of Karnataka; 2003 A.I.R. S.C.W. 3587*, where the legal requirements for the acceptability of dying declarations was under considerations, the Apex court in an illuminating judgment after considering various decision and the

principles governing dying declaration laid stress that where there is no material to show that the dying declaration was the result of product of imagination, tutoring or prompting but the same appears to have been made by the deceased voluntarily, it is trust-worthy and has credibility. It was also laid-down that –

“the dying declaration is only a piece of un-tested evidence and must like any other evidence, satisfy the court that what is stated therein is the un-allowed truth and that it is absolutely safe to act upon. 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 will be no legal impediment to make it basis of conviction, even if there is no corroboration.”

Keeping in view these principles the evidence in regard to the dying declarations we proceed to scrutinize the evidence of the prosecution.

The undisputed claim of the prosecution is that when the occurrence took place informant Hari Ram was also in the house although occupying the room other than in which his daughter Ms Rekha, the victim of the case, was present. This witness has not seen the actual occurrence but he gave categorical statement that his daughter came running to his room while she was engulfed in flames and she told him that she had been set to fire by Mohan who has thrown oil or petrol on her. Under Section 32 (1) of the Evidence Act to make a dying declaration admissible it is sufficient if the words spoken by the victim have connection with any of the transaction which resulted in the death of the victim. From the evidence of witnesses it is evident that Ms Rekha had spoken to him about the circumstance which has connection with the transaction in which she was set to fire after inflammable substance was thrown on her body. Soon before she told about it to the witness, the circumstance has close nexus with the transaction that resulted in her death later-on. The words spoken by her were most spontaneous and natural and there was absolutely no occasion for her to even make it out of imagination, what to think of any tutoring or prompting. Her statement therefore fall within the purview of section 32(1) of the Evidence Act. The evidence of the witness therefore prove oral dying declaration of the victim which is admissible in evidence. The learned Sessions Judge has not taken note of the oral dying declaration of the victim

which has every element of credibility although the evidence, facts and circumstances of the case warranted its consideration.

The other dying declaration of the deceased in the case is written and it was made to B. Prasad (P.W.8) who was the reader of the Sub-Divisional-Magistrate Ram Nagar and was deputed to record the statement by his superior Officer. He had status of Naib-Tehsildar as proved by evidence of S.D.M. Sri Neeraj Shukla (D.W.3). The dying declaration, Ex.Ka.8, as mentioned earlier was recorded after Dr. G.S.Tripathi (P.W.7) had certified that Ms Rekha is conscious and in a fit state to make statement and further that after recording of the statement he certified that the declarant remained conscious even after making the declaration. Ms Rekha told all about the circumstance and the transaction in which she was sent to fire after inflammable substance was thrown on her body. She also stated that She also disclosed the time of the occurrence and the fact that at that time she was busy in making preparation for the dinner. In order to fix the identity of the culprit Mohan she gave out that Mohan reside near the temple. The victim was residing with her father in village Garjia, where as mentioned earlier, famous temple of Garjia is situate. She also claimed that on being set to fire she raised alarm where-upon her father came to her rescue. She also gave out that she is unmarried.

Learned counsel for the accused-appellant submitted that the dying declaration is highly incoherent and inconsistent and further that it has element of false claim and in the totality and circumstances of the case the same cannot be held to be trust-worthy and credible. In support of the argument it was pointed out that informant Hari Ram gave out that his daughter Ms Rekha was married and her divorce had not taken place. In defence Yashvir Singh (D.W.4) the husband of Ms Rekha was examined to prove this fact. He even filed photographs Ex. Kha-9 and Kha-10 taken at the time of the marriage on 6th June 1997. He stated that Ms Rekha is not residing with him since December, 1998 and their relations are presently strained. Even if Ms Rekha gave out that she was unmarried it makes little difference in view of the fact that her relations with her husband got strained and she was living separately with her father. The claim made by her that she was unmarried would not adversely tell upon her declaration as to the

circumstance which has connection with the transaction which resulted in her death. In other words the declaration that accused Mohan has thrown inflammable substance on her person and then set her to fire being coherent and categorical does not admit of any suggestion that it was the result of any imagination. Tutoring or prompting and therefore there was no legal impediment to treat his dying declaration as truthful, trust-worthy and reliable. In our view the learned Sessions Judge therefore made no error in taking similar view and placing reliance on the said dying declaration.

Another dying declaration considered by the learned Sessions Judge is the statement of the victim recorded U/s 161 of the Code, by the Investigating Officer Mrs. Vimala Gunjiyal (P.W.10) the I.O. stated that the statement was recorded on 26-2-1999 at Safdarjang Hospital, New Delhi and before that she got the information from the Medical Officer of the hospital that Ms Rekha was in a fit condition to give the statement. The communication is Ex.Ka.12 on the record. The I.O. also gave out that she took precaution of sending informant Hari Ram out from the room before recording the statement of Ms Rekha in the said hospital and that whatever was stated by Ms Rekha the same was written in the case diary. The copy of the statement U/s 161 of the Code was not filed on record by the I.O. However the learned Sessions Judge perused the case diary and was satisfied that the statement was so recorded by the I.O. and took note of the same. The learned counsel for the accused-appellant submitted that the statement was not legally proved and its copy was not exhibited in evidence, the learned Sessions Judge could not have legally considered the statement in evidence by perusal of the case diary. We see no force in this argument because U/S 172 (2) of the Code any criminal court may send for the case diary of a case under inquiry or trial in such court, and may use such diaries, not as evidence in the case but to aid it in such inquiry or trial. From the perusal of the judgment it is evident that the learned Sessions Judge had not used the case diary as a piece of evidence but merely as an aid to verify the claim made by the I.O. that the statement of Ms Rekha was so recorded and it was then treated as dying declaration. With reference to this observation it will also be pertinent to mention that if there was any technical deficiency the same was made good by subjecting the Investigating Officer to cross-examination on this point and to elicit from her actual relevant

statement made by Ms Rekha. On being confronted with the case diary the I.O. stated that Ms Rekha gave statement that some oil of black colour was thrown on her face and then she was set to fire where-after she ran towards the room of her father who and another person tried to put off the fire. Ms Rekha also gave the statement that she was set to fire by Mohan Pujari although she did not name that person as Manoj Kumar Pandey. Thus the statement given by Ms. Rekha U/s 161 of the Code was proved in the cross examination of the Investigating Officer and there was no legal impediment in its admissibility in the evidence in the case. On the face of the facts of the case the decision of Apex Court in the matter of *Mahavir Singh and others versus State of Haryana; (2001) 7 Supreme Court Cases 118* cited by the learned counsel for the accused-appellant has no application here. The ratio of reported decision is that entries in police diaries cannot be used as the evidence against the accused and these cannot therefore be used to explain any contradiction in the evidence of a prosecution witness which the defence has brought forth by using any portion of a statement of the witness record U/S 161 of the Code. On the contrary the learned Sessions Judge has not used the statement in the case diary as evidence but it was merely perused to verify that the statement of Ms Rekha was as such recorded or not by the I.O. and to which the I.O. was confronted by the defence in cross-examination.

As regards the trust-worthiness of the said statement is concerned there is nothing in the cross-examination of the I.O. as may suggest that the statement was incorrectly written in the case diary or that the victim has not named the accused as the person who has thrown inflammable substance on the person of the victim and then set her to fire. Further the evidence of the I.O. also rule out the possibility of the statement having been given by Ms Rekha as a result of some tutoring and therefore the same appear to be fully credible, worth placing reliance thereon as has rightly been done by the learned Sessions Judge.

For the reasons as stated above we are of the firm view that the above dying declarations of Ms Rekha are truthful and these prove beyond doubt that the accused-appellant was responsible for committing the murder of Ms Rekha by throwing inflammable substance on her body and then setting her to fire as stated above. The inference drawn by the learned Sessions Judge in

saddling the accused with the responsibility of commission of the crime on the basis of the dying declarations therefore cannot be assailed.

The F.I.R. of the case, Ex.Ka.1, was lodged after a delay of about 12 hours and it was argued that the prosecution has not explained the delay and therefore there are sufficient reasons to doubt the genuineness of the same. No doubt it is well settled that delay in lodging the first information report quite often results in embellishment which is a creature of after-thought. It is therefore essential that delay in lodging of the first information report should be satisfactorily explained. The learned Additional Advocate General submitted that the broad features of the case are itself glaring enough to explain the delay in lodging the F.I.R. As a young daughter of the informant was made to receive burn injuries in the late hours of the night of 10-2-1999, considering her serious condition the informant remained worried about her welfare and preferred to remain in hospital where she was admitted after the occurrence. The informant Hari Ram testified that he had told the attending Medical Officer to give information of the incident to the police but on being informed on telephone none tuned up and message was sent by the police that they will come next morning. It appears that out of shock after the incident the informant could not gather courage to report the matter to the police by lodging an F.I.R. in the late night of the occurrence itself and if he went to lodge the F.I.R. next morning at 10 A.M. it could not be said that the delay was deliberate and it remained un-explained. The learned Sessions Judge also considered these aspects of the case and rightly did not attach any undue importance to the delay in lodging the F.I.R.

It was also submitted that the F.I.R. has not been proved because the person who got it typed on the dictation of the informant Hari Ram was not produced in evidence. Even though it is so the informant gave out that he got the F.I.R. prepared at tehsil from some one who was not known to him by name and at the same time testified that it was prepared on his telling the important and broad events and facts of the incident. He has stated that the contents of the F.I.R. were not read over to him after the same was got prepared. However the informant on oath in court claimed that it was got prepared by him and stated the incident and facts which occur in the written F.I.R., Ex.Ka.1 Therefore, it cannot be said that the F.I.R. was not legally proved by the evidence of the informant. Pointing out the statement of the

informant that some exaggeration was there in the F.I.R. but he stood to the test in regard to the broad features of the incident that her daughter Ms Rekha told him that she was sent to fore by Mohan Pujari who had thrown inflammable substance on her body inside the house. Consequently it cannot safely be accepted that on account of these factors the entire prosecution version become suspicious and need to be discarded. In other words the F.I.R. of the case amply corroborate the case of the prosecution and the version as also contained in the dying declarations.

In regard to the motive of the crime learned counsel for the accused-appellant submitted that there being no direct evidence to prove commission of the crime the question of motive or malice assume significance and the prosecution evidence failed to establish any motive against the accused for committing the crime. Hari Ram gave categorical statement that the accused used to visit his house and wanted to marry his daughter Ms Rekha but family members of the accused were not prepared to accept a Harijan girl as bride of their family. There is nothing in the cross-examination of the witness so as to discredit his claim about the attitude of the accused and also their close acquaintance. Ms Rekha was a young girl of about 16 years and due to strained relations with her husband, was residing with her father. The possibility of intimate relations between the accused and the victim in the face of evidence of the informant and the facts and circumstances of the case cannot be ruled out. In view of the trust-worthy evidence in the case and the dying declarations of the victim the affair ended up in the tragic incident and in the manner as proved by the evidence in the case. Considering these aspects of the case we are not inclined to find favour with the argument of the learned counsel and the prosecution evidence proving the guilt of the accused cannot be out-rightly discredited. Even otherwise it is well settled that where positive evidence against the accused is cogent and reliable the question of motive and for that matter proof thereof pale into insignificance. Considering this also the case of the case of the prosecution and its evidence as discussed above cannot at all be viewed with suspicion and disbelieved.

The defence has taken the stand that since the victim of the case was a Harijan by caste the accused belonging to high caste was falsely implicated in order to receive compensation. D.W.3, Neeraj Shukla, S.D.M. Ram Nagar

testified that the father of the victim informant Hari Ram had been paid a sum of Rs. 75000/- as compensation. The stand taken does not in any way help the cause of the accused because it will be a matter of mere assumption that of all the people belonging to high caste accused was singled out to be nominated as a culprit of the crime.

The investigation of the case was also adversely commented upon but nothing of substance has come out to create doubt in the prosecution case and its evidence. It is well settled that remissness or negligence on the part of the Investigating Officer would not discredit the otherwise trustworthy and reliable evidence of the prosecution. Initial steps after the registration of the case were taken by Sub-Inspector Atar Singh (P.W.9) although Deputy S.P. Mrs. Vimala Gunjyal (P.W.10) was entrusted with the investigation of the case. Referring to the decision of Madras High Court in the case of *Chinnasamy V. State*; 2000 Criminal Law Journal 956 it was argued that since the case against the accused was also registered for an offence U/S 3(1)(X) of the S.C. and S.T. Act sub-inspector of the Police was not legally authorized to investigate the case and in view of the steps taken by P.W. 9 the entire proceedings stand vitiated. The principle cannot be applied to the facts of the case because Dy. S.P., P.w.10 has investigated the case and the sub-inspector merely seized the burn sweater and plastic container of kerosene oil from there besides making arrest of the accused. When the case was registered Dy. S.P., P.W.10 was not immediately Available, however the investigation of the case was made by her as contemplated by the provisions of the said Act and therefore the question of the proceedings being vitiated does not arise.

For the foregoing discussion and conclusions we do not find any substance and merit in this appeal and we therefore, up-hold the conviction and sentence as awarded against the accused-appellant by the learned Sessions Judge per judgment and order dated 26-8-2000. The appeal is accordingly dismissed. The accused-appellant is in jail and he shall serve out the sentence awarded against him.

Let the record of the case be sent back to the Court concerned for necessary compliance.

Dated 30-8-2003

ISB

(Irshad Hussain, J.)

(P.C.Verma, J.)