

**Neutral Citation No. - 2023:AHC:118841-DB**

**A.F.R.**

**Reserved on 8<sup>th</sup> May, 2023**

**Delivered on 29<sup>th</sup> May, 2023**

**Court No. - 44**

**Case :- CRIMINAL APPEAL No. - 3963 of 2013**

**Appellant :- Jai Kishan @ Bablu**

**Respondent :- State of U.P.**

**Counsel for Appellant :- D.S. Pandey, Gajendra Kumar Gautam, K.K.**

**Srivastava, Mohammad Arshad Khan, Mr Saurabh Gour, R.V. Pandey, Sanjay**

**Kumar Yadav, Vikash Chandra Tiwari**

**Counsel for Respondent :- Govt. Advocate, Sunil Kumar Dubey**

With

**Case :- CRIMINAL APPEAL No. - 4249 of 2013**

**Appellant :- Smt. Anita**

**Respondent :- State of U.P.**

**Counsel for Appellant :- D.S. Pandey, K.K. Srivastava, Ramesh Chandra Dwivedi**

**Counsel for Respondent :- Govt. Advocate, Sunil Kumar Dubey**

**Hon'ble Dr. Kaushal Jayendra Thaker, J.**

**Hon'ble Shiv Shanker Prasad, J.**

**(Delivered by Hon. Shiv Shanker Prasad, J.)**

1. Both the criminal appeals are directed against the impugned judgment dated 20<sup>th</sup> August, 2013 passed by the Additional Sessions Judge, Court No.2, Ghaziabad in Sessions Trial No. 1476 of 2011 (State Vs. Jaikishan @ Bablu and 2 Others), arising out of Case Crime No. 112 of 2011, under Sections 302/120B I.P.C., Police Station-Bahadurgarh, District-Ghaziabad, whereby accused-appellants Jaikishan @ Bablu and Smt. Anita have been convicted for an offence Section 302 I.P.C. and have been sentenced to life imprisonment along with Rs.10,000/- fine for commissioning of offence under Section 302.; in default of payment of fine they have to further undergo one year additional imprisonment, whereas the other co-accused Kuberdutt has been acquitted for the offence under Sections 302/120B I.P.C.

2. Since the basic facts, issues and the judgment of the trial court are similar and common, both criminal appeals have been clubbed and heard together and the same are being decided by this common judgment.

3. Heard Sri Mohammad Arshad, learned counsel for the accused-appellants and learned counsel for the State. Sri Sunil Kumar Dubey, learned counsel for the informant was not present at the time of hearing of both the appeals.

4. The present case proceeds on a written report of the informant/P.W.-1 Niranjana Sharma (Exhibit-ka-1), which has been scribed by Tarun Sharma (P.W.-2) dated 20<sup>th</sup> July, 2011, wherein it has been stated that he solemnized the marriage of his daughter Rekha with Jai Kishan alias Bablu son of Radhe Shukla village Bhadsyana about 14 years ago. Some time ago, the accused-appellant Jai Kishan alias Bablu started establishing illicit relationship with accused-appellant Anita wife of Hari Prakash Sharma village Bhadsyana police station Bahadurgarh, who is a peon in Sarvitaishi Inter College Bhadsyana. Daughter of the informant Rekha used to repeatedly object her husband (accused-appellant Jaikishan) for having illicit relations with accused-appellant Anita. On that objection, her husband used to beat her time and again. It has further been stated that accused Kuber Dutt, Rekha's brother-in-law i.e. Jeth used to encourage his brother i.e. Jaikishan for such illicit relationship. On 19<sup>th</sup> July, 2011 at 11:00 p.m. (night), as per the conspiracy hatched by accused Kuber Dutt, the accused-appellants Jaikishan and Anita, they poured kerosene on Rekha and set her on fire, due to which Rekha died. Information about the death of the deceased Rekha was given to the informant on telephone by the Village Pradhan, Mr. Satish Fauji and he has informed him that in-laws of the deceased Rekha took her in burnt condition to the Hospital at Meerut. On receiving the said information, the informant reached the Meerut Medical College/Hospital where he was informed that the deceased was referred to the hospital at Delhi. When they were on the way to Delhi by Ambulance along with deceased Rekha for her treatment, she succumbed to death. Informant reached the Police Station for lodging the FIR along with Ambulance wherein the dead body of the deceased was kept.

5. Pursuant to the above written report dated 20<sup>th</sup> July, 2011, a FIR (Exhibit-ka/10) came to be registered as Case Crime No. 112 of 2011 under Sections 302, 120-B I.P.C. at Police Station-Bahadurgarh, District-Meerut. After lodging of the FIR, the first Investigating Officer Sub-

Inspector Ram Prasad Sharma (P.W.-4) proceeded and after perusing and making entry in the Case Diary about the written report and chik FIR, he reached the place where the Ambulance was standing. He got the inquest of the body of the deceased prepared (Exhibit-ka/2) in the presence of inquest witnesses, who have been appointed by him. After getting the dead body sealed and making all necessary formalities like preparing of documents, draft of seal, photo lash, police form-13, letters wrote to Chief Medical Officer and R.I. P.W.4 got the dead body sent to the Mortuary. After that P.W.-4 has recorded the statements of P.W.1 and P.W.-2 and went to the place of occurrence along with P.W.-1. P.W.-4 has prepared the site plan (Exhibit-ka/9), whereafter he has collected plastic jar (jerkin) containing kerosene oil, a matchbox, some matches, some pieces of clothes of deceased Rekha which she had worn at the time of incident from the place of occurrence and prepared recovery memo (Exhibit-ka/10) in the presence of witnesses Desh Deepak, Sushil Kumar, Dinesh Kumar. He has also recorded their statements. P.W.-4 has also arrested the accused-appellants Jaikishan and Anita and their statements were also recorded.

6. The autopsy of the body of the deceased Rekha was conducted on 20<sup>th</sup> July, 2011 at 05:00 p.m. by Autopsy Surgeon Dr. Jitendra Kumar Tyagi (P.W.-6) and in the autopsy report (Ex.Ka-7), P.W.-6 has found superficial to deep burn injuries about 70% on the body of the deceased. He has opined that the cause of death of the deceased is sock due to following ante mortem burn injuries:

- “1. Singeing of hair present.*
- 2. Line of redness present.*
- 3. Superficial to deep burn present.*
- 4. Areas spared-lower back, both foot, half of lower extremities,*
- 5. About 70% to burn area is present.*
- 6 Foley’s catheter is present in place.”*

7. On 11<sup>th</sup> August, 2011, Sub-Inspector Sanjeev Kumar (P.W.-7) took over the further investigation after P.W.-4 and has recorded the statement of HCP Netrapal Singh. After conclusions of the statutory investigation

under Chapter XII Cr.P.C.. P.W.-7 has submitted the charge-sheet (Exhibit-ka/14) against the accused-appellants.

8. On submission of charge-sheet, the concerned Magistrate took cognizance in the matter and committed the case to the Court of Sessions by whom the case was to be tried. On 16<sup>th</sup> March, 2012, the concerned Court framed charges under Sections 302/34 and 120-B I.P.C. against the accused-appellants Jaikishan and Anita and co-accused Kuberdutt. The charges were read out and explained to the accused-appellant, who denied the accusation and demanded trial.

9. The trial started and the prosecution has examined seven witnesses, who are as follows:-

1	Niranjan Sharma (informant/complainant)	PW1
2	Tarun Sharma (scriber of the written report)	PW2
3	Tanu	PW3
4	Sub-Inspector Ram Prasad Sharma (first Investigating Officer)	PW4
5	Head Constable-06 Ram Charan Singh	PW5
6	Dr. Jitendra Kumar Tyagi (Autopsy Surgeon)	PW6
7	Sub-Inspector Sanjeev Kumar (Investigating Officer, who submitted the charge-sheet)	PW7

10. The prosecution in order to establish the charges levelled against the accused-appellant has relied upon following documentary evidence, which were duly proved and consequently marked as Exhibits:

1	Written report dated 20 <sup>th</sup> July, 2011	Ex.Ka.-1
2	Inquest report dated 20 <sup>th</sup> July, 2011	Ex.Ka.-2
3	FIR dated 20 <sup>th</sup> July, 2011	Ex. Ka.-10
4	Recovery memo of plastic jar of kerosene oil, matchbox, matches, pieces of clothes of the deceased	Ex.Ka/10A

5	Post-mortem/autopsy report dated 20 <sup>th</sup> July, 2011	Ex.Ka.-13
6	Documents relating to paper no.33, draft of seal, photo lash, police form 13, letters to CMO and RI	Ex. Ka.-3 to 8
7	Charge-sheet	Ex.Ka/14
8	Site plan with index	Exhibit-ka/9

11. After recording of the prosecution evidence, the incriminating evidence were put to the accused for recording his statement under section 313 Cr.PC. In their statements recorded U/s 313 Cr.P.C. the accused-appellants including co-accused Kuber Dutt denied his involvement in the crime. Accused appellants specifically stated before the trial court that they have been falsely implicated in this case. The accused-appellant Jaikishan @ Bablu has stated that on the date of incident, he was not at home and when he returned on the next day of the incident, he came to know that his wife has been burnt and his family members have taken her to the hospital. Two witnesses namely, Jeetpal as DW-1 and Viresh Kumar as DW-2 were examined by the defence.

12. On the basis of above evidence adduced during the course of trial, the court below after relying upon the documentary as well as oral evidence adduced by the prosecution and after recording categorical findings of facts has come to the conclusion while passing impugned judgment of conviction that the prosecution has been able to fully prove that the accused-appellants have committed the offence of murder of deceased Rekha. As such, the trial court has found the offence under Sections 302 I.P.C. to have been committed by both the accused-appellants and the trial court has not found the offence under Sections 302/120-B I.P.C. against the co-accused Kuber Dutt. The trial court has accordingly convicted the accused-appellants under Section 302 of the Indian Penal Code and sentenced him life imprisonment with fine of Rs. 10, 000/- for the offence under Sections 302 I.P.C.

13. Being aggrieved with the impugned judgment and order of conviction passed by the trial court, the accused-appellant has preferred the present jail appeal.

14. The submission of the learned counsel for the accused-appellants is that there is no direct evidence connecting the accused-appellants with the commissioning of the crime as the testimony of star independent witness Tanu (P.W.-3) cannot be said to be reliable as at the time of incident he was aged about 5 years and was under the custody of his maternal grandfather; the motive is absolutely weak; the prosecution case rests on circumstantial evidence in which the accused-appellants have been implicated only on the basis of suspicion that there were illicit relationship between both the accused-appellants and no evidence exist to hold the accused-appellants guilty.

15. It is further submitted that the trial court has relied upon the statement of Tanu which was recorded by the Investigating Officer after four days of the incident in which there is no whisper of the version as unfolded in the FIR. It is further submitted that the accused-appellants have not committed the alleged offence, whereas the deceased has committed suicide by pouring kerosene oil on herself and set her on fire, as being a loose temper lady, she used to quarrel with the accused-appellant Jaikishan due to suspicion of his having illicit relationship with accused-appellant Anita. Qua the aggressive conduct of the deceased due to suspicion of accused-appellant having illicit relationship with accused-appellant Anita, he had made an application before the concerned Police Station. It is then submitted that since the marriage of the accused-appellant Jaikishan was solemnized with the deceased 14 years ago, there was no occasion for the accused-appellant to commit the murder of the deceased. It is also submitted that the conviction and sentence passed by the trial court against the accused-appellant is too severe and without considering the evidence available on record. It is next submitted that the accused-appellant has no criminal antecedents to his credit except the present and he was on bail during the course of trial.

16. On the cumulative strength of the aforesaid, learned counsel appearing for the appellants submits that in view of the inconsistency in the

statements of the prosecution witnesses; the prosecution has failed to establish the guilt of accused-appellant beyond reasonable doubt based on circumstantial evidence. As such the sentence is excessive and ought not be sustained and the order of sentence must be modified taking lenient view in the matter.

17. Per contra, Mr. N.K. Sharma, learned A.G.A. for the State, supporting the judgment and order of conviction, submits that the first information report has been lodged promptly naming the accused person; there is clinching evidence to support the prosecution's case; the incident in which the deceased is alleged to have been murdered by the accused-appellants Jaikishan @ Bablu and Anita at about 11:00 p.m. which is alleged to have been witnessed by the son of accused-appellant Jaikishan and deceased Rekha (P.W.-3); P.W.-3 is star eye witness of the alleged incident; the place of occurrence has not been disputed by the defence; and the accused-appellants have strong motive or intention and the same has also been explained by the evidence of prosecution. Therefore, the prosecution has proved the charges levelled against the accused-appellants beyond reasonable doubt.

18. To bolster the aforesaid submissions, learned A.G.A. has invited the attention of the Court to the latest judgment of the Apex Court in the case of **Mekala Sivaiah vs. State of Andhara Pradesh** reported in *2022 SCC Online SC 887*, whereby the Apex Court *in paragraph nos.25 and 26* has held as follows:

*"25. The facts and evidence in present case has been squarely analyzed by both Trial Court as well the High Court and the same can be summarized as follows:*

*i. The prosecution has discharged its duties in proving the guilt of the appellant for the offence under Section 302 I.P.C. beyond reasonable doubt.*

*ii. When there is ample ocular evidence corroborated by medical evidence, mere non-recovery of weapon from the appellant would not materially affect the case of the prosecution.*

*iii. If the testimony of an eye witness is otherwise found trustworthy and reliable, the same cannot be disbelieved and rejected merely because certain insignificant, normal or natural contradictions have appeared into his testimony.*

*iv. The deceased has been attacked by the appellant in broad daylight and there is direct evidence available to prove the same and the motive behind the attack is also apparent considering there was previous enmity between the appellant and PW-1.*

*26. Having considered the aforesaid facts of the present case in juxtaposition with the judgments referred to above and upon appreciation of evidence of the eyewitnesses and other material adduced by the prosecution, the Trial Court as well as the High Court were right in convicting the appellant for the offence under Section 302 I.P.C. Therefore, we do not find any ground warranting interference with the findings of the Trial Court and the High Court."*

*(Emphasis added)*

19. Mr. N.K. Sharma, learned A.G.A. for the State has also placed reliance upon the following judgments of the Apex Court and Patna High Court:

(a) Ram Kumar Madhusudan Pathak vs. State of Gujarat reported in 1998 0 Supreme (SC) 836;

(b) Arulvelu & Anr. Vs. State Rep. By the Public Prosecutor & Anr. Reported in 2009 0 Supreme (SC) 1628; and

(c) Ram Nath Nonia vs. State of Bihar reported in 1999 0 Supreme (Pat) 778.

On the cumulative strength of the aforesaid submissions, learned A.G.A. submits that as this is a case of direct evidence, the impugned judgment and order of conviction does not suffer from any illegality and infirmity so as to warrant any interference by this Court. As such the present jail appeal filed by the accused appellants who committed heinous crime by murdering the deceased is liable to be dismissed.

20. We have examined the respective contentions urged by the learned counsels for the parties and have perused the records of the present appeal including the lower court records as also the impugned judgment of conviction.

21. The only question requires to be addressed and determined in this appeal is whether the conclusion of guilt arrived at by the learned trial court and the sentence awarded is legal and sustainable in law and suffers from any infirmity and perversity.



22. Before entering into the merits of the case set up by the learned counsel for the accused-appellants and the learned A.G.A. qua impugned judgment and order of conviction passed by the trial court, it is desirable for us to briefly refer to the statements of the prosecution witnesses.

23. P.W.-1/informant/complainant, who happens to be the father of the deceased Rekha in his examination-in-chief has stated that deceased Rekha was his daughter. Her marriage was solemnized with accused Jaikishan @ Bablu before 14 years of incident. The character of the accused-appellant Jaikishan @ Bablu was very bad. He had illicit relations with accused-appellant Anita. She is wife of Hari Prakash, who is working as a peon at Sarva Hitaishi Inter College, Bhadsyana. Rekha and Jaikishan had relations earlier. Later when Jaikishan had an illicit relationship with Anita, Jaikishan used to beat Rekha after consuming alcohol. Rekha told Jaikishan not to go near Anita and this witness also told Jaikishan about the said matter, on which he had beaten Rekha in front of him. Accused Kuber Dutt supported Jaikishan in continuance of such illicit relationship. It was Kuber Dutt who got Rekha killed in collusion with. The accused Kuber Dutt was the Jeth (brother-in-law of the deceased), who used to encourage Jaikishan. He used to torture his daughter Rekha.

24. In the Court this witness has identified the accused persons, namely, Anita, Jaikishan alias Bablu, who conspired with Kuber Dutt and set Rekha on fire by pouring kerosene oil at around 11.00 pm on 19-7-11 in the night. Rekha was tied with a rope and was set on fire. The village head (Gram Pradhan) Satish Fauji informed the informant/P.W.-1 about Rekha's burning through telephone. The informant/P.W.-1 told Satish Pradhan how much Rekha was burnt on which Satish Pradhan made Rekha talk on the phone and in reply Rekha said that she had completely burnt.

25. This witness has further stated that Rekha was assaulted by the accused persons on 22-5-11 prior to the incident due to which she had come to him, then she went to Bahadurgarh Police Station on 23<sup>rd</sup> May, 2011 and gave a written report for lodging of the FIR against the accused persons for torturing and assaulting her on which the FIR was registered, the signatures appended thereon have been proved by the informant/P.W.-

1 before the trial court. On 24-5-2011, the informant/P.W.-1 got Rekha medically examined at Medical Garh Hospital and the photo copy of the medical examination is on record. Then the deceased went to the house of informant/P.W.1 and after that a meeting was held between both the family members and the Police in which the accused Kuber Dutt took responsibility that accused Jaikishan alias Bablu would never go to accused Anita, resultantly a settlement has been arrived at bearing Faisalanama N.C.R. No. 41 of 2011, a photo copy of the same is on record as Paper No. 11A. When it was read out to the witness, the witness said that it was the same.

26. In the cross -examination, this witness has stated that in the Meerut Medical Hospital, he did not met with accused Kuber Dutt and the people of the village fled after seeing him. The informant/P.W.1 met his daughter Rekha, where she told that the accused Jaikishan, Anita and Kuber set her on fire. Rekha also told that first she was tied on the cot, then accused Anita poured kerosene oil on her and accused Jai Kishan lit the fire. This was disclosed to him on 20-7-11 at 7.30 a.m. in the Medical Hospital, where Rekha was admitted. In the cross-examination, this witness has also stated that his statement was recorded by the Inspector on 20<sup>th</sup> July, 2011 at 12:00 noon.

27. P.W.-2 Tarun, who happens to be the real brother of the deceased and son of informant/P.W.1, in his examination-in-chief has stated that Rekha (deceased) was married 14 years before her murder. His sister Rekha was kept well after marriage for one or two years, after that a woman named Anita came in the village, whose husband's name is Hari Prakash, who is a peon in Sarva-Hitaishi Inter College. Rekha's husband, namely, Jai Kishan alias Bablu had illicit relations with accused Anita. His sister Rekha repeatedly told Jaikishan not to meet Anita on which her husband Jaikishan alias Bablu and brother-in-law Kuber Dutt used to beat his sister. Her brother-in-law Kuber also used to abuse her badly saying that Rekha should be killed and would keep Anita in the house in her place. On hearing the illicit relationship of Jai Kishan with Anita, this witness along with other family members including (informant/P.W.-1) tried

to convince Jai Kishan not to meet Anita and they also complained to Kuber Dutt about the same.

28. This witness has further stated that before this incident, the accused persons Jaikishan, Kuberdudd and Anita had beaten his sister Rekha badly and thrown her out from their house in relation to which Rekha had informed the Police and Rekha's medical was also done. Rekha had given the written information on 23-5-11. This witness has also attested the signatures of Rekha appended on NCR.

29. This witness has further stated that after some days, on the advice of some respectable person and relatives, this witness's side and accused persons reached on an agreement, wherein the accused Kuberdudd assured that such thing would not happen in the future and it was his responsibility. This witness has also verified the photocopy of the compromise entered into between the parties arising out of the N.C.R. lodged by the deceased Rekha which is also on record.

30. This witness has further stated that they went to Meerut Medical College from their home. His sister Rekha was found in the hospital in a serious burnt condition. She told that her husband Jaikishan alias Bablu and brother-in-law Kuber Dutt and Anita were set her on fire. This witness has identified the accused persons in the Court and has stated that they killed his sister Rekha after setting her on fire. This witness has further stated that the doctor told them that Rekha was seriously burnt due to which they refused to admit her and advised to take her to Delhi. But the deceased was admitted due to decent approach of Jai Kishan and Kuber Dutt in the hospital, after that Doctor told that the deceased has been referred to Delhi. After referring Delhi, they went to Delhi with Rekha but Rekha succumbed to severe burns on the way. He had written the report of the incident at the behest of his father Niranjana Sharma (informant/P.W.-1).

31. This witness has further stated that all the three accused had murdered his sister Rekha as Jaikishan alias Bablu had illicit relations with Anita and the refusal of Rekha to keep Anita in her house resulted in her murder.

32. P.W.-3 Tanu, who happens to be the son of the deceased Rekha and accused Jaikishan @ Bablu, has stated in his examination-in-chief that he was staying with his maternal grand-father (Nana) at Nangla Karan. He had been living at the place of maternal grand-father and maternal uncle since his mother's death. His mother's name was Rekha. His mother died many days ago. His mother died in the fire. His father, his uncle and Anita aunty had set his mother on fire. This witness has identified the accused persons, Jaikishan alias Bablu, Tau Kuber and Anita in the Court.

33. This witness has stated that his father jumped into the house and opened the latch, then Anita Aunty and Tau Kuber entered, injected his mother in the arm and then all three together tied up her and poured kerosene oil on her, then his father took out a matchbox from his pocket and set her on fire. At that time he was there he asked them why were they burning his mother, then his father hit him in the house due to which he sustained injuries on his head that is why he cried and shouted, then the people of the neighborhood came, then his father took him in his lap to a Thakur's house. He did not know the name of that Thakur. He kept him locked up in the same Thakur's house. On the next day in the evening, sons of his uncle and neighbour came, they brought him out from that house and on the way his maternal uncle met him at Dehra Kuti and from there he went to maternal uncle's house with him. Since then he has been living with maternal uncle and maternal grandfather.

34. This witness has further stated that his father (accused Ramkishan @ Bablu) used to beat his mother (deceased Rekha). His mother used to tell his father not to go to Anita aunty's house, on this his father used to beat his mother. His father used to go to Anita aunty's house and stay there and his father did not live with his mother. His father used to come to their house in drunken condition and used to beat his mother. His maternal grand-father and uncle used to convince his father and accused Kuber Dutt, but such act of his father did not stop. He also asked his father to live at Hapur with Anita and leave his mother. This witness has also stated that he has disclosed all the facts to the Inspector, which he has stated in his testimony.

35. This witness has also stated that his father used to work as a driver of bus and truck. He, his mother and his sister lived at home. His father used to go out for work on a day and come home on the next day. When his mother was burnt by the accused-persons, his mother and he were in the house at that time. His mother cooked food on that day, he ate it but his mother (deceased) did not eat. His father had killed his mother in the evening. His mother cooked food at 9 o'clock after that his father came. This witness had finished eating when his father came. He could not tell as to when his father came. He has further stated that the door of the house was closed with latch. His father (accused-appellant Jaikishan @ Bablu) entered into the house by jumping across the wall of which no sound was raised. He could not point out the height of the wall from which his father jumped. At that time he was lying with his mother on the cot but he was not sleeping.

36. This witness has further stated that on the date of incident, his father was at the place of accused Anita, so they did not make any phone call to him on that day. Co-accused persons Anita and Kuber Dutt entered through the door when his father (accused-appellant Jaikishan) opened the door. On the date of incident the deceased i.e. his mother had gone to Pradhan's place, when his father had beaten her. He was there in the house when his mother was burning. His mother was wearing salwar suit at that time. He did not know the colour of her mother's Salwar suit. There is a wall between the place where food was cooked and where they laid down. While his mother was cooking, at that time he was there with his mother.

37. In the cross-examination, this witness has stated that earlier he had given his statement to the Police at Dehrakuti, 4 to 5 days after his mother was burnt. The police station is at Dehra Kuti itself. His maternal uncle Satish had brought him for giving his statement,. He has disclosed the Police that his father had entered the house by jumping. He has also disclosed the Police that his uncle i.e. accused Kuber was present there. He has further stated that his father had assaulted his mother in the evening on the date of incident. Even before that they used to beat her. The deceased was also beaten an hour or two of the burning. Bricks were

hit on the back. He has disclosed the Inspector about the beating in the evening. His mother had also disclosed to his maternal grand-father after she was beaten. When his father was beating his mother, the people of the locality had gathered there.

38. This witness has further stated that before the incident of burning, his father did not come to his house for two-three months. Before two to three days, his father had beaten his mother and after that on the date of incident in the evening. He did not know whether his mother and his father had any meeting in these 2 to 3 days or not. His father did not come to his house 2 to 3 days before the date on which his mother was burnt. His father came to uncle's house i.e. accused Kuber Dutt. Two to three days before when his father came to his uncle's house, he had beaten his mother and this fact has been disclosed by him to the Inspector.

This witness has denied that he stayed with his aunt Usha for several days after the incident. He has also denied that the police met him at his aunt Usha's place after the incident. He did not go with the police where his mother was burnt.

39. This witness has also stated that his mother fainted when his uncle (Tau i.e. accused Kuber Dutt) gave injection to her. The injection was given in front of him. His uncle Kuber Dutt kept the vial from which the injection was filled in his pocket. After getting the injection, his mother did not speak, these people had removed the clothes spread on the cot to which the mother was tied.

40. This witness has denied that he did not see the incident about which he has given the statement. He has also denied that his mother was alone at home at that time and burnt herself while cooking. This witness has also denied that his maternal grand-father had demanded Rs. Ten lacs and on refusal of the same, he has falsely implicated. He has also denied that because of staying with his maternal uncle, he was giving false testimony under their pressure.

41. P.W.-4 Sub-Inspector Ramprasad Sharma, who has been adduced by the prosecution, has investigated the case. This witness has stated in his cross examination that the deceased used to live with her family. The

house of accused Kuber Dutt was different. The witness Tanu did not disclose him that his father jumped into the house and opened the latch, then accused Anita and his uncle Kuber entered, his uncle Kuber injected his mother, then all three together tied his mother and pured kerosene on her, then father took out a matchstick and struck on matchbox, set her on fire. P.W.-3 Tanu did not disclose him that at the time of setting her on fire, his father had hit him on ground and he did not disclose him whether he sustained any head injury or a lump had come out on his head. This witness has also not disclosed that when he cried and shouted, the people of the neighborhood came and his father picked him up and took him to Thakur's house. P.W.-3 has also not disclosed him that he was locked up in a Thakur's house. P.W.-4 has denied that his maternal uncle brought him for giving his statement. This witness has stated that P.W.-3 has not disclosed him about the presence of accused Kuber Dutt at the time of the incident. P.W.-3 has not disclosed him about accused Kuber setting the deceased on fire and his father hitting the deceased with bricks a couple of hours before the incident. Head Constable-06 Ram Charan Singh has been adduced as P.W.-5. This witness has prepared the chik FIR and proved the same in the Court.

42. Autopsy Surgeon Dr. Jitendra Kumar Tyagi who has conducted the autopsy of the deceased Rekha has been adduced as P.W.-6. In his examination-in-chief he has stated that the age of the deceased was about 35 years. During the external examination of the body of the deceased Rekha, P.W.-6 has found that the deceased was of normal structure and stiffness after death was present all over the body; her eyes were congested, the skins of nose, ears and mouth of the deceased were burnt; the burn existed superficial to deep; there was no fracture; the hair of the head of the deceased was the distressed; line of redness was present; some part was superficial burn and some was deep burn; total about 70 percent of the body was burnt; the parts that were not burnt were the lower part of the waist and the anus, both the feet and the lower half of both the legs. A urine pipe was present in the dead body.

43. P.W.-6 on internal examination of the body of the deceased has found that the scalp and membranes were congested; the brain and its

membranes were also congested; the walls were congested; both the lungs and their pleura were congested; larynx and trachea were also congested and shoot particles were present in it; the bone cord congested; the heart membrane was congested and the heart was full of blood. On the basis of aforesaid examination, P.W.-6 has opined that the cause of death of the deceased was shock due to ante-mortem burn injuries. In the cross-examination, this witness has stated that there was no mark of tying of any rope on the body of the deceased and there was no mark of any assault on her body.

44. Sub-Inspector Sanjeev Kumar has been adduced as P.W.-7, who has also investigated the case after P.W. 5. In his examination-in-chief this witness has stated that on 12<sup>th</sup> August, 2011, before her death, the deceased lodged an N.C.R. No. 41 of 2011 under Sections 323, 504 and 506 I.P.C. and on that N.C.R. settlement agreement (Faisalanama) was submitted. In the cross-examination, this witness has stated that in the N.C.R. lodged by the deceased, the investigation was conducted by an earlier incumbent. He has stated that it is true that on 22<sup>nd</sup> May, 2011, an application about the aforesaid incident mentioned in N.C.R. was given by the deceased wherein she claimed that in the presence of respectable persons of the village, whatever the differences and suspicion, there might be in between the deceased and her husband, came to an end and therefore, she did not want any action against her husband. This witness has submitted the charge-sheet.

45. From the side of defence, Viresh Kumar has been adduced as D.W.-1. In his examination-in-chief this witness has stated that the accused Jaikishan and Kuber Dutt were his neighbours. He was sleeping on his terrace when the deceased died. He had come to the spot after hearing the noise. The time was around 11 to 11.30 in the night, he saw that the deceased was lying burnt. He did not see when she was burning. P.W.-3 Tanu son of accused Jaikishan and deceased disclosed him that his mother got burnt after pouring kerosene and at that time, his father was not at home, as he was on duty. He was a private bus driver. He saw that he goes to drive the bus in the morning and after staying for a night comes the



next day in the morning. Accused Kuber Dutt and his wife had gone to get the deceased admitted to the Medical College in Meerut. The next day a panchayat was held in which the family members of the deceased demanded money.

46. Jeet Pal Singh has been adduced as D.W.-2. In his examination-in-chief, this witness has stated that at the time of occurrence he had reached the spot after hearing the noise. He heard that the deceased had set herself on fire. The accused Kuber Dutt and his wife took the deceased to the hospital. In the cross-examination, this witness has stated that he asked P.W.-3 as to how his mother was burnt, in reply he disclosed him that his mother got burnt after pouring kerosene oil on herself.

47. According to the story of the prosecution, in the night of 19<sup>th</sup> July, 2011, the informant/P.W.-1 was informed on the phone by Satish Fauji, Pradhan of village Bhadsyana that his daughter Smt. Rekha had been burnt by her in-laws at 11:00 p.m. (in the night) and she was taken to Meerut Medical Hospital in burnt condition. On this information, the informant/P.W.-1 went to the hospital to see his daughter where he saw his daughter in a burnt condition and his daughter was burnt up to 70%. Seeing the serious condition, daughter of the informant/P.W.1 was referred from Meerut Hospital to Safdarjung Hospital, Delhi, but she died on the way. On 20<sup>th</sup> July, 2011 at 11.00 a.m. a written report was lodged at the Police Station against husband of the deceased, namely, Jaikishan @ Bablu, lover of her husband, namely, Anita and her brother-in-law Kuber Dutt. After investigation, the Police has submitted the charge-sheet.

48. On the deeper scrutiny of the oral as well as documentary evidence led during the course of trial as also the judgment of the trial court, we are in full agreement with the categorical findings recorded by the trial court while passing the impugned judgment. The trial court has rightly recorded that according to P.W.-6 Dr. Jitendra Kumar Autopsy Surgeon, the deceased was burnt upto 70%. The deceased was burnt due to kerosene oil being poured on her and being set her on fire. The Police have recovered kerosene oil canister, matchbox, some matches and some semi-burnt clothes from the spot. On the basis of aforesaid facts and

circumstances the trial court has opined that the untimely death of deceased Rekha was due to setting her on fire at her in-laws' house by pouring kerosene oil on her. As such the argument of the defence that the deceased has committed suicide herself by pouring kerosene oil on her and setting her on fire in the night of the incident has no force. There is no such reliable evidence or proof available on record to suggest that the deceased committed suicide by pouring kerosene oil on her and setting herself on fire. The accused Jaikishan i.e. the husband of the deceased was having an illicit relationship with accused-appellant Anita, wife of Hari Prakash, resident of the same village and the knowledge of that illicit relationship was with the deceased due to which quarrel took place between the deceased Rekha and her husband Jaikishan @ Bablu. The deceased Rekha used to object the illicit relationship of her husband with accused Anita due to which he used to beat and torture her. Because of the aforesaid illicit relationship in the night of the incident, the deceased Mrs. Rekha was burnt by pouring kerosene on the night of the incident. At that time P.W.-3 Tanu, son of the deceased, whose age was 5 to 6, was inside the house. Tanu's elder sister had gone to her maternal grandfather's house 15 to 20 days before the incident because there was an incident of fighting and discordant atmosphere in the house, the main reason behind which was the illicit physical relationship between accused Jaikishan and accused Anita. Informant/P.W.-1, Niranjana Sharma and P.W.-2 Tarun Sharma were at their house at the time of occurrence, meaning thereby that these two prosecution witnesses were not present at the place of incident, but after the incident, when they were informed by the Village Pradhan Satish Fauji, through the phone, then they came to the hospital to see the deceased Rekha. The deceased Rekha Sharma was married to accused Jaikishan 14 years ago. From then, accused Jaikishan did not had illicit relationship with Anita and the atmosphere of the family was fine but after having illicit relationship with Anita, there was estrangement and discord between accused Jaikishan and his wife Rekha. P.W.-1 and P.W.-2 were also aware of illicit physical relations of accused Jaikishan alias Bablu and Anita. Even two months before the incident, the deceased Rekha was beaten up by the accused Jaikishan, for which the deceased Rekha had complained to her mother and father, as a result of

which she went to her maternal home. She had also given a written report to the concerned Police Station against the accused Jaikishan and Anita. She had also got her medical examination done, later, after Panchayat, the deceased came back to live with her in-laws and forgave her husband Jaikishan alias Bablu on the assurance that he would not have any illicit relationship with Anita from that date and would improve his conduct but nothing like that happened because of which discordant atmosphere started again between Rekha and accused Jaikishan regarding his illicit relationship with accused Anita. The informant/P.W.-1 Nirjan Sharma had written a report, which has been scribed his son P.W.-2 Tarun in which the allegation of killing the deceased by pouring kerosene oil on her and setting her on fire has been made against the accused Jaikishan and accused Anita, whereas the allegation of conspirator for committing such offence has been made against the accused Kuberdudd.

49. The trial court has also rightly recorded that both the prosecution witnesses i.e. P.W.-1 and P.W.-2, who are hear say witnesses, have corroborated the same version as unfolded in the FIR. The trial court has also recorded that both the prosecution witnesses i.e. P.W.-1 and P.W.2, however, have not clarified in their testimony as to why accused Kuber Dutt conspired to get the deceased Rekha burnt to death. Accused Kuber Dutt lives separately from the deceased Rekha and accused Jaikishan. The accused Kuber Dutt is elder brother of accused Jaikishan, who are total five brother and all of them are living separately in their different houses. The house of accused Kuber Dutt is also different from that of accused Jaikishan. Accused Kuber Dutt also has his own family. Accused Jaikishan had illicit physical relationship with accused Anita but the prosecution has failed to explain the vested interest of accused Kuber Dutt in such illicit relationship between the two, meaning thereby the interest behind the involvement of accused Kuber Dutt in this crime is unclear. Behind any crime, the criminal's maliciousness is hidden. There is always some connection or reason between the crime and criminal. In the present case, accused Kuber had no illicit relationship with accused Anita. If accused Anita had illicit relationship with accused Kuber, then it could be said that because of accused Anita, he supported accused Jaikishan in getting Rekha killed but only on the basis that the accused Jaikishan is real

brother of accused Kuber Dutt, he played the role of conspirator in this incident, does not seem expedient as there is no reliable evidence.

50. P.W. -3 Tanu, son of deceased Rekha and accused Jaikishan in his testimony has specifically implicated his father i.e. Jaikishan and accused Anita for killing his mother by pouring kerosene oil on her and setting her on fire. Four days after the incident i.e. on 24<sup>th</sup> July, 2023 statement of this witness was recorded by P.W.-4 under Section 161 Cr.P.C. in which he has named his father Jaikishan @ Bablu and his girlfriend i.e. accused Anita for murdering his mother by setting her on fire. According to P.W.-3 Tanu, in the night of incident at 11:00 pm his father Jaikishan and Anita tied his mother Rekha Sharma with a rope and then poured kerosene on her and set her on fire.

51. For examining the correctness or other wise of the testimony of P.W.-3, who is the star prosecution witness and an eye witness, his statement recorded under Section 161 Cr.P.C. is extracted herein-under:

*"मुकदमा उपरोक्त में विवेचना की कार्यवाही का पर्चा III दि० 22/7/11 को किता कर वास्ते अवलोकन सादर सेवा में प्रेषित किया जा चुका है। आज मैं SO थाना हाजा से रवाना होकर विवेचना में मामूर होकर ग्राम भदस्याना में मृतका के मकान पर आया तो देखा कि घर के मेन दरवाजे पर कुण्डी लगी। जानकारी करने पर पता चला कि मृतका का बेटा तनू अपने ताऊ राजेश्वर दत्त के पास रह रहा है अतः चलकर श्री राजेश्वर दत्त के घर पर आया। घर पर मृतका का बेटा तनू मौजूद मिला तथा ताऊ राजेश्वर व ताई श्रीमति उषा मौजूद मिले। अतः बच्चे को प्यार से बिना किसी पूछताछ कर कथन अंकित किये जाते हैं।*

*बयान गवाह – बदरीयाफत मिस्टर तनू पुत्र जयकिशन @ बब्लू निवासी भदस्याना थाना बहादुरगढ उम्र करीब 5-6 वर्ष ने पूछने पर रोते हुए बताया कि मेरी मम्मी बहुत अच्छी थी। मेरे पापा गन्दे हैं। पापा अनिता आन्टी के पास जाते थे। मम्मी मना करती थी। तब पापा मम्मी को पीटते थे। ताऊजी कुबेर मम्मी को ही डाटते थे। पापा को कुछ नहीं कहते थे। तीन दिन पहले शाम को पापा ने मम्मी की पिटाई की थी। फिर पापा को कई लोगों ने डाटा था। रात में मम्मी रो रही थी। मम्मी जल रही थी। मैं देखा मेरी मम्मी को पापा व अनिता आन्टी ने तेल डालकर आग लगायी। फिर पापा मुझे बाहर छोड़कर अनिता आन्टी के साथ चले गये। फिर मम्मी को डाक्टर के यहाँ ले गये।"*

52. The said statement of P.W.-3 has also been supported by P.W.-1 and P.W.-2 in their testimony. It was only after the incident that P.W.-3 Tanu went to his maternal grandmother. At the time of occurrence P.W.-3 Tanu was 5 to 6 years old and a child studying in class-I. Two years after the incident, he has come to the court to give his statement as P.W.-3. In such

a situation, how much does a 5 to 6 years old child remember about the incident that happened two years back is doubtful in itself.

53. On the basis of such finding the trial court has opined that the child is undeveloped, probably that is why he has come to the court and gave a very different statement from what he had given to the Police under Section 161 Cr.P.C. immediately after four days of the incident. According to P.W.-3 Tanu, accused Kuberdudd rendered her mother unconscious by giving her injection. His father Jaikishan entered into the house by scaling the wall and opened the main door. The latch was opened after which accused Anita and accused Kuber came inside the house, accused Anita and accused Jaikishan tied her mother with ropes with the cot, then his father Jaikishan burnt her mother with fire by pouring kerosene oil on her. If the incident took place in such a manner, as P.W.-3 Tanu has given in the trial court, then he could have said these things when P.W.-4 questioned him after 4 days of the incident while recording his statement under Section 161 Cr.P.C, why he did not disclosed the above facts, no satisfactory answer has been given by the prosecution. Soon after the incident P.W.-3 Tanu had gone to his maternal grand-father and maternal uncle's place. If the incident had happened in the same way as he has given in his statement in the trial court, then in such a situation he must have disclosed same to his maternal grandparents also about how the incident happened. The informant/P.W.1 and P.W.2 should have also given the statements in the same manner as given by P.W.-3 Tanu. After the incident P.W.-1 Niranjan Sharma had written a report to the Police Station. In the FIR same version should have been written as has been given by PW-3 Tanu in his statement. The statement of PW-3 Tanu is not supported by any other evidence available on record.

54. The trial court has further recorded that the accused Kuber Dutt, being the brother of accused Jaikishan alias Bablu, had some sympathy with accused Jaikishan, but because of this sympathy, accused Kuber Dutt conspired to get the deceased Rekha killed, does not seem to be appropriate. What was the intention of the accused Kuber behind getting the deceased Rekha killed and what was being done for his benefit, the prosecution has not succeeded to prove the same. In the FIR and in the statements of P.W.-1 and P.W.-2, accused Kuber Dutt has been described

as a conspirator but no clear evidence has been given regarding his participation in the alleged offence. P.W.-3 Tanu has clearly given his statement regarding the involvement of accused Kuber Dutt but the statement of P.W.-3 Tanu cannot be given much importance as P.W.-3 Tanu was a child of 5 to 6 years of age at the time of incident and he was 8 to 9 years old at the time of giving his statement before the trial court. The statement of P.W.-3 Tanu under Section 161 Cr.P.C. and the statement given in the trial court have been presented with a fanciful story. In such a situation, a natural question arises as to why P.W.-3 Tanu did not disclose such facts when his statement has been recorded by P.W.-4 under Section 161 Cr.P.C. which he disclosed in the trial court. In his testimony, P.W.-3 Tanu has stated that after the incident, his father Jaikishan alias Bablu had beaten him and taken him to another house and locked him there. After remaining closed for a day, Kuber Dutt's son took him out. All these things do not match with any other evidence available on record. In such a situation statement of P.W.-3 Tanu in the opinion of the trial Court is of a less relevancy as he was taught by a truthful person, and has fabricated story on his own free will. However, the trial court has opined that if the entire statement of P.W.-3 Tanu given in the trial court as well as before P.W.4 under Section 161 Cr.P.C. is seen together, then it definitely establishes that her mother was burnt to death by pouring kerosene oil on her in the night of the incident, behind which his father Jaikishan @ Bablu and accused Anita was involved. Since they had an illicit relationship and both had killed the deceased Rekha after pouring kerosene oil on her and setting her on fire.

55. The trial court has further recorded that learned counsel for the accused Kuber Dutt argued that according to P.W.-1, when the information of incident was given to him by Pradhan Satish Fauji, he had also talked to his daughter Rekha and asked about the incident, on the basis of which, as well as on the basis of the information given by the villagers, he had written a report at the police station. Learned counsel for accused Kuber further argued that there were various discussions in the village regarding the relationship between accused Anita and accused Jaikishan, due to which the family environment of accused Jaikishan and deceased Rekha

had become discordant. There used to be fights between them. The parents of the deceased had held a panchayat twice. Even before the incident, accused Jaikishan threw Rekha out of the house after beating and at the same time accused Kuber Dutt, being elder brother, convinced the accused Jaikishan and the parents of deceased Rekha. Due to the efforts of accused Kuber Dutt, the parents of the deceased Rekha agreed to send her again with accused Jaikishan. The trial court on the basis of such argument has formed an opinion that after the incident of fight that took place two months before the incident, the accused Kuber had a great involvement in bringing about a settlement between the husband and wife. On the assurance of Kuber Dutt, the deceased Rekha had come to live with her in-laws when the accused Jaikishan's habits did not improve and he again maintained illicit relations with accused Anita, which ultimately resulted in the murder of the deceased Rekha, that is why Rekha's parents including his father and brother i.e. P.W.-1 and P.W.-2 became angry with the accused Jaikishan, Anita and also Kuber Dutt, as if they had not believed to the assurance of the accused Kuber Dutt and would have not sent Rekha with accused Jaikishan, his daughter Rekha would have been alive today. Neither Rekha would have gone to live with her in-laws nor she would have been burnt to death by Jaikishan along with his girlfriend Anita. P.W.-7 is also an Investigating Officer who has proved the police papers. P.W. -5 is a policeman who proved the chik FIR.

56. The trial court has further recorded that the statements of defence witnesses i.e. D.W.-1 Jeetpal Singh and D.W.-2 Viresh also do not seem to help the accused-appellants as the incident took place at 11.00 p.m. (night). DW-1 and DW-2 were informed about the same. It was not known when the accused Jaikishan goes to his job and when he comes. If the said defence witnesses were aware that the deceased Rekha was murdered and accused Jaikishan and Anita did not burn her, then in such a situation they should have written a request to the police and administrative officials during the investigation. It should have been that Mrs. Rekha was not burnt but she herself committed suicide. In this regard, they should have also given affidavits in the court before the magistrate, which would have clarified what is the truth behind the incident. Two years after the incident, now all of a sudden coming to the court, without any

basis, the statements given by the said defence witnesses is definitely a statement made away from truth with the intention of saving the accused.

57. The trial court has further recorded that as far as the involvement of accused Jaikishan alias Bablu and accused Anita in the incident is concerned, in the light of the above analysis, the involvement of two accused is completely proved. This incident has happened only because of illicit relationship between accused Jaikishan and accused Anita due to which they murdered the deceased by pouring kerosene oil on her and setting her on fire in the night of the incident. As far as the question of accused Kuber Dutt is concerned, the trial court has opined that the presence of accused Kuber Dutt is doubtful in the light of evidence available on record. There is no evidence available as to participation of accused Kuber Dutt in the incident. If the entire statements of the fact witnesses i.e. P.W.-1, P.W.-2 and P.W.-3 are seen together in the light of the version as unfolded in the FIR, then in such a situation, the prosecution story against the accused Kuber could not be proved beyond reasonable doubt, because the accused Kuber Dutt would have got the benefit of the doubt.

58. On deeper scrutiny and evaluation of the evidence led during the course of trial, we are of the in full agreement with the findings recorded by the trial court in holding the accused appellants Jaikishan @ Bablu and Anita guilty for the offence under Section 302 I.P.C. We also agree with the findings recorded by the trial court that since the prosecution has failed to prove the guilt of the accused Kuber Dutt under Section 120-B I.P.C. beyond reasonable doubt, he should be given benefit of doubt.

59. Apart from the above, so far as the conviction of the accused-appellants under Section 302 I.P.C. is concerned, it is worth noticing that no doubt there is some improvement in the statements of the star prosecution witness/solitary eye witness of the incident i.e. P.W.-3, but when both the statements are read together carefully, it will be definitely cropped up that the accused-appellants, namely, Jaikishan @ Bablu and Anita used to have illicit relations, which the deceased used to object and due to which the accused-appellant Jaikishan used to beat and torture her and ultimately, in the night of the incident, both the accused-appellants killed her by pouring kerosene oil on her and setting her on fire.



60. Mere on the basis of some improvement in the testimony of P.W.-3, the entire evidence of this witness cannot be ruled out as he was 5 to 6 years old at the time of recording his statement under Section 161 Cr.P.C. and 8 to 9 years old at the time of recording his statement before the trial court and he was under pressure of his maternal grand-father and maternal uncle. On this point, we do not agree with the findings recorded by the trial court while taking into consideration the oral evidence of P.W.-3 in respect of accused-appellants, namely, Ramkishan @ Bablu and Anita. No child in this country, who loves his mother and father most, will be ready to make allegations against his mother or father at the behest of his maternal grandfather or maternal uncle, until he feels that wrong is done by his father with his mother or by his mother with his father.

61. The Apex Court in the case of **P. Ramesh Vs. State Represented by Inspector of Police** reported in (2019) 20 SCC 593 has in paragraph 14 to 16 has observed as under:

*“14. A child has to be a competent witness first, only then is her/his statement admissible. The rule was laid down in a decision of the US Supreme Court in Wheeler v United States, wherein it was held thus:*

*“5.... While no one would think of calling as a witness an infant only two or three years old, there is no precise age which determines the question of competency. This depends on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former. The decision of this question rests primarily with the trial judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which- will tend to disclose his capacity and intelligence as well as his understanding of the obligations of an oath. As many of these matters cannot be photographed into the record the decision of the trial judge will not be disturbed on review unless from that which is preserved it is clear that it was erroneous...”*

*(emphasis supplied)*

15. In *Ratansinh Dalsukhbhai Nayak v State of Gujarat*, this Court held thus:

*“7. ... The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses*

*are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness."*

*(emphasis supplied)*

*16. In order to determine the competency of a child witness, the judge has to form her or his opinion. The judge is at the liberty to test the capacity of a child witness and no precise rule can be laid down regarding the degree of intelligence and knowledge which will render the child a competent witness. The competency of a child witness can be ascertained by questioning her/him to find out the capability to understand the occurrence witnessed and to speak the truth before the court. In criminal proceedings, a person of any age is competent to give evidence if she/he is able to (i) understand questions put as a witness; and (ii) give such answers to the questions that can be understood. A child of tender age can be allowed to testify if she/he has the intellectual capacity to understand questions and give rational answers thereto. A child becomes incompetent only in case the court considers that the child was unable to understand the questions and answer them in a coherent and comprehensible manner. If the child understands the questions put to her/him and gives rational answers to those questions, it can be taken that she/he is a competent witness to be examined."*

62. This version of P.W.-3 that the accused-appellants, namely, Jaikishan @ Bablu and Anita used to have illicit relations, which the deceased used to object and due to which the accused-appellant Jaikishan used to beat and torture the deceased and ultimately, in the night of the incident, both the accused-appellants killed her by pouring kerosene oil on her and setting her on fire, has been fully supported by the testimony of P.W.1 and P.W.-2 and the version as unfolded in the FIR, even though the P.W.-1 and P.W.-2 are hear say witnesses but they are consistent from the very beginning and till the recording of their statements before the trial court. The prosecution version that due to illicit relations of accused-appellant Jaikishan @ Bablu with accused-appellant Anita, he used to beat and torture the deceased and before two months of the incident, accused-appellant had beaten the deceased as she objected his illicit relations with accused Anita and thrown out the deceased from his house after which she went to her parent's place and disclosed the same to her parents and after that she lodged an NCR being NCR No. 41 of 2011 under Sections

323, 504, 506 I.P.C. against the accused-appellants and she also got herself medically examined and after settlement agreement (faisalanama), she went to her in-laws place, has also been proved by the P.W.-7 (second Investigating Officer). From the such facts it is also clear that the accused-appellants had strong motive to kill the deceased. The autopsy report of the body of the deceased as well as statements of the Autopsy Surgeon P.W.6 Dr. Jitendra Kumar Tyagi support the prosecution version.

63. In view of the above discussions and deliberations, we find that the finding of the Court below with regard to accused-appellants Jaikishan @ Bablu and Anita is correct and the guilt of both the accused-appellants have been proved beyond reasonable doubt by the prosecution, which is sustainable in the eyes of law. Such accused-appellants, who committed heinous crime in murdering the deceased Rekha by pouring kerosene oil on her and setting her on fire only because she was strong protester of their illicit relationship, are not entitled to any leniency from us. Such persons, who are black spot in the society, cannot be set at liberty.

64. Consequently, both the appeals filed by the accused-appellants are devoid of merit and are accordingly dismissed. .

65. Let a copy of this judgment be sent to the Chief Judicial Magistrate, concerned henceforth, who shall transmit the same to the Jail Superintendent concerned in terms of this judgment.

(Shiv Shanker Prasad, J.)

(Dr. Kaushal Jayendra Thaker, J)

**Order Date :- 29.05.2023**

Sushil/-