

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Date of Decision: 19th August, 2009

+ **CRL.A. 384/2001**

MOHD. MOHSIN Appellant
Through: Mr. Sumeet Verma, Advocate

versus

STATE Respondent
Through: Mr. Pawan Sharma, Advocate

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MS. JUSTICE INDERMEET KAUR

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

PRADEEP NANDRAJOG, J. (ORAL)

1. Vide impugned judgment and order dated 1.10.1999, the appellant has been convicted for the offence of having murdered his wife Noorjahan.

2. Vide order dated 5.10.1999, the appellant has been sentenced to undergo imprisonment for life and to pay a fine in sum of Rs.10,000/-; in default of payment of fine he has been directed to undergo rigorous imprisonment for 2 years.

3. A perusal of the impugned decision shows that the dying declaration Ex.PW-9/A recorded by Mr.Deepak Virmani

PW-9, then working as the Sub-Divisional Magistrate in the area, has been accepted as truthful, without blemish and inspiring confidence. Since the deceased named the appellant as the perpetrator of the crime, the learned Trial Judge has convicted the appellant for the offence of having deliberately set fire to Noorjahan as per the dying declaration Ex.PW-9/A.

4. Noorjahan, aged about 19 years, was admitted at GTB Hospital on 20.10.1996 at around 10:00 PM; a fact recorded in her MLC Ex.PW-7/A.

5. Noorjahan was brought to the hospital by the appellant and was suffering from 70% burns. As recorded in the MLC, the front of her face, both arms and forearms, front and back of the whole chest and the abdomen as also the right thigh were burnt.

6. On receipt of the information of a lady being burnt, HC Rajender Singh left for the hospital in the company of SI Onkar Singh PW-6. They found Noorjahan admitted in the casualty of the hospital in a burnt condition. The Sub-Divisional Magistrate of the area was informed.

7. The statement Ex.PW-9/A of Noorajahan was recorded by the Sub-Divisional Magistrate somewhere around 1:00 AM on 21.10.1996 i.e. the intervening night of 20th and 21st October 1996.

8. In her statement Ex.PW-9/A Noorjahan disclosed that she was the wife of the appellant and resided in House No.68, Gali No.2, West Karta Nagar Delhi and that her age was 19 years. She informed that she had married the appellant 8-9 months ago and that it was a love marriage. That she was residing with the appellant for the last 3 months in Krishna Nagar area and that the appellant was engaged in the work of nickel polish. On 20.10.1996 she had a quarrel with her husband i.e. the appellant, who gave her physical beating and threatened to set her on fire. That at 8:00 PM her husband sprinkled kerosene oil on her and set her on fire. That she was not accidentally burnt and for the incident she holds her husband fully responsible.

9. Making an endorsement Ex.PW-6/A beneath the statement recorded by the Sub-Divisional Magistrate, SI Onkar Singh, got registered the FIR in question.

10. We may note at this stage that the endorsement Ex.PW-6/A records that the statement of the deceased and the accompanying endorsement has been dispatched from the hospital at 1:15 AM on 21.10.1996.

11. The investigating officer returned to the house of the appellant and the deceased, to carry out further investigation, and he prepared a rough site plan, contours

whereof were later on got recorded in the site plan to scale Ex.PW-5/A. The plan shows the place wherefrom a plastic can containing kerosene oil was lifted as also the place where burnt clothes and a matchbox was lifted. The spot wherefrom the same were lifted is inside a room adjoining an open verandah in the northern direction of the verandah.

12. In spite of best medical treatment Noorjahan could not be saved. The young girl unfortunately died on 26.10.1996. The body of Noorjahan was seized and sent to the mortuary for post-mortem. Dr.K.K.Banerjee PW-10 conducted the post-mortem on 26.10.1996 at 11:10 AM and inter-alia noted that the deceased had ante-mortem burn injuries which were deep to superficial burns and were present over the face, front and back of chest, both hands, back of abdomen and gluteal region, front of both thighs and upper parts of front of abdomen. He also noted that there was evidence of bruising as a result of blunt force impact present over the right leg. He further opined that 68% of the body surface was burnt and that the cause of death was septicemia due to burn injuries. The post-mortem report Ex.PW-10/A recording as aforementioned was penned by him.

13. After the post-mortem he handed over the scalp hair of the deceased to the investigating officer, obviously for

forensic evaluation to opine whether kerosene oil was detected on the scalp hair or not.

14. The investigating officer did not send the scalp hair of the deceased for forensic examination, evidenced by the CFSL Report Ex.PW-15/E, which shows only 2 exhibits being sent for forensic examination, being partially burnt cloth pieces and the can lifted from the room where Noorjahan was burnt. Kerosene oil was detected in the container. Neither kerosene oil nor its residues were detected on the partially burnt cloth pieces.

15. At the trial Akhtari Begum, PW-1, the mother of Noorjahan and Ayub Khan PW-2, the brother of Noorjahan appeared as witnesses of the prosecution and both deposed that the appellant had eloped with Noorjahan and in respect thereof a complaint was lodged with the police and that Noorjahan was recovered from village Srakda, District Muradabad, U.P. from the house of the appellant and that due to intervention of community people, Noorjahan was permitted to go back to the appellant. Both deposed that when they heard that Noorjahan was burnt, they reached her house and took her in a TSR to GTB Hospital and that after she was admitted at the hospital, she told them that the appellant had set her on fire.

16. We may note that there is a difference in the version of Akhtari Begum and her son Ayub Khan with respect to what was told by the deceased as the cause of her burn injuries. Whereas Akhtari Beguma said that her daughter told her that since appellant used to beat her quite regularly she told the appellant as to why he does not kill her once and for all and upon this, the appellant poured kerosene oil on her and set her on fire by lighting a matchstick. Ayub Khan deposed differently. He said that his sister told him that she told the appellant to fetch water from the tap on the street as she had to cook food, upon which the appellant lost his temper and told her as to why every time he returned home he is asked to bring water. He desired to know from her as to why she would not bring water to the house before he arrived. Mohsin i.e. the appellant told her that he would burn her. She challenged the appellant to burn her, upon which the appellant poured kerosene oil on her and lit a matchstick and ran away.

17. HC Rajender Singh PW-3, who had accompanying SI Onkar Singh PW-6, to the hospital when DD No.42, Ex.PW-3/A was registered at the police station, pertaining to Noorjahan being burnt, stated that after the SDM reached the hospital the statement of the deceased was recorded.

18. Since an argument has been projected in the

appeal by learned counsel for the appellant as to who actually recorded the statement Ex.PW-9/A made by the deceased, we note the exact words used by PW-3 on the issue. He said: *'after SDM Sahib reached the hospital he directed SI Onkar Singh to record the statement of injured Noorjahan'*.

19. SI Onkar Singh PW-6 deposed that when the SDM reached the hospital pursuant to information given by him and recorded the statement of Noorjahan, he made an endorsement Ex.PW-6/A, on the same and prepared the rukka for registration of the case.

20. Mr.Deepak Virmani PW-9 the SDM concerned, deposed that he recorded the statement of Noorjahan at 1:00 AM in his own handwriting and that the statement was Ex.PW-9/A, which bore his signatures at point 'A'. He further deposed that he orally directed the IO to take appropriate action as per law.

21. Learned counsel for the appellant has challenged the impugned judgment and order dated 1.10.1999 by urging the following points:-

(i) The post-mortem report Ex.PW-10/A categorically records that the scalp hair were preserved and handed over to the IO. The FSL report Ex.PW-15/E shows that the scalp hair were not sent for forensic evaluation. Counsel submits that

since the case of the appellant is that Noorjahan suffered accidental burns while cooking, absence of kerosene oil on the scalp hair would have probablized the said fact.

(ii) That the MLC Ex.PW-7/A does not record that smell of kerosene oil could be detected by the doctor when Noorjahan was examined by the doctor at GTB hospital. Thus, counsel urges that the same discredits the dying declaration of Noorjahan that the appellant poured kerosene oil on her and then set her on fire.

(iii) Drawing our attention to the statement Ex.PW-9/A, learned counsel points out that right hand thumb impression of Noorjahan has been obtained thereon. Referring to the post-mortem report Ex.PW-10/A wherein it is recorded that both the hands of the deceased had ante-mortem burn injuries and linking the same to the testimony of Dr.K.K.Banerjee PW-10, where he stated that both the hands of the deceased were completely burnt, learned counsel submits that a serious doubt is cast whether at all the thumb impression on the statement Ex.PW-9/A could be that of Noorjahan. Learned counsel has specifically urged that the thumb impression on the statement Ex.PW-9/A is so clear that the possibility of the same being those of a person whose hands are burnt can safely be ruled out.

(iv) With reference to the testimony of HC Rajender Singh PW-3, SI Onkar Singh PW-6 and Mr. Deepak Virmani PW-9, the SDM concerned, learned counsel urges that there is considerable confusion as to who actually is the scribe of the statement Ex.PW-9/A. Learned counsel urges that as per HC Rajender Singh the statement was scribed by SI Onkar Singh under the directions of the learned Sub-Divisional Magistrate. SI Onkar Singh and the Sub-Divisional Magistrate have deposed to the contrary i.e. that the Sub-Divisional Magistrate recorded the statement. Thus, learned counsel submits that it would be unsafe to sustain the conviction of the appellant on the basis of the statement Ex.PW-9/A.

(v) With reference to the testimony of the mother and the brother of the deceased on the issue as to what Noorjahan told them pertaining to the circumstance of her catching fire, learned counsel submits that the mother and son have given completely different versions of what Noorjahan said about her receiving burn injuries. Counsel submits that the said two versions are also at complete variance with the version recorded in the statement Ex.PW-9/A. The crux of the submission is that, we have on record two versions of an oral dying declaration and one written version of a dying declaration; all three being at variance with each other with

respect to the circumstances and the cause attributed by the deceased resulting in her suffering burn injuries which prove fatal.

(vi) With reference to the statement of PW-1, while deposing in Court, that in spite of her requesting the investigating officer he did not record her statement under Section 161 Cr.P.C. counsel urges that it is apparent that Akhtari Begum's version as deposed in Court was for the first time brought in the realm of existence in Court and therefore lacked credibility.

(vii) Questioning the credibility of the testimony of PW-2, learned counsel draws our attention to the improvements made by him while deposing in Court vis-à-vis his statement recorded under Section 161 Cr.P.C. The improvements are the allegations pertaining to the demand of dowry by the appellant, which do not find mention in the statement under Section 161 Cr.P.C. as made by the witness.

(viii) Learned counsel urges that PW-1 and PW-2 are most unreliable witnesses for the reason they have stated that they were the ones who had brought the deceased to the hospital and the appellant had run away. The fact of the matter is, as recorded in the MLC of the deceased, that the husband i.e. the appellant brought her to the hospital.

22. We deal with the submission noted hereinabove at seriatim.

23. It is settled law that a lapse by the investigating officer cannot be taken advantage of by the defence, if there is otherwise cogent evidence inculcating the accused. Thus, merely because scalp hair of Noorjahan were not sent for forensic examination would not mean that the case of the prosecution has to be thrown out. It was so held in the decision reported as 2000 SCC Cri. 1516 State of West Bengal Vs. Mir Mohammad Umar & Ors. In this context it is important to note that in her dying declaration Noorjahan has not stated that the appellant poured kerosene oil on her head. She has only said that the appellant sprinkled kerosene oil on her and set her on fire. Further, the MLC does not record the detection of kerosene oil from the body of Noorjahan. It all depends as to how much kerosene oil is thrown on a person who is burnt. If quantity of kerosene oil thrown is small it would get consumed in its entirety by being soaked by the clothes worn by the person and when the body is set on fire, the parts of the clothes which have absorbed kerosene oil would flair-up first and immediately, thereby leaving no residual traces of kerosene oil either on the clothes or on the body. A Division Bench of this Court in its decision dated 4.2.2009 deciding

Crl.A.No.312/2007 Maksood Ali Vs. State has highlighted aforenoted aspect. The post-mortem report of the deceased shows that 68% of her body surface was burnt and the burns were deep to superficial, meaning thereby, not a very large quantity of kerosene oil was sprinkled on Noorjahan. Learned counsel for the appellant has cited a decision of a Division Bench of this Court reported as 2009 (1) JCC 491 Jitender Kumar Vs. State (NCT) of Delhi to urge that the said decision holds that absence of kerosene oil on the clothes of the deceased or the smell thereof not emanating from the body rules out that kerosene oil was thrown. We have perused the decision, which incidentally was authored by one of us, namely, Pradeep Nandrajog, J. The observations in said decision pertaining to kerosene oil not being detected on the body of the deceased nor on the partly burnt clothes of the deceased have to be understood with reference to the facts of the case. The deceased had, in her dying declaration, inculpated her mother-in-law, alleging that the mother-in-law had thrown kerosene oil on her. There was evidence in said case to prove that the mother-in-law was not in the house. Further, the burn injuries on the deceased were suggestive of accidental burn injuries. It was in said circumstance that additional sustenance was sought in the reasoning that in all

probability the deceased was not burnt to death. The decision is not an authority that whenever kerosene oil is not detected on the clothes of the deceased or smell of kerosene oil is not noted from the body the only conclusion to be drawn is that kerosene oil was not used.

24. The second submission pertaining to smell of kerosene oil not being detected by the doctor. When Noorjahan was admitted at the hospital stands dealt with while dealing with submission No.1 and for the reasons noted in the preceding para, it hardly matters whether smell of kerosene oil was not detected by the doctor on the body of Noorjahan.

25. The third submission urged pertains to the thumb impression of Noorjahan on her statement Ex.PW-9/A, it is apparent that the submission is premised on the fact that the post-mortem report of Noorjahan records that both hands were burnt. We do not think that from said fact the only conclusion is that the thumb impression of Noorjahan could not be obtained. A perusal of the post-mortem report Ex.PW-10/A shows that Dr.K.K.Banerjee has noted that the burn injuries on the body of Noorjahan were deep to superficial. It is possible that the burn injuries on her hands were superficial. We note that Dr.K.K.Banerjee has not been cross examined with reference to his post-mortem report as to whether the hands

of the deceased had deep burn injuries. Mr. Deepak Virmani PW-9, the SDM concerned has proved the statement Ex.PW-9/A. During cross examination he affirmed that the thumb impression on the statement is that of Noorjahan. We see no reason why Mr. Deepak Virmani would speak lies or would fabricate record.

26. The fourth submission urged as to there being considerable confusion as to who is the scribe of the statement Ex.PW-9/A, it is apparent that the foundation of the argument is the testimony of HC Rajender Singh PW-3 who has said that after the SDM reached the hospital he directed SI Onkar Singh to record the statement of Noorjahan. But, SI Onkar Singh has categorically deposed that the statement was recorded by SDM. The SDM i.e. Mr. Deepak Virmani has also stated that he recorded the statement. Thus, there is no scope to infer any confusion. In this connection it needs to be emphasized that SI Onkar Singh PW-6 has deposed that on the directions of the SDM to get registered a case after the statement Ex.PW-9/A of Noorjahan was recorded and handed over to him, he made an endorsement Ex.PW-6/A beneath the same and prepared the rukka for FIR to be registered. During cross examination no question has been put to SI Onkar Singh pertaining to his testimony relating to the endorsement Ex.PW-6/A. We have

seen the writing Ex.PW-9/A and the writing Ex.PW-6/A. They are in different hands. Thus, SI Onkar Singh being scribe of Ex.PW-9/A is inherently ruled out. It appears that the direction given by the SDM to SI Onkar Singh to get registered the FIR after the SDM recorded the statement Ex.PW-9/A has been remembered by HC Rajender Singh as if the direction was to get the statement recorded.

27. The fifth to eighth submissions pertain to the testimonies of Akhtari Begum and her son Ayub Khan; the improvements made by them and the inconsistent version of what the deceased told them and lastly Akhtari Begum stating that the police never recorded her statement.

28. The over talkative Indians, for unexplainable reasons, revel in weaving self opined stories resulting in embellishments in their versions. A popular TV serial highlighted the same where four participants were confined in a sound proof booth and the only means of communication between the participants was an intercom. The anchor of the show would read out a script to participant No.1 who after listening to the same would convey the same over the intercom to participant No.2, who in turn, would communicate the same over the intercom to participant No.3, who would communicate the same to participant No.4. He/she being the

last participant would then speak it out to the audience. The team which could successfully transmit the information with the least variation was the winner. It was noted that in all cases, of what was originally spoken of vis-à-vis what was finally communicated by participant No.4, had material variations ranging between 50% to 70%. Not only were omissions made but even irrelevant insertions were made in the text and the context of the statements forming part of the original transcript. Thus, Akhtari Begum and Ayub Khan interweaving their own versions while retaining the core is irrelevant. It is obvious that Akhtari Begum and Ayub Khan were angry with the appellant and to properly nail him have given exaggerated versions qua him. No doubt, Akhtari Begum has said that her statement was never recorded by the police, but it appears that the old lady has a fading memory. Insp.Vinod Kapoor PW-15 who took over the investigation from SI Onkar Singh has categorically deposed that the statements under Section 161 Cr.P.C. of the witnesses were got recorded by him and the scribe thereof was SI Onkar Singh. His testimony to said effect has gone unchallenged.

29. We need not resort to sever the truth from the lies in their testimonies for the reason we propose to completely ignore the same.

30. Ignoring the testimonies of Akhtari Begum and Ayub Khan we have on record the authentic and unblemished dying declaration made by the deceased being Ex.PW-9/A. It is settled law that a dying declaration which inspires confidence and is unblemished can form the sole evidence to convict the accused. Dying declarations of such high quality need no corroboration. But, in the instant case, we find corroboration to the dying declaration of the deceased. She has categorically stated that on the day she was burnt, her husband i.e. the appellant had physically beaten her. The MLC of Noorjahan specifically notes evidence of bruising as a result of blunt force impact over the right leg. It is obvious that Noorjahan was beaten before she was burnt. Her said statement in her dying declaration is corroborative by independent evidence.

31. We find no merit in the appeal which is dismissed.

32. The appellant is on bail. His bail bonds and surety bonds are cancelled. The appellant is directed to surrender and suffer the remaining sentence.

PRADEEP NANDRAJOG, J.

INDERMEET KAUR, J.

**AUGUST 19, 2009
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