

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

% Date of Decision: 19th August, 2009

+ **CRL.APPEAL NO.390/2001**

DAVINDER Appellant
Through: Mr.Rajpal Singh, Advocate.

versus

STATE Respondent
Through: Mr. Pawan Sharma, A.P.P.

CRL.APPEAL NO.549/2001

SHEELA DEVI Appellant
Through: Mr.Rajpal Singh, Advocate.

versus

STATE Respondent
Through: Mr. Pawan Sharma, A.P.P.

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. We note the submissions urged by learned counsel for the appellants. It is firstly urged that PW-9 has admitted during cross examination that his statement under Section 161 Cr.P.C. was recorded on 13.9.1998; the offence being committed in the intervening night of 12th and 13th

July 1998, it was obvious, is the submission made, that there is an unexplained delay by the investigating officer in recording the statement of PW-9 under Section 161 Cr.P.C. Hence, counsel urges that the testimony of PW-9 who claims to be the recipient of an oral dying declaration made by the deceased has to be ignored. The second submission is that the MLC Ex.PW-2/A of the deceased and the post-mortem report Ex.PW-1/A do not record that smell of kerosene oil was detected from the body of the deceased. Thus, counsel urges that it can safely be assumed that kerosene oil was not thrown on the deceased. The third submission made is that the various exhibits seized by the investigating officer from the house of the deceased, as noted in the memo Ex.PW-14/A were not sent for forensic examination and as a result a valuable right of the accused has been taken away. Counsel submits that the memo Ex.PW-14/A shows that cuttings from the bed on which the deceased was burnt have been lifted by the investigating officer and since the deceased claimed that she was sleeping when appellant Davinder threw kerosene oil on her before setting her on fire, had the cuttings from the bed tested negative for the presence of kerosene oil, the same would have discredited the dying declaration made by the deceased to the Sub Divisional Magistrate. Lastly, counsel urges that Gaura, the daughter of the deceased who was

present in the house of the deceased has deliberately not been examined by the prosecution for the reason the deceased had set fire to herself to teach a lesson to the appellants and as deposed to by the defence witnesses Gaura had instigated her mother to name the appellants as the perpetrators of the crime. Counsel urged that had Gaura stepped into the witness box, the prosecution feared that truth would have emerged by cross-examining Gaura.

2. We may note that the only challenge to the statement Ex.PW-13/A recorded by the Sub Divisional Magistrate and as made by the deceased is on the plea pertaining to not sending the bed cuttings for forensic analysis.

3. Let us briefly note the facts. As recorded in the MLC Ex.PW-2/A of Kirpa Devi, the deceased, she was brought to the casualty of GTB Hospital at 3:55 AM on 13.7.1998. Information pertaining to the deceased being on fire was received in the police station and entered vide DD No.80-B, Ex.PW-5/A at 3:20 AM.

4. SI Sanjeev Sharma PW-18 accompanied by Const. Atma Ram went to the house of the deceased and there from to the hospital. He called Shri Kuldeep Gangar PW-13, the SDM. The SDM reached the hospital by around 7:00 AM. On the MLC of the deceased at the portion encircled Ex.PW-20/A, Dr.Praveen Chandra PW-20, made an

endorsement certifying that the patient was fit for statement. Kuldeep Singh Gangar immediately recorded her statement Ex.PW-13/A and obtained her thumb impression at point Mark 'A' on the statement.

5. In her statement Ex.PW-13/A, which is in question-answer form, Kirpa Devi informed that her landlord, Davinder and his wife Sheela had sprinkled kerosene oil on her and set her on fire. She gave a reason for the act, being that her son Ashok was in love with Renu the daughter of the Davinder and Sheela and that for the last 15 days Renu was missing and even her son was missing for the last one week. Due to this her landlord and his wife used to quarrel with her. That she was sleeping in her house. Her sleep was disturbed when kerosene oil was sprinkled on her. Davinder was sprinkling kerosene oil on her and his wife Sheela lit a match stick and set her on fire.

6. The MLC of the deceased shows that she has been brought to the hospital in a PCR van by ASI Inder Singh PW-9. The MLC records a fact as disclosed by the patient herself that she was set on fire by the appellants who poured kerosene oil on her. As per ASI Inder Singh PW-9, when he was removing the deceased to the hospital on the way she told him that the appellants had poured kerosene oil on her and set her on fire. Thus, as per the prosecution, the first dying declaration of the deceased is

an oral dying declaration made to ASI Inder Singh immediately after the incident.

7. The second dying declaration made by the deceased is to the doctor who prepared the MLC Ex.PW-2/A i.e. Dr.Adarsh PW-2, who proved the MLC. The third dying declaration is Ex.PW-13/A recorded by the SDM Shri Kuldeep Singh Gangar PW-13 who proved the same. The last is the oral dying declaration made by the deceased to her son-in-law Srinivas PW-4 who was in the house of his in-laws and went to the hospital and deposed that when he was in the hospital his mother-in-law told him that the appellants had set her on fire.

8. We may note at the outset that SI Amar Singh PW-8 has deposed that FIR No.379/98 under Section 363 IPC was registered against Ashok, son of Kirpa Devi the deceased at the instance of appellant Davinder Kumar. Ashok and Kirpa Devi were tenants under Davinder. It is thus apparent that the appellants were nursing a grievance against the deceased and her son Ashok and hence had a motive.

9. Before discussing the submission made by learned counsel for the appellants we may note that Kirpa Devi died a few hours after her statement was recorded by the learned SDM.

10. It is settled law that defective investigation or lapses by the investigating officer are not sufficient to throw out the case of the prosecution, if it is otherwise established by cogent evidence. Thus, the lapse of the investigating officer in belatedly recording the statement of PW-9 under Section 161 Cr.P.C. and in not sending for forensic examination the various exhibits seized from the place of occurrence of the crime have to be ignored, if otherwise the prosecution has successfully proved the case. Yes, if doubts arise in the judicial mind, said lapses have to be put in the weighing scales in favour of the accused.

11. PW-9 ASI Inder Singh is the first person to have met the deceased because he responded to the distress call being in charge of the nearest PCR van. He has no motive to tell lies. Thus, notwithstanding the lapse committed by the investigating officer in belatedly recording the statement of PW-9 under Section 161 Cr.P.C., his testimony qua the dying declaration made by the deceased has to be accepted for the reason he has successfully withstood the test of cross-examination.

12. Even if we ignore the testimony of PW-9, we have on record the second dying declaration of the deceased recorded on the MLC Ex.PW-2/A by Dr.Adarsh PW-2. We note that PW-2 has proved the MLC Ex.PW-2/A and has deposed that the same is in his hand. Except for a bald

suggestion that the patient did not state to him the history of how she was burnt, PW-2 has not been cross-examined with respect to the mental and physical condition of the deceased and her capacity to coherently state. PW-2 is a doctor in government service. He has no animosity towards the accused. Why should he be lying? We hold that the testimony of PW-2 is credible and so is the MLC Ex.PW-2/A prepared by him.

13. The statement Ex.PW-13/A recorded by the SDM Shri Kuldeep Singh Gangar PW-13 is preceded by a certification Ex.PW-20/A by doctor Praveen Chandra PW-20 duly certifying that the deceased was fit for statement. The statement Ex.PW-13/A has been duly proved by PW-13 to whom it has not even been suggested that the deceased was not in a position to make the statement. A bald suggestion has been made to him that he has incorrectly recorded the statement. Why should PW-13 do so? He has no animosity towards the appellants.

14. We may ignore the oral dying declaration claimed to have been made by the deceased to him as deposed to by Sriniwas PW-4.

15. We have independent evidence of the truth of the dying declaration. The same is through the testimony of Ramwati DW-1 and Om Prakash DW-2, the neighbours who have deposed in favour of the accused, but have

ignored the fact that while introducing themselves as witnesses both have deposed that the cries of help by the deceased awoke them from their slumber at the break of dawn on 13.7.1998. Both claimed that the cries of help of the deceased led them to her house which was the ground floor of the building on the first floor whereof resided the appellants. Both of them claimed that Gaura, the daughter of the deceased told her in their presence to name the appellants as the ones who had set her on fire. If this be so, the obvious conclusion would be that the deceased set herself on fire. It means that either she was attempting a suicide, in which case, she would not call for help. Or so over powered with hate against the appellants was she, that she was prepared to inflict a life threatening injury on self and falsely implicate the appellants. If this was so, she needed no instigation by her daughter.

16. We concur with the view taken by the learned Trial Judge that the prosecution has successfully proved a motive of the appellants to commit the crime. The prosecution has successfully proved the commission of the crime by the appellants by proving the dying declarations of the deceased through PW-2 and PW-13.

17. That Gaura, the daughter of the deceased was not examined as a witness by no stretch of imagination can

be attributed to the desire of the investigating officer to hold back a material witness.

18. We find no merit in the appeals. The appeals are dismissed.

19. The appellants are on bail. The bails bonds and surety bonds furnished by them are cancelled.

PRADEEP NANDRAJOG, J.

INDERMEET KAUR, J.

AUGUST 19, 2009
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