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IN THE HIGH COURT OF DELHI

Judgment reserved on : January 19, 2009

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Judgment delivered on : February 04, 2009

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CRL.A.312/2007

MAKSOOD ALI

..... Appellant

Through: Mr.Sumeet Verma, Advocate.

versus

STATE

..... Respondent

Through: Ms.Richa Kapoor, Advocate.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE ARUNA SURESH

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

: PRADEEP NANDRAJOG, J.

1. On 3.6.2002 at around 11.50 PM a message was received at the PCR van 'Baker' that a person was on fire at house No.144/145 near the graveyard at Welcome Colony. From the PCR van the message was flashed to PS Welcome where information, as per the message, was recorded vide DD No.23A, Ex.PW-20/A, and was handed over to ASI Ashik Ali Kirmani PW-20, so that he could proceed to the spot. He did so. Const. Gangadhar PW-5, accompanied him.

2. In the meanwhile the police personnel of the PCR van proceeded to the spot. HC Khangesh Kumar PW-7, who was a part of the police team in the PCR van helped in removing Shakeela (the deceased), from a room on the first floor of the house. The PCR van took her to GTB Hospital where she was admitted at 1.00 AM on 4.6.2002. Shakeela was badly burnt. At the hospital, Dr.Ankur, on emergency duty, examined Shakeela and recorded on the MLC Ex.PW-16/A, that the patient had burns on the neck, front of chest, abdomen and back, right arm, left fore-arm, right thigh and part of leg with back covering 40% of the body. It was noted in the MLC: *'Smell of kerosene in clothes'*. The patient was noted to be conscious and oriented.

3. ASI Ashik Ali Kirmani and Const. Gangadhar reached the place of occurrence as disclosed in Ex.PW-20/A and on learning that the injured had been removed to GTB Hospital, ASI Ashik Ali Kirmani proceeded to the hospital, leaving behind Const. Gangadhar at the spot.

4. At the hospital, he enquired about the mental condition of the patient and the doctor i.e. Dr.Ankur informed, that the patient was fit for statement and accordingly, he i.e. ASI Ashik Ali Kirmani recorded the statement Ex.PW-4/A of Shakeela. She stated that she was married to Maksood according to Muslim rites about 14 years ago and three children, a son named Mehboob aged 12 years and two daughters named Aashia aged 8 years and Zeenat aged 4 years were born to them. That she used to live with her children in the

village and about two years ago came to Delhi with the children. Her husband used to quarrel with her every day and used to compel her to go back to the village leaving the children behind. That her husband was an alcoholic and that on many occasions had beaten her. That her husband was employed at a LIC canteen at Connaught Place. That at 8.30 PM today, her husband came back to the house and started abusing her and additionally started beating her. Thereafter, he took their son Mehboob to a doctor to purchase medicine. On returning, he once again started quarreling with her. He took her inside the room and started beating her and locked the door from inside and said that she should immediately leave his house, leaving the children behind, otherwise he will kill her. She told him as to where she could go at that time. At which he said that he would destroy her by setting her on fire and at that he picked up a can containing kerosene oil lying in the room and after pouring the same over her set her on fire after lighting a match-stick from a match-box which he was having with him. Her clothes caught fire. Crying she ran towards the door and started opening the door. He prevented her from going out. After opening the door when she went out to reach the bath-room to douse the fire by pouring a bucket of water he snatched the bucket from her hand. Somebody informed the police and the PCR van had brought her to the hospital.

5. Since an argument has been advanced with respect to Shakeela being possibly tutored, it may be noted that Abdul Jabbar

PW-4, brother of Shakeela, has signed the said statement at point A-1 i.e. was present when the statement was recorded.

6. ASI Ashik Ali Kirmani made an endorsement, Ex.PW-20/C, on Shakeela's statement and forwarded the same through Const. Gangadhar for registration of the FIR. At the police station, ASI Nagendra Singh PW-6, registered the FIR Ex.PW-6/A under Section 307 IPC at 2.45 AM on 4.6.2002.

7. In the meanwhile ASI Ashik Ali Kirmani returned to the place of the incident. He prepared a rough site plan Ex.PW-20/D. Seven burnt pieces of salwar kameez, a match-box, a chunni and a plastic can were seized from the spot as recorded vide recovery memo Ex.PW-5/A. A photographer, Const. Ratan Singh PW-1, was summoned who reached the site at 4.30 AM and took photographs Ex.PW-1/A, Ex.PW-1/B and Ex.PW-1/C; negatives whereof are Ex.PW-1/D, Ex.PW-1/E and Ex.PW-1/F.

8. The appellant was apprehended at the house itself as per arrest memo Ex.PW-20/G.

9. A few days later, SI Mukesh Kumar Jain PW-15, went to the spot and at the pointing out of Inspector Mehar Chand prepared the scaled site plan Ex.PW-15/A.

10. Shakeela succumbed to her injuries at around 11.40 AM on 8.6.2002. Const. Jasbeer PW-10, on duty at GTB Hospital informed the police station that Shakeela had died which information was noted vide DD No.12A, Ex.PW-20/H and hence the offence punishable under Section 302 IPC was added in the FIR.

11. The SHO of the police station, Inspector Mehar Chand PW-21, reached the hospital and sent the body for post-mortem where Dr.Arvind Kumar PW-18, conducted the post-mortem and made the report Ex.PW-18/A recording as under:-

“Superficial to deep ante mortem flame burns involving the forty per cent (40%) of total body surface area. Foul smelling greenish yellow slough present over the burn areas. Singeing of body hair and scalp hair present. Charring of skin present at places. Burn areas are – face, hairline, anterior and posterior, neck, chest and abdomen, right upper limbs, part of left upper limb, back, genitalia both the thigh and buttocks.

No other external injury present over the body.”

12. He opined that the cause of death was shock due to septicemia resulting on account of ante mortem flame burn involving 40% of the total body surface area.

13. He preserved the scalp hair, blood on gauze piece and unburnt skin tissues for forensic examination which were taken possession of by SHO Mehar Chand vide memo Ex.PW-8/A.

14. The items seized at the spot vide seizure memo Ex.PW-5/A were sent for forensic examination to the CFSL, Hyderabad which gave a report, Ex.PW-21/E, to the effect that no trace of kerosene was detected from any item, save and except the can.

15. On 20.8.2002, Inspector Mehar Chand moved an application before the learned Metropolitan Magistrate requesting that the statement of the son of the deceased, namely Mehboob Ali and a daughter of the deceased namely Aashia Bano be recorded under Section 164 Cr.P.C. Rakesh Kumar, MM, Delhi, PW-19, recorded the statement Ex.PW-9/A of Mehboob Ali, and the

statement Ex.PW-11/A of Aashia, as per which Mehboob Ali stated that on 3rd of the month his father returned to the house at night after consuming liquor. That his father used to drink every day. Then he took him for buying medicine. He used to pass blood in his stools. After purchasing medicine they came back. Since the medicine was mixed his mother started separating the pouches. His parents quarreled. His father said that Rs.50/- has been wasted and threw the medicine outside. His father started beating his mother and after pouring kerosene oil over her set her on fire. When his mother tried to douse the flames by pouring water on herself his father snatched the bucket. Police came to the house and took his parents to the hospital. In her statement, Aashia stated that her father had consumed alcohol in the night. He took Mehboob to purchase medicine. Then both fought. Her mother was wanting to serve dinner. Her father did not eat the food. He started drinking alcohol. Her father poured kerosene oil on her mother and set her on fire. Neighbours gathered, followed by the police.

16. Armed with the aforesaid material and listing the children of the deceased and one Rehmat Ali PW-3 and Islam Beg PW-17, neighbours of the deceased and the accused, as also the brother of the deceased Abdul Jabbar PW-4, as the witnesses of the prosecution a challan was filed alleging that the appellant had murdered his wife by pouring kerosene oil on her and thereafter set her on fire.

17. At the trial, the MLC of the deceased was proved through the testimony of Dr.S.Kohli PW-16, for the reason, Dr.Ankur who had examined the deceased and had recorded the MLC Ex.PW-16/A had left the hospital and Dr.S.Kohli had worked with him and claimed to be familiar with his signatures and his writing.

18. The doctor who conducted the post mortem Dr.Arvind Kumar PW-18 proved the post-mortem report Ex.PW-18/A. Various police officers who were associated with the inquiry were examined to prove the site plan, photographs of the site, the seizure memos and the recovery memos. No submissions have been made with respect to the purity of the investigation carried out and hence we eschew reference to their depositions.

19. The son of the deceased namely Mehboob Ali was examined as PW-9. The Court questioned him to record a satisfaction that he understood the questions put to him. He was thereafter examined. He reiterated what he had stated before the learned Metropolitan Magistrate in his statement Ex.PW-9/A but made additions that: *Thereafter accused Maksood Ali my father bolted the room as well as the window of the room inside and in our presence he poured kerosene oil on the person of my mother Shakeela and set her ablaze after lighting the match-stick.*

20. It may be noted that immediately prior to this statement he deposed of a quarrel between his parents having taken place outside the room.

21. The daughter of the deceased Aashia Bano was examined as PW-11. The Court questioned her to record a satisfaction that she understood the questions put to her. She was examined thereafter. She re-stated what she had said in her statement before the learned Metropolitan Magistrate i.e. Ex.PW-11/A, but deviated a little by stating that after setting her mother on fire the accused fled away.

22. Rehmat Ali PW-3, and Islam Beg PW-17, turned hostile. They did not support the prosecution. They resiled from their previous statements recorded by the police under Section 161 Cr.P.C.

23. Abdul Jabbar, the brother of the deceased was examined as PW-4. He deposed that the accused was a habitual drinker and used to beat his wife and his children which fact was told to him by his sister on numerous occasions. That at the night of 3rd and 4th June 2002 he was in his house when he received a message from a neighbour of his sister that his sister was set on fire. He rushed to her house and proceeded to GTB Hospital because he learnt that his sister had been removed there. He deposed that his sister made the statement Ex.PW-4/A in his presence and that he signed the same at point A-1.

24. Relevant would it be to note that he was cross-examined by counsel for the accused and that no suggestion was given to the witness that he had tutored his sister to state what she did.

25. Believing that Ex.PW-4/A was a statement truthfully made by the deceased and believing ASI Ashik Ali Kirmani who had recorded the statement and finding corroboration thereto from the testimony of the children of the appellant and the deceased, as also the fact that in the MLC it was recorded that the patient was fit for statement, the learned Trial Judge has returned a finding of guilt.

26. At the hearing of the appeal, learned counsel for the appellant urged the following points:-

(1) The CFSL report, Ex.PW-21/E, did not report kerosene residue being detected from the burnt clothes and the match-box recovered from the site and hence use of kerosene was ruled out. If this was so, counsel urged that obviously the deceased lied and that the children were tutored. Learned counsel urged that there was a motive for the deceased to falsely implicate the appellant because her statement shows that the appellant was desiring that she should return and live in the village; which was not to the liking of the deceased. Counsel elaborated by urging that since brother of the deceased was present at the hospital, the possibility of his tutoring his sister could not be ruled out.

(2) Learned counsel made the second submission based on a statement made by ASI Ashik Ali Kirmani PW-20, who on cross-examination, admitted that when he arrested the appellant he had noted that the appellant had burn wounds on his hands. Counsel urges that as explained by the

appellant in his statement under Section 313 Cr.P.C., when the appellant reached home he saw that his wife was on fire and he tried to save her and in the process suffered burn injuries on his hands. Counsel urges that the prosecution has not explained as to how did the appellant suffer burn injuries on his hands and the explanation of the appellant was consistent with the injury suffered by the appellant and hence was evidence of the appellant being innocent.

(3) The third submission made was that only the upper part of the body of the deceased was burnt. Had kerosene oil being poured on her, the entire body would have caught fire. Counsel urges that the nature of the burn injuries suggest that the upper garments of the deceased caught fire and not the lower. This probablizes that the deceased was cooking on the stove and accidentally caught fire.

(4) Last submission made was that the son Mehboob Ali PW-9, had deposed of being outside the room when the parents fought, followed by his father bolting the room from inside and then lighting a match-stick and setting his mother on fire. Counsel urged that where from Mehboob Ali could see this, if the door was locked.

27. Neither submission made by learned counsel for the appellant has impressed us.

28. That no kerosene was detected from the burnt clothes and the match-box recovered from site as per CFSL report Ex.PW-

21/E does not mean that the deceased and her children lied. No text has been shown to us that if kerosene oil is used, residues thereof have to be always found on the unburnt pieces of cloth or the match-box. It all depends as to how much kerosene oil was poured. Dousing a person with kerosene oil is distinct from sprinkling kerosene oil on a person. The former means a large volume of kerosene oil being used and the latter would mean a less volume of kerosene oil used. If you sprinkle kerosene oil on a person, not all clothes and not the entire segment of the clothes worn, would get soaked with kerosene oil. Hence, the absence of kerosene oil being found on the pieces of unburnt clothes and the match-box does not negate the truthfulness of the dying declaration of the deceased and the statements made by her children. On the issue of Abdul Jabbar tutoring his sister, we note that when Abdul Jabbar appeared as PW-4 no suggestion has been given to him that he had tutored his sister. Thus, it does not lie in the mouth of the appellant to urge that Abdul Jabbar had tutored his sister. The plea that the deceased had a motive to falsely implicate her husband because her statement itself showed a marital discord between the couple has to be rejected for the simple reason each and every case of bride burning has elements of a marital discord, may be in the form of a dowry demand or that the husband had got fed up with his wife. We may add a caveat here. Motive for the wife to falsely implicate her husband requires to be proved with cogent and direct

evidence, and if shown to exist objectively, a presumption of false implication can be raised. The instant case has no such evidence.

29. The second plea urged is neither here nor there. The burn wounds on the hands of the appellants are explainable as per the dying declaration of the deceased and the testimony of her son Mehboob Ali PW-9. Both have stated that when the deceased tried to douse the flames by pouring water lying stored in a bucket, the appellant prevented her from so doing. It is obvious that the appellant had tried to grapple with his wife to prevent her from extinguishing the fire and in the said process suffered superficial burns on his hands.

30. We have used the expression superficial burns, for the reason, admittedly the appellant was apprehended the same night and as required by law produced before the Magistrate the next day. Had the appellant suffered deep burn wounds, the same would not have gone unnoticed by the Magistrate, who then would have certainly directed that medical treatment be given to the appellant. There is no evidence of the appellant being given any medical aid for suffering burn wounds. This shows that the burn wounds were extremely superficial. We note that the appellant has stated in his statement under Section 313 Cr.P.C. that he suffered the burn wounds on his hands when on reaching home he found that his wife was on fire and tried to douse the fire. But, we find no such suggestion was given to PW-9 and PW-11 that the appellant had

reached home in the night and had noted that their mother was on fire and that he tried to rescue their mother.

31. The third submission is again a figment of an imaginative mind but vague probability. The prosecution has not to bring on record such evidence where each and every hypothesis projected at the end of the trial by the accused requires to be explained. We clarify, reasonable probabilities and of a kind which any reasonable person would probablize on a given set of circumstances do need to be explained by the prosecution as per the evidence of the prosecution. That only the upper part of the body of the deceased was burnt is actually a misnomer, because as noted above, the post-mortem report shows that the front and the rear torso, the upper thighs, the genitals, and the buttock of the deceased were burnt. As explained with reference to the first submission urged, if less kerosene oil is sprinkled or more kerosene oil is sprinkled or is poured, would determine the percentage extent of the body affected by the burns. But, we need not probablize or speculate for the reason, no stove has been recovered from the room where the deceased was burnt. Obviously, the cooking place was elsewhere. The place where the deceased has been burnt as per Ex.PW-15/A is the living room of the couple.

32. The last submission made, with reference to the deposition of Mehboob Ali PW-9 wherein the child witness stated that his parents had quarreled outside followed by them going inside the room and the father bolting the room from inside and

then lighting a match-stick to set his mother on fire, being a bundle of lies, for the reason how could the child see through the door, needs to be dealt with before we bring the curtains down on our decision.

33. A human mind is very fertile. It connects intervening events not seen by the eye with reference to a preceding and a succeeding event seen by the eye, and hence perceived by the brain. If a child sees his father and mother in a fight inside a room, the door being closed and seconds later the door being opened and his mother walking out and on fire; rationale would tell him that the obvious thing which has happened is that inside the room, the mother has caught fire. Add on the fact that the parents were fighting. The child would obviously presume that the father was the culprit. Of course, the child could not have seen his mother being set on fire as claimed by him. But, the first part of what he saw and the latter part of what he saw i.e. the parents fighting inside the room and seconds later his mother opening the door of the room and coming out engulfed in flames has been seen by him, and to this extent it can be said that the child witness has seen these events. The further event of the child seeing his mother rush towards the bucket of water and attempting to douse the fire by pouring the water on her body and his father preventing his mother from so doing has also been seen by the child. Merely because, with reference to two events, the child has presumed an event,

which was the obvious event, and without which his mother could not have caught fire, does not mean that the child is lying.

34. We see no infirmity in the impugned decision.

35. The appeal is dismissed.

PRADEEP NANDRAJOG, J.

ARUNA SURESH, J.

FEBRUARY 04, 2009
Dharmender