

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

% Date of Decision :09th March, 2010

+ **CRL. APPEAL No.147/2010**

GOPAL KASHYAP @ GOPAL
KRISHAN @ BHURE

..... Appellant

Through: Mr.Manjit Singh Chauhan &
Mr.Mukesh Kumar, Advocates

versus

STATE

..... Respondent

Through: Mr.M.N.Dudeja, A.P.P.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR. JUSTICE SURESH KAIT

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

PRADEEP NANDRAJOG, J. (Oral)

1. Heard learned counsel for the parties.
2. Vide impugned judgment and order dated 02.01.2010, with reference to the testimony of Ajit Kumar PW-13, the Area Executive Magistrate; with reference to the testimony of SI Birsa Oraon PW-23 and the testimony of Insp. Rajender Dubey PW-27, the learned Trial Judge has held that the prosecution has successfully established that the

statement Ex.PW-13/A recorded by Ajit Kumar and the statement Ex.PW-23/A recorded by SI Birsa Oraon were the truthful dying declarations made by the deceased Sita pertaining to the cause of her death. Since in the two statements Sita inculpated her husband i.e. the appellant as the one who poured kerosene oil on her and set her on fire, the learned Trial Judge has returned a verdict of guilt against the appellant and as a result has convicted him for the offence of having murdered Sita.

3. With reference to the testimony of Kumari Pushpa PW-6 and her brother Dharmender Kumar PW-10, the learned Trial Judge has held that the prosecution has successfully established that Sita was subjected to harassment and cruelty on account of demand of dowry by her husband i.e. the appellant.

4. It may be noted that Kumari Pushpa and Dharmender Kumar are the sister and brother respectively of Sita.

5. On the issue whether Sita was fit for statement when SI Birsa Oraon and when Ajit Kumar the Area Executive Magistrate, recorded the statements Ex.PW-23/A and Ex.PW-13/A respectively of Sita at 11:50 A.M. and 12.45 Noon respectively on 21.5.2007 i.e. the day when Sita was admitted

at LNJP Hospital, the learned Trial Judge has held that the testimony of Dr.Mohd.Amir PW-11 establishes that Sita was declared fit for statement by him at 12:50 P.M. on 21.05.2007 and that the testimony of Dr.Dhirender Suman PW-17 established that the endorsement recording time at 11:40 A.M. on the MLC of the deceased, certifying her fit for statement, was proved to be in the handwriting of Dr.Nidhi Maheshwari who had worked under Dr.Dhirender Suman PW-17 and hence it stood established that Sita was fit for statement at 11:40 AM when SI Birsa Oraon recorded the statement of Sita.

6. The controversy which arose with respect to the testimony of Smt.Rani PW-18 and Vinod PW-19, two persons living in the neighbourhood of the appellant and his wife Sita, whether the appellant was present in the house when Sita received burn injuries and whether the door of the house was broken into, with reference to the testimony of SI Birsa Oraon and Insp.Rajender Dubey, the learned trial Judge has held that the two prosecution witnesses could not be believed as the two police officers were categorical in their deposition that when they went to the matrimonial house of Sita they saw no evidence of a forcible entry into the house i.e. did not see any sign of the door latch being broken to facilitate an entry inside.

7. Process of law commenced when, as deposed to by

HC Prahlad PW-3, he recorded DD No.11-A, Ex.PW-3/A, at 10:30 A.M. on 21.05.2007 that an information was received through the Police Control Room that a lady had set herself on fire at House No.3147, Lal Darwaja, Sita Ram Bazar, Delhi.

8. SI Birsa Oraon was entrusted with the inquiry after DD No.11-A was recorded. Accompanied by ASI Mahender Singh he left for the spot. In the meanwhile, Inspector Rajender Dubey PW-27, also received the information and he proceeded to the spot along with the SHO of the Police Station Insp.Rambir Singh. In this manner, four senior officers viz., ASI Mahender Singh, SI Birsa Oraon, Insp. Rajender Dubey and Insp.Rambir Singh reached the spot where Sita had received burn injuries i.e. her matrimonial house.

9. They learnt that Sita had been removed to LNJP Hospital by the Police Control Room van. As deposed to by them, SI Birsa Oraon PW-23 and Insp.Rajender Dubey PW-27 proceeded to LNJP hospital where they were informed that Sita had been given emergency medical aid at the casualty and shifted to the Burns Ward.

10. As deposed to by the two police officers, they obtained a certificate of being fit for statement from the doctor on duty on the MLC Ex.PW-5/A of Sita at 11:40 AM. As deposed to by SI Birsa Oraon PW-23, he recorded the

statement Ex.PW-23/A of Sita and obtained her thumb impression thereon. As per the statement she inculpated her husband as the one who poured kerosene oil on her and set her on fire. Thereafter, the two police officers, as deposed to by them, telephonically informed the office of the Executive Magistrate Ajit Kumar PW-13 who as deposed to by him, reached LNJP Hospital on receiving the information. He reached the hospital at 12:45 P.M. and at 12:50 P.M. received certification from the doctor concerned that Sita was fit for statement and accordingly he recorded her statement Ex.PW-13/A in the Burns Ward of the hospital. In the said statement, Sita inculpated her husband as the one who set her on fire.

11. The MLC Ex.PW-5/A of Sita has been drawn up by Dr.Pammi Chaudhary, the Chief Medical Officer on duty in the casualty of LNJP Hospital. As deposed to by Dr.Pammi Chaudhary, Sita was brought to the casualty of LNJP Hospital in a burnt condition at 11:00 A.M. on 21.05.2007 by a police officer incharge of the Police Control Room van. The patient was conscious and oriented but was unable to speak and write; said two facts stand duly recorded on the MLC Ex.PW-5/A. It stands recorded on the MLC that since no relation of the patient was present and since history of the burn injuries could not be taken from the lady, none was being recorded as to

how the patient suffered burn injuries.

12. As deposed to by Dr.Pammi Chaudhary she gave first aid and whatever medication was required to be given and thereafter referred the patient to the Burns Emergency Ward. She stated that she could not take the blood pressure of the patient because the arms were burnt. She stated, a fact noted on the MLC Ex.PW-5/A, that the patient had deep burns covering nearly 90-100% of the body. Dr.Pammi Chaudhary proved that she was the author of the MLC Ex.PW-5/A. She identified her signatures at point 'A' on the said MLC.

13. Dr.Mohd.Amir PW-11 deposed that on 21.5.2007 he was working as a Junior Resident in LNJP Hospital and was posted at the Burns & Plastic Surgery Ward and that on 21.5.2007 Sita was admitted at the Burns & Plastic Unit under in-charge of Dr.A.Goel vide CR No.649648 at 2:05 PM.

14. We may highlight here itself that as per Dr.Mohd.Amir, Sita was referred from the emergency of LNJP Hospital to the Burns Ward at 2:05 PM.

15. Further narratives from the testimony of Dr.Mohd.Amir may be noted. According to him when the patient was admitted at the ward in the Burns Department, he found her fit for statement and at 12:50 PM he made the

endorsement encircled "C" on the MLC Ex.PW-5/A recording the time 12:50 PM and the fact that Sita was fit for statement.

16. On being cross-examined, Dr.Mohd.Amir admitted: *"I was on duty on 21.05.2007 from 9:00 AM to 9:00 AM next day in Burn & Plastic Ward. I am not authorized to examine any patient outside Burn & Plastic Ward".* On being further cross-examined he stated: *"The patient was present in Burns Ward when I had certified her to be fit for statement".*

17. Relevant would it be to note that Sita died in the Burns Ward at 2:10 AM on 22.05.2007 i.e. she died when Dr.Mohd.Amir was still on duty in the Burn Ward. He drew up the death summary Ex.PW-11/A of Sita. He deposed that he drew up the death summary and his signatures were appended by him at point 'A' on the death summary. In the death summary, at serial No.3 and 4 of the printed proforma, it stands recorded:-

"3. DATE OF ADMISSION & TIME : 21.05.2007 at 2:05 PM.

4. DATE OF DEATH & TIME : 22.05.2007 AT 2:10 AM."

18. Dr.Dhirender Suman PW-17 deposed that he was a Senior Resident in the Burns Department of LNJP Hospital and Dr.Nidhi Maheshwari had worked with him and he was in a position to identify the signatures and handwriting of Dr.Nidhi Maheshwari. He deposed that the writing and the signature on

the portion encircled "D" on the MLC Ex.PW-5/A was in the handwriting of Dr.Nidhi Maheshwari. It may be noted that the portion encircled "D" on the MLC Ex.PW-5/A of Sita records the time 11:40 AM and the fact that Sita was fit for statement. It bears the date 21.05.2007 and signatures of Dr.Nidhi Maheshwari stand appended on the said certification.

19. Kumari Pushpa PW-6 deposed that this was the second marriage of her sister and that her sister used to complain of her husband harassing and torturing her for dowry. She deposed that when she and her brother received information of Sita being admitted at LNJP Hospital they came to Delhi and visited Sita at 11:00 PM. She deposed that she talked with Sita for about 5 minutes and that Sita told her that the appellant had poured kerosene oil on her and set her on fire.

20. Dharmender Kumar PW-10, the brother of Sita deposed in sync with his sister Kumari Pushpa. He also claimed that when he and Pushpa met Sita at the LNJP Hospital, Sita told them that her husband had set her on fire.

21. Smt.Rani PW-18, a witness of the prosecution who was not declared hostile nor was subjected to any cross-examination by the learned APP, deposed that on 21.5.2007 at about 10:00 AM, she was standing at the door of her house

and saw Sita and her daughter Komal at their residence. Whereas Komal was turned out of the room where Sita resided, Sita bolted the door from inside. She saw smoke emanating from the said room. With the help of her nephew Vinod they kicked the door open. They saw Sita lying in the middle of the doorway. She was burnt. Vinod poured water on her. She telephoned the police on the number 100 from the mobile of Vinod. Police came there and took Sita to the hospital.

22. On being cross-examined she stated that the appellant returned from Mandi at 12:30 PM and was not present in the house when the incident took place. She admitted that there used to be occasional fights between the husband and wife on account of their daughter Komal.

23. Vinod PW-19 deposed in sync with the testimony of PW-18, deposing that he responded to the cries of PW-18 and that along with PW-18 he kicked open the door of the house of Sita and poured water on her. He deposed that Gopal came to the house after some time and was arrested. He stated that Gopal was not present at the house at the time of the incident.

24. It may be noted that Insp.Rajender Dubey PW-27 admitted the fact that when the police was conducting investigation at the spot on 21.5.2007 and was in the process

of lifting various exhibits from the house and photographs were being taken, Gopal Kashyap i.e. the appellant turned up at the spot and identified himself as the husband of the deceased and that the appellant was immediately arrested at the spot.

25. The learned Trial Judge has sustained the conviction of the appellant for the offence punishable under Section 498-A IPC on the testimony of the brother and the sister of Sita. Appellant's conviction for the offence punishable under Section 302 IPC has been sustained on the basis of her dying declarations recorded vide Ex.PW-13/A and Ex.PW-23/A.

26. But, what assumes importance in the instant case are facts, which in our opinion have been ignored or trivialized by the learned Trial Judge, as under:-

(a) As per Dr.Mohd.Amir PW-11, Sita was admitted at the Burns Ward at 2:05 PM. Said fact finds independent corroborative consistency from the death summary Ex.PW-11/A of Sita drawn up by Dr.Mohd.Amir which also records that Sita was admitted at the Burns Ward at 2:05 PM on 21.5.2007.

(b) Dr.Mohd.Amir categorically admitted that he remained on duty from 9:00 AM to 9:00 AM from 21.5.2007 to 22.5.2007 in the Burn & Plastic Ward and that he was

not authorized to examine any patient outside the Burn & Plastic Ward.

- (c) As per Dr.Dhirender Suman PW-17 he was a Senior Resident in the Burns Department and Dr.Nidhi Maheshwari had worked with him. As per him, the endorsement encircled "D" on the MLC Ex.PW-5/A was in the hand of Dr.Nidhi Maheshwari. As noted above, the time recorded in the said endorsement is 11:40 AM.
- (d) As per Dr.Pammi Chaudhary PW-5, she had treated Sita who was brought to the casualty of LNJP Hospital since she i.e. Dr.Pammi Chaudhary was working as the Chief Medical Officer in the casualty. She stated that she referred the patient to the Burns Emergency after giving her medical aid. She categorically deposed that the patient was not able to speak and write.
- (e) Dr.Pammi Chaudhary has not stated that anyone else except for her attended to the patient as long as patient was in the casualty of LNJP Hospital.

27. A question would arise, as to how can, under the circumstances, when Sita remained in the casualty till she was transferred to the Burns Department at around 2:05 PM could Dr.Nidhi Maheshwari and Dr.Mohd.Amir go about recording the

time 11:40 AM and 12:50 PM respectively while certifying that Sita was fit for statement. It assumes importance that Dr.Nidhi Maheshwari could not be examined, but Dr.Mohd.Amir who was examined, categorically admitted that doctors in the Burns Department were not allowed to treat any patient outside the Burns Department. If that be so, we fail to understand as to how Dr.Mohd.Amir and Dr.Nidhi Maheshwari who were both posted in the Burns Department could give the certifications on the MLC of the deceased at the point of time when Sita was in the casualty of LNJP Hospital. We repeat that as per Dr.Mohd.Amir and the death summary of the deceased drawn up by him the deceased was admitted at the Burns Ward of LNJP Hospital at 2:05 PM.

28. The debate on the admissibility of dying declarations can be traced to the 17th and 18th century when rudimentary 4 Rules of Evidence were brought into existence and as noted by legal historians. The four rules were: the Character Rule, the Corroboration Rule, the Confession Rule and the Hearsay Rule.

29. The debate pertaining to Hearsay Rule was that, the opponents against the admissibility of hearsay evidence were arguing that hearsay evidence suffers from three defects. Firstly, the maker of the statement not being under oath

renders unsafe the admission of hearsay evidence. Secondly, the maker of the statement is not available for cross-examination, a vital and probably the only tool in the hand of the opponent to show the lack of credibility in the statement; and lastly, the possibility of witnesses being planted to claim having heard something spoken by a person who is dead or cannot be found. As against that, those who argued for admissibility of hearsay evidence referred to the Doctrine of Necessity and urged that necessity required admissibility of hearsay evidence for the reason, what can we do if the maker of the statement is dead or cannot be found.

30. The debate was won by those who were in favour of admissibility of hearsay evidence. But, the Rule of Caution was always applied by Courts.

31. The Rule of Caution was to see that there was no blemish whatsoever in the facts surrounding the dying declarations and there was purity in the dying declaration. The reason is obvious. Entry point of said evidence is the only point where the Court can control the credibility thereof. Once a dying declaration is introduced as evidence and de-hors the entry point thereof, the Court would have no means to determine the veracity of a dying declaration.

32. Guided by the aforesaid legal principles, it assumes importance that Sita was admitted at the Burns Department at 2:05 PM, a fact finding mention in the death summary Ex.PW-11/A. There is evidence that the doctors in the Burns Ward were not authorized to treat any patient outside the Burns Ward. There is evidence that Dr.Mohd.Amir and Dr.Nidhi Maheshwari were posted in the Burns Ward. Thus, we are left wondering as to wherefrom the two doctors could certify Sita to be fit for statement at 11:40 AM and 12:50 PM when she was not even in their ward.

33. In this connection, we may note that Dr.Mohd.Amir who admitted that the patient was admitted at the Burns Ward at 2:05 PM and further admitted that he was not authorized to treat the patient outside the Burns Ward, failed to render any justification as to how could he certify at 12:50 PM that Sita was fit for statement.

34. The question of such justification coming or not from Dr.Nidhi Maheshwari did not arise because she could not be examined as a witness and her alleged certification was proved through the testimony of Dr.Dhirender Suman PW-17.

35. Why would PW-18 and PW-19 be deposing falsely? Nothing has been brought out to show anything to us wherefrom we can gather that the two witnesses were

deposing falsely. No doubt they are the neighbours of the appellant but from said fact alone it would be difficult to draw an inference that the two have deposed falsely. One part of their deposition has found independent corroboration. The same is through the testimony of Insp.Rajender Dubey PW-27.

36. Both witnesses categorically deposed that the appellant returned to his house when the police was conducting investigation in the house. Insp.Rajender Dubey PW-27 has admitted the said fact.

37. Is the conduct of the appellant not relevant? Does it not required to be factored into?

38. We feel it does. The innocent return of Gopal to his house shows that he had nothing to hide and he had no reasons to flee from justice. If he had set his wife on fire and fled from the house, as claimed by the prosecution, why would he be returning to his house in the late afternoon on the same day?

39. With reference to the testimony of PW-18 and PW-19, none of whom have been declared hostile or cross-examined by the learned APP, coupled with the admission afore-noted of Insp.Rajender Dubey, we have further evidence pointing towards the innocence of the appellant.

40. One more circumstance needs to be noted, which has been totally ignored by the learned Trial Judge.

41. The MLC Ex.PW-5/A as well as the post-mortem report Ex.PW-1/A proved through the testimony of the author thereof i.e. Dr.Vinod PW-1, shows that the deceased was badly burnt. The post-mortem report Ex.PW-1/A shows that 98% of the body of the deceased was burnt.

42. It assumes significance to note that with 98% of the body being burnt, the 2% unaffected parts were the soles and the palms. Thumb impressions of Sita have been obtained on her statement Ex.PW-13/A and Ex.PW-23/A by Ajit Kumar PW-13 and SI Birsa Oraon PW-23 respectively.

43. In the decision reported as 1999 SCC (CrI.) 352 Pavan Kumar Paras Nath Tiwary vs. State of Gujarat, it was factored that a badly burnt body with the palms not being burnt evidences no attempt on the part of the victim to stamp out the fire. It was held that the natural conduct of a person who accidentally catches fire or is deliberately set on fire would be to stamp out the flames using the palms resulting in the palms having signs of burns.

44. Whether Sita committed suicide?

45. Well, she may have done so. The motive for the suicide could be that this was her second marriage. Poverty

came in the way of the couple. As deposed to by Sita's sister and brother, she was harassed on account of dowry. That she had a child from the first marriage and probably the appellant was having some problem to feed the child could be another aggravating circumstance.

46. We need not pen any further for the reason we find a serious doubt with respect to Dr.Nidhi Maheshwari and Dr.Mohd.Amir being competent and in a position to certify at 11:40 AM and 12:50 PM on 21.5.2007 that Sita was fit for statement. At that time Sita was yet to be admitted in the Burns Department. There is evidence that the two doctors were not authorized to treat any patient outside the Burns Department.

47. Under the circumstances, with reference to the testimony of Dr.Pammi Chaudhary, it would be difficult to return a positive finding with certainty that the deceased was fit for statement as claimed by the prosecution.

48. In fact, state of consciousness and a state of fitness for making statement are two different state of minds of a person. A person may be conscious but not fit for statement. To be fit for statement requires a much higher level of mental alertness.

49. Giving a holistic view to the evidence on record we regret our inability to concur with view taken by the learned Trial Judge who seems to have ignored the vital components of the prosecution evidence and as noted by us herein above. If not more, the appellant would be entitled to be given the benefit of doubt.

50. We do so.

51. On the issue of the offence punishable under Section 498-A IPC, we have no reasons to doubt the testimony of PW-6 and PW-10. The same establishes that the appellant was troubling and torturing the deceased for dowry.

52. Thus, the appeal stands disposed of setting aside the conviction of the appellant for the offence of having murdered Sita. The relatable sentence imposed upon the appellant to undergo imprisonment for life for the offence of murder is set aside.

53. The appeal pertaining to the conviction of the appellant for the offence punishable under Section 498-A IPC is dismissed. The sentence imposed to undergo rigorous imprisonment for 3 years and pay fine in sum of Rs.5,000/- and in default to undergo rigorous imprisonment for 6 months is affirmed.

54. The appellant is in jail.

55. Copy of this decision be sent to the Superintendent, Central Jail, Tihar for necessary action.

56. Needless to state, if the appellant has undergone the sentence of imprisonment for 3 years and has paid the fine in sum of Rs.5,000/-, giving benefit of remissions if not earned, the appellant would be set free forthwith if not required in custody in any other case.

57. Before concluding we place on record our gratitude to learned counsel for the appellant and the State. The appeal which came up for preliminary hearing and was admitted on 16.2.2010 is being finally disposed of in less than a month of the appeal being admitted for hearing.

58. It is reassuring to the Court and we assume, to the society at large and members of the legal fraternity, that with respect to an indictment relatable to an event which took place on 21.5.2007 the original journey and the journey in appeal have been completed in less than 3 years.

PRADEEP NANDRAJOG, J.

SURESH KAIT, J.

March 09, 2010
nks / dkb