

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

Judgment delivered on: May 12, 2010

+ **CRIMINAL APPEAL NO.975/2009**

NARESH

....APPELLANT

Through: Mr. Dhananjay Kumar, Advocate

Versus

STATE OF NCT OF DELHI

.....RESPONDENT

Through: Mr. Lovkesh Sawhney, APP

CORAM:

HON'BLE MR. JUSTICE A.K. SIKRI

HON'BLE MR. JUSTICE AJIT BHARIHOKE

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

AJIT BHARIHOKE, J.(ORAL)

1. This appeal is directed against the impugned judgment dated 03.11.2003 in Sessions Case No.9/08 FIR No.175/03 P.S. Sangam Vihar convicting the appellant for the offences punishable under Section 302 IPC and Section 498A IPC and the consequent order on sentence.

2. Briefly stated, case of the prosecution is that Sonia (deceased) was married to the appellant about a year and a half prior to the occurrence. She got a payment of Rs.20,000/- from her earlier

husband in the divorce proceedings. On 08.04.2003, the appellant demanded money from the deceased and when she declined to pay, the appellant got enraged and he set the deceased on fire after pouring kerosene oil over her in DDA Flat No.243, Tigri, Khanpur. It is also the case of prosecution that shortly after the marriage, the appellant had been harassing and ill-treating the deceased.

3. The learned Additional Sessions Judge, on conclusion of the evidence on behalf of the State as well as the appellant and after hearing the parties, found the appellant guilty for murder of the deceased and also for treating her with cruelty within the meaning of Section 498A IPC and accordingly convicted the appellant under Section 302 IPC as also under Section 498A IPC. The conviction of the appellant under Section 302 IPC is based upon the purported dying declaration of the deceased recorded by the SDM. There is no eye witness to the occurrence.

4. The main plank of the argument of the appellant is that the dying declaration relied upon by the learned Additional Sessions Judge does not pass the test of reliability. Learned counsel also argued that from the MLC of the deceased, it is apparent that she was taken to the hospital by her mother Ms. Nirmala Mehta. Therefore, a possibility of the dying declaration being the result of tutoring or influence by the mother cannot be ruled out.

5. The law relating to dying declaration is well settled. Supreme Court in the matter of **Munnu Raja Vs. State of M.P.**, 1976 SC 2199 held that is neither a rule of law nor of prudence that a dying declaration cannot be acted upon without corroboration. In yet another case i.e. **State of U.P. Vs. Ram Sagar Yadav**, AIR 1985 SC 416, Supreme Court held that if the court is satisfied that dying declaration is true and voluntary, it can base conviction on it without corroboration. From the above judgments, it is obvious that an accused can be convicted on the basis of dying declaration alone but the rule of prudence demands that the court should satisfy its conscience by looking into the accompanying circumstances before acting upon the dying declaration. In the instant case, learned counsel for the appellant has challenged the correctness and reliability of the dying declaration and he has also raised a contention of possibility of the dying declaration being the result of tutoring or undue influence. Therefore, need for some corroboration assumes importance. The Investigating Officer, ASI Daya Nand (PW14) has testified that on a second visit to the spot of occurrence, he met the appellant who had reached there. The appellant was having fire burns on his hands as well as his face. When ASI Daya Nand asked for the cause of those fire burns, the appellant confessed that he had demanded money from the deceased and when she declined to oblige, he set her on fire after pouring kerosene upon her. On perusal of the statement of the appellant under Section 313 Cr.P.C., we find that above referred

incriminating evidence was not put to the appellant for seeking his explanation, which creates a technical problem in appreciation of evidence.

6. Recording of statements of the accused under Section 313 (1)(b) of the Code of Criminal Procedure is an important component of a criminal trial. The object of this provision is to give an opportunity to the accused to answer each and every piece of incriminating evidence adduced and relied upon by the prosecution. It is obligatory on the part of the Trial Court to examine the accused for that purpose and if such an opportunity is not afforded the incriminating piece of evidence available in the prosecution evidence which was not put to the accused in his examination under Section 313 Cr.P.C. cannot be relied upon against the accused to hold him guilty. In this case also, the incriminating evidence that the Investigating Officer noticed fire burns on the hands and face of the accused on the date of occurrence has not been put by the learned trial Judge to the accused in his examination under Section 313 Cr.P.C. This lapse on the part of the learned trial Judge has tied our hands inasmuch as we cannot take into account aforesaid incriminating evidence which is material for just adjudication of the appeal.

7. In view of the above, question is what is the effect of said lapse committed while examining the accused under Section 313 Cr.P.C.? Whether or not the above referred irregularity committed by the

learned trial Judge in examination of the appellant under Section 313 Cr.P.C. is curable? In our considered view, the aforesaid irregularity can easily be cured by further examining the appellant under Section 313 Cr.P.C. in order to afford him an opportunity to explain the above referred incriminating evidence appearing against him in the prosecution evidence. This will not cause any prejudice either to the accused or to the prosecution as it would satisfy the requirement of Section 313 Cr.P.C. and ensure that the matter is decided not on mere technicality but on merits of the evidence produced against the appellant and achieve the ends of justice.

8. We have two options to cure the above irregularity. We may re-examine the appellant under Section 313 Cr.P.C. in relation to the aforesaid incriminating evidence which was not put to him during trial or we may remand the case back to the concerned court for further examination of the accused under Section 313 Cr.P.C. in relation to the above referred incriminating evidence. We are refraining from exercising the first option mainly for the reason that in recent past we have come across several cases in which the statements of the accused persons have been recorded by the courts below in casual and perfunctory manner and we feel such a course will send a message to the courts below to be careful in analysing the evidence before proceeding to examine an accused under Section 313(1)(b) of the Code. Otherwise also, we deem it appropriate that the Trial Court itself should examine the appellant under Section 313 Cr.P.C. and appreciate

the evidence on record in the light of the explanation having been given by the accused as such a course will not affect the right of appeal of the accused.

9. In view of the above, we set aside the impugned judgment of conviction and remand the case back to the concerned Additional Sessions Judge who passed the impugned judgment irrespective of his present posting with the direction that he shall examine the appellant in accordance with the letter and spirit of Section 313 Cr.P.C. by putting all the incriminating circumstances to him to afford him an opportunity to explain the incriminating evidence appearing against him and on the basis of said explanation he shall re-appreciate the evidence and decide the case afresh.

10. Appeal is disposed of accordingly.

A.K. SIKRI, J.

AJIT BHARIHOKE, J.

MAY 12 , 2010
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