

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ CRL.A. 396/2009

% Date of Decision: 29th November, 2012

NARENDER KUMAR GIRI Appellant
Through: Mr. Thakur Virender Pratap Singh
Charak, amicus curiae with Mr. R.P.
Singh Tomar, Mr. Pushpender Charak
and Ms. Sushma, Advs.

versus

STATE Respondent
Through: Ms. Richa Kapur, APP.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE S.P.GARG

SANJIV KHANNA, J. (ORAL)

Narender Giri impugns his conviction under Section 302 of the Indian Penal Code (IPC) for murder of his wife Baby and five year old son Rakesh, by throwing acid on them in the intervening night of 3rd and 4th April, 2004. The appellant has been sentenced to life imprisonment and fine of Rs.1,000/- , and in default of payment of fine, he has to further undergo simple imprisonment for one month.

2. Learned Amicus Curiae, appearing for the appellant, has questioned the conviction on various grounds. It is submitted that the testimony of Haribansh Giri (PW-2), father of appellant's wife Baby, in the Court was contrary to his statement under Section 154 Cr.P.C (Ex.PW-2/A), which formed the basis of the FIR (PW 4/A). It was argued that the appellant was not present at the crime spot, at the time of occurrence, and hence was not detained. Attention was drawn to the site plan (Ex.PW-8/C) of the floor in question, where the incident occurred. It was pointed out that the crime spot was the corner room, from where it would have been difficult for the appellant to escape and run away, since he would have crossed several rooms. Therefore, if indeed the appellant was the perpetrator, he would have been caught by the neighbours. It was submitted that statement of Kumar Sanju (CW-1), daughter of the appellant and the deceased, should not be accepted as she was a tutored witness. Her statement was not of a truthful and credible witness because she has been staying with PW-2, her maternal grandfather, post the incident. It was contended that DD No.34/A, (Ex.PW-8/B) records that one Praveen had called the Police Control Room from mobile no. 911634244 when the incident occurred and, therefore, he was the

material and relevant witness, in this case, but he has not been examined. Similarly, none of the neighbours had been examined as prosecution witness.

3. The police received information at 12.25 A.M., on 4th April, 2004, that a man (husband) had thrown acid on his wife, at the location recorded therein. The PCR transmitted this information to the Police Station, Usmanpur and, consequent thereto, DD 34A was recorded. One Praveen had made the said call and, it is true, that he has not been produced but, in our opinion, this does not affect the merits of the statements of CW1 and PW2 which we shall dwell into, in detail. This lapse on the part of the prosecution does not materially affect or cast doubt about the testimony of the two witnesses mentioned above.

4. Dr. R. Dayal(PW-12) has proved that the MLC of Baby, wife of the appellant, written by Dr. Santosh Kumar who examined her on 4th April, 2004, at about 1.19 A.M. The said MLC, marked as Ex.PW-12/A, bears signatures of Dr. Santosh Kumar which have been identified by PW-12. The deceased Baby had 90-100 % burn injuries- over her face, head, neck, perinium, both the upper and lower limbs, chest and abdomen. Dr. Santosh Kumar had also examined Rakesh, son of the appellant and the deceased, aged 5 years, at about 1.26 A.M. On local examination, Dr. Santosh Kumar

observed that he had 90-100 % burns- over his face, neck, chest, abdomen, perineum and back lower limbs. MLC of Rakesh was marked Ex.PW-12/B. Dr. Santosh Kumar had since left the hospital and his whereabouts were not known.

5. Baby and Rakesh subsequently expired, in the hospital, at 2.30 A.M and 8.50 A.M, respectively, on 4th April, 2004 itself. The Post Mortem Reports of the deceased Baby and Rakesh, marked as Ex.PW-4/A & B, have been proved by Dr. S. Lal (PW-4). PW-4 has observed Rakesh to be a thinly built child. He has stated that the body had superficial and deep acid burns, all over, except the feet. Therefore, about 90-95% of the body had acid burns. The cause of death was ^{shock} shock, as a result of superficial to deep antie mortem acid burns. Similarly, the deceased Baby had superficial deep acid burns, present all over her body, except her feet over approximately 90-95 % of the total body. The cause of death was shock, as a result of antie-mortem acid burns. No other visible external injury marks were present on the two bodies. There is nothing in the cross examination to doubt the testimony of PW-4, about the nature and cause of death, and it remains undisputed that the two died because of acid burns.

6. Haribansh Giri (PW-2) was the father of the deceased Baby and maternal grandfather of the deceased Rakesh. The appellant is his son-in-law. PW-2 had come to Delhi, two months before the date of occurrence, for treatment of his son and was residing with the deceased Baby and her family- the appellant and her children, in her house at Pankeil, near Pushta. Three-four days before the date of occurrence, the appellant had left the house at Pankeil and had started living in the house of Kushi Ram. PW-2 has averred that the appellant used to beat his daughter and was cruel towards her. On 3rd April, 2004, at about 11.00 P.M., his grand-daughter Sanju came to his house, where he was sleeping. Sanju told him that the appellant had gagged her mother's mouth with a cloth and had broken her hands. He had poured some oil (acid) on her and Rakesh. PW-2, Shambu Singh and some other persons, then went to the house of the appellant. They found that his daughter was lying in an injured condition, in the street outside the house. At that time, she was naked. The appellant was not present. Someone had phoned and informed the police. Rakesh (wrongly typed as 'Akesh' in his statement) was also crying in pain. The police reached and took Baby and Rakesh to GTB Hospital and PW-2 accompanied them. His statement was recorded by the police in the hospital. He

identified the said statement as PW-2/A but voluntarily added that whatever he had stated in the Court was the true and correct version and not what was recorded in Ex.PW 2/A. The police officer had told him that the statement of Sanju would not have weightage to secure conviction of the appellant and, therefore, cited him as an eye-witness, though he had not actually seen the occurrence. Sanju had seen the occurrence and had told him about the incident. Thereafter, the police officers visited the place of occurrence and collected incriminating evidence like the plastic can, burnt clothes and two pairs of hawai chappals. These were sealed and taken into possession vide memo Ex PW2/B. He identified the dead body of his daughter and grandson Rakesh.

7. APP for the State cross examined PW-2 but the said witness did not deviate from the statement, he had voluntarily made. He reiterated that he had not gone to the house of Baby and had not actually seen the appellant pouring acid on Baby or Rakesh. He was not an eye witness to the actual occurrence. He further stated that he was not deposing falsely to save his son-in-law i.e. the appellant from punishment. In his cross examination, PW-2 was asked to state what his daughter Baby had told him and he answered that his daughter had told him that her mouth was gagged, her

arms were broken and acid can was turned on her when she was sleeping with her son Rakesh. The deceased Baby had further stated, to her father, that she would not survive. In the cross examination, he agreed that he had not told the police that Baby had made the said statement to him. He volunteered that he had no opportunity to state the said facts to the police but he had informed that his daughter told him that she would not survive. He recollected that he was tenant in the house of Bankelal, at that time, and the house was situated at a distance of about 100-150 metres from the house of Baby. He denied the suggestion that the appellant was living at Noida separately and away from Baby, from six months prior to the incident. He has affirmed that Sanju was living with him, after the incident, and was nine years of age. He had stated that he could produce Sanju in Court, if so directed.

8. After the statement of PW-2, Sanju was produced as a court witness, in terms of the order dated 18th July 2007 i.e the date on which cross examination of PW-2 was concluded. CW-1 was examined, in the Court, on 5th September, 2007. At that time, she appeared to be about 6-7 years of age. Being a child witness, her expatiated testimony has to be examined with due care and caution, to exclude any possibility of tutoring and to ensure that her

sense of observation was not questionable and influenced by considerations which may affect the child witness of her age. (See in this regard, our observations in *Aditya Gupta and Others v. State*, Crim. Appeal No. 478/2011 decided on 22nd November, 2012; *Mohd. Wasim and Others v. State*, Crim. Appeal 1008/2011 decided on 12th October, 2012 and *Amrit Sharma @ Amit Vs. The State*, Crim. Appeal No.122/2011 decided on 18th October, 2012).

9. In the present case we notice that, before CW-1 was examined, several questions were put to her by the Trial Court to satisfy whether CW-1 was able to understand the proceedings, answer the questions put to her and be in a position to make a statement about the occurrence. She has deposed that she was residing with her father, mother, sister Suman and brother Rakesh in Delhi. She did not know the address. She did not remember the date, month or year but remembered that one night her father, who was present in the Court and identified as Narender Kumar Giri, had beaten her mother, broken her hands and after gagging her mouth, had thrown acid on CW-1's mother and brother Rakesh. Both of them sustained burn injuries. Thereafter, the appellant ran away. She has stated that her maternal grandfather used to reside in Delhi at the time of the occurrence. She had

gone to his house and had informed him about the incident. She recollected that the police had removed her mother and brother from the spot. She has affirmed that the appellant used to beat her mother. In the cross examination, she was able to tell the name of the school where she was studying and went on to state that she has shifted to the village, after her father had killed her mother. She could not name the landlord and tell whether he used to visit their house. She recollected that two "uncles" used to reside in adjoining rooms but she did not know their names. They did not have any children and were not related to CW-1's family. She has narrated that, when the incident occurred, she reached the house where PW-2 was residing within 10 minutes (sic- the word 'months' appears to have been wrongly typed). She has denied the suggestion that she was in the lap of her mother, at the time of occurrence, and stated that she was standing near the window, outside the room in which the incident took place. She correctly mentioned the time, in the court watch, and said that her father used to leave home at 9.00 A.M. and return at 8.00 P.M. She further averred that the police had made enquiries from her but no enquiry was made from the neighbours or tenants or from her sister. She denied the suggestion that the police had made enquiries from Rakesh and stated that he had died.

Similarly, she stated, the police had not recorded the statement of her mother because she had died. She had not come to know about the death of her mother and brother immediately and came to know about it, in the morning. She was questioned whether her maternal Uncle (Sarabjeet mama) used to reside in their house, prior to the occurrence of the incident, to which she has stated that he was working in Delhi but was not residing with them. Similarly, she stated, her maternal aunt Munni Devi was residing in Delhi but she was not aware of her address. To another question, put to her, she replied that she knows what was acid and that people can die from acid. She has stated that the acid, that was poured on her mother, was in a plastic container and was about 5 liters, (about 1.5 ft in height). She has affirmed that the plastic container was seized by the police and her mother had sustained injuries on her face, back, shoulder and legs.

10. After scrupulous examination of PW-2 and CW-1 statements, we firmly believe that these statements are truthful, reliable and credible, and therefore, should be accepted by the Court to be a true account of the incident. PW-2 came forth and honestly told the court that the prosecution or police version, as recorded in the Rukka, was incorrect and that the police officer had made him change and record an incorrect version to the effect

that he was an eyewitness, even though he was not present there at the time of occurrence and it was CW-1 who had actually seen the incident. Only on being told by CW-1, he rushed to the appellant's house and saw that Baby and Rakesh were in injured condition. We do not think that PW-2 had any reason to tutor CW-1 and, therefore, compel her to appear as a witness against her father. CW-1 no doubt is a child witness but, in the present case, we are satisfied that her statement is completely reliable. CW-1 has implicated her father, for the death of her mother and brother, and we do not think she has wrongly stated her father to be the perpetrator of the said crime.

11. CW-1 was staying with PW-2 but, as noticed above, PW-2 did not go by the prosecution version and denied that he was an eye witness. In such circumstances, it cannot be submitted that PW-2 had tutored CW-1 to make a wrong statement in the Court. Credibility of statement of CW1 is established from the courage, probity and forthrightness displayed by PW 2. This also negates the possibility and chance that he would have tutored or instigated CW 1 to depose against her father.

12. There is evidence, on record, to show that the appellant absconded, after the occurrence. He did not visit the hospital or take Baby or Rakesh to

the hospital. Proceedings under Section 82 Cr.P.C were initiated against him and he was declared a proclaimed offender on 8th July, 2004. He was finally arrested on 31st August 2006, vide order memo Ex. PW-10/A proved by SI Pramod(PW-10). The conduct of the accused, in running away from the spot and absconding, only corroborates his involvement as the perpetrator. We also notice that MLC (Ex. PW-12/A and 12/B) states that Baby and Rakesh were brought to the said hospital by HC Pop Singh. The appellant, in his statement under Section 313, did not deny that Baby was his wife and PW-2 his father-in-law. He has claimed that he was residing in Noida, 4-5 months before the date of occurrence whereas his wife, children and father-in-law were residing in Delhi. Regarding his absconding, his version was that it was only 5-6 months, after the incident, that he was apprised of his wife and son's death when he visited the rented house, in Delhi. He did not lead any defence evidence. As noticed above, the appellant, who was declared a proclaimed offender and was arrested more than two years after the incident, has not tried to explain as to why he did not try to get in touch with his family, including the two daughters in that interim period. It would be gullible to believe that the appellant, for nearly

two years or for 4-5 months, remained unaware about the said occurrence and made no attempts to contact his family.

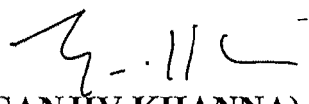
13. The fact, that PW-2 had stated that his daughter Baby was found on the road without clothes, does not negate the prosecution version. The acid burnt clothes etc. were found in the room. Apparently, in agony and pain, she removed her acid drenched clothes and ran out to save herself.

14. We shall deal with the last contention on the question of accused's presence, at the time of the incident. It would be presumptuous to accept that the appellant could not have run away from the spot, or he would have been caught by the neighbours. It should be noted that the time of occurrence is 11.00 P.M., at night, when normally people are inside their homes. People are also generally reluctant to interfere and poke their nose into other people's affairs. The police was certainly called and reached the spot soon, after the occurrence. There may have been some lapse, on the part of the police, as the informant was not examined but this does not, as pointed out at the outset of this case, destroy the credible and trust worthy statements of CW-1 and PW-2.

15. We are not required to elucidate upon the statements of police witnesses, as they are formal in nature, and the counsel for the appellant has

not raised any contention or plea with regard to the investigation or the statement made by the police officers. However, one cannot but disapprove the conduct of the police officers, involved in this case, who had made PW-2 sign a wrong and incorrect statement. This is an aspect which the police authorities should examine and take appropriate action.

16. In view of the aforesaid position, we affirm the conviction and sentence of the appellant. The appeal is accordingly dismissed.


(SANJIV KHANNA)
JUDGE


(S.P.GARG)
JUDGE

NOVEMBER 29, 2012

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