

IN THE HIGH COURT OF DELHI AT NEW DELHI

PRONOUNCED ON: 01.03.2012

CRL.APPEAL No.1366/2011

RAJARAM

..... Appellant

Through: Mr. M.L. Vashistha, Advocate.

versus

STATE OF NCT OF DELHI.

..... Respondent

Through: Ms. Richa Kapoor, APP for the State

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

MR. JUSTICE S.P. GARG

MR. JUSTICE S.RAVINDRA BHAT (OPEN COURT)

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1. This appeal challenges the judgment dated 18.8.2011 and order on sentence dated 25.8.2011 whereby the learned ASJ (Karkardooma Courts) convicted the appellant, Raja Ram for the offence under section 302, IPC, and sentenced him to undergo life imprisonment, and imposed a fine of ₹.7000/-. It was further added that in case of default of payment of fine, he shall suffer additional imprisonment for one year.

2. The prosecution case was that on 17.06.2009 at about 11.00 am, a quarrel took place between Mamta, the deceased and her husband

Raja Ram, the appellant herein, over household expenses and excessive consumption of liquor by the latter. Raja dragged his wife to the *gali* (street) and slapped her. She stayed out for about an hour, and upon feeling giddy, she went inside the house and slept. Thereafter, she again demanded money from her husband for household expenses. This time he leveled allegations that she had been giving his hard earned money to her parents. When she objected to these allegations, he poured kerosene oil from a lantern on her body, and lit her on fire with a matchstick. However, when he saw people from the locality gathering there, he tried to extinguish the fire by pouring a bucket of water. He then removed Mamta to trauma centre from where she was taken to LNJP Hospital. Investigation was taken up, and her statement was recorded at the hospital. Later, she succumbed to her burn injuries; her body was sent for post-mortem. The appellant was arrested in the case and charged for the offence punishable under Section 302, IPC, to which he pleaded not guilty and claimed trial.

3. During the trial, the prosecution examined 17 witnesses, and placed on record medical and forensic evidence to prove its case. In defence, two witnesses were examined on behalf of the appellant. The defence version, borne out from the defence witnesses, and the appellant's statement under section 313, CrPC was that Mamta had committed suicide. The Trial Court, after hearing the parties and considering the evidence on record, rejected this defence, and convicted the accused for the offence of murder punishable under section 302, IPC. He was sentenced in the manner aforementioned.

4. The Trial Court based its finding of guilt on the following circumstances which it held had been proved: a) written dying declaration recorded by SI Deshwal in the presence of Dr. Pranay Kapur; b) account of the oral dying declaration made by PW-1 Ram Bhajan, father of deceased Mamta; c) medical evidence indicating burn injuries to be the cause of death; d) scientific evidence indicating that the burnt clothes and ashes thereof contained residue of kerosene. The court did not rely on the testimony of PW-10 Parul and PW-11 Dhruv (both children of the deceased and the appellant) on the ground that they had been tutored. Furthermore, the learned ASJ disbelieved the testimonies of defence witnesses through which the defence of suicide was sought to be proved.

5. During the hearing of this appeal, learned counsel for the appellant highlighted the following exonerating circumstances which were not given due weight by the learned ASJ in the impugned judgment:

- The exonerating depositions (a version contrary to their section 164, CrPC statements) made by alleged eye witnesses PW-10 Parul and PW-11 Dhruv (both children from the appellant's marriage with the deceased) both of whom stated that their father did not set Mamta on fire; they also deposed that their earlier statements recorded by the Magistrate had been tutored as per their maternal grandmother's instructions.
- Delay in recording statements under section 161, CrPC and section 164, CrPC of alleged eye witnesses Parul and Dhruv.

- Delay in recording PW-1 Ram Bhajan's statement under section 161, CrPC
- Both PW-8 and PW-9 were not able to identify as to who had declared Mamta fit for giving statement to police. Also, non-examination of such doctor who had declared her fit.
- Time at which the observation that Mamta is "fit for statement" was made at point B on MLC was not recorded.
- Testimony of independent witness DW-1 Sikander Kumar who stated that he heard Mamta say "*apna aur bacho ka dyan rakhna, mujhse galti ho gai*", and of DW-2 Ram Sagar who testified about a suicide attempt that was allegedly made by Mamta in May 2008.
- PW-14 did not state that PW-9 had heard Mamta's statement; he merely stated that he (PW-9) had attested it.

Counsel urged that these circumstances point out material inconsistencies, and cast grave doubt as to the credibility of the prosecution version. In any case, it was argued, the evidence did not establish the guilt of the appellant beyond all reasonable doubt.

6. In response, Learned APP, for the state, defended the impugned judgment arguing that the impugned findings were based on facts properly held proved. It was urged that Mamta's dying declaration had been adequately established by the testimony of SI Deshwal and Dr. Pranay Kapur, both having witnessed the same. The contents of the dying declaration, as deposed by these two witnesses, was also

corroborated by Mamta's father Ram Bhajan. Furthermore, urged counsel that no fault could be found with the learned ASJ's reliance on medical and other scientific evidence to conclude that Mamta's death was caused by burn injuries sustained due to burning of kerosene which was found on the residue of her clothes and hair from her scalp.

Analysis

7. This Court has perused the evidence on record as well as the impugned judgment. We shall deal with all the incriminating circumstances based on which the learned ASJ reached the finding of guilt.

Recorded Dying Declaration

8. The learned ASJ relied on Mamta's statement (Ex. PW-9/A) which was, as per the prosecution case, recorded by PW-14 SI Deshwal in the presence of PW-9 Dr. Pranay Kapur. This document has a thumb impression, which the prosecution claims was given by deceased Mamta. The document reveals that Mamta and Raja Ram had been married for close to 10 years; that they had two children, Parul and Dhruv; that on 17.6.2005, at around 11:AM, Mamta and the appellant had a fight on issues concerning household expenses, and consumption of liquor (by the appellant). During the fight, the appellant slapped her, and beat her outside in the street. After the fight, she waited outside the house, at the street for about an hour,

after which she went inside when she started feeling giddy; the appellant was sleeping inside, and woke up soon after. She then again asked for money; the appellant stated that she must bring back his money that she gave to her parents. When she refuted these allegations by saying that it was a false allegation, the appellant poured kerosene from the lamp and lit her on fire; she started screaming and ran outside; the appellant, upon seeing other persons gather, poured a bucket of water to douse the fire. The appellant then took her to Trauma Centre where they were asked to go to LNJP Hospital.

9. The prosecution case is that PW-9 Dr. Pranay Kapur witnessed the recording of Mamta's statement, and he gave his attestation in writing. During his testimony, PW-9 stated that the IO recorded Mamta's statement in his presence, that he read the recorded statement and that it was the correct account of Mamta's statement. He stated that at that time, more than 70% of Mamta's total body surface area was burnt, including her face and genitals; but she was still conscious and in a position to depose herself. He deposed that his signature was present at point A on Ex. PW-9/A. In his cross-examination, he admitted that there were many other persons in the same Ward in which Mamta was kept. Furthermore, he stated that he cannot explain the exact contents of Mamta's statement; that whatever was stated by Mamta was recorded by IO and was counter signed by him. He stated that Mamta was in a serious condition at that time, and that the writing encircled at point B was his own handwriting.

10. PW-14, during his examination-in-chief, stated Mamta's thumb impression was taken at point X, and Dr. Kapur's attestation at point B, his signature being at point A. He stated that his own endorsement was at point Y. His version was that upon receiving information, he and Const. Devender reached LNJP hospital at about 5-5:15 PM. He stated that Mamta was fit for statement, which was recorded by him in Dr. Pranay's presence; that after recording the statement, he prepared the *rukka* (first intimation) and handed it over to Const. Devender for registration of FIR. During his cross-examination, he also stated that 2-3 doctors were present in the ward when the statement was recorded; that Mamta's relatives or in-laws were not present. He also stated that even though he met with the in-charge of the ward, he did not seek his permission for recording Mamta's statement. He also admitted that Mamta was in a critical condition at that time; that she was having bandage on her face (clarified as from head to chin). However, he further stated that she was not unconscious at that time, and denied the suggestion that she was not in a position to speak. He stated that he did not know that Dr. Kapur was not giving treatment to Mamta. He also deposed that Const. Devender was standing separately near the bed. The witness also deposed that he was having the contact no. of one SDM; that he gave a call to that SDM (Sub-Divisional Magistrate), but he refused to come to the hospital; after the refusal, he did not call any other SDM. He, moreover, stated that from that time on 17.6.2009 till the time Mamta survived, i.e. on 22.6.2009, neither did he make any further inquiries from her, nor made any

effort to call the SDM for recording her statement. He even stated that after 17.6.2009, he visited the hospital next on 22.6.2009.

11. In his examination-in-chief, PW-6 Const. Devender also stated that Mamta's statement was recorded by SI Deshwal in the presence of a doctor from LNJP hospital; he did not identify Dr. Pranay Kapur as being that doctor. During his cross-examination, he revealed that SI Deshwal had not obtained any permission for going from the spot from the SHO concerned. He deposed that he along with PW-14 reached the hospital at about 5/5:15 PM. At first, PW-14 got obtained Mamta's MLC; this witness could not state from whom PW-14 obtained the MLC. He further stated that Mamta's statement was recorded in his presence; but he did not know what was stated by Mamta in her statement made to PW-14. He clarified that he did not recollect the statement given by Mamta. He stated they remained in the ward for about two hours. During these two hours, the doctor also went to examine other patients. As regards intimation to SDM, PW-6 stated that PW-14 did not call the SDM to hospital in his presence, and that nothing was done by PW-14 in his presence since he been sent to PS for getting the case registered. Later, he also stated that it took about 20-25 minutes in recording Mamta's statement. He stated that Mamta was critical, but was in a condition to speak. He admitted that ward staff was present at that time. He denied suggestions that Mamta's statement was never recorded by PW-14, or that he deposed falsely.

12. The prosecution also examined Dr. Arvind Mohan, CMO (Chief Medical Officer) at LNJP Hospital. He testified that one Dr. Manoj Kumar Sharma, then a Junior Resident doctor had prepared Mamta's MLC; and that Dr. Manoj Sharma has since left the hospital. After seeing the MLC, he stated that it was a case of 90% burn injuries, that Mamta was provided medical treatment, and admitted in burn emergency for expert opinion and management. He stated during his cross-examination that he could not identify the signature on the MLC wherein it is certified that Mamta was fit for giving statement.

13. Undoubtedly, if the prosecution's proof for the circumstance that Mamta actually made the statement which PW-14 claims to have recorded is held to be adequate, her statement would amount to a dying declaration, and would have to be treated as a highly incriminating circumstance against the accused. Based on the evidence, the learned Trial Court found the statement to have been proved. This Court, however, doubts the correctness of this finding.

14. The MLC (Ex. PW-8/A) mentions at point B the observation "fit for statement" for Mamta. However, no witness was produced who testified to having written the statement. Thus, as was confirmed by the testimony of PW-8 Dr. Arvind Kumar, who was the CMO at the hospital on that day, neither the identity of the person who made this observation, nor the time at which it was made are known. The observation, it appears from the MLC and PW-8's testimony, was made by a JR (Junior Resident). However, it is incredible as to how none could identify who made the observation. Hospital records

should have shown the person in charge of each ward. If not that, PW-8 (the CMO), at least, should have been able to identify the signature of a person who worked under his supervision. The MLC further shows that 90% of Mamta's total body surface area (TBSA) had burn injuries. PW-2 Dr. Anju Rani, who conducted the post mortem on Mamta's dead body, also testified that the TBSA was 85%. She stated that face (clarified as from forehead to chin) of the dead body was entirely burnt. PW-14 corroborated this when he stated during his cross examination that Mamta was having bandage on her face. Thus, from the evidence describing her medical condition, it seems unlikely to us that she could actually have been fit enough to give her statement to PW-14. However, the prosecution version (as deposed to by PW-6, PW-9, and PW-14) is that she was conscious and able to depose. Moreover, this Court is mindful of the position of law that certification or endorsement from a doctor about fitness of maker to make a statement is not necessary. However, in our opinion, when, like in this case, evidence exists suggesting the maker's inability to make a statement, a doctor's certification or endorsement, if not indispensable, is helpful to prove that the maker was, in fact, fit to make the statement. In the present case, even though a certification apparently exists, the same, in our opinion, does not stand adequately proved. The non-identification, and consequent non-examination of the person who so certified Mamta to be fit for statement is vital gap in the prosecution case. In our opinion, the possibility that such certification was a fabricated one cannot be ruled out.

15. This Court also notices some inconsistencies in the testimonies of PW-14, PW-6 and PW-9. Firstly, as per the testimony of these three witnesses, all these witnesses had been present when the statement was recorded. However, PW-6 admitted that he did not know as to what the contents of the statement were; he, in the next statement, clarified that he did not recollect. PW-9 even though, in his examination-in-chief, claimed to have read the statement recorded, in his cross-examination, he stated that *“I cannot explain the contents of the statements of Mamta. Whatever was stated by Mamta was recorded by the IO and it was counter signed by me.”* This, in our opinion, does not inspire confidence. Even though he claims to have witnessed Mamta’s statement, the fact that he was unable to, even briefly, describe her statement, compels us to infer that his verification that PW-14 recorded the true and correct account of Mamta’s statement cannot be believed.

16. Moreover, it is also noted that PW-14 stated that he called an SDM who refused to come, upon which, he himself recorded Mamta’s statement. The testimony of PW-6 and PW-14 is that they reached the hospital at around 5:15 PM, and after obtaining Mamta’s MLC, her statement was recorded, which took about 20 minutes. PW-9 stated that the statement was recorded at about 6:00 PM on that evening. PW-14 stated that PW-6 was present beside Mamta’s bed when the statement was recorded. PW-6 confirmed that he was present, and that he remained at the hospital for about two hours. As per his account, he went to the P.S. along with the *rukka* (Ex. PW-14/B) to get the case

registered only after the statement had been recorded. It is a vital part of the prosecution case that the case was registered based only upon Mamta's statement, and that till that time, PW-6 was also present at the hospital. However, when, during his cross-examination, PW-6 was questioned about whether any SDM was called, he stated that PW-14 did not call any SDM in his presence; he clarified stating nothing was done by PW-14 in his presence as he had been sent to the P.S. to get the case registered. Thus, even though PW-6 claimed that he was present, and that too for about two hours, he, it seems, was not present when PW-14 called SDM, as he (PW-6) went to the P.S. to get the case registered. This is clearly untenable. PW-14 claimed that he called the SDM before recording the statement, and that PW-6 was sent for registering the case at the P.S. after recording the statement. Thus, PW-6's assertion that he did not witness PW-14 calling any SDM is untrustworthy. In these circumstances, this fact (that PW-14 called SDM) cannot be held proved merely on the basis of PW-14's testimony. It is also noted that the prosecution did not produce any call records (or any other evidence) to support this claim. Thus, we hold that it does not stand proved that any SDM was called before recording of Mamta's alleged statement.

17. Thus, neither the fact that Mamta was fit for statement, nor the fact that any SDM was called, stand proved. Both PW-6 and PW-9, even though they claimed to be present, were unable to testify, in any manner whatsoever, as to the contents of Mamta's alleged statement. In light of the above, the circumstance that PW-14, in the presence of

PW-9, recorded Mamta's statement, in which the appellant was implicated, cannot be held to have been proved. Also, the fact that even though Mamta survived for about five more days, her statement was not recorded by any magistrate, further supports our inference. Therefore, Ex. PW-9/A recorded by PW-14 in PW-9's presence is of no assistance to the prosecution, and cannot be relied upon.

18. Lastly with regard to this circumstance, another exonerating circumstance is that PW-1, Mamta's father stated in his testimony that Mamta was matriculate, and that she knew how to sign; however still, as is clear from Ex. PW-9/A, her thumb impression was taken. PW-14, in this regard, stated that he did not know that Mamta was literate, and that she could sign. He further clarified that he asked Mamta to sign on her statement, but she told that she was not in a position to do so. The Post Mortem report (Ex. PW-4/A) reveals that she did not have burn injuries on the front and back of lower half of both arms. This arguably could include her hands also. The MLC report (Ex. PW-8/A) also does indicate that her hands had burn injuries. Thus, if her statement was actually recorded, she could have, arguably, signed the same instead of giving her thumb impression. This, however, is not a major inconsistency, and does not by itself prove or disprove anything. It may also be added that PW-14 initially stated that he did not know, and in the very next sentence stated that he asked Mamta to sign, but she said she could not due to her condition. When these facts are seen in light of the other exonerating circumstance, certainly some additional doubt regarding the prosecution version is created.

Account of Mamta's Oral Dying Declaration

19. The prosecution also relied on PW-1 Ram Bhajan's testimony to establish that Mamta had made to her father (PW-1) an oral statement implicating the appellant. The Trial Court held that PW-1's testimony giving account of Mamta's oral statement incriminating the appellant was admissible. PW-1, in his testimony, stated that when he went to the hospital, he was told by Mamta that the appellant had poured kerosene on her, and lit the fire. He also stated that whenever Mamta used to visit his house, she used to complain about the appellant that he (the appellant) used to consume excessive liquor and whenever she used to demand money from the appellant for household expenses, he used to ask Mamta to take money from her father. However, he was unable to recollect, at the time of his testimony on 25.2.2010, the names of his grand-children, the date, month and year of the incident. During his cross-examination, he stated that he was first told about Mamta being lit on fire by one of his neighbours; this he later clarified was not his **neighbour, but Mamta's neighbour**; he again changed his stand on this point stating that he was informed by his wife and children who had received a phone call informing them about Mamta. He stated that he first went to the appellant's house at about 12:30 AM at night (later stated as 12 midnight) where he saw the appellant in police custody (later clarified as standing near the

police officials, but not handcuffed). There, he stated that he was told by the neighbours and police officials that Mamta had been set on fire, and was admitted at a hospital. He then went to the hospital at around 1 AM. He further stated that at the hospital, no conversation between him and his daughter took place in the presence of his wife. He also stated that he did not know if anyone had recorded Mamta's statement, and that no statement was recorded in his presence. He further stated that when he met her daughter, she was not fully conscious, but was only asking for water; and that since permission was not given as such by the doctor, he did not give her water. Furthermore, he denied the allegation that Mamta's full face was burnt, or that she was not in a position to ask for water. However, he later stated that when he went to the hospital, he found bandage on her entire body.

20. This Court has perused through PW-1's testimony. He was categorical in his claim that Mamta had often complained to him about the appellant, that he (the appellant) used to consume liquor and beat her. It was only during his examination-in-chief that he stated that Mamta had told him that the appellant had lit her on fire. Even though his cross-examination was done rather searchingly, at no point did he re-iterate this position regarding Mamta's alleged oral statement made to him at the hospital. All he said was that Mamta was not fully conscious, but she asked for water. This answer, it seems, would have been in response to a question asking PW-1 what had happened when he reached the hospital, or met her daughter at the hospital. The fact

that his response merely described her semi-conscious state and her request for water is puzzling. Had Mamta actually told him that the appellant was the one who lit her on fire, PW-1, at this point in his cross-examination, should have stated so. The fact that he did not, creates some doubt about the credibility of his statement. It would be unwise to reject his version altogether; but, at the same time, in our opinion, it would be unsafe to rely on his testimony alone to convict the appellant. Also, herein, it is important to note that as per PW-14's, PW-1's statement under Section 161, CrPC was recorded only upon Mamta's death, on 22.6.2009. Had Mamta actually implicated the appellant, PW-1 would have gone and told the police about the same. As this did not happen, in our opinion, the doubt about his (PW-1's) version is compounded.

Miscellaneous Evidence

21. PW-10 Parul and PW-11 Dhruv, both children of the appellant and the deceased Mamta, were also examined by the prosecution. Both of them had, in their statement under section 164, CrPC, implicated the appellant stating that their father had poured kerosene on their mother, and then using a match, lit her on fire. During their examination-in-chief, however, they turned hostile, and deposed that they had been instructed to give a contrary version earlier by their grandmother, with whom they had been staying at that time, and who had threatened to beat them if they did not depose as per her instructions. The Trial Court did not rely on the testimonies of these two witnesses, holding that the children were prone to tutoring.

22. We have seen their statements recorded under section 164, CrPC as well as their testimonies. At the time their statements were recorded by the magistrate, Dhruv was aged 4, and Parul aged 7. Their statements, it appears to us, were recorded in a rather mechanical manner, and no attempt at all was made to determine if their statements had been tutored; even the preliminary questions asked to determine their capacity seem inadequate for the purpose. During the trial, however, PW-10 categorically stated that on the day of the incident, her mother had gone to *nani*'s (maternal grandmother) house, and when she returned she poured kerosene upon herself and lit herself on fire. She stated that her statement recorded earlier had been instructed to her by her *nani*. When she was cross-examined by the APP, she maintained her stand, and stated that her *nani* used to beat her. She stated that when her earlier statement had been recorded, her *nani* was not inside the judge's chamber, but she was still slightly scared of her. She denied allegations that her father had poured kerosene and lit her mother on fire.

23. PW-11 Dhruv also, in his testimony, stated that his mother sprinkled kerosene on herself and set herself on fire; that his father did not play any role in the same. Upon being cross-examined by learned APP, he had stated that he had told the same version which he claimed was the truth even before the magistrate. However, he further stated during his examination that even for his testimony in court, he had been instructed by his grand-parents as to what to state in court. Thus,

as regards PW-11, we have no doubt in holding that his testimony is unreliable on account of being tutored.

24. As far as PW-10 is concerned, her statement, even though cannot be held to be conclusively exonerating, it, nevertheless, create reasonable doubt about the prosecution version. The children's statements under section 161 was recorded only on 25.8.2009. Furthermore, the recording of their statements by the magistrate was also delayed, on 3.9.2009. These facts seen together also lead us to infer that the prosecution version is not free from doubt.

25. Thus, none of the purported dying declarations sought to be established by the prosecution can be held to be proved. Furthermore, PW-11's testimony also creates suspicion about the prosecution version. The basic foundation of the prosecution case were the dying declarations through which it had sought to prove that it was the appellant, and no one else, who had poured kerosene on the deceased, and set her on fire using a matchstick. This fact, in our opinion, has not been proved. Thus, the supporting evidence which the prosecution, and Trial Court relied upon (medical evidence to prove that death was caused due to burn injuries, and expert evidence to prove that kerosene was the flammable substance used) need not be examined.

26. Lastly, even though further examination is unnecessary, the following circumstances it can be said to be exonerating:

(1) Even though PW-14 stated that two burned matchsticks were also found from the spot (appellant's house), no documentary evidence was produced to support the same.

(2) Mamta's mother's statement was not recorded by the police. Consequently, she was not examined during the trial. PW-1 (Mamta's father) had testified that his wife remained present inside the ward with Mamta for substantial time during Mamta's stay at the hospital before her death. Had Mamta made any incriminating statements to her mother, she would have been a vital prosecution witness.

(3) As per PW-14's testimony, the lamp found at the spot was almost full of kerosene oil.

(4) Testimony of independent witness DW-1 Sikander Kumar (an autorickshaw driver in whose vehicle the appellant transport Mamta to the hospital) who stated that he heard Mamta say "apna aur bacho ka dyan rakhna, mujhse galti ho gai".

(5) Testimony of DW-2 Ram Sagar who testified about a suicide attempt that was allegedly made by Mamta in May 2008.

27. In view of the above discussions, this Court is of the opinion that the Trial Court erred in convicting the appellant. The conviction

is, therefore, set aside, and the appeal is allowed. The appellant is directed to be set free unless required in any other case.

**S. RAVINDRA BHAT
(JUDGE)**

March 01, 2012

**S.P. GARG
(JUDGE)**