

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on : 17.04.2012

Decided on : 27.04.2012

+

CRIMINAL APPEAL No.68/2012 & CrI.M.B.119/2012

JUGAL KISHORE

..... Appellant

Through : Sh. R.K. Dikshit, Advocate

versus

STATE GOVT. OF NCT OF DELHI

..... Respondent

Through : Sh. Sanjay Lao, APP.

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

MR. JUSTICE S.P. GARG

MR. JUSTICE S.RAVINDRA BHAT

%

1. The appellant challenges a judgment and order of the learned Additional Sessions Judge (ASJ) dated 26.05.2010 and the order on sentence dated 31.05.2010 in S.C. No. 57/2010 by which he was convicted for the offence punishable under Section 302 IPC and sentenced to undergo imprisonment for life along with other sentences.

2. The prosecution alleges that Meena used to work as a domestic help to sustain herself. The appellant – Jugal Kishore was the brother-in-law (husband's brother). It was alleged that Jugal Kishore objected to Meena working as a domestic help and he frequently had altercations with her as he asked her to stop working. The deceased nevertheless continued to work. It was alleged that on

22.04.2008, when Meena was at the District Park, Nand Nagri, the Appellant went there and told her that since she did not stop working, he would teach her a lesson. He had a plastic can filled with acid. It was alleged by the prosecution that Jugal Kishore poured acid over Meena's head from a plastic can or container. She shouted for help and the appellant immediately fled the spot. It is further alleged that PW-17, (a Home guard constable) who heard about the incident from someone, went to the spot and took Meena to the hospital. On the way, she told him that Jugal Kishore was responsible for the acid attack. It was alleged that the police had received intimation and reached the G.T.B. Hospital where Meena had been taken. Her statement implicating the accused was recorded by PW-20, as Ex.PW-20/A; this was treated during the trial as dying declaration. The prosecution further alleged that this dying declaration was witnessed by another policeman.

3. The appellant, according to the prosecution, absconded from the place and was later arrested from a bus stand. After completion of the investigation, during the course of which the prosecution collected the incriminating material as well as Forensic Science Laboratory (FSL) reports; the Postmortem Report etc., a charge sheet was filed. The Trial Court framed the charges against the accused. He entered the plea of not guilty and claimed trial. During the course of proceedings, the prosecution relied on the testimonies of 24 witnesses, besides the documentary evidence it placed on the record. On an overall consideration of these, the Trial Court concluded that the appellant's guilt had been proved beyond reasonable doubt. He was, therefore, convicted for the offences mentioned previously and sentenced to undergo various prison terms.

4. The Trial Court has based its findings on the dying declaration made by the deceased, to PWs-17 and 20. It is also found that the circumstances surrounding

the attack and the incident to have been corroborated by the medical and scientific evidence in the form of Postmortem Report and the FSL reports.

5. It was argued on behalf of the appellant that the Trial Court fell into error in believing the testimony of PW-20, as far as the alleged dying declaration was concerned. Learned counsel highlighted that even though the MLC in this case, Ex. PW-12/A, was produced in the Court and does explicitly mention that the injured was in a fit state of mind to record her statement, yet the police did not take any steps to call the Sub-Divisional Magistrate (SDM) or at least ensure the presence of the attending doctor. Learned counsel highlighted that even a reading of the testimony of PW-20 established that the doctor was around when the alleged dying declaration was recorded. Yet, inexplicitly, the doctor's statement or even his signatures on the dying declaration as a witness were not taken down. He was not produced during the trial, to lend credibility to the story of the dying declaration having been recorded contemporaneously. This, threw a cloud of suspicion on the assertion made by PW-20 that the deceased was in a condition to record her statement.

6. Learned counsel impeached the credibility of PW-17 and urged that even though he claimed to have been employed as a Constable in the Home Guards, in cross-examination, the witness admitted to not reporting the incident to his superior officers. Furthermore, argued learned counsel, the testimonies of PWs-17 and 13 could not stand together. If in fact PW-17 came to know about the incident in the manner deposed by him, i.e. as to his having been told about it by a boy, there was no question of the deceased running down the street as alleged by PW-13. The latter was a resident of the neighborhood who claimed to know Meena, the deceased and claimed in her testimony that on the day of the incident, she saw

Meena running down the street and shouting-out aloud that her brother-in-law (i.e. the present appellant) had poured acid over her. If indeed this was the situation, there would have been no question of Meena entering the District Park where PW-17 found her and taken her immediately for medical treatment.

7. It was urged next that the prosecution story is entirely unbelievable because even though PW-17 deposed to having taken Meena to the GTB Hospital, yet her name was not mentioned in the Medico-Legal Certificate (MLC). Learned counsel emphasized that if Meena was indeed in a proper condition and frame of mind to narrate the details pertaining to her attack to PW-17 either before setting-out to the hospital or during the journey, and was in a fit state of mind to record her statement to PW-20, there was no reason why her name could not be recorded or ascertained by PW-17. It was stressed that the fact that the MLC did not mention her name gives a clear lie to the so called dying declaration, because it even records that PW-17 had taken her to the hospital. All these belie his allegation of having been informed about the circumstances surrounding the attack as well as identity of the attacker.

8. Learned counsel next submitted that PW-13 had claimed during her deposition, to have informed Chander-pal, PW-1 about the incident on the date of occurrence itself, i.e. on 22.04.2008. The prosecution nevertheless did not record his statement for a considerable period of time. This witness, i.e. PW-1 had deposed to visiting his wife in the hospital where he was informed about the acid attack by the appellant upon her. He also deposed that the dying declaration was made in his presence. However, Ex. PW-20/A did not bear-out this assertion. It is further argued very crucially that the statement of PW-1 was recorded for the first time on 14.10.2009 and thereafter, the prosecution chose to have his statement

recorded by the Magistrate under Section 164 Cr. PC on 12.01.2010. The incident in this case occurred on 22.04.2008. The entire circumstances which led to the recording of PW-1's statement and his progressive improvement of the prosecution case in respect of what he had seen and what his wife had allegedly narrated to him immediately after the acid attack threw grave doubts and suspicion over the prosecution's version *vis-à-vis* his presence after the incident. For these reasons, it is submitted by the counsel that the dying declaration sought to be relied upon by the prosecution and accepted by the Trial Court could not have been acted upon.

9. Learned APP urged that there are no substantial or compelling reasons for this Court to interfere with well-reasoned findings of the Trial Court. It was submitted that the MLC in this case was recorded at 09.00 AM, i.e. within 30 minutes of the attack. Learned APP submitted that a bare reading of the site plan would reveal that the place where the acid attack occurred as well as the place from where the articles, such as the earth control etc. were seized are so close and proximate to each other as to leave no room for doubt regarding the veracity of PW-17's statement. Learned counsel emphasized that even if the Court were to ignore the testimonies of PW-13 and PW-1, the totality of the evidence on the record overwhelmingly pointed to the appellant being criminally responsible in this case.

10. It was argued that the testimony of PW-1 corroborated the motive which the prosecution had alleged in this case, i.e. the deceased, Meena's working as a domestic help being an irritant to the appellant, who wanted her to stop doing so. The witness, PW-1 had clarified that since it was difficult for him and his family to make both ends meet, the deceased used to work as a domestic help which she had been doing for about 8-10 years before the incident. It was submitted that so far as

PW-17 is concerned, the appellant could not make-out any good reason for discarding his testimony. Emphasizing that this witness was entirely independent and in no way could be considered partisan or even a police witness, the learned APP highlighted that he happened to be present at the spot and immediately upon being informed about the acid attack, reached the District Park. He was able to quickly take the deceased to the hospital where she received medical attention and where dying declaration was recorded by PW-20.

11. Learned APP submitted that there is no thumb rule that a dying declaration recorded by police stands on a weaker footing. As long as the testimony of the concerned witness passes through the test of credibility, the Courts would not ignore it if it is relevant and material for the determination of any issue in a criminal case. It was submitted that PW-20's testimony has to be considered in the context of the fact that the MLC Ex. PW-12/A was recorded at 09.00 AM; he reached the spot immediately after that and was able to ascertain from the concerned doctor that the deceased was in a fit physical and mental condition to record her statement. The appellant had not been able to show how the observation in the MLC with regard to the fitness or the state of mind of the injured to make a statement had to be discarded or disbelieved. Under these circumstances, it was perfectly natural for the police officer, i.e. PW-20 to enquire as to the circumstances which led to the serious acid injuries upon the deceased. She narrated the events which had taken place inherently. Learned counsel emphasized that there is no rule which obliges someone who hears or records a dying declaration, to also ensure that the doctor attests to it in a particular format or that a doctor is present. The learned APP relied on *Laxman v State of Maharastra* 2002

(6) SCC 710 in this regard. That it was urged is a matter of prudence_and is also dependent on whether any doctor is available at the spot.

12. Learned APP lastly submitted that taking an overview of the entirety of the circumstances which included not only the dying declaration of the deceased but also testimonies of PW-17 and the circumstances which emerged from a reading of the testimonies of PW-1 with regard to motive as well as the recoveries and seizures made from the site, the conclusions drawn by the Trial Court ought not to be disturbed.

13. It can be seen from the above discussion that the prosecution relied primarily on the statements of PW-13, PW-17 and PW-20 to allege criminal responsibility of the Appellant, for the death of Meena, on account of acid burns. The post-mortem report in this case recorded that she had suffered 90% burns all over the body; there is evidence in the form of eyewitness testimony that she was unable to see, on account of acid burns over her eyes. Meena died, as a matter of fact, on 24-4-2008. Ex. PW-1/A is the memo evidencing handing over of the body to PW-1, her husband.

14. The first question which this Court has to decide is whether PW-17's testimony regarding the identity of Meena's attacker, i.e. the appellant, is credible and trustworthy. This witness deposed that he was working as a Constable with the Home Guard till 2005. He was informed about the acid attack on Meena, by some boy. He rushed to the District Park, and saw her. He took her to the GTB hospital. Either when he went there, or when he took her to the hospital, Meena told him about the circumstances surrounding the attack, as well as the identity of the person who poured acid over her. Now, external corroboration of his version is *prima facie* found in Ex. PW-12/A the MLC, which contains his name, as the man

who took the injured. Intriguingly, however, the injured's name is not recorded. PW-20 mentions that when he went to the hospital, he did not find PW-17, and that the witness went to the police station later. Ex.PW-8/A is the DD entry in the records of PS Nand Nagri, at 9:30 AM, mentioning that an unknown woman had been admitted with extensive burn injuries. PW-20 stated that he reached the hospital at around 9:45 AM and the statement of the deceased was recorded at 10:30. The FIR (Ex. PW-5/A) was recorded at 10:45 AM. This clearly shows that at least when PW-17 took the injured to the hospital, her identity was unknown. The MLC also mentions only about alleged history of burn injuries; there is no clue that acid was thrown in the manner alleged. Besides, being a responsible officer, trained in the drill of what ought to be done when dealing with a medico legal case, it is quite surprising that PW-17 left without waiting for the police. His conduct is not that of a responsible individual; he does not even mention having seen any police man, and satisfying himself that the incident was suitably reported to the nearest police station. He certainly was not present when the alleged dying declaration was recorded by PW-20. PW-17 deposed that his duty ended at 2:00 PM and that he went that evening to the police station to record his statement. This casual approach cannot be understood by the court.

15. Apart from the above improbability, what is striking is that the evidence of PW-13 contradicts PW-17. This witness is a resident of the neighbourhood, and knew Meena. This witness deposed to hearing Meena shouting loudly, and running on the street, in front of her house, saying that Jugal Kishore had thrown acid on her. Now, this version was recorded by her in the statement under Section 161 Cr. PC; she was consistent with that version, in the deposition in court. If this is correct, the testimony of PW-17 that he saw the deceased in the District Park,

cannot be correct. PW-17 said that he saw the deceased in the park, and that according to her, the incident whereby the Appellant poured acid over her, took place in the park. The versions of these two eyewitnesses regarding place of the incident are inconsistent and irreconcilable. This aspect assumes importance because no public witness was associated while the police seized earth control, a jug (which contained acid) and the lid of the jug, from the park.

16. At some stage, the prosecution felt that PW-1 was a material witness. He was the husband of the deceased; PW-13 claims to have informed him about the attack. PW-1's statement was not recorded the same day; instead he only claimed the body on 24-4-2008. His statement was recorded under Section 161, as late as on 14-10-2009. The delay in this regard is inexplicable. Furthermore, the prosecution had this witness's statement recorded before the Magistrate on 10-1-2010, under Section 164. In each of these he sought to improve his version. In court, he deposed to having seen the deceased make the dying declaration to PW-20. The latter, however did not corroborate this version. This court has no doubt that this witness is not reliable; aside from the several improvements he made, and the fact that the prosecution has not shown why his statement was recorded after such a delay, the other damaging material is the deposition of his father, PW-2. This witness stated that PW-1 Chander Pal used to be a drunkard, frequently borrowing money and also beating his wife. PW-2 also mentioned about a strained relationship between him, his family and PW-1 on this score, and deposed that though the family felt that the deceased had illicit relationship with someone else, there was no quarrel between her and the Appellant, her brother in law (and the witness's younger son).

17. Having regard to the totality of the above circumstances, this Court is of the opinion that it was unsafe to rely on the testimony of PW-20 regarding the dying declaration made to him by the deceased.

18. This brings the Court to a discussion of the testimony of PW-20, who sought to prove the dying declaration recorded by him Ex. PW-20/A. At the outset, there is no rule of evidence or law that the dying declaration recorded by a police personnel cannot be taken into account without corroboration. (Ref. *State of Rajasthan v. Teja Ram* (1999 (3) SCC 507), *Rajik Ram v. Jaswant Singh Chauhan* (AIR 1975 SC 667) and *Tahsildar Singh v. State of U.P.* AIR 1959 SC 1012). In *Paras Yadav and Ors. v. State of Bihar* (1999 (2) SCC 126) it was held that the statement of the deceased recorded by a police officer in a routine manner as a complaint and not as a dying declaration can be taken as such a dying declaration after the injured's death if he was found to be in a fit state of health to make a statement. If the statement is recorded by an investigating officer it can be relied upon if the evidence of the prosecution witness is clearly established beyond reasonable doubt that the deceased was conscious and he was removed to the hospital and he was in a fit state of health to make the statement. In the instant case, the position appears to be different. At the same time, the Court has to be cautious in accepting this evidence, and should be alive to all other materials, because the statement cannot be subjected to cross examination.

19. Reliability and credibility of the witness who deposes about the dying declaration are the twin requirements which the Trial Court is obliged to satisfy itself about, while basing its findings on such evidence. In this case, even though the MLC was recorded seemingly at 9 AM, yet, when the dying declaration was recorded, clearly no doctor was present, nor asked to witness the statement. The

doctor who recorded the MLC, and also made an endorsement that the injured was in a fit state of mind to record the dying declaration was not joined in the investigation, much less produced in court. Though it is not incumbent on the prosecution to seek a certification about the state of mind of the maker of the declaration, on the document, the availability of the doctor, who can conveniently witness the statement, is a factor which would lend assurance to the credibility of that evidence, particularly if it is to be the sole basis of a conviction. In this case, the other important aspect is that the injured lived on for two more days; the prosecution did not indicate any attempt on its part to have a declaration or statement recorded through the concerned executive magistrate, or SDM.

20. Having regard to the totality of the above circumstances, and discussion, this Court is of opinion that the evidence led before the Trial Court was not of the nature and character as would have justified in recording the Appellant's conviction and consequent sentence. The impugned judgment is, therefore, set aside. The appellant is directed to be released forthwith, unless he is required in any other case. CrI. A. 68/2012 and the application are consequently allowed.

**S. RAVINDRA BHAT
(JUDGE)**

April 27, 2012

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