

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

+ CRL.REV.P. 704/2009

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Reserved on: 25th May, 2012

Decided on: 17th July, 2012

AJAY SINGH

..... Petitioner

Through: Mr. J.S.Kushwaha, Advocate
Mr. Karan Bharioke, Amicus Curiae

versus

STATE

..... Respondent

Through: Mr. Mukesh Gupta, APP for State

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. By this petition the Petitioner Ajay Kumar has challenged the order dated 3rd September, 2009 whereby charge under Section 304 IPC was directed to be framed and framed against the Petitioner and co-accused Smt. Kamlesh, Petitioner's wife and his sons Kamal Kant and Deepak Kumar. On 25th May, 2010 this Court issued notice to the Petitioner and the co-accuseds as to why charge under Sections 302/34 IPC be not framed against them and passed the following order:

“I have heard learned counsel for the Petitioner and APP for the State.

By way of this revision petition, the petitioner has challenged the order dated 3rd September, 2009 passed by the learned Additional sessions Judge framing charge against him as well as three other co-accused persons under Section 304/34 IPC.

The petitioner-accused is the father-in-law of deceased Mamta. As per the case of the prosecution, on the day of the incident accused Kamal Kant, husband of the deceased, had

first fought with her and then sprinkled kerosene oil on her and pushed her towards the burning gas stove in the kitchen of their house. She fell on the burning stove and caught fire. The petitioner, his wife and his other son Deepak were, as per the further case of the prosecution, at that time came out of the house and were seen by two witnesses running away.

The police being informed of the incident registered a case under Section 307/498-A/34 IPC but the victim succumbed to the burn injuries and then the case was converted into one under Section 302 IPC. Upon conclusion of investigation Section 304-B IPC (Dowry Death) was also invoked and the petitioner, his wife and his two sons were charge-sheeted by the police under Sections 498-A/304-B/302/34 IPC.

In due course the case came to be committed to Sessions Court and the learned Additional Sessions Judge on 3rd September, 2009 passed the following order on charge.

“Prima facie, charge u/s 304 IPC is made out.”

And then framed a charge under Section 304 r/w Section 34 IPC against all the four accused persons.

Learned counsel for the petitioner has argued that there was no material whatsoever placed by the Investigating Agency before the trial Court relying on which charge under Section 304 IPC could be framed against the petitioner-accused. It has been contended that the deceased herself had made a statement before the Executive Magistrate, which is being relied upon by the prosecution as her dying declaration that it was her husband Kamal Kant who had poured kerosene oil on her and then pushed her on the burning gas stove and she caught fire and she had also claimed that at that time nobody else from her in-laws was present. Therefore, counsel contended, Section 34 IPC could not have been pressed into service by the prosecution and the learned trial Court for charging the petitioner under Section

304 IPC.

Learned APP, on the other hand submitted that there are two witnesses who had claimed that on the day of the incident, which took place in the morning time, they had seen smoke coming out from the house of the accused persons and the petitioner, his wife and his other son Deepak were seen coming out of their house and running away. APP submitted that if they were not involved in the incident they would have been with the deceased helping her out instead of running away from the house.

Learned counsel for the petitioner submitted that the statement of those two witnesses were recorded in May, 2009 while the incident was of March, 2009 and, therefore, no credence can be placed on the statement such witnesses.

In my view, as far as the question of delayed recording of the statements of the two witnesses, namely, Ashok and Ramesh, who had seen the petitioner-accused, his wife and his other son running away when the deceased Mamta was burning inside is concerned that aspect can be taken considered only after these witnesses have been given an opportunity to explain the delay in their coming forward with the said version and also to the Investigating Officer to explain the delay in recording of their statements. At the stage of framing of charge against the petitioner-accused there was sufficient material before the trial Court for putting him to trial and not discharging him. So, I do not find anything wrong in the impugned order for putting the petitioner-accused to trial.

However, in my view, which of course at present is a prima facie view, the learned trial Court has done something wrong in framing a charge under Section 304 IPC.

In view of the fact that the deceased claimed in her statement before the Executive Magistrate that her husband had poured Kerosene oil on her and then slapped her and pushed

due to which she fell down on the burning gas stove and she had caught fire, a *prima facie* case of murder was made out. The trial Judge has not even stated in the order as to what submissions were advanced on behalf of the accused to bring down the offence to Section 304 IPC or as to how he himself was of the view that it was not a case of murder. However, before any final view is taken on this aspect of the matter this Court in exercise of the revisional jurisdiction being entitled to correct miscarriage of justice, a notice is issued not only to the petitioner-accused but also to his other co-accused persons to show cause as to why the charge under Section 302/34 IPC be not framed against them.

Counsel for the present petitioner-accused says he would make his submissions as and when the matter is now heard on this aspect. Notice be issued to the co-accused persons, returnable for 24th September, 2012.

Learned APP has submitted that before the next date he would also find out whether the State has challenged the discharge of the accused for the offence of murder or not.

The trial Court record be retained here.”

2. Thus the Petitioner and the co-accused persons Smt. Kamlesh, Kamal Kant and Deepak were heard through learned counsel and learned Amicus Curiae as to the order on charge and why charge under Sections 302/34 IPC be not framed against them. Learned counsel for the Petitioner and the learned Amicus Curiae stated that the deceased had made three statements/dying declarations, two before the SDM and the third before the Investigating Officer which do not implicate the Petitioner and the co-accuseds for offence under Sections 302/34 IPC. The video CD given by the Complainant to the police officer has not been investigated. Since the

authenticity of the CD and the identification of the voice therein have not been done, the same is not admissible in evidence and cannot be looked at even at the stage of charge. Reliance is placed on *Navindchandra N. Majithia vs. State of Meghalaya*, 2000 (8) SCC 323. It is contended that a perusal of all the three statements clearly show that they are tutored and cannot be relied upon. Even if the statements are taken on their face value, they do not show any intention on the part of the Petitioner and the co-accused to kill the deceased as alleged and thus no charge under Section 304 or Section 302 IPC is made out against them. A perusal of the three statement consistently show that neither the Petitioner nor his family members, that is, the co-accused were present at the place of the incident when the alleged offence took place and thus the statements of the witnesses, who allegedly saw the Petitioner and the co-accused running away from the place of incident, are false. The deceased had married Kamal Kant against the wishes of her family members. Therefore, the family of the deceased has falsely implicated them by making the deceased to change the statements repeatedly. The deceased was well and was discharged from the hospital on 10th April, 2009 and she died as she developed septicemia in her stomach. Hence in no case offence under Section 302 IPC is made out. Thus the Petitioner be discharged of the offence under Section 304 IPC and no charge under Sections 302/34 IPC be directed to be framed against the Petitioner or his family members, the co-accused.

3. Learned APP for the State on the other hand contends that besides the three statements of the deceased one more statement of the deceased was recorded by her family members through video recording. As per the said

statement, the Petitioner and his family members, the co-accused killed the deceased by burning her. The said video CD was examined by the Investigating Officer and transcript thereof has been prepared and filed along with the charge sheet. The issue regarding the genuineness of the video CD and identification of the voice falls into the realm of reliability and will have to be decided during trial when the prosecution witnesses appear in the witness box and depose in this regard. Since the video CD is admissible in evidence at the stage of charge, the reliability thereof cannot be gone into and hence in view of the statement made by the deceased which was video recorded, charge under Sections 302/34 IPC is liable to be framed against the Petitioner and his family members who are the co-accused. He further states that no petition has been filed by the State against the impugned order, wherein no charge has been framed against the Petitioner and the co-accused for offence under Section 302/34 IPC.

4. I have heard learned counsel for the parties.

5. The Petitioner Ajay Singh, Smt. Kamlesh, Kamal Kant and Deepak Kumar are the father-in-law, mother-in-law, husband and brother-in-law respectively of the deceased Mamta. Briefly the prosecution case is that on 9th March, 2009 the deceased suffered burn injuries and was taken to the hospital. On the same day the statement of the deceased was recorded by the Executive Magistrate wherein the deceased alleged that her marriage was solemnized on 15th August, 2008 according to the Hindu Rites and Customs whereafter she lived with her husband and in-laws for two months. It was a love marriage which was solemnized in a mandir. Thereafter the deceased has been living separately with her husband in a rented house at Bhagwati

Vihar. The husband of the deceased was keeping her well. It is further stated that the deceased was never harassed for dowry. As the deceased used to suffer back ache and pain in the ribs, somebody suggested her that she should apply kerosene oil on the back and ribs. In the morning at about 8.30-8.45 a.m. when she started preparing tea, the moment she lit the gas stove, she caught fire. She raised an alarm and her husband came to extinguish the fire with the quilt and thereafter made her sit under the tap after opening the water. In the process Kamal Kant also suffered burn injuries on his hands. According to the deceased, her husband took her to the hospital in an auto and no one was responsible for the incident nor was her husband, in-laws or any other family members involved in the same. She wanted no action against them.

6. The second statement of Smt. Mamta was recorded on 14th March, 2009 by the Executive Magistrate, Tehsildar, Najafgarh wherein she alleged that her husband was keeping her well, used to take care of her and never demanded dowry etc. She was living happily with Kamal Kant however, his family members used to annoy her and they were not allowing to use their belongings and used to say that if she needed the goods she should bring the same. Her in-laws used to visit Rajpuri residence where she was living with her husband on tenancy. However, her mother-in-law and father-in-law did not talk to her. According to her 8-10 days before the incident they shifted to a house on rent at Bhagwati Vihar from where her husband used to visit his house. Her mother-in-law used to instigate her husband who used to say that his wife is alright and he has to live with her. Her husband's family members also used to instigate him. One day prior to the incident on 8th her

husband had visited his house and after coming back from there, he picked up a quarrel with her and said that he would leave the house and all the problems of his mother would finish. The Complainant brought him back at 11.30 p.m. from Majid Wali Gali and then her husband went to sleep however, he did not talk to her. When she got up at 6.00-7.00 a.m. they had a quarrel and in between she went for preparing tea. At that time her husband spread a quarter of kerosene oil on her which was lying there and said that he would finish her on that day so that all problems will be over. Thereafter he went and sat on the bed. Then he again stood up and started keeping his clothes and said that he was leaving the house. When the Complainant tried to snatch clothes from him, he slapped and pushed her due to which she fell on the burning gas stove in the room and her clothes caught fire. She raised alarm and her husband tried to extinguish the fire with the quilt and made her sit under the tap. Thereafter, he wrapped her in bed sheet and brought to the hospital. In this statement she stated that her husband had no intention and her mother-in-law, father in law and other members were not present at that time though the quarrel between the two took place due to her in-laws.

7. The third statement of Smt. Mamta was recorded on 16th March, 2009 before the Investigating Officer wherein she stated that though the behavior of the husband was well with her however, his family members used to annoy her. Her mother-in-law often quarreled with her and used to taunt her for not bringing the dowry. They solemnized the marriage in Mandir and at that time no dowry was given. Due to the mental harassment caused by the mother-in-law they took the house on rent and started living there. They had shifted to rented house at Bhagwati Vihar 8-10 days ago from where her

husband used to visit his parents. Her mother in law used to instigate her husband. On 8th her husband visited his mother and after coming back slept silently and did not talk to her. In the morning her husband quarreled with her. In between she left for preparing the tea when her husband Kamal spread quarter of kerosene oil on her which was lying there and stated that he would finish her and then problems will be over. The husband of the deceased pushed her due to which she fell down on the gas stove and her clothes caught fire. Her husband tried to extinguish fire. Thereafter he brought her to the hospital.

8. A perusal of the three statements of the deceased does not reveal that the in-laws were not present and it was only her husband who was present at the relevant time in the house. There is no role assigned to the family members except stating that they were annoyed with her and used to taunt her.

9. The deceased died on 12th April, 2009. The statement of the father of the deceased was recorded on 9th March, 2009 wherein he alleged that Kamal Kant and his daughter had married each other contrary to his wishes and within two months of the marriage the deceased started living separately from her in laws. Kamal Kant, the husband of the deceased, his son-in-law used to do photography work and after two months his father, that is, the Petitioner Ajay Kumar stopped giving money for rent. Kamal's mother used to taunt his daughter for not bringing the dowry articles. Around three months ago his daughter was pushed from the roof by the in-laws. He had doubt that his daughter has been burnt by her husband and her in-laws.

10. On 19th May, 2009 a complaint of the mother of the deceased dated 16th May, 2009 was received by SHO, PS Bindapur along with a video CD of the statement of the deceased recorded by the family members of the deceased. The said CD was played by the Investigating Officer and its transcript was prepared. As per the statement of the deceased recorded in the CD the deceased further stated that Kamal's father, that is, the Petitioner herein and Kamal's brother had made her life hell and Kamal's mother used to beat her for not bringing dowry. Because of this she took a house on rent. On 19th October, 2009 the mother-in-law of the deceased dragged her to the stairs and pushed her from the roof and injured her head. A police case was registered. The parents and brother of her husband used to say that either she gets dowry or otherwise she will not stay in the house and used to instigate Kamal to kill the deceased. On 9th October, 2009 when she was lying on the bed, her husband and in laws poured kerosene oil on her and lit her on fire. In the meantime, neighbours came and then Kamal along with the neighbours put water on her. She stated that her father was not in a position to give dowry of Rs. 5 lakhs as she had three other sisters. When her parents complained to the police, the police did not register the complaint.

11. It is in view of this statement recorded on video CD that this court issued notice to the Petitioner and the co-accused as to why charge under Sections 302/34 be not framed against them. The primary contention of the learned counsel for the Petitioner is that this video recording is not admissible in evidence as the investigating agency has conducted no investigation to prove the authenticity and identity of the voice in the video CD.

12. It may be noted that there is no dispute to the proposition that audio or video recording is admissible in evidence. However, to prove a statement recorded on the tape recorder or video recording, the prosecution has to prove that there is no tampering with the recorded version, the voice matches with that of the deceased. However, these issues are to be looked into during the trial. At this stage suffice it is to state that this video recording is admissible in evidence. Though the learned amicus curiae has termed this as a private investigation being barred as held in *Navindchandra N. Majithia* (Supra) however, to my mind it is like any other evidence. No doubt during trial it would be the duty of the prosecution to prove the authenticity of the video recording and the identification of the voice. Thus, the prosecution is entitled to prove the same. This video recording cannot be held to be per se inadmissible in law. There is no doubt that the deceased has made inconsistent statements and has improved her version. However, the same would be in the realm of appreciation of evidence and cannot be gone into at this stage by this Court.

13. Further public witnesses Ramesh and Ashok Kumar have stated that soon after the incident they saw the Petitioners Kamlesh and Deepak running out of the house after the incident. In view of the statements of the deceased, her father and Statement of witnesses Ramesh and Ashok Kumar, prima facie a strong suspicion arises against the Petitioner and the co-accuseds for having committed the offence under Section 302/34 IPC.

14. I find no merit in the contention of the learned counsel for the Petitioner that since the death occurred due to septicemia no charge under Section 302 IPC can be framed. Even though death was due to septicemia,

however, the same was a direct result of burn injuries. In *Sudershan Kumar vs. State of Delhi, 1975 (3) SCC 831* their Lordships held:

“9. In the present case, it is established beyond all reasonable doubt that the accused intended to cause injuries by throwing acid and injuries were caused on the person of Maya Devi. Dr V.K. Jain, who treated Maya Devi in the City Clinic has stated in his evidence that the injuries suffered by Maya Devi were sufficient collectively, in the ordinary course of nature, to cause death. The opinion of Dr Jain is corroborated by the evidence of Dr K.S. Raj Kumar. He said that the burns were to the extent of 35 per cent of the body, that if the burn exceeded 30 per cent, the same would be dangerous to life and that the injuries on Maya Devi were dangerous to life. Dr S.S. Kaushal who conducted the post-mortem examination was of the view that death was due to toxaemia and septicaemia from absorption of toxins on account of the extensive superficial ulceration of the body caused by some corrosive material. The evidence of these doctors would show that the injuries caused to Maya Devi were of a dangerous character. The fact that Maya Devi lingered for about 12 days would not show that the death was not the direct result of the act of the appellant in throwing acid on her. The medical evidence is clear that 35 per cent of the surface of the body of Maya Devi was burnt as a result of the injuries received by her.

The involvement of one-third to one-half of the superficial surface of the body is likely to end fatally.

... In suppurative cases, death may occur after five or six weeks or even longer.

10. Taylor says that after the fourth day of the injury, “the chief danger to life is the occurrence of sepsis in the burned areas”.

11. It was contended for the appellant that death of Maya Devi was not the direct result of the injuries caused by the acid burns but was on account of some supervening circumstances

not resulting from the injuries and therefore, the appellant could not be held guilty of murder. He relied on the evidence of Dr. (Miss) Nirmala Lakshmi Narain who had stated, on her cross-examination, that the cause of death of Maya Devi was malaena and respiratory failure. Malaena, according to Dr Jain is nothing but passing of old blood in the stools. The evidence of Dr S.S. Kaushal who performed the post-mortem examination of the dead body is definite. He says:

Death, in my opinion, was due to toxaemia and septicaemia from absorption of toxins from extensive superficial ulceration of the body caused by some corrosive material.

12. As already stated, the evidence of Dr. Jain and Dr Raj Kumar is also to the effect that the injuries caused on Maya Devi were sufficient in the ordinary course of nature to cause death. The fact that Maya Devi developed symptoms of malaena and respiratory failure and they also contributed to her death cannot in any way affect our conclusion that the injuries caused by the acid burns were the direct cause of her death.

Since Curling first drew attention to the occurrence of duodenal ulcers after burns numerous cases have been recorded both in vivo and post-mortem after burns. Petechiae of the stomach and duodenum, often with erosions, occasionally acute ulcers, is a more common post-mortem finding: the condition is due to anoxia from hypotension and stasis. The large bowel may also be involved.

Modi, in his *Medical Jurisprudence*, has stated that burns would cause:

Inflammation of serous membranes and internal organs, such as meningitis, peritonitis, oedema glottidis, pleurisy, bronchitis, broncho-pneumonia, pneumonia, enteritis and perforating ulcer of the duodenum.”

15. The impugned order dated 3rd September, 2009 is set aside. The Trial Court is directed to frame charge under Section 302/34 IPC against the Petitioner Ajay Singh and the co-accused Kamlesh, Kamal Kant and Deepak and proceed in accordance with law.

16. Petition is disposed of. Trial Court record be sent back.

(MUKTA GUPTA)
JUDGE

JULY 17, 2012

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