

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

% *Date of decision: September 11, 2014*

+ **CRL.A. 739/2000**

SHIV KUMAR

..... Appellant

Represented by: Ms.Inderjeet Sidhu, Amicus
Curiae (Advocate).

versus

N.C.T. OF DELHI

..... Respondent

Represented by: Mr.Lovkesh Sawhney, APP for the
State with Inspector Arun Chauhan
and SI Shiv Kumar, PS Krishna
Nagar.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J. (ORAL)

1. Shiv Kumar challenges the judgment dated October 31, 2000 convicting him for the murder of his wife Kamlesh and son Ashu and the order on sentence dated November 06, 2000 directing him to undergo imprisonment for life and to pay a fine of ₹5,000/- and in default of payment of fine to undergo simple imprisonment for one year.

2. Learned Amicus Curiae for Shiv Kumar assails the judgment on the ground that the dying declaration of the deceased was clearly an afterthought. The deceased not only committed suicide but also burnt her child in her lap and implicated the appellant which version is supported by the statement of the child Ashu before the doctor and deposition of an independent witness Phoolwati Verma, DW-1, a neighbour. The version of the parents of the deceased cannot be relied upon for convicting Shiv Kumar for offence under Section 302 IPC as they were not present at the spot.

Assuming that Shiv Kumar was in the habit of consuming liquor and quarrelling with the deceased, the same is not sufficient to convict Shiv Kumar for offence punishable under Section 302 IPC as the circumstances proved otherwise.

3. Learned APP for the State on the other hand rests the prosecution case on the dying declaration of Kamlesh recorded vide Ex.PW-28/A on the basis of which the case of the prosecution stands proved beyond reasonable doubt.

4. Process of law was set into motion on October 05, 1992 at about 1.08 PM when an information Ex.PW-21/A was received through wireless that a lady has burnt (ek aurat ne aag laga li he) which was recorded vide DD No.8/A. The PCR reached at the spot and admitted Kamlesh in SDN Hospital. The second information was received vide DD No.10/A at 1.45 PM that a child Ashu, aged four years had been admitted in JPN hospital in burnt condition. Simultaneously at 1.50 PM DD No.11/A was received with regard to the admission of Kamlesh at SDN hospital in burnt condition by Head Constable Jagbir of PCR who was later admitted in GTB Hospital.

5. The MLC of Kamlesh Ex.PW-27/A notices alleged history of burn 65% and the appellant was semi-conscious. She was unfit for statement and subsequently declared fit for statement at 10.45 PM when SI Gian Singh, PW-28 recorded the statement of Kamlesh Ex.PW-28/A in the presence of two public witnesses Anand Prakash and Ashwani Kumar wherein Kamlesh stated as under:

“She was married to Shiv Kumar in June, 1983. Shiv Kumar did not go out for earning. Her father had even given a three wheeler scooter. Even then Shiv Kumar did not go to work and used to drink liquor. Shiv Kumar used to ask for the gold chain which was given at the birth of her son. On 30th

September, 1992 she refused to give the chain. On that day night Shiv Kumar quarrelled with her after taking the drink. In the morning he again asked for the chain which she complained to her father and brother-in-law. Her brother in law scolded her husband. Shiv Kumar went out somewhere in the morning and when he returned he assaulted her. On this she stated that it was better to die so she poured kerosene oil on herself and her son clung to her. Her husband lit the matchstick and put her on fire due to which she and her son got burnt.

6. Anand Prakash, the witness to Ex.PW-28/A appeared as PW-7 and deposed about the dying declaration made by Kamlesh. Anand Prakash is a relative of Kamlesh as the younger sister of Kamlesh was married to the nephew of Anand Prakash.

7. The MLC of Ashu was exhibited vide Ex.PW-23/A which notes alleged history as told by the patient child himself that his mother had burnt himself which was corroborated by the father of the child who had brought him.

8. Abhimanyu PW-1 and Manju PW-2, the parents of the deceased appeared in the witness box and deposed about Shiv Kumar's habit of consuming liquor, quarrelling and beating their daughter. They also deposed that they had purchased a three wheeler scooter for Shiv Kumar as he was unemployed and that he was demanding gold chain from the deceased so that he could get his three wheeler repaired.

9. No eye witness to the occurrence has been examined by the prosecution however, the defence examined Phool Wati Verma DW-1 who was a neighbour who deposed that in the month of October, 1992 she was present at her house when she heard noise about some lady being burnt in

her neighbourhood. She went there and saw that the room was closed from inside and Kamlesh was burning. Shiv Kumar was present in the adjoining room. Thereafter other neighbours tried to open the door and after breaking the door Shiv Kumar put blanket on his child. He also put blanket on his wife. Shiv Kumar took his child to the hospital and the wife was taken by the neighbours to the hospital. She further deposed that she had not seen any quarrel between Shiv Kumar and his wife.

10. The issue in the present case is whether Kamlesh committed suicide by pouring kerosene oil on herself and on her son or that she poured kerosene oil on herself and her son clung to her and thereafter fire was lit by her husband. Even ignoring the statement of the child Ashu, who gave history that he was burnt when his mother set both herself and him on fire, as he may have been tutored by his father, since he took him to the hospital, even the dying declaration of the deceased casts a doubt as to whether Shiv Kumar lit fire.

11. Ex.PW-28/A notices that the deceased poured kerosene oil on herself and not the son but because her son clung to her and Shiv Kumar lit fire, they both got burnt. This version of Kamlesh, the deceased in the dying declaration is not corroborated by the MLC of Ashu which notices smell of kerosene oil when he was admitted with 65% burns and except the lower part of his body including thighs all body had been burnt. Further CFSL report also notices kerosene residual on the clothes of the deceased child Ashu. This would not have been possible if the child had merely clung with the mother after she had poured kerosene oil on herself but only if she had doused both herself and the child with kerosene oil.

12. Further the prosecution has neither taken the photographs of the crime

scene nor exhibited the same so as to come to a conclusion whether the room was closed from inside or not. As against the same, the defence had led the evidence of an independent witness, a neighbour who stated that when she went she found the room closed from inside and Shiv Kumar was present in the other room and only when the neighbours broke open the door that he put blanket on Ashu and Kamlesh and took Ashu to the hospital.

13. Considering the evidence on record we are of the opinion that the dying declaration Ex.PW-28/A to the extent that it states that Shiv Kumar lit the matchstick and put the deceased on fire is not reliable. The appellant is entitled to the benefit of doubt. Consequently, the judgment of conviction and order on sentence are set aside.

10. Appeal is disposed of.

11. T.C.R. be returned.

(MUKTA GUPTA)
JUDGE

(PRADEEP NANDRAJOG)
JUDGE

SEPTEMBER 11, 2014
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