

\$~R-35 (Part-B)

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

Date of Decision: 27th November, 2015

CRL.A. 221/2000

+ BALBIR Appellant

Through: Mr. M. L. Yadav, Adv.
versus

STATE Respondent

Through: Ms. Aashaa Tiwari, APP.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE R.K.GAUBA

SANJIV KHANNA, J (ORAL)

1. Balbir by the judgment under challenge dated 17.11.1999 stands convicted for murder of his wife Mamta at about 1:30/2:00 AM in the intervening night between 20th and 21st July, 1997 and for perpetrating cruelty and harassment under Section 498-A IPC of the Indian Penal Code, 1860 ("IPC" in short).

2. By the order on sentence dated 26.11.1999, the appellant Balbir has been sentenced to undergo imprisonment for life, fine of Rs.2,000/- and in default to undergo Simple Imprisonment for one year for the offence punishable under Section 302 IPC and Rigorous Imprisonment for three years with fine of Rs.500/- and in default to undergo Simple Imprisonment for 15 days for the offence under Section 498-A IPC. Substantive sentences it is directed would run concurrently and benefit

of Section 428 of Code of Criminal Procedure, 1973 (Cr.P.C, for short) would apply.

3. The factum that the deceased Mamta had married Balbir about two years prior to the date of occurrence is not disputed. It is also not challenged that Mamta had suffered burn injuries in the intervening night between 20th and 21st July, 1997 in her matrimonial home located at house no.R-909, Mangolpuri, Delhi, where the couple was residing on rent alongwith an infant child aged about 6 months. Mamta was brought to Jai Prakash Narain Hospital at about 02:40 AM on 21.07.1997 and examined vide MLC (Ex.PW9/A). Mamta died at about 07:30 PM on 21.07.1997. Post-mortem report marked Ex.PW10/A records that Mamta had dermo-epidermal burn injuries over her face, neck, front of scalp hair, front of chest and abdomen, front of both upper limbs (except over outer aspect of right arm, outer aspect upper third right forearm, outer aspect middle third left forearm), front upper 3/4th of right thigh and front upper 2/3rd of left thigh. Line of redness was seen at places along margins of burnt and unburnt area. Burnt area showed peeling of skin at places exposing radish base. Unpeeled skin showed blackening at places due to deposition of unburnt soot particles in skin. Scalp and facial hair had singed and was burnt in front. Total estimated burnt area was about 30% -35% (thirty- thirty five percent). No other external injuries could be seen on internal examination. All the burnt injuries were opined ante-mortem and of recent duration and were caused by flame. White ointment was seen applied all over the burnt area. No smell of kerosene could be detected from the body and the scalp hair. Cause of death as opined was shock consequent upon around 44 % dermoepidermal burn injuries.

4. The prosecution case against the appellant is primarily predicated on the dying declaration of the deceased Mamta as recorded in the MLC (Ex.PW9/A) by the doctor on duty and deposed by her parents Jai Kishan (PW2) and Saroj (PW3) who were residing nearby and had come to the place of occurrence after they had heard and learnt that their daughter Mamta had suffered burns. The prosecution also relies on the conduct of the appellant who was present at the spot and subsequently absconded. The appellant was arrested, when he surrendered on 06.08.1997. For the purpose of record, we note that the appellant has not disputed his presence in the room where he was residing with Mamta at the time of the occurrence. The appellant has propounded and submitted that Mamta had committed suicide and he was not the perpetrator who had caused the burns.

5. The appellant Balbir was charged under Section 498-A and 302 IPC, and in alternative, under Section 304-B IPC. The impugned judgment acquits Balbir from the charge under Section 304-B IPC on the ground that the requirement of “soon before” was not satisfied as prosecution has not been able to prove that Mamta was treated and subjected to cruelty or harassment “soon before” her un-natural death in connection with the demand of dowry.

6. MLC (Ex.PW9/A) was proved by Dr. Bharat Kumar Aggarwal (PW9), a junior resident working in the Casualty Ward of the Lok Naik Jai Prakash hospital (LNJP Hospital) in the intervening night of 20th and 21st July, 1997. At about 02:40 AM, he had examined Mamta who was brought to the casualty with burns. At that time, Mamta had stated that she was set on fire by her husband. The aforesaid statement of Mamta

was noted and recorded by Dr. Bharat Kumar Aggarwal (PW9) in the MLC (Ex.PW9/A) wherein it was mentioned “alleged history-patient having been set on fire of husband as stated by the patient”. In his cross-examination, Dr. Bharat Kumar Aggarwal (PW9) denied the suggestion that Mamta was not in position to speak or that history was given by relatives. Pertinently, Ex.PW9/A mentions that the patient was oriented.

7. It is apparent that thereafter Mamta’s condition deteriorated as she was unable to make statement as per opinion recorded on the MLC Ex.PW9/A at 06:15 AM on 21.07.1997.

8. Jai Kishan (PW2) has deposed that her deceased daughter Mamta was expecting second child at the time of occurrence and was pregnant. After, Balbir was thrown out by his brothers and sister-in-laws, initially the couple had resided with Jai Kishan (PW2). Thereafter, the appellant Balbir had taken premises No.R-909, Mangolpuri on rent. The appellant Balbir would quarrel and would demand that Mamta should get a television set for their house. PW2 was unable to gift a television, due to his poor financial position and as he had four children to support. Mamta and the appellant Balbir would often quarrel. On 21.07.1997 at about 01:30-02:00 AM, PW2 was sleeping in his house, when he had heard the noise that “Mamta had suffered burns.” PW2 alongwith his wife thereupon had rushed to the house of Mamta. The appellant Balbir was standing outside and her daughter was present inside in a corner of the room. She had suffered burns. Seeing them, Balbir tried to run away but PW2 had caught hold of him. Subsequently, Balbir managed to flee from the spot. PW2 and his wife took Mamta to Jivan Clinic, but she

was refused admission and PW2 was asked to inform the police. At that time, Mamta was conscious and speaking. They informed the police on 100 number and PCR official came to the spot and they were taken to Irwin (LNJP Hospital). Mamta had then professed that Balbir had quarrelled with her and had closed her mouth with his hand, poured kerosene oil on her and had set her on fire. PW2 proclaimed that the PCR official had recorded statement of her daughter Mamta to the same effect. Mamta repeatedly pleaded and had asked PW2, whether she would be alright and PW2 had assured her that everything would be fine. On the basis of statement of PW2, marked Ex.PW2/A, the FIR in question marked Ex.PW5/A was registered. From the place of occurrence, the police had taken into possession, burnt clothes of Mamta, burnt hair and five litre kerosene oil can, which were sealed by the police. PW2 identified one unsealed kerosene oil can marked Ex.P-1.

9. We have gone through the cross-examination of PW2. There is nothing substantive to show and establish that PW2 deposition and assertion on the dying declaration given by Mamta is false, incorrect and made up. In other words, PW2 had asserted and affirmed the dying declaration recorded in MLC (Ex.PW9/A) and deposed to by Dr. Bharat Kumar Aggarwal (PW9) in his ocular evidence.

10. Learned counsel for the appellant has drawn our attention to the statement of PW2 (Ex.PW2/A) recorded by the SDM, wherein it is recorded that PW2 had heard noise that a girl has been burnt and not that Mamta had been burnt. This according to us is an insignificant deviation. Jai Kishan (PW2) had certainly got up in the middle of the

night on hearing noise and had proceeded to Mamta's residence. PW2 had taken Mamta to the clinic and the hospital. He and his wife had informed the police.

11. It is also apparent and established that PW2 and his wife Saroj (PW3) had reached to the residence of Mamta and Balbir. At that time Mamta was conscious and oriented, a fact which is specially recorded and corroborated in the MLC (Ex.PW9/A).

12. Saroj (PW3) has identically deposed about repeated demand for a television set and the fact that in the intervening night she was sleeping, when she had heard noise that Mamta had been burnt. Accordingly, she and her husband had rushed to the house where Mamta use to reside and saw that a huge crowd had collected. Mamta was residing on the first floor. PW3, however, professed that the door of the staircase leading to the room where Mamta was residing was bolted from inside and they reached the said room after climbing from an adjoining house. PW3 has to this extent deviated from the statement of PW2. This difference is not material and relevant. Importantly, PW3 has also deposed that Mamta was sitting in the corner of the room and had suffered burnt injuries. Six months old daughter of deceased Mamta was lying on the cot. Balbir was standing outside the room and was apprehended by PW2. Later on Balbir managed to escape. Mamta was first taken to Jivan Clinic but doctor was not available there and a call was made to the police. Mamta was removed to the JPN Hospital in the PCR vehicle. On the way, Mamta had narrated that the appellant Balbir had poured kerosene oil from a can and lighted a match stick and set her on fire. In the hospital Mamta had screamed in pain and thereafter she (deceased Mamta)

became unconscious. Mamta never regained consciousness and expired at about 07:00 PM. PW3 in his her cross-examination testified that the distance between her house and matrimonial home of Mamta was three *galis* (streets) and she had heard the noise, as they were sleeping on the roof. She was confronted with her statement Ex.PW3/A wherein word “Mamta” was not recorded and that PW3 had not stated that the door of the staircase was closed or bolted from inside. We have ignored and not relied on this portion of PW3’s version. PW3’s statement that her daughter Mamta had become unconscious sometime after she was admitted for treatment gets corroboration from the endorsement on the MLC (Ex.PW9/A) that at 06:15 AM, Mamta was unfit to make a statement. PW3 has further deposed that when they had left for hospital, landlord of the house had locked the door of Mamta’s residence and had handed over the key of the room to her and she in turn had handed over the key to SI Sanwer Mal (PW11) in the evening on 21st July, 1997. PW-3 denied the suggestion that Mamta had committed suicide after pouring kerosene on herself.

13. Khem Chand (PW4), landlord and owner of the house/room where the appellant Balbir and the deceased Mamta used to reside, affirms presence of PW2 and PW3 at the spot. PW4 was sleeping on the first floor, when on hearing noise at about midnight in the intervening night of 20th and 21st July, 1997, he got up. He had seen Mamta sitting outside the room with burns. Parents of Mamta were present. Balbir was seen coming down stairs. Mamta was taken by her parents to a hospital, but she was denied admission. The police was informed and had arrived at the spot. The police had got the place photographed and had taken into possession one can containing kerosene oil (vide memo

Ex.PW4/A). Initially PW4 could not identify kerosene oil can shown to him, stating the can seized was bigger in size. PW4 was cross-examined by public prosecutor and in his cross-examination PW4 affirmed that PW2 had caught hold of Balbir, but the appellant had managed to escape. He clarified that due to lapse of time, he had forgotten the size of the tin can seized from the spot and, therefore, he could not earlier, identify the can, marked Ex.P-1.

14. Learned counsel for appellant is right in his contention that PCR officer i.e. HC Amrik Singh who had driven/taken the deceased Mamta and her parents to LNJP Hospital has not been examined. However, this cannot be a ground to disbelieve, the dying declaration of Mamta recorded by Dr. Bharat Kumar Aggarwal (PW9) vide Ex.PW9/A. The said doctor in his oral deposition has affirmed that Mamta had stated that she was set on fire by her husband.

15. The aforesaid factual narration in the dying declaration is affirmed by Jai Kishan (PW2) and Saroj (PW3). Khem Chand (PW4) affirms the presence of Balbir at the spot and has stated that he (Balbir) had managed to run away, even before police was informed. There is nothing on record to suggest that Balbir had suffered burn injuries. SI Sanwer Mal (PW11) the investigating officer, has deposed that he had after recording the FIR, inspected the spot i.e house no.R-909, Mangolpuri on the first floor and prepared the site plan (Ex.PW11/B). At the spot, he had noted one iron tin can, having some kerosene oil. One burnt lady's shirt, one bra and some hair were noticed and seized vide Ex.PW4/A. In his cross-examination, PW11 clarified that he remained at the spot for about 1 –1½ hour and except for the exhibits, he

did not find any articles in burnt condition in the room. Thus it is not a case where the fire had spread and engulfed articles lying in the room.

16. We are not inclined to accept that the appellant's assertion that Mamta had committed suicide, for facts on record do not support the said plea. The dying declaration recorded by Dr. Bharat Kumar Aggarwal (PW9) in MLC (Ex.PW9/A) is to the contrary. The material and evidence found at the spot does not indicate that any attempt was made to save Mamta or to extinguish the fire. Water had not been pored to douse the fire on Mamta. Only burnt pieces of clothes were found at the spot. No attempt was made by the appellant Balbir to put off the fire by pouring water or by putting bed-sheet or similar cloth on Mamta. Balbir did not suffer any injury. The conduct of the appellant Balbir in running away from the spot rather than informing Mamta's parents and not accompanying Mamta to the clinic and then to the hospital are not entirely insignificant factors. The aforesaid conduct corroborates and affirm that the dying declaration is a truthful and correct version of what had happened. The dying declaration was not given out of revenge or ill will to falsely implicate the appellant Balbir.

17. With regard to offence under Section 498-A IPC, PW2 and PW3 have given their version as to how the deceased was harassed by the appellant Balbir who was demanding a television set from the parents. Conviction under Section 498-A IPC is justified and as per law.

18. We also do not find any reason to interfere with the order of sentence.

19. In view of aforesaid discussion, we do not find any merit in the appeal and the same is dismissed. The Sentence awarded to the appellant was suspended vide order dated 13.09.2005, after he had undergone incarceration for approximately eight years. The appellant is now absconding and an open ended non-bailable warrant has been issued for his arrest and appearance. Said proceedings against the appellant Balbir will continue before the successor trial court. Proceedings under Sections 82 and 83 Cr.P.C shall also be initiated and notice will be issued to the surety. A copy of this judgment will be sent to trial court for compliance.

SANJIV KHANNA
(JUDGE)

R.K. GAUBA
(JUDGE)

NOVEMBER 27, 2015

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