

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

CRA-D No. 864-DB of 2011 (O&M)
Date of decision:- 13.12.2016.

Jaspal Singh @ Mushkal and another Appellants.

Versus

U.T. Chandigarh Respondent.

CORAM:- HON'BLE MR. JUSTICE S.S. SARON
HON'BLE MRS. JUSTICE LISA GILL

Present: Mr. Manoj Bajaj, Advocate for the appellants.

Mr. Rajiv Sharma, APP, U.T. Chandigarh.

S.S.Saron, J.

Mr. Manoj Bajaj, Advocate is appearing for Shiv Kumar @ Shivji (appellant No.2). No one is appearing for Jaspal Singh @ Mushkal (appellant No.1). On request of the Court, Mr. Manoj Bajaj, Advocate has agreed to assist the Court on behalf of Jaspal Singh @ Mushkal (appellant No.1) also. Therefore, he is appointed as *amicus curiae* for appellant No.1.

The appeal has been filed by Jaspal Singh @ Mushkal and Shiv Kumar @ Shivji (appellants) against the judgment of conviction dated 18.07.2011 and order of sentence dated 19.07.2011 passed by the learned Additional Sessions Judge, Chandigarh whereby the appellants have been convicted for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code ('IPC' - for short) and sentenced to undergo rigorous imprisonment for life, besides, pay a fine of Rs.5,000/- each and in default in

payment thereof, undergo rigorous imprisonment for a period of one year each.

Learned counsel for the appellants submits that the case was against three persons, namely, Jaspal Singh @ Mushkal (appellant No.1), Shiv Kumar @ Shivji (appellant No.2) and Saurabh, who was declared a juvenile. It is submitted that Saurabh, who was declared juvenile, has been acquitted by the learned Juvenile Justice Board vide judgment dated 13.10.2014, certified copy of which is attached as Annexure P6 with CRM No.38721 of 2014. It is submitted that the said judgment has an important bearing on the case, therefore, the same be taken in evidence as additional evidence in terms of Section 391 of the Code of Criminal Procedure ('Cr.P.C.' - for short).

Learned counsel for U.T. Chandigarh submits that the said judgment is not liable to be taken in evidence as additional evidence at this stage and the case is liable to be heard on the basis of evidence and material available on record.

After giving our thoughtful consideration to the matter, we are of the view that the said judgment dated 13.10.2014 passed by the learned Juvenile Justice Board has a bearing on the issues involved in the case and the same is considered essential for the just decision of the case, besides, being an order of the Board it is *per se* admissible in evidence. Therefore, the judgment dated 13.10.2014 passed by the learned Juvenile Justice Board is taken on record and exhibited on record as Ex.PX.

The prosecution case is that a wireless message was received in Police Station Sector 31, Chandigarh on 28.09.2009 by ASI Harjinder Singh

(PW11) that in the house of Des Raj of village Faidan, a person had been burnt and he had been taken to Government Medical College and Hospital ('GMCH' - for short), Sector 32, Chandigarh. The police party reached there and found Brij Lal (deceased in the case) was admitted in the hospital. He was medically examined by Dr. Deepak (PW4). In terms of the MLR (Ex.PG), burns to the extent of 95% were detected on the person of Brij Lal. The Investigating Officer submitted an application (Ex.PBB) before the doctor regarding the fitness of the injured to make a statement. Brij Lal (injured), however, was declared unfit to make a statement vide endorsement (Ex.PAA). Later during the day i.e. on 28.09.2009 at about 11.00 p.m., Shri Amit Sharma, Judicial Magistrate 1st Class, Chandigarh was apprised of the incident and was asked to record the statement of Brij Lal. The doctor, however, vide report Ex.PJ/1 declared that he was unfit to make a statement. The statement of Brij Lal could not be recorded and an order (Ex.PK) to the said effect was passed by the learned Magistrate on 28.09.2009.

In the meantime, Munni (complainant) (PW7) met ASI Harjinder Singh (PW11) and her statement (Ex.PU) was recorded. According to Munni (PW7), aged about 37 years, her family members were residing as tenants in the house of Des Raj in village Faidan, U.T. Chandigarh. Her husband Brij Lal used to sell 'chhole poories' on a 'rehri' (hand-cart) in Sector 47-C, Chandigarh. Brij Lal finished his work and returned home on 28.09.2009 at about 4.30 p.m. Then at about 5.00 p.m. he went to take a bath at the tap within the boundary. He came back after taking a bath. He was wearing underwear and had his towel tied. At about 6.00 p.m. Mushkal (appellant No.1), Shivji (appellant No.2) and Saurabh (juvenile) son

of Jaili, who were residing at the back of the house of the complainant, came to her room. They asked Brij Lal as to why was he taking a bath in an undressed state. Brij Lal informed them that he was wearing underwear while taking bath. On hearing this, the above said persons started beating Brij Lal and also tore the clothes of the complainant Munni (PW7). The kerosene that was kept in her house was poured by Shivji (appellant No.2) on her husband. Mushkal (appellant No.1) held the hand of Brij Lal while Saurabh (juvenile) set fire with the matchstick. The clothes of Brij Lal caught fire and he raised a cry after coming out of the room. The complainant and the neighbours put a 'bichhoni' (bed-sheet) on Brij Lal and then her neighbour Lali took Brij Lal in his car and got him admitted in GMCH, Sector 32, Chandigarh. Action was asked to be taken against Shivji (appellant No.2), Mushkal (appellant No.1) and Saurabh (juvenile). They had tried to kill her husband. The statement was recorded, it was heard by the complainant and accepted as correct. On the basis of the above said statement (Ex.PU) of Munni, a formal FIR (Ex.PDD) was registered.

Investigation of the case was conducted by ASI Harjinder Singh (PW11). According to ASI Harjinder Singh (PW11), a boy by the name of Lal Singh met him at the GMCH, Sector 32, Chandigarh. He informed ASI Harjinder Singh (PW11) that her mother (Munni) had gone home to bring money. Then, he along with police officials and police photographer, namely, Constable Harjinder Singh (PW10) reached the spot. At the spot, Munni (PW7) met him in room No.1 village Faidan. She got her statement (Ex.PU) recorded. The statement was read over to her and she put her thumb impression at point 'A', which was attested by ASI Harjinder Singh (PW11)

at point 'B'. FIR (Ex.PDD) for the offence punishable under Section 307 IPC was registered on the said statement (Ex.PU) of Munni. Special report was sent through special messenger to the Illaqa Magistrate as well as senior police officers as also the SHO. At the spot, Constable Som Nath (PW1) was present. FIR (Ex.PDD) was registered by SI Rajbir Singh (PW12) and endorsement of the same was made on the complaint at Ex.PEE. He (PW11) identified the signatures of SI Rajbir Singh (PW12) as he had worked with him and had seen him signing and writing in official capacity.

The spot was inspected at the instance of the complainant. Rough site plan (Ex.PFF) was prepared. Inside the room, there was one 'can' (Ex.P25) having about 200 ml. of kerosene, a matchbox containing matchsticks along with 'bichhoni' (bed-sheet) (Ex.P23) and a 'bori' (jute bag) (Ex.P24), which were taken in possession after making a parcel vide memo Ex.PC. The 'can' containing kerosene and the remaining case property consisting of a matchbox, 'bori' (jute bag) and 'bichhoni' (bed-sheet), which was partially burnt and smelling of kerosene, were separately sealed with a cloth bag with seal of 'HS' at two places. The seal after use was handed over to Constable Som Nath (PW1).

A search for the accused was made along with complainant Munni (PW7) wife of injured Brij Lal. However, they were not found at their residences. Then the police reached at the spot. In the meantime, Constable Paramjit also reached at the spot with a copy of FIR. The complainant had also reached at the spot. The parcels were thereafter taken and deposited with the 'munshi' of the 'malkhana'. A search of the accused persons was again carried out. Then information was received that the accused had come to the

house of the complainant for compromise. ASI Harjinder Singh (PW11) along with the police party reached the house of complainant i.e. the house of Des Raj at village Faidan. Jaspal Singh @ Mushkal (appellant No.1) and Shiv Kuamr @ Shivji (appellant No.2) were found in the house of complainant. They were arrested and a personal search was carried out vide search memo Ex.PA and Ex.PB, which were signed by Constable Som Nath and thumb marked by Munni (PW7).

Thereafter, ASI Harjinder Singh (PW11) submitted an application dated 30.09.2009 (Ex.PGG) for obtaining fitness of the injured to make a statement. The patient, vide endorsement Ex.PHH, on the same day was declared unfit to make a statement. Then another application (Ex.PII) was submitted on 01.10.2009 to the doctor on duty at GMCH, Sector 32, Chandigarh for obtaining the fitness of the injured for making a statement. The doctor, vide endorsement (Ex.PJJ), declared the patient Brij Lal fit for making a statement. An application (Ex.PL) was then submitted on 01.10.2009 before the learned Illaqa Magistrate for recording the statement of Brij Lal, injured in a burn case. The learned Judicial Magistrate 1st Class, Chandigarh passed an order (Ex.PM) on 01.10.2009 at 12.40 p.m. The order was to the effect that ASI Harjinder Singh (PW11) had moved an application for recording the statement of Brij Lal (injured) before him being the Area Magistrate. He was admitted in the burns ward of GMCH, Sector 32, Chandigarh. The learned Magistrate after reaching the hospital vide Ex.PM/1 asked for taking opinion of the doctor regarding the fitness of the injured to make a statement. The doctor vide Ex.PM/2 opined that the injured was fit to make a statement. The learned Illaqa Magistrate introduced himself vide

Ex.PM/3 that he was Pritpal Singh, Judicial Magistrate 1st Class, Chandigarh. He heard the patient Brij Lal and stated that he was not bound to make a statement and in case he volunteered to make a statement, the same could be used against him at any later stage as evidence. He understood the contents of warning and volunteered to make a statement which was free from undue influence and pressure. The learned Magistrate proceeded to record his statement. The statement (Ex.PQ) of the injured Brij Lal was recorded. He put his left toe and right toe impressions as both his hands were burnt. Brij Lal had remained fit while his statement was being recorded and a report of the doctor in this respect is Ex.PR. The learned Judicial Magistrate 1st Class vide Ex.PS recorded that full statement of the patient Brij Lal had been recorded. He had given his statement voluntarily. Only he and Dr. Sachin Garg were present at the time of recording the statement, which was read over and explained to him which he admitted to be correct. Thereafter, the learned Magistrate vide Ex.PS/1 directed the Ahlmad of his Court to seal the statement along with other documents in a sealed cover and keep with other documents as he was the Area Magistrate. ASI Harjinder Singh (PW11) submitted an application Ex.PT for inspection of the statement, which was allowed by the learned Magistrate vide Ex.PT/1. The file was inspected.

ASI Harjinder Singh (PW11) was present at Police Station Sector 31, Chandigarh on 01.10.2009 and at about 09.20 p.m., he received information that Brij Lal injured in the burn case and admitted at GMCH, Sector 32, Chandigarh had expired. He (PW11) along with Constable Som Nath (PW1) reached GMCH, Sector 32, Chandigarh. He obtained death report (Ex.PKK) and the death summary (Ex.PLL) and conducted inquest

proceedings. The offence under Section 302 IPC was added against the accused. The inquest report (Ex.PV) was prepared and statements of the witnesses were recorded. An application (Ex.PNN) was submitted for conducting the post-mortem examination on the dead body of Brij Lal on 02.10.2009. After conducting the post-mortem examination, the report (Ex.PQQ) was obtained by him. The body was handed over vide receipt (Ex.PX). The case property in this case had been deposited with the Central Forensic Science Laboratory (CFSL) through Constable Som Nath (PW1) on 28.10.2009. The spot was got inspected from Constable Yashpal (PW2), who took rough notes from ASI Harjinder Singh (PW11) and he prepared a scaled site plan Ex.PD. During the course of investigation, MLR (Ex.PG) of Brij Lal was also obtained. The third accused in the case, i.e. Saurabh (juvenile), was arrested. Later, during the course of investigation, the photographs were taken in possession and statements of witnesses were recorded. After completion of investigation, the police report/‘challan’ was submitted by Inspector Bhupinder Singh (PW9) whose signatures were identified by ASI Harjinder Singh (PW11) as he had worked with him. The CFSL report (Ex.PRR) was obtained and supplementary ‘challan’ was submitted.

The police report was filed in the Court of learned Judicial Magistrate 1st Class, Chandigarh on 22.12.2009. The learned Judicial Magistrate 1st Class, Chandigarh vide order dated 06.01.2010, in view of the offence punishable under Section 302 IPC having been committed which was exclusively triable by the Court of Session, committed the case to the said Court for 20.01.2010. The accused were remanded to the judicial custody

and directed to be produced before the Court of the learned Sessions Judge, Chandigarh on the date fixed. The case was assigned to the court of learned Additional Sessions Judge, Chandigarh, who framed charges against the accused (appellants) on 20.01.2010. It was alleged that the appellants along with Saurabh (juvenile facing trial before the Juvenile Justice Board) on 28.09.2009 at about 6/6.30 p.m. at the house of Des Raj village Faidan, UT Chandigarh in furtherance of their common intention committed the murder of Brij Lal intentionally or knowingly by burning him by pouring kerosene on him and setting him ablaze and thereby they both committed an offence punishable under Section 302 read with Section 34 IPC, which was within the cognizance of the Court. It was directed that both the appellants be tried by the said Court of learned Additional Sessions Judge, Chandigarh. The contents of the charges were read over and explained to the appellants in their vernacular language. They heard and understood the charge. They pleaded not guilty and claimed trial.

The prosecution, in order to establish its case, examined as many as fourteen witnesses, besides, tendered documents in evidence.

The learned trial Court, after considering the evidence and material on record, convicted and sentenced the appellants for the offence punishable under Section 302 read with Section 34 IPC. The appellants aggrieved against their conviction and sentences have filed the present appeal.

Mr. Manoj Bajaj, Advocate appearing for the appellants submits that there are glaring infirmities in the prosecution case inasmuch as in the dying declaration of Brij Lal, the incident is stated to have occurred at the

water pump where he was taking a bath whereas his wife Munni (complainant) (PW7) in her statement (Ex.PU) has stated that the incident had occurred in their house. The same position has been deposed by ASI Harjinder Singh (PW11). Therefore, according to learned counsel for the appellants, the place of occurrence is not established. It is further submitted that Munni (PW7) has not supported the prosecution case. Lal Singh, another eye-witness who was present at the spot, has not been examined and was given up by the prosecution. A reference has also been made to the judgment (Ex.PX) passed by the learned Juvenile Justice Board which has been taken on record, to contend that Saurabh, who had lit the matchstick has been acquitted as Munni (PW3 in that case) had resiled from her earlier statement, besides, Lal Singh, who appeared as PW4 before the learned Juvenile Justice Board, also did not support the prosecution case. Therefore, according to the learned counsel for the appellants, the appellants are also liable to be given the benefit of doubt and acquitted.

In response, Shri Rajiv Sharma, Advocate appearing for respondent U.T. Administration, assisted by HC Anand Kumar, Police Station Sector 31, Chandigarh, submits that there is no reason whatsoever to discard the dying declaration of Brij Lal, which clearly establishes and proves on record that the appellants had set him on fire. It is submitted that Brij Lal, in his dying declaration, had clearly implicated the appellants in the commission of the crime and minor discrepancies pointed by the learned counsel for the appellants are inconsequential. It is submitted that the authenticity of the dying declaration can also be gauged from the fact that at the time of recording his statement, only the Magistrate and the doctor and

no one else was present. It is also submitted that Brij Lal was specifically mentioned to be fit to give the statement.

We have given our thoughtful consideration to the contentions as have been raised by the learned counsel appearing for the parties and with their assistance have gone through the records of the case.

The important evidence that has been referred to during the course of hearing is the dying declaration (Ex.PQ) of Brij Lal (deceased) that was recorded by Shri Pritpal Singh, learned Judicial Magistrate 1st Class, Chandigarh.

It is stated by Brij Lal that on the day of the festival of Dussehra, he at about 4.00 p.m. returned home and he went for taking a bath at the pump. At that time, the appellants came there and after some time Saurabh also came there. They all started saying as to why was he taking a bath there and they started beating him. Shivji (appellant No.2) said that his work be finished forever. Mushkal (appellant No.1) caught hold of him. Shivji (appellant No.2) poured kerosene on him and Saurabh (juvenile) set him ablaze by lighting the matchstick. He got burnt and became unconscious. Thereafter, he did not know what had happened.

Dr. Sachin Garg (PW14) vide endorsement (Ex.PR) had certified that the patient remained fit during the recording of his statement. The left and right toe impressions of Brij Lal were taken on the dying declaration as both his hands were burnt. As already noticed, the learned Magistrate vide Ex.PM/3 had recorded that Brij Lal had volunteered to make a statement, which was free from undue influence and pressure. Then, the learned Magistrate proceeded to record the statement. After recording the

statement, it was certified by the learned Magistrate that he had recorded full statement of patient Brij Lal, who had voluntarily given his statement. Besides, at the time of recording the statement only he and Dr. Sachin Garg (PW14) were present. The statement, it is mentioned, was read over and explained to Brij Lal, which he admitted to be correct and put his toe impressions as both his hands were burnt. Nothing had been added or deleted in the statement and it contained full account of the statement of the patient Brij Lal.

In view of the said statement, according to Shri Sharma, learned counsel appearing for the U.T. Administration, there is no reason to doubt the veracity of the prosecution case and the appellants are liable to be convicted on the basis of the dying declaration to which there is no doubt.

It is, however, to be noticed that Saurabh (juvenile), who had lit the matchstick, has been acquitted by the learned Juvenile Justice Board vide judgment dated 13.10.2014 (Ex.PX). ASI Harjinder Singh (PW11) was examined as PW2 in the said case; besides, Munni Devi (PW7 herein) was examined as PW3. She stated before the learned Juvenile Justice Board that she had gone to see Dussehra celebrations with her children and when she came back lot of people had gathered outside her house. She stated that she had never seen Saurabh (juvenile). Lal Singh, who had been given up in the present case, was examined as PW4 before the learned Juvenile Justice Board. He stated that some boys were fighting with his father (Brij Lal) but he failed to identify the juvenile in the Court. He was declared hostile. The statement of the juvenile was recorded in terms of Section 313 Cr.P.C. wherein he pleaded innocence.

The learned Juvenile Justice Board observed that Munni Devi and Lal Singh, who were eye witnesses to the incident that had occurred, had failed to support the prosecution case and they also failed to recognize the juvenile in the court. It was further observed that though the dying declaration of Brij Lal was on the file wherein he had attributed a clear role to the juvenile Saurabh but his own wife (Munni) and son (Lal Singh) had failed to support his version. Accordingly, Saurabh (juvenile) was acquitted.

The learned counsel for U.T. Chandigarh has not been able to show whether the order dated 13.10.2014 (Ex.PX) passed by the learned Juvenile Justice Board was assailed by way of an appeal or revision.

It may also be noticed that Munni (complainant) appeared as PW7 in the present case. She stated that it was in the month of September 2009. At that time she was residing with her family in the house of Des Raj in village Faidan, Chandigarh. Her husband had gone for his work as he used to put a 'rehri' of 'chhole-poori' in Sector 47, Chandigarh. She stated that she did not know when her husband came as she had already gone for Dussehra festival along with her son Lal Singh and Dhir Singh. She left the house at 4.00 p.m. and came back at 7.00 p.m. When she reached home, she saw that the public and police had gathered at the spot. Her husband had already been shifted to hospital as he was in a burnt condition. She was under a shock and somebody obtained her thumb impressions. She did not know what was written. According to her, no such incident of her husband being burnt had taken place in her presence. She was declared hostile and was cross-examined by the learned Public Prosecutor. The statement (Ex.PU) was read over to her; however, she denied having made such a statement before

the police. She voluntarily stated that she had not made any such statement before the police as she had not witnessed the occurrence. She further stated that it was wrong to say that on 28.09.2009 at 4.30 p.m., she was present at home when her husband Des Raj (sic. - Brij Lal) came after finishing his work and at 5.00 p.m. he had gone to take a bath at the tap which was inside the boundary of the house belonging to Des Raj and he was wearing underwear and towel. She denied that when her husband came back after taking a bath then at 6.00 p.m. the appellants along with Saurabh (juvenile) also came there and they asked her husband as to why was he taking bath at the tap in an undressed state. She in fact denied the entire prosecution case that was put to her in her cross-examination. A lengthy cross-examination was conducted but nothing could be brought out from her which would help the prosecution case from which the guilt of the appellants can be stated to be established.

Munni (PW7) was cross-examined by learned counsel for the appellants as well. She stated that she was not literate and did not know Hindi language. No paper had been read out to her before her thumb impression was obtained. She stated that she reached from Ram Dussehra to her house at about 7.00 p.m. when the police and other villagers were present. She learnt that her husband had got burn injuries and had been taken to the hospital. She left for the hospital at Sector 32, Chandigarh along with both her sons. Her husband was not able to speak. The police persons and the villagers were meeting her husband till he died and they had been trying to speak with him during this period to make the statement. He was unable to speak, however, he could hear. They were trying to provoke her husband to

say something against someone. Lal Singh son of the deceased was given up by the Public Prosecutor as having been won over.

It may also be noticed that according to Brij Lal (deceased), the incident had taken place at water pump where he was having a bath, while according to Munni (PW7) in her initial statement (Ex.PU), the incident had taken place in their house. This was also stated by ASI Harjinder Singh (PW11) that the incident had taken place in the house of Des Raj where Brij Lal was a tenant. In fact, the place where the incident had taken place has not been fixed and proved on record by the prosecution with certainty and this casts a serious doubt in the prosecution case.

It may also be noticed that there are discrepancies in the MLR (Ex.PG), which shows that the patient (deceased) had been brought to the hospital at 10.00 p.m. on 28.09.2009 by one Sudhir Kumar, who it is stated was the nephew of Brij Lal. The said Sudhir Kumar has not been examined by the prosecution. The said MLR further shows that the dates of arrival of the patient in hospital, of the police docket and below the signatures of the doctor who examined the patient, have been changed to '28.09.2009'. The dates were put with a rubber stamp and then have been changed by hand to '28.09.2009'. Besides, the patient is reported to have been brought at 10.00 p.m. while date and time of examination was mentioned as 28.09.2009 at 9.45 p.m.

Learned counsel for the appellants has submitted that the case appears to be one of self-immolation as according to Brij Lal as per his dying declaration, the incident had occurred at 4.00 p.m. whereas according to his wife Munni (PW7) as per her statement (Ex.PU), the incident had occurred at

6.00 p.m., while the patient (Brij Lal) was brought to the GMCH, Sector 32, Chandigarh at 10.00 p.m. according to the MLR (Ex.PG). The distance from the house of the deceased to GMCH, Sector 32 is about two kilometres as per the FIR. As per MLR (Ex.PG), the brief history of the case has been mentioned to be an alleged history of burning with unknown mode at unknown time at home. These aspects indeed cast a serious doubt on the prosecution case and the benefit of the same is to go to the appellants.

Keeping in view the aforesaid material facts, circumstances and evidence on record, it would be just and expedient to set aside the impugned judgment and order dated 18.07.2011 and 19.07.2011 convicting and sentencing the appellants.

Accordingly, the appeal is allowed, the judgment of conviction dated 18.07.2011 and order of sentence dated 19.07.2011 passed by the learned Additional Sessions Judge, Chandigarh convicting and sentencing the appellants for the offence punishable under Section 302 read with Section 34 IPC are set aside and the appellants are acquitted of the offence for which they were charged.

(S.S. Saron)
Judge

(Lisa Gill)
Judge

December 13, 2016.
'om'/A.Kaundal