

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

% *Date of Decision : March 16, 2016*

+ **CRL.A.459/2000**

GIRI RAJ KISHORE & ORS.Appellants
Represented by: Mr.Harsh Prabhakar, Advocate
(Amicus Curiae) with Mr.Anirudh
Tanwar, Advocate

versus

STATERespondent
Represented by: Mr.Varun Goswami, APP

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE MUKTA GUPTA

PRADEEP NANDRAJOG, J. (Oral)

1. The appellants before us seek to assail the judgment dated February 24, 2000 convicting them for the offence punishable under Section 302/34 IPC and the order on sentence dated March 03, 2000 passed consequently, whereby imprisonment for life and fine of ₹2,000/- each has been imposed upon them by the learned Additional Sessions Judge - Shahdara, Delhi.
2. At the outset, we venture to pithily capture the contours of the incident and the steps taken during investigation that are germane to the adjudication of the present appeal whilst eschewing unnecessary particulars to avoid prolixity.
3. On the fateful day – October 20, 1996, in the afternoon around 01:30/02:00 PM the deceased Lallu Kashyap consumed liquor in the

company of the appellants : Giri Raj Kishore and Girdhari Lal @ Pinki at the house of his brother-in-law - Rakesh located at 117, B Block, Gali No. 3, Meet Nagar, Delhi. The appellants were related to Rakesh (not examined during trial) being his nephew and were also residing with him at the said address. According to the prosecution, Appellant No.2 - Girdhari Lal @ Pinki asked Lallu Kashyap to return ₹1,000/- which was advanced to him by Rakesh when he needed money for medical treatment. Lallu Kashyap told that he had not recovered fully and would return the money once he recovered fully and started earning. The appellants are stated to have lost temper and Appellant No.1 remarked that Lallu Kashyap should be taught a lesson. Consequently, Appellant No.2 got a can of kerosene oil and poured kerosene on Lallu Kashyap. Appellant No.1 lit fire with the help of a matchstick and set Lallu Kashyap on fire. Lallu Kashyap came out in the gali outside the house and rolled on the ground in order to douse the flames. After having successfully extinguished the flames, Lallu Kashyap went to the house of his sister Shiv Rani PW-1 at Bhajanpura and made the first dying declaration to her of how he was set on fire.

4. Thereafter, Lallu Kashyap was shifted to G.T.B. Hospital by ASI Bhagwan Dass - PCR (not examined during course of investigation and trial). At around 04:05/04:15 PM, Dr.R.K.Nagar PW-8, examined Lallu Kashyap and prepared the MLC, Ex.PW-8/A, wherein it was noted that Lallu Kashyap was unfit for statement and burns were suffered over the entire body except some portions of thighs and legs. Further, presence of alcohol was also suspected.

5. Thereafter, at 04.35 PM the Duty Constable deputed at G.T.B. Hospital telephonically intimated P.S.Nand Nagari at 04:35 PM that one Lallu Kashyap had been admitted in G.T.B. Hospital by ASI Bhagwan

Dass who had brought him from House No.185/34, Durga Gali No.2, Kachhi Colony. It was further stated that Lallu Kashyap had disclosed that after having suffered burn injuries at Meet Nagar he reached the house of his sister at Bhajanpura. The said information was duly recorded at P.S.Nand Nagari vide DD No.29B Ex.PW-9/A. Thereafter, the investigation was entrusted to SI Avdesh Kumar PW-9 who along with Ct.Surender (not examined during trial) reached G.T.B. Hospital. The patient had already been declared not fit for statement. No eye-witness could be found at the hospital. In view of such circumstances, DD No.29B was kept pending.

6. As deposed to by Shiv Rani PW-1 before the Court, Lallu Kashyap informed her in hospital at around 09:00 PM that Appellant No.1 had set him on fire.

7. Thereafter, at 11:45 PM Lallu Kashyap was declared fit for statement by a doctor (not examined during trial). In furtherance thereof, SI Avdesh Kumar attempted to make enquiries from Lallu Kashyap but found that he was not in a state to give a clear statement since he was unable to state the place of occurrence and how he had sustained the injuries.

8. On October 22, 1996, at around 04:00 PM, SI Avdesh Kumar along with Ct.Manoj Kumar PW-6 arrived at G.T.B. Hospital. SI Avdesh Kumar recorded the statement/*fardbayan* Ex.PW-9/B of Lallu Kashyap. He obtained the left thumb impression of the injured on the statement/*fardbayan* recorded by him. Further, SI Avdesh Kumar made the endorsement/*tehrir* Ex.PW-9/C at 05:30 PM beneath the statement of Lallu Kashyap and recommended registration of case under Section 307/34 I.P.C. Accordingly, the *rukka* was sent to P.S.Nand Nagari through Ct.Manoj Kumar.

9. SI Avdesh Kumar recorded the statements of Shiv Rani PW-1 - sister of Lallu Kashyap and Amar Singh PW-5 - younger brother of Lallu Kashyap. HC Rishi Pal PW-4 - Duty Officer at P.S.Nand Nagari, received the *rukka* from Ct.Manoj Kumar at 05:45 PM and consequently registered FIR No.653/96 Ex.PW-4/A dated October 22, 1996 under Section 307/34 I.P.C. Around 06:30 PM, Ct.Manoj Kumar returned to the hospital and handed over the copy of the FIR and the original *rukka* to SI Avdesh Kumar.

10. Thereafter, SI Avdesh Kumar along with Ct.Manoj Kumar proceeded in search of the house of the brother-in-law of Lallu Kashyap; where Lallu Kashyap had received burn injuries. SI Avdesh Kumar and Ct.Manoj Kumar successfully traced the place in question, namely, House No.117, B Block, Gali No.3, Meet Nagar. Thereupon, SI Avdesh Kumar saw a boy in the said house and upon enquiry, it was revealed that the said boy was Appellant No.1 - Giri Raj Kishore. Thereafter Appellant No.1 was brought to G.T.B. Hospital and Lallu Kashyap identified him as one of the accused who set him ablaze. Statement of Lallu Kashyap to this effect was recorded in terms of Section 161 Cr.P.C. The Appellant No.1 was formally arrested by SI Avdesh Kumar and his personal search memo Ex.PW-6/E was prepared. Disclosure Statement Ex.PW-6/A of the Appellant No.1 was recorded by SI Avdesh Kumar.

11. SI Avdesh Kumar along with Ct.Manoj Kumar and Appellant No.1 thereafter reached the scene of crime. Appellant No.1 allegedly pointed out the place of occurrence in the said house and the said fact was recorded by SI Avdesh Kumar vide pointing out memo Ex.PW-6/B. Thereafter, Appellant No.1 got recovered a yellow coloured plastic can Ex.P-1 containing kerosene oil and the same was seized by SI Avdesh Kumar vide seizure memo Ex.PW-6/C. Further, on inspection of the spot

of occurrence, SI Avdesh Kumar found a nicker Ex.P-2 hanging on a khoonti/ hook. The said nicker was burnt from the right side. The nicker was seized by SI Avdesh Kumar vide seizure memo Ex.PW-6/D. Thereafter, SI Avdesh Kumar prepared a visual site plan Ex.PW-9/D without scale at the instance of Asha PW-2; a co-tenant in the said premises who had allegedly witnessed the incident.

12. Suffice would it be to note that the said witness did not support the case of the prosecution during trial and was declared hostile.

13. Statements of Asha and Ct.Manoj Kumar were recorded by SI Avdesh Kumar in terms of Section 161 of Cr.P.C. Thereafter, SI Avdesh Kumar deposited the can and nicker recovered at the spot in the malkhana of P.S.Nand Nagari.

14. On October 23, 1996 at 04:30 PM, SI Avdesh Kumar approached Shri Sanjiv Khirwar PW-10 - Sub Divisional Magistrate - Seelampur; who also held the charge of Seemapuri, to record the statement of the injured. Therefore Shri Sanjiv Khirwar reached G.T.B. Hospital at 05:40 PM and recorded the statement Ex.PW-10/A of Lallu Kashyap as per which the appellants had set him ablaze.

15. On October 26, 1996 information was received at P.S.Nand Nagari from G.T.B. Hospital that Lallu Kashyap (hereinafter referred to as 'deceased') had succumbed to his injuries and had expired. D.D.No.7A Ex.PW-9/F was recorded to this effect at P.S. Nand Nagari. Consequently, SI Avdesh Kumar directed that the case be converted from 307/ 34 IPC to 302/ 34 IPC.

16. Seizing the dead body SI Avdesh Kumar drew up the inquest proceedings Ex.PW-9/G and dispatched the body to the mortuary of GTB Hospital for autopsy. Dr.Anil Kohli PW-3 conducted the Post-Mortem Report and prepared the report Ex.PW-3/A recording therein that the

deceased had suffered 80% superficial to deep burns on the whole body except both the legs, outer side of the right thigh and right side of the waist. Time since death was opined to be approximately one day. The cause of death was opined to be septicemic shock due to antemortem superficial to deep burns produced by flames covering 80% of the body surface. Sample of scalp hair was also preserved for analysing the presence of kerosene and the same was handed over along with the sample seal to Ct.Kishan Pal (not examined during trial).

17. On October 29, 1996 an information was received at P.S.Nand Nagari that Appellant No.2 - Girdhari Lal @ Pinki had surrendered in the Court of Shri Sanjiv Jain, Learned Metropolitan Magistrate. Consequent thereto, SI Avdesh Kumar visited the Court and effected formal arrest.

18. CFSL Report (P/X) confirmed the presence of kerosene on the scalp hair of the deceased.

19. Armed with the said material, the investigating agency proceeded to submit a Final Report in the Court and the accused who are the appellants before us were sent for trial.

20. It may be highlighted that we have crystallised the narration of facts as reproduced in the preceding paragraphs upon the careful analysis of the testimony of prosecution witnesses and copies of some documents (formally proved during course of trial) that were appended along with the Memorandum of Appeal. Regrettably the Lower Court record of the present case could not be traced by the concerned record keeping branch. Vide Order dated May 23, 2014, the predecessor bench of this Court directed the Registrar (Vigilance) to conduct appropriate fact finding inquiry to affix responsibility on delinquent officials who were found negligent in discharge of their duties. In compliance thereof, a report of

the inquiry conducted by Joint Registrar (Judicial) (Rules) has been submitted by the Registrar General of this Court.

21. The finding of guilt was returned by the learned Trial Court on the strength of incriminatory circumstances that we reproduce hitherto fore.

i. Two dying declarations recorded in succession by SI Avdesh Kumar and Shri Sanjiv Khirwar - S.D.M. and both the statements indicted the appellants.

ii. Testimony of Shiv Rani to the effect that the deceased had informed her in hospital that Appellant No.1 had set him on fire.

iii. The Appellant No.1 got recovered a can Ex.P-1 containing kerosene oil from the spot of occurrence. Upon search a burnt nicker Ex.P-2 was also found at the spot of occurrence.

iv. Corroboration to the version comprised in the dying declarations, in as much as, the MLC prepared upon admission of injured in G.T.B. Hospital revealed intake of alcohol.

22. We have endowed careful consideration to the rival submissions advanced at the bar by the learned *Amicus* - Shri Harsh Prabhakar and the learned APP - Shri Varun Goswami. The 'Synopsis of Submissions' submitted by the learned *Amicus* during course of hearing has been taken on record.

23. *Apropos* Appellant No.2, we find that it is the admitted case of the prosecution that the deceased whilst informing his sister Shiv Rani about the incident, did not spell his involvement and singularly implicated Appellant No.1. The said statement purported to have been made by the deceased was earliest in point of time i.e. on the day of incident itself and the statements recorded by SI Avdesh Kumar and Sanjiv Khirwar were much later. The possibility of ensnaring Appellant No.2 along with his brother Appellant No.1 is after-thought stemming from feeling of

vengeance cannot be ruled out. It would thus not be safe to act upon the subsequent statements of the injured/ deceased dated October 22, 1996 and October 23, 1996 to salvage a finding of guilt *qua* Appellant No.2.

24. Incidentally, we may also observe that on the day of incident Appellant No.2 would in all probability be aged less than eighteen years. We say so because perusal of the available record reveals that on January 21, 2000 when the statement of the accused was being recorded by the learned Trial Court in terms of Section 313 Cr.P.C., Appellant No.2 stated his age to be nineteen years. The said fact would suggest that on the day of incident, he would be aged between sixteen to seventeen years. The Order on Sentence dated March 03, 2000 passed by the learned Trial Court also notices the fact that the accused was found above sixteen years of age by the 'Children Court' during inquiry. In view of the unequivocal mandate of Section 7-A of the Juvenile Justice (Care and Protection of Children) Act, 2000 read with Explanation appended to Section 20 of the said Act, the Appellant No.2 is entitled to invoke the plea of juvenility as well. However, we need not delve into the said aspect of the matter any further as we have already observed in the preceding paragraph that the said Appellant is entitled to benefit of doubt and deserves to be acquitted as his role does not emerge in the statement made by the injured/ deceased to his sister Shiv Rani on the day of incident itself, thus substantially detracting the credibility of the subsequent statements of the injured/ deceased to the extent they indict him.

25. However, the case of the prosecution *qua* Appellant No.1 is conclusively established without serious blemish inasmuch as his involvement has been categorically spelt by the injured/ deceased consistently since the earliest opportunity. It assumes significance that the testimony of Shiv Rani to the effect that her brother told her that Giri Raj

had set him ablaze was not specifically controverted by the learned Defence Counsel in cross-examination. In the decision reported as (1998) 3 SCC 561 State of U.P. v. Nahar Singh, while manifesting the importance of challenging the testimony of witnesses during course of cross-examination, the Supreme Court cited with approval the luminous observations of Lord Herschell, L.C. in (1893) 6 R 67 Browne v. Dunn which we reproduce below:

“I cannot help saying, that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which, it is suggested, indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness, you are bound, whilst he is in the box, to give an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but it is essential to fair play and fair dealing with witnesses.”

26. The fact that the subsequent statements of the deceased dated October 22, 1996 and October 23, 1996 have been held by us to suffer from the taint of improvement/exaggeration *qua* Appellant No.2 would not *ipso facto* denude them of the credibility *apropos* Appellant No.1 in view of the assurance lent by the circumstance that his involvement was disclosed by the injured/deceased to his sister Shiv Rani on the day of the

incident itself. Since time immemorial it is a settled proposition of law that the doctrine '*falsus in uno falsus in omnibus*' is inapplicable in the Indian context. The fact that the evidence adduced by a witness is found false or unworthy of credit on a particular aspect does not automatically lead to rejection of his evidence in entirety. In such circumstances, the Court would analyse the evidence with utmost care and circumspection and may, as a matter of prudence, seek corroboration.

27. Before drawing curtains, we are required to examine a crucial aspect of the matter that must necessarily be answered in cases of such kind *viz.* whether the offence under Section 302 IPC would be constituted or the case would fall within the realm of Section 304 IPC.

28. Admittedly, according to the statement of the injured/ deceased before SI Avdesh Kumar, the unfortunate incident occurred at the spur of moment when parties were in an inebriated state and the appellant lost temper when the deceased expressed inability to immediately repay the loan of ₹1,000/- taken from Rakesh. Ostensibly the appellant did not harbour any intention to kill the deceased. If that were the case he would have not allowed the deceased to escape from the house. The appellant did not contrive to use weapons to injure the deceased and 'kerosene' being a common household article fell in hands of the appellant during the fit of rage. It would be pertinent to highlight that the deceased successfully extinguished fire and was able to reach the house of his sister at Bhajanpura from where the police was informed and he was admitted in hospital. The deceased finally succumbed to injuries after a period of six days and the cause of death was opined to be septicemic shock.

29. At this juncture, it would be apposite to consider the decision of the Supreme Court reported as (2015) 2 SCC 638 *K.Ravi Kumar v. State of Karnataka*, that has been pressed into service by the learned *Amicus* to

buttress his submissions on this aspect of the matter. The facts comprised in the report of the judgment reveal that the accused asked his wife to accompany him to see the condition of his ailing father but the wife refused by saying that they would go some other day. This resulted into a heated argument between the couple and the same led to the stabbing of the wife. The accused also poured kerosene oil on his wife and set her on fire. After taking a stock of various decisions rendered on this aspect, the Court observed that there was no premeditation in the commission of the offence and the incident occurred due to sudden quarrel which ensued between the accused and his wife. Resultantly, the Supreme Court altered the conviction of the accused from Section 302 IPC to Section 304 (II) IPC.

30. In view of the discussion comprised in the preceding paragraphs, we dispose of the present appeal *qua* Appellant No.1 by converting his conviction from one under Section 302/34 IPC to Section 304 (II) IPC. Record reveals that he has undergone incarceration for a period of more than five years. He was aged around twenty years at the time of incident and the Nominal Roll reveals no criminal antecedents other than the present case. Approximately two decades have elapsed since the incident. The circumstance of long lapse of time between the commission of offence and date of decision of the appeal may be taken into consideration as a factor to levy an appropriate sentence. We are therefore inclined to sentence the Appellant No.1 to the period already undergone by him in custody. As highlighted by us earlier, the appeal *qua* Appellant No.2 - Girdhari Lal @ Pinki is allowed and he is hereby acquitted of all charges. The Appellants are on bail. Bail Bonds and Surety Bonds are discharged.

31. Copy of this decision be sent to the Superintendent - Central Jail, Tihar for updating the jail record.

(PRADEEP NANDRAJOG)
JUDGE

(MUKTA GUPTA)
JUDGE

MARCH 16, 2016
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