

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

% Reserved on: 28th October, 2017
Decided on: 25th November, 2017

+ **CRL.A. 448/2012**

JAGAN NATH

..... Appellant

Represented by: Mr. Pramod Kumar Dubey
with Ms. Namita Wali,
Advocates.

versus

STATE

..... Respondent

Represented by: Mr. Amit Gupta, APP for the
State.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

HON'BLE MR. JUSTICE NAVIN CHAWLA

1. In the present appeal the appellant Jagan Nath challenges his conviction for offence punishable under Section 302 IPC vide the judgment dated 28th May, 2011 and the order on sentence dated 1st June, 2011 directing him to undergo imprisonment for life and to pay a fine of ₹5,000 in default whereof to undergo simple imprisonment for three months.

2. Investigation commenced on receipt of DD No. 9A at 4:22 PM on 27th May, 2010 at P.S. Sonia Vihar exhibited vide Ex.PW-15/A informing that in Gali No. 11, Sonia Vihar H. No. B-814 a man has burnt his daughter, who has been injured and the fire has been doused. ASI Jafruddin (PW-13) Incharge PCR van reached at the spot, found a girl named Bindu in a burnt condition and he took her to GTB hospital and got her admitted at about 5:00 PM.

3. MLC of Bindu was prepared by Dr. Arun Kumar (PW-4) vide Ex-PW-4/A which noted that the patient was conscious and oriented. There

were about 70% burns on face, neck, upper part of chest, lower part of abdomen and bilateral upper and lower limbs.

4. Investigating Officer SI Teg Bahadur reached the hospital and recorded statement of Ms. Bindu vide Ex. PW-15/C which was attested by Dr. Arun Kumar vide Ex. PW-4/B.

5. Ms. Bindu aged 18 years, stated that she was the daughter of Jagan Nath. She was residing in the H.No. B/814, Gali No. 11 Sonia Vihar with her father, brothers and sister. Around 2 - 3 years ago, her mother had died. She was the eldest in the house and her brothers and sister were younger to her. On 27th May, 2010 around 4:00 PM, she was present at home with her brothers and sister when her father came to the first floor of the house. After they had the meal, her father sent all the children outside and asked her why she wanted to disclose to police about death of her mother. He further stated that he would hang her. Thereafter he closed the room, pressed her neck, poured kerosene oil over her and burnt her. This incident was also witnessed by her younger sister Indu. Her father Jagan Nath tried to kill her by pouring oil when she started crying, people gathered and somebody called at 100 number.

6. Crime team also reached at the spot and collected the plastic can of kerosene oil and match sticks vide the seizure memo Ex. PW-17/B. Further, the Investigating Officer from the spot also collected the mattress which was in a burnt condition and sent the same to the FSL besides other exhibits seized by the Doctor. Statement of Indu, the younger sister of Bindu, was also recorded who supported the version of Bindu. Bindu, however, passed away on 1st June, 2010 at 5:30 AM whereafter Section 302 IPC was added in the investigation.

7. Jagan Nath was arrested on the same day and thereafter charge-sheet was filed against him, charge for offence punishable under Section 302 IPC was framed. Before Court, prosecution examined 18 witnesses whereafter statement of Jagan Nath under Section 313 Cr.P.C. was recorded, who stated that it was a false case and he has falsely been implicated. Jagan Nath did not lead any defence evidence and no specific plea was taken that he was not present at the time of incident except in answer to a question about his arrest wherein he stated that he was arrested after he came back from the market.

8. Learned counsel for Jagan Nath submits that admittedly no dying declaration was recorded by PCR Officer nor in the MLC. The MLC was prepared around 5.00 PM wherein it was noted that Bindu was fit for statement. However, the statement was purportedly recorded after 7:00 PM and there is no endorsement on record to show that at 7:00 PM Bindu was fit for making statement. Thus, in the absence of a certificate of fitness for making the statement, the dying declaration cannot be relied upon. Despite the fact that the deceased died after four days, no effort was made to get her dying declaration recorded by the SDM. FIR was registered after doing the entire recovery. Though 50 to 60 people gathered at the spot, none stated that Jagan Nath was present at the spot or he committed the offence. Statement of Indu (PW-2), the other daughter of Jagan Nath and sister of deceased, is not reliable. Challenging the veracity of the dying declaration, it is also stated that despite the fact that Bindu had 70% burns it is not known how her thumb impression was taken on the dying declaration. Hence the prosecution has not been able to prove that the offence has been committed by the appellant, hence his conviction for offence punishable under Section 302 IPC and consequent order on sentence are liable to be set aside.

9. Learned APP for the State on the other hand submits that at the time of preparation of MLC itself Bindu was fit for statement and Ex. PW-15/C was recorded in the presence of Dr. Arun Kumar, who attested the statement. The first PCR call received by the police itself informs that Bindu had been burnt by her father. The dying declaration being corroborated in the material particulars, conviction can be safely based on the same. Further, non-recording of the statement before the SDM does not nullify the dying declaration of the deceased recorded immediately after the incident by the Investigating Officer in the presence of the doctor and the conviction of the appellant can be safely based on the dying declaration of Bindu who has clearly stated about the role of the appellant. Appellant Jagan Nath has led no evidence to show that he was not present at the spot at the time of incident. Further, even if Indu PW-2 was examined and re-examined by the APP, her part testimony which lends corroboration to the dying declaration can be looked into.

10. Statement of Bindu was recorded by the Investigating Officer in the presence of Dr. Arun Kumar who attested and deposed that the statement was recorded in his presence vide Ex. PW-4/B. In cross-examination, Dr. Arun Kumar was suggested that he neither conducted examination of the patient on 27th May, 2010 nor has the statement recorded in his presence which he denied. He also denied that the patient was not conscious or oriented at the time of recording of the statement or that he was deposing falsely thus even in the absence of a written certificate of fitness to make the statement at 7.00 PM, the fact that the deceased was fit to make the statement has been proved by the deposition of Dr. Arun Kumar and his attestation vide Ex. PW- 4/B. Merely because no further statement of the

deceased was recorded by the SDM though she lived another four days is not a ground to reject this valid dying declaration.

11. Though conviction of Jagan Nath under Section 302 IPC can be solely based on this dying declaration of Bindu, however, it would be appropriate to note the testimony of Indu who though vacillated in her examination and cross-examination but, in part-testimony supported the dying declaration which fact is further supported by the FSL report. PW-2 Indu deposed as under:-

“My father accused present in the court today, was asking my deceased sister Bindu, to eat meat. She was refusing to eat meat. I have not seen anything and my deceased sister burnt due to anger. I have nothing else to say.

At this stage Ld. Addl. PP seeks permission to cross-examine the witness on the ground that he had not disclosing complete facts heard. Allowed. By Sh. Mukul Kumar Addl.PP for the State.

The mother's name was Lach Kala. She had expired about four years back due to heart attack. H.No. B-814, Gali No. 11, is in the name of my father. Apart from myself and deceased sister Bindu, I have four brothers. All the four brother and younger to me.

It is correct that on 27th May, 2010 I along with my sister and brother were present in the court at about 4.00 PM. It is also correct that accused present in the court today, who is my father was present on the first floor, it is also correct that after having meals, my father sent all the children down stairs. It is correct that my father asked my deceased sister Bindu as to why she wants to diclsoe to police about the fact of death of her mother. He also said to my deceased sister that he would hang her. It is correct that first my father closed the door and pressed the neck of my deceased sister Bindu and then poured kerosene oil over her and burned her. Police had also reached the spot and made inquiries from me

and also recorded my statement. By Sh. K.N. Sharma Ld. Counsel from legal Aid.

It was 4.00 PM when we had food. I had not seen the accused pressing the neck of Bindu. I had also not seen accused pouring kerosene oil on Bindu. I came to know after about 3 days about death of my sister Bindu. My statement was recorded by the police but I do not know where and when. I do not know what was recorded in my statement.

At this stage Ld.Addl. PP seeks permission to re-examine the witness. Heard. Allowed.

Re-examination:-

I have heard my father saying to Bindu that he will press the neck of Bindu and pour kerosene oil over her and burn her but I have not seen him doing to. It is wrong to suggest that I had seen my father pressing the neck of Bindu and burn her with kerosene oil. It is wrong to suggest that my father had murdered by sister Bindu by pressing her neck and burning her. It is wrong to suggest that I had witnessed the aforesaid fact with own eyes. It is wrong to suggest that since accused is my father, I am deposing falsely to save him."

12. It is well settled that part testimony of a hostile witness which is corroborated in material particulars can be relied upon to base a conviction as reiterated in the decision reported as 2013 (11) SCC 719 Attar Singh vs. State of Maharashtra as under:

14. We have meticulously considered the arguments advanced on this vital aspect of the matter on which the conviction and sentence imposed on the appellant is based. This compels us to consider as to whether the conviction and sentence recorded on the basis of the testimony of the witness who has been declared hostile could be relied upon for recording conviction of the appellant-accused. But it was difficult to overlook the relevance and value of the evidence of even a hostile witness while considering as to what extent their evidence could be allowed to be relied upon and used by the prosecution. It could not be ignored that when a witness is declared hostile and

when his testimony is not shaken on material points in the cross-examination, there is no ground to reject his testimony in toto as it is well settled by a catena of decisions that the court is not precluded from taking into account the statement of a hostile witness altogether and it is not necessary to discard the same in toto and can be relied upon partly. If some portion of the statement of the hostile witness inspires confidence, it can be relied upon. He cannot be thrown out as wholly unreliable. This was the view expressed by this Court in Syad Akbar v. State of Karnataka [(1980) 1 SCC 30 : 1980 SCC (Cri) 59] whereby the learned Judges of the Supreme Court reversed the judgment of the Karnataka High Court which had discarded the evidence of a hostile witness in its entirety.

15. Similarly, other High Courts in Gulshan Kumar v. State [1993 Cri LJ 1525 (Del)] as also Kunwar v. State of U.P. [1993 Cri LJ 3421 (All)] as also Haneefa v. State [1993 Cri LJ 2125 (Ker)] have held that it is not necessary to discard the evidence of the hostile witness in toto and can be relied upon partly. So also, in State of U.P. v. Chet Ram [(1989) 2 SCC 425 : 1989 SCC (Cri) 388 : AIR 1989 SC 1543 : 1989 Cri LJ 1785] , it was held that if some portion of the statement of the hostile witness inspires confidence it can be relied upon and the witness cannot be termed as wholly unreliable. It was further categorically held in Shatrughan v. State of M.P. [1993 Cri LJ 120 (MP)] that hostile witness is not necessarily a false witness. Granting of a permission by the court to cross-examine his own witness does not amount to adjudication by the court as to the veracity of a witness. It only means a declaration that the witness is adverse or unfriendly to the party calling him and not that the witness is untruthful. This was the view expressed by this Court in Sat Paul v. Delhi Admn. [(1976) 1 SCC 727 : 1976 SCC (Cri) 160 : AIR 1976 SC 294]

16. Thus, merely because a witness becomes hostile it would not result in throwing out the prosecution case, but the court

must see the relative effect of his testimony. If the evidence of a hostile witness is corroborated by other evidence, there is no legal bar to convict the accused. Thus testimony of a hostile witness is acceptable to the extent it is corroborated by that of a reliable witness. It is, therefore, open to the court to consider the evidence and there is no objection to a part of that evidence being made use of in support of the prosecution or in support of the accused.

13. As per the FSL report which was not required to be formally proved, having been admitted in evidence, kerosene oil was detected on the burnt matchsticks, mattress and in the plastic can, thus, corroborating the version of deceased Bindu in her dying declaration duly supported by Indu PW-2 in her part-testimony.

14. In view of the discussion aforesaid, this court finds no error in the impugned judgment convicting Jagan Nath for offence punishable under Section 302 IPC or the order on sentence.

15. Appeal is accordingly dismissed.

16. Copy of the order be sent to Tihar Jail for updation of records and intimation to the appellant. Trial Court record be sent back.

(MUKTA GUPTA)
JUDGE

(NAVIN CHAWLA)
JUDGE

NOVEMBER 25, 2017
‘yo’