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IN THE HIGH COURT OF DELHI AT NEW DELHI

Decided on: 10th October, 2018

+ CRL.A. 779/2001

SANJAY SHAH

..... Appellant

Through: Mr. Ashutosh Lohia, Advocate

versus

STATE, DELHI ADMINISTRATION

..... Respondent

Through: Mr. Amit Ahlawat, APP for the
State

CORAM:

HON'BLE MR. JUSTICE R.K.GAUBA

ORDER (ORAL)

1. The appellant by the present appeal has challenged the judgment dated 09.10.2001 and order on sentence dated 10.10.2001 passed in Sessions case No.154/2001, whereby he was held guilty and convicted on the charge for offence punishable under Sections 498-A and 304-B of the Indian Penal Code, 1860 (IPC) and awarded punishment in the form of rigorous imprisonment for two years with fine of Rs.5,000/- on the first count and rigorous imprisonment for ten years with fine of Rs.10,000/- on the second count which were to run concurrently.

2. The appellant was married to Aruna on 30.04.1986. Two sons took birth out of the said wedlock. The couple with their two children,

father of the appellant and his younger brother concededly were living together in the matrimonial home described as DDA Flat No.TU-53, Vishakha Enclave, Pitam Pura, New Delhi. Early in the morning on 28.07.1993 Aruna suffered burn injuries in the matrimonial home. She was taken by the appellant to nearby Sarvodaya Hospital and information in this regard was conveyed to Police Post Pitam Pura where it was logged as DD No.72 on 28.07.1993 at 5:30 a.m. She was shifted from the said hospital to Lok Nayak Jai Prakash Narayan Hospital where she arrived at 6:00 a.m. on the same morning, she being examined against medico legal certificate (MLC) by Dr. S. Madan (PW-7) in the casualty, the injuries suffered having been opined to be 95%. Sometime during the night of 28-29.07.1993, Aruna succumbed to the burn injuries and input in this regard was conveyed to the Police Post Pitam Pura vide DD No.57 recorded at 01:30 hours of 29.07.1993.

3. On the basis of statement of Om Prakash (PW-3), father of Aruna (deceased), the First Information Report (FIR) No.201/1993 was registered in Police Station Shalimar Bagh for offences punishable under Section 498-A/304-B IPC. The investigation was concluded and final report of investigation (charge sheet) dated 24.08.1993 was submitted under Section 173 of the Code of Criminal Procedure, 1973 (Cr.P.C.) seeking the trial of the appellant. The Metropolitan Magistrate having taken cognizance on the aforementioned charge sheet and having issued the process, the presence of the appellant was secured, he having been arrested in the

case of 29.07.1993 and being in judicial custody at that point of time. After due compliance with the procedure in law, the case was committed to the court of Sessions.

4. In the trial that commenced after the charge had been framed, the prosecution examined, in all, twelve witnesses, they including ASI Ranbir Singh (PW-1), Dr. George Paul (PW-2), Om Parkash (PW-3), Smt. Santosh (PW-4), Constable Randeep Singh (PW-5), Mr. S.S. Sidhu (PW-6), Dr. S. Madan (PW-7), P.C. Chaturvedi (PW-8), Inspector Rishi Dev (PW-9), Dr. Gautam Khanna (PW-10), Head Constable Subhash (PW-11) and Constable Maharaj Singh (PW-12). Out of the said witnesses PW-1 and PW-5 were together they having gone to the private hospital upon receipt of the first intimation about the deceased having been brought there in burnt condition and they having followed her to the government hospital where MLC of the deceased was collected and the statement (Ex.PW-1/C) of PW-3, father of the deceased, was recorded.

5. PW-1 had made a request to the Sub- Divisional Magistrate (SDM) (PW-8) to reach the hospital and had assisted him, the said SDM having recorded the statement (Ex.PW-3/A) of PW-3, the father of the deceased, it leading to registration of the FIR (Ex.PW-1/D). PW-1 had also taken investigative steps including arrest of the appellant, after personal search (vide memo Ex.PW-1/H), and taking into possession the stove (Ex.P-1) with which victim had suffered the burn injuries, by formal seizure memo (Ex.PW-1/E). He had also

prepared the site plan (Ex.PW-1/F), copy whereof is found to be not of much assistance.

6. Evidence of PW-2 who conducted autopsy on the dead body and that of PW-10 who prepared the death summary (PW-10/A) and PW-7, who had examined the victim in the govt. hospital vide MLC (Ex.PW-7/A) leaves no room for doubt that the deceased had suffered extensive burn injuries assessed at the very inception to be 95% covering almost the entire body. The autopsy report leaves no room for any doubt that the shock consequent upon burn injuries leading to complications like septicemia resulted in death, it undoubtedly being unnatural.

7. The prosecution relied upon two dying statements of the victim, one forming part of the MLC (Ex.PW-7/A), facts in which regard were also testified to by the examining medical officer (PW-7) and, the other, statement (Ex.PW-8/A) made before the SDM (PW-8), this besides the testimony of Om Parkash (PW-3) and Santosh (PW-4), the father and mother respectively of the deceased, as to the sequence of events anterior to the incident wherein Aruna suffered injuries which proved fatal.

8. The trial court judgment itself narrates, *inter alia*, the sum and substance of testimonies of PW-3 and PW-4 and also the fact that both of them died before they could be cross-examined. Accepting the examination-in-chief of the said witnesses as good evidence, the trial court has returned finding that the deceased was subjected to harassment and cruelty by the appellant over his illicit demands of

money to be arranged by her parental family. It has found corroboration from the dying declaration attributed to the deceased, particularly the statement made before the SDM so as to return a finding that the prosecution has proved that the deceased was subjected to illegal demands of dowry and harassment and cruelty soon before her unnatural death, within seven years of marriage, and consequently holding the prosecution to have succeeded in bringing home its case on presumption of guilt raised under Section 113-B of Indian Evidence Act, 1872.

9. The appeal was brought in October, 2001 to challenge the correctness, legality and propriety of the conclusions reached by the trial court. The record of appeal would show that the trial court record was requisitioned by order dated 29.10.2001. There is a pencilled note below the proceedings of the said date confirming that the trial court record had been received and added. The appellant was enlarged on bail pending hearing on the appeal by order dated 08.11.2001. The appeal had been earlier “admitted” and put in the list of regulars by order dated 08.11.2001. It came up for hearing on 07.08.2009 from the said category. There is pencilled note below the proceedings of the said date that the lower court record was under the process of “*re-construction*”. The record which has been presented before the court is the reconstructed record as submitted by the trial court pursuant to the administrative instructions that are stated to have been sent, as was noted in the proceedings on 24.08.2017.

10. While hearing three other similarly placed criminal appeals, they being, CrI.A.438/2001, titled *Mohit Mehra vs. State*, CrI.A.673/2001, titled *Sanjay & Ors. vs. State*, and CrI.A.742/2005, titled *Leelu @ Babli vs. State*, this court, by earlier orders, had called for reports firstly from the Registrar (Appellate) and then from the Registrar General. Some reports have been submitted pursuant to the said directions, the same having found to be deficient and, by virtue of common order dated 27.09.2018 passed in those appeals, further report has been called for from the Registrar General. A copy of the said order commonly passed on record of the said appeals has been placed on the file of this appeal for ready reference. The sum and substance of the reports which have been made so far to this court is that the records of the trial courts in as many as 127 criminal appeals had gone missing from the offices of the registry and in this regard some inquiries have been made. While the need for some further follow up action in the context of lost of such large number of records in serious cases would continue to be subject matter of consideration of the court in the aforesaid three matters, there is no reason why consideration of the present appeal where record to the extent it could be re-constructed has been brought before the court, should not proceed further in light of the ruling of the Supreme Court in *State of U.P. vs. Abhai Raj Singh & Anr.*, (2004) 4 SCC 6.

11. The learned counsel for the appellant and the learned Additional Public Prosecutor for the State have submitted that they have no objection to the adjudication on the appeal at hand on the basis of re-

constructed record, it being clear even from the judgment of the trial court that the *de novo* trial, as is one of the possible courses open to the court in terms of the ruling in *Abhai Raj Singh* (supra) would not serve any purpose inasmuch as two crucial witnesses, namely, Om Parkash (PW-3) and Santosh (PW-4) had passed away even during the trial in the court of Sessions, the case in the consequence, hinging only on the two dying declarations, one forming narration in the MLC (Ex.PW-7/A) and the other (PW-8/A) as recorded by the SDM.

12. Having heard both sides and having gone through the record, this court does not approve of the approach of the trial court to the statements of PW-3 and PW-4. It may be that after their examination-in-chief had been recorded, the defence had taken some adjournments. But then, the fact that the said witnesses died before even a single question could be put to them during cross-examination is something which was not within the control of the appellant. There is nothing on record to suggest that the defence had intentionally delayed the matter knowing that the evidence of PW-3 and PW-4 would be lost upon their death. In fact, there is nothing to show that the death of PW-3 and PW-4 was even anticipated at the relevant point of time. There is no reason why the untested statements of PW-3 or PW-4 should be taken as “*evidence*” that could be acted upon. The basic principle that in order to be treated as good evidence the testimony must be subjected to cross-examination will have to be applied in the present case. Otherwise, the appellant would virtually stand condemned

unheard, deprived of the valuable right to discredit or challenge the veracity of the prosecution witnesses by cross-examination.

13. In view of the above, the statements of PW-3 and PW-4 are being excluded from consideration, the case for the prosecution being tested only with reference to the dying declarations.

14. The arguments of the appellant has been that the brothers of the deceased had made heavy borrowings from him, he being in the business of sale of audio-cassettes from a small premises in the name and style of “*Sanjay Cassettes*” in Old Lajpat Rai Market and his insistence throughout was for the said borrowed money to be refunded by them. It has been his argument that since money was not being refunded, there was some friction in his domestic life, his wife (the deceased) not liking the husband (the appellant) insisting on refund of money by her brothers. In the MLC, while ascertaining the history from the victim, the examining medical officer (PW-7) had noted her response. He proved the said response with reference to the MLC (Ex.PW-7/A) in the course of his testimony. The victim had stated that she had set herself on fire in the morning of 28.07.1993 “*after getting sick of every day fight with her husband*”, the cause of such fights as stated by her to be “*due to every day allegations made by the husband about his in-laws*”.

15. It appears the trial Judge read the above statement of the deceased as corroborative of the case for the prosecution, founded essentially on the versions of PW-3 and PW-4, as to illicit demands for money. This need not necessarily have been the import of the

statement of the deceased. The “*in-laws*” of the husband to which she had alluded in the above statement to the examining medical officer would undoubtedly be the members of her parental family. From the way she put it to the medical officer, it cannot be deduced that she was referring to any demands being made by her husband of her parental family. On the contrary, she was referring to some “*allegations*” being leveled by her husband against her parental family. The “*allegations*” cannot be treated as “*expectations or demands*”. The expression will have to be construed as “*cause for some grouse*” of the husband vis-à-vis the parental family of the victim.

16. The statement (Ex.PW-8/A) of the victim made before the SDM is a document which is not credible. Its photocopy, as presented in the re-constructed record, reveals that the same was recorded in English. The SDM during the course of his deposition conceded that he had examined the victim in the hospital in Hindi. There is no reason explained as to why he opted not to record the statement in the language in which the deceased had made it to him or as to why he would chose the narrative form, instead of preparing the record in question and answer form. When asked about the justification for such approach and also as to why he had not taken care to obtain a certificate from the attending doctor as to the fitness of the person making the statement, the witness (PW-8) chose to take cover of “*this being his practice*”. This court is not impressed with such explanation particularly in view of the statement of the examining medical officer (PW-7) about presence of the relatives of the victim who had been

freely interacting with her around the time and after recording of the MLC. The statement (Ex.PW-8/A) recorded by PW-8, in the opinion of this court, cannot become the solitary evidence for upholding the conviction of the appellant on the above mentioned charge, especially because the said statement is in sharp contrast to what was stated to the examining medical officer (PW-7) immediately upon arrival of the victim in the hospital. The said statement (PW-7/A) as given to the examining medical officer in fact corroborates the defence theory of the deceased being unhappy with the appellant because of his grouse against her parental family in the backdrop of failure on their part to refund his money.

17. For the foregoing reasons, this court finds it not safe to uphold the finding of guilt returned by the trial court on the basis of above noted evidence. Doubts persist and the benefit of such doubts will have to go to the appellant.

18. The appeal is, therefore, allowed. The impugned judgment dated 09.10.2001 and the order on sentence dated 10.10.2001, passed in Sessions Case No.154/2001, arising out of case FIR No.201/1993, under Sections 498-A/304-B IPC of Police Station Shalimar Bagh are hereby set aside. The appellant stands acquitted. Bail bonds and surety bonds stand discharged.

R.K.GAUBA, J.

OCTOBER 10, 2018/vk