
(2010) 02 DEL CK 0065
In the Delhi High Court
Case No : Criminal A. 339 of 2008

Ashok Kumar and Another

APPELLANT

Vs

State of NCT of Delhi

RESPONDENT

Date of Decision : 02-02-2010

Acts Referred:

Citation : (2010) 167 DLT 72 : (2010) 5 ILR Delhi 16 : (2010) 2 RCR(Criminal) 252

Hon'ble Judges : Suresh Kait, J;Pradeep Nandrajog, J

Bench : Division Bench

Advocate : Vijay Babbar, for the Appellant; M.N. Dudeja, for the Respondent

Judgement

Pradeep Nandrajog, J.—Six accused; the husband, the mother-in-law, the elder brother of the husband, the wife of the elder brother of the husband and the two sisters of the husband of the deceased, Bharti were charged for the offence punishable u/s 498A/34 IPC. Four of them, the husband, the mother-in-law, the elder brother of the husband and the wife of the elder brother of the husband of the deceased were also charged for the offence punishable u/s 302/34 IPC pertaining to the death of Bharti, who admittedly suffered burn injuries in her matrimonial house at around 3:00 P.M. on 28.04.2002. As a result of the burn injuries she died on 05.05.2002.

2. Disbelieving the testimony of Krishan Lal PW-6, Shanti Devi PW-13 and Sunil Kumar PW-15, father, mother and brother of Bharti pertaining to dowry demands and cruelty towards the deceased by the family members save and except the appellants as also disbelieving the testimony of Krishan Lal pertaining to the alleged dying declaration made by the deceased to him and accepting the statement Ex.PW-1/A of Bharti as made to Sh. V. Valte, SDM of the area (PW-14) on 29.04.2002, all the accused, save and except accused Ashok Kumar the husband of the deceased and Kaushalya Devi, the mother-in-law of the deceased have been acquitted. Ashok Kumar and Kaushalya Devi have been convicted for the offences punishable under Sections 302/498A/34 IPC, vide judgment and

order dated 25.03.2008 and vide order on sentence dated 28.03.2008, for the offence of murder, they have been sentenced to undergo imprisonment for life. For the offence punishable u/s 498A IPC, the two have been sentenced to undergo imprisonment for a period of two years.

3. Arguing the appeal today, learned Counsel for the appellants Sh. Vijay Babbar Advocate has restricted submissions to the appellants being convicted for the offence of murder, stating that he does not challenge their conviction for the offence punishable u/s 498A IPC inasmuch as the two have already undergone the imprisonment for a period much in excess of two years.

4. Briefly noted, the prosecution attempted to prove the dying declaration made by the deceased with reference to the testimony of Krishan Lal, father of the deceased who claimed that when his daughter regained consciousness on 29.04.2002, she had disclosed to him that the appellants as also Anita, sister-in-law of the deceased, her brother-in-law Shyam Lal and Shyam Lal's wife Gayatri Devi had participated in the commission of the crime i.e. had set her on fire. In direct conflict with the testimony of Krishan Lal was the statement Ex.PW-1/A of the deceased made to Sh. V. Valte, the SDM of the area who appeared as PW-14. In the said statement, circumstances and cause of her death as disclosed by Bharti are as under:

Q. What is your name?

A. My name is Bharti Rani.

Q. Are you married?

A. Yes, I got married to Ashok Sharma about 11/2 years ago. I got one child, a girl about three months old.

Q. Are you happy after marriage?

A. No, soon after marriage I was harassed by my husband and mother-in-law. I was often beaten and kept in the verandah outside the house. They kept demanding for more dowry. Pappu (Jeth), Gayatri (Jethani), Usha and Anita (both nanads) influenced my mother-in-law and husband to demand dowry.

Q. How did you get burnt?

A. Yesterday, at about 3.00 P.M., my mother-in-law poured k. oil over my body near the kitchen and my husband burnt me with matches. Someone informed the police, who took me to the hospital.

5. The defence relied upon the MLC Ex.PW-18/A of the deceased which contained an endorsement by the doctor that the history of burn injuries sustained by Anita were as a result of explosion of LPG gas stove. Noting that the husband of the deceased was present by her side and had brought her to the hospital, the learned trial Judge has disbelieved the endorsement on the MLC Ex.PW-18/A of the deceased giving an additional reason; that at the spot no damaged or

exploded LPG gas stove was found.

6. The purported dying declaration sought to be proved through the testimony of the father of the deceased has been disbelieved by the learned Trial Judge noting that as told to the police by Krishan Lal, his daughter has only told him that her mother-in-law had poured kerosene oil on her and her husband had set her on fire, but while deposing in court he stated that his daughter told him that her husband had caught her. Accused Usha and Anita were present. Her mother-in-law sprinkled kerosene oil on her and when she tried to run away, her husband closed the door of the room and that her husband set her on fire.

7. In view of the improvements made by Krishan Lal while deposing in court and ascribing role to persons whom he has not named when his statement was recorded by the police, the learned Trial Judge has disbelieved the testimony of Krishan Lal.

8. With respect to the dying declaration Ex.PW-1/A which was proved through the testimony of scribe of the statement; namely Sh. V. Valte PW-14, SDM of the area, the learned Trial Judge has held that the same inspires confidence and is sufficient to nail the guilt of the husband and the mother-in-law of the deceased.

9. The veracity of the dying declaration Ex.PW-1/A was questioned before the learned trial Judge with reference to the site plan Ex.PW-10/A.

10. The learned trial Judge has discussed the argument of the defence with reference to the dying declaration and the site plan which is as under:

Learned Defence counsel has argued that the dying declaration recorded by SDM is per se contradictory in regard to the place of incident. It has been submitted that as per the dying declaration Ex.PW-1/A the spot of incident is near the kitchen, whereas the injured was found on the first floor. Prosecution has placed on record the site plan prepared by the IO as well as the site plan prepared by PW-10 Tirath Singh. Both the site plan indicate that the kitchen is on ground floor, whereas the injured was found on the first floor in the burnt condition. The site plan Ex.PW-2/A has added to the confusion. Note No. 1 on site plan Ex.PW-10/A has shown the place of occurrence on first floor. In support of its contention Ld. Counsel for the accused has cited Shaikkh Bakshu and Ors. v. State of Maharashtra VI. In this case there were two dying declaration and there was contradiction in respect of the alleged place of occurrence. According to the deceased the occurrence took place in the bed room however, as per pachnama no burn marks were found in the bed room. Rather the burn marks were found in the kitchen. In this case the Apex Court rejected the dying declaration on the ground that it was not reliable.

I have gone through the judgment. With entire humility at my command I consider that the abovesaid case can be respectfully distinguished on the facts and circumstances of the present case. In this case there were two dying declarations recorded in the span of around one hour. The first dying declaration

was allegedly recorded at around 6 PM, whereas the information was received at around 6.30 P.M. There were other glaring contradictions also which surfaced in the prosecution case. In the present case, the deceased only stated in her dying declaration that Smt. Kaushalya Devi poured kerosene oil over her body near the kitchen. Thereafter, the deceased continued to say that her husband burnt her with matches. If this sentence is read as a whole, it does not indicate that the victim was burnt near the kitchen. The photographs proved on record undoubtedly indicates that the burn marks were also found on the first floor. In this regard we have also to understand the topography of the house. The perusal of site plan Ex.PW-10/A indicates that the staircase is just near the kitchen and it opens near the room at first floor. There is a possibility that after the kerosene oil was poured on victim she might have run to save her life on the first floor and then on the first floor she was burnt. Unfortunately, the victim is not before us and only she could have actually told that what had happened at that time. In absence of any direct evidence, the court has to look for the prevailing circumstances. In the present case if we go through the testimony of prosecution witnesses there is nothing to suggest that the deceased was tutored in any manner. The credibility of the dying declaration can also be ascertained from the fact that deceased did not name other relatives of her husband regarding whom she made the allegations of instigating her husband and mother-in-law for the demand of dowry. Had there been any possibility of tutoring, nothing would have stopped the deceased to take the name of other relatives of the husband....

11. Learned Counsel for the appellants and the State have debated on the issue with reference to the dying declaration Ex.PW-1/A and the site plan Ex.PW-10/A.

12. Whereas, learned Counsel for the appellants has urged that if there was a possibility as opined by the learned trial Judge (possibility as noted in the underlined portion extracted from the impugned decision hereinabove) that kerosene oil was poured upon the deceased when she was just near the kitchen on the ground floor and she ran up to the first floor and entered the bed room of her house when she was set on fire in the said room, there was also an equal possibility that whatever happened was in the room on the first floor and if that be so, the narration of the incident by the deceased as recorded in Ex.PW-1/A would be incorrect.

13. Counsel urges that it is settled law that if any blemish is found in a dying declaration, then the principle of law that a dying declaration does not require any corroboration is not applicable.

14. With reference to the dying declaration of Bharti, it is to be noted that she has narrated the circumstances of her death in extremely brief language. She has simply stated that at about 3.00 P.M. her mother-in-law poured kerosene oil over her body near the kitchen and her husband burnt her with a matches.

15. Bharti does not say that after she was set on fire she ran up the stairs up to her bed room. Bharti does not say that after kerosene oil was poured on her she

ran upstairs up to her bed room and that she was set on fire in the said room.

16. At this stage, we may straightaway note the site plan to scale Ex.PW-10/A. The site plan shows that the matrimonial house of the deceased has ground floor and a first floor. The kitchen is on the ground floor. Towards the eastern wall of the kitchen is the staircase leading up to the first floor. Towards further east is the toilet. The door of the kitchen opens onto the compound abutting the kitchen in the northern side. The room on the first floor is adjoining the landing of the staircase on the first floor and is just above the kitchen on the ground floor. Five spots have been marked in the site plan. The same are as under:

No. 1 Shows the place of occurrence and one half burnt match-stick was recovered by the police.

No. 2 Shows the place from where Kurta was recovered.

No. 3 Shows the place from where Salwar was recovered.

No. 4 Shows the place where kerosene was sprinkled by the accused Ashok Kumar on Bharti Rani.

No. 5 Shows the place from where lamp was recovered.

17. It would be important to highlight that a burnt match stick has been shown recovered from the spot No. 1 which is the space between the landing and the door of the room on the first floor. The burnt Kurta and Salwar of the deceased have been shown recovered from the spot No. 2 and 3, which spots are in the room on the first floor of the house. Spot No. 5 is the slab of the kitchen wherefrom the lamp was recovered. Spot No. 4 is on the compound just at the door of the kitchen and is the stated place where kerosene is sprinkled upon the deceased.

18. With respect to spot No. 4 it assumes importance to note that nothing incriminating has been lifted from the said spot. It is apparent that spot No. 4 has been shown by the Investigating Officer on his own assumption, for the reason nobody pointed out the said spot as the one where kerosene oil was statedly sprinkled on the deceased. It is obvious that since the deceased stated that her mother-in-law poured kerosene oil on her near the kitchen the learned Investigation Officer has opted to show the said spot at serial No. 4.

19. From the fact that a burnt match-stick was recovered from the spot No. 1 which is just outside the door of the room on the first floor, a reasonable presumption would be that the deceased was engulfed in flames not on the ground floor but on the first floor moreso for the reason no burnt pieces of cloth or ash have been recovered on the staircase or outside the kitchen from spot No. 4 till the staircase. Had the deceased was set on fire outside the kitchen one would have found either ash or burnt pieces of cloth anywhere between spot No. 4 and spot No. 1.

20. The deficiency in a complete narration of what happened at the spot in the

dying declaration of the deceased has resulted in the receiver of the facts speculating as to what could have happened. The learned trial judge has speculated in the following words: "There is a possibility that after the kerosene oil was poured on victim she might have run to save her life on the first floor and then on the first floor she was burnt."

21. It is settled law that the moment, in a criminal trial, to resolve issues, a Court has to speculate, the benefit of reasoning has to be in favour of the accused as long as a reasonable reasoning flows out of what can be speculated upon. We may clarify that it is not within the province of a court to speculate or enter into surmises, but if while reasoning on an issue, it becomes necessary to infer the existence of a fact which presumably may exist, rival view points of a fact which may be presumed have to be kept in mind and a fact which may be presumed in favour of the accused has to be preferred.

22. The site plan Ex.PW-10/A is clearly indicative of the fact that Bharti suffered burns somewhere on the first floor and the said spot could be either inside the room where spots 2 and 3 are shown or it could be at spot No. 1 on the first floor.

23. The MLC of the deceased shows that her husband i.e. Ashok had accompanied her to the hospital.

24. The MLC Ex.PW-16/A of Ashok prepared at the same hospital shows the following burn injuries on his hand:

(i) Charred RT. hand distal 1/4th of palmer aspect and palmer side of four fingers excluding thumb. Distal 3/4 of dorsum of hand and almost whole of dorsal side of medial four fingers.

(ii) Multiple blisters of 2 x 3 cm on the dorsum and palmar side.

25. It is apparent that Ashok has attempted to stamp out the fire on his wife. The burn injuries on his right hand are not superficial. There is charring on the right hand and multiple blisters thereon.

26. The learned Trial Judge has wished away the said evidence by recording: "Merely because the accused Ashok suffered burn injuries on his hand entire story of the prosecution cannot be thrown out. It cannot be ruled out that a person after setting on fire would certainly try to do something to show that he rather tried to save his wife."

27. We may note that when they were examined u/s 313 Cr.P.C. the appellants stated that the deceased set herself on fire.

28. The learned Trial Judge, before whom the decision reported as Shaikah Bakshu and Others Vs. State of Maharashtra, has observed that the ratio of the said decision was not applicable as it could be distinguished on account of the reason that in said case two dying declarations were recorded within a span of around 1 hour and the Court found material differences in the two.

29. Having perused the decision in Shaikkah Bakshu's case (supra), we note that 3 reasons have been given by the Supreme Court to disbelieve the dying declaration of deceased Rubina (the victim in the said case). Firstly, the possibility of Rubina being tutored. The second of material discrepancies in the two dying declarations made by her within a span of one hour. Lastly; to quote:

According to the deceased, the occurrence took place in the bedroom. It is to be noted that no mark of burn injury was noted in the bedroom, and they were noticed in the kitchen. The High Court noted, even if the spot of occurrence has not been correctly stated by the deceased the same is of no consequence. That certainly has effect on the credibility of dying declaration, contrary to what the High Court observed.

30. Though a site plan is not treated as a substantive evidence, but the evidentiary value thereof cannot be slighted, for the reason a site plan throws light on the scene of the crime and sometimes assumes importance as in the instant case.

31. There is a indeed a handicap with reference to the cursory dying declaration made by the deceased when she does not disclose the exact place where she was burnt. She does not state that she ran up the stairs. Her only statement that kerosene oil was thrown on her near the kitchen, seen in light of the site plan, creates considerable confusion as to what exactly happened at the spot.

32. The conduct of Ashok Kumar of attempting to douse the fire on his wife and removing her to the hospital has to be factored in the decision.

33. That Ashok was present in the company of his wife has not only been admitted by him but is proved independently when we look at the MLC of the deceased which shows that Ashok removed his wife to the hospital as also when we look to the MLC of Ashok which shows his right hand charred and full of blisters.

34. The learned Trial Judge has discussed the evidentiary value of Ashok's MLC Ex.PW-16/A by stating that it could not be ruled out that a person, after setting on fire another person would try and do something.

35. Let us take the reasoning of the learned Trial Judge to its logical conclusion. It means that Ashok, after setting fire to his wife suddenly realized the negative moral worth of his act and the good in him surfaced or he simply created a drama to try and save his wife. Yes, this could be a probability. But, it is equally possible that on seeing his wife on fire, Ashok proceeded to save his wife. It is in this context it assumes importance to note that the burn injuries on the right hand of Ashok are not superficial burn injuries. His right hand has got charring and blisters. This suggest his earnestness in rescuing his wife and not an act of simple drama.

36. Yet again, at the second stage, while writing the judgment we have found ourselves in an area where two possibilities are emerging.

37. We see no escape from the situation that the inchoate and brief facts in the dying declaration Ex.PW-1/A compel us to hold that a benefit of doubt needs to be granted to the appellants.

38. Before concluding we may note that where there is evidence of a motive to falsely implicate innocent persons in a dying declaration, the rule of prudence requires the Court to look for some corroboration to the dying declaration.

39. The motive for the deceased to inculcate innocent persons has emerged in this case. In that, we find that in her dying declaration, though not relatable to the incident and relatable to the past, the deceased has not only inculpated her husband, her mother-in-law; the only two persons with whom she used to reside in her matrimonial house, but even the elder brother of her husband and the wife of the elder brother who lived in a different house as also the two married sisters of her husband. It assumes significance that the father of the deceased, while trying to prove a dying declaration made to him by his daughter, inculpated the brother-in-law and two sisters-in-law of the deceased, who were not even present in the house when the crime was committed.

40. The appeal is allowed insofar as the appellants have been convicted for the offence punishable u/s 302/34 IPC. The appellants are acquitted of the charge of having murdered Bharti.

41. Maintaining the conviction and sentence of the appellants for the offence punishable u/s 498A/34 IPC, we dispose of the appeal setting aside the impugned judgment and order dated 25.3.2008 convicting the appellants for the offence of murder. We set aside the sentence of imprisonment for life for the said offence.

42. At this stage, learned Counsel for the appellants informs that the mother-in-law of the deceased namely Kaushalya has died. Thus, we bring the curtains down by recording that the appeal insofar as the conviction of appellant No. 2 is concerned stands abated.

43. Appellant Ashok Kumar is acquitted of the charge of murder. Since the appellant Ashok Kumar is still in jail we direct that the present decision be sent to Superintendent, Central Jail, Tihar with a direction that Ashok Kumar shall be released if not required in any other case for the reason Ashok Kumar has undergone a sentence much in excess of 2 years i.e. the sentence which he has to serve for his being convicted for the offence punishable u/s 498A/34 IPC.

44. The bail bond and surety bond furnished by appellant No. 2 Kaushalya Devi are discharged.