

(2009) 02 DEL CK 0309

In the Delhi High Court

Case No : Criminal Appeal No. 37 of 2005

Mohd. Kamal Hussain

APPELLANT

Vs

State (G.N.C.T. of Delhi)

RESPONDENT

Date of Decision : 11-02-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Evidence Act, 1872 — Section 32
Penal Code, 1860 (IPC) — Section 300, 302, 304, 307

Citation : (2009) 02 DEL CK 0309

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

Bench : Division Bench

Advocate : Sumeet Verma, for the Appellant; Richa Kapoor, APP, for the Respondent

Judgement

Pradeep Nandrajog, J.—28th January 2003 was an unfortunate day in the life of Aaysha. At around noon she suffered acid burns and information thereof was conveyed to Police Station Mehrauli, where Const. Uganti PW-8, recorded DD No. 11, Ex. PW-8/1. Having received the information, SI Surender Dhayia PW-12 accompanied by Const. Ashok Kumar PW-9 and HC Naresh PW-7 left for the spot and therefrom reached Safdarjang Hospital, for the reason, in the meanwhile a PCR van had reached the house of Aaysha and on finding her suffering from acid burns, removed her to Safdarjang Hospital.

2. At the hospital, SI Surender Dhayia moved an application Ex.PW-12/A seeking permission from the doctor to record the statement of Aaysha, on which Dr. S.K. Sinha recorded: "Pt. can give statement".

3. He recorded the statement, Ex. PW-12/B, of Aaysha, wherein she disclosed that she was a resident of Holi Chowk, Village Neb Sarai and was married to the appellant. That her mother was also residing with them and that all of them had come from Dhaka, Bangladesh. That about eight years back she was married with the appellant and had two children; a daughter named Kulsum and a son

named Abu Kalam. That she and her mother were rag pickers and she had been requesting her husband to do some work. He was addicted to alcohol and used to fight with her. On being compelled to work he threatened that he would kill her. At the intervening night of 27/28.1.2003 her husband quarreled with her. Her mother intervened. Her husband said that come what may, he would not leave her. In the morning when her mother had gone to a Aanganwadi to bring back her daughter Kulsum and she was resting on a sheet in the house, at around 10.00 AM, her husband Kamal came to the house. She woke up and saw her husband with a bottle in his right hand. He poured the contents of the bottle on her. The same was acid (Tezab). While throwing acid on her he shouted that he would not spare her. She screamed and thereupon Kamal ran away. She suffered burn injuries on her face and her chest. After some time her mother came, and in a police van removed her to the hospital.

4. SI Surender Dhayia made an endorsement, Ex.PW-12/C, on the statement and forwarded the same through Const.Naresh and at the Police Station, HC Babita Yadav PW-11, registered the FIR, Ex.PW-11/A, u/s 307 IPC.

5. The appellant did not return to his house. The police searched for him but could not apprehend him.

6. At the hospital, Aaysha was examined by Dr. S.K. Chawla PW-4, who recorded the MLC Ex.PW-4/A. He recorded thereon that Aaysha had been brought to the hospital at 1.45 PM on 28.1.2003 by a Head Constable. He recorded that the information of the acid burn injuries were disclosed to him by the patient herself. He recorded the history of how the patient had sustained the injuries as follows:

H/o alleged to have burn when she was sleeping and her husband poured TEJAB on her body and she got burnt on various parts of body. Her mother informed police and police brought her to this hospital.

7. He noted that 30% of the body was having acid burns. The burns were on the face and the eyes. He noted that the cornea was white and the lower lip swollen.

8. The appellant just did not return home. Aaysha continued to remain hospitalised. Her condition deteriorated and she died on 28.2.2003 i.e. after exactly a month of suffering burn injuries due to acid being thrown on her.

9. On learning about her death, the police added the offence punishable u/s 302 IPC in the FIR and went to the hospital. The dead body of the unfortunate young woman was seized and sent for post-mortem to the mortuary at Safdarjang Hospital where Dr. Arvind Thergaonkar PW-5, conducted the post-mortem. He noted the following external injuries on the deceased:-

dermo epidermal burns superficial to deep, mainly deep, infected in nature present on face and neck on front side and front of chest, upper part of abdomen on right arm and front of upper part of thighs, about 30% burns were found. Area of corrosive blackening was seen on right arm and front of thighs. Infection was seen mainly on face, neck and front of chest and thighs. No other mark of

injury or signs of struggle were seen on body.

10. The report of the internal examination was recorded as under:

Scalp, skull and brain ? no effusion of blood was seen in scalp, skull vault and base were normal. Brain was congested.

Neck and thorax ? Trachea/neck structures/chest wall were normal except burn injuries. Lungs showed edema and patchy consolidations changes. Heart was normal.

Abdominal Pelvis ? stomach was empty.

Liver/spleen/kidneys, all were congested. Rest of the organs were normal. Uterus was empty.

11. He gave the opinion pertaining to the cause of death, as septicemia following 30% anti-mortem corrosive acid burns.

12. The appellant was arrested on 16.8.2003 by the police of Police Station Jahangir Puri for another offence under the Arms Act and said fact was conveyed to the SHO of the Police Station Mehrauli who took steps to move an application in the court of the Metropolitan Magistrate for interrogation of the appellant and on obtaining the custody of the appellant in the instant FIR, recorded a formal arrest in the instant case on 19.8.2003.

13. The appellant was sent to trial for having murdered his wife Aaysha.

14. At the trial Dr. S.K. Chawla PW-4 proved the MLC, Ex.PW-4/A of the deceased. Relevant for the purposes of the present decision, in light of the arguments urged in appeal, suffice would it be to note that the doctor was not examined with respect to the contents of the MLC. He was not challenged on the factum of his having recorded in the MLC that the patient herself gave the history of the burns. He was not challenged on the factum of his recording in the MLC that the patient was brought by a police constable. We note that he was cross-examined on the fact whether mother of the patient was present when he had examined the patient, to which he responded that he did not remember. He was questioned as to what treatment was given to the patient, to which he responded that he can give said information only after looking into the case sheet. He informed that he started the treatment on the patient after 15-20 minutes and gave the normal IV fluid and pain killer to the patient. He stated that he did not remember whether the Investigating Officer had moved any application seeking permission to record the statement of the patient or not. He stated that he was assisted by medical staff but did not remember who was on duty on that day.

15. Dr. Arvind Thergaonkar PW-5, proved the postmortem of the deceased and reiterated the contents and his opinion recorded therein. We note that he was not cross-examined with respect to the post-mortem report.

16. The mother of Aaysha was examined as PW-10. She deposed that she was a

citizen of Bangladesh and was residing with the appellant and her daughter Aaysha at Village Neb Sarai, Holi Chowk. She deposed that two children were born to her daughter Aaysha. She stated that on 27.1.2003 a quarrel had taken place between the couple as the appellant had come late in the night after consuming liquor. Next day morning at 9.30 AM she had gone with the daughter of Aaysha to her school and when she came back she found her daughter Aaysha having acid burns. She deposed that her daughter told that the appellant had thrown acid at her and had run away. She deposed that she took her daughter to Safdarjang Hospital. She deposed that from the room where the incident took place the police seized one bed-sheet Ex. P-1, two pillows Ex. P-2, Ex. P-3 and one Chunni Ex. P-4.

17. On being cross-examined, she stated that the police recorded her statement when she had taken her daughter to the hospital. Statement of no other witness was recorded in her presence. She stated that the moment she took her daughter to the hospital she was asked to stay out and was not asked by the police or the doctor to thumb mark any document. She stated that when the police came to the hospital and went to the burn ward, a doctor and a nurse were near her daughter, but she was not allowed an entry there. She stated that some medicine was applied on the burnt portions of her daughter before the police had arrived. She denied the suggestion that she was deposing falsely or that no fight had taken place between the couple on the intervening night of 27/28.1.2003. She denied that the appellant did not pour acid on her daughter. She denied that her daughter did not tell her that the appellant had thrown acid on her and had run away. She denied that her daughter was a stubborn person and poured acid on self and committed suicide.

18. SI Surender Dhayia PW-12, deposed that on receipt of the DD entry, he along with HC Ashok and Const. Naresh proceeded to the spot and thereon to the hospital and he moved an application Ex.PW-12/A for recording the statement of Aaysha and that at point "X", the doctor made an endorsement declaring Aaysha fit for statement. That he recorded the statement Ex. PW-12/B made by Aaysha who affixed, at point A, her right thumb impression. He made endorsement Ex.PW-12/C on the said statement, and forwarded the same through Const. Naresh for registration of the FIR and returned to the spot with HC Ashok. He prepared the site plan Ex.PW-12/D. He called a photographer to take the photographs and took into possession a bed sheet, two pillows, and one chunni, entry whereof was recorded in the recovery memo Ex.PW-8/A and after sealing the same handed them to HC Ashok Kumar. He stated that on 1.3.2003, when information was received that Aaysha had expired he reached the hospital and prepared the inquest papers Ex.PW5/3 and sent the body for post-mortem and after post-mortem was conducted, obtained the post-mortem report. He identified the bed sheet Ex.P-1, two pillows Ex.P-2 and Ex.P-3 and a Chunni Ex.P-4 as the ones he had seized. (We note that the pillows and the chunni are recorded as being in a burnt condition.)

19. On being cross-examined, he stated that he reached the hospital at around 2.00 PM and met Aaysha's mother outside the hospital. He reiterated that he obtained the opinion of the doctor before recording the statement of the patient. He denied the suggestion that he did not move any application seeking the opinion of the doctor whether Aaysha was fit for statement. He denied that the endorsement at point "X" on the application Ex.PW-12/A was manufactured by him. He stated that he did not call the SDM to the spot because the marriage was more than seven years. He denied that Aaysha was not in a position to make any statement. He denied having not questioned Aaysha. He denied that he was colluding with the mother of the deceased and was falsely implicating the appellant. He denied that he himself affixed the thumb impression of the deceased on any blank paper.

20. These are the broad contours of the evidence of the prosecution.

21. The appellant was examined u/s 313 Cr.P.C. The incriminating circumstance of his wife having made the statement Ex.PW-12/B was put to him vide question No. 9. The incriminating circumstance of MLC Ex.PW-4/A was put to him vide question No. 13. The incriminating circumstance pertaining to the post-mortem report was put to him vide question No. 17.

22. We eschew reference to other incriminating circumstances put to him for the reason no submissions have been made with respect thereto. We are noting the above-noted circumstances put to the appellant for the reason a submission has been made by learned Counsel for the appellant that the incriminating circumstances relatable to the MLC and the post-mortem report were not put to the appellant.

23. The appellant led no evidence in defence.

24. Vide impugned judgment dated 8.9.2004 the learned trial judge has held that there was no reason to disbelieve the statement Ex.PW-12/B made by Aaysha. Holding the same to be a dying declaration, the learned trial judge has held that by his act, the appellant has intentionally caused the death of his wife and hence has punished the appellant for the offence punishable u/s 302 IPC i.e. the murder of his wife.

25. From the impugned decision, we note that the statement Ex.PW-12/B made by Aaysha, was questioned on the ground that in spite of adequate opportunity available, the Sub Divisional Magistrate of the area was not involved i.e. was not summoned and Aaysha's statement was not got recorded before the SDM. The statement Ex.PW-12/B was also questioned on the plea that the doctor who made the endorsement, as claimed by the police, certifying the patient fit for statement, was not examined; in fact his name was not even entered in the list of witnesses. It was also challenged as being motivated by the mother of the deceased. It was urged that the mother of Aaysha had admitted taking her to the hospital and being in the hospital when police came.

26. All the pleas have been negated by the learned trial judge.

27. With reference to the non involvement of the SDM of the area, the learned trial judge has noted that when SI Surender Dhayia PW-12, was questioned as to why he did not call a Sub Divisional Magistrate for getting the statement of Aaysha recorded, he responded that the marriage was more than seven years old. The learned trial judge has opined that it appears to be a case of an ill-informed police officer who thought that the law was that only when a lady suffers burn injuries within seven years of her marriage, law requires her statement to be recorded by a SDM.

28. The argument of not examining the doctor who recorded the opinion that the statement of Aaysha can be recorded, has been dealt with by the learned trial judge in paras 9 to 12 of the decision and with reference to a decision of the Supreme Court reported as 1999 VIII A.D. (SC) 426 Koli Chuni Lal Savji v. State of Gujrat it has been held that mere absence of an endorsement by a doctor that the patient was fit, is not fatal to a dying declaration recorded by a police officer if otherwise there is evidence on record that the patient was fit for statement.

29. The conclusion drawn by the learned judge is that merely because the doctor who gave the opinion that the statement of the patient can be recorded was not examined is not fatal. The learned trial judge has also opined, with reference to Section 32 of the Evidence Act, that a statement whether written or verbal, made by a person who is dead is a relevant fact and such a statement would be admissible.

30. It is apparent that the trial judge has dealt with the issue on a multiple prolonged reasoning. Suffice would it be to record by us that mere absence of examining a doctor who has recorded that the patient is fit for statement by itself would not be fatal if there is evidence on record to otherwise show that the patient was fit for statement. In other words in such a situation the Court has to be a little careful.

31. It is not of insignificance to note that Aaysha had lived on for 30 days before she died. It is also not of insignificance to note that the doctor who examined Aaysha and recorded the MLC Ex. PW-4/A has himself recorded that the history of the burn wounds has been given to him by the patient herself; meaning thereby that the patient was conscious and was in a position to comprehend questions and answer the same. The MLC of the deceased shows that she was admitted at 1.45 PM. The statement of Aaysha was recorded somewhere after that and before 3.30 PM evidenced by the fact that the endorsement Ex.PW-12/C on her statement has been dispatched for FIR to be registered at 3.30 PM, a fact recorded on the endorsement. We find corroboration to the said timing when we look at the FIR which shows that the same was registered at 4.00 PM on 28.1.2003.

32. We have noted herein above that Dr. S.K. Chawla PW-4 who had examined Aaysha and had prepared the MLC Ex.PW-4/A was not cross-examined pertaining

to the contents of the document i.e. the MLC authored by him. Thus, the contents of the MLC have gone unchallenged. In the said MLC Dr.S.K.Chawla has recorded: HO alleged to have burn when she was sleeping and her husband poured teazab on her body and she got burnt on various parts of body. INF self.

33. Learned Counsel for the appellant urged that the MLC itself records that the face of Aaysha was burnt with acid and the lower lip was swollen. Thus, Counsel urges that it is not possible that Aaysha could have told said fact to the doctor. Learned Counsel further urged that Aaysha's mother who was examined as PW-10 admitted that she took her daughter to the hospital and therefore it was she who told the said fact to the doctor.

34. We are afraid, the submission cannot be accepted for the reason when Dr. S.K. Chawla appeared as a witness and proved the MLC Ex.PW-4/A the contents of the MLC were not questioned and he was not cross-examined with respect thereto. We note that on the MLC he has recorded that Aaysha was brought to the hospital by a Constable. We also note that PW-10 categorically deposed that when her daughter was admitted at the hospital she was not allowed to be near her daughter and saw from a distance that the police officers and the doctors were speaking with her daughter.

35. This also takes care of the argument of learned Counsel for the appellant that the mother of Aaysha had influenced the will of Aaysha.

36. The plea that the doctor who purportedly certified Aaysha to be fit for statement has not been examined, as noted by the learned Trial Judge, in the decision reported as Koli Chunilal Savji and Another Vs. State of Gujarat, it was observed that mere non examination of the doctor who gave the opinion that the patient was fit for making statement is not fatal as long as from the available evidence the Court is satisfied that the patient was fit for statement.

37. The plea of learned Counsel for the appellant that in the decision reported as Smt. Laxmi Vs. Om Prakash and Others, . the Supreme Court held that where ample opportunity was available to get a dying declaration recorded before a Sub Divisional Magistrate, a statement recorded by the police has no evidentiary value is neither here nor there for the reason no such ratio can be culled from said decision. It is of importance to note that in said decision (para 19) it was noted that the police officer who had purportedly recorded the statement had recorded an endorsement that the doctor (not named) had told him that the patient was fit for giving statement. No such endorsement was made by any doctor and none was proved. It was in said circumstance that the Supreme Court rejected the purported statement recorded by the police officer and went on to observe the desirability of getting dying declarations recorded before a Sub Divisional Magistrate.

38. We may note that in a recent decision reported as Dayal Singh Vs. State of Maharashtra, the law pertaining to recording statements by a police officer vis-?-vis being recorded before a magistrate has been re-visited by the Supreme Court

and it has been held that no hard or fast rule of law pertaining to dying declarations can be culled out from the various judicial decisions and the only thing of concern is whether the purported statement is true i.e. the primary effort of the Court has to be to find out whether the dying declaration is true. In para 12 of the decision it was observed as under:

12. In *Kulwant Singh and Others Vs. State of Punjab*, it has been held that it is not essential that a dying declaration should be made only before a Magistrate. Section 32 of the Evidence Act nowhere states that the dying declaration must be recorded in the presence of a Magistrate or in other words any statement which has not been recorded before the Magistrate cannot be treated to be dying declaration. In *Vidhya Devi and Another Vs. State of Haryana*, challenge to a dying declaration recorded by a police officer in the presence of doctor, who had given an opinion that the deceased was in a fit state of mind to make the statement, was held to be credible and reliable and sufficient to establish the guilt of the accused.

39. It is lastly urged that since Aaysha died after 30 days of the incident and the cause of death is septicameia, at best Section 304 Part-II IPC is attracted and not Section 300 thereof.

40. The issue where the victim is burnt and the burns cover between 30% to 35% of the body and the death occurs after many days due to infection spreading in the vital organs of the victim has troubled the Courts evidenced by certain decisions holding that by its very nature of the act, burning a victim is an imminently dangerous act and in the least a very high degree of knowledge can be attributed to the offender of knowing the consequences of his act. Certain decisions have applied the principle of *causa causan* to hold that if some other event intervenes between the principal act and the resultant effect the said principle is not applicable and thus have reduced the gravity of the offence. But, said decisions relate to burn by fire.

41. In the case of acid burns, the jurisprudence is a little different. In the decision reported as *Sudershan Kumar Vs. State of Delhi*, Medical Jurisprudence and Toxicology 17th Edn. was referred to wherein it was opined that: "The involvement of one-third to one-half of the superficial area of the body is likely to end fatally...in supportive cases, death may occur after five or six or even longer". With reference to Taylor's Principles and Practice of Medical Jurisprudence 12th Edn. Vol.I it was noted that in cases of acid burns: "The chief danger to life is the occurrence of sepsis in the burned areas." Accordingly, where the victim who had suffered 35% burns of the body due to acid and death resulted, it was held to be a case attracting Section 302 IPC.

42. The submission of learned Counsel for the appellant that afore-noted decision is distinguishable because in said case 35% of the body was burnt with acid and in the instant case the victim was burnt over 30% of the body is neither here nor there for the reason there is hardly any percentage difference between 30% and

35%. In any case, the opinions would always have a margin of 5% on either side. These opinions are not formulas of mathematics and hence have not to be applied as equations.

43. It is lastly urged that neither has it been recorded in the post-mortem report that the burn injuries were sufficient in the ordinary course of nature to cause death nor has the doctor who conducted the post-mortem deposed so. The submission requires us to decide the case ignoring common sense and standard text on the subject. We have noted herein above a decision of the Supreme Court with reference to acid burn injuries and the medical jurisprudence relatable thereto. We cannot shut our eyes to the same. It is settled law that the medical condition of the victim has to be evaluated by the Court with reference to evidence and the opinions of the doctor are the evidence before the Court. We need not note a catena of decisions where in spite of an opinion of a doctor, with reference to medical jurisprudence, the defence has been able to establish to the contrary and hence the Courts have ignored the opinion of the doctor. Thus, where the prosecution, due to carelessness or inadvertence does not bring on record the opinion of a medical expert, based on the material before it and with reference to medical jurisprudence, the Court has to take a decision.

44. We find no merits in the appeal. The appeal is dismissed.