
(2012) 11 DEL CK 0202
In the Delhi High Court
Case No : Criminal A. 1090 of 2011

Subhash

APPELLANT

Vs

State of NCT of Delhi

RESPONDENT

Date of Decision : 19-11-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 164, 313
Evidence Act, 1872 — Section 154
Penal Code, 1860 (IPC) — Section 302

Citation : (2013) 197 DLT 279

Hon'ble Judges : Sanjiv Khanna, J; S.P. Garg, J

Bench : Division Bench

Advocate : G.B. Sewak, for the Appellant; Sanjay Lao, APP., for the Respondent

Final Decision : Disposed Off

Judgement

Sanjiv Khanna, J.—The appellant Subhash stands convicted, u/s 302 of the Indian Penal Code, 1860 (IPC), for having committed murder of his wife Shashi Sharma, in Sessions Case No. 80/2010, arising out of FIR No. 561/2005, Police Station Sultan Puri. He has been sentenced to life imprisonment and fine of Rs. 10,000/-. In default of payment of fine, he has to undergo rigorous imprisonment for three months. It is undisputed that Shashi Sharma, wife of the appellant, was admitted to Safdarjung Hospital with burn injuries, on 9th April, 2005. Her MLC (Ex. PW 14/A), recorded on 9th April, 2005, at 03.10 A.M., mentions that she was brought to the hospital by her mother Kiran. She expired on 9th April, 2005 at 15.00 Hrs. As per Post Mortem Report (Ex. PW 23/A), cause of death was shock, caused by ante-mortem thermal burn injuries. The percentage of burn injuries, on the body, was 95% and she had epidermal to dermoepidermal burns, all over the body, except on parts of the scalp and pelvis. Dr. Alaxender (PW-23), Sr. Special and Head of Department of Forensic Medicine, Safdarjung Hospital, who had conducted the post mortem on deceased's body, proved that the post mortem opinion (Ex. PW 23/A) was written and signed by him. He opined, before the court, that 95% burn injuries cannot be caused by

the accident mentioned, in the alleged history, given in the MLC - Ex. PW 14/A. For the sake of convenience we are reproducing the said portion of the MLC below:-

Alleged history of sustain accidental thermal burns when kerosene oil can which was kept at on top of almirah, where she was sleep, fell over her and a burning mosquito coil was kept there and her clothes caught fire and she sustained burns

2. PW-23 similarly avers, in his report (Ex. PW 23/C), where his opinion was sought by Insp. Mohd. Iqbal (PW-24), regarding whether the injuries mentioned in the Post Mortem Report support the alleged history, given in the MLC.

3. Statement of PW-23, in the court, and his written opinion remain uncontested. He was not subjected to any cross-examination. However, this is not the sole ground to hold that, the present case, is not one of accidental burns but rather a case where the appellant, deliberately and intentionally, caused burn injuries by throwing kerosene on his wife Shashi Sharma. It has been proved beyond doubt, that the cause of death, as recorded in the aforesaid statement (MLC Ex. PW 14/A) is incorrect and untrue.

4. Kiran (PW-3) was the deceased's mother who averred that her daughter Shashi married, the appellant, in the year 1994 and had two children-Karan and Arjun. The daughter's family resided at D-4/39 Sector 20, Rohini. The deceased Shashi often complained, to her mother, that the appellant was an alcoholic who resorted to physical violence against her. In the intervening night of 8th & 9th April, 2005 at about 1.30 A.M., Arjun, the deceased's son, had called PW-3, on telephone, and revealed that Shashi had received burn injuries and PW-3 should immediately reach Brahm Shakti Hospital. PW-3, along with her husband, reached Brahm Shakti Hospital and saw the burned body of Shashi. Appellant Subhash was taking her to Safdarjung Hospital, on a three-wheeler. PW-3 sat in that three wheeler scooter, with the deceased and the appellant, while her husband Nand Kishore and son Kamal reached Safdarjung Hospital, separately. Shashi was unconscious in the auto and did not regain her conscious, at any later time. On 9th April, 2005, in the evening, Karan and Arjun revealed to PW-3 that, before the incident, the appellant had consumed liquor and had beaten Shashi. Thereafter, the appellant poured kerosene on Shashi and set her on fire. PW-3's statement to the police (Ex. PW 3/A) bears her signature and she stood by her stand, in the cross-examination. There is no reason to disbelieve the statement. She vehemently denied that Shashi had an accidental death. She reiterated that her cross-examination was true and correct and she had not deposed a false statement or had made a statement in anger. At the same time, we cannot rely upon that portion of statement of PW-3, where she has narrated what Karan and Arjun had told her, as that would amount to hearsay.

5. The two children, Karan and Arjun, had appeared as PW-4 and PW-17, respectively. PW-4 was aged about 12 years, when his statement was recorded on 15th February, 2008. The Court first verified, by putting forth few questions to

PW-4, whether, in view of his age, he was competent to be examined. In his examination-in-chief, recorded on 15th February, 2008, he had affirmed that his father, the appellant whom he identified in the court, consumed liquor. PW-4 disclosed that his father had poured kerosene from a can, on his mother, and had set her on fire. PW-4 professed that he had seen the incident. The appellant tried to extinguish the flames when he realized that Shashi was completely burnt. PW-4 went, outside the house, and called Vishal (PW-10) and his mother was taken to the hospital by the appellant and PW-10. PW-4 telephoned his grandmother, Kiran, and informed her that his mother was being taken to Brahm Shakti Hospital. His statement, was recorded u/s 164 Cr. P.C. on 13th April, 2005, marked Ex PW 4/A. He identified his signatures (on Ex. PW 4/A) in Hindi and English. In the cross-examination, conducted on 15th February, 2008, PW-4 denied being tutored by his maternal grandmother, though he admitted that he was staying at his maternal grandparent's house. In the cross-examination, interestingly, no direct questions, relating to actual occurrence and that the appellant had not poured kerosene and deliberately burnt Shashi, were put to him. PW-4 denied that his father was implicated on the suggestion of his grandparents and that his father, the appellant herein, had not burnt his mother.

6. PW-4 was recalled, for further cross-examination, on 29th January, 2011, nearly three years after the date of earlier cross-examination conducted on 15th February, 2008. By 29th January, 2011, PW-4 was 15 years of age and he took a complete summersault, from his previous statements. He purported that he and his younger brother had slept, in the back room, by 9.00/9.20 PM, on the night of the incident and the front room was not visible to them. In the intervening night on 4th and 5th April, 2005, his father woke the two children up, at 12.30 or 1.00 A.M., and stated that their mother had received burn injuries and was being taken to the hospital. PW-4 states that they were asked to sleep in the house of Suman Aunty and he was not aware about what had happened between his parents. He denied that there was any quarrel between his parents and alleged that the police, when his statement was recorded, had handed over a paper and had asked him to narrate from that paper. PW-4 asserts, the police had threatened him, and his brother, that they would be put behind bars, if they don't depose accordingly and therefore, whatever he had stated earlier, before the court, was tutored by the police. When PW-4 was cross-examined, by the public prosecutor, he reiterated that his statement in the court on 29th January, 2011 was correct and his earlier statement, on 15th February, 2008, was false because the police had threatened PW-4. However, PW-4 could not name any police officer, who had threatened him, and agreed that he had not disclosed to the Judge that he was being pressurized by the police. He admitted that his statement, u/s 164 Cr. P.C., was recorded and signed by him only after he had said that it was correct.

7. Statement of Karan (PW-17), recorded on 16th May, 2009. PW-17 averred that, on 8th April, 2005, his father came drunk to the house, at late night, and started a quarrel with his mother. His father i.e. the appellant asked his mother

to leave and go to her parents' house, on which, Shashi PW-17's mother, came out in the street, holding PW-17 by the hand. The father also came out and then dragged his mother back to the house. PW-17 followed his parents to the room. His father poured kerosene, from the can, on his mother and set her on fire. When his mother was burning, she threw her chunni away and rubbed her body on the wall, in order to extinguish the fire. In order to save her, his father put a blanket over his mother. His father deliberately got his hand and some of his body parts burnt, while hugging her. Some boys, living near their house, were called and his mother was moved to Brahm Shakti Hospital, on scooter. He telephoned his maternal grandmother and informed that his mother has been moved to Brahm Shakti Hospital. On the date of his examination, i.e. 16th May, 2009, PW-17 was 12 years of age and, before he was examined, several questions were put forth, to satisfy that the witness comprehends the questions and can give rational answers. Thereafter, PW-17's cross-examination was deferred and he was cross-examined after 11 months, on 6th April, 2010. Like PW-4, in his cross-examination on 29th January, 2011, PW-17 changed his stand obsequiously to save his father i.e. the appellant. He purports that, on the day of the incident, his father had asked his mother to warm the food and at that time PW-17 was not asleep. His mother went inside the kitchen and, after few minutes, they heard his mother crying. PW-17 rushed towards the kitchen and found that his mother's body was in flames. His father tried to save his mother and, hence, sustained burn injuries on his hand and belly. However, in cross-examination, PW-17 admitted that his parents had quarreled, prior to the incident. He was not aware as to where his mother was taken for treatment and has stated that his mother was not set ablaze by his father but had sustained burn injuries while warming the meal, on the stove. According to him, his parents had a cordial relationship. He denied that his statement was recorded by the police. He stated that he had previously deposed before the court, at the instance of the police, who had met him outside the court. On being re-examined by the public prosecutor, PW-17 accepted that he had made a statement before the Metropolitan Magistrate (PW 21/C) on 13th April, 2005, u/s 164 Cr. P.C. He denied the suggestion that he had created a new story, at the instance of his Nani, to save his father. He denied that he had stated incorrect facts and had disclosed correct facts on 6th April, 2010. However, he accepted that he had not made a written complaint, to any authority, that he had been tutored by the police.

8. In such cases, where the witness has penchant for dithering in his stand, his statement need not be disregarded and instead prosecution can place reliance on the portions which give force to their submission, provided that it is duly corroborated with evidence. This has been expounded by the Supreme Court in *Bhajju @ Karan Singh Vs. State of M.P.*, :

35. Now, we shall discuss the effect of hostile witnesses as well as the worth of the defence put forward on behalf of the appellant-accused. Normally, when a witness deposes contrary to the stand of the prosecution and his own statement

recorded u/s 161 Cr. PC, the prosecutor, with the permission of the court, can pray to the court for declaring that witness hostile and for granting leave to cross-examine the said witness. If such a permission is granted by the court then the witness is subjected to cross-examination by the prosecutor as well as an opportunity is provided to the defence to cross-examine such witnesses, if he so desires. In other words, there is a limited examination-in-chief, cross-examination by the prosecutor and cross-examination by the counsel for the accused. It is admissible to use the examination-in-chief as well as the cross-examination of the said witness insofar as it supports the case of the prosecution.

36. It is settled law that the evidence of hostile witnesses can also be relied upon by the prosecution to the extent to which it supports the prosecution version of the incident. The evidence of such witnesses cannot be treated as washed off the records, it remains admissible in trial and there is no legal bar to base the conviction of the accused upon such testimony, if corroborated by other reliable evidence. Section 154 of the Evidence Act enables the court, in its discretion, to permit the person, who calls a witness, to put any question to him which might be put in cross-examination by the adverse party.

37. The view that the evidence of the witness who has been called and cross-examined by the party with the leave of the court, cannot be believed or disbelieved in part and has to be excluded altogether, is not the correct exposition of law. The courts may rely upon so much of the testimony which supports the case of the prosecution and is corroborated by other evidence. It is also now a settled canon of criminal jurisprudence that the part which has been allowed to be cross-examined can also be relied upon by the prosecution. These principles have been encompassed in the judgments of this Court in the following cases:

- (a) Koli Lakhmanbhai Chanabhai Vs. State of Gujarat, ,
- (b) Prithi Vs. State of Haryana, ,
- (c) Sidhartha Vashisht @ Manu Sharma Vs. State (NCT of Delhi), and
- (d) Ramkrushna Vs. State of Maharashtra, .

9. In Gagan Kanojia and Another Vs. State of Punjab, , the Supreme Court has held that part of the statement of a child witness, even if tutored, can be relied upon, if the tutored part can be separated from the untutored part, in case such remaining untutored part inspires confidence. In such an eventuality the untutored part can be believed or at least taken into consideration for the purpose of corroboration as in the case of a hostile witness.

10. We have examined the statements of PW-4 and PW-17 and are clearly of the view that the initial statements made by them should be accepted, as they are the true and correct versions. The subsequent statements, made by PW-4, when recalled for cross-examination on 29th January, 2011 and cross-examination of PW-17 on 6th April, 2010 do not represent the correct and true facts. In fact,

there is a contradiction in the statement made by PW-4 on 29th January, 2011 and the cross-examination of PW-17 on 6th April, 2010. PW-4 in the cross-examination on 29th January, 2011, has stated that he did not see anything because he was asleep. Even the date mentioned by him is incorrect. Similarly the time indicated by PW-4 as 12.30/1.00 A.M. is wrong and does not match with the statement of PW-17. PW-17, on the other hand, in the cross-examination had stated that he saw that his mother had gone to the kitchen where she caught fire. This is contrary to what had been stated in the MLC, that kerosene can fell on the deceased and a burning mosquito coil was lying there which led to accidental fire, burning Shashi. The statements of both PW-4 and PW-17 were recorded, u/s 164 Cr. P.C., by Nirja Bhatia (PW-21) Metropolitan Magistrate. Statements of Karan and Arjun, Ex. PW 4/A and PW 20/B, have been proved by her. The two statements match and confirm the statements made by PW-4, in the examination in chief and cross-examination on 15th February, 2008 and examination in chief of PW-17 on 16th May, 2009.

11. The appellant, in his statement u/s 313 Cr. P.C., accepted and admitted his presence in the house, on the night intervening 8th & 9th April, 2005. He has stated that he had taken his wife, with burn injuries, at about 1.30 AM to the hospital. The relevant portion of the statement of the appellant u/s 313 Cr. P.C. reads:-

Q. 42 Have you anything else to say?

Ans. I am innocent. I have been falsely implicated in this case. On the day of incident I was sleeping and at about 12.30 a.m. I got up after hearing the cries of my wife, I saw that my wife was burning, I tried to extinguish the fire and due to that I also received burn injuries. Ultimately I succeeded in extinguishing the fire by wrapping the blanket around my wife. I took my wife to the Brahm Shakti hospital on the scooter of one Vishal and on the way to hospital my wife told me that she received burn injuries due to falling of kerosene oil and burning of mosquito coil clothes of my wife caught fire and she screamed due to burn injuries and I got up and tried to save my wife.

12. Dr. Abhishekh Sharma (PW-14), working as Senior Resident in Safdarjung Hospital, had prepared the MLC (PW 14/A). In the cross-examination, he has stated that the patient Shashi had herself given the alleged history, recorded in the said MLC, and at that time she was fit to make a statement. MLC Report (Ex. PW 14-A) notes that the deceased had suffered injury at 1.00 AM and the admission was at 3.10 A.M., on the same date. However, it is pertinent to mention that it does not record who had made the statement recorded therein.

13. Suman (PW-9), a neighbour, resided at D-4/24 Sector 20 Rohini, Delhi. She deposed that the intervening night of 8th & 9th April, 2005, at about 1.00 AM/1.30 AM, she heard cries of a male and a female. Subhash, the appellant and their neighbour, knocked at Suman's door and told her that his wife had received burn injuries. Subhash and her son Vishal had taken Shashi to the hospital, on a

two wheeler scooter. Later, Vishal returned to the house and the two children had stayed in PW-9's house from 1.30 AM to 8.00 AM of 9th April, 2005. Thereafter, maternal uncle, of the two children, took them home. Vishal appeared as PW-10 and made a similar statement that he, along with Subhash, had taken Shashi to Brahm Shakti Hospital.

14. Constable Dalbir Singh (PW-11), had taken photographs (Ex. PW 11/A to PW 11/E). The photographs, in question, contradict the stand taken by the appellant. A bed is clearly visible in the photograph PW 11/A. The bed and the bed cover etc. thereon were not burnt. A gas stove, next to the bed, is clearly visible. There are burn signs, adjacent to the gas stove, but the stove was not burnt (see Ex. 11/E). No almirah next to the bed is visible. A careful examination, of the photographs, shows that personal belongings kept in the house did not burn. Burning marks are confined to a particular spot, in the house. The photographs contradict the defence plea that a kerosene can had fallen and the deceased Shashi had accidentally caught fire because mosquito coil was burning.

15. ASI Chandan Singh (PW-13) has stated that he visited the deceased, at Safdarjung Hospital, and collected her MLC Report. At that time, the deceased was unfit for statement. Thereafter, he went to the house of the deceased. It was open and nobody was there. He observed smell of kerosene in the room and one yellow colour plastic can was lying there. He found few burnt clothes and one burnt blanket in the house. The goods were lying scattered. He recorded statement of Kiran (PW-3), on this basis rukka was prepared and FIR was registered. Thereafter, he recorded statement of Arjun and Karan. Subsequently, the appellant made a disclosure statement (Ex. PW 5/B) and, on the basis of disclosure statement, one plastic can of yellow colour was recovered from the park. In the cross-examination, he clarified that he had not seen the plastic can of yellow colour in the room. We may record that plastic cans are visible in the photographs but they are of white colour. PW-13 has stated that he had forgotten some facts in his examination-in-chief. He was recalled for further cross-examination but there was nothing in his cross-examination to dent or create doubt about the prosecution case. In the cross-examination, he reiterated that no kerosene can was lying on the spot and the yellow can was recovered on the basis of the disclosure statement made by the appellant.

16. HC Bijender (PW-16) visited the spot i.e. the house No. D-4/39 Sector 20, Rohini and in the first room he found some burnt clothes, i.e. shirt, baniyan, T-shirt and a blanket. Crime team was called and photographs were taken. He did not find any eye-witness at the spot. He remained at the spot, while the Investigating Officer had gone to the hospital. The burnt items were smelling of kerosene and were seized. Kiran's (PW-3) statement was recorded by the Investigating Officer.

17. HC Sunil (PW-20) was part of the investigating team, along with ASI Chandan Singh and I.O. SHO Mohd. Iqbal. On identification, by Nand Kishore (PW-5), the appellant was arrested at 6.10 A.M. vide arrest memo (Ex. PW 5/B).

On the basis of the disclosure statement, kerosene can, which contained some kerosene and smelled of it, was found in the DDA Park, near the house (Seizure Memo Ex. PW 5/D). Disclosure statement of the appellant was recorded at 6.15 A.M., at the spot, while sitting at the footpath.

18. Inspector Mohd. Iqbal (PW-24), the SHO and the Investigating Officer, inspected the spot before the crime team reached. He has stated that previous Investigating Officer, ASI Chandan Singh, had partially completed investigation and had lifted few articles from the spot i.e. burnt chunni, shirt, T-shirt and one blanket. He recorded statement of Karan and Arjun, both sons of the appellant Subhash. Statement of Nand Kishore (PW-5), father of the deceased, was also recorded. Appellant Subhash was arrested at the pointing out of PW-5, and on the basis of the statement of Subhash, the appellant, the kerosene can was recovered from DDA park, seized vide seizure memo Ex. PW 5/D. PW-24 also proved the prosecution version and recognized the plastic kerosene can, in the court. He has stated that, at the spot where the incident occurred there were burn marks, on the wall and the floor, and smell of kerosene was present.

19. There is no doubt that plastic can was recovered, in the early morning on 9th April, 2005 at about 6.15 AM, at the instance of the appellant. Recovery of the can is an important seizure. Crime team, as noticed, had reached the spot immediately and they have not mentioned regarding presence of any plastic can with kerosene. There were no burn marks, in the kitchen and bathroom, as per Mohd. Iqbal (PW-24). He averred that he could not record the deceased's statement, because the Doctor told him that she was not fit for statement.

20. Nand Kishore (PW-5), father of the deceased, had gone along with his wife Kiran (PW-2) and son Kamal to Brahm Shakti Hospital and to Safdarjung Hospital. His daughter Shashi was unconscious, when he met her, and she was taken in three wheeler scooter to Safdarjung Hospital from Brahm Shakti Hospital. On 10th April, 2005, Subhash was arrested and, thereafter, on the basis of disclosure statement made by him the kerosene can was recovered from the park. He has signed the seizure memo Ex. PW 5/D.

21. In view of the aforesaid discussion, we uphold the conviction of the appellant u/s 302 IPC for having committed murder of his wife Shashi Sharma. We also uphold the order of sentence of life imprisonment with fine of Rs. 10,000/-. We, however, modify direction of the trial court and hold that in default of payment of fine, the appellant will undergo simple imprisonment for two months. The Child Welfare Committee is called upon and required to get in touch with Karan and Arjun and take appropriate and required measures as per law to ensure that they are properly educated, taken care of and protected. Copy of this judgment will be sent to the Child Welfare Committee. The appeal is disposed of.