
(2009) 01 DEL CK 0190
In the Delhi High Court
Case No : Criminal Appeal 279 of 2007

Uma Shankar

APPELLANT

Vs

State of NCT of Delhi

RESPONDENT

Date of Decision : 21-01-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 174
Penal Code, 1860 (IPC) — Section 302

Citation : (2009) 01 DEL CK 0190

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

Bench : Division Bench

Advocate : Jitender Khanna, for the Appellant; Richa Kapoor, for the Respondent

Final Decision : Allowed

Judgement

Pradeep Nandrajog, J.—As per the testimony of Dewan Singh PW-4, father of the deceased Vidhya, recorded on 16.9.2004, the appellant Uma Shankar and Vidhya; the deceased were married about 18 ? 19 years ago and four children, three sons and one daughter were born to them. Vidhya died on 14.11.2000. She died after 14 years of her marriage.

2. On 12.11.2000, Vidhya suffered burn injuries while in her house. It was around 1.00 PM. She was rushed to Safdarjung Hospital where she was admitted, as per MLC Ex.PW-17/A, at 2.15 PM. Dr. Charu Sharma examined Vidhya and recorded in the MLC that the patient was brought with a history of sustaining burn injuries accidentally from pressure stove while she was cooking food. Contemporaneously, a telephonic information was received at the police station Sangam Vihar at 1.12 PM on 12.11.2000, pursuant where to DD Entry No. 7-A was recorded that the caller was calling from phone No. 6072274 and had informed that a lady had burnt herself behind House No. 607, Gali No. 10, Budh Bazar, Devli Gaon.

3. HC Ram Pal PW-8, posted at PCR van No. E-55 and in-charge of the van, also

received information from the control room that a lady had been burnt in House No. 607, Gali No. 10, Budh Bazar, Devli and on receiving the said information he went to the address given and found Vidhya in a burnt condition. He took her in the PCR van and got her admitted at Safdarjung Hospital.

4. SI Satbir Janauna PW-13, posted at PS Sangam Vihar was handed over a copy of DD Entry No. 7-A and he reached House No. 607, Gali No. 10, Budh Bazar, Devli and learnt that Vidhya, wife of the appellant, had received burn injuries and had been removed to Safdarjung Hospital. He went to Safdarjung Hospital and moved an application Ex.PW-13/A for recording the statement of Vidhya and since the doctor opined that Vidhya was fit for statement he recorded her statement, Ex.PW-13/B. In the statement, Ex.PW-13/B Vidhya stated as under:

I reside at the afore-noted address. I was married about 16-17 years ago. I have four children out of which three boys and one is a girl. My elder son is aged 13 years. In the afternoon today at around 1.00 I had removed a can containing kerosene oil kept at the top of an almirah and was wanting to fill kerosene oil in a stove when the oil spilled out from the can which was without a cap and my clothes caught fire. At the time of the incident my husband and children were not in the house. No one is responsible for the incident. The incident occurred due to my negligence. The police has brought me to the hospital.

5. Being relevant for the purposes of present decision, since the statement of Vidhya has been recorded in vernacular, we propose to note a part of her statement in vernacular since same has been interpreted by the learned trial judge as unbelievable, resulting in the statement Ex.PW-13/B being rejected as untrustworthy. The same is as under:

...Mein almaari ke upar baney khany mein rakhi mitti tel ki kanny utar kar stove mein tel daalna chah rahi thi to bina dhakkan ki rakhi hui kanny se tel mujh par gir gaya aur mere kapdo mein aag lag gayi....

6. After recording the statement of Vidhya, SI Satbir PW-13, went to the house and seized a plastic can, one burnt match-stick and piece of pink colour saree and after preparing a pulanda sealed the same vide seizure memo No. Ex.PW-13/C.

7. Vidhya died at Safdarjung Hospital on 14.11.2000.

8. As per death report, Ex.PW-13/F, the deceased had 95% burn injuries which resulted in her death.

9. We note that the post-mortem report of the deceased, lying unproved in the trial court record, opines that the deceased died due to shock resulting from flame burn injuries.

10. The police appears to have recorded statements of various persons, and being influenced by the statement Ex.PW-13/B made by Vidhya herself, chose not to register any FIR, till on 26.12.2003 the SHO PS Sangam Vihar recorded a

note, Ex.PW-12/B, as under:

On 12.11.2000 an information regarding sustaining burn injuries by a lady in Gali No. 10, Budh Bazar, Sangam Vihar, was received from South District Control Room which was recorded vide DD No. - 7A and was entrusted to SI Satya Veer Janola. SI Satya Veer Janola reached Safdarjung Hospital, collected MLC No. 11505/2000 in respect of injured Smt. Vidhya Devi w/o Shanker R/o H.No.607, Gali No. 9, Budh Bazar, Sangam Vihar and recorded her statement wherein she stated that she had sustained accidental burn while cooking food. Smt. Vidhya Devi succumbed to her injuries in hospital same day. The IO conducted the Inquest proceedings u/s 174 Cr.P.C. and recorded the statement of relevant persons including that of Kumari Sunita, the daughter of the deceased, age about 8 years. Whereas, the other persons made their statement suggesting that it was a case of accident, Kumari Sunita categorically stated that her father had beaten her mother with the belt, taken her to a room, poured kerosene oil on her, set her on fire and fled away from the house.

As Kumari Sunita and other persons made contradictory statements, the IO sought prosecution opinion with a regard to whether a case is made out or not. After seeking some clarification, the Chief Prosecutor did not give any opinion and left the matter to the investigating agency to decide which of the statement was correct. The chief prosecutor sent his note on 15/05/2000 but the same was not taken-up further and was lying with the different IO's without any action.

Prima-facie, a case punishable u/s 302 IPC is made out from the statement of Kumari Sunita who is the sole eye witness to the incident and as such is most reliable. It would have been appropriate to register a case and investigated to find out the truth but the same was not done by the IO's for the reasons known to them.

If approved, we may register a case u/s 302 IPC on the statement of Kumari Sunita and investigated it.

Submitted for orders please.

11. A belated FIR, Ex.PW-2/A, was registered on 6.1.2004 u/s 302 IPC. Uma Shanker, husband of the deceased was sent for trial.

12. Needless to state, the belated registration of the FIR has resulted in vital evidence not coming on record. We note that along with the challan neither the site plan prepared nor photographs taken at the spot were filed, much less proved at the trial. Further, the persons whose statements were recorded (as noted in Ex.PW-12/B) have not been listed as witnesses. It is relevant to note that in the note Ex.PW-12/B it has been recorded that some persons made statements to the police suggesting that it was a case of accident.

13. Evidenced by the note Ex.PW-12/B, Kumari Sunita, the daughter of Vidhya was the sole and the star witness of the prosecution. Everything turned on her testimony.

14. She was examined on 16.9.2004 and stated that she had three brothers and that she was the only sister. She stated that on 12.11.2000 at 1.00 PM she was present in the house with her parents and along with her mother had gone to a doctor to buy medicines. Her father reached the shop of the doctor and started beating her mother. He caught hold of her mother's hand and brought her to the house and gave her further beating with hands and belt. She said that her father told her mother that he would keep one Ms.Kamlesh and would leave her mother and that thereafter her father took her mother into the kitchen and after pouring kerosene oil bolted the kitchen from outside and ran away. She raised an alarm. The neighbours gathered. Somebody informed the police. The police took her mother to the hospital. After 2 days her maternal uncle Kalua came to their house and took her and two of her brothers viz. Rahul and Bablu to his house and since then she is living in the house of her maternal uncle at Mahmood Pur, Meerut. On being cross-examined, she stated that her elder brother Babban is deaf and dumb and lives in a deaf and dumb hospital at Ballabgarh. That her brothers Rahul and Bablu are not studying and are residing with her maternal uncle Kalua. She stated that she did not remember the name of the school where she was studying in the year 2000. She stated that her brothers Rahul and Bablu were present in the house when her mother was burnt and that there were two tenants in the house one of whom was Kamlesh. She stated that when her father threw a matchstick at her mother she cried "bachao bachao" on which a tenant opened the latch of the kitchen and stopped her from going inside telling her that she would also receive burns. To a specific question as to whether there used to be fights between her parents before the date of the incident, she responded that no quarrel took place between her mother and father before the date of the incident. On being further cross- examined, she stated that she had come to the Court from the house of her maternal uncle. She denied the suggestion that she was deposing falsely.

15. Father of the deceased, Dewan Singh PW-4, deposed that he received information of the death of his daughter on being informed by his son-in-law. He stated that he took the dead body of his daughter and cremated her. He stated that the appellant used to quarrel with his daughter and used to harass his daughter.

16. Relevant would it be to note that PW-4 gave no particulars or incidences of the alleged harassment caused to his daughter.

17. Kalua PW-5, the brother of the deceased deposed that the accused and his sister lived happily but just before the death of Vidhya there used to be quarrel as the appellant wanted to sell the house and his sister was opposing the same. He stated that the appellant had developed illicit relations with some woman. He stated that he received information of his sister being burnt on 14.11.2000 and came to Delhi on 15.11.2000 and learnt that his sister had expired.

18. Relevant would it be to note that PW-5 did not depose about his sister ever telling him that the appellant used to physically assault her. It would be relevant

to note that as per PW-5 the cause of the verbal quarrel between the husband and the wife was the desire of the appellant to sell the residential house and the opposition of the deceased; a recent event.

19. Vide impugned judgment dated 12.3.2007, the learned Trial Judge has convicted the appellant holding that the testimony of the daughter of the appellant, PW-3, Kumari Sunita inspired confidence. Discussing the statement made by the deceased at the hospital to PW-13, i.e. Ex.PW-13/B learned Trial Judge has, in para 11 and 12, held as under:

11. In the present case it has to be seen in the light of all these facts whether the dying declaration inspires confidence or not. The deceased had stated that she was taking down the can which was placed above the almirah to put kerosene oil in the stove. There was no cap on the can and the oil fell on her due to which her clothes got fire and she sustained burn injuries. It is important to note that she was taking down the can which was above the almirah to put kerosene oil on the stove meaning thereby that the stove was not burning at that time as it was to be filled with the kerosene oil. The second important point is that no pressure stove was recovered from the place of incident which clearly shows that incident has not taken place as stated by the deceased in her statement to the IO. There is one witness examined as PW6 who is from the public. He has stated that deceased has also told him about the incident. Witness deposed that:

...the wife of the accused told me that she got burnt while preparing food and stove burst....

But this also does not find support from the circumstances. From the scene no vegetables or dough used for making chappaties were recovered. Only articles recovered from the spot are one can on which SERVO PRIDE was found written with about 25 ml kerosene oil Ex.P-1 and match stick with its one end burnt Ex.P-3 and some pieces of pink colour saree Ex.P-2. If the testimony of PW-6 is to be believed that deceased told him that she sustained burn injuries due to burst of stove, then from the kitchen pieces of stove should have been found and as she was preparing food some utensils used for preparing the food had to be there. Surely there should have been some cut marks or injuries on the person of the deceased sustained due to flying pieces of stove. There should have been marks on the walls also due to the burst of stove but no such circumstance or evidence could be found on the spot. All these circumstances clearly shows that the dying declaration given by the deceased is not true and correct version of the circumstances leading to her death. Similarly the statement of PW-6 also cannot be relied upon as the circumstances do no support his testimony. According to the dying declaration she was taking down the can to put kerosene oil in the stove. For this purpose there should have been a pressure stove on the spot but no such stove was found on the spot. Secondly as the kerosene was to be put in the stove the obvious inference which can be drawn is that the stove was not burning. If she burnt the stove after pouring kerosene in the stove then she

would have changed her clothes.

12. No doubt it is to be believed that a person who is going to meet his maker would not tell a lie but in the present case the circumstances show that she had deliberately given a false statement may be due to the reason that she had four children and there was nobody to look after her children after her as all were minor. They have to stay with her husband as her relatives were not in Delhi or they would have to live alone in Delhi and all these circumstances pressed in her mind and she exonerated her husband. Keeping in view all these facts in my opinion the dying declaration Ex.PW-13/B does not inspire confidence and cannot be relied upon.

20. We have carefully perused the testimony of PW-3 as also Ex.PW-13/B.

21. Before we analyze the two, it needs to be noted that the learned Trial Judge did not have the benefit of a site plan nor did he have the benefit of the photographs of the place where the unfortunate incident took place. Even we are suffering the same handicap. Had the site plan and the photographs been filed, the same would have told their own story.

22. Thus, if any doubt arises vis-?-vis the location of the almirah where from the can containing the oil was removed and the place where Vidhya caught fire or was burnt, benefit has to be to the credit of the appellant.

23. The learned Trial Judge has noted that Ex.PW-13/B records that Vidhya was taking down the can which was placed above the almirah to pour kerosene oil in the stove and since there was no cap on the can, kerosene oil fell on her due to which her clothes caught fire.

24. The learned Trial Judge has been at pain to note that the statement does not record that Vidhya was to pour kerosene oil in the stove, where from a conclusion has been drawn that the stove was not burning at that time (See underlined portions of para 11 of the impugned decision as extracted in para 19 above.) The second point noted by the learned Trial Judge is that no pressure stove was recovered from the place of incident.

25. We note that the recovery memo Ex.PW-13/A records the seizure of a plastic can, one burnt match stick and a piece of burnt cloth.

26. If we peruse Ex.PW-13/B it becomes apparent that the maker thereof has apparently clubbed two events, one of removing the kerosene oil can from the top of the almirah and the second of filling the stove with oil from the can.

27. It is not clear in the statement, whether Vidhya, had intended to state that she was in the process of removing the can, intending to fill kerosene oil in the stove, or that having removed the can from the top of the almirah when she was intending to fill kerosene oil in the stove, some oil spilled on to her and her clothes caught fire.

28. If we peruse the testimony of PW-3 we find that she has categorically

deposed that her father took her mother inside the kitchen and poured kerosene oil over her and set her mother on fire and bolted the door from outside. She has further stated that a neighbour, who, hearing her screams, came to the house and opened the door of the kitchen.

29. It is apparent even from the testimony of the PW-3 that Vidhya had caught fire in the kitchen.

30. What needs to be considered is, whether PW-3 could be tutored.

31. It assumes importance to note that immediately after the incident, PW-3 and her two brothers started living in the house of their maternal uncle Kalua PW-5 and remained there. Even on the date when PW-3 was brought to the Court to depose as a witness of the prosecution she came from the custody of her maternal uncle.

32. There are traces of PW-3 being tutored. In her examination-in-chief she has deposed that her father used to beat her mother but in cross-examination admitted that no quarrel took place between her parents prior to the date of the incident.

33. This lends credence to the fact that the relationship between the appellant and his wife were cordial and if at all there were hiccups, the same were the usual ones which do happen between a married couple.

34. The importance of the site plan and the photographs may be highlighted. The position of the almirah where from the can of oil was removed, the distance thereof from the kitchen, or if in the kitchen, its exact location, the exact spot where from burnt matchstick, burnt pieces of cloth and the can were recovered would have thrown light on the site where the incident occurred. In the absence thereof there is a handicap in evaluating the testimony of PW-3.

35. We note that since Vidhya died soon after making her statement to the investigating officer, the same has to be treated as her dying declaration unless there is evidence to establish that she was under the control of someone who made her speak falsely.

36. In this connection it is important to note that Vidhya was removed to the hospital by HC Ram Pal PW-8, who, on cross-examination, has stated that no other family member of Vidhya accompanied her to Safdarjung Hospital when he took Vidhya to the hospital. This means that the appellant was not present in the hospital when Vidhya was admitted. Thus, his influencing Vidhya is ruled out. The statement of Vidhya that when the incident occurred her children and her husband were not in the house stands corroborated by the testimony of PW-8 HC Ram Pal.

37. We find corroboration to the statement of Vidhya in the MLC Ex.PW-17/A, wherein the doctor who examined Vidhya, while recording the case history has recorded: "H/O sustaining burns accidentally from pressure stove while she was

cooking food." Since no family member was present when Vidhya was admitted at the hospital, who else other than Vidhya could have given the said history.

38. We further note that as deposed by PW-13, he recorded the statement of Vidhya after moving an application, Ex.PW-13/A, to the doctor seeking permission of the doctor to examine Vidhya, on which application the doctor certified Vidhya to be fit for making a statement.

39. Unfortunately, the learned Trial Judge has ignored the afore-noted vital evidence and circumstances.

40. We are of the opinion that on the evidence on record it is difficult to return a finding that the evidence on record unerringly points towards the guilt of the accused and rules out his innocence.

41. It would be of importance to re-state that the FIR has been recorded after 4 years of the incident and the charge-sheet was filed without vital documents i.e. the site plan of the site of occurrence as also the photographs. Unfortunately, even statement recorded u/s 161 Cr.P.C. by the investigating officer immediately after the incident have also not seen the light of the day. We re-emphasize that in the note Ex.PW-12/B it has been recorded that some persons made statements suggestive of the fact that the incident was a pure accident.

42. The appeal is allowed.

43. Impugned judgment dated 12.3.2007 and order on sentence dated 29.3.2007 is set aside.

44. The appellant is directed to be set free if not required in any other case.

45. Copy of this order be sent to Superintendent, Central Jail, Tihar, New Delhi.