

Cr. Appeal No.11/2010
Cr.M.A.No.49/2012
c/w Confirm 03/2010

Uma Devi

State of J&K and others

Hon'ble Mr. Justice Hasnain Massodi, Judge
Hon'ble Mr. Justice Bansi Lal Bhat, Judge

For appellant(s): Mr. Aditya Gupta, Advocate
Mr. Munish Sharma, Advocate.
For Respondent(s): Mrs. Neeru Goswami, Dy. AG.

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| i. | Whether approved for reporting in Press/Media | : Optional |
| ii. | Whether to be reported in Digest/Journal | : Yes |

1. Late Mohinder Paul son of Bhagat Ram resident of Dani Dhar, Rajouri, was in the late evening of 14th May 2004, admitted in District Hospital, Rajouri, as a burn case with burn injuries on his neck, chest, abdomen, upper limbs and right lower limbs.

2. ASI Khadim Hussain P/S Rajouri on getting information about admission of injured Mohinder Paul in District Hospital, Rajouri, rushed to the hospital to record his statement. However, the doctor attending on the patient, declared him unfit to make any statement. The police officer made a second attempt on 15th May 2004. This time the doctor declared patient to be

capable of making statement. His statement was accordingly recorded. Mohinder Paul narrating events of 14th May 2004 evening stated that his wife – appellant before the Court, on 14th May 2004 at about 9.30 P.M., hiding behind a drum in their house, suddenly threw kerosene oil on him as soon as he entered the house and thereafter set him on fire; that he rushed out of the house, tried to put off fire by rolling on ground and was carried by neighbours who assembled on the spot to District Hospital, Rajouri. Explaining reasons that made his wife to make an attempt on his life, deceased stated that his wife was a woman of *easy virtue* and his efforts to reform her, made her inimical towards him, resulting in the murderous assault.

3. The statement recorded prompted police station Rajouri to register case FIR No.35/2004 under Section 307 RPC against appellant. The investigation was entrusted to ASI Khadim Hussain. The condition of patient deteriorated. He was shifted to Government Medical College Hospital Jammu, where he breathed his last on 19th May 2004. The case was, therefore, converted into offence punishable under Section 302 RPC.

4. The Investigating Officer took over the dead body, got its post-mortem conducted, recorded statements of all those acquainted with facts and circumstances of the case including the doctor in whose presence statement of deceased was recorded on 15th May 2004 and the doctor, who conducted autopsy. The investigation on the strength of material collected during investigation was concluded as proved against appellant. She was taken into custody, after deceased succumbed to injuries in Government Medical College Hospital, Jammu. The appellant was found to have committed murder of her husband by setting him on fire and therefore, guilty of offence punishable under Section 302 RPC.

5. Station House Officer Police Station Rajouri presented charge sheet alleging commission of offence punishable under Section 302 RPC against appellant before Chief Judicial Magistrate, Rajouri, on 3rd July 2003. The case was committed to Sessions on 29th July 2013. The accused was formally charged of the offence punishable under Section 302 RPC on 2nd September 2004. She pleaded not guilty. The prosecution, in the circumstances, was asked to prove charge against appellant.

6. The prosecution examined all the witnesses listed in the charge sheet with the only exception of Shri Sajad Ahmad Khan Inspector SHO P/S Rajouri. The witnesses examined by prosecution included Master Pankaj Kumar and Master Ankush Kumar – two minor sons of deceased and appellant, as also PWs Madan Singh *alias* Bitu, Satya Devi, Ashok Bali and Wazir Hussain as witnesses to occurrence. S/Shri Amar Nath, Sushil Kumar and Dr. Rajinder Kumar, in whose presence dying declaration was recorded, also crossed the witness box.

7. The circumstances appearing in the prosecution evidence were put to appellant on 8th August 2009 so as to enable him to offer his explanation. The appellant denied veracity of prosecution evidence. She attributed the statements made by her minor sons to the influence their grandfather had on minors. She admitted that deceased died because of burn injuries. However, she took the stand that her husband was a drunkard and accidentally caught fire from Chullah (stove) in the kitchen in her absence and some people who had enmity with appellant took advantage of accident and falsely implicated appellant in alleged murder of her husband. The appellant examined two witnesses—DWs

Sushil Kumar and Sunil Kumar in her defence. The witnesses are brother and elder son of the deceased.

8. The Trial Court on going through charge sheet, evidence adduced by prosecution to substantiate the charge and statement of appellant under Section 342 Cr.P.C. and defence evidence held prosecution to have proved its case against appellant beyond reasonable doubt. The appellant vide judgement dated 19th March 2010 was convicted of offence punishable under Section 302 RPC. Learned Sessions Judge by separate order dated 20th March 2010, opining that case before the court was not “rarest of rare cases” and therefore did not warrant death sentence, sentenced appellant to imprisonment for life and fine of Rs.5000/-.

9. Appellant questions Trial Court judgment dated 19th March 2010 and order dated 20th March 2010 through medium of Criminal Appeal on hand. The grounds set out in appeal are of routine type, like grounds come across in an appeal questioning conviction and sentence on conclusion of the criminal trial. It is averred that Trial Court judgement suffers from misappreciation of evidence. Trial Court is said to have allowed itself to be misdirected and record conviction without any material on file to connect

appellant with the alleged occurrence. The allegations set out in the charge sheet are said to be concocted by prosecution. The Trial Court judgement is said to be passed on statements of child witnesses, who later made effort to shift their stand. The prosecution evidence including testimony of child witnesses, according to appellant, suffers from serious discrepancies and contradictions and is therefore, rendered un-creditworthy. It is further averred that Trial Court after rejecting the dying declaration ought not to have relied on other prosecution evidence to hold appellant guilty of offence alleged against her.

10. Trial Court has submitted the proceedings under Section 374 Cr.P.C. for confirmation of sentence and it is registered as Confirm No.03/2010 and taken up along side Criminal Appeal No.11/2010.

11. We have gone through Trial Court judgement dated 19.03.2009 and order dated 20.03.2009, whereby appellant has been convicted of offence punishable under Section 302 RPC and sentenced to imprisonment for life and fine of Rs.5,000/-. We have gone through memo of Appeal as also Trial Court record and have heard learned counsel for parties.

12. The prosecution to bring home guilt to appellant/accused proposed to rely on “dying declaration” made by deceased and recorded by PW Khadim Hussain ASI on 15th May 2004, in presence of PWs Amar Nath, Sushil Kumar and Dr. Rajinder Kumar. Prosecution also intended to rely on testimony of prosecution witness Pankaj Kumar and Ankush Kumar – witnesses to occurrence and Madan Singh, Satya Devi, Ashok Bali, Ram Kali and Wazir Hussain, who immediately after occurrence saw deceased engulfed in flames rolling on ground outside his house to extinguish the fire. Support was also sought from testimony of PWs Dr. Rajinder Kumar, Dr. Manju Tickoo and other witnesses associated with investigation.

13. Let us see whether documentary evidence relied upon by prosecution was duly proved and whether witnesses to occurrence who crossed witness box, supported prosecution case and enabled it to prove its case beyond reasonable doubt against appellant. Trial Court discarded dying statement EXPW-AN on the ground that the date on which it was recorded was not free from doubt and so was not the capacity of deceased at the relevant time to make statement. Trial Court detected overwriting in the date of recording of dying

declaration and in the second line of statement recorded and held the overwriting to cast doubt on dying declaration in view of some discrepancies come across in the statement of witnesses who were claimed to be present at the time dying declaration was recorded. Trial Court suspected dying declaration to have been recorded on 14th May 2004 and not 15th May 2004 as shown in the dying declaration. Trial Court concluded so on the basis of insertions/overwriting made on the date of dying declaration and also statements of PWs Pankaj Kumar and Ankush Kumar, who claimed to have been present along side their father in District Hospital Rajouri and that their father narrated all the events during night of 14th/15th May 2004 to police. However, such a conclusion could not be drawn as PW Amar Nath admitted to have been informed about occurrence in morning of 15th May 2004 and to have visited the Hospital on 15th May 2004 and not on 14th May 2004, while PW Dr.Rajinder Kumar claimed to have declared deceased fit to make statement vide EXPW14/RK/1, after ASI Khadim Hussain approached with a written docket on 15th May 2004. The endorsement recorded by Doctor EXPW-14/RK/1, mentions 12.10 P.M. 15th May 2004 as time and date when deceased was declared fit

to make statement. On a similar docket dated 14th May 2004, PW Doctor had declared the deceased not fit to make statement. Trial Court, therefore, did not find it safe to place reliance on dying declaration and proceeded to sift other evidence on the file to reach a conclusion regarding guilt or otherwise of appellant. Trial Court obviously shifted focus on testimony of eye-witnesses to occurrence.

14. Prosecution witness Master Pankaj Kumar and Ankush Kumar are only witnesses to occurrence. They are minor children of deceased and appellant. PW Ankush Kumar deposed that deceased on his return from work in the evening of 14th May 2004 found his wife – appellant, not present in house and on enquiry was told by PW Pankaj Kumar that she had gone to house of her relation PW Ram Kali; that deceased sent PW Pankaj Kumar to ask appellant to return to her home; that after PW Pankaj Kumar proceeded to house of PW Ram Kali and the appellant did not return for a while, deceased himself went to house of PW Ram Kali; that the appellant returned to her house, whereafter deceased and PW Pankaj Kumar also came back to their home; that appellant hid herself behind drum inside house and the moment deceased entered

house, she threw kerosene oil on him and set him on fire; that deceased shocked when kerosene oil was thrown on him, asked appellant the reason for doing so, to which she responded by saying that it was a joke; that the appellant after saying so set him on fire; that PW Pankaj Kumar slapped appellant whereafter both children were turned out of house and on their alarm, PWs Madan Singh alias Bitu, Sethi, Sonu, and Wazir Hussain rushed to the spot. The witness has added that appellant even refused to allow those who assembled outside house, to make use of cart (Charpai) lying in her house for carrying deceased to Hospital. PW Pankaj Kumar confirming presence of PW Ankush Kumar at the scene of occurrence supported him in all minor details. PW Pankaj Kumar deposed before the trial Court that he at the instance of deceased went to house of PW Ram Kali to request appellant to return home; that she avoided to return and deceased thereafter went to house of PW Ram Kali to ask appellant to return home, whereafter appellant returned home; that appellant threw kerosene oil on deceased and thereafter set him on fire. PW Pankaj Kumar has deposed that deceased and appellant used to quarrel and as deceased disliked appellant he used to remain aloof. Both the witnesses

have confirmed presence of PW Madan Singh alias Bitu, Sethi, Sonu and Wazir Hussain, at the place of occurrence immediately after deceased engulfed in flames, rushed out of his house, rolled on the ground to extinguish the fire.

15. PWs Pankaj Kumar and Ankush Kumar are equally related to deceased and appellant and there is no reason to infer that they nursed ill-will or hatred against appellant and had a reason to falsely implicate her. PW Pankaj Kumar was 15 years of age and PW Ankush Kumar 11 years of age at the time they appeared in the witness box on 15th July 2005 and were a year younger i.e. 14 and 10 years of age at the time they witnessed occurrence. Their statements appear natural and uninfluenced account of the events of 14th May 2004 evening in the house of deceased. It sounds natural that deceased on his return from day long work in a neighbouring village, on finding his wife-appellant not in the house, asked his younger son PW Pankaj Kumar to go to PW Ram Kali's house and ask her to return home and when she avoided to return, to himself go to ask her to return. It equally sounds natural that PW Pankaj Kumar younger son of the couple, slapped appellant as a reaction to her setting deceased on fire. It

is quite normal that PW Pankaj Kumar aged 10 years reacted in said manner while PW Ankush Kumar 03 years elder to PW Pankaj Kumar did not so react but only raised hue and cry that attracted other prosecution witnesses to the scene of occurrence. Both prosecution witnesses have given vivid details of occurrence and their evidence does not suffer from any major discrepancy or contradiction as would persuade one to suspect their testimony to be outcome of any influence exercised by their grand father, as claimed by appellant or any other person.

16. The story of accidental fire projected by appellant does not fit in the facts and circumstances. It is important to note that deceased as per post-mortem report EXPW-15/MT, had burn injuries around the neck, at the front of the chest, back of the chest, abdomen and back, both upper limbs and both lower limbs except left leg and left foot and upper 2/3rd of right leg and right foot. The burnt area was approximately 80 percent. In first place, we do not find any record that "Chullah" was lit in the kitchen of the house of the deceased and appellant at the time of alleged occurrence was not in the house. Secondly, had it been a case of accidental fire caught from Chullah,

burns on the body would not have been so extensive, covering almost whole of the body as is recorded in EXPW-15/MT.

17. Testimony of PW Ankush Kumar and Pankaj Kumar, two minor children of appellant and deceased, are corroborated in essential details by other prosecution witnesses, who have seen deceased rolling on ground to put off fire, tried to douse the flames, informed police and shifted deceased to hospital. PW Madan Singh alias Bitu has claimed to have seen deceased in flames, to have rushed to spot, thrown blanket on deceased and put off fire. PW Satya Devi, also a neighbour, stated that on the day of occurrence at 9.30 PM, when she was on roof top of her house, she saw deceased in flames, raised hue and cry wailing that some body was burning and that PW Madan Singh carrying a blanket rushed to deceased wrapped him in blanket to put off fire. The witness claimed to have herself rushed to deceased, asked him as to what had happened to him, to which deceased replied that he was set on fire. PW Ashok Bali stated that he was attracted to the scene of occurrence by noise from house of deceased; that he rushed to place of occurrence, saw deceased in flames and deceased, who was conscious,

said that he had been set on fire by appellant. PW Ashok Bali claimed to have informed police about occurrence. PW Wazir Hussain made a similar statement though he claimed to have reached scene of occurrence a little after PWs Madan Singh, Satya Devi and Ashok Bali. Testimony rendered by PWs Pankaj Kumar and Ankush Kumar, therefore, finds corroboration in all essential details from testimony of PWs Madan Singh, Satya Devi, Ashok Bali and Wazir Hussain.

18. The prosecution evidence was supported by other witnesses namely PWs Neeraj Kumar, Mazhar Hussain, Dwarka Nath, Madan Lal, Dr. Rajinder Kumar, Dr. Manju Tickoo and ASI Khadim Hussain. The documentary evidence in the shape of EXPW-NK, EXPW-MH, EXPW-15/MT also reinforces prosecution case. In the circumstances, there was sufficient evidence brought on record by prosecution even in absence of dying declaration EXPW-AN, to connect appellant with the crime.

19. We are of the opinion that trial Court magnified discrepancies as regards time of recording dying declaration, out of proportion and unjustifiably excluded dying declaration EXPW-AN from the

prosecution evidence. There was convincing evidence on file to prove that PW Khadim Hussain approached the doctor attending on the deceased in late evening of 14.05.2004 itself after the deceased was admitted in the hospital. However, the patient (deceased) was declared unfit to make any statement. The Police Officer again approached the doctor in the afternoon of 15.05.2004 and the doctor declaring the patient (deceased) fit to make statement (EXPW-14/RK/I), allowed the Police Officer to record his statement, in his presence and in presence of other witnesses. The doctor (PW – Rajinder Kumar), wrote a certificate (EXPW-14/RK/I) on the reverse of the dying declaration (EXPW-AN) affirming that the statement was recorded in his presence. PW – Khadim Hussain who recorded the dying declaration, PWs – Amarnath and Dr. Rajinder Kumar in whose presence the dying declaration was recorded, proved EXPW – AN. Their statements were tested at the anvil of cross examination and were not in any manner discredited or impeached. In the circumstances, only because PWs – Ankush Kumar and Pankaj Kumar state that the deceased during night intervening 14th/15th May, 2004 narrated the events to the Police should not have prompted learned Trial Judge to disregard EXPW-

AN. It is quite natural that a patient crying, on a sick bed may keep on repeating the reasons that led to his plight. This by itself would lead to the conclusion that the statement EXPW-AN was not made at the time and on the date recorded therein, moreso, when the scribe and the witnesses prove the statement and their testimony is left unscathed. We, however, do not propose to dilate on this aspect of the case as the evidence on record, other than EXPW-AN, convincingly proves the prosecution case.

20. The defence evidence on the other hand did not create any dents in prosecution evidence. DW Sushil Kumar is brother of deceased. His house is $\frac{1}{2}$ kilometres from residential house of deceased and he does not claim to have been present at the place of occurrence. The witness claims to have informed deceased in hospital that he accidentally caught fire. DW Sushil Kumar is elder son of deceased and has deposed that deceased accidentally caught fire from *Chullah* when he fell in an intoxicated condition near Chullah. He claims to have taken deceased to hospital with the help of neighbours. The witness in cross examination admitted that he saw his father when he was engulfed in flames. The evidence on record does not point to presence of DW

Sunil Kumar at the scene of occurrence. His statement that deceased was in intoxicated condition and caught fire when he fell near Chula, does not sound convincing in the background of statements made by PWs Pankaj Kumar and Ankush Kumar and also medical evidence on record.

21. The Trial Court, for the reasons discussed had before it cogent, convincing and reliable evidence, free from any ambiguity or serious contradiction, that connected appellant with alleged occurrence and helped prosecution to prove its case beyond any shadow of doubt. The Trial Court had, therefore, no option but to hold prosecution to have proved its case against appellant and to hold her guilty of having committed murder of her husband in the evening of 14th May 2004, by setting him on fire and convicted of offence punishable under Section 302 RPC. The sentence of imprisonment for life and fine of Rs.5000/- awarded vide order dated 20.03.2010 is also in accordance with law as it is lesser of two punishments that could have been awarded by the trial Court.

22. For the reasons discussed, we do not find any merit in the Appeal. The Appeal is, accordingly, **dismissed** and Trial Court judgement dated 19th March

2010 and order dated 20th March 2010 convicting appellant of commission of offence punishable under Section 302 RPC and sentenced to undergo imprisonment for life and fine of Rs.5000/- are upheld.

23. Confirm No.03/2010 is disposed of, accordingly.

(Bansi Lal Bhat)
Judge

(Hasnain Massodi)
Judge

Jammu
23/12/2013
Ajaz Ahmad