

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Date of Decision : 5th May, 2010

+ **CRL.A. 454/2010**

RAHIS Appellant
Through: Mr.V.Madhukar, Advocate and
Mr.Jayendra Sevada, Advocate

versus

STATE (NCT) OF DELHI Respondent
Through: Mr.M.N.Dudeja, Advocate

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE SURESH KAIT

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to Reporter or not?
3. Whether the judgment should be reported in the Digest?

PRADEEP NANDRAJOG, J. (Oral)

1. With reference to the testimony of Mst.Hajjan PW-1; the testimony of SI Prakash Roy PW-9 and the statement Ex.PW-1/A recorded by him and as made by deceased Rizwana; and lastly the testimony of Sh.A.K.Passi and the statement Ex.PW-3/A recorded by him and as made by Rizwana, the learned trial Judge has returned a finding that the prosecution has successfully established that deceased Rizwana made three dying declarations to the cause and circumstances of her death and in each statement she inculpated her husband, the appellant Rahis; holding further

that the burn injuries on Rahis stood explained not as the result of his attempting to save his wife but as the consequence of his attempting to prevent his wife from dousing the flames on her, as deposed to by Mst.Hajjan PW-5; vide impugned judgment and order dated 19.11.2009, appellant Rahis has been convicted for the offence of having poured kerosene oil on his wife with the intention to burn her in the early hours of the morning on 30.07.2007 and thereafter set her on fire as a result of which she died, thereby committing an offence punishable under Section 302 IPC.

2. In para 25 of the impugned decision, the learned trial judge has held that the dying declarations are consistent and made after short interval immediately after the deceased suffered burn injuries and hence inspire confidence. In para 26 it has been held that the dying declarations do not suffer any infirmity and there is no evidence that the deceased was tutored.

3. D.D.No.35-A, Ex.PW-9/A, has been recorded at PS Gokalpuri Delhi at 5:44 AM on 30.07.2007 recording firstly that a lady had set herself on fire in a house in street No.1, Mustafabad, Tirpal Factory; immediately followed by the narrative therein that a lady has been set on fire in House No.66/11, Street No.1, Old Mustafabad.

4. The information aforesaid has been recorded at the

police station on being relayed through police control room where a PCR call was made by somebody and hence the nearest PCR van was rushed to the place of the incident. ASI Karan Singh incharge of PCR Van No.36 rushed Rizwana as also her husband Rahis to GTB hospital, a fact recorded on the MLC Ex.PW-11/B of the appellant and the MLC Ex.PW-11/A of Rizwana. On both MLCs it is recorded that ASI Karan Singh of 36 PCR Van had brought the two to GTB Hospital Shahdara.

5. Dr.Ravinder Singh Junior Resident at GTB hospital attended to Rizwana and prepared the MLC Ex.PW-11/A recording therein that Rizwana was brought to the hospital at 6:40 AM on 30.07.2007 and that she was conscious and oriented as also fit for statement. He recorded her B.P. as 100/70 mm/Hg and her pulse at 110 per minute. He further recorded that neither her left thumb nor her right thumb impression could be taken on the MLC as the impressions thereon were not traceable. After giving emergency and immediate medical treatment to Rizwana he referred her over to the surgical department.

6. Simultaneously, Dr.Avinash Jivan Taggi examined the appellant recording therein that he had been admitted at GTB hospital at 6:35 AM by ASI Karan Singh. On the MLC Ex.PW-11/B he recorded that appellant had burns over both arms covering 15% to 18% of the body surface area.

7. As deposed to by SI Prakash Roy PW-9, DD No.35-A was entrusted to him for investigation and he left the police station accompanied by Const.Anil. On reaching House No.66/11, Gali No.1, Old Mustafabad, Delhi, they learnt that Rizwana had been removed along with her husband to GTB hospital in a PCR Van. He inspected the spot and called the crime team. He seized a kerosene plastic dabba and sealed the same as recorded in seizure memo Ex.PW-8/D. Two beat constables reached the spot and he directed them to guard the spot. Accompanied by Const.Anil he reached GTB Hospital where he found Rizwana admitted for treatment having 90% to 95% burns and declared fit for statement and thus he recorded the statement Ex.PW-1/A of Rizwana and took the thumb impression on the statement at point 'X'. One Dr.Ram Millan PW-1 was present when he recorded Rizwana's statement, who appended his signatures at point 'Y' beneath the statement. SI Prakash Roy passed on the information for an Executive Magistrate to be sent and very soon Mr.A.K.Passi the Executive Magistrate (PW-3) came to the hospital and recorded Rizwana's statement Ex.PW-3/A. He thereafter got the FIR registered. Since the appellant was at the hospital under treatment SI Prakash Roy arrested him as recorded in the arrest memo Ex.PW-8/A. At the spot SI Prakash Roy summoned the crime team and got photographed a room

where he found evidence of somebody being burnt i.e. burnt clothes, sheet etc. being found. This was the room in which he had picked up a plastic can as recorded in the memo Ex.PW-8/D.

8. Rizwana could not survive and information thereof was received from the hospital on 06.08.2007 when DD.No.5B was recorded at the police station. Insp.Prakash Roy immediately went to the hospital, seized the dead body of Rizwana and sent it to mortuary. Inquest papers were filled up. Body was got identified and post-mortem was conducted. The doctor preserved the scalp hair of the deceased and handed over the same to him. Dr.Juthika Dev PW-4 conducted the post-mortem and opined that death was due to septicemia shock due to anti mortem burn injuries as recorded on the post-mortem report Ex.PW-4/A. Relevant would it to be note that no soot particles were found or detected in the trachea of the deceased.

9. Sh.A.K.Passi PW-3, Executive Magistrate Seelampur, deposed that he received telephonic call through SI Prakash Roy at 7:30 AM on 30.07.2007 about a lady being admitted at GTB in burnt condition. He reached GTB hospital at around 9:30 AM. SI Prakash Roy met him there. He found Rizwana at the hospital and the doctor had certified her for statement. He recorded her statement Ex.PW-3/A and after that Rizwana put

her thumb impression on the same at point 'X'.

10. Mst.Hajjan PW-5 deposed that deceased Rizwana accompanied by the appellant and her sister had come to her House No.66/11, Gali No.1, Old Mustafabad, Delhi a day prior to the incident as they wanted to take a room on rent. Next day evening at about 7:00 PM she i.e. Rizwana came alone, she i.e. Mst.Hajjan enquired as to where her husband was. Rizwana stated that her husband had another wife and had given everything to the other wife and had asked her for taking a room on rent. She gave a room on rent to her. At about 9:00 PM appellant came. The two wanted to spend the night in her house. Since there was no electricity in the room which she had let out, she requested them to sleep at the roof and gave assurance that she would make necessary arrangement for electricity to be supplied in their room on the next day and thereafter went to sleep after locking the main door. The next morning at about 5:00 AM she opened the door and saw deceased coming out of the toilet. The deceased asked her for key telling her that her husband had gone for *Pheri*. Thereafter she went to offer *Namaj* outside her room in the veranda. Deceased kept the key near her as she was not allowed to speak during *Namaj*. Thereafter she saw the deceased come out of her room in burning condition. She enquired as to what had happened. Deceased replied that her

husband had burnt her. Rahis, husband of the deceased was standing behind her. She told Rahis as to why has he done an act which may put everyone into a problem but he kept standing. Rizwana ran towards the toilet. Rahis did not move to save her. Thereafter Rizwana turn towards her room and when she passed by Rahis, he pushed her. Mohalla people gathered. Somebody called the police. Rahis could not escape as the main gate was closed. The police took both Rizwana and her husband. **(It is apparent that there is a typing error while recording the examination-in-chief of Mst.Hajjan where it is recorded that the deceased asked her for key telling her that her husband had gone for Pheri. The witness must have said that the deceased asked her for key telling her that her husband has to go for Pheri. Otherwise, the later part of her statement that when she saw the deceased in flame she saw her husband behind her would be in conflict.)**

11. Relevant would it be to note that Hajjan made considerable deviations from what she had told the investigating officer and as recorded in her statement Ex.PW-5/A under Section 161 Cr.P.C. On being confronted by the contents of her previous statement she denied having told the police that she heard noise from the room of the deceased and saw Rahis setting fire to Rizwana whose clothes were drenched

with kerosene oil or that she saw, much less told, that Rahis threw the kerosene oil container. She denied having seen or told the police that Rizwana had caught hold of the hand of Rahis who was trying to run away from the room.

12. Let us now pen down, after translating, the statement Ex.PW-1/A as also the statement Ex.PW-3/A made by Rizwana and recorded by SI Prakash Roy and A.K.Passi respectively.

13. Both statements are in vernacular and hence we translate the two. Ex.PW-1/A reads as under:-

“Statement of Rizwana, W/o Rahis, R/o House of Hajjan, Gali No.1, Old Mustafabad, Delhi aged 30 years.

I reside at the above noted address as a tenant since last two days and for 4-5 months prior thereto was residing with my mother and before that at the house of Babu Builder at Gali No.20, House No.251, Old Mustafabad. In said house I was residing with my husband Rahis. I got married to Rahis S/o Sabu about 4 months ago. This was his second marriage. From his first marriage, 3 children were born to him. About a month ago the first wife of Rahis named Ruksana had come to him and the two started living together in a house in Gali No.14, Mustafabad which was taken on rent, but Rahis kept on visiting me but later on stopped visiting me. Today night my husband Rahis came to me and spent the night with me. A minor altercation took place between the two on the issue of his first marriage and children and finding an opportunity Rahis poured kerosene oil on me in the morning and set me on fire. I cried. People from the neighbourhood came and somebody rang up the number 100. Police came and removed me to GTB Hospital”

14. It be noted that beneath the statement Ex.PW-1/A

the right thumb impression has been taken but without any ridges of the thumb being visible. The thumb impression is more like a blob. At point 'Y' signatures of Dr.Ram Millan stand appended.

15. The statement Ex.PW-3/A reads as under:-

"Statement of Rizwana, W/o Rahis R/o House of Hajjan, Gali No.1, Old Mustafabad, Delhi aged 30 years.

I reside at the aforementioned address as a tenant since last 2 days and before that I was residing with my mother. I was married to Rahis S/o Sabu about 3-4 months ago. About a month ago the first wife of Rahis named Ruksana came to Rahis and the two started residing in a house in Gali No.14, Mustafabad. 3 Children born to his first wife were also with her. After his first wife returned Rahis stopped visiting me. Yesterday i.e. on 29.7.2007 at around 10:00 PM Rahis came to me and spent the night with me. A minor altercation ensued between us on the issue of his first wife and children. Today morning when I was sleeping on a charpai (cot) in my room my slumber was broken and as I opened my eyes I saw Rahis pouring kerosene oil on myself and before I could yell for help he set me on fire. He attempted to flee but I caught his hands and cried for help. Somebody rang up the police. Police came and removed me to the hospital."

16. The notation made beneath the statement Ex.PW-3/A by Sh.A.K.Passi records that he recorded the statement at 10:00 AM. The right thumb impression has purportedly being taken. The same is a faint blob; ridges whereof are totally invisible.

17. In the two statements Ex.PW-1/A and Ex.PW-3/A Rizwana has not stated that in the morning when she got up

she went to the toilet and on return met the landlady Mst.Hajjan and requested her for the key of the main gate to be handed over to her as her husband had to go out for pheri. In the two statements made by her, it is apparent that all of a sudden her husband threw kerosene oil on her and set her on fire. It assumes significance to note that there is a variation inter se the two statements, for the reason in her statement Ex.PW-1/A she does not state that her slumber was broken when her husband threw kerosene oil on her. In the statement Ex.PW-3/A she so states. Further, in the statement Ex.PW-1/A she does not state that she was sleeping on a cot in her room. In the statement Ex.PW-3/A she so states. The statement Ex.PW-1/A, meaningfully read, shows that an altercation took place between the husband and wife in the morning on the issue of Rahis's first wife returning to him. In her statement Ex.PW-3/A it is stated with clarity that the altercation took place the previous night and that next day morning when she was sleeping Rahis poured kerosene oil on her and at that point of time her sleep was broken.

18. It is apparent that the manner in which Hajjan PW-5 has deposed to the events and circumstances of a dying declaration, nothing of that kind finds reflected in the two statements Ex.PW-1/A and Ex.PW-3/A. In no statement does Rizwana say that her landlady had come and to the landlady

she had made any dying declaration.

19. Apart from the differences in the two statements Ex.PW-1/A and Ex.PW-3/A noted by us hereinabove, it is further relevant to note that the place where she was set on fire has not been disclosed by Rizwana in the statement Ex.PW-1/A but has been disclosed in the statement Ex.PW-3/A where it is recorded that when she was sleeping on her charpai in the room when her husband threw kerosene oil on her and set her on fire.

20. The photographs Ex.PW-7/A to Ex.PW-7/D show burnt clothes inside a room. The 4 photographs show the entire room and no cot can be seen by us in the photographs. Burnt clothes can be seen by us in the said 4 photographs.

21. It is apparent that Rizwana was not sleeping on any cot as claimed by her in her statement Ex.PW-3/A. It is an admitted fact that the appellant had burn injuries extending over both hands and his forearms. 15% to 18% of the body area was affected by the parents. When examined under Section 313 Cr.P.C. the appellant stated that he was on the terrace when he heard noise and as he came down he saw Rizwana burning. He tried to douse the fire and in the process sustained burn injuries on his chest and arms.

22. It assumes importance to note that the date of the incident is the early morning of 30.7.2007. The month of July

is a hot and humid month in the city of Delhi. It also assumes importance that Hajjan PW-5 has deposed that since there was no electricity in the room and since the same was taken on rent just 2 days prior she had requested Rizwana and the appellant to sleep on the terrace. Thus, there is every probability that the two slept on the terrace and at some point of time Rizwana came to the room taken on rent, the room where she admittedly got burnt.

23. The question would be, whether Rizwana committed suicide or the appellant set her on fire.

24. The plastic container stated to be the one having kerosene as also the scalp hair of the deceased was sent for forensic examination and as per the FSL Report, not even formally proved by tendering, but available at page 277 to 303 of the Trial Court Record, show that no residue of either petrol, kerosene or diesel could be detected on either the scalp or the plastic container in question.

25. Absence of any inflammable oil on the scalp hair may be explainable as the result of less oil being thrown and hence no traces of residue of inflammable oil detected therein but it assumes importance that even in the container no traces of any kind of inflammable oil were detected.

26. The manner in which PW-5 has deposed to the dying declaration made by Rizwana is not reflected in

Rizwana's statement Ex.PW-1/A and Ex.PW-3/A. Further, as noted hereinabove there are discrepant statements by Rizwana in her two statements Ex.PW-1/A and Ex.PW-3/A. It assumes importance that no charpai is to be seen in the photographs Ex.PW-7/A to Ex.PW-7/D and this belies a substantial content of Rizwana's second dying declaration Ex.PW-3/A. It is also important to note that save and except one certification on the MLC of Rizwana that she is fit for statement at 6:40 AM there is no second certification of her being fit at 9:30 AM or 10:00 AM. This was the time when Rizwana's statement Ex.PW-3/A was recorded.

27. As held in the decision reported as 2007 (3) JCC 2355 Mehiboobsab Abbasabi Nadaf Vs. State of Karnataka where there are more than one dying declarations made by the deceased, extra care has to be taken to see as to which dying declaration inspires confidence and the one which inspires confidence has to be accepted. If none inspires confidence, each has to be discarded. In the same decision, in para 7, it was held that inconsistencies in the dying declarations is a relevant factor while placing reliance thereupon. It was held that since the deceased had taken different stands in different dying declarations, none could be safely relied upon. It is settled position that discrepant or mutually contradictory statement in successive dying

declaration rouse suspicion.

28. In the decision reported as 2006 (2) SCLAE 482 P.Mani Vs. State of Tamilnadu, in para 14, it was observed as under:-

“14. Indisputably conviction can be recorded on the basis of dying declaration alone but therefore the same must be wholly reliable. In a case where suspicion can be raised as regard the correctness of the dying declaration, the Court before convicting an accused on the basis thereof would look for some corroborative evidence. Suspicion, it is trite, is no substitute for proof. If evidence brought on records suggests that such dying declaration does not reveal the entire truth, it may be considered only as a piece of evidence in which even conviction may not be rested only on the basis thereof. The question as to whether a dying declaration is of impeccable character would depend upon several factors: physical and mental condition of the deceased is one of them.”

29. In the decision reported as AIR 1958 SC 22 Khushal Rao Vs. State of Bombay, the Supreme Court spoke as under; pertaining to dying declarations:-

“17. Hence, in order to pass the test of reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused who had no opportunity of testing the veracity of the statement by cross-examination. But once, the Court has come to the conclusion that the dying declaration was the truthful version as to the circumstances of the death and the assailants of the victim, there is no question of further corroboration.

If, on the other hand, the Court, after examining the dying declaration in all its aspects, and testing its veracity, has come to the conclusion that it is not reliable by itself, and that it suffers from an infirmity, then, without corroboration it cannot form the basis

of a conviction. Thus, the necessity for corroboration arises not from any inherent weakness of a dying declaration as a piece of evidence, as held in some of the reported cases, but from the fact the Court, in a given case has come to the conclusion that that particular dying declaration was not free from the infirmities, referred to above or from such other infirmities as may be disclosed in evidence in that case.”

30. Needless to state if there is motive emerging for the maker of the dying declaration to falsely implicate somebody, even same has to be factored in the decision making process.

31. Now, the motive for Rizwana to falsely implicate the appellant is surfacing, being her dejection, anger or hatred for the appellant who after getting married to her 3-4 months back chose to return to the company of his first wife.

32. Keeping in view the totality of the circumstances as aforesaid, which unfortunately have been glossed over by the learned Trial Judge, we are of the opinion that the appellant is entitled to, if not more, the benefit of doubt.

33. The appeal is allowed. The impugned judgment and order dated 19.11.2009 convicting the appellant for the offence of having murdered his wife is set aside. The appellant is acquitted of the charge framed against him.

34. Since the appellant is in jail we direct that a copy of this decision be sent to the Superintendent Central Jail Tihar with a direction that if not required in any other case, the

appellant be set free forthwith.

35. The last word. We place on record our appreciation for learned counsel for the appellant and the respondent. The instant appeal which was listed for preliminary hearing for the first time on 21.4.2010 and was admitted on said date was set down for hearing for today and within 2 weeks of the appeal being filed in this Court, the same stands disposed of.

**(PRADEEP NANDRAJOG)
JUDGE**

**(SURESH KAIT)
JUDGE**

**May 05, 2010
mm/mr**