2025 INSC 529

Reportable

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 2142 OF 2017

Aejaz Ahmad Sheikh ... Appellant

versus

State of Uttar Pradesh & Anr. ... Respondents

with

CRIMINAL APPEAL NOS. 2143-2144 OF 2017

J U D G M E N T

ABHAY S. OKA, J.

FACTUAL ASPECTS

1. These appeals arise from the same impugned judgment of the High Court by which one Hasim Sheikh (the accused) was acquitted of the offence punishable under Section 302 of the Indian Penal Code (for short 'the IPC'). The incident is very gruesome. It is the death of Amina (wife of the accused) and her three daughters, namely, Najma, Fatima and Salma, due to burn injuries.

Even Aslam (cousin of the accused) died due to the burn injuries sustained in the same incident.

2. The accused and Amina had three daughters Najma, Fatima and Salma and two sons Kamar Hasim and Kadam. The complainant is PW-1 Aejaz Ahmad Sheikh. He is the real brother of the deceased Amina. As the accused used to abuse and beat his deceased wife and deceased daughters, PW-1 visited the house of the accused on 26th December 2008. He made an attempt to resolve the issue. He was not successful. He was told to leave the house. While he was leaving the house, the deceased Amina told him not to go as the accused and his family members were intending to kill her. A few hours after PW-1 reached his home, he received a call that the accused, out of anger, along with his cousin Aslam, poured kerosene on Amina and the three daughters and set them on fire. Daughter Najma died on the spot, and the other three were admitted to the District Hospital. PW-1 rushed to the hospital and met his sister Amina, who disclosed that after

his departure, the accused, along with Aslam, poured kerosene on her and three daughters and set them on fire. On the very same day, Aslam was also admitted to the hospital due to burn injuries. On 26th December 2008, the dying declaration of daughter Fatima was recorded by Tahsildar, Deoria, Harish Chandra Singh (PW-11). Fatima stated that her father and the village people poured kerosene oil and set it on fire. She blamed her paternal grandparents for being the root cause of the burning. On the same day, a dying declaration of the wife, Amina, was recorded by PW-11, in which she stated that the accused locked her and her three daughters and poured kerosene on her and her daughters and set them on fire. She stated that Najma died, and she, along with her two daughters, sustained burn injuries.

3. On 26th December 2008, on the complaint of PW-1, a first information report was registered for the offences punishable under Sections 302,307 and 120B of the IPC. On the next day, the recovery of burnt clothes and a plastic

can containing 100 gms. of kerosene was recovered from the site of the incident. On 1st January 2009, Salma died. On 2nd January 2009, co-accused Aslam died. On the same day, Fatima succumbed to burn injuries. On 6th January 2009, Amina died. All of them died due to burn injuries. A charge sheet was filed against the accused for the offences punishable under Section 302 of the IPC.

4. The learned Addl. District and Sessions Judge, by judgment dated 19th April 2014, convicted the accused. The learned Judge accepted the testimony of PW-5 Kamar Hasim, the minor son of the accused. The learned Judge also accepted the dying declarations of Amina and Fatima recorded by PW-11, Tahsildar. He held the accused guilty of the offence punishable under Section 302 of the IPC. The learned Judge held that this case was falling under the category of rarest of the rare cases and proceeded to award capital punishment.

5. By the impugned judgment, the High Court not only declined to confirm the capital punishment but proceeded to acquit the accused.

6. Criminal Appeal nos.2143-44 of 2017 has been preferred by the State, and Criminal Appeal no.2142 of 2017 has been preferred by PW-1 complainant. As no one represented PW-1, this Court appointed learned counsel Shri Shubhranshu Padhi as Amicus to espouse the cause of PW-1. He and the counsel for the State made detailed submissions.

SUBMISSIONS

7. Learned counsel appointed as amicus curiae to espouse the cause of the PW-1 (Appellant in Criminal Appeal No.2142 of 2017) has taken us through the depositions of the material prosecution witnesses and dying declarations. He submitted that the dying declarations of Amina and Fatima were properly recorded by PW-11, Tahsildar, after obtaining a fitness certificate from PW-14, Dr. KC Rai. He submitted that the evidence

of both witnesses has not been shaken in the cross-examination. He submitted that the dying declarations were substantive pieces of evidence based on which the conviction of the accused could be based. He submitted that the dying declarations inspire confidence. He submitted that PW-1 complainant, PW-2 Rayajul Haq, PW-3 Sadaqat Ali and PW-4 Sajjad Ahmad have deposed that deceased Amina was in a condition to speak and point out the role of the accused. He invited our attention to the testimony of the PW-5, a child witness. He submitted that there are bound to be some minor omissions and contradictions in the evidence of a 15 years old boy who had seen his mother and three sisters being burnt by his father. His evidence cannot be discarded for that reason. Moreover, in the examination-in-chief, he deposed that he was threatened not to make any statement before the police authorities. He pointed out that though the High Court had held that there was no explanation for the severe burn injuries sustained by Aslam, PW-5 deposed that he was holding the victims at the time of the incident,

which caused the burn injuries to him. Learned counsel submitted that the High Court had misread the medical evidence and came to the erroneous conclusion that Najma committed suicide and others were injured in the process of saving her. He would, therefore, submit that the guilt of the accused was proved beyond a reasonable doubt and, on reappreciation of the evidence, any court will come to a conclusion that the only possible finding was that the guilt of the accused was proved beyond a reasonable doubt.

8. Learned counsel appearing for the first informant relied upon the following decisions:

i. ***Raju Devade v. State of Maharashtra[1];***

ii. ***J. Ramulu & Anr. v. State of Andhra Pradesh[2]; and***

iii. ***Balbir Singh & Anr. v. State of Punjab[3]***

He also relied upon a decision of this Court in the case of ***Baleshwar Mahto and Anr. v. State of Bihar and Anr.***[4]. Relying upon the decision, he submitted that primacy

[1] (2016) 11 SCC 673
[2] (2009) 16 SCC 432
[3] (2006) 12 SCC 283
[4] (2017) 3 SCC 152

must always be given to the ocular evidence and not to medical evidence.

9. Learned counsel appearing for the accused pointed out that the evidence of dying declarations was not put to the accused in his statement recorded under Section 313 of the CrPC. He relied upon a decision of this Court in the case of ***Raj Kumar v. State (NCT of Delhi)***[5]***.***

CONSIDERATION OF SUBMISSIONS

10. We will deal with evidence of eye-witness PW-5 Kamar Hasim, who was 15 years old at the time of recording his evidence. It is well settled that a minor is also a competent witness. This Court in the case of ***P.Ramesh v. State***[6] has dealt with this issue. Under Section 118 of the Indian Evidence Act, 1872 (the 'Evidence Act'), a minor is a competent witness. In paragraph 16 of the said decision in the case of ***P. Ramesh***, this Court held thus:

> **"16. In order to determine the competency of a child witness, the Judge has to form her or his opinion.**

[5] (2023) 17 SCC 95
[6] (2019) 20 SCC 593

The Judge is at liberty to test the capacity of a child witness and no precise rule can be laid down regarding the degree of intelligence and knowledge which will render the child a competent witness. The competency of a child witness can be ascertained by questioning her/him to find out the capability to understand the occurrence witnessed and to speak the truth before the court. In criminal proceedings, a person of any age is competent to give evidence if she/he is able to (*i*) understand questions put as a witness; and (*ii*) give such answers to the questions that can be understood. A child of tender age can be allowed to testify if she/he has the intellectual capacity to understand questions and give rational answers thereto. [*Ratansinh Dalsukhbhai Nayak* v. *State of Gujarat*, (2004) 1 SCC 64 : 2004 SCC (Cri) 7] A child becomes incompetent only in case the court considers that the child was unable to understand the questions and answer them in a coherent and comprehensible manner. [Sarkar, *Law of Evidence*, 19th Edn., Vol. 2, Lexis Nexis, p. 2678 citing *Director of Public Prosecutions* v. *M*, 1998 QB 913 : (1998) 2 WLR 604 : (1997) 2 All ER 749 (QBD)] If the child understands the questions put to her/him and gives rational answers to those questions, it can be taken that she/he is a competent witness to be examined."

(emphasis added)

In the case of ***Pradeep v. State of Haryana***[7] in paragraphs 9 and 10, this Court held thus:

> "9. It is a well settled principle that corroboration of the testimony of a child witness is not a rule but a measure of caution and prudence. A child witness of tender age is easily susceptible to tutoring. However, that by itself is no ground to reject the evidence of a child witness. The Court must make careful scrutiny of the evidence of a child witness. The Court must apply its mind to the question whether there is a possibility of the child witness being tutored. Therefore, scrutiny of the evidence of a child witness is required to be made by the Court with care and caution.
>
> **10. Before recording evidence of a minor, it is the duty of a Judicial Officer to ask preliminary questions to him with a view to ascertain whether the minor can understand the questions put to him and is in a position to give rational answers. The Judge must be satisfied that the minor is able to understand the questions and respond to them and understands the importance of speaking the truth. Therefore, the role of the Judge who records the evidence is very crucial. He has to make a proper preliminary examination of the minor by putting appropriate questions to ascertain whether the minor is capable of**

[7] (2023) SCC Online SC 777

> **understanding the questions put to him and is able to give rational answers. It is advisable to record the preliminary questions and answers so that the Appellate Court can go into the correctness of the opinion of the Trial Court.**"
>
> (emphasis added)

11. We may note here that before administering oath to PW-5, even preliminary questions were not put to him by the learned Trial Judge for ascertaining whether he is able to understand the questions put to him and is in a position to answer the same. The learned Judge should have asked preliminary questions to him to ascertain whether he understood the importance of the oath. The learned Judge ought to have recorded satisfaction that the minor was competent to depose. However, this was not done by the learned Judge. He straightaway administered oath to the minor witness. In the deposition, it is not even mentioned that certain preliminary questions were put to the witnesses. Thus, it is apparent that the learned Trial Judge administered oath to PW-5 and recorded his deposition without satisfying himself about the

competence of the minor to depose. This raises a question mark on the testimony of PW-5 especially when a minor witness can be easily tutored.

12. PW-5 deposed that PW-1 came around 4 o'clock to their house on the day of the incident. One Sajjad Jaif and one more uncle had come with him. All of them arrived in a jeep. Before he arrived, the accused Aslam and other family members were verbally abusing his mother, three sisters and his younger brother. The witness further deposed that the accused (his father) had assaulted him. When PW-1 arrived, the accused, Aslam and family members started verbally abusing him. His father held PW-1's collar and Aslam and Saiyyad were threatening to slap him. PW-1 told his mother that he would come on the next day with his maternal grandfather. He described the main incident as under:

> ".....Suddenly after that, Hasim, Saiyyad, Hamid, Aslam, Ayesha, Sahdun, Shama Parvez aka Gudiya, all of them came and started dragging my mother and three sisters towards the kitchen. After that I

> and my younger brother Kadim started pulling our mother and sisters towards us. Sahidun and Shama Parvez pushed me and my brother away. After that my younger brother sat and started crying in the doorway of the outside room but I continued trying to pull them towards myself. Then I saw Hasim, Saiyyad, Hamid, Aslam, Ayesha, Sahidun, Shama Parvez aka Gudiya, they started pushing my mother and sisters, and after that Saiyyad, Hasim, took a huge gallon and started pouring kerosene oil on them. And Aslam was holding my mother and sisters. After Saiyyad took a match and gave it to Hasim and told him to set them on fire and get rid of the trouble. As soon as Hasim lit the match and threw it on my mother and sisters, the fire went out of control. I got very scared after seeing all this. After that I thought of saving my own life. When I went out from the kitchen, I came across my younger brother sitting and crying. I opened the door and I and my younger brother Kadim ran out."

The witness further deposed that after he ran out of the house, he met Imran and requested Imran to save everyone. In the cross-examination, PW-5 stated that he was 12 years old when the incident happened and he was in 5th class.

13. We find that material contradictions have been brought on record in the evidence of PW-5 which have been proved through evidence of investigating officer PW-10, Shri Rajiv Singh. PW-5 was confronted with the following statements made by him in his statement recorded under Section 161 of CrPC:

a. On seeing the smoke during the argument and fight inside, Aslam (co-accused), Shah Alam and other people went in to save his sisters Najma, Fatima and Salma and his mother who were burning;

b. While trying to put out the fire, Aslam also caught on fire and Sayyed and Shah Alam also suffered some burns. His father's hand and body were also burnt; and

c. He did not know how the fire started.

In the evidence of PW-10, the prior statements by which PW-5 was confronted, have been duly proved. These are major contradictions brought on record. These

contradictions, apart from the fact that the learned Trial Judge did not satisfy himself about the capacity of PW-5 to understand and answer questions, make the testimony of PW-5 vulnerable.

14. In the cross-examination, PW-5 stated that after the incident, the village Pradhan took him to police station. When the inspector asked him, he stated that he did not know anything. He admitted that he did not tell anything about the incident to his paternal grandparents. In the cross-examination, he stated that the Inspector did not take his statement. He stated that he was giving testimony about the incident for the first time three years after the incident. In view of what we have discussed above, it is unsafe to rely upon his evidence.

15. Now, we come to the dying declarations of deceased Fatima and Amina allegedly recorded by PW-11, who was the Tahsildar on duty. PW-11 in the cross-examination has accepted that after recording the statements of both the victims, he did not read over the same to the victims.

He admitted that there is no such endorsement made on the statements. He also accepted that the doctor had simply mentioned on the dying declarations that both of them were "fit" and had not stated that they were in a condition to make a statement.

16. The most unfortunate part is that the evidence of PW-11 about the dying declarations made by these two victims has not been put to the accused in his examination under Section 313 of CrPC. Not only that what is stated in the evidence by PW-11 is not put to the accused in his statement under Section 313 of CrPC, but even the fact that the dying declarations were made by Fatima and Amina to PW-11 was not put to the accused.

17. According to the prosecution, the deceased Amina made a dying declaration even to PW-1. Even the testimony of PW-1 to that effect has not been put to the accused in his statement under Section 313 of CrPC.

18. The case of the prosecution is that Amina also made a dying declaration before PW-2. He stated in his deposition that "we found Amina Khatun in the hospital and she told us everything in relation to the incident." He has not deposed what exactly deceased Amina told him. Therefore, it cannot be said that Amina made a dying declaration before PW-2 implicating the accused.

19. Now, coming to the evidence of PW-3, he stated that in hospital Amina told PW-1 that the accused and Aslam poured kerosene oil and set her and her daughters on fire. In the cross-examination, he admitted that he gave a statement to the investigating officer according to whatever PW-1 told him. When he was confronted with his statement under Section 161 of CrPC, he admitted that his statement regarding the accused pouring kerosene and setting the deceased and her daughters on fire was made by him as per the narration of PW-1. Therefore, it is very difficult to believe the testimony of PW-3.

20. Now, we come to the testimony of PW-4. He deposed that while he was in hospital, Amina informed PW-1 that the accused and Aslam dragged her and her daughters towards the room, sprinkled kerosene on them and set them on fire. It is pertinent to note that even this part of the testimony regarding dying declaration of Amina has not been put to the accused in the statement under Section 313 of the CrPC. In the cross-examination, he stated that he visited the hospital regularly from the time Amina and her two daughters were admitted to the hospital. He admitted that though he attempted to talk to Amina in the hospital, she was not able to talk, and she just asked for water.

21. Thus, the evidence of prosecution regarding the dying declaration was not put to the accused in his statement under Section 313 of CrPC. The law on this aspect is well-settled. In the case of ***Raj Kumar v. State (NCT of Delhi)***[5], this Court has summarised the law on his aspect. Paragraph 22 of the said decision reads thus:

"22. The law consistently laid down by this Court can be summarised as under:

22.1. **It is the duty of the trial court to put each material circumstance appearing in the evidence against the accused specifically, distinctively and separately. The material circumstance means the circumstance or the material on the basis of which the prosecution is seeking his conviction.**

22.2. The object of examination of the accused under Section 313 is to enable the accused to explain any circumstance appearing against him in the evidence.

22.3. The Court must ordinarily eschew material circumstances not put to the accused from consideration while dealing with the case of the particular accused.

22.4. **The failure to put material circumstances to the accused amounts to a serious irregularity. It will vitiate the trial if it is shown to have prejudiced the accused.**

22.5. If any irregularity in putting the material circumstance to the accused does not result in failure of justice, it becomes a curable defect. However, while deciding whether the defect can be cured, one of the considerations will be the passage of time from the date of the incident.

> 22.6. In case such irregularity is curable, even the appellate court can question the accused on the material circumstance which is not put to him.
>
> 22.7. In a given case, the case can be remanded to the trial court from the stage of recording the supplementary statement of the accused concerned under Section 313CrPC.
>
> 22.8. While deciding the question whether prejudice has been caused to the accused because of the omission, the delay in raising the contention is only one of the several factors to be considered."
>
> (emphasis added)

22. The prosecution has heavily relied upon the dying declarations of the two victims. As this evidence was not put to the accused in his statement under Section 313 of the CrPC, he was denied an opportunity to explain the same. Hence, this omission causes prejudice to him. Therefore, the evidence of dying declaration will have to be kept out of consideration.

23. The incident occurred on 26th December 2008. Even assuming that omission in recording the statement of the accused is curable, the question is whether, after a lapse

of more than 14 years, the case can be remanded to the Trial Court for further examination of the accused under Section 313 of the CrPC. After such a long gap of 14 years, it will be unjust to compel the accused to face such an examination. The accused has undergone incarceration for more than 6 years. From the date of the Trial Court judgment till the date of the impugned judgment, there was a hanging sword over him of the capital punishment. Therefore, we are of the view that it will be unjust now at this stage to pass an order of remand for recording further statements under Section 313 of the CrPC. The remand at this stage will cause prejudice to the accused. Though we do not agree with some of the findings recorded by the High Court, it is not possible to find fault with the ultimate conclusion drawn by it.

24. There are two other important aspects of the case. Co-accused Aslam, a cousin of the accused, also suffered burn injuries in the incident. He died on 2nd January 2009 with septicaemia. He suffered 40% burn injuries. The

prosecution also suppressed the fact that the accused also suffered superficial to deep burn injuries on the face and both forearms to the extent of 20%. This fact was brought to the record by the accused by examining Dr. K.C. Rai as a defence witness.

25. According to the prosecution's case, after pouring kerosene oil on the victims, the accused and Aslam were standing outside the room and were not allowing anybody to enter the room. Co-accused Aslam is himself a victim of the fire. There is no explanation offered by the prosecution of how the accused and Aslam suffered burn injuries. The burn injuries to Aslam proved to be fatal. This also raises suspicion about the prosecution's case.

26. We are dealing with an appeal against acquittal. After reappreciation of evidence, we find that the view taken by the High Court that the guilt of the accused was not proved beyond a reasonable doubt is a possible view which could have been taken on the basis of the evidence

on record. Even assuming that another view is possible, that is no ground to overturn the order of acquittal.

27. It is true that the incident is very shocking in which a woman and her three daughters were burnt, and one of them died on the spot, the other three died after a few days. However, in the absence of legal evidence on record to prove the guilt of the accused beyond a reasonable doubt, we cannot interfere with the impugned judgment of the High Court.

28. Before we part with this judgment, we have a suggestion to make. There are several criminal appeals which come to this Court where we find that vital prosecution evidence is not put to the accused in statement under Section 313 of the CrPC. The Court becomes helpless, as due to the long lapse of time, the defect cannot be cured by passing an order of remand. In the case of ***Raj Kumar v. State (NCT of Delhi)***[5], this Court dealt with this issue. In paragraphs 29 and 30, this Court held thus:

"29. In many criminal trials, a large number of witnesses are examined, and evidence is voluminous. It is true that the Judicial Officers have to understand the importance of Section 313. But now the court is empowered to take the help of the prosecutor and the defence counsel in preparing relevant questions. Therefore, when the trial Judge prepares questions to be put to the accused under Section 313, before putting the questions to the accused, the Judge can always provide copies of the said questions to the learned Public Prosecutor as well as the learned defence counsel and seek their assistance for ensuring that every relevant material circumstance appearing against the accused is put to him. When the Judge seeks the assistance of the prosecutor and the defence lawyer, the lawyers must act as the officers of the court and not as mouthpieces of their respective clients. While recording the statement under Section 313CrPC in cases involving a large number of prosecution witnesses, the Judicial Officers will be well advised to take benefit of sub-section (5) of Section 313CrPC, which will ensure that the chances of committing errors and omissions are minimised.

30. In 1951, while delivering the verdict in *Tara Singh* [*Tara Singh* v. *State*, 1951 SCC 903 : 1951 SCC OnLine SC 49] , this Court lamented that in many cases, scant attention is paid to the salutary provision

> of Section 342CrPC, 1898. We are sorry to note that the situation continues to be the same after 72 years as we see such defaults in large number of cases. The National and the State Judicial Academies must take a note of this situation. The Registry shall forward a copy of this decision to the National and all the State Judicial Academies."

We want to supplement what is reproduced above. When an appeal against conviction is preferred before the High Court, at the earliest stage, the High Court must examine whether there is a proper statement of the accused recorded under Section 313 of CrPC (Section 351 of the Bharatiya Nagarik Suraksha Sanhita, 2023). If any defect is found, at that stage, the same can be cured either by High Court recording further statement or by directing the Trial Court to record. If this approach is adopted, the argument of delay and prejudice will not be available to the accused.

29. We must record our appreciation for the very valuable assistance rendered by Mr. Shubhranshu Padhi, appointed as amicus curiae.

30. The appeals are, accordingly, dismissed.

.....J.
(Abhay S Oka)

.....J.
(Pankaj Mithal)

.....J.
(Ahsanuddin Amanullah)

New Delhi;
April 22, 2025.