

(2017) 06 CAL CK 0044
In the Calcutta High Court
Case No : 99 of 2011

Bhairab Chakraborty & Anr.

APPELLANT

Vs

The State of West Bengal

RESPONDENT

Date of Decision : 30-06-2017

Acts Referred:

Code of Criminal Procedure, 1973, Section 313 - Power to examine the accused
Indian Penal Code, 1860, Section 120B,
Section 34, S

Citation : (2017) 06 CAL CK 0044

Hon'ble Judges : Aniruddha Bose, Asha Arora

Bench : DIVISION BENCH

Advocate : Rabi Sankar Chattopadhyay,?Suman Sankar Chattopadhyay,?Santanu Maji,?Souvik Dutta,?Monojit Chatterjee,?Snigdha Saha,?Subhadip Banerjee, Subir Banerjee, Kakali Chatterjee, Pratick Bose

Judgement

1. Both the appellants in this appeal have been sentenced to suffer rigorous imprisonment for life and directed to pay fine of Rs.5,000/- each on charge of committing murder of one Lata Chakraborty on 8th October, 2007. In default in paying fine, further imprisonment of six months have been directed.

Prosecution case is that on 8th October, 2007, at Shalboni forest kerosene oil was poured on the victim upon being tied to a tree by a rope, and thereafter she was ignited. In the written complaint made by the father of the victim on 9th October, 2007, the first appellant (Bhairab) has been referred to as her husband. On the basis of this complaint, formal F.I.R. was registered on 9th October 2007 at 11:55 hrs. There is some dispute as to whether the marriage

between the victim and the first appellant had actually been solemnized or not. In the written complaint it has been recorded that the marriage had taken place on 6th August, 2007 as per hindu rites and customs but registration of the marriage was not effected, though the application for the same was submitted before the Sub-Registrar, Suri. A copy of the application under Section 8 of the Hindu Marriage Act, 1955 has been made Exhibit-"14". The prosecution version that Bhairab and Lata had been living together has however been denied by the appellants in response to their examination under Section 313 of the Code of Criminal Procedure, 1973.

2. It has been submitted on behalf of the prosecution that on the morning of 9th October 2007, Lalu Lohar (P.W.11), a resident of Shalboni had informed the family of Lata that she had suffered burn injury. The P.W.1 (Mukti Kahar) and P.W.2 (Archana Kahar) being the parents of the victim have deposed that they went to the spot where the victim was found in charred (the witnesses referred to her condition as half-burnt) state but conscious. Thereafter, she was taken to the hospital and complaint was made to the Suri police station on the same day that is 9th October, 2007. The father of the victim was the complainant, P.W.1 and in his written complaint he named the appellants Bhairab and Manju along with three other persons, Santu, Budo and Subir as accused persons. The victim survived for nine days after suffering burn injuries. The cause of her death, as it appears from the post-mortem report, was due to the effects of burn injuries. The autopsy surgeon, Dr. Debashis Som (P.W.15) has corroborated this in his evidence and also stated that injury was ante-mortem in nature. The nature of injuries was extensive, as is revealed from the post-mortem report. The autopsy surgeon's deposition was that during the period she was in hospital, she was capable of speaking because her larynx and voice box area "were not caught with fire".

3. The prosecution has altogether examined twenty witnesses in this case, which was registered on the basis of the written complaint of P.W.1 as Suri P.S Case No.168/2007. Initial case was started under Sections

498A / 326 / 307 read with Section 120B of the Indian Penal Code, 1860.

Charges were framed against all the appellants under Sections 302 / 34 and 120B of the 1860 Code while the appellants were charged under Section 498A of the Code as well. The Trial Court however, found that the prosecution had failed to prove the charges against Santu, Buddhadeb and Subir and found them not guilty of committing the offence they were charged with. The Trial Court also found the appellants not guilty of offence under Section 498A of I.P.C. Among the twenty witnesses examined, P.W.1 and P.W.2 were the parents of the victim. Other witnesses of fact were Doli Kahar-P.W.3, Anarkali Kahar-P.W.4, Balai Kahar-P.W.5, Renu Bagdi-P.W.7, Padma Lohar-P.W.8, Mangli Murmu-P.W.9, Lakshmi Kahar-P.W.10, and Upen Kahar-P.W.14. P.W.1, P.W.2 and P.W.10 were relatives of the victim. P.W.3, P.W.4, P.W.5 and P.W.14 were co-villagers of the victim, the village being known as Kariddhya. P.W.7, P.W.8, P.W.9, P.W.11 were residents of Shalboni village, where the victim was found in charred condition. Of these witnesses of fact P.W.4, P.W.5, P.W.7, P.W.8 were declared hostile. P.W.17, P.W.18 and P.W.20 were police witnesses, the last among them being the investigating officer.

4. There is no eye witness to the incident and the prosecution case is built on circumstantial evidence. The fact that the victim was found at Shalboni has been proved by P.W.9 and P.W.11, apart from P.W.1, P.W.2, P.W.3 and P.W.5. In his deposition the P.W.11 stated:-

"I reside at Shalboni village. Nearly 2 ? years back one lady, who was caught with fire told me that her parents house is at Kariddhya, Bouripara and she requested me to inform the incident to her parents. I had communicated the incident to them and thereafter the victim"s parents and others came there."

His deposition when linked with deposition of P.W.1, in which the latter stated that he was informed by Lalu of Shalboni that the victim Lata

was suffering from burn injuries and on such information, he went to the place of occurrence found Lata there establishes this fact. There is also sufficient evidence to the effect that the appellant no.1 had married Lata. Certain doubts have been raised by the appellants on legality of the marriage, but adequate evidence is there that the appellant no.1 had relationship with the victim.

5. The judgement of the Trial Court is primarily founded on dying declarations of the victim. In this case three of the witnesses of fact, being the P.W.1, P.W.2 and P.W.14 have stated in their depositions that when they reached the location at Shalboni, each of them found the victim conscious and she had named the accused persons as perpetrators of the crime. P.W.1 stated:-

"On being asked she disclosed that the accds. Bhairab, Santu and Manju and 2 others assaulted her in the last night and thereafter she was tied by a rope with a tree. Thereafter, Manju poured k.oil over her body and Bhairab fired. We took her to hospital. Concerned doctor told us that she was in critical stage. At that time

Bhairab was not present on the spot or in hospital."

Similarly, P.W.2, being the mother of the victim stated:-

"In one morning I came to know that she was caught with fire. It was in the month Aswain. After getting the news we went to the spot. I found her in half burned condition. She was full of sense. On being asked she stated that the accused persons insisted her for putting her signature in a blank paper as the accused Bhairab has already married with another lady. She did not agree to put her signature in the said blank paper. Thereafter she was tied up with a tree after being assaulted. The accused person Manju poured k.oil and

the accid. Bhairab set fire upon her. Thereafter the accused persons fled away, she cried for help and somehow managed to escape. Thereafter one person of Shalboni village had informed us about this incident."

P.W.14, a co-villagers in his deposition stated:-

"On being asked Lata told us that in the previous night the accused persons took her to a jungle and insisted her to put signature in a blank paper and to leave Bhairab but Lata did not agree to sign. Thereafter she tied up with a tree by the accused Santu, Budo and Subir and the accused Manju poured k.oil over her body and accused Bhairab set fire."

6. The investigating Officer Ashalata Goswami, being the P.W.20 also has recorded a statement of the victim in the same line on 9th October 2007. This statement has been marked "Exhibit-11". In this exhibit, the statement of Lata has been, inter alia, recorded that the husband of the victim on the preceding night had taken her to Shalboni village. There she found her sister-in-law Manju, as also local residents Santu, Budo and Sudhir. The statement, in Bengali, further records that the victim stated that they assaulted her to compel her to leave Bhairab. When she refused, she was grappled by them while Manju poured kerosene oil on her and her husband ignited her with a matchstick. After that, all of them fled. According to the recording of P.W.20, for about ten days, the victim said, she was being pressurised to break her relationship with Bhairab as the latter had remarried. As it appears from this exhibit, the victim is stated to have said the entire story to the doctor, but according to her the doctor did not properly listen to her.

7. Learned Counsel for the appellants has emphasised on the bedhead ticket (part of exhibit 7) as also the deposition of Dr. D.K. Mukhopadhaya (P.W.16) to counter the statements of four witnesses constituting dying declarations. The P.W.16 had treated the victim in the burn unit of Suri Sadar Hospital. In his

deposition he stated that the patient had told him that it was suicidal burn due to quarrel between herself and the accused Bhairab and that quarrel was due to his second marriage. He has referred to Exhibit-"7/1" as the statement recorded by him. This recordal is effected in the Bed Head Ticket, a document, which appears to be part of treatment records, captioned "Daily Clinical Notes". The heading of this note is "on admission", and it records:- "suicidal burn following a quarrel her husband (Bhairab Chakraborty) for his second marriage"

The same document records that requisition had been sent for taking dying declaration. But in that note, specifically referring to suicidal burn there is no disclosure of the source of information.

8. From the evidence available, it transpires that there was an element of reluctance on the part of the medical and administrative authorities to have the dying declaration recorded by a civil official. Dr. D. K. Mukhopadhaya (P.W.16) has stated in his examination-in-chief:-

"I have informed the Superintendent of Suri Sadar Hospital for recording the statement of the victim. Instantly he has referred to the then S.D.O. for recording the statement of the victim. A reminder was also given to the S.D.O. by the Superintendent at my instance."

9. Ashalata Goswami, P.W.20 being the I.O also wanted a Magistrate to record the dying declaration. This fact appears from her deposition:-

"On 9/10/2007 just after taking charge of investigation I submitted a petition to S.D.O. Suri Sadar for appointing a Magistrate to record the dying declaration of burnt patient Lata Kahar @ Chakraborty admitted to Suri Sadar Hospital. This is the requisition made

by me to the SDO Suri for appointment of a Magistrate for recording dying declaration.

This the xerox copy attested by Superintendent Suri Sadar Hospital, marked as Ext. 9.

S.D.O. Suri endorsed my application to Superintendent Suri Sadar Hospital asking him to request Bed in-charge of the patient to take dying declaration.

Dr. D.K. Mukherjee, Bed in-charge wrote to Superintendent Suri Sadar Hospital requesting him to inform S.D.O. for sending one Deputy Magistrate for taking dying declaration. This is the Xerox attested copy as Exhibit 10."

10. The Trial Judge, however, rejected the defence of the appellants that it was a case of suicide on the ground that none of the witnesses except P.W.16 had supported the defence version that it was a case of suicidal burn. The witnesses who had turned hostile also did not refer to suicide as the cause of death of the victim. Of the four witnesses who deposed on dying declaration, P.W.1 and P.W.2 were relatives, P.W.20 was a police witness and P.W.14 was a co-villager and their statements in their depositions referring of recordal of statement of the victim corroborate. In the case of Gopal Vs. State of Madhya Pradesh [(2009) 12 SCC 600], it has been held:-

"Law relating to appreciation of evidence in the form of more than one dying declaration is well settled. Accordingly, it is not the plurality of the dying declarations but the reliability thereof that adds weight to the prosecution case. If a dying declaration is found to be

voluntary, reliable and made in fit mental condition, it can be relied upon without any corroboration. The statement should be consistent throughout. If the deceased had several opportunities of making such dying declarations, that is to say, if there are more than one dying declaration they should be consistent. (See: Kundula Bala Subrahman-
yam v. State of A.P.1 [(1993) 2 SCC 684]. However, if some inconsistencies are noticed between one dying declaration and the other, the court has to examine the nature of the inconsistencies, namely, whether they are material or not. While scrutinizing the contents of various dying declaration, in such a situation, the court has to examine the same in the light of the various surrounding facts and circumstances."

11. The other judgement on which the appellants have relied upon is Nanhar V. State of Haryana [(2010) 11 SCC 423]. In this judgement, it has been held:-

"In our considered opinion, the dying declaration should be such, which should immensely strike to be genuine and stating true story of its maker. It should be free from all doubts and on going through it, an impression has to be registered immediately in mind that it is genuine, true and not tainted with doubts. It should not be the result of tutoring..."

In the case of Nanhar (supra), the dying declaration was not believed.

12. Learned counsel for the appellants has sought to persuade us to believe the evidence P.W.16, particularly since he has not been declared hostile and there was no enmity between the doctor and the victim or her family. Further the dying declaration implicating the two appellants were not mentioned in the written complaint. It is also pointed out on behalf of the appellants that evidence of P.W. 20 on dying declaration should be disbelieved because being the Investigating Officer, she was interested in conviction of the appellants. Moreover, there was no witness in the recorded statement. So far as other witnesses of fact are concerned who have deposed on dying declarations of the victim, appellants' case is that P.W. 1 and P.W. 2 were close relatives of the victims and P.W. 14 was a co-villager.

13. We, however, are not inclined to reject the statements of P.W.1, and P.W.2 and P.W.14, all of whom have given a uniform narrative of the victim's statement on the aspect of being set on fire by the appellants. When contradicted in cross-examination, they stuck to their evidence in examination-in-chief. The deposition of P.W.20 also broadly corroborates what these three witnesses have stated. While we accept that doctor's deposition ought to be valued high on the yardstick of creditworthiness, but the noting in the bed-head ticket does not inspire our confidence. The recording in the noting does not reflect that it was a statement of the victim. In his examination, he had stated that it was the victim's statement he had recorded. In exhibit "11", however, such recordal is not there. The failure on the part of hospital authorities to arrange for an official for recording dying declaration creates doubt over the intention of the hospital authority. The fact that the victim was staying with the first appellant in our opinion has been proved. The motive for the crime appears to be "second marriage" of the first appellant. There is sufficient evidence that at the material point of time the appellant no.1 was living with the victim. The appellants have failed to come

up with a plausible reason as to how the victim suffered her burn injuries. There was no reporting of the incident by the appellants and in particular the first appellant, either to police or family members of the victim. Thus, while we accept the proposition that plurality of dying declarations ought not to be the determinant factor for its acceptance, we are unable to reject the evidence of P.W.1, P.W.2, P.W.14 and P.W.20. In the event it was only evidence of P.W. 20 on dying declaration, it might not have been sufficient to find the appellants guilty. But there is a chain of witnesses who have deposed on this factor. Merely because it was not made part of the written complaint, evidence from the witness box on dying declarations cannot be ignored or negated.

14. We, however, refrain from coming to a specific finding on accepting the evidence of the aforesaid four witnesses and in sustaining the finding of guilt and judgment of conviction because of improper examination of the accused persons under Section 313 of the 1973 Code. We find the circumstances relating to dying declarations emanating from the evidence of any of the four aforesaid prosecution witnesses were not put to the appellants. The judgement of the Trial Court being based on dying declarations made by the aforesaid four witnesses, this failure in our opinion has caused prejudice to the appellants. For this reason, we set aside the judgment under appeal and direct the Trial Court to recommence the trial from the stage of examination of the accused/appellants under Section 313 of the 1973 Code and dispose of the matter in accordance with law on priority basis within four months from the date of communication of this judgment.

15. Let a copy of the judgement be forthwith sent to the Trial Court along with the records.

16. Urgent Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.