

(2018) 04 GAU CK 0091
In the Gauhati High Court
Case No : Crl.A. 90 of 2009

CHAYARANI KARMAKAR and ANR

APPELLANT

Vs

THE STATE OF ASSAM

RESPONDENT

Date of Decision : 11-04-2018

Acts Referred:

Indian Evidence Act, 1872 — Section 113B

Citation : (2018) 04 GAU CK 0091

Hon'ble Judges : MIR ALFAZ ALI

Bench : Single Bench

Final Decision : Allowed

Judgement

1.This appeal is directed against the judgment and order dated 20.03.2009 passed by learned Addl. Sessions Judge (FTC) No. 1, Kamrup(M),

Guwahati, in Sessions Case No. 213(K)/2009. By the said judgment, learned Sessions Judge convicted the appellants u/s 304-B IPC and sentenced to

imprisonment for 10 years.

2. As per the prosecution case, the victim Sipra Sarkar was married to Nilu Karmakar about one and half year before the occurrence. The victim was

set ablaze by her mother-in-law, sister-in-law and brother-in-law, in absence of her husband, on 06/10/2003, at about 5 pm and she succumbed to the

injuries after three days. The brother of the victim (PW 1), having come to know, that her sister sustained serious burn injuries, rushed to Guwahati

from his native place, Kokrajhar. When he met the victim in the hospital, the victim told that her mother-in-law, sister-in-law and brother-in-law set fire

to her in absence of her husband. PW 1 lodged the FIR (Ext.1), on the basis of which police registered a case u/s 326/307/34 IPC and commenced

investigation. The victim died on 09/10/2003. After conclusion of investigation, the charge-sheet was laid against three persons including the present

appellants u/s 304-B IPC. One of the charge-sheeted accused, being the brother-in-law of the victim, absconded and the present appellants stood trial.

3. In course of trial, charge was framed against both the appellants u/s 304-B IPC, to which they pleaded guilty. Prosecution examined 10 witnesses

to establish the charge. On conclusion of evidence of the prosecution, the accused/appellants were examined u/s 313 CrPC, wherein they took the

plea of innocence. On appreciation of evidence, learned trial court convicted both the appellants u/s 304-B IPC and awarded sentence as indicated

above.

4. Aggrieved, the appellants preferred the instant appeal.

5. Learned amicus curiae, Anup Mrinal Dutta for the appellants and learned Addl. Public Prosecutor, Ms. S. Jahan, for the State were heard.

6. Learned amicus curiae strenuously arguing for the acquittal of the appellants contended, that there was no legal evidence with regard to torture and

harassment of the victim in connection with any dowry demand. Learned counsel further contended that the dying declarations, on which the learned

trial court heavily relied, were not reliable and the necessary ingredients for constituting an offence u/s 304-B IPC were not proved beyond reasonable

doubt. Learned Addl. Public Prosecutor, Ms. S. Jahan, supporting the conviction and sentence of the appellants contended, that the evidence brought

on record, were sufficient to establish the charge against the appellants beyond reasonable doubt requiring no interference with the impugned judgment

and order.

7. Perusal of the impugned judgment and a survey of the evidence and materials on record transpire, that learned trial court convicted the

accused/appellants essentially relying on the dying declarations of the victim recorded by the investigating officer as well as the oral dying declaration

and the evidence of PW 1 & PW 2 who, deposed, that the victim was subjected to harassment and cruelty in connection with demand of dowry. Since

the learned trial court heavily relied on the dying declarations to convict the appellants, let me first deal with the dying declarations of the victim. The

record reveals that there were two sets of dying declarations. One was written dying declaration recorded by the investigating officer and other set of

dying declaration was the oral dying declaration stated to have been made before the witnesses. The written dying declaration recorded by the

investigating officer was marked as exhibit- 8. The content of the written dying declaration was as under :-

â??The marriage took place before one year six months. My mother-in-law, brother-in-law, Nikhil Karmakar and sister in law, Anima Karmakar

were present. While I was arranging clothes on the â??ulnaâ??, fire was set from backside. My husband was not present at that time in the house.

My husband is a good person. Occurrence took place at 5 Oâ??clock in the afternoon. The quarrel used to take place for small small things and also

for the furniture not being good. â??

8. PW 10, the investigating officer, who recorded the statement of the victim, deposed, that he was verbally instructed by the O.C. to take preliminary

steps in the case on the basis of G.D. Entry No. 192 dated 07.10.2003. He went to the Gauhati Medical College and Hospital, Female Ward on

07.10.2003, at about 5.30 pm, where he found the victim with burn injury. He recorded the statement of the victim in presence of Dr. Partha Pratim

Baruah, staff nurse (PW 6) and Smt. Roushanara Khatun, a medical staff. He also proved the said statement (dying declaration) as exhibit-8. During

cross-examination, PW 10 stated that he reached the hospital at 5.30 pm and he recorded the statement of the victim at 10.30 pm. He also stated to

have obtained the right thumb impression of the victim on the Ext.8, the dying declaration. During cross-examination, he further stated that he did not

obtain any certificate from the doctor with regard to the fitness of the victim to give statement. According to him, he took consent from the staff nurse

for recording the statement of the victim.

9. Learned amicus curiae submitted that the exhibit -8 (dying declaration) recorded by the investigating officer could not be relied upon as there was

no attempt on the part of the investigating officer to get the dying declarations recorded by the Magistrate, nor any certificate was obtained from the

doctor as to the fitness of the victim, though the dying declarations was allegedly recorded in the hospital and in presence of doctor and nurse. In

support of his contention, learned amicus curiae placed reliance on the following decisions :-

1. Laxmi (SMT) â??VS- Omprakash & Ors. reported in (2001) 6 SCC 118,

2. State of Rajasthan Vs. Wakteng reported in AIR 2007 SC 2020.

10. The Apex Court, in Laxmi Vs. Omprakash (supra), observed that the practice of the dying declaration being recorded by the investigating officer

should be discouraged, unless there are exceptional circumstances, showing that the victim was in such a precarious condition, that it was not possible

for the investigating officer to avail the service of a magistrate or any other independent person for recording the dying declaration. The Apex Court at

para 30 of the said judgment held as under :-

“30. A dying declaration made to a police officer is admissible in evidence, however, the practice of dying declaration being recorded by an

investigating officer has been discouraged and this Court has urged the investigating officers to avail the services of a Magistrate for recording dying

declaration if it was possible to do so and the only exception is when the deceased was in such a precarious condition that there was no other

alternative left except the statement being recorded by the investigating officer or the police officer, later on relied on as dying declaration. In Munnu

Raja V. State of M.P., this Court observed : (SCC p. 108, para 11)

“Investigating officers are naturally interested in the success of the investigation and the practice of the investigating officer himself recording a

dying declaration during the course of an investigation ought not to be encouraged.”

The dying declaration recorded by the investigating officer in the presence of the doctor and some of the friends and relations of the deceased was

excluded from consideration as the failure to requisition the services of a Magistrate for recording the dying declaration.”

11. In State of Rajasthan Vs- Wakteng (supra), the Apex Court discarded the dying declaration for not obtaining the certificate as to the fitness of the

victim, when the doctor was present in the hospital and the dying declaration was recorded after two days of the occurrence and for not bringing on

record any evidence as to why a magistrate could not be called for recording the dying declaration.

12. In Paparambaka Vs. State of A.P. reported in (1999) 7 SCC 695, the Apex Court observed that in absence of medical certificate, that the injured

was in a fit state of mind at the time of making dying declaration, it would be very much risky to accept the subjective satisfaction of the Magistrate,

who opined that the injured was in a fit state of mind at the time of making dying declaration.

13. In *Sheikh Rafique and Anr. v. State of Maharashtra* reported in AIR 2008 SCC 1360, the Apex Court was reluctant to rely on the dying

declaration in absence of any certificate of a doctor in respect of the victim's mental fitness. However, there were other factors in the said case

raising question as to the veracity and probability of the prosecution case.

14. A constitution bench of the Supreme Court in *Laxman v. State of Maharashtra* reported in 2002 CrL. L.J. 4095 also relied by the learned trial

court, held that as a rule of prudence, a certificate from a doctor in respect of mental fitness of the victim should be insisted, so as to ascertain the

truthfulness of the dying declaration, but mere absence of doctor's certification in respect of mental fitness of the victim would not render a dying

declaration unworthy of trust.

15. PW 3 Dr. Nethramani Kakati, who conducted the postmortem examination on the body of the victim opined that there was 85% burn injury on the

whole body of the victim. The doctor also found the scalp hairs burnt and the eye lids and eye balls were found completely burnt indicating that face

was severely burnt. PW 6, the staff nurse of the hospital, where the victim was admitted after the occurrence, stated that the entire body of the

victim, including her fingers were burnt and her entire body was under bandage, except the face. PW 6, who was also shown as the attesting witness

to Ext. 8 (dying declaration), deposed that the right thumb impression of the victim available on Ext. 8 (dying declaration) was not taken in her

presence.

16. What, therefore, transpires from the evidence of PW 10 is, that though, he arrived at the hospital at 7.30 in the evening, he recorded the statement

of the victim at 10.30 pm after three hours of his arrival at the hospital. It is also evident from the testimony of PW 1 & PW 2, the brother and mother

of the victim, that the victim died on 09.10.2003 at 11.30 at night. PW 1 categorically stated in his evidence that on 07.10.2003, having come to know

about the occurrence, he informed the police over phone and on the next day, he lodged the formal FIR and after lodging the FIR on 08.10.2003,

police recorded the statement of the victim in his presence on 08.10.2003.

17. PW 6 in his evidence stated that she was present at the time of recording the

dying declaration. According to her, the victim told that since after marriage, her mother in law, brother in law and sister in law put pressure on her for insufficient dowry articles and always found fault with her all activities. They also picked up quarrel with the victim for low quality articles given at the time of marriage. The victim also mentioned that the accused persons always criticized her, whenever she prepared food. The victim further stated that on the date of occurrence, while she was placing clothes on the ulna, her mother-in-law, sister-in-law and brother-in-law poured kerosene oil on her body and set fire. The victim further stated that her husband was good and he was not present at the time of occurrence.

18. Evidently the victim sustained 85% burn injury on the whole body including face and her entire body was under bandage, except the face. It was also evident from the testimony of the doctor that the face and head of the victim were also burnt, as according to doctor, scalp hair and eye balls and eye lids were completely burnt. The evidence that the entire body of the victim, except her face, was under bandage and oral testimony of PW 6, that thumb impression of the victim on the exhibit- 8 was not taken in her presence, raises a question -- when the entire body of the victim including the fingers, except the face, were burnt and covered with bandage, how the thumb impression of the victim was taken on exhibit - 8. Although the doctor was shown to be present and his signature was taken on exhibit -8, doctor was not examined in the instant case. If the evidence of PW 6, that she was present at the time of recording statement is believed, then her statement as to dying declaration materially differs from the dying declaration recorded by PW 10. The victim having sustained 85% burn injury and her whole body including face having been burnt, a question necessarily arises, whether the victim was in a fit state of mind to make any statement.

19. It is no doubt true, that the dying declaration cannot be thrown away only because, it was recorded by investigating officer. If the fact situation was so compelling, that there was no scope or time for the investigating officer to avail the service of a magistrate or an independent person to record the dying declaration or to obtain a certificate from doctor as to fitness of the victim, the dying declaration, even if recorded by investigating officer has to be given weight, if otherwise found to be unblemished. But then, prosecution is certainly under obligation to bring on record by evidence, that

there was no option available to the investigating officer, but to record the statement himself without obtaining any fitness certificate. Admittedly, according to the I.O. himself, he arrived at the hospital at 7.30 pm and recorded the statement of the victim at 10.30 pm, i.e., after three hours of his arrival at the hospital. The victim died on 09-10-2003, i.e., after three days of the occurrence and she survived for two days after recording her statement by the investigating officer. Therefore, evidently the investigating officer got ample time to get the dying declaration recorded by magistrate or any other independent person. Though there was ample time for the I.O. for getting the dying declaration recorded by a magistrate or any independent person, there was no evidence on record to show, that the I/O made any endeavour to avail the service of a magistrate to record the dying declaration. When evidently doctor was present in the hospital, the investigating officer could have easily obtained a certificate as to the fitness of the victim to make statement, as he recorded the statement after three hours of his arrival at the hospital.

20. The above evidence and materials brought on record revealed the following circumstances which raises finger against the credibility of the dying declaration in the present case :-

i. When the victim sustained 85% burn injury over the whole body including face, causing complete damage to eye balls, whether the victim was really fit to make a statement. (ii) If the entire body including the fingers were burnt and the entire body was under bandage, except the face, how the victim put her thumb impression on exhibit-8. (iii) The thumb impression of the victim was not taken in presence of PW 6, who was shown as attesting witness to the dying declaration. (iv) There are vast difference between the dying declaration (exhibit-8) and the statement of PW 6, in whose presence, the dying declaration was recorded. (v) There was contradiction between the evidence of PW 1 & PW 10 as to the date of recording dying declaration.(vi) Though the victim died after three days of the occurrence and after two days of recording the alleged dying declaration by the investigating officer, no endeavour was made to avail the service of a magistrate or an independent person to record the dying declaration of the victim. (vii) Though dying declaration was recorded in the hospital and doctors were stated to be present, no medical certificate was obtained as to

fitness of the victim, rather permission was taken from a nurse (PW 6).

21. In view of the above facts and circumstances, it can hardly be said that the dying declaration (exhibit -8) was recorded under compelling

circumstances by the I/O, or there was no scope or time for obtaining a certificate from the doctor or availing the service of a magistrate or any

independent person for recording the statement of the victim. Therefore, this court is of the view, that in the facts and circumstances of the case,

exhibit-8, the so called dying declaration cannot be relied upon for basing conviction of the accused/appellants.

22. Coming to the oral dying declaration, both PW 1 and PW 2 deposed about the oral dying declaration. Learned trial court disbelieved the evidence

of PW 1 with regard to the oral dying declaration, and rightly so, as her statement as to dying declaration was not worthy of trust. PW 1, the brother

of the victim, stated in his evidence, that after arriving at the hospital on being asked by him, the victim told that when she was arranging clothes on the

ulna (wooden hanger), her mother- in-law poured kerosene on her body and her sister in law set fire on her body by matchstick and the brother in law

Nikhil Karmakar put a curtain and immediately after knowing about the facts from her sister, he informed the police. According to PW 10, on the

basis of the oral information given by PW 1 over phone, the G.D. Entry was made, which was proved as exhibit -9. As per exhibit-9, the PW 1 did not

mention as to the involvement of the brother- in- law, though, while deposing in court regarding dying declaration, he also implicated the brother-in-law

of the victim. The testimony of PW 1 as regards the dying declaration appears to be inconsistent with his previous statement, and as such, oral

testimony of the PW 1 is also hardly worthy of inspiring confidence so far the oral dying declaration is concerned. Thus, both the oral as well as

written dying declaration in the present case have to be excluded from consideration inasmuch, it will be totally unsafe to rely on the dying declaration,

for the reason stated above.

23. In order to establish a charge u/s 304-B IPC, it is not necessary for the prosecution to establish that death of the victim was homicidal. To prove a

charge of dowry death u/s 304-B IPC, prosecution needs to establish the following essential ingredients :-

a. Death was caused to a married woman

b. Death was caused by burn or bodily injury or occurs otherwise than under normal circumstances.

c. Death occurred within 7 years of marriage.

d. The deceased was subjected to cruelty or harassment in connection with demand for dowry by her husband or relatives of the husband.

e. Cruelty or harassment was meted out soon before the death of the victim.

24. That the victim was a married woman and her death occurred within 7 years of marriage were not in dispute in the present case. That the death

of the victim occurred due to burn injury was also established by the evidence brought on record. Learned trial court in the impugned judgment

observed that the harassment on the victim was proved by evidence of PW 1 & PW 2. PW 1, the brother of the victim deposed that since after the

marriage, all the three accused persons frequently picked up quarrel with the victim complaining about insufficient dowry and low quality of the

articles given at the time of marriage. According to him, when the victim visited the maternal home, she told before her mother (PW 2) regarding her

sister-in-law, mother-in-law and brother-in-law quarrelling with her. PW 2 told him (PW 1) about the victim complaining before her. Thus, admittedly

PW 1 did not have personal knowledge as to the victim being subjected to any torture and cruelty by her in-laws. He only came to know from his

mother, PW 2, that since after the marriage of the victim, her mother-in-law and sister-in-law used to complain that dowry articles were insufficient

and were of low quality. According to PW 2, victim told her regarding her in-laws complaining about the low quality and insufficient dowry articles,

while visiting the maternal home. However, the PW 2 stated in her previous statement recorded u/s 164 CrPC (Ex-2), that the victim never made any

complain before her regarding any torture meted out to her by her in-laws. She also did not state in her evidence that the victim was subjected to

torture or cruelty in connection with dowry demand. Thus, the oral testimony of PW 2, that the victim stated before her, while visiting the paternal

home, regarding her in-laws complaining about the low quality and insufficient dowry articles, is hardly convincing, inasmuch as, such statement of the

PW 2 given in court for the first time appears to be totally contradictory and mutually destructive with her previous statement recorded u/s 164 CrPC.

25. What therefore, transpires from the evidence of the PW 1 and PW 2, mother

and brother of the victim respectively, was that there was no legal evidence to show that the victim was subjected to torture and harassment for demand of dowry. Learned trial court is also found to have relied on a statement of the husband of the victim recorded u/s 164 CrPC, for coming to the finding, that the victim was subjected to torture in connection with dowry demand. However, the husband of the victim was not examined in the instant case. It needs no mention that the statement recorded u/s 164 CrPC was not evidence, reason being that such statement was not testified by cross-examination. The statement recorded u/s 164 CrPC is nothing more than a previous statement, which can be used to corroborate or contradict the author of such statement. But in the instant case, the husband of the victim having not been examined as a witness, his statement recorded u/s 164 CrPC could not be used as evidence. After discarding the evidence of PW 1 and PW 2, prosecution is left with no legal evidence to prove that victim was subjected to cruelty or harassment by the in-laws.

26. The Apex Court, in *Satbir Singh and Ors. v. State of Punjab and Ors.* reported in 2001 8 SCC 633 held, that the prosecution, in case of offence u/s 304-B IPC, cannot escape from the burden of proof, that the harassment or cruelty were meted out to the victim for demand of dowry and also that such cruelty or harassment was caused soon before the death of the victim. If the interval elapsed between the infliction of such harassment or cruelty or death is wide enough, the court cannot be in a position to guess that in all probabilities the harassment or cruelty would have been the immediate cause of death the victim.

27. In *Vipin Jaiswal v. State of Andhra Pradesh* reported in (2013) 3 SCC 684, the Apex Court held that in any case to hold an accused guilty of both the offences u/s 304-B and 498-A IPC, the prosecution is required to prove beyond reasonable doubt that the deceased was subjected to cruelty or harassment by the accused.

28. As indicated above, prosecution evidence was hopelessly short of proving the factum of the victim being subjected to harassment and cruelty in connection with dowry demand. Even for taking a presumption under Section 113B of the Evidence Act for a dowry death, the prosecution needs to prove beyond reasonable doubt that the victim was subjected to cruelty or harassment by the accused in connection with any demand for dowry

soon before death. It is not doubt true, that expression "soon before death" has to be understood on the basis of the facts and circumstances of a particular case and it cannot be given a rigid or restricted meaning. What is necessary to see is that there should be a perceptible nexus between the death and dowry related harassment. Be that as it may, prosecution in the present case having not been able to prove beyond doubt that the victim was subjected to cruelty or harassment for dowry demand, question of time of harassment has become redundant. What therefore, crystallizes from the entire evidence of the prosecution is that, all the essential ingredients to constitute an offence u/s 304-B IPC has not been proved beyond doubt. Unless all the ingredients constituting the offence u/s 304-B IPC or the essential ingredients required for taking a presumption u/s 113-B is available, the accused cannot be convicted u/s 304-B IPC.

29. Thus the oral evidence of PW 1, PW 2, PW 3, PW 6 & PW 10 crystallizes that prosecution has not been able to discharge its burden to prove the charge u/s 304-B IPC beyond reasonable doubt and as such, the appellants, at least ought to have been given the benefit of doubt. Prosecution evidence having found to be inadequate to bring home the charge u/s 304-B of the IPC against the accused/appellants, the conviction and sentence of the appellants cannot be sustained. Accordingly, the appeal is allowed.

30. While deeply appreciating the commendable assistance rendered by Mr. Anup Mrinal Dutta, learned amicus curiae in disposing the present appeal, it is provided that he shall be paid Rs.7,500/- (Rupees seven thousand five hundred) as professional fees by the Gauhati High Court Legal Service Committee on production of a certified copy of this judgment.

31. Send back the LCR.