

(1993) 08 MP CK 0022

In the Madhya Pradesh High Court

Case No : Criminal Appeal No. 1153 of 1985

Deepak Raghunathrao Shohle @ Shole and Another

APPELLANT

Vs

State of Madhya Pradesh

RESPONDENT

Date of Decision : 16-08-1993

Acts Referred:

Evidence Act, 1872 — Section 113A, 32(1)
Penal Code, 1860 (IPC) — Section 306, 354

Citation : (1993) 38 MPLJ 729 : (1993) MPLJ 729

Hon'ble Judges : D.M. Dharmadhikari, J

Bench : Single Bench

Advocate : S.C. Datt, for the Appellant; D.K. Jain, for the Respondent

Judgement

D.M. Dharmadhikari, J.

The two accused in this case have appealed to this Court against their conviction under Sections 354 and 306 of the Indian Penal Code, sentencing them to one and three years' rigorous imprisonment, respectively to run concurrently.

The prosecution case is that Miss Asha aged about sixteen years committed suicide by setting herself afire. The prosecution relied on three dying declarations made by the deceased between 24-1-1985 and 25-1-1985. The alleged date of incident is 24-1-1985 at 10.00 P.M. It has come in the evidence of prosecution witnesses that one young man Eknath was a conductor on a bus. He used to visit Ku. Asha frequently even at odd hours. The incident is said to have taken place in the house of the deceased when she was sleeping in a room with her young brother and father Ramchandra (P.W.3), who was sleeping in the adjoining room. The alleged dying declaration, first in point of time, is Ex. P-5, recorded by Dr. B. M. Malviya (P.W.1), who examined her soon after the incident with burn injuries. In her statement to the doctor, her version of the incident was that when she came out of the room at 10.00 in the night for easing herself, the two accused persons, who lived as her tenants in the same house, approached her and made overtures for sexual intercourse. When she refused, the accused were said to

have threatened her that they would defame her. In the same statement, she admitted that at that time the bus conductor was with her.

The above statement Ex. P. 5 recorded by Dr. Malviya was made on 25-1-1985 at about 3.00 A.M. in the night. The second alleged dying declaration has been made to the police which is recorded as DEHATINALISHI or F.I.R. marked as Ex. P. 12. This statement to the police was made on 25-1-1985, twenty minutes after the earlier statement made to the doctor. In her statement to the police, which was recorded by S. O., H. S. Parmar (P.W. 8), the version of the incident given by her is said to be a material improvement over her initial version. In the F.I.R. lodged by her, it was stated that while she was sleeping with her brother Parmanand, the two accused persons, at 10"O clock in the midnight knocked the door. She opened the door and found one of the accused-appellant No. 2 Babulal s/o Kadu Rao at the door, but she did not give him entry and closed the door. After ten minutes, when she got up to go to the bath room, conductor Eknath came to her, as he used to come frequently. In the meantime the two accused persons entered the room and both of them caught hold of her and asked her that they be allowed to commit sexual intercourse. When she refused, they threatened that they would defame her and would commit rape. She started weeping. Although they did not commit any sexual intercourse but caught hold of her and thus outraged her modesty. It is her statement that she then asked Eknath to leave the room. After this incident she again got up at 11.00 in the night and poured kerosene on her body and lit herself afire.

The third dying declaration is recorded as Ex. P. 6 by Naib Tahsildar Rakesh Babu Khare (P.W. 7) on 25-1-1985 at 2.44 P.M. In her statement made to the Naib Tahsildar, she implicated only appellant No. 2 Babulal and stated that he misbehaved with her, tried to kiss her and made overtures towards her, which she repelled. Thereafter, she was threatened with defamation and hence she set herself afire the same night. She also stated that the other accused was also present at the time of the incident.

The conviction of the appellants fully rests on the dying declarations Ex. P. 5, Ex. P. 6 and Ex. P. 12 made by the deceased at three different points of time mentioned above.

The learned counsel for the accused assails the conviction mainly on two grounds. Firstly it is submitted that accepting the entire prosecution story, there is no case made out of abetment of suicide u/s 306 of the Indian Penal Code, as there was no positive act on the part of the accused. It is submitted that outraging her modesty or overtures alleged to have been made by the two accused persons might have been a motive for committing suicide, but the acts did not constitute acts of abetment within the meaning of Section 306 read with Section 107 of the Indian Penal Code. Reliance is placed on a decision of this Court in the case of Panchamram and Samailal v. State of M.P. 1971 J.L.J. S.N. 80.

The second ground urged on behalf of the accused is that none of the three

dying declarations is admissible as evidence u/s 32(1) of the Evidence Act. The contention advanced is that the alleged acts on the part of the accused might have constituted a motive for the deceased to commit suicide, but those "were not circumstances of the transaction which resulted in her death", within the meaning of Section 32(1) of the Evidence Act. It is argued that the expression "cause of death" mentioned in Section 32(1) of the Evidence Act means only the manner and method by which the death was caused and not any antecedent circumstances to the incident or the motive of either the accused or the deceased. Reliance is placed on the following decisions:

(i) Subramania Maistry and Another Vs. Nachiar Ammal,

(ii) In Re: Peria Chelliah Nadar,

Lastly, it was submitted that the three so called dying declarations cannot also be relied upon u/s 32(1) of the Evidence Act as pieces of evidence for holding the accused guilty of offence u/s 354 of the Indian Penal Code. It is argued that in case the three dying declarations are excluded from consideration, as inadmissible in evidence, there is no other evidence, led by the prosecution to sustain conviction of the accused either u/s 306 or 354 of the Indian Penal Code. According to the learned counsel appearing for the accused, the dying declaration made first in point of time was to Dr. Malviya (P.W. 1), wherein the allegation was only of making some overtures towards the deceased, which may constitute an offence only u/s 509 of the Indian Penal Code for which the accused was never charged.

The first question which falls for decision is whether the two accused persons can be held guilty of offence u/s 306 of the Indian Penal Code. Abetment has been defined u/s 107 of the Penal Code. On the evidence led by the prosecution in the case, can it be said that the two accused persons, in any manner, either "instigated", were "engaged" in conspiracy or intentionally "aided" in commission of suicide by the deceased. As is the statement of the deceased, disclosed from her three dying declarations, the two accused persons, at late hour of the night, entered her room and tried to take advantage of the situation to commit sexual offence against her. This act on the part of the accused might or might not have driven the woman to commit suicide. In the facts as have been brought on record, the two accused persons could not have foreseen that such act on their part, may be that it was a serious offence, would necessarily drive that woman to commit suicide. It is admitted by the deceased in her own dying declarations that not soon after the incident of outraging her modesty, but after about an hour she set herself afire. In my considered opinion therefore, this is not a case where it can be said that the two accused persons were abettors to the act of commission of suicide by the deceased. This is not a case of a married woman, who having been subjected to a continuous treatment of torture, had ended her life. No presumption u/s 113A of the Evidence Act arises in such a case. Here is a case of a woman whose modesty was outraged while she was with her paramour. There was neither any intention nor any positive act on the

part of the accused to instigate her or aid her in committing suicide. The two accused persons, therefore, cannot be held guilty of the offence u/s 306 of the Indian Penal Code and their conviction on that count by the trial Court, is liable to be set aside.

The next question that arises for decision is as to what other offence can be said to have been committed by the two accused persons on the basis of evidence on record. The learned counsel appearing for the accused severely criticised the three dying declarations as highly inconsistent with each other and, therefore, liable to be totally excluded from consideration. Reliance is placed on the decision in the case of Smt. Kamla Vs. State of Punjab,

At the outset, I must state that in the three dying declarations which have been repeatedly read before me by the learned counsel for the parties, I do not find any inconsistency to reject them on that ground. The first dying declaration made to Dr. Malviya was at about 3.00 A.M. in the night, at the time when she must have been in great pains because of the burn injuries. In that condition she had merely mentioned the names of both the accused and stated that when she had come out of the room for easing herself, they made overtures towards her and threatened her with defamation. In her second dying declaration (Ex.P.12) made to the police at about 3.20 A.M. the same night, she had named both the accused persons who had caught hold of her and made overtures towards her for sexual intercourse. It cannot be said that the second dying declaration contained in F.I.R. (Ex. P. 12) is in any manner inconsistent with the first dying declaration made to the doctor. It may be that in the first dying declaration, she had not given full details of the incident and in the second declaration some more details of the incident were given but that does not render the second dying declaration inconsistent. The third dying declaration (Ex.P.6) was recorded by the Executive Magistrate, in which she named both the accused persons having made overtures towards her for sexual intercourse and threatened her with defamation if their sexual lust was not allowed to be satisfied. The third dying declaration is in no manner, in material particulars, inconsistent or contrary to the earlier two dying declarations. If all the three dying declarations are read together, the same incident has been narrated in different ways giving more or less details of the same incident which furnished a cause for her to commit suicide.

The learned counsel appearing for the State is right in submitting that more than one dying declaration, if not inconsistent, can be relied upon as evidence in the case. [See -- Ganpat Mahadeo Mane v. State of Maharashtra, AIR 1993 SC 1180.]

In relation to the three dying declarations, the next contention advanced by the learned counsel appearing for the accused is that they have no evidentiary value u/s 32 of the Evidence Act, even for basing conviction u/s 354 Indian Penal Code. The relevant part of Section 32(1) of the Evidence Act reads as under:--

"32. Statements written or verbal.....are themselves relevant facts in the following cases :--

(1) When it relates to cause of death. -- When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in case in which the cause of that person's death comes into question. Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question."

From the provision quoted above, it is to be noticed that statements made by persons who are dead are admissible as evidence of relevant facts because their evidence cannot in any other manner come on record. This is so by rule of necessity. The only rider in Section 32(1) is that they should relate to the "cause of his death" or "the circumstances of the transaction which resulted in his death". The word used is "death". According to me the "death" may be homicidal or suicidal and, therefore, the word "death" includes suicidal death. Much emphasis has been laid by the learned counsel on the expression "any of the circumstances which resulted in his death". According to the learned counsel for the accused, outraging of the modesty of a young woman cannot be said to be a transaction which resulted in her death. This argument on the face of clear language of Section 32(1) of the Evidence Act cannot be accepted. The expression "any of the circumstances of the transaction which resulted in death" is wider than the expression earlier used in the same clause "cause of his death". The former expression does convey some limitation. It is not as broad or analogous to circumstantial evidence which includes evidence of all relevant facts. It has been used in some narrower sense, to the circumstances which have some proximate relation with the actual occurrence. If there is a close connection between certain circumstances and the death, they are relevant and are admissible in evidence u/s 32(1) of the Evidence Act. Illustration (a) u/s 32 given hereunder would make the legal position clearer:--

"(a) The question is, whether A was murdered by B; or A died of injuries received in a transaction in the course of which she was ravished. The question is whether she was ravished by B; or

The question is, whether A was killed by B under such circumstances that a suit would lie against B by A's widow.

Statements made by A as to the cause of his or her death referring respectively to the murder, the rape and the actionable wrong under consideration are relevant facts."

[See the following cases :-- (i) AIR 1939 47 (Privy Council) (ii) Satish Chandra Saha Vs. The State, (iii) Thanuvan Ratnakaran v. State AIR 1955 TK 8 7 and (iv) Dukhi Dei Vs. The State,] In the case of Satish Chandra Saha (supra), statement of the deceased that he was going to the accused to release his cow which the accused had confined, made shortly before the quarrel over recovery of the cow, during which the accused struck the deceased, which resulted in his death, is

held admissible. In the case of Thanuvan Ratnakar (*supra*) which is more relevant for the purpose of this case, it has been held as under:--

Where the prosecution case is that the accused wanted to do away with the deceased because she was made pregnant by him, the statement of the deceased to the witness of her such condition through him is relevant.

In the instant case, as I have discussed above, modesty of the deceased was outraged by two accused persons and she was also intimidated that she would be defamed in society. Thereafter, a short interval she immolated herself. The statement, therefore, made by her before her death, containing narration of the incident, which resulted in her suicidal death is clearly, according to me, relevant fact, because the question before me is to ascertain the cause of her committing suicide. In cases of suicidal deaths where the question before the Court is whether there was any instigation, inducement or abetment in commission of suicide or whether there was any offence committed against the deceased, before committing suicide by her, the only evidence that may be made available is in the nature of her dying declaration. To hold that such dying declaration of the deceased in a case of suicidal death is not a relevant fact, would be negation of justice and clear misinterpretation of the provisions of Section 32(1) of the Evidence Act. I rely on the following decisions:

(i) Emperor v. Faiz and Ors. AIR 1916 Lah 106; and

(ii) AIR 1940 340 (Nagpur)

The decision in the case of Kappinaiah and Anr. (*supra*) is distinguishable as in that case suicide was committed three days after rape and it was not a circumstance in the same transaction resulting in her suicidal death. The case of Re. Peria Chelliah Nadar (*supra*) is also distinguishable on facts where statement of deceased wife was held inadmissible in trial of murder of her husband.

It is further argued that the circumstances in this case cannot rule out the possibility that since the deceased was caught red-handed in illicit relationship with Eknath, under the fear of being defamed in society because of likely disclosure by the accused of the fact to her father and others, she took the extreme step of ending her life. The learned counsel does admit that the other possibility that the situation was sought to be exploited to their advantage by the two accused persons by making overtures towards her, cannot also be ruled out. He, therefore, argues that because of the inconsistency in her three dying declarations given at three different points of time, which could not be tested by her cross-examination due to her death, conviction of the appellants is unsustainable. They are falsely implicated. The above argument advanced does not at all impress me. There is no enmity shown between the deceased and the two accused persons and I do not find from the evidence any reason or ground to infer that at the time of her impending death, in her dying declarations rendered thrice, she would falsely implicate the accused persons. The accused persons in their examination at the end of trial have taken defence in which they

have not denied their presence at the place of incident and the fact of having objected to the conduct of the deceased in carrying on illicit relationship with Eknath. If the defence were true there was no cause for the deceased to falsely implicate the accused persons.

Relying on the above decisions and the clear language of Section 32(1) of the Evidence Act, I have no hesitation in holding that the dying declarations made by the deceased, of the incident of outraging her modesty by the two accused persons is a relevant fact admissible in evidence and conviction could be based on the same.

Lastly, it is argued by the learned counsel for the accused that in the light of the three dying declarations giving different versions, the first in point of time which was given to the doctor, if believed, only makes out a case for lesser offence u/s 509 of the Indian Penal Code, for which they were not charged and conviction of the accused for offence u/s 354, Indian Penal Code was bad.

As I have held above, the three dying declarations are not in any manner inconsistent with each other as to discredit all of them. All the three dying declarations can, therefore, be read in evidence. The deceased before and at the time of her death, in her dying declarations, has clearly stated that the two accused persons entered her room, caught hold of her and demanded of her that she should subject herself to sexual intercourse with them on the threat that she would be defamed. A clear case, therefore, of offence u/s 354 of the Indian Penal Code is made out against the accused.

Now remains the question of sentence. Since I have held that no offence u/s 306, Indian Penal Code is made out, imposition of sentence of five years E rigorous imprisonment on the accused has to be set aside and they are liable to be acquitted of the charge u/s 306 of the Penal Code.

The accused had no business to dabble in the private affairs of the deceased, may be that she had illicit relationship with Eknath. They tried to take advantage of the situation of the deceased for satisfaction of their sexual lust. They deserve no leniency and deserve to be punished for offence with maximum sentence, but since there is no appeal for enhancement of sentence I maintain the conviction and sentence imposed by the trial Court, u/s 354 of the Indian Penal Code.

Consequently, the appeal only partly succeeds. The two accused persons are acquitted of the charge u/s 306 of the Indian Penal Code and the sentence imposed for the said offence. Their conviction and sentence of one year's rigorous imprisonment, u/s 354 of the Indian Penal Code is maintained. They are on bail. They should surrender themselves to their bail bonds to suffer the sentences imposed on them.