
(2019) 09 CAL CK 0207

In the Calcutta High Court

Case No : Criminal Appeal (CRA) No. 61 Of 2012

Dilip Karmakar & Ors

APPELLANT

Vs

State Of West Bengal

RESPONDENT

Date of Decision : 12-09-2019

Acts Referred:

Indian Penal Code, 1860 — Section 34, 302, 304B, 307, 326, 498A
Dowry Prohibition Act, 1961 — Section 3, 4
Code Of Criminal Procedure, 1973 — Section 428

Citation : (2019) 09 CAL CK 0207

Hon'ble Judges : Joymalya Bagchi, J; Jay Sengupta, J

Bench : Division Bench

Advocate : Partha Sarathi Bhattacharyya, Sukla Das Chandra, Arun Kumar Maiti, K. Sengupta

Final Decision : Disposed Of

Judgement

Joymalya Bagchi, J

The appellants have approached this Court from the correctional home challenging their conviction and sentence for commission of offence punishable under sections 498A/34 and 302/34 of I.P.C vide a judgment and/or order dated 21/24.11.2008 passed by the learned Additional Sessions Judge, Fast Track, 2nd Court, Paschim Medinipur in Sessions Trial Case No. XXXV of December 2006.

Prosecution case, as alleged, against the appellants is to the effect that one Sima (since deceased) was married to Dilip Karmakar, appellant No.1 one year five months prior to the incident. At the time of marriage dowry of Rs.10,000/-, gold ring, gold chain, ear rings, clothing and gifts etc. were given by Sankar Dhara, father of the deceased (P.W.1) to the appellants being the husband and other in-laws of the victim housewife. Two months after the marriage, the appellants started subjecting her to mental and physical torture and demanded an additional amount of Rs.5,000/. As Sankar Dhara, father of the deceased was financially weak, he was unable to meet such demand. As a result, Sima was

subjected to physical assault and was not even provided with adequate food.

On the date of the incident i.e. 20.09.2005 Sima was beaten up by the appellants and thereafter appellant Nos.2, 3 and 4 being the father-in-law, mother-in-law and sister-in-law set her on her fire after pouring kerosene on her. Her husband (appellant no.1 herein), rushed to the spot and tried to douse the fire with water. Sima was admitted at Midnapur Sadar Hospital and a written complaint dated 22.09.2005 was lodged by her father Sankar Dhara at Kharagpur (Local) Police Station under sections 498A/326/307 of I.P.C and 3/4 of the D.P. Act against the appellants. Sima expired in the hospital three days after the incident and offence under section 302 of the I.P.C was added to the array of accusations in the FIR.

In conclusion of investigation charge sheet was filed against the appellants and case was committed to the court of sessions and transferred to the Court of the Additional Sessions Judge, Fast Track, 2nd Court, Paschim Medinipur for trial and disposal.

Charges were framed against the appellants under sections 498A/34, 302/34 and 304B/34 of I.P.C. The appellants pleaded not guilty and claimed to be tried.

In the course of trial, prosecution examined 22 witnesses and exhibited a number of documents to prove its case.

Defence of the appellants was that the victim had suffered accidental burns and died as would appear from her statement to P.W. 21, Dr. P.S. Hembram who treated her at the hospital and they have been falsely implicated in the case.

During trial one of the accused persons Jiban Karmakar, father-in-law of the deceased, expired.

In conclusion of trial the Trial Judge by the impugned judgment and/or order dated 21/24.11.2008 convicted and sentenced the appellants.

Mr. Bhattacharyya appearing for the appellants argued that the Trial Court had failed to consider the exonerative dying declaration of the victim before P.W. 21, Dr. P.S. Hembram recorded in the bed ticket Exhibit 8 (series) and illegally recorded an order of conviction against the appellants. Oral dying declaration of the victim made before the prosecution witnesses is an afterthought as the same is neither reflected in the FIR nor in their earlier statements to the police. Accordingly the embellished claim of the prosecution witnesses with regard to an oral dying declaration made by the victim is not trustworthy and the appellants are entitled to an order of acquittal.

On the other hand, Mr. Maiti, learned Additional Public Prosecutor appearing for the State argued that the Trial Court has rightly refused to rely on the statement made before the P.W. 21 relating to accidental burns which appears to be untruthful in view of the opinion of the said witness himself. That apart, no burnt/ burst stove was recovered from the place of occurrence, nor was any sign

of blackening of the walls of the room noticed in this case. On the other hand, evidence of the relation witnesses namely P.Ws 3, 8 and 9 are corroborated by independent witnesses namely P.W. 5 and 6 with regard to the oral dying declaration made by the victim incriminating the role of the appellants in setting the housewife on fire. Hence, the appeal is liable to be dismissed.

The present case gives rise to a dilemma of conflicting dying declarations. While the appellants relied on a statement made by the injured victim Sima before the attending doctor P.W. 21 claiming that she suffered from accidental burns due to bursting of stove, prosecution has strongly relied on the evidence of her parents and relations P.Ws 8 and 9 and independent witnesses P.Ws 5 and 6 who claimed that she told them that the appellants poured kerosene oil on her body and set her on fire on the fateful day.

It is settled law that the conviction of an accused can be solely based on a dying declaration provided the same is a reliable one. In a catena of decisions the Apex Court had held that a dying declaration can be the sole basis of conviction provided the following tests are satisfied:

(i) the maker was conscious and in a fit state of mind and capable of making such declaration;

(ii) the declaration is a voluntary and truthful one and not a product of prompting at the behest of others. [See *Khushal Rao Vs. State of Bombay* A.I.R 1958 SC 22 (para 16), *K. Ramachandra Reddy & Anr. Vs. The Public Prosecutor* (1976) 3 SCC 618 (para 6), *Paniben (Smt) Vs. State of Gujarat* (1992) 2 SCC 474 (para 18).]

It is for the court to sift the evidence on record and satisfy itself whether in a particular case the aforesaid parameters are duly established or not. Moreover, when the court is confronted with two or more dying declarations of conflicting nature a higher duty is cast on its shoulder to examine which of the dying declarations is reliable in the factual matrix of the case and come to a conclusion with regard to the truthfulness of such declarations. In *Shudhakar Vs. State of M.P* 2012 Cr.LJ 3985, the Apex Court while dealing with multiple mutually contradictory dying declarations held as follows:-

"21. Having referred to the law relating to dying declaration, now we may examine the issue that is cases involving multiple dying declarations made by the deceased, which of the various dying declarations should be believed by the Court and what are the principles governing such determination. This becomes important where the multiple dying declarations made by the deceased are either contradictory or are at variance with each other to a large extent. The test of common prudence would be to first examine which of the dying declarations is corroborated by other prosecution evidence. Further, the attendant circumstances, the condition of the deceased at the relevant time, the medical evidence, the voluntariness and genuineness of the statement made by the deceased, physical and mental fitness of the deceased and possibility of the deceased being tutored are some of the factors which would guide the exercise

of judicial discretion."

It further held:-

"22....in the case of multiple dying declarations each dying declaration has to be considered independently on its own merit as to appreciate its evidentiary value and one cannot be rejected because of the contents of the other. In cases where there is more than one dying declaration, it is the duty of the court to consider each of them in its correct perspective and satisfy itself which one of them reflects the true state of affairs."

Similarly, in Jagbir Singh Vs. State (N.C.T Of Delhi) (MANU/SC/1200/2019) the Court summarized the law relating to dying declaration as follows:-

"30. A survey of the decisions would show that the principles can be culled out as follows:

- a. Conviction of a person can be made solely on the basis of a dying declaration which inspires confidence of the court;
- b. If there is nothing suspicious about the declaration, no corroboration may be necessary;
- c. No doubt, the court must be satisfied that there is no tutoring or prompting;
- d. The court must also analyse and come to the conclusion that imagination of the deceased was not at play in making the declaration. In this regard, the court must look to the entirety of the language of the dying declaration;
- e. Considering material before it, both in the form of oral and documentary evidence, the court must be satisfied that the version is compatible with the reality and the truth as can be gleaned from the facts established;
- f. However, there may be cases where there are more than one dying declaration. If there are more than one dying declaration, the dying declarations may entirely agree with one another. There may be dying declarations where inconsistencies between the declarations emerge. The extent of the inconsistencies would then have to be considered by the court. The inconsistencies may turn out to be reconcilable.
- g. In such cases, where the inconsistencies go to some matter of detail or description but is incriminatory in nature as far as the accused is concerned, the court would look to the material on record to conclude as to which dying declaration is to be relied on unless it be shown that they are unreliable;
- h. The third category of cases is that where there are more than one dying declaration and inconsistencies between the declarations are absolute and the dying declarations are irreconcilable being repugnant to one another. In a dying declaration, the accused may not be blamed at all and the cause of death may be placed at the doorstep of an unfortunate accident. This may be followed up by another dying declaration which is diametrically opposed to the first dying

declaration. In fact, in that scenario, it may not be a question of an inconsistent dying declaration but a dying declaration which is completely opposed to the dying declaration which is given earlier. There may be more than two.

i. In the third scenario, what is the duty of the court? Should the court, without looking into anything else, conclude that in view of complete inconsistency, the second or the third dying declaration which is relied on by the prosecution is demolished by the earlier dying declaration or dying declarations or is it the duty of the court to carefully attend to not only the dying declarations but examine the rest of the materials in the form of evidence placed before the court and still conclude that the incriminatory dying declaration is capable of being relied upon?"

With regard to the multiple dying declarations, it held:-

"31. We would think that on a conspectus of the law as laid down by this court, when there are more than one dying declaration, and in the earlier dying declaration, the accused is not sought to be roped in but in the later dying declaration, a summersault is made by the deceased, the case must be decided on the facts of each case. The court will not be relieved of its duty to carefully examine the entirety of materials as also the circumstances surrounding the making of the different dying declarations. If the court finds that the incriminatory dying declaration brings out the truthful position particularly in conjunction with the capacity of the deceased to make such declaration, the voluntariness with which it was made which involves, no doubt, ruling out tutoring and prompting and also the other evidence which support the contents of the incriminatory dying declaration, it can be acted upon. Equally, the circumstances which render the earlier dying declaration, worthy or unworthy of acceptance, can be considered."

I have made an endeavour to elicit the truth from the quagmire of inconsistent dying declarations by applying the aforesaid propositions of law to the facts of this case.

P.W. 21 Dr. P.S. Hembram treated the victim Sima when she was admitted in the female surgical ward in Medinipur Medical College and Hospital. As per the statement of the patient, history of injury was recorded as accidental burn as her clothes had caught fire due to explosion of cooking stove on 20.9.2005 at 8 p.m. P.W.21 proved the bed head ticket [Ext. 8 (series)]. In the latter part of his deposition, P.W. 21 doubted the truthfulness of such statement and stated in the event of explosion of stove, apart from the burn injuries, abrasion, laceration, bruise etc. are expected on the body of the victim. No such injuries were found on the body of the patient. Hence, he opined the case may be one of homicide. In cross-examination, he, however, admitted that the victim was conscious and the statement was recorded as per her version.

P.W. 15 Dr D.K. Mridha held post mortem examination over the body of the victim and found the following injuries :

"(1) burnt injury involving chest, abdomen, except at lower ambical region with an area of 3" (2) both lower limbs were burnt upto above ankle (3) right upper limb medially (4) left upper limb fully burnt (5) back of face, abdomen fully burnt (6) both lower limbs upto ankle of the body were fully burnt (7) face and sole were not burnt. 80% of the body was burnt".

He opined that the death of the victim was due to burn injuries, ante mortem in nature. He proved post mortem report (Ext.3). He opined that death may be homicidal, accidental or suicidal depending upon circumstantial evidence.

Apart from the clarification given by P.W.21 which improbabilises a case of accidental burn arising out of bursting of stove, it appears that the investigating officer P.W. 20 who visited the place of occurrence did not find any burst/burnt stove at the spot. On the other hand he seized blanket, towel and a plastic bottle smelling of kerosene from the room under a seizure list (Ext. 7). It is also relevant to note that the place of occurrence is noted to be a bedroom and not a kitchen of the house.

In view of the aforesaid facts and circumstances of the case particularly the opinion of P.W. 21 with regard to nature of injuries suffered by the victim and the fact that the place of occurrence is a bed room wherefrom no broken/burst stove was recovered, I am in agreement with the conclusion of the trial judge that the attending facts and circumstances of the case do not corroborate the contents of the exonerative dying declaration and renders it an improbable one.

On the other hand it is most probable that the victim who had been admitted in the hospital by the accused persons upon their prompting had made the exonerative dying declaration to the attending doctor (P.W. 21) which does not disclose the true state of affairs leading to the burn injuries suffered by her.

Let me now examine the veracity of the incriminating oral dying declaration of the victim as claimed by the prosecution witnesses in their depositions in Court.

P.W. 8 Sankar Dhara is the father of the victim and de facto complainant. He deposed that his daughter had married Dilip Karmakar 1½ years ago. She was set on fire by the accused persons and P.W.1 had lodged a written complaint which was scribed by P.W 7. It is pertinent to note that in the written complaint there is no whisper of any oral dying declaration made by the victim either to P.W. 8 or to his wife P.W. 9 and others.

On the other hand the FIR speaks of an effort on the part of the appellant no. 1 to save his wife when other in-laws i.e. the appellant nos. 2 and 3 had set her on fire.

P.W. 9 Puspa Dhara, mother of the deceased deposed that her daughter was married to Dilip Karmakar 1½ years prior to the incident. At the time of marriage they had given dowry. However, on demand of additional dowry of Rs. 5000/-, the deceased was subjected to torture and the matter was referred to a local

Panchayet but to no avail. When she went to the hospital her daughter had told her that the accused persons had poured kerosene oil on her and set her on fire. P.W.9 claimed that she had gone to hospital with her husband P.W. 8, her sister Jasoda Rana, P.W. 3 and neighbours Biswanath Rana, P.W. 5 and Lakshmi Patar, P.W. 6. She was cross examined with regard to her previous statement made to the police wherein she had not stated about the dying declaration made by her daughter. No doubt P.Ws 3, 5 and 6 have corroborated the evidence of P.W. 9, mother of the victim with regard to the oral dying declaration made by the victim. These witnesses were cross examined with regard to their omission to make disclosure of the so-called dying declaration to the police during investigation.

In the light of the aforesaid evidence on record it appears that P.Ws 3, 5, 6 and 9 have stated about the oral dying declaration for the first time in court. There is no reflection of the oral dying declaration either in the FIR or in their statements to the police during investigation. Furthermore, P.W. 8, father of the victim and the defacto complainant, did not state about the dying declaration even during his deposition in Court. On the contrary, he claimed that his daughter was not in a condition to talk to him.

Accordingly I am constrained to hold that the incriminating oral dying declaration which has come out from the mouths of the prosecution witnesses for the first time in court appears to be an afterthought and in the factual backdrop of the case where it appears that appellant no. 1 had tried to save the victim from burning, the so-called incriminating dying declaration does not have the resonance of truth or reliability to form the sole basis of conviction in this case.

In the light of the aforesaid discussion, I am not inclined to rely either on the exonerative dying declaration recorded by P.W. 21 or on the so-called incriminating oral statement of the victim made to P.Ws 3, 5, 6 and 9 as claimed by them for the first time in court. However, the evidence of the prosecution witnesses particularly that of the relation witnesses P.Ws 3 and 9 i.e the aunt and the mother of the deceased as well as the other witnesses namely P.Ws 5 and 6 clearly establishes the fact that the short matrimonial life of the victim was punctured with continuous torture over additional demand of dowry to the tune of Rs. 5000/-. Ultimately she suffered unnatural death due to burns. The aforesaid factual matrix clearly establishes not only the ingredients of the offence punishable under sections 498A/34 of I.P.C but also the ingredients of sections 304B of I.P.C which are as follows:

- (i) death of the housewife occurred within seven years of marriage
- (ii) victim died due to burn injuries or under circumstances otherwise than under normal circumstances
- (iii) soon before the death she was subjected to torture for or in connection with dowry.

Facts of the case have clearly established ingredients (i) and (ii) of the aforesaid offence. With regard to ingredients (iii), I note that the evidence on record particularly that of the mother of the deceased and her aunt (i.e P.W.3 and P.W.9) clearly established a continuous torture over an additional demand of Rs. 5000/-which ended in her unnatural death on the fateful day. Expression 'soon before the death' occurring in the aforesaid section does not yield to any mathematical determination of the number of days/months between the acts of torture and the ultimate unnatural death of the deceased. In the event of a clear and live link between the torture for or in connection with dowry and the unnatural death is established, the said ingredient of the offence of dowry death can be said to be proved. I have no doubt that in the factual matrix of the case a clear and live link between the torture suffered by the victim during her short matrimonial life of 1½ years and her unnatural death due to burn injuries has been established and all the ingredients of the offence under section 304B of I.P.C have been proved beyond doubt.

In the light of the aforesaid discussion, while upholding the conviction under sections 498A/34 of I.P.C, I convert the conviction of the appellants from sections 302/34 of I.P.C to one under section 304B/34 of I.P.C. As charge under sections 304B/34 of I.P.C had been framed against the accused persons during trial and since they had been convicted of a graver offence, namely murder, alteration of their conviction to the offence under sections 304B/34 of I.P.C to my considered opinion does not cause any prejudice or occasion any failure of justice to the appellants.

Hence, I hold the appellants guilty of the offences punishable under sections 498A/34 of I.P.C and under sections 304B/34 of I.P.C.

Sentence imposed on the appellants by the trial court for the commission of offence punishable under sections 498A/34 I.P.C is upheld. As the appellants have already undergone imprisonment for eleven years , I direct that they may be sentenced to suffer imprisonment for the period already undergone for the offence punishable under sections 304B/34 of I.P.C.

Accordingly, appellants shall be forthwith released from custody (if they are not wanted in any other cases) and discharged from their bail bonds after expiry of six months in terms of 437A of the Code of Criminal Procedure.

The period of detention, if any, undergone by the appellant during the period of investigation, enquiry and trial shall be set off against the substantive sentence, as aforesaid, in terms of section 428 of the Code of Criminal Procedure.

The appeal is accordingly disposed of.

Copy of the judgment along with LCR to be sent down to the trial court at once for necessary compliance.

Urgent photostat certified copy of this order, if applied for, be supplied expeditiously after complying with all necessary legal formalities.

I agree.