

(2017) 02 MP CK 0131
In the Madhya Pradesh High Court
Case No : 251 of 2001

Dilip Singh Datodia?S/o Sher Singh Datodia Vs State of M.P. & Ors.

Date of Decision : 15-02-2017

Acts Referred:

Indian Penal Code, 1860, Section 376,
Section 342, Section 109, Section 306, Section 376(1) -
Punishment for rape - Punishment fo

Citation : (2017) 02 MP CK 0131

Hon'ble Judges : Alok Verma

Bench : Single Bench

Advocate : A K Saraswat, Peeyush Jain

Judgement

1. This criminal appeal is directed against the judgment and sentence passed by the learned 4th Additional Sessions Judge, Mandsaur in Session Trial No.94/2000 dated 14.02.2001 whereby the learned Sessions Judge found appellant No.1 guilty under Sections 342, 376(1) r/w Section 109 of IPC and sentenced her to undergo rigorous imprisonment for 6 months and fine of Rs.1,000/-. The Sessions Court also found appellant No.2 guilty under Sections 342, 376(1) of IPC and sentenced him to undergo rigorous imprisonment of 7 years and fine of Rs.1,000/-.

2. According to the prosecution story, the incident allegedly took place on 03.03.2000. The prosecutrix was admitted in District Hospital, Mandsaur with 95% burn injuries on her body. An intimation of her admission to District Hospital was sent to Police Station- City Kotwali, Mandsaur on which Sub- Inspector Krishnawati (P.W.-10) reached the District Hospital and in presence of Karulal (P.W.-14) and one Radheshyam, recorded her statement. She succumbed to her brunt injuries and died on 09.03.2000. Her statement recorded by Sub Inspector Krishnawati which is produced by the prosecution as Ex.P-10, which is treated by the trial Court as her dying declaration under Section 32 of Evidence Act. In her statement, she stated that one Teju came to call her that his maternal aunt is calling her. When she went to her house, the accused Hemkunwar locked her in a

room, where the accused Hukumsingh was already there. It is alleged that in the room, the accused Hukumsingh committed rape on her, thereafter, she came back from back door of the house to her own house. Her parents were not at home so she did not narrate the story to anybody. In the evening, expecting infamy, she poured kerosene on herself and put her on fire. Thereafter, she was shifted to the hospital.

3. Charges under Sections 376(1), 342, 306 of IPC were framed against the accused Hukumsingh while charges under Sections 376(1) r/w Section 109, 342, 306 of IPC were framed against the accused Hemkunwar. After recording evidence of both the accused, the learned Additional Sessions Judge found the accused Hukumsingh guilty under Sections 376(1), 342 IPC while the trial Court found accused Hemkunwar guilty under Section 376(1) r/w 109 and Section 342 IPC. They were acquitted from the charge under Section 306 IPC.

4. Aggrieved by this order of conviction and sentence, the present appeal is filed on the grounds that (i) there is no evidence to connect the present appellants for the alleged crime committed (ii) there is also no evidence against the appellant No.1 Hemkunwar. (iii) the conviction is based on a hearsay evidence, it is uncorroborated. (iv) the trial Court relied on Ex.P-10 and treated this statement as dying declaration. (v) the trial Court erred in doing so because recording of evidence was not possible as the prosecutrix was admitted with 95% burn injuries on her body and in such condition giving statement was not possible. (vi) there was also no certificate of the doctor to show that the prosecutrix was in conscious and in a condition to give statement. (vii) the witness before whom the statement was recorded did not support the prosecution story, and therefore, this statement is also doubtful. (viii) the trial Court also erred in holding that the prosecutrix committed suicide while she herself informed the doctor that she accidentally received burn injuries, as the inferences drawn by the trial Court were based on hearsay evidence, the conviction and sentence is bad in law.

5. Learned counsel for the State supports the judgment passed by the trial Court and prays that the appeal should be dismissed.

6. The learned counsel for the appellants placed reliance on judgment of Hon'ble Apex Court in case of Sudhakar and another vs. State of Maharashtra; 2006 6 SCC 671.

7. The Hon'ble Apex Court after taking into consideration the various case laws on Section 32 of Evidence Act, laid down the following propositions namely as :- "Thus, from a review of the authorities mentioned above and the clear language of Section 32(1) of the Evidence Act, the following propositions emerge:

(1) Section 32 is an exception of the rule of hearsay and makes admissible the statement of a person who dies, whether the death is a homicide or a suicide, provided the statement relates to the cause of death, or exhibits circumstances leading to the death. In this respect, as indicated above, the Indian Evidence Act, in view of the peculiar conditions of our society and the diverse nature and

character of our people, has thought it necessary to widen the sphere of Section 32 to avoid injustice.

(2) The test of proximity cannot be too literally construed and practically reduced to a cut-and-dried formula of universal application so as to be confined in a straitjacket. Distance of time would depend or vary with the circumstances of each case. For instance, where death is a logical culmination of a continuous drama long in process and is, as it were, a finale of the story, the statement regarding each step directly connected with the end of the drama would be admissible because the entire statement would have to be read as an organic whole and not torn from the context. Sometimes statements relevant to or furnishing an immediate motive may also be admissible as being a part of the transaction of death. It is manifest that all these statements come to light only after the death of the deceased who speaks from death. For instance, where the death takes place within a very short time of the marriage or the distance of time is not spread over more than 3-4 months the statement may be admissible under Section 32.

(3) The second part of clause (1) of Section 32 is yet another exception to the rule that in criminal law the evidence of a person who was not being subjected to or given an opportunity of being cross-examined by the accused, would be valueless because the place of cross-examination is taken by the solemnity and sanctity of oath for the simple reason that a person on the verge of death is not likely to make a false statement unless there is strong evidence to show that the statement was secured either by prompting or tutoring.

(4) It may be important to note that Section 32 does not speak of homicide alone but includes suicide also, hence all the circumstances which may be relevant to prove a case of homicide would be equally relevant to prove a case of suicide.

(5) Where the main evidence consists of statements and letters written by the deceased which are directly connected with or related to her death and which reveal a tell-tale story, the said statement would clearly fall within the four corners of Section 32 and, therefore, admissible. The distance of time alone in such cases would not make the statement irrelevant."

8. The dying declaration is acceptive of Rule of hearsay. Section 32(1) of Evidence Act is produced as under:- "Section 32 in The Indian Evidence Act, 1872

"32. Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant. Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, 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 cases 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."

9. It is apparent from bare reading of Section 32 of Evidence Act that the dying declaration is only admissible in a proceeding in which the cause of his death comes into question.

10. Reverting back to the present case, Sub-Inspector Krishnawati recorded the evidence of the prosecutrix Ex.P-10 on 03.03.2000 on the date of incident itself. At that time, she did not even inform the doctor, as the doctor, who examined the prosecutrix. Dr. S.L. Verma (P.W.-6), who examined the prosecutrix on 03.03.2000 when she was brought to the hospital by her father Bansilal. He specifically stated in his statement that no statement recorded before him, and therefore, it is apparent that Sub-Inspector Krishnawati did not inform the doctor on duty before recording the statement. She did not even obtain the certificate whether the prosecutrix was in a condition to give such statement, and thereafter, in her statement, Krishnawati (P.W.-10) stated that head-constable Chedi Prasad was sent to call the Executive Magistrate. However, he was not found but she did not requested the duty doctor to remain present and record the statement.

11. After this, no action was taken by her though it was in her knowledge that according to statement of the prosecutrix rape was committed on her on 4th, 5th & 6th March, 2000. She did not take any action and the crime was registered only on 7th March, 2000. On that day, the prosecutrix was examined after a delay of almost 4 days and as expected, no human spermatozoa were found in her body.

12. Taking all these factors into consideration, it is apparent that the statement Ex.P-10 which was treated as dying declaration by the learned trial Court is itself doubtful. There is also a possibility that it was anti-dated and prepared when the police realized that a crime had to be registered. Apart from this, immediately on reaching the hospital, father of the prosecutrix did not inform the doctor and it was only informed by the prosecutrix that she sustained burn injuries as kerosene lamp which, she was trying to light, fell on her at 7:00 pm.

13. The dying declaration is relevant and can be read as such only when cause of death of maker of the statement comes into question. In this case, the appellants were discharged from the charge under Section 306 IPC. Cause of death of the prosecutrix was no longer in question, and therefore, the statement given by the prosecutrix before her death could not be used for convicting the present appellants under Sections 376, 342 of IPC. For this purpose, statement was the hearsay statement and did not fall under the exception created by

Section 32 of Evidence Act.

14. In this view of the matter, I find that the conviction and sentence passed on the present appellants cannot be allowed to sustain. The appeal deserves to be allowed and hereby allowed. The conviction of appellant No.1 under Sections 376(1) r/w Section 109 and 342 IPC and the sentence awarded on her are set aside. She is acquitted from the charge under the aforementioned sections. The conviction of appellant No.2 under Sections 376(1) and 342 IPC is set aside and he is acquitted under the aforementioned charges. The seized property if deposited in the trial Court shall be destroyed. The amount of fine if any deposited by the present appellants shall be refunded to them by the trial Court.