

(2009) 07 CAL CK 0020
In the Calcutta High Court
Case No : C.R.R. No. 3473 of 2008

Indrajit Kundu and Others

APPELLANT

Vs

The State of West Bengal and Another

RESPONDENT

Date of Decision : 30-07-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 173, 173(2)
Penal Code, 1860 (IPC) — Section 107, 109, 306, 34

Citation : (2009) 07 CAL CK 0020

Hon'ble Judges : Partha Sakha Datta, J

Bench : Single Bench

Advocate : S. Moitra, for the Appellant; Swapan Kr. Mallick, for the Respondent

Final Decision : Allowed

Judgement

Partha Sakha Datta, J.—The question is whether the learned Trial Court was justified in framing charge against the petitioners u/s 306 read with section 34 of the Indian Penal Code. The victim, the youngest daughter of the de facto complainant was a painter and artist and by selling her pictures the family of the complainant used to be maintained. A structure was erected on the roof of the second floor of the building where the victim would do the work of painting. To acquire proficiency in English an English teacher was appointed for the victim, he is the petitioner No.1, Indrajit Kundu. The other two petitioners are his parents. There developed intimacy between the victim and Indrajit in course of coaching. There was a decision between the two of early marriage. To finalize the proposal of marriage the victim had gone to the house of Indrajit on 5th of March, 2004. The de facto complainant came to know that when the victim had asked Indrajit in his house to finalize the date of marriage the parents of Indrajit came out to raise shouts and addressed the victim saying " you are a call-girl, why my son would marry you, we would give our son in marriage elsewhere". Indrajit did not protest against this version of his parents. His daughter, victim returned home and became mentally perturbed. He, and his other daughters tried to persuade

the victim and assured that he would personally talk with the parents of Indrajit and decide everything. Then the victim took dinner and retired to bed. On 6th March, 2004, the victim as usual went to her drawing room; at about noon she asked her another sister to give her mobile phone. At about 1.00 p.m. the victim was called for lunch, no response was received. His another daughter started crying and it was found that the victim committed suicide. The de facto complainant is confident from the conversation of the victim held on 5th of March, 2004 and from her letter dated 6th of March, 2004 that Indrajit and his parents were responsible for commission of suicide by the victim.

2. Jorabagan Police Station started Jorabagan P.S. Case No. 38 dated 6th of March, 2004 against the three petitioners u/s 306 of IPC. Charge sheet was submitted against the three on 7th May, 2004 under the aforesaid section of the law.

3. There are two suicidal notes. The first one reads as follows: "for my death Sanjit Kundu and his wife Anju Kundu of Madan Mohan Press are responsible. My fault is that I love Indrajit Kundu, their divorcee son. Assuring me of marriage Indrajit in order to expose his modern bent of mind persuaded me in cohabitation. I had given him all the money for purchasing of computer. His parents abused me in silly words and his father spotted my character by telling me as a call-girl. If I am a call-girl, why I by hard labour draw picture and go for coaching."

4. Another note is like this: "Hope all is well. There develops a special disease in spine. If one is a coward or minor then there is a law to use another person as support. Is it wrong to standby in course of need? No stigma can be erased by any law. I have right to live with head held high. Sir ! Your father stigmatized me as call-girl; would you remove this stigma by law? Remedy in the matter lies with you; other wise I will leave no stone unturned to give all the photos of the hotel to the opposite side. How long a coward would live with breathing trouble? How long your phone will remain switched off? Should I send a photo of the C.P. Try to meet me or else other course is open and don't forget that I am a human being. Hope I will get a letter. At this moment stigma on me as call-girl is more grave than your stigma. So far as my living in the world is concerned try to be a man instead of being a machine for money making. Could you say why my life came to be this? It is you who are to erase my stigma. All humiliations cannot be forgotten by a mere word that "I am always with you". They know my situation that I could not cry on my mother's death but I cannot but stop my tears in eyes and forget the humiliations."

5. It appears from the materials in the C.D. that the deceased committed suicide by hanging on 6th March, 2004 sometime between 12.00 hours and 15.00 hours in her study-cum-painting room on the roof of three storied building. One note of suicide written by the victim in Bengali was found beside her body where she held Sanjit Kundu and Anju Kundu to be responsible for her death. According to the de facto complainant the accused persons abetted in commission of suicide

not only by refusing to hold marriage of Indrajit with the deceased who had love affairs between them but also induced her to commit suicide. The victim is stated to had been a good painter. She would coach students of Class-XII and B.A. first year class and also drawing. In the year of 2002 she came in contact with Indrajit and intimacy developed. Indrajit was previously married to one Smt. Anindita Banerjee who got divorce in the year of 2001. Before proposed marriage the deceased is said to had physical relationship with Indrajit. During investigation I.O. seized some incriminating documents and articles including suicidal note written in Bengali, mobile phone, one scarf which has been reportedly used by Suparna Dawn to commit suicide by hanging, one wooden stool etc. I.O. further examined Smt. Shukla Dawn, Sri Shiba Prasad Dawn and Sri Pulak Kundu who confirmed the writing on the suicidal note as of Suparna Dawn @ Shrabani. They also stated that Shrabani had love affairs with Indrajit Kundu and on 5.3.2004 she went to the residence of Indrajit Kundu when Sri Sanjit Kundu and Smt. Anju Kundu termed her as "Call Girl" and asked her to die so that Indrajit Kundu could get rid of her. During investigation several other witnesses namely Sri Shambhunath Saha, Sadananda Dawn, Amarnath Dawn, Rajib Paul, Smt. Nilima Dey, Sanjay Chakrabonty etc. were examined. They confirmed that there was an intimacy between Indrajit Kundu and Suparna Dawn and both were supposed to marry. The inquest and Post Mortem examination were held over the body of Suparna Dawn and it has been confirmed by Dr. B.Mukherjee, Demonstrator, Dept. of Forensic and State Medicine, Medical College , Kolkata that the death was due to hanging ante-mortem in nature and Suparna Dawn used to have sexual intercourse. It further appeared from the suicide note that the deceased gave money to Indrajit Kundu to purchase one personal computer. During search one P.C. and its component could be seized pursuant to the statement of Indrajit Kundu and being led and identified by him. The relevant documents in respect of the purchase of the said computers could be seized. The suicidal note and the letter along with specimen writing of Suparna Dawn were sent to the Forensic Science Laboratory to have the opinion of the expert on the authorship of the writings and the opinion has been obtained which confirmed that the writing was of Suparna Dawn. The mobile phone of Suparna Dawn has been sent to the Forensic Science Laboratory to retrieve the contents of the Short Messages Services and the report of FSL expert revealed that accused Indrajit Kundu used to send SMS assuring the victim girl to marry. The I.O. examined Tapas Basu and his wife and it revealed that they knew the intimacy of Suparna Dawn with Indrajit Kundu and both were supposed to marry each other. They revealed that Suparna informed the details of incidents that took place at the residence of Indrajit Kundu on 5.3.2004. It revealed that on 5.3.2004 Suparna Dawn wrote a letter in Bengali in presence of her two students namely Miss. Moumita Indra and Miss. Saswati Roy and asked them to deliver the said letter to Sri Indrajit Kundu on the same evening. Both Saswati and Moumita had been to the residence of Indrajit Kundu to deliver the said letter but as Indrajit Kundu did not respond well they could not deliver the said letter. Non-delivery of such letter upset Suparna Dawn. Both Moumita Indra and Saswati Roy

were examined. The said letter could be seized. It revealed that both Indrajit Kundu and Suparna Dawn used two mobile phones of Reliance India. Mobile phones which were seized. The original customer application forms and the call details could be obtained. It revealed from the details of the call chart that both Suparna Dawn and Indrajit Kundu used to have talks over phone on regular basis for long duration.

6. Learned advocate appearing for the petitioners submitted that given the definition of abetment as it appears from section 107 of the IPC which includes mental process of instigating a person or intentionally aiding a person in doing of a thing and a code of role which can be prescribed as instigating or aiding of doing thing, the present case does not present any picture prima facie of abetment allegedly committed by the petitioners in the house of the de facto complainant. The suicide committed by the victim cannot be said to be the result of any action of the petitioners nor can be it said that the commission of suicide by the victim was the only course open to her due to action of the petitioners. There was no goading or solicitation or insinuation by any of the petitioners to the victim to commit suicide. It is submitted by Mr. Moitra, learned counsel for the petitioners that mere expression of certain words that the victim should die is not sufficient requirement of section 107; and consequently of section 306 of the IPC. It cannot be said that given the facts disclosed in section 173 Cr PC papers the petitioners had any mens rea of committing abetment to the commission of suicide by the victim.

7. Mr. Swapan Kr. Mallick, learned advocate for the State of West Bengal submitted that when charge sheet has been submitted there was no point in quashing the proceeding.

8. This is not exactly a case of quashing of the proceeding. Learned Additional Sessions Judge by order dated 4th September, 2008 overruling the contention of the petitioners decided to frame charges against the petitioners observing that where there is simply a probability of the accused persons being convicted a charge may be framed. Learned Judge observed that there is reasonable likelihood of the accused persons being convicted of the offence u/s 306 of the IPC. Since by the order dated 4th September, 2008 of the learned trial Court opined that there are prima facie materials to hold charge. It is now to be examined whether the materials so far made available u/s 173(2) of the Cr PC are sufficient to frame charge against the petitioners. Earlier the petitioners made an application being CRR No. 1817 of 2007 and that application was disposed of with the order that the learned trial Court will consider the materials and pass an order and the petitioners were permitted to raise their points before the learned trial Court. Now that the learned Judge has passed an order on 4th September, 2008 and the said order is now under challenge it is, therefore, necessary to consider whether trial Court was justified in holding that a prima facie case of abetment to commit suicide. The provision of section 306 IPC is:

If any person commits suicide, whoever abets the commission of such suicide,

shall be punished with imprisonment of either description for a term which may extend to 10 years, and shall also be liable to fine.

9. In order to find a person guilty of the offence u/s 306 of the IPC one of the ingredients is that the accused abetted the commission of suicide. This abetment of the commission of suicide has to be within the meaning of section 107 of the IPC. To abet one has to instigate a person in doing the thing or encouraging with one or more other persons in any conspiracy for doing of that thing if an act or illegal omission takes place in pursuance of the conspiracy and in order to the doing of a thing or intentionally aiding by any act or illegal omission in the doing of that thing. A person is said to instigate another to an act when he actively suggests or stipulates him to the act of any means or language, direct or indirect, whether it takes the form of express solicitation, or of hints, insinuation or encouragement (See *Brij Lal Vs. Prem Chand and Another*,). Therefore in common parlance the word "instigate" means to "goad" or "urge" "forward" or to "provoke", "incite", "urge" or "encourage" to do an act. Therefore, instigation entails knowledge of the criminality of an act. As to the second clause there as to be combined effort of two or more persons in the hatching of conspiracy. Particularly, the law has made a distinction between abetment by conspiracy and a criminal conspiracy . In abetment by conspiracy a mere combination of persons or agreement between them is not enough, while in criminal conspiracy mere agreement is enough if the agreement is to commit an offence. Therefore, in abetment by conspiracy there must be something more than a mere conspiracy, some act or illegal omission in pursuance of that conspiracy. Under the third clause element of intention to aid by any act or illegal omission must remain present in the doing of a thing. To convict a person for abetment in the commission of offence element of mens rea must remain present. In order to substantiate a charge u/s 306 of the IPC it has to be established that the person abetted must commit suicide. Death by commission of suicide must have been the desired object of the abettors; and with that in view they must have instigated, goaded, urged or encouraged the victim in commission of suicide. The instigation may be by provoking or inciting the person committing suicide. This instigation may be gathered by positive acts done by the abettors or by omission in the doing of a thing. The acts or omission committed by the abettors immediately before the commission of suicide are vital. What appears is that in order to finalise marriage the deceased had gone to the house of Indrajit on 5th March, 2004 where Sanjit Kundu and Anju Kundu turned down the proposal of marriage terming the deceased as "call girl". Suicide note reveals that for the death of the deceased Sanjit and Anju are responsible as without any just cause they abused her and termed her as "call girl". The suicide note does not at all reveal that the petitioners Sanjit and Anju asked her to die. The statement of the father of the victim and those of the other witnesses examined by the prosecution are absolutely silent on the essential ingredients of section 107 of the IPC. None of them stated in their statements that the petitioners Sanjit and Anju asked the deceased to commit suicide. Save and except terming the

deceased as "call girl" there was no utterance which can be interpreted to be an act of "instigating", "goading", "urging", "soliciting" or "insinuating" the deceased to commit suicide. Can it be said that by terming the deceased as call girl the two petitioners Sanjit and Anju desired that the deceased would commit suicide ? Even, as the law has now been well settled , to ask , " to go and die "does not constitute the ingredients of abetment of instigation. There is not a single material to hold that the petitioners termed the deceased as "call girl" with the intention that she should die. Commission of suicide appears to be an unilateral act of the victim. In the note of suicide there is no act or omission described to show that the deceased was instigated to commit suicide or intentionally aided by any positive act or illegal omission in the commission of suicide. In *Annakali Datta & Ors. v. State*, reported in 1990 (II) CHN 38, it was held on the that mere fact that the deceased committed suicide after he was badly treated a case of strong suspicion regarding the commission of an offence u/s 306IPC cannot be said to have been made out. It was observed that if someone actively suggests or goads another to the act by express soliciting, insinuating or encouragement amount to abetment of the act. Their Lordships of the Supreme Court in *Ramesh Kumar Vs. State of Chhattisgarh*, , observed that instigation is to goad, urge forward, provoke, incite, encourage to do an act. In the decision of *Ramesh Kumar Vs. State of Chhattisgarh*, the Supreme Court held that, "To satisfy the requirement of instigation though it is not necessary that actual words must be used to that effect or what constitutes instigation must necessarily and specifically be suggestive of the consequence. Yet a reasonable certainty to incite the consequence must be capable of being spelt out." The present one is not a case where the accused persons had by their acts or omission or by a continued course of conduct created such circumstances that the deceased was left with no other option except to commit suicide in which case an instigation may have been inferred. A word uttered in the fit of anger or emotion without intending the consequences to actually follow cannot be said to be instigation. From the discussion already made by me, I hold as follows: The act or conduct of the accused, however insulting and abusive those maybe, will not by themselves suffice to constitute abetment of commission of suicide, unless those are reasonably capable of suggesting that the accused intended by such acts consequence of suicide. Even if the words uttered by the accused or his conduct in public are sufficient to demean or humiliate the deceased and even to drive him to suicide, such acts will not amount to instigation or abetment of commission of suicide, unless it is established that the accused intended by their acts, consequence of a suicide. It is not enough if the acts of the accused cause persuasion in the mind of the deceased to commit suicide." Utterance of the word "call girl" cannot be held to be an act to goad, or provoke or incite or encourage to commit suicide. Therefore, the question is whether by terming deceased as "call girl" the two petitioners Sanjit and Anju have really intended that the deceased would commit suicide as a consequence of such utterance. To my mind it is not permissible under the law to hold so. In *Sohan Raj Sharma v. State of Haryana*, reported in (2009)1 SCC (Cri) 387, their Lordships referred to

Mahendra Singh v. State of Madhya Pradesh, reported in 1995 SCC (Cri) 1157 where it was observed that in cases of alleged abetment of suicide there must be proof of direct or indirect acts of incitement to the commission of suicide. Here in the instant case no such direct or indirect act of incitement to the commission of suicide is present. Mahendra Singh was further referred to in Kishori Lal v. State of M.P., reported in (2007) 3 SCC (Cri) 701. In Randhir Singh v. State of Punjab, reported in 2005 SCC (Cri) 56, it was observed as follows:

More active role which can be described as instigating or aiding the doing of the thing is required before a person can be said to be abetting the commission of offence u/s 306 of the IPC.

In Kishangiri Mangalgiri Goswami Vs. State of Gujarat, , Their Lordships of the Supreme Court observed as follows:

In State of West Bengal Vs. Orilal Jaiswal and another, this Court has observed that the Courts should be extremely careful in assessing the facts and circumstances of each case and the evidence adduced in the trial for the purpose of finding whether the cruelty meted out to the victim had in fact induced her to end her life by committing suicide. If it transpires to the Court that a victim committing suicide was hypersensitive to ordinary petulance, discord and differences in domestic life quite common to the society to which the victim belonged and such petulance discord and differences were not expected to induce a similarly circumstanced individual in a given society to commit suicide , the conscience of the Court should not be satisfied for basing a finding that the accused charged of abetting the offence of suicide should be found guilty.

10. Section 107 IPC defines abetment of a thing. The offence of abetment is a separate and distinct offence provided in the Act as an offence. A person, abets the doing of a thing when (1) he instigates any person to do that thing; or (2) engages with one or more other persons in any conspiracy for the doing of that thing; or (3) intentionally aids, by act or illegal omission, the doing of that thing. These things are essential to complete abetment as a crime. The word "instigate" literally means to provoke, incite, urge on or bring about by persuasion to do any thing. The abetment may be by instigation, conspiracy or intentional aid, as provided in the three clauses of section 107. Section 109 provides that if the act abetted is committed in consequence of abetment and there is no provision for the punishment of such abetment then the offender is to be punished with the punishment provided for the original offence. "Abetted" in section 109 means the specific offence abetted. Therefore, the offence for the abetment of which a person is charged with the abetment is normally linked with the proved offence.

11. In cases of alleged abetment of suicide there must be proof of direct or indirect acts of incitement to the commission of suicide. The mere fact that the husband treated the deceased-wife with cruelty is not enough. (See Mahinder Singh v. State of M.P., [1995 AIR SCW 4570].

12. The aforesaid aspects were highlighted in *Kishori Lal Vs. State of M.P.*, , *Randhir Singh & Anr. v. State of Punjab*, [2004 (13)SCC 129] and *Sohan Raj Sharma v. State of Haryana*, reported in (2009)1SCC(Cri) 387. Reference may also be had to *Sanju @ Sanjay Singh Sengar Vs. State of Madhya Pradesh*, .

13. Mr. Swapan Kr. Mallick, learned Advocate for the State referred to *State of Bihar Vs. Ramesh Singh*, where it was held that," strong suspicion against the accused, if the matter remains in the region of suspicion , cannot take the place of proof of his guilt at the conclusion of the trial. But at the initial stage if there is a strong suspicion which leads the Court to think that there is ground for presuming that the accused has committed an offence then it is not open to the Court to say that there is no sufficient ground for proceeding against the accused." In *Soma Chakravarty Vs. State through CBI*, , it was held that," it may be mentioned that the settled legal position, as mentioned in the above decision, is that if on the basis of material on record the Court could form an opinion that the accused might have committed offence it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence. At the time of framing of the charges the probative value of the material on record cannot be gone into, and the material brought on record by the prosecution has to be accepted as true at that stage. Before framing a charge the Court must apply its judicial mind on the material placed on record and must be satisfied that the commission of offence by the accused was possible. Whether in fact, the accused committed the offence, can only be decided in the trial."

14. But these two decisions are misplaced. Facts are very clear in the instant case in the note of suicide. The victim did not say that she was asked to commit suicide by any petitioners. During conversation in the house of the accused persons none of the witnesses was present. Therefore, what actually have taken place has been reproduced in the suicide note which does not reveal that except abusing her by terming as "call girl" no other utterance was made. In this scenario, the case does not present one of suspicion. It cannot be held that by using the said word the petitioners intended that these words would urge the victim to commit suicide. The note addressed to the husband clearly depicts a sense of frustration, a mode of dejection in the victim. After a long spell of cohabitation at different places and after so much of intimacy Indrajit maintained silence when the other two petitioners confronted the victim with "call girl". After this episode the victim tried to contact Indrajit over mobile phone but he switched off his phone meaning thereby that Indrajit was reluctant to be in touch with the victim. The victim termed Indrajit as "coward" and a man with no spine. Indrajit of course cannot be charged with offence u/s 306 of the IPC. It is the alleged utterances of the other two petitioners against the victim that she was call girl that contributed to laying charge sheet u/s 306 IPC. But the position of law does not warrant framing of charge simply on the basis of the statement noticed above. A few witnesses stated before the I.O. that the two petitioners Sanjit and Anju asked the victim to commit suicide but that is not what has been

recorded in the note of suicide. It is the utterance, "call girl" that mentally perturbed the victim which according to her would not be erased. In such circumstances, the ingredient of section 107 of the IPC cannot be said to have been present.

15. Accordingly. I do not find that any material is there for framing charge. Application is allowed. Order of the learned trial Court is set aside. Accused persons shall be deemed to be discharged from bail bonds, if they are on bail.

Urgent xerox certified copy, if applied for, be given to the parties as expeditiously as possible.