
(2010) 02 JH CK 0108
In the Jharkhand High Court

Md. Farooq @ Raju and Bibi Hazra

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 22-02-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 313
Dowry Prohibition Act, 1961 — Section 4
Penal Code, 1860 (IPC) — Section 302, 498A

Citation : (2010) 02 JH CK 0108

Hon'ble Judges : Jaya Roy, J; J.C.S. Rawat, J

Bench : Division Bench

Final Decision : Allowed

Judgement

J.C.S. Rawat, J.—This appeal is directed against the judgment and order dated 17.3.1993 passed by 1st Additional Judicial Commissioner/Additional Sessions Judge, Ranchi in Sessions Trial No. 377/34 of 1988 by which the accused appellants have been convicted under Sections 302, 498A of the Indian Penal Code and Section 4 of the Dowry Prohibition Act and each of them have been sentenced to imprisonment for life u/s 302 of the Indian Penal Code and three years rigorous imprisonment u/s 498A IPC and six months rigorous imprisonment u/s 4 of the Dowry Prohibition Act. All the sentences have been directed to run concurrently.

2. Briefly stated, the facts of the case is that a written report was lodged by Talat Pravin-PW-7 who is the material aunt of Shama Khatoon, the deceased alleging that on 27.6.1985, it was informed to her that the deceased Shama Khatoon has sustained some burn injuries and she has been admitted in Rajendra Medical College and Hospital, Ranchi. Thereafter, PW-7, Talat Praveen, maternal aunt of the deceased, the mother of the deceased (PW-4 Najima Khatoon) and the brother of the deceased, (Saiyad Javed) reached at the hospital where they found that the deceased was on the bed and she had sustained burn injuries. When she was asked how she reserved the burn injuries, she told them that she

had been burnt by her mother-in-law and husband. She however stated that she was tied up with rope and her mouth was closed by cloth and thereafter, kerosene oil was sprinkled upon her body and she was set to fire by match stick and consequently she received the burn injuries. It was further alleged in the fardbeyan that she was married to Md. Farooq @ Raju, the appellant No. 1 two years ago and he had been demanding a tape recorder. When the said demand was not fulfilled, her husband, Farooq, the appellant No. 1 used to assault her. It was further alleged that after 2 - 3 days, she died on 2.7.1985. Thereafter, the case was registered in the Police Station and the matter was investigated by the police. After completion of the investigation, the charge-sheet was submitted on 24.10.1985

3. After taking cognizance, the matter was committed to Court of Sessions and the Sessions Judge framed the charges. The accused-appellants denied all the charges and claimed to be tried.

4. The prosecution, in support of its case, examined as many as ten witnesses. PW-1 Md. Azeem, uncle of the deceased, PW-2 S.S. Tarweej, the maternal uncle of the deceased PW-3 Shamim Akhtar, the brother of the deceased, PW-4 .Najma Khatoon, the mother of the deceased, PW- 5, Saiyad Javed, the maternal uncle of the deceased, PW-(5 Jebunissa, Sister of the deceased, PW-7 Talat Praveen, the maternal aunt of the deceased and the informant of the case, PW-8, Dr. Renu Bala, the doctor who conducted autopsy over the dead body of the deceased, PW-9-Jugal Prasad, a formal witness who has proved the sanction order of the Deputy Commissioner sanctioning the prosecution of the appellants for the offence u/s 4 of the Dowry Prohibition Act and PW- 10,Ramashish Singh, the Investigating Officer, who has investigated the matter and submitted the charge-sheet.

5. The accused-appellants were examined u/s 313 Cr.P.C. after the evidence of the prosecution was closed. They have stated in their statement that they have been falsely implicated in this case. They never threatened the deceased at any point of time and they have not burnt her, as alleged by the prosecution It was further alleged by them that the appellant No. 1-the husband of the deceased, was not present in the house. He was on duty in Hinalco, a Factory from 8 a.m to 5 p.m and the mother-in-law was also away from the house. During the defence evidence, it was brought on record that the deceased got burn injuries accidentally while she was cooking food and when the appellants came to know that she had sustained burn injuries, they rushed to the deceased and took her to the hospital where she was admitted.

6. It needs to be mentioned here that it is not in dispute that the death occurred due to burns. It is further fortified by the evidence of PW-8 Dr. Renu Bala, who conducted autopsy on the dead body of the deceased. She has found the following ante-mortem injuries on her person

Burnt area covering almost whole of the body surface to left head, face soles of

both feet and a portion of hands.

7. It was also opined by the doctor that the death of the deceased was due to burn injuries and the duration of the death was 12 to 24 hours from the time of conducting the post-Mortem examination. The post-mortem was conducted on 2.7.1985 at about 17.30 p.m. in the hospital, it was also opined that the burn injuries were also possible due to sprinkling of kerosene oil. It is also pertinent to mention here that the prosecution has not produced the burn injuries report when it is the admitted position that the deceased was admitted in the hospital on 26.6.1985. The other witnesses who have been produced by the prosecution have also stated that the deceased sustained burn injuries due to which she died after 3 - 4 days of the occurrence.

8. Now, it is to be seen whether the appellants are the author of the injuries on the person of the deceased or not? There is no direct evidence in this case. The case is based only on the circumstantial evidence, particularly, on the oral dying declaration which is said to have been given by the deceased to PW-4 Najma Khatoon, the mother of the deceased, PW-7 Talat Praveen, the maternal aunt of the deceased and PW-5 Saiyad Javed, the maternal brother of the deceased.

9. Now we will examine what exactly has come on record about the dying declaration by way of the evidences of these witnesses, PW-4, Najima Khatoon has categorically stated in her evidence that when she reached at the hospital her daughter, the deceased, stated "Maa mujhe hat pair bandkar miti ka tel chirakkar mere sohar aur saas ne jala diya hai". It is stated that her hands and feet were tied, thereafter, oil was sprinkled by her husband and mother-in-law and then she was set to fire. PW-4 Najima Khatoon has also admitted in her cross-examination that she had not given her statement to the police that the deceased had given any such statement implicating the mother-in-law and the husband. She has also stated in her cross-examination that when the deceased gave this dying declaration, her maternal brother, Saiyad Javed-PW-5 and his sister PW-7, Talat Praveen were present in the Hospital and besides them no other person was present there at that time. PW-5 Saiyad Javed has stated that when he received the information that his sister was admitted in the hospital, he went in the hospital and on being asked as to how she received the burn injuries, the deceased told him: "Main jali nahi, jalai gai hun. Usne bataya ki uski saas or sauhar ne use jalaya hai, Uske bad wo mar gai". It was stated that she was not burnt accidentally, rather, she had been burnt by her husband and the mother-in-law. Later on, she died. PW-7 has stated in his deposition before the court that on the date of incident she went to the hospital and the deceased was on the bed. When she asked the cause of her injuries, the deceased stated that "Meri khala, mujhe jalaya gaya hai". Thereafter, the deceased told her that if the husband and mother-in-law of the deceased go outside of the room then the deceased would reveal the facts about her injuries. Thereupon, the mother-in-law and the husband left the room. Thereafter, the deceased informed her that her husband as well as the mother-in-law had burnt her. She stated that in the

foregoing night, she was subjected to assault and thereafter, kerosene was sprinkled on her body and her mouth was tied and fire was set to her. During the cross-examination, this witness has stated that when the deceased stated this fact to her, at that time, there was none except the deceased in the hospital. Thus, it is revealed from her evidence that none except the deceased, Shama Khatoon was present in the hospital at the time of dying declaration. These are the only three witnesses recording the giving of the dying declaration to the witnesses.

10. Now we have to examine that this dying declaration can be relied upon or not? It is settled position of law that dying declaration should be credible and cogent while relying upon the dying declaration and the court should be cautious while examining the evidence of the dying declaration. The learned Counsel appearing for the appellant contended that the incident occurred on 26.6.1985 whereas the death occurred about 4-5 days later from the date of the occurrence and the report was lodged on 4.7.1985, Even after the death of the deceased which was on 2.7.1985 the first version and the dying declaration came before the police on 4.7.1985. The dying declaration which is said to have been given by the deceased is on 26th or 27th June, 1985. This version at first came after a week. Now, the question arises, whether, on such dying declaration, the court can act upon or not. To come to a conclusion, the other attending circumstances of the dying declaration has to be seen. The first and foremost thing which comes to our mind is that PW-3, Md. Shmim and PW-4, Najma Khatoon had gone to hospital immediately on 27.6.1985 after the occurrence, the deceased was in a position to talk to others. She was admitted in the hospital due to burn injuries. The doctor, who was attending the deceased in the hospital would have sent a parwana to the police out post situated nearby the hospital or the police station where the matter could have been inquired by the police. It has also come in the evidence of the witnesses that the injured was under the treatment of a doctor in the hospital but even then no effort was made either by the police or by the prosecution to explain as to why it so happened. To explain this contingency the only thing which was to be done was to prove the entity from the facts in the records of the hospital which could have been summoned before the court by the prosecution and the doctor under whom she was being treated would have made a note to this effect in his admission (sic) which would have also contained the fact whether he had informed the police or what exactly was stated to him at that time. The prosecution, for the reasons best known to it, neither produced the record of the hospital nor the doctor who attended the deceased in this hospital. The court cannot assess on which parts of the body the injuries were found and what type of injuries, were there. It is obvious that if the doctor would have felt that it was an accidental case then he would have also advised to get her statement recorded. This obviously gives an impression of suspicion about giving the dying declaration to the witnesses.

11. Secondly, the dying declaration was given on 27.6.85. It has come in the evidence of the prosecution witnesses that the brother of the deceased Syed

Javed was also informed about the incidence. It is obvious that if any relative would have come across such fact that the deceased was on the death bed it would have been his natural conduct leaving all the aspects, to report the matter to the police station. It is stated in the dying declaration that if this fact would be disclosed to any one, the deceased would be divorced by her husband. It is of course an unbelievable thought because if the husband and wife are living together, there may be a quarrel but there is a degree of quarrel up to which it may be reported or up to which it should not be reported. Where all the limits have been crossed and the wife has been set to fire, we feel that all the limits of human behaviour had been crossed if dying declaration is taken into consideration and in such circumstances no body will tolerate such barbarous action either of his own or any other family member. In such circumstance, it would have been natural conduct of the brother of the deceased to report the matter immediately to the police and seek redressal of the grievance of his sister. Keeping silence and non-action on the part of the witnesses i.e. Pws 4, 5 and 7 leads to doubt and leave no room of suspicion on the veracity of dying declaration.

12. It is further appeared from the evidence of the witnesses which have been extracted above from which it appears that the exact words have been stated by the witnesses which were uttered by the deceased. It is also in the evidence of these three witnesses that all these persons were present at the time of giving of dying declaration. However PW7, Talat Praveen, in her cross examination, has given a different version that no other person was present at the hospital while the deceased stated this fact. It is also in the evidence of PW 4, that when the deceased gave her dying declaration to PWs 5 and 7 were present in the hospital. It cannot be stated that a separate dying declaration was given by the deceased to P.W.- 7. This evidence also gives a picture to the effect that the dying declaration was given before all these persons. The words which have been extracted and quoted above, have been stated differently by the witnesses. Another factor is of participation of the husband and the mother-in-law of the deceased in her burning. Thus the mode and manner of the occurrence as stated is different.

13. It is further necessary to mention that PW 4, Najma Khatoon has stated in her evidence that she did not utter u/s 161 during investigation about the statement given by the deceased to her about the cause of death and the participation of the husband and the mother-in law. She has said that she had not stated this fact to the Police during the investigation u/s 161 of the Cr.P.C. Admittedly the report was lodged on 4.7.85 and statement would have been taken thereafter. She has stated this fact for the first time before the court. The evidence of PW4 was recorded on 2.8.89 i.e. after about two years of the incident, meaning thereby that for the first time this fact about the dying declaration was disclosed before the court. The prosecution has tried to explain this aspect of the matter from the evidence of the prosecution witness No. 4, Nazma where she has said in her deposition that she had not stated about the

dying declaration to the I.O., as stated in her examination in chief. She had apprehension of being alone and so she did not narrate this fact to the I.O. But by the time the statement was recorded, her daughter had died and as such there was no apprehension or anything which she was explaining before the court. Thus the explanation which has been offered is not credible and cogent. Thus this witness cannot be relied upon while assessing the evidentiary value of the dying declaration. P.W.5.

14. P.W.-5, Saiyad Javed who is the brother of the deceased, has stated that his sister had made a dying declaration implicating the mother-in-law and the husband. This fact came to the I.O. on 30.7.85 which is evident from the case diary and this dying declaration was stated to have been made on 27.6.85. It was not reported to any of the authorities either by way of an application or any measure. P.W.4. After hearing the narration of his sister in the hospital, he would have immediately left for the hospital and would have sought redressal of the grievance of his, sister by setting the law into motion. Thus the evidence of PW4 is shaky and cannot be relied upon on the point of dying declaration, PW.7. Talat praveen, the informant of the case, has stated that the dying declaration was given to her implicating the mother-in-law and the husband and when she appeared before the court. It is also stated by her that she did not know the strain relationship between the husband-appellant and the wife-deceased and the mother in-law. The dying declaration was given to her and she did not lodge the report immediately. She came forward to lodge the report on 4.7.1985 after almost 8 days of such statement. She has said that the dying declaration was given to her when nobody was present whereas we have come to a definite conclusion, on the basis of the evidence of other witnesses, that other persons were also present there. PW7 who lodged the FIR is also not credible.

15. It is alleged that there is delay in lodging the FIR. The incident occurred on 27.6.85 and the deceased was admitted to the hospital on the same day. The deceased remained in the hospital for 3-4 days and she died thereafter which comes to, on the basis of the evidence on 2.7.85 and the report was lodged on 4.7.85. Thus, if the death occurred on Tuesday, what was the reason for not reporting the matter to the police till Friday. There is no satisfactory explanation to this effect. This delay becomes more relevant and fatal to the prosecution when the prosecution came before the court stating that three witnesses, PW4, Najma Khatoon, PW5, Sayed Javed and PW7, Talat Praveen have all stated that the dying declaration was given to them by the deceased. Non-reporting of the matter goes to the root of the credibility of the prosecution witnesses that the incident occurred in the manner and mode as stated by the prosecution. The entire evidence did not inspire confidence that the prosecution has brought a true picture of the matter.

16. Considering the entire facts, evidence and circumstances of the case we are of the view that the dying declaration which has been made the basis of conviction by the trial court is not credible and cogent. The manner and mode of

the evidence about the dying declaration is suspicious. The prosecution has failed to prove the case beyond the reasonable doubt. Hence the appellants are entitled to the benefit of doubt. In our view, the trial court has erred in convicting the appellants. Hence, this appeal is allowed and the judgment of conviction and order of sentence passed against the appellant is hereby set aside. The appellants are on bail. They are discharged from the liabilities of their bail bonds. They need not surrender in the trial court.