
(2009) 04 CAL CK 0032
In the Calcutta High Court
Case No : C.R.A. No. 235 of 2003

Nazma Bibi alias Nazma Bewa and Another	APPELLANT
Vs	
The State of West Bengal	RESPONDENT

Date of Decision : 24-04-2009

Acts Referred:

Penal Code, 1860 (IPC) — Section 302, 34

Citation : (2009) 3 CALLT 527

Hon'ble Judges : Pranab Kumar Chattopadhyay, J; Ashim Kumar Roy, J

Bench : Division Bench

Advocate : Siladitya Sanyal, for the Appellant; Y.J. Dastoor Biplab Mitra and Mr. Prabir Majumder for the State, for the Respondent

Final Decision : Allowed

Judgement

Ashim Kumar Roy, J.—In this Criminal Appeal the appellant Nazma Bibi @ Nazma Bewa and Munni Bibi challenged their conviction under sections 302/34 and u/s 498A of the Indian Penal Code and sentence of life imprisonment and rigorous imprisonment for 3 years respectively with fine and default clause.

2. Both the appellants along with one Munna Khan, who happened to be the son of the appellant No. 1 and the brother-in-law of appellant No. 2 were placed on trial to answer charges under sections 498A/302/34 of the Indian Penal Code. While the said Munna Khan was acquitted of the said charges, the trial of the appellants has been ended in their conviction.

3. The sum and substance of the prosecution case as it transpires from the FIR are as follows:

The marriage between the accused Munna Khan and Nagma Khatun @ Doli was solemnized on January 7, 2001 according to Muslim Rites and Customs. At the time of marriage the father of deceased Nagma Khatun promised to give an Almirah to the accused party as a dowry. Since her husband could not give the said Almirah the accused person with whom the deceased Nagma used to stay at

her matrimonial home started torturing her in various ways. The said accused persons also did not allow the mother, sisters and other relatives of the deceased Nagma to meet her whenever they visited her matrimonial home. The accused persons also kept her confined under lock and key and did not allow her to mix with anybody. On 25.02.2001, at about 9:30 p.m. at night Nagma Khatun @ Doli attempted to commit suicide by set on fire by pouring kerosene oil all over her body and as a result she sustained severe burn injuries. When hearing the alarm raised by her husband the local people rushed to the spot and rescued her. At that time her mother-in-law and the wife of the elder brother-in-law were present there but subsequently fled away. She was then removed to M.R. Bangur Hospital.

4. On the basis of the a case under sections 498A/326/307/109 of the Indian Penal Code was initially registered and after the victim succumbed to her injuries on February 27, 2001, section 302 of the Indian Penal Code was added.

5. Upon perusal of the materials-on-record of this appeal, we find the prosecution case against the appellants for intentionally causing death of Nagma Khatun @ Doli rests solely on dying declarations, both oral and recorded. While the oral dying declarations were allegedly made by her to some of the prosecution witnesses, there is another dying declaration recorded-by the R.M.O. of the Hospital. Besides that the prosecution relied on the evidence of the relations of the victim housewife to prove the charge of cruelty committed to her by the present appellants being relations of her husband, before her death.

6. During trial prosecution examined as many as 16 witnesses, out of them P.W.1 Abdul Aziz is the father of the deceased. The P.W.2 Najma Bibi and P.W.3 Nadima Bibi are her sisters. The P.W.4 Saira Bibi is her mother. The P.W.5 Ohidulla Mondal, P.W.7 Noor Mohammad are local residents. The P.W.12 is Dr. S. Chakraborty, who recorded the dying declaration of the deceased housewife, P.W.13 Dr. Asit Baran Dutta is the doctor under whom the deceased Nagma Khatun @ Doli with burn injuries was admitted at Bangur Hospital. The P.W.14 Arun Kumar Saha is the Autopsy Surgeon. While rests are formal witnesses and out of them P.W.15 is the Investigating Officer of the case. The witness Odud Bagani, who was examined as P.W.16, wrote the FIR on the instruction of the P.W.1, the informant.

7. Mr. Siladitya Sanyal, the learned counsel appearing on behalf of the appellants submitted before this Court it would be quite unsafe to sustain order of conviction of the appellants on the basis of the alleged dying declarations because the nature and extent of burn injuries suffered by the deceased. According to him after sustaining about 90% burn injuries, nearly after sustaining two day, it was quite impossible for any one to make any declaration that too just before the death. Mr. Sanyal further submitted that it is an admitted position that after recording of the dying declaration the doctor concerned has not read over and explained the same to the deceased and accordingly the said dying declaration should not be taken into consideration. In this connection Mr.

Sanyal relied on a decision of the Hon'ble Supreme Court in the case of Shaikh Bakshu & Ors. v. State of Maharashtra, reported in (2008)1 SCC (CrI) 679.

8. We have also heard Mr. Dastoor, the learned counsel appearing on behalf of the State and have very carefully perused the" depositions of the witnesses and other materials on record more particularly the recorded dying declaration marked Exhibit - 8.

9. The defence case as it appears from the trend of cross-examinations and submission made by the learned counsel of the appellants that it was a case and the victim Nagma Khatun Doli sustained those injuries due to a stove burst.

10. It is well settled that there can always be a lawful conviction based solely on dying declaration and there is no need for any independent "corroboration, if it is found such dying declaration is wholly reliable and Without any blemish. However, when there is no evidence except the dying declaration all that is essential for a Court to see the same is free from all "suspicions. In this regard, reference may be made to the case of Jai Karan v. State of Delhi (NCT), reported in 1999 SCC (Cri) 1385.

11. The P.W.2 Nazma Bibi, 3 Nasima Bibi and P.W.4 Saira Khatun, the two sisters and the mother of the victim housewife claimed in their evidence that after the occurrence the victim disclosed to them that she was set on fire by the present appellants.

12. According to the P.W.2 Nazma Bibi at Hospital she had a talk with victim Nagma, when the witness was told by the victim that her mother-in-law and sister-in-law, the appellants before us burnt her. Although this witness in her cross-examination stated that she told the Investigating Officer of the case what was told to her by Nagma but from the evidence of the P.W.15, the Investigating Officer it is found that the same was never told to him by the said witness. Similarly, the P.W.4 Saira Bibi although deposed that the victim Nagma told her after the incident that fire was set on her as Almirah was not given at the time of the marriage and she disclose about the same to the Investigating Officer of the case, but according to the Investigating Officer of the case P.W. 15 no such statement was made to him by the said witness. We further found in her alleged dying declaration made by the victim Nagma to the P.W.4, while she stated that she was set on fire for not giving Almirah during her marriage but there is no mention as to who was responsible for causing such burn injuries to her. No name of the accused has been transpired. Both the witnesses P.W.2 Nazma Bibi and P.W.4 Saira Bibi not having stated in their statement recorded u/s 161 of the Code of Criminal Procedure during investigation that Nagma Khatun @ Doli, the victim housewife had made a dying declaration to them implicating the appellants for setting her on fire and same being very vital and material omission affecting the credibility of the said witnesses as regards to the factum of the said dying declaration disclosed in Court for the first time ought to be excluded from consideration. In the case of State of Punjab v. Parveen Kumar, reported in

(2006) 1 SCC (Cri) 146 in the similar circumstances the Hon''ble Apex Court endorsed the view of High Court that when witness does not disclose in his statement recorded u/s 161 of the Code of Criminal Procedure about making of any dying declaration by the victim his claim made before the Court for the first time ought to be kept out for consideration.

13. The P.W.3 Nasima Bibi in her evidence that victim Nagma told her at Hospital that she was set on fire from back side by her mother-in-law and sister-in-law. The witness further stated after removal of Nagma to Hospital she met her on 26th in the early morning, i.e. on the next day of the incident along with her mother, the P.W.4 and some local men and at that time they were at Hospital for about one hour, when there was no doctor and nurse and they returned home at about 8/8:30 a.m. The witness further stated to at that time when she visited her at the Hospital the victim Nagma stated to her that she was set on fire by her mother-in-law and sister-in-law, when the witness was standing beside Nagma and her mother, the P.W.4 was sitting on a chair. Although P.W.3 Nasima Bibi claimed that when she was told by victim Nagma that she was set on fire by her mother-in-law and sister-in-law some local people and her mother was present there, neither any local people was examined in support of the same nor her mother P.W.4 corroborated her.

14. According to the P.W.4 Saira Bibi after the occurrence she along with others removed Nagma with burn injuries to the Hospital where she remained for about a few hours but had no talk with Nagma and thereafter on the next day at about 4 p.m. she had been to the Hospital again. The P.W.4 never claimed that she had been to the Hospital with P.W.3 Nasima Bibi on the next day at the early morning or that in her presence the victim Nagma told P.W.3 as to how she sustained burn injuries. Thus, the evidence of P.W.3 Nasima Bibi about the dying declaration made by the victim housewife becomes highly doubtful.

15. There is another very serious infirmity in the prosecution case, although the First Information Report was lodged on the next day, i.e. on February 22, 2001 at about 11:45 hours by the father of the victim housewife, P.W.1 Abdul Aziz nearly after 14 hours of the alleged incident but there is no mention about any alleged dying declaration made by the victim housewife against the appellants and it was categorically stated that being unable to bear torture meted out to her by her in laws she committed suicide. Such omission is very significant having regards to the facts that P.W.1 Abdul Aziz the maker of the FIR stated in his evidence that before coming to the Police Station he came across with his two daughters P.W.2 and P.W.3 and his wife P.W.4 and it appears from the evidence of the P.W.2, 3 and 4 that such a dying declaration was made to them in between the night of the occurrence and the early morning of the next day.

16. In view of the aforesaid patent contradictions and infirmities in the evidence of the prosecution witnesses as regards to the factum of oral dying declaration made by the victim Nagma Khatun @ Doli to them we are unable to act thereupon.

17. The next is the Exhibit 8, the dying declaration recorded by P.W.12, Dr. Sunil Chakraborty. A dying declaration when recorded by a doctor certainly assumes importance as regards to its acceptability but is not conclusive. In the case *Mayur Panabhai Shah v. State of Gujarat*, reported in 1982 SCC (Cri) 442, the Hon'ble Supreme Court observed that there is no irrebuttable presumption of law that doctor is always a witness of truth and his evidence is required to be appreciated like other witnesses.

18. We have very carefully perused the Exhibit 8, the alleged dying declaration recorded by a doctor and have found the same does not bear any signature of the declarant and there is no endorsement that after recording, the same was read over and explained to the declarant. Although, signature of the declarant is always essential in the dying declaration but its absence is not per se fatal unless it is explained. However, in the case in hand we that prosecution has not come out with any explanation whatsoever as to why the signature of the declarant was not obtained in the said dying declaration, Exhibit 8. It is never the case of the prosecution that no signature or thumb impression could have been obtained due to the nature of injuries sustained by the declarant on her palm or in the fingers.

19. In a recent decision reported in (2008) 1 SCC (Cri) 679 in the case of *Shaikh Bakshu & Ors. v. State of Maharashtra*, the Apex Court endorsed the necessity of mentioning in the dying declaration that the same was read over and explained to the declarant. In the said case, the Apex Court held in the dying it must be clearly mentioned that same was read over and explained to the deceased and such facts cannot be presumed. In this connection it is also pertinent to note the doctor concerned in his substantive evidence before the Court never also claimed that after recording of the dying declaration he read over and explained the same to the declarant.

20. Moreover, there are other aspects of the case, which has a great impact as to the question acceptability of the Exhibit 8. Although, according to the P.W.12 doctor who recorded the alleged dying declaration, Exhibit 8 at the time of recording the sister-in-charge was present but surprisingly enough her presence was not recorded in Exhibit 8 as a witness and there is no explanation for the same. It appears although all the medical papers including the bed head ticket of the victim Nagma Khatun was seized from the Hospital by the police under a seizure list, Exhibit 3 but so far as the Exhibit 8, the alleged dying declaration is concerned, surprisingly there was no seizure list as regards to the same and that too without any explanation. In our opinion, the aforesaid omissions are quite fatal for the prosecution case.

21. In this connection it is also pertinent to note that it appears from the perusal of the bed head ticket, the Exhibit 3 that the victim housewife Nagma Khatun @ Doli with 90% burn injuries was admitted at M.R. Bangur Hospital on 25th of February, 2001 at around 10 p.m. under Dr. Asit Baran Dutta and on 27th of February, 2001 at about 1:00 p.m. her dying declaration was recorded P.W.12 Dr.

Sunil Chakraborty, R.M.O. of the Hospital and a few hours thereafter she succumbed to her injuries. It appears from the evidence P.W.13 Dr. Asit Baran Dutta under whom she was admitted at the Hospital that on 26th of February, 2001 her condition was very serious. We further found from the Bed Head Ticket of the victim housewife, which was seized by the police during investigation and are the part of the records of this case, that since her admission at the Hospital she was under sedative and other pain relieving drugs. We also found from the Bed Head Ticket that within a few hours after recording of her dying declaration she became gasping, the pulse not palpable, blood pressure not recordable, respiration a few, heart rate (+) and within a few minutes she died.

22. It would not be out of place to mention before recording of her alleged dying declaration the victim housewife was although in the midst of her close relations from her admission in the Hospital.

23. Furthermore upon a careful perusal of the admission sheet of the victim housewife, we find that she was brought by one Rahamatullah Khan at the emergency with the history of burns from Kerosene stove. It was the admitted case of the prosecution she was brought at the Hospital by the relations and neighbouring people not by the appellants or by the relations and immediately after the occurrence the appellants fled away. The examination of said Rahamatullah Khan was very much necessary to unearth as to how she sustained burn injuries, particularly because the victim housewife was admitted at the Hospital by the said Rahamatullah Khan with the history of burns by stove in absence of the appellants or anyone having interest in them. However, the prosecution withheld the said witness and did not examine him during trial. This also a serious lacuna in the prosecution case.

24. In view of the aforesaid lacunas and infirmities, we are of the opinion that it would not be safe to act on the aforesaid alleged dying declaration both oral and recorded to sustain the conviction of the appellant. Accordingly, the conviction of the appellants u/s 302/34 of the Indian Penal Code is aside.

25. The appellants were also convicted u/s 498A of the Indian Penal Code and sentenced to suffer rigorous imprisonment for three years and to pay a fine of Rs. 1,000/- and in default to suffer rigorous imprisonment for two months. It appears after conviction since May, 2003 they are in jail and thus they have already served out the said sentence imposed upon them. Be that as it may, since the said conviction is also under challenged, we are of the opinion a decision ought to be rendered by this Court as regards to the same.

26. The provisions of section 498A of the Indian Penal Code are read as follows:

498A. Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

Explanation: For the purposes of this section, "cruelty" means-

(a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

27. The charge against the appellants under sections 498A/34 of the Indian Penal Code also rests on the evidence of P.W.1, P.W.2, P.W.3, P.W.4 and P.W.5. So far as the P.W.1 Abdul Aziz, the father of the victim housewife is concerned although the said witness in his chief alleged about the torture upon his daughter by the accused persons but in his cross-examination he has admitted that he had no personal knowledge about the same and had learnt everything from his wife. The wife of the P.W.1 was also examined as P.W.4 during the trial but she had never claimed to have told anything about such torture to the prosecution witness No. 1. Thus, the evidence of P.W.1, who has no direct knowledge about the incident of torture remains hearsay in nature and ought to be kept out of consideration. So far as the other witnesses are concerned it is the evidence of P.W.2, 3 and 4, the two elder sisters of the victim housewife and her mother that she was subjected to torture by the appellants because they could not give the Almirah which they promise to give as dowry at the marriage. The evidence of the P.W.2 that Nagma was subjected to torture by the appellants at her matrimonial home not being stated to the police in her statement recorded u/s 161 of the Code of Criminal Procedure, we are not inclined to act thereupon. However, the P.W.2 never claimed that Nagma was tortured by her in laws as their demand for an Almirah could not have been fulfilled. The P.W.3 admitted in her cross-examination that she has not stated to the police about the demand of Almirah by the accused persons in her statement made during the investigation. The P.W.4, the mother of the victim housewife has also not stated to the police about the demand of Almirah as dowry by the appellants. Similarly, the only local witness P.W.5 Ohidulla Mondal admitted in his evidence that it was not stated to the police that the father of the victim housewife told him about the torture perpetrated upon her by the appellants for demand of dowry. According to the said witness the P.W.5, the victim housewife was kept under close door and windows and she was not allowed to speak anyone also did not find place in his statement recorded during investigation, thus his evidence in Court becomes wholly unworthy of credit. We have further found from the prosecution case although in the same house several tenants were residing but none of them nor anyone of the neighbour was examined by the prosecution to prove the charge against the appellants.

28. Thus, we are also not inclined to sustain their conviction u/s 498A of the Indian Penal Code and same is accordingly set aside.

29. In the result, this appeal stands allowed and order of conviction of the

appellants under sections 302/498A/34 of the Indian Penal Code stands set aside. The appellants who are now in jail, if not wanted in connection with any other case be forthwith released from the custody.

The Office is directed to send down the Lower Court Records immediately.

Pranab Kumar Chattopadhyay, J.

30. I agree.