
(2013) 07 JH CK 0062

In the Jharkhand High Court

Case No : Criminal Appeal (SJ) No. 614 of 2002

Nepal Mandal and Sadanand Mandal

APPELLANT

Vs

The State of Jharkhand

RESPONDENT

Date of Decision : 05-07-2013

Acts Referred:

Dowry Prohibition Act, 1961 — Section 3, 4

Evidence Act, 1872 — Section 32, 62

Penal Code, 1860 (IPC) — Section 302, 304B, 328, 34, 498A

Citation : (2013) 4 AJR 328 : (2014) 1 DMC 604 : (2013) 3 JLJR 425

Hon'ble Judges : Dhruv Narayan Upadhyay, J

Bench : Single Bench

Advocate : Ananda Sen and Nagmani Tiwari, for the Appellant; Sunil Kr. Dubey, Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

Dhruv Narayan Upadhyay, J.—The judgment and order of conviction and sentence dated 20.9.2002 passed by the learned Additional Sessions Judge-IX, Dhanbad in connection with S.T. No. 347 of 1993 corresponding to Topchanchi (Hariharpur) P.S. Case No. 65 of 1998 (G.R. No. 379 of 1988), is under challenge in this appeal. On 10.5.1988, Fardbeyan of Basudeo Mandal was recorded by S.I. Gupteshwar Singh of Hariharpur Police Station on the basis of which Topchanchi (Hariharpur) P.S. Case No. 65 of 1988 u/s. 498A, 328, 302/34 I.P.C. and Section 3/4 of the D.P. Act against the appellants and other accused was registered. The fact which appeared from the Fardbeyan in brief is that Sumitra Devi (daughter of the informant) was married to appellant Nepal Mandal in the year 1986, but she was not happy with her conjugal life as the accused persons including the appellants had been demanding Rs. 1,500/-, balance amount towards dowry. The informant due to his poor economic condition failed to meet the demand, therefore, Sumitra was subjected to torture and treated with cruelty by her husband and in-laws. On the eve of Holi, the deceased had been to her parent's house, but fifteen days prior to her death, she was taken back to her matrimonial

home by her husband Nepal Mandal. On 8.5.1988, the appellant Nepal Mandal informed to Dwarika Prasad (brother of informant) that Sumitra is lying ill. The informant after receiving such information with regard to illness of the daughter went to the house of Sumitra and found that she was lying unconscious on a cot. When he asked to her mother-in-law, she told that no medical treatment has yet been provided to her. Thereafter Sumitra was brought by the informant, but there was no change in her condition and hence she was taken to Ashirvad Nursing Home at Dhanbad at about 1.00-1.30 p.m., but she was declared dead. The informant with the dead body of his daughter went to Hariharpur P.S. in the evening and logged a written report, disclosing suspicious condition in which Sumitra died. On the following day postmortem was done and the Doctor had opined cause of death due to poisoning. When the informant got confirmed that his daughter died due to poisoning, he had given his Fardbeyan raising allegations against the appellants and other accused.

2. The police after due investigation submitted charge-sheet against four accused persons namely, Nepal Mandal, Gopal Mandal, Sadanand Mandal, and Titli Devi u/s. 498A, 328, 302/34 I.P.C. and Section 3/4 of D.P. Act. The case of the appellants and other accused was committed to the Court of Sessions and it was registered as S.T. No. 372 of 1993. The charges were framed and the accused persons were put on trial. In course of trial, charges were framed u/s. 498A, 328, 302/34 I.P.C. and Section 3/4 of the D.P. Act. On 16.04.2002 a fresh charge u/s. 304B I.P.C. was framed. The accused persons facing the trial had waived the cross examination of the witnesses after amendment of the charge.

3. The prosecution has examined altogether 6 witnesses to substantiate the charge and after considering the evidence on record, the learned Sessions Judge has been pleased to hold these two appellant guilty for the offence punishable u/s. 304B I.P.C., but acquitted two of the accused, namely, Gopal Mandal and Titli Devi and hence this appeal.

4. The learned counsel appearing for the appellants has assailed the impugned judgment and the findings on the ground that the written information which was lodged by the informant on 8.5.1988 has been suppressed by the prosecution and no case on that information was registered. The learned Sessions Judge has observed that Sanha on the basis of that written report was lodged, but no such Sanha number has been brought on record by the prosecution. It is admitted case of the prosecution that dead body challan and inquest report were prepared on 9.5.1988 and postmortem was also done on that very date which is conclusive that postmortem was done prior to the institution of the present case. The original postmortem report has also been suppressed and carbon copy, which appears to be a secondary evidence has been proved with objection.

The viscera report has not been proved.

The I.O. has not been examined.

On the same and similar set of evidence two of the co-accused have been

acquitted. The prosecution has failed to prove that the deceased was subjected to cruelty soon before her death for or in connection with demand of dowry.

5. Learned A.P.P. has opposed the argument and submitted that on the basis of information lodged on 8.5.1988, an U.D. Case was registered. In connection with that U.D. Case, inquest report and dead body challan were prepared and the postmortem was done. Since the informant was not very much sure regarding cause of death prior to perusal of postmortem report, he did not raise allegation against the appellants (accused). As a matter of fact, when it was known that Sumitra died due to poisoning, Fardbeyan of informant was recorded and U.D. Case was converted into present case by registering Topchanchi (Hariharpur) P.S. Case No. 65 of 1988 and investigation was proceeded ahead. The prosecution witnesses i.e. P.W. 1, P.W. 3 and P.W. 5 have fully supported the prosecution case. The Doctor P.W. 6 has proved the postmortem report and opined the cause of death due to poison.

6. In the present case, the appellants have been held guilty for the offence punishable u/s 304B I.P.C. on the basis of evidence adduced by material witnesses Binoti Devi (P.W. 1), Deepak Kumar Mandal (P.W. 3), Basudeo Mandal (P.W. 5) who are respectively mother, brother and father of the deceased. According to evidence of P.W. 5 he was informed by his brother Dwarika Prasad Mandal (P.W. 4) that Sumitra Devi (deceased) was suffering from illness. On receiving such information he went to the matrimonial home of Sumitra and reached there at about 10-10.30 a.m. and found Sumitra unconscious, lying on a cot. He asked the mother-in-law of Sumitra whether any medical treatment has been provided to Sumitra or not, but received reply in negative. Thereafter Sumitra was brought by the informant to a Doctor at Topchanchi and from there she was taken to Ashirvad Nursing Home, Dhanbad, where she was declared dead.

The informant with the dead body went to Hariharpur P.S. and lodged a written report disclosing therein about death of Sumitra which occurred in suspicious circumstances. On the next day postmortem was done and it was declared that Sumitra died due to poisoning. On 10.5.1988 in the morning at 7 a.m., Fardbeyan of informant P.W. 5 was recorded and this case was registered. This witness has fully supported the prosecution case in his deposition, which has been corroborated by P.W. 1 and P.W. 3. There are some contradictions in the statement of P.W. 3 and P.W. 5.

7. The learned counsel has raised a vital point that a written report was lodged by the informant on 8.5.1988 while he had been to the P.S. along with the dead body, but no case on that written report was instituted and the same has been suppressed by the police, and a case on the basis of Fardbeyan recorded on 10.5.1988 was registered against the appellants and other accused. The informant himself has admitted that he had lodged a written report on 8.5.1988 in respect of death of Sumitra. According to the prosecution, the postmortem was done on 9.5.1988. The learned Sessions Judge has observed in his judgment

that on the basis of information lodged by P.W. 5, a Sanha was registered, but no such Sanha has been brought on record nor any reference is there in the deposition of witnesses. The Investigating Officer has not been examined which according to me in the circumstances of the present case is fatal to the prosecution. Had he been examined he would have thrown light on this aspect of the prosecution case.

From the evidence on record, it is unknown as to what case on the basis of that written report was lodged or on what reference the inquest report and dead body challan were prepared. I do not find any case reference even in the postmortem report (Ext.-2). The inquest report and dead body challan are tagged with the postmortem report, but these two documents have not been proved and exhibited and therefore I do not think that these documents can be looked into. To satisfy my anxiety when I perused the inquest report and dead body challan, it appears that the police officials had written Hariharpur Thana U.D. Case No. of 1988 dated 8.5.1988 at 19 hours. Thus it is clear that the number of U.D. Case, was left blank and it is not known whether any U.D. case in fact was registered or not.

When I go through the evidence of P.W. 5 it reveals that he has stated, after he could learn about the cause of death from the postmortem report, he had given his Fardbeyan on 10.5.1988 raising allegations against the accused including the appellants. This version of informant indicates that in the written report which he had lodged on 8.5.1988, he had not raised any allegation against the appellants and other accused. There is no impediment that U.D. Case cannot be converted into a cognizable offence constituting offence punishable under Section, 302 or 304B or 306 or 304 of the Indian Penal Code, but then such evidence for such conversion is very much required. Again I am compel to observe that non-examination of the I.O. in such circumstance is fatal to the prosecution case. Had he been examined he would have thrown light on this aspect.

Since it is admitted case of the informant that he had not raised allegation against appellants in the written report lodged just after the death of his daughter Sumitra on 8.5.1988, the allegation raised in the Fardbeyan recorded two days after death of the deceased, cannot be considered free from doubt. There was no occasion for the Officer-in-Charge to record a separate Fardbeyan of the informant when he had already lodged a written report.

8. The informant has stated that he received information regarding illness of Sumitra from his brother Dwarika Prasad Mandal (P.W. 4), but said Dwarika Prasad Mandal has been declared hostile and he did not support the prosecution case as made out by the informant. He did not say that he informed his brother P.W. 5 regarding illness of Sumitra. He has gone to the extent of saying that he knows nothing about the incident and he could not say under what circumstances Sumitra died. In the circumstances again non-examination of I.O. gives a death stroke to the prosecution case.

Since the version of the informant recorded in the Fardbeyan is a second statement regarding the incident, I do not feel inclined to discuss evidence of other witnesses i.e. P.W. 3 and P.W. 1

9. Before concluding the findings I feel it desirable to answer a question raised by the learned counsel whether carbon copy of postmortem report is a secondary evidence?

Explanation 2 of Section 62 of the Indian Evidence Act is relevant in this context which reads as follows:-

Explanation 2 of Section 62-Where a number of documents are all made by one uniform process, as in the case of printing, lithography or photography, each is primary evidence of the contents of the rest; but, where they are all copies of a common original, they are not primary evidence of the contents of the original.

The carbon copy of the postmortem report has been proved by P.W. 6 who had conducted the postmortem examination on the dead body of Sumitra and this carbon copy of postmortem report was prepared in one uniform process and therefore it is a primary evidence. The Doctor who had conducted the postmortem and prepared postmortem report in carbon process, has proved it as Ext.-2.

Their lordships in the Judgment reported in Prithi Chand Vs. State of Himachal Pradesh, have also held the carbon copy of medical report, if prepared in one uniform process, is primary evidence within the meaning of Explanation 2 of Section 62 of the Evidence Act. To make it more clear, I feel inclined to quote para-4 of the said Judgment, which reads as under:-

4. The prosecutrix was examined by Dr. C.S. Vedwa, who had issued the medical certificate, Ext. P-E dated 16-6-1979. The medical certificate shows that the prosecutrix had not developed secondary sex characters, auxiliary and pubic hair were absent and there were abrasions of 3"x1/8" and 2"x1/8" on the lumbar region. She also found signs of inflammation around the vulva; the vagina was bleeding, the hymen was absent with the edges torn and there was tenderness all around. The hymen was bleeding on touch and the vagina admitted one finger with difficulty. The girl's salwar was bloodstained. It was taken in a sealed packet along with two slides and swabs. Unfortunately, this lady doctor who had delivered a child was not available for giving evidence as she had proceeded on long leave. The learned Sessions Judge felt that it would not be possible to secure her presence without undue delay, and therefore, permitted the prosecution to prove the certificate through PW 2 Dr. Kapila, who was conversant with her handwriting and signature, he having worked with her for about two years. He stated that the carbon copy of the certificate Ext. P-E was prepared by Dr. Vedwa by one process and bear her signature. The learned Counsel for the appellant contended that this certificate was inadmissible in evidence since the prosecution has failed to prove that the original certificate was lost and not available. Section 32 of the Evidence Act provides that when a statement, written

or verbal, is made by a person in the discharge of professional duty whose attendance cannot be procured without an amount of delay, the same is relevant and admissible in evidence. Besides, since the carbon copy was made by one uniform process the same was primary evidence within the meaning of Explanation 2 to Section 62 of the Evidence Act. Therefore the medical certificate Ext. P-E was clearly admissible in evidence. That apart, there is strong, reliable and dependable evidence of the prosecution witnesses which clearly proves that the prosecutrix was raped by the appellant.

Thus it is clear that if the postmortem report prepared in one uniform carbon process in duplicate or triplicate, each carbon copy duly signed by the Doctor who prepared it, is a primary evidence and it becomes more strengthened when the maker himself proves it before the court.

However, in view of the discussions made above and also considering non-examination of I.O., the Fardbeyan on the basis of which instant case was registered cannot be considered a true version of the incident. The non-examination of I.O., non-production of the written report lodged by the informant on 8.5.1988, non-exhibition of inquest report and other necessary documents, the benefit of doubt is liable to be given to the appellants and accordingly they are acquitted from the charges levelled against them. The judgment of conviction and sentence dated 20.9.2002, passed by the learned Additional Sessions Judge-IX, Dhanbad in connection with S.T. No. 347 of 1993 corresponding to Topchanchi (Hariharpur) P.S. Case No. 65 of 1998 (G.R. No. 379 of 1988), stands set aside. The appellants are also discharged from the liabilities of their bail bond and set at liberty.

In the result, the appeal stands allowed.