

(2010) 01 CHH CK 0015
In the Chhattisgarh High Court
Case No : Criminal Appeal No. 1227 of 2002

Promod Tiwari @ Kajutiwari and Another	APPELLANT
Vs	
State of C.G.	RESPONDENT

Date of Decision : 19-01-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 313
Dowry Prohibition Act, 1961 — Section 3, 4
Penal Code, 1860 (IPC) — Section 302, 34, 498A

Citation : (2010) 3 CGLJ 92

Hon'ble Judges : T.P. Sharma, J; R.L. Jhanwar, J

Bench : Full Bench

Advocate : Hamida Siddiqui, for the Appellant; Rakesh Jha, Deputy Govt. Advocate, for the Respondent

Final Decision : Allowed

Judgement

T.P. Sharma, J.—Challenge in this appeal is to the judgment of conviction and order of sentence dated 25-11-2002 passed by the 1st Additional Sessions Judge, Ambikapur in Sessions Trial No. 76/2002, whereby and where under learned Additional Sessions Judge after holding the Appellants guilty for commission of homicidal death amounting to murder of deceased Rashmi Tiwari - wife of Appellant No. 1 Pramod Tiwari in sharing common intention, commission of cruelty and torture upon her and demand of dowry, convicted the Appellants under Sections 302 read with Section 34, 498A of the I.P.C. 3 and 4 of the Dowry Prohibition Act, 1961, and sentenced each of them to undergo imprisonment for life and pay fine of Rs. 1,000/-, in default of payment of fine to further undergo R.I. for six months; to undergo R.I. for three years and pay fine of Rs. 500/-, in default of payment of fine to further undergo R.I. for three months; to undergo R.I. for six months and pay fine of Rs. 500/-, in default of payment of fine to further undergo R.I. for three months and to undergo R.I. for six months and pay fine of Rs. 500/-, in default of payment of fine to further undergo R.I. for three months, respectively.

2. Judgment is impugned on the ground that without any credible and clinching evidence, the Court below has convicted and sentenced the Appellants in the aforesaid manner and thereby committed illegality.

3. Case of the prosecution, in brief, is that Rashmi Tiwari @ Rani Tiwari -wife of Appellant No. 1 Pramod Tiwari @ Kaju Tiwari and sister-in-law (bhabhi) of Appellant No. 2 Pradeep Tiwari @ Pinku Tiwari, was married to Appellant No. 1 in April 1998. The Appellants used to commit torture and cruelty upon her in connection with demand of dowry. On the fateful day of 20-9-2001 at about 3.30 p.m. at Ambikapur, the Appellants were present in their house, Rashmi Tiwari (since deceased) was also present and Appellant No. 1 Pramod Tiwari poured kerosene oil over the body of Rashmi Tiwari and set her ablaze and also closed the door. Rashmi Tiwari sustained burn injuries. She was shifted to Holy Cross Hospital, Ambikapur for treatment. The doctors intimated to the police station relating to the incident vide Ex.P-20. Nirmala Devi (P.W. 5) - mother of the deceased came to the hospital before whom the deceased made dying declaration that Appellant No. 1 Pramod Tiwari has set her ablaze after pouring kerosene oil on her body. She lodged the F.I.R. vide Ex.P-7. Bed head ticket Ex.P-21 of the deceased was seized. On 20-9-2001 dying declaration of the deceased was recorded by Executive Magistrate P.D. Lakra (P.W. 2) vide Ex.P-1 in which the deceased has deposed that Appellant No. 1 Pramod Tiwari has set her ablaze after pouring kerosene oil on her and Appellant No. 2 Pradeep Tiwari was present in the house. Burnt pieces of clothes of the deceased were recovered vide Ex.P-3 on 22-9-2001. One shirt and one pant having kerosene oil smell were seized from accused Pramod Tiwari vide Ex.P-2. Appellant No. 1 Pramod Tiwari was also sent for medical examination vide Ex.P-6A and he was examined by Dr. J.K. Jain (P.W. 4) but no burn injury was found on his body vide Ex.P-6. Match box, stove, letter and burnt piece of cloth were recovered from the spot vide Ex.P-15. Spot map was prepared by the Investigating Officer vide Ex.P-16. During the course of treatment, Rashmi Tiwari died on 30-9-2001. Death of the deceased was intimated by the doctor vide Ex.P-4 and on the basis of Ex.P-4 merged intimation was recorded vide Ex.P-5.

4. After summoning the witnesses vide Ex.P-10, inquest over the dead body of the deceased was prepared vide Ex.P-11. The dead body was sent for autopsy to District Hospital, Ambikapur vide Ex.P-8 and autopsy was conducted by Dr. J.K. Relwani (P.W. 6) vide Ex.P-9 who found burn injuries over the dead body and cause of death was syncope as a result of septicemia. Seized articles were sent for chemical analysis vide Ex.P-19.

5. Statements of the witnesses were recorded u/s 161 of the Code of Criminal Procedure and after completion of investigation, charge sheet was filed before the Chief Judicial Magistrate, Ambikapur, who in turn, committed the case to the Court of Sessions, Ambikapur, from where learned Additional Sessions Judge, received the case on transfer for trial.

6. In order to prove the guilt of the Appellants, the prosecution has examined as

many as eleven witnesses. The accused were examined u/s 313 of the Code of Criminal Procedure in which they denied the circumstances appearing against them, they pleaded innocence and false implication. They have also examined Vijendra Prasad Gupta @ Biju (D.W. 1), Gulam Rasul Ansari (D.W. 2) and Sanjay Mishra (D.W. 3) in their defence. Vijendra Prasad Gupta @ Biju (D.W. 1) has deposed that he is residing in the same vicinity and he has not heard any quarrel or dispute between the deceased and the Appellants family. Gulam Rasul Ansari (D.W. 2) has deposed that there was no demand relating to dowry and on the date of incident he heard sound and saw fumes coming out from the house of the accused, then he went to the house of the accused along with Sanjay Mishra (D.W. 3), nobody was present in the house and the deceased was lying in the courtyard in burnt condition, after some time, hearing the sound, accused Pradeep Tiwari came towards the betel shop and they took the deceased in a rickshaw to the hospital, she was not in a position to talk clearly. Sanjay Mishra (D.W. 3) has corroborated the evidence of Gulam Rasul Ansari (D.W. 2) and has deposed that while injured Rashmi was burning, he asked her on which she replied that she has been defamed, therefore, she does not want to live and she herself has poured kerosene oil on her body and set herself ablaze.

7. After appreciating the evidence adduced on behalf of the parties, the Court below has convicted and sentenced the Appellants as aforementioned.

8. We have heard learned Counsel for the parties, perused the judgment impugned and record of the Court below.

9. Learned Counsel for the Appellants vehemently argued that the prosecution has not adduced any evidence against Appellant No. 2 to connect him with the crime in question, therefore, conviction and sentence against Appellant No. 2 is not sustainable under the law. As regards conviction and sentence of Appellant No. 1, learned Counsel argued that the prosecution has not adduced any credible and clinching evidence to prove that Appellant No. 1 has poured kerosene oil over the body of the deceased and set her ablaze. Dying declaration Ex.P-1 is not admissible in evidence in absence of certificate of fitness of the doctor, only signature of the doctor over Ex.P-1 does not prove the fact that the injured was in fit state of mind to give statement. After the incident, injured Rashmi was admitted in the Mission Hospital where the treating doctor Dr. Amit Toppo has recorded her statement that it was a suicidal burn which finds place in Ex.P-21C. In case of 100% burns the person would not be in a position to give statement. The oral dying declaration made by the deceased before Satish Kumar Tiwari (P.W. 1) uncle (mama) and Nirmala Devi (P.W. 5) - mother of the deceased is not safe to rely, they are interested witnesses and they have deposed after the alleged incident only with a view to implicate the husband and relatives of the deceased after the death of the deceased. The Appellants have never demanded dowry. Learned Counsel placed reliance in the matter of Sharad Birdhichand Sarda Vs. State of Maharashtra, in which the Apex Court has held that close relatives of victim have tendency to exaggerate or add facts, the Court should

examine their evidence with great care and caution.

10. On the other hand, learned State counsel opposed the appeal and submitted that the dying declaration made by the deceased before the Executive Magistrate vide Ex.P-1 is admissible in evidence and well corroborated by the evidence of Satish Kumar Tiwari (P.W. 1) and Nirmala Devi (P.W. 5), uncle and mother of the deceased, respectively, before whom the deceased has made oral dying declaration on the same day in the hospital. In case of dying declaration, the person who records the dying declaration is required to satisfy himself that the injured is in a fit statement of mind to state the things. In absence of fitness certificate from the doctor, the dying declaration so recorded does not become indissmissible in evidence.

11. In order to appreciate the arguments advanced on behalf of the parties, we have examined the evidence adduced on behalf of the parties and their evidence.

12. In the present case, abnormal death of the deceased as a result of 100% burn injuries resulted into septicemia is not substantially disputed by the Appellants, otherwise established by the evidence of Dr. J.K. Relwani (P.W. 6) and the autopsy report Ex.P-9 which reveal that burn injuries were found over the body of the deceased and the deceased died as a result of septicemia.

13. As regards complicity of the Appellants in the crime in question, conviction of the Appellants is based on written and oral dying declaration made by the deceased on the date of incident.

14. At the outset, the dying declaration Ex.P-1 is not against Appellant No. 2 Pradeep Tiwari, it shows only the presence of Appellant No. 2 Pradeep Tiwari. Satish Kumar Tiwari (P.W. 1), uncle of the deceased, has deposed in his evidence that Appellant No. 1 Pramod Tiwari has poured kerosene oil over the body of the deceased and set her ablaze. Nirmala Devi (P.W. 5), mother of the deceased, has corroborated the evidence of Satish Kumar Tiwari (P.W. 1) relating to the oral dying declaration. But these witnesses have not deposed anything against Appellant No. 2 Pradeep Tiwari.

15. P.D. Lakra (P.W. 2) has deposed in his evidence that in compliance of oral direction of the Sub Divisional Officer, Ambikapur, he went to the Mission Hospital at about 6.15 p.m. on 20-9-2001 where injured Rashmi Tiwari was admitted, he asked the doctor about the condition of the injured and after satisfying himself he has recorded the dying declaration of injured Rashmi. In her statement, Rashmi has stated that her husband Pramod Tiwari after closing the room has poured kerosene oil over her and set her ablaze, at that time, her mother-in-law and children were not present in the house. He has further deposed that at the time of recording the dying declaration the doctor was also present. In his cross-examination, he has denied the suggestion that the injured was not in conscious stage.

16. Satish Kumar Tiwari (P.W. 1), uncle of the deceased, has also deposed that

Rashmi has made dying declaration that Appellant No. 1 Pramod Tiwari has poured kerosene oil over her body and set her ablaze. Nirmala Devi (P.W. 5), mother of the deceased, has deposed in para 5 of her evidence that Appellant No. 1 Pramod Tiwari has poured kerosene oil over the body of her daughter and set her ablaze and also closed the door, therefore, her daughter was unable to run away from the place of incident.

17. Defence has cross-examined Satish Kumar Tiwari (P.W. 1) in detail and in his detailed cross-examination, he has admitted that they have not reported the matter earlier relating to cruelty and torture on the ground that they are Hindus, only one marriage is permissible in their religion and the dispute may be resolved by mutual understanding. In para 16 of his evidence, he has denied the suggestion that as a result of bum injuries the deceased was not in conscious stage, she was unable to identify the persons and she was talking baselessly.

18. Defence has also cross-examined Nirmala Devi (P.W. 5) in detail. In para 17 of her cross-examination, she has deposed that statement of injured Rashmi was not recorded before her. She has stated in para 19 of her evidence that earlier she has not lodged report relating to demand of dowry.

19. The evidence relating to oral dying declaration made by injured Rashmi is unchallenged in the statements of Satish Kumar Tiwari (P.W. 1) and Nirmala Devi (P.W. 5). Both these Witnesses are mother and uncle of the deceased and relatives of the deceased, but only on the ground of their relationship, their statements cannot be discarded.

20. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. While dealing with the question of evidence of relative witnesses the Apex Court in the matter of Sharad Birdhichand Sarda Vs. State of Maharashtra, has held that close relatives of the victim have tendency to exaggerate or add facts, Court should examine their evidence with great care and caution. Para 48 of the judgment of the Apex Court in the above cited case reads thus,

48. Before discussing the evidence of the witnesses we might mention a few preliminary remarks against the background of which the oral statements are to be considered. All persons to whom the oral statements are said to have been made by Manju when she visited Beed for the last time, are close relatives and friends of the deceased. In view of the close relationship and affection any person in the position of the witness would naturally have a tendency to exaggerate or add facts which may not have been stated to them at all. Not that this is done consciously but even unconsciously the love and affection for the deceased would create a psychological hatred against the supposed murderer and, therefore, the Court has to examine such evidence with very great care and caution. Even if the witnesses were speaking a part of the truth or perhaps the whole of it, they would be guided by a spirit of revenge or nemesis against the accused person and in this process certain facts which may not or could not have

been stated may be imagined to have been stated unconsciously by the witnesses in order to see that the offender is punished. This is human psychology and no one can help it.

21. The evidence of Satish Kumar Tiwari (P.W. 1) and Nirmala Devi (P.W. 5) relating to oral dying declaration is also corroborated by the evidence of Executive Magistrate P.D. Lakra (P.W. 2) and the dying declaration recorded by him vide Ex.P-1. Bloodstained clothes were also seized from accused Pramod Tiwari vide Ex.P-2. In para 9 of his evidence Satish Kumar Tiwari (P.W. 1) has deposed relating to seizure of shirt and pant from Pramod Tiwari containing smell of kerosene. The factum of dying declaration is also mentioned in Ex.P-7 the promptly lodged F.I.R.

22. The principle of dying declaration is based on legal maxim "nemo moriturus proesumitur mentiri" - a man will not meet his maker with a lie in his mouth.

23. Lord Chief Justice Baron Eyre (See. R. v. Woodcock (1789) 1 Lea 502.) expressed his view relating to dying declaration as follows:

... That such declarations are made in extremity, when the party is at the point of death, and when every hope of this world is gone; when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn and so awful is considered by the law as creating an obligation, equal to that which is imposed by a positive oath in a court of justice....

24. As has been held by the Apex Court in the matter of State of Uttar Pradesh Vs. Ram Sagar Yadav and Others, . if the court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration.

25. In the present case, defence has examined Vijendra Prasad Gupta @ Biju (D.W. 1) who has deposed that he is not having any information relating to demand of dowry by the Appellants or their relatives. He is neighbour of the Appellants. Gulam Rasul Ansari (D.W. 2) has deposed that at the time of incident the Appellants were not present in the house and Pradeep Tiwari came later on, the deceased was not in a position to talk and he along with Sanjay Mishra (D.W. 3) took the deceased to the hospital for treatment. But Sanjay Mishra (D.W. 3) has specifically deposed in para 4 of his evidence that he has asked injured Rashmi about the incident on which she told that she has been defamed, therefore, she herself has poured kerosene oil on her body and set herself ablaze.

26. The statements of Gulam Rasul Ansari (D.W. 2) and Sanjay Mishra (D.W. 3) are self-contradictory. According to their statements, they have simultaneously went to the spot, but according to Gulam Rasul Ansari (D.W. 2) the injured was not in a position to talk, however, according to the evidence of Sanjay Mishra (D.W. 3), the injured has specifically stated that she herself has poured kerosene oil over her body and set herself ablaze on the ground that she has been

defamed. This makes their evidence unreliable and suspicious.

27. This is a case of death of bride in the house of her in-laws where according to the allegation, the in-laws and husband used to demand dowry and have committed cruelty and torture. In case of domestic violence or harassment, normally the effected persons i.e. daughter-in-law does not report or inform anyone about the harassment or tortuous attitude of her husband or in-law's to other persons but as and when she gets the opportunity, she informs about it to her parents. The parents of the bride normally do not react immediately but wait for an opportune time, in the hope of amicable settlement between the parties and to avoid further complications which may arise in future. But when the matter becomes intolerable then the daughter-in-law or the effected lady discloses the tortuous attitude of her husband and in-law's, to the police, neighbour and other persons related to her to get the dispute resolved with their intervention.

28. Only on the ground that the relatives of the deceased have not lodged report earlier or they have not taken any recourse of law, their evidence cannot be discarded. Satish Kumar Tiwari (P.W. 1) and Nirmala Devi (P.W. 5) are close relatives of the deceased and they have specifically stated that Rashmi made dying declaration that her husband Pramod Tiwari (Appellant No. 1 herein) poured kerosene oil over her body and set her ablaze. But they have not deposed against Pradeep Tiwari (Appellant No. 2 herein) or against other relatives relating to commission of the aforesaid offence. This shows that these witnesses have not exaggerated or added facts or that they have not falsely implicated the other persons.

29. On close scrutiny of the evidence of Satish Kumar Tiwari (P.W. 1) and Nirmala Devi (P.W. 5), their evidence inspire confidence, their evidence is trustworthy and corroborated by the promptly lodged F.I.R. Ex.P-7 and the dying declaration Ex.P-1 recorded by P.D. Lakra (P.W. 2). Oral and written dying declarations made by the deceased are sufficient for drawing inference that Appellant No. 1 Pramod Tiwari has poured kerosene oil over the body of the deceased and set her ablaze, and thereby caused homicidal death of the deceased. Causing of death by pouring kerosene oil and setting the deceased ablaze show that Appellant No. 1 Pramod Tiwari has caused homicidal death of the deceased amounting to murder.

30. Satish Kumar Tiwari (P.W. 1) and Nirmala Devi (P.W. 5) have also deposed against the Appellants and other relatives of Appellant No. 1 Pramod Tiwari relating to demand of dowry, but no specific instance has been deposed by them. On the basis of omnibus and bald statements any positive finding relating to demand of dowry or commission of torture and cruelty would not be legally possible. The evidence of both these witnesses reveals that the behaviour of Appellant No. 1 Pramod Tiwari with his wife was not cordial and finally he has committed the homicidal death of his wife amounting to murder. In absence of consistent evidence relating to demand of dowry and commission of cruelty and

torture, conviction and sentence of the Appellants under Sections 498A of the I.P.C., 3 and 4 of the Dowry Prohibition Act, 1961 are not sustainable under the law.

31. After appreciating the evidence available on record, the Court below has convicted and sentenced the Appellants in the manner mentioned in para 1 of this judgment, but has not considered the most material aspect of the case i.e. absence of evidence relating to demand of dowry and commission of cruelty and harassment, and thereby, the Court below has committed illegality. The Court below has also not considered the fact that only the presence of Appellant No. 2 Pradeep Tiwari is not sufficient for drawing any positive inference of commission of the offence against him that too in his house.

32. For the foregoing reasons, the appeal is partly allowed.

(a) Conviction and sentences imposed upon the Appellants under Sections 498A of the I.P.C., 3 and 4 of the Dowry Prohibition Act, 1961 are hereby set aside and the Appellants are acquitted of the said charges.

(b) Conviction and sentences imposed upon Appellant No. 2 Pradeep Tiwari u/s 302 read with Section 34 of the I.P.C. are also set aside and he is acquitted of the said charge. Presently, he is on bail, his bail bonds are discharged and he need not surrender before the Court.

(c) Conviction and sentences imposed upon Appellant No. 1 Pramod Tiwari u/s 302 read with Section 34 of the I.P.C. are hereby maintained.