
(2013) 10 CAL CK 0052
In the Calcutta High Court
Case No : C.R.A. No. 289 of 2007

Sraban Banik @ Rahul Banik

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 09-10-2013

Acts Referred:

Citation : (2014) 1 CHN 445

Hon'ble Judges : N. Patherya, J; Asim Kumar Ray, J

Bench : Division Bench

Judgement

N. Patherya, J.—This appeal has been filed against the judgment and order of conviction dated 9th April, 2007 and sentence dated 10th April, 2007 passed by the Additional District and Sessions Judge, 2nd Fast Track Court, Serampore in Sessions Trial Case No. 1 of 2007 arising out of Sessions Case No. 163 of 2006 u/s 304B IPC whereby the appellant was directed to suffer R.I. for life and to pay a fine of Rs. 5,000/-. The case of the prosecution is that the victim and the appellant married on 29th April, 2006 at Kali Temple. They resided in the house of the victim after marriage and thereafter they took a rented accommodation at Hind Motor. Thereafter the appellant demanded dowry from the victim which demand was not fulfilled and torture both physical and mental was inflicted on the victim. Subsequently, the victim was taken by the appellant to her matrimonial home at Uttarpara. Prior to the incident the appellant attempted to kill the victim by pouring mosquito repellent into her mouth. The victim unable to bear such torture set herself on fire by pouring kerosene.

2. On the basis of a telephonic call received by the I.O. PW 19 that a 19 year old girl had committed suicide in her bed room by pouring kerosene on her body and setting herself on fire, the police officer reached the place of incident at Shibhala Street, Bhadrakali under Uttarpara P.S. The fire was put off by the neighbouring people and the victim taken to hospital. The victim was admitted to Uttarpara State General Hospital in a serious condition and thereafter the officers of the concerned police station informed the parents of the victim about the incident. In

her statement made before the I.O. (PW 19) which was treated as an FIR Uttarpara P.S. Case No. 124 of 2006 was registered and investigation initiated.

3. On completion of investigation charge-sheet under sections 498A, 306 and 304B IPC was submitted. The case was committed to the Court of Sessions Judge, Hooghly for disposal and later transferred to the Court of the Additional District and Sessions Judge, 2nd Fast Track Court, Serampore for trial. Formal charge under sections 498A, 306 and 304B IPC was framed against the appellant and the same was read over and explained to the appellant who pleaded "not guilty" and claimed to be tried.

4. On behalf of the prosecution 19 witnesses were examined and none was examined by the defence. The appellant was examined u/s 313 Cr.P.C.. Certain documents were also taken on record as exhibits. On consideration of the evidence the Court below passed the order of conviction and sentence. Hence this appeal.

5. Counsel for the appellant submits that the order of conviction and sentence be set aside as the case u/s 498A IPC and demand for dowry was not proved by the prosecution. The dying declaration made before the doctor is invalid and the statement u/s 154 Cr.P.C. has been treated not only as a dying declaration but also as an FIR, both of which are not valid.

6. There was never any demand for dowry and the evidence of PW 5 (mother) is an exaggeration and ought not to be relied on. Even assuming without admitting that the demand for dowry u/s 498A IPC stands proved, at the highest it may be a case of harassment and therefore will attract section 306 IPC and not section 304B IPC. The prosecution has not been able to prove the case u/s 304B IPC against the appellant.

7. As regards the statement made by the victim on 23rd July, 2006 and recorded by the I.O. (PW 19) which is now being treated as a dying declaration u/s 32 of the 1872 Act. The said dying declaration (Exhibit-8) is not a valid statement. The patient should be mentally fit to make the statement. There is no such certificate given by the doctor, The said statement has been made before the I.O. and not before an Executive Magistrate. If it was made before an Executive Magistrate there would have been no reason to challenge the same but having been made before the I.O. who is an interested person the same cannot be treated as a valid dying declaration and no importance can be given to it. The serious condition of the patient and no certification by the doctor regarding the condition of the patient raises a doubt with regard to the genuineness of the dying declaration and makes one believe that the same was prepared subsequently.

8. From the bed head ticket it will appear that the victim was admitted to the hospital at 7.10 pm and administered medicines. The dying declaration before the doctor was made at 7.30 pm with a certificate that the patient was conscious, alert and in a state of mental fitness. The statement u/s 154 Cr.P.C. was made at 20.50 hours by which time the medicine had taken effect and a

doubt arises regarding the capacity of the patient to make such a detailed dying declaration. Therefore the statement recorded by the I.O. and treated as a dying declaration need not be looked into. The patient was not in a condition to make the statement far less in a fit state of mind to make such statement.

9. The dying declaration recorded at 7.30 pm by PW 10 (Dr.) can also not be relied on, as it was the I.O. who requisitioned recording of a dying declaration. PW 10 (Dr.) in his evidence has stated that the condition of the patient was grave and the treatment given by the doctor was oxygen inhalation, intravenous drip so also injection compose antibiotic and tetanus. Compose was given to the victim to give her some relief due to burn injuries and it takes effect in 10 minutes. As held in G.C. Kanungo and D.C. Routray Vs. State of Orissa, , the doctor is not to have the last word on the subject. PW 15 (Dr.) has stated in his evidence that the victim suffered 90% burn injury and was in no position to speak. There is no attestation of the LTI of the victim in the statement and dying declaration. The treatment sheet is exhibit-4 and the dying declaration before the doctor is exhibit-5. Reliance is placed on Nazam Bibi @Nazam Bewa & Anr. v. State of West Bengal ECr. N 2009 (3) Calcutta 530 and AIR (2004) SC 503. The Dr's evidence is not logical or objective and need not be relied on.

10. The statement of the victim was recorded at 7.30 pm by P.W. 10 (Dr.) and the complaint by PW 5 has spoken against the appellant. PW 19 (I.O.) was overzealous and recorded the statement of the victim. PW 15 (doctor) has stated that the patient suffered 90% burnt injuries. At 7.30 pm it was impossible for the patient with breathing problem to make the dying declaration before the PW 10 (Dr.). At 7.45 pm the statement u/s 154 Cr.P.C. is recorded by the I.O. (PW 19). PW 17 (the autopsy surgeon) has stated that he found epidermal and dermoepidermal over the whole body and in such cases the patient cannot survive.

11. The complaint u/s 154 Cr.P.C. is in great detail and PW 19 (I.O.) has stated that when the victim was shifted to Uttarpara Hospital a requisition was put to the Superintendent to record her dying statement. In cross-examination it has been recorded that at 19.45 hours (7.45 pm) the statement of the victim was recorded. The burnt articles were not sent to FSL for chemical examination. The LTI of the victim was not attested and it has been stated by the I.O. that no oxygen was given to the victim therefore his presence in the ward is in doubt. It is impossible for a burnt patient to give a vivid picture as made in the FIR. Reliance is placed on State of Maharashtra Vs. Sanjay, . A dying declaration made before a Magistrate is to be accepted as held in Laxman Vs. State of Maharashtra, . Reliance is also placed on Munnu Raja and Another Vs. The State of Madhya Pradesh, .

12. PW 19 (I.O.) in his evidence has spoken about harassment but no case has been made out by the prosecution of cruelty inflicted on the victim soon before her death. Therefore it is not a case u/s 304B IPC but may be a case u/s 306 IPC only if the dying declaration and FIR is believed. Reliance is placed on Narwinder

Singh Vs. State of Punjab, . Harassment led to suicide but not for demand of dowry, therefore will attract section 306 IPC and not section 304B IPC. The appellant has already served 7 years in custody and therefore his case may be considered accordingly.

13. In opposing the said appeal counsel for the State submits that within three months of marriage the suicide was committed. PW 11 (nurse) has supported the case of the prosecution with regard to recording of the dying declaration by PW 10 (Dr.). The certificate given regarding the mental fitness of the victim was never challenged therefore the doctor or the certificate given by him cannot be disbelieved. PW 10 (Dr.) has also certified that the victim put her LTI on completion of recording of the dying declaration recorded by him and this too has remained unchallenged. As held in 2008 (16) SCC 350 a certificate given by a doctor regarding the victim's fitness is to be accepted. As the evidence of the PW 5 (mother) matches with PW 19 (I.O.)'s evidence and the statements made in the FIR the case of torture soon before her death was established. Therefore the order of conviction and sentence be upheld.

14. In reply counsel for the appellant submits that the dying declaration was challenged.

15. Having considered the submissions of the parties PW 5 (mother) has in her evidence stated that the victim told her over phone of the demand for dowry by the appellant and torture inflicted both physical and mental for such demand. In the dying declaration (Ext. 5) recorded by PW 10 (Dr.) the victim while stating of torture did not state that the torture was for non-fulfillment of demand. PW 5 (mother) has also in her cross-examination stated that regarding torture there was discussion between the family members. This is corroborated by the evidence of PW 12 who has stated that PW 5 would state to them of the torture. PW 19 (I.O.) has also corroborated the statement of PW 5 and PW 12 as regards torture on the victim by the appellant. That torture was for any demand does not emerge from the evidence of PW 19 (I.O.). Therefore the case u/s 498A IPC appears to be not established by the prosecution against the appellant.

16. For a charge u/s 304B IPC to be established it is necessary to ascertain whether the torture inflicted on the victim was soon before her death. To ascertain the aforesaid the evidence of the injured witness and PW 5 is of importance. The victim made 2 statements which are treated as dying declarations (Ext. 5 and Ext. 1). Ext. 1 has also been treated as an FIR and was recorded at 20.50 hrs. i.e. after the recording of Ext. 5. It is in great detail and it is doubtful whether the victim was in a condition to make such a detailed narration, therefore it does not pass the test of total reliability. But the recording of Ext. 5 cannot be doubted as it was recorded by PW 10 (Dr.) on a requisition being made by PW 19 (I.O.) with the Superintendent of the Uttarpara State General Hospital. It is the 1st statement made by the victim at 7.30 pm after being admitted at 7.10 pm by Swapan Dutta (PW 4) as will appear from Ext. 4. From the BHT (Ext. 4) it will appear that the victim (patient) was conscious and

oriented and in the case history it has been specifically mentioned that the victim (patient) stated that she put fire on her person after putting kerosene oil. This finds corroboration in Ext. 5, the dying declaration and the evidence of PW 10 and PW 11. PW 10 (Dr.) has stated that the dying declaration was recorded by him and the LTI was put by the victim in his presence. He has also in examination stated that the certificate was given by him and that the victim was capable of making the declaration.

17. PW 11 (nurse) has also stated that PW 10 (Dr.) recorded the statement (Ext. 5) in her presence and the victim (patient) put her signature on completion of recording of her statement. The said evidence has not been dislodged therefore it remains. There is no reason not to believe Ext. 5 or the Dr. (PW 10) and PW 11 (nurse) as both are independent witness. According to PW 17 (PM Dr.) the death was due to burn and as the victim has stated how the burn occurred the non-mention by the PM Dr. (PW 17) is not of any relevance especially in view of the dying declaration (Ext. 5) and the BHT.

18. As Ext. 5 and the evidence of PW 10 and PW 11 supports the case of the prosecution u/s 306 IPC it is not necessary to rely on the 2nd dying declaration which is later in point of time.

19. PW 5 (mother) in examination has stated that before she reached the Uttarpara State General Hospital, the ambulance was ready to take the victim to Calcutta. Therefore the question of tutoring the victim by PW 5 cannot arise.

20. Keeping the 2 dying declarations, side by side the case of torture is consistent in both. This is a material particular which coupled with the statement of the victim in Ext. 5 (1st DD) that due to such torture she committed suicide constitutes a consistent fact and as held in State of Maharashtra Vs. Sanjay, by virtue thereof the appellant stands implicated u/s 306 IPC and not u/s 302 IPC.

21. That the victim was subjected to cruelty and torture before her death is not evidenced from either Ext. 5 or evidence of the PWs. Therefore the ingredient of section 304B IPC has not been satisfied.

22. A charge u/s 306 IPC was also framed which is corroborated by Ext 5 (1st DD) and the evidence of PW 10 and PW 11. The victim categorically made a statement on 23.7.2006 at 7.30 pm that "her husband inflicted torture-mental and physical on her and he would provoke her to commit suicide and so she committed suicide".

23. Beyond the said what more evidence would be needed by any Court of Law in the absence of tutoring so also not having met her relatives to convict the accused husband appellant herein u/s 306 IPC, as undoubtedly it is because of the constant provocation or instigation, call it by whatever name that led the victim to commit suicide as recorded by her in her statement before PW 10 and PW 11 which on her death is her DD.

24. In view of Munnu Raja and Another Vs. The State of Madhya Pradesh, the

dying declaration recorded by the I.O. is excluded from consideration.

25. (2002) 6 SCC 701 and AIR (2004) SC 503 are not applicable to the facts of the instant case and are distinguishable on facts.

26. In view of (2008) 16 SCC 350 there is no reason to disbelieve the certificate given by PW 10 (Dr.). Accordingly the order of conviction and sentence u/s 306 IPC is upheld and the conviction and sentence u/s 498A and section 302 IPC is set-aside. The sentence of life imprisonment is modified to sentence of 10 years u/s 306 IPC along with a fine of Rs. 1,000/- in default 3 months S.I. In view of the aforesaid this appeal is disposed off.

A.K. Ray, J.

I agree.