

(1991) 10 CAL CK 0001
In the Calcutta High Court
Case No : C.A. No. 97 of 1989

Tapan Pal and Others

APPELLANT

Vs

The State of W. Bengal

RESPONDENT

Date of Decision : 01-10-1991

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161
Evidence Act, 1872 — Section 113A, 32, 32(1)
Penal Code, 1860 (IPC) — Section 306, 498A

Citation : (1992) CriLJ 1017

Hon'ble Judges : S.P. Rajkhowa, J;J.N. Hore, J

Bench : Division Bench

Final Decision : Allowed

Judgement

J.N. Hore, J.—The appellants were convicted under Sections 306 and 498A, Indian Penal Code by the learned Assistant Sessions Judge, Kalna and for his conviction u/s 306, Indian Penal Code, appellant No. 1 Tapan Pal was sentenced to suffer rigorous imprisonment for 71/2 years and pay a fine of Rs. 2,500/-, in default further simple imprisonment for 6 months and appellant No. 2 Lakshmirani Pal was sentenced to suffer rigorous imprisonment for 5 years and to pay fine of Rs. 2,500/-, in default, to suffer further simple imprisonment for 6 months. The fine, if realised, was ordered to be paid to P.W. 2 Subharani Kumar, mother of the deceased. No separate sentence was passed u/s 498A, Indian Penal Code. Swapan Pal and Puspita Pal younger brother and sister of appellant Tapan Pal respectively were found not guilty and acquitted of both the charges.

2. Briefly stated, the prosecution case is as follows:--

Namita Pal, daughter of Late Abhoypada Kumar and P.W. 2 Sudharani Kumar of village Tildange, P.S. Balagarh, District Hooghly was married to appellant No. 1 Tapan Pal of village Gopalpur, P. S. Kalna, District Burdwan about 3 years before the occurrence. Since marriage, she was subjected to physical and mental tortures by the two appellants and Swapan and Pusparani. On 4-12-87, Namita

committed suicide by hanging as she could no longer bear the habitual tortures meted out to her.

3. P.W. 1 Apurba Kumar, cousin of Namita, lodged a written report on the basis of which, formal F.I.R. was drawn up and a case was registered against the appellants and others under Sections 498A/306, Indian Penal Code. PW 13, S.I. Narendra Nath Saha took up investigation in the case and on completion of investigation, submitted charge-sheet against the accused persons Under Sections 498A/306, Indian Penal Code which in usual course ended in committal of the case to the Court of Session.

4. In defence, the appellants pleaded innocence denying all the material allegations.

5. In order to bring home the charges to the accused, the prosecution examined 13 witnesses while the defence examined none.

6. It is not disputed before us that Namita committed suicide by hanging and is amply proved by the prosecution. PW 12, Dr. B. K. Bose, M.O. Kalna Hospital who held autopsy on the dead body of Namita found ligature mark obliquely running non-continuous marks high on the neck-knot on the side below the line of jaw. On dissection, he found in the uterus a dead female footus about 32 weeks of gestation maturity. The hyoid bone was found intact. Death, in the opinion of the doctor, was due to asphyxia caused by hanging which was ante-mortem. There is, therefore, no doubt that Namita committed suicide by hanging while she was carrying 7/8 months.

7. There is no dispute that Namita committed suicide within 7 years of her marriage. Under the newly inserted Section 113A of the Evidence Act, presumption as to commission of the offence u/s 306 (abetment of suicide) would be available only on the proof that Namita was subjected to cruelty by the appellants within the meaning of the newly inserted Section 498A, Indian Penal Code. So, it is necessary to consider first whether the charge u/s 498A has been proved by the prosecution beyond reasonable doubt. Section 498A is as follows:

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 damage 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". Explanation (b) is not attracted in this case inasmuch as there is no allegation of harassment of the deceased with a view to coercing her

or her relative to meet any unlawful demand for any property or valuable security or for failure to meet such demand so, the question for our consideration is whether the deceased was subjected to cruelty by the appellants within the meaning of Explanation (a) of Section 498A.

8. On hearing the learned Advocates on both sides and upon a careful perusal of the evidence on record and the facts and circumstances of the case, we are of the opinion that there is no cogent legal evidence in support of the charge u/s 498A and the prosecution has hopelessly failed to prove the same. The order of conviction as recorded by the court below is based mainly on conjectures, surmises and inadmissible evidence. The evidence adduced by the prosecution consists mainly of the alleged statements made by the deceased regarding her torture by the appellants when she visited her father's house on some occasions. PW 1 Apurba Kumar, cousin of the deceased lives at a different place. His testimony is that during his visit to PW 2's house Namita reported that since marriage she was subjected to mental and physical tortures by her husband and brother-in-law. He does not, therefore, implicate the appellant No. 2. In answer to a question put by the Court he clarifies "mental torture" by stating that she was pressed hard to part with her gold ornaments and valuables for the purpose of marriage of her sister-in-law by the accused persons but she refused to part with the same. This part of his testimony which appears to be an embellishment not found within the four corners of the First Information Report is not acceptable. Even true, this would not amount to mental cruelty inasmuch as there was no harassment or coercion. After refusal the accused persons did not proceed further. The evidence of this witness is vague to the extreme. He does not say as to when and under what circumstances the deceased made the alleged statement to him. PW 2 Sudharani Kumar, mother of the deceased and PW 3 Nidhiram Kumar, cousin of the deceased also state that Namita during her visit to her father's house reported that she was subjected to tortures by the accused. PW 2 has further stated that she was denied food for which she was compelled to come back alone. This is an embellishment she has not made such a statement in her examination u/s 161, Cr. P.C. and, therefore, her present statement that Namita stated that she was denied food and, therefore, she had to come alone must be discarded. PW 4 Sadhan Chandra Mondal and PW 5 Subhas Ghosh, neighbours of PW 2 seek to support the testimony of PWs 1, 2 and 3. PW 4 has stated that Namita time to time came to her mother and at that time she spoke of tortures by her husband Tapan and his family members. His evidence appears to be hearsay. He does not say that he was present when Namita made the alleged statement. It is clear from his cross-examination that he heard about the alleged torture from PW 2, mother of Namita. PW 5 states that Namita time to time came to the house of PW 2 and disclosed to PWs 2 and 3 that she was subjected to physical tortures by her husband, mother-in-law and others. He claims to have overheard this as a contiguous neighbour. It, however, appears from his cross-examination that his house on the west is intervened by three houses and it was impossible for him to hear Namita making the alleged

statement to PWs 2 and 3 from his house. No reliance can be placed on the testimony of PW 5.

9. In her cross-examination PW 2 has stated that Namita was hot tempered and out spoken. She did not notice any sign of anger when she came to her house alone occasionally. She got no scent of grievance against the accused from her at that time. This demolishes the entire prosecution case and the testimony of the witnesses that Namita made the alleged statements regarding tortures by the accused. She has further stated that Namita used to come once or twice a month and none of the accused persons expressed dissatisfaction over Namita's coming to her father's house alone. She has further stated that she did not take it easily and tried to persuade her daughter not to come alone to her house and there was even altercation between her and Namita over this matter. She has further stated that the standard of living of their family is better than that of the accused and that her daughter expressed her dissatisfaction over the inferior standard of living of the accused. Her daughter lamented before her for not having been married with a suitable or better candidate and in a good family. Namita expressed her unhappiness over the economic disparity between the two families. She has further admitted that she was on cordial terms with appellant No. 1. It is clear, therefore, that the real cause of unhappiness of Namita was not the alleged tortures but her resentment over unequal match. She considered her husband who runs a Grocer's shop and the members of the family of low social and economic status and the high-strung and sensitive girl could not obviously adjust herself to the family of her husband.

10. Assuming, however, that Namita made the alleged statements about her torture by the accused, let us consider whether the same are admissible in evidence u/s 32(1) of the Evidence Act as dying declaration. The evidence is extremely vague and does not disclose as to when and on how many occasions the deceased made the alleged statements. There is also no specific evidence as to when she visited her father's house last. PW 1 has stated in the cross-examination that he saw the deceased last in the house of PW 2 15 days before the occurrence but he does not speak of any statement of the deceased regarding the alleged torture on that date. It appears from the evidence of PW 4 that after Bhadra there was no such statement by the deceased. The deceased died in Falgun, so the alleged statements, if any, were made six months before the date of occurrence. The statements are also vague to the extreme and did not disclose over acts of such nature which were likely to drive the deceased to commit suicide or even endanger her life or limb. The alleged circumstances have no proximate relation to the actual occurrence, namely suicidal death of Namita. The statements, in the facts and circumstances of the case are not admissible u/s 32(1) of the Indian Evidence Act. The learned Advocate for the State has contended that Section 32 may be extended beyond the immediate and the statements of the deceased are admissible in view of the decision of the Supreme Court in *Sharad Birdhichand Sarda Vs. State of Maharashtra*,

11. In *Sharad Birdhichand Sarda v. State of Maharashtra* (Supra) Fazal Ali, J. on a review of the authorities, laid down the following proposition (at pages 174 1984 Cri LJ 1747):

i) Section 32 is an exception to the rule of hearsay and makes admissible the statement of a person who dies, whether the death is homicide, or a suicide, provided the statement relates to the cause of death, or exhibits circumstances leading to the death. In this respect, as indicated above, the Indian Evidence Act, in view of the peculiar conditions of our society and the diverse nature and character of our people, has thought, it necessary to widen the sphere of Section 32 to avoid injustice.

ii) The test of proximity cannot be too literally construed and practically reduced to a cut-and-dried formula of universal application so as to be confined in a strait-jacket. Distance of time would depend or vary with the circumstances of each case. For instance, where death is a logical culmination of a continuous drama long in process and is, as it were, a finale of the story, the statement regarding each step directly connected with the end of the drama would be admissible, because the entire statement would have to be read as an organic whole and not torn from the context. Sometimes statements relevant to or furnishing an immediate motive may also be admissible as being a part of the transaction of death. It is manifest that all these statements come to light only after the death of the deceased who speaks from death. For instance, where the death takes place within a very short time of the marriage or the distance of time is not spread over more than 3-4 months the statement may be admissible u/s 32.

iii) The second part of Clause (1) of Section 32 is yet another exception to the rule that in criminal law the evidence of a person who was not being subjected to or given an opportunity of being cross-examined by the accused would be valueless because the place of cross-examination is taken by the solemnity and sanctity of oath for the simple reason that a person on the verge of death is not likely to make a false statement unless there is strong evidence to show that the statement was secured either by prompting or tutoring.

iv) It may be important to note that Section 32 does not speak of homicide alone but includes suicide also, hence all the circumstances which may be relevant to prove a case of homicide would be equally relevant to prove a case of suicide.

v) Where the main evidence consists of statements and letters written by the deceased which are directly connected with or related to her death and which reveal a tell-tale story, the said statement would clearly fall within the four corners of Section 32 and, therefore, admissible. The distance of time alone in such cases would not make the statement irrelevant.

12. Sabyasachi Mukherjee, J. while concurring with the view of Fazal Ali, J. sounded a note of caution. He has observed as follows (1984 Cri. LJ 1789):--

I would, however, like to state that this approach should be taken with a great

deal of caution and care and though I respectfully agree with Fazal Ali, J. that the test of proximity cannot and should not be too literally construed and be reduced practically to a cut-and-dried formula of universal application, it must be emphasised that whenever it is extended beyond the immediate, it should be the exception and must be done with very great caution and care. As a general proposition, it cannot be laid down for all purposes that for instance where a death takes place within a short time of marriage and the distance of time is not spread over three or four months, the statement would be admissible u/s 32 of the Evidence Act. This is always not so and cannot be so. In very exceptional circumstances like the circumstances in the present case such statements may be admissible and that too not for proving the positive fact but as an indication of a negative fact, namely raising some doubt about the guilt of the accused as in this case.

13. The above decision has no application to the facts of the present case. There are no exceptional circumstances like those in Sharad's case (Supra). In the instant case, the distance is spread over more than six months. The statements are vague and do not specify the acts of omission and commission. The element of continuity is lacking. There are isolated one or two statements made more than six months before the suicidal death of Namita. It is not a case where the statements are directly connected with or related to her death or reveal a tell-tale story or that death was the logical culmination of a continuous drama long in process and is, as it were a finale of the story. It is a case where a few cryptic, vague and general statements were made long before her death which cannot be said to be directly connected or related to her death. In our opinion, the alleged statements, if any, are not relevant and admissible u/s 32(1) of the Evidence Act.

14. Even assuming that the alleged statements are admissible u/s 32(1) of the Evidence Act, the same are insufficient to prove cruelty within the meaning of Section 498A. Basic facts from which cruelty is to be inferred I are to be alleged and proved. It is not sufficient to say that the deceased was subjected to torture or cruelty. In the absence of specific acts of omission or commission the court is not in a position to decide whether the conduct of the accused amounted to cruelty within the meaning of Section 498A. So, the vague statements that the deceased was subjected to tortures or cruelty is not sufficient to prove the charge u/s 498A, I.P.C.

15. The prosecution comes with a story that on the complaint of PWs 1, 2 and 3 to some Anchal members and prominent villagers of Gopalpur village such as PW 6 Dinabandu Ghosh, PW 7 Ahed Ali, PW 8 Abdul Gani, PW 9 Harendra Nath Kumar and PW 10 Saktipada Paul about tortures of Namita by the accused they held Salish and cautioned the accused to behave properly but the accused did not pay heed to it. This seems to be a new story not found within the four corners of the First Information Report and in the statements of the witnesses recorded u/s 161, Cr. P.C. PW 7 does not support the story. It appears that PW 7, Anchal Prodhan, on receipt of information from PW 6 Dinabandhu Ghosh and PW

8 Abdul Gani informed police over telephone about the commission of suicide by the deceased by hanging on the basis of which police made a G.D. Entry No. 146 dated 4-12-87 (Ext. 4). This is the earliest version of the occurrence. There is no whisper about the alleged torture by the accused. In fact, there was no allegation against the accused persons at all. PWs 6 and 8 who now come with the story that they received complaint from PW 1 about tortures on the deceased by the accused and accordingly they held a Salish and cautioned the accused did not make an such statements to PW 7 while reporting the incident about commission of suicide by the deceased as the evidence of PW 7 clearly discloses. It transpires from the evidence of PWs 8 and 13 that PW 8 handed over a written information to PW 13 when he met him at Bhatrigram on way to the police station. The prosecution has withheld this earlier written information lodged by PW 8 but the evidence of PW 13 clearly shows that in the written information there was no allegation against the accused persons. There are also serious inconsistencies in the testimony of the witnesses. According to PW 9 the alleged Salish was held one or two months before the occurrence while according to PW 8 the Salish took place only a few days before the occurrence and PW 6 has stated that Salish was held on the day on which the deceased committed suicide by hanging a few hours before the occurrence. According to PWs 6 and 8 all the accused persons were present but PW 9 has categorically stated that appellant Tapan and his brother Swapan were not present. PW 10, on the other hand, has stated that they asked Tapan and Lakshmirani who were present in the house to stop quarrels. PW 8 states that PWs. 1 and 3 requested him to look after the interest of the deceased at the matrimonial home. He does not speak of any complaint regarding torture. PW 10 speaks about only ordinary domestic quarrels and not torture. The entire story of Salish on the complaint of the de facto complainant about the alleged torture appears to be a myth. At any rate the evidence of these witnesses with regard to tortures, quarrels or ill-treatment is hearsay being reported by PWs 1 and 3 who had also no personal knowledge about the same. PW 6 has, however, stated that he "heard" torture while passing by the side of the house of the accused. Apart from the vague and indefinite nature of the statement, it is not understood how "torture" could be "heard". The evidence of PW 10 shows that at the so-called Salish only quarrel ensued between the deceased and her mother-in-law and the witnesses left the place. It appears from the cross-examination of this witness that it was the deceased who used to pick-up quarrel and her voice was so loud that it was audible from his shop. So the testimony of PWs. 6, 8, 9 and 10 does not in any way support the charge u/s 498A.

16. As the charge u/s 498A, Indian Penal Code has not been proved there is no question of drawing presumption u/s 113A of the Evidence Act about commission of any offence u/s 306, Indian Penal Code.

17. The appeal is, therefore, allowed and the order of conviction and sentence is set aside. Both the appellants are acquitted of both the charges. Appellant No. 1 who is in jail be forthwith set at liberty. Appellant No. 2 who is on bail is

discharged from her bail bond.

S.P. Rajkhowa, J.

18. I agree.