

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Suvra Ghosh

C.R.A. 631 of 2006

Paritosh Saha
-Vs-
State of West Bengal

For the Appellants : Mr. Arijit Bhusan Bagchi,
Advocate.

For the State : Ms. Sukanya Bhattacharyya,
Mr. Mirza Firoj Ahmed Begg.

Heard on : 18th September, 2020

Judgment on : 18th September, 2020

Joymalya Bagchi, J. :-

The appeal is directed against the judgment and order dated 14.12.2005 and 15.12.2005 passed by learned Additional District & Sessions Judge, 2nd Fast Track Court, Alipurduar in Sessions Trial Case No. 21 of 2005 arising out of Sessions Case No.70 of 2005 convicting the appellant for commission of offence punishable under Sections 498A/304B of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for life for the offence punishable under Section 304B of the Indian Penal Code and to suffer rigorous imprisonment for three years and to pay fine of Rs.2,000/- in default to suffer rigorous imprisonment for six months more for the offence punishable under Section 498A of the Indian Penal Code. Both the sentences to run concurrently.

Prosecution case, as alleged against the appellant, is to the effect that one and a half years ago the appellant was married to the victim Amrita Saha @ Uma Saha. Since marriage, the appellant subjected her to mental and physical torture

on demand of money from the in-laws. A male child was born to the couple. 3 / 4 months prior to the incident, Amrita lodged a complaint at Madarihat Police Station as she was unable to bear the torture. Her husband was arrested and detained for three months. 10/12 days after his release on bail, on the fateful day i.e. 18.3.2004 he beat his wife and set her on fire. She was taken to Madarihat Hospital and thereafter to Alipurduar Hospital where she breathed her last on 19.3.2004 at 3.00 A.M. Sankar Saha (P.W.1), cousin of the deceased lodged First Information Report. In conclusion of investigation, charge sheet was filed against the appellant. Charge was framed under Sections 498A/304B of the Indian Penal Code.

In the course of trial prosecution examined 13 witnesses and exhibited a number of documents. In conclusion of trial, the Trial Judge by the impugned judgement and order dated 14.12.2005 and 15.12.2005 convicted and sentenced the appellant, as aforesaid.

Mr. Arijit Bhusan Bagchi, learned Advocate appearing for the appellant submits that there is no direct evidence that the appellant had set the victim housewife on fire. Oral dying declaration as deposed by P.Ws.2, 5 and 10 is most unreliable. No police or Doctor who were claimed to be present have been examined to prove the dying declaration. There is no reflection of the dying declaration in the first information report. He accordingly prayed for acquittal of the appellant.

On the other hand, Mrs. Sukanya Bhattacharyya, learned Advocate appearing for the State argues that there is overwhelming evidence to show that the victim housewife was subjected to mental and physical torture over demand of money by the appellant. He had been detained in custody with regard to an earlier complaint lodged by the victim. Upon release from custody he set the victim housewife on fire. Oral dying declaration has been duly proved and the prosecution case has been established beyond doubt.

I have examined the evidence on record. All the prosecution witnesses including the neighbours viz., P.Ws.3 and 6 have unequivocally spoken of

torture and ill-treatment of the victim during her short matrimonial life. They deposed in unison with regard to cruelty upon the housewife which compelled her to lodge complaint against the appellant who was arrested. Hence, I have no doubt in my mind the short matrimonial life of the victim was punctuated with sustained cruelty by her husband resulting in her unnatural death.

Evidence of the aforesaid prosecution witnesses as well as the post mortem Doctor (P.W.12) establish beyond doubt that the victim died due to burn injuries within one and half years of marriage. P.W.12, post mortem Doctor deposed that the victim suffered 95% burn injuries and death was due to septicaemia and shock arising out of such injuries and ante mortem in nature.

Thus, the only issue of controversy which remains unresolved is whether the appellant had set the housewife on fire or not. There is no direct evidence to that effect. However, prosecution has relied on P.Ws.2, 5 and 10 with regard to an oral dying declaration made by the victim that she had been set on fire by her husband. Veracity of such version has been strongly disputed by the appellant. The best evidence viz., Doctor and Nurse of the Hospital (who were claimed to be present) have not been examined. There is no reflection of the so called dying declaration in the first information report lodged by P.W.1.

P.W.2 deposed the victim had made a dying declaration to her when he had visited her at Madarihat Hospital. She, however, admitted Doctor and Nurse were present at the said hospital. Her evidence is corroborated by P.W.10. P.W.5 also deposed that the victim was conscious at Madarihat Hospital and had made dying declaration before him. Police had come to the hospital.

All these witnesses are related to the deceased and admittedly there was an inimical relationship arising out of an earlier complaint lodged against the appellant, as aforesaid. The witnesses have spoken of the presence of medical personnel and police in the hospital when the deceased made the statement. However, neither the medical papers relating to the treatment of the patient at Madarihat Hospital or the medical personnel who treated her at the said hospital have not been produced nor examined during trial. No explanation is

forthcoming why such vital and independent evidence relating to the state of consciousness of the victim at the Hospital and the version of the Medical Officer who attended her at the time of making the dying declaration were withheld by the prosecution. Police personnel who was present has also not been examined.

Hence, I am constrained to hold that the prosecution has failed to produce the best evidence viz., Doctor and Nurse who were admittedly present at the time of making of the dying declaration to prove such fact. Withholding of the best evidence, in my opinion, affects the credibility and veracity of the dying declaration. Doubt with regard to the truthfulness of the version of interested witnesses is further strengthened due to non-disclosure of this vital fact in the first information report. Hence, I do not consider it prudent to rely on the deposition of P.Ws.2, 5 and 10 with regard to the so called dying declaration of the victim when the Medical Officer who were present at the time of such declaration has not been examined and such fact is significantly absent in the first information report.

Even though one disbelieves the dying declaration, the overwhelming evidence on record, however, proves the ingredients of the offence punishable under Section 304B of the Indian Penal Code.

Ingredients of Section 304B of the Indian Penal Code are as follows:-

**“(a) the death of a woman was caused by burns or bodily injury or had occurred otherwise than under normal circumstances;
(b) such death should have occurred within 7 years of her marriage;
(c) the deceased was subjected to cruelty or harassment by her husband or by any relative of her husband;
(d) such cruelty or harassment should be for or in connection with the demand of dowry; and
(e) to such cruelty or harassment the deceased should have been subjected soon before her death.”**
[See. *Kailash V. State of M.P. (2007) 2 SCC (Cri) 359*]

As discussed earlier, the evidence on record both of the relations of the deceased as well as the local witnesses establish beyond doubt the continuous physical and mental torture meted out to the victim housewife resulting in her death due to burn injuries within one and a half years of marriage. Essential ingredients of Section 304B of Indian Penal Code are, therefore, proved even if the oral dying declaration of the deceased is discounted. Appellant has also

failed to rebut the statutory presumption under Section 113B of the Evidence Act in the facts of the instant case.

Accordingly, I uphold the conviction recorded upon the appellant on the score of Sections 498A/304B of the Indian Penal Code.

Coming to the issue of sentence, I find that the appellant has been directed to suffer the maximum sentence of life imprisonment on the score of Section 304B of the Indian Penal Code. I have noted that the so called oral dying declaration of the victim has not been proved. Hence, it cannot be said beyond reasonable doubt that the appellant had set her on fire.

Appellant has already suffered imprisonment for more than 14 years. In view of the aforesaid fact, I modify the substantive sentence imposed on the appellant on the score of Section 304B of the Indian Penal Code and direct that he shall suffer imprisonment for the period already under gone. Other portions of the sentence shall remain unaltered.

The appeal is, accordingly, disposed of.

Period of detention suffered by appellant during investigation, enquiry or trial shall be set off under Section 428 of the Code of Criminal Procedure.

Copy of the judgment along with LCR be sent down to the trial court at once.

Urgent photostat certified copy of this order, if applied for, shall be given to the parties, as expeditiously as possible on compliance of all necessary formalities.

I agree.

(Suvra Ghosh, J.)

(Joymalya Bagchi, J.)