

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Reserved on 27-11-2019

Delivered on 30-01-2020

CRA No. 1215 of 2017

1. Gulam Mustafa S/o Aabdul Gani, Aged About 52 Years R/o Sector -7, Street No 9, Qtr. No. 3/b, Bhilai Nagar District Durg, Chhattisgarh.
2. Rahmat Ali, S/o Abdul Gani, Aged About 55 Years R/o Sector 6, F- Market, Bhilalal Nagar, Tahsil And District Durg, Chhattisgarh.

---- Appellants

Versus

- State of Chhattisgarh Through The Police Station Bhilai Nagar, Distrit Durg, Chhattisgarh.

---- Respondent

For Appellants : Mr. Uttam Pandey, Advocate.

For respondent/State : Mrs. Subha Shrivastava, PL.

Hon'ble Shri Justice Ram Prasanna Sharma**CAV Judgment**

1. This appeal is preferred against the judgment of conviction and order of sentence dated 1-8-2017 passed by the First Additional Sessions Judge, Durg (CG) in Sessions Trial No. 165 of 2010 wherein the said Court has convicted the appellants for commission of offence under Section 306 read with Section 34 of IPC, 1860 and sentenced them to undergo rigorous imprisonment for five years and to pay fine of Rs.1000/- each with default stipulations.

2. As per version of prosecution, both appellants are full blood brothers. Name of the deceased is Noor Jahan who is wife of appellant No.1 namely Gulam Mustafa. The date of incident is 6-7-2010 & 7-7-2010. The deceased was issue-less and before the date of incident appellant No.1 married with some other girl and reached to the house of the deceased with that girl. Both appellants assaulted the deceased and harassed her on the date of incident that is why the deceased poured kerosene on her body and set her ablaze. Dying declaration of the deceased was recorded by the Executive Magistrate in which she stated regarding circumstances of transaction which resulted in her death. The matter was reported and investigated. After completion of trial, appellants were charge-sheeted and convicted as mentioned above.

3. Learned counsel for the appellants would submit as under:

- i) Deceased sustained 95% burn injuries and fitness certificate of the deceased was not obtained before recording her dying declaration by the Sub Divisional Magistrate.
- ii Deceased was knowing Bihari accent and was not knowing Hindi language whereas dying declaration has been recorded in Hindi language, therefore, dying declaration is not to be acted

upon

- lii) Prosecution has not proved second marriage through cogent evidence and the finding is based on hearsay evidence, therefore, finding of the trial court is not proper.
- iv) From the evidence of Mohd. Kamrin (PW/5), it is established that the deceased and the appellants have cordial relation which is overlooked by the trial court.
- v) The trial court has not evaluated the evidence properly, therefore, finding of the trial court is liable to be set aside.

He placed reliance in the matter of **Atbir vs. Govt. of N.C.T of Delhi, reported in (2010) 9 SCC-1** wherein Honorable the Supreme Court held that while recording dying declaration, factors such as mental condition of maker, alertness of his/her mind and memory, evidential value etc., have to be taken into account.

4. On the other hand, learned counsel for the State supporting the impugned judgment would submit that the finding of the trial Court is based on proper marshalling of the evidence and the same is not liable to be interfered while invoking the jurisdiction of the appeal.

5. I have heard learned counsel for the parties and perused record of the court below in which impugned judgment is passed.

6. The question for consideration of this court is whether both the appellants abetted the deceased to commit suicide. PW/2 Dr. N.P. Jangde, Senior Medical Officer conducted autopsy of deceased on 9-7-2010 at District Hospital, Durg and recorded finding that cause of death of the deceased is shock due to ante-mortem burn. Though expert opined that he also found fracture in ribs of the deceased that is why it may be a homicidal death but looking to dying declaration of the deceased (Ex.P/12), the trial court recorded finding that deceased poured kerosene on her body and set her ablaze, therefore, death of the deceased is suicidal in nature. Finding arrived at by the trial court is based on dying declaration of the deceased and the finding is not challenged by the State, therefore, same attained finality. Looking to the evidence on record, death of the deceased is suicidal in nature.

7. Mohd. Kamrin (PW/5) is the brother of the deceased. As per version of this witness, appellant No.1 Gulam Mustafa had solemnized second marriage with some other girl and thereafter he

started assaulting the deceased. As per version of this witness, his sister informed him that both appellants used to beat her and harassed her and harassing is in high magnitude. Version of this witness is supported by version of Virendra Bahadur Panchabai, Sub Divisional Magistrate (PW/7) who recorded dying declaration of the deceased on 6-7-2010 at 2.50 pm at Sector-9 Hospital, Bhilai. As per version of this witness, he recorded statement of deceased as per Ex.P/12. In the said statement deceased made declaration that from 9th June her husband left residence of Bhilai by saying that he is leaving for Mumbai and sometimes he informed the deceased that he is at Delhi and sometimes he informed that he is staying at Banaras and sometimes he is at Bhopal. After 20 days he came with girl aged about 20 – 22 years and informed the deceased that he had married with the said girl. On the date of incident both appellants assaulted her by footwear (chappal). She made dying declaration that due to harassment she is ending her life.

8. Learned counsel for the appellants would submit that fitness certificate of the deceased before recording dying declaration was not obtained, therefore, dying declaration is not dependable.

9. In view of this court, Virendra Bahadur Panchabai (PW/7) who is Sub Divisional Magistrate deposed before the trial court that before recording dying declaration of the deceased, he obtained fitness certificate of the deceased to make a statement. Looking to

the entire evidence of this witness, there is nothing to discard dying declaration.

10. Learned counsel for the appellants would further submit that the deceased was knowing Bihari language whereas dying declaration was recorded in Hindi language, therefore, same is not reliable piece of evidence.

11. After going through the statement of PW/7 Virendra Bahadur Panchabhai, Sub Divisional Magistrate, argument is without substance. This witness has clearly stated that the deceased was having knowledge of Hindi and she was speaking in Hindi. This witness has clearly denied that the deceased was not competent to speak Hindi language, therefore, argument advanced on behalf of the appellants is not sustainable. From the entire evidence, it is clearly established that appellant No.1 Gulam Mustafa solemnized second marriage with a girl aged about 20-22 years and thereafter both appellants have harassed the deceased on the date of incident.

12. The next question for consideration of this court is whether the act of the appellants falls within definition of abetment. In the matter of **Gangula Mohan Reddy vs. State of Andhra Pradesh**, reported in 2010 (1) SCC 750, Hon'ble the Supreme Court held that an active act or direct act which leads deceased to commit suicide seeing no option and this act must have been intended to push deceased into such a position that he commits suicide is required for abetment.

13. In view of this court, direct nexus to suicide is condition precedent for instigation or intentionally aiding to commit suicide. Inference has to be drawn from circumstances and it has to be determined whether circumstances had been such which in fact had created the situation that a person felt totally frustrated and committed suicide.

14. In the present case, appellant No.1 Gulam Mustafa married with a girl aged about 20 – 22 years in presence of his first wife who is deceased and brought his second wife to the house where deceased was residing which was sarcastic for her. Again, both appellants assaulted her which shows magnitude of harassment on the part of both appellants. Looking to the entire facts and circumstances of the case and the act of both appellants which is done on the date of incident, it can be easily said that they created a situation which totally frustrated the deceased to commit suicide and their act is an active act and direct act for commission of suicide of the deceased. PW/7 Virendra Bahudur Panchahai, Sub Divisional Magistrate is firm in his statement and he obtained fitness certificate of the deceased to make a statement before recording dying declaration of the deceased. In view of the above, argument advanced on behalf of the appellants is not sustainable and the case law cited by learned counsel for the appellants is of no help as the same is clearly distinguishable from the facts of the present case.

15. The act of the appellants falls within mischief of Section 306 read with Section 34 of the IPC for which the trial court convicted them. Conviction of the appellants is hereby affirmed. The trial Court awarded sentence of five years to both appellants for the said offence which cannot be said to be harsh, disproportionate or unreasonable. Sentence part is also not liable to be interfered with.

16. Accordingly, the appeal being devoid of merit is liable to be and is hereby dismissed. Both appellants are reported to be in jail, therefore, no further order for their arrest etc., is required.

Sd/-

(Ram Prasanna Sharma)

Judge

Raju