

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Bivas Pattanayak

C.R.A. 661 of 2017

Sisir Paul & Anr.
-Vs-
State of West Bengal

For the Appellant : Mr. Moinak Bakshi, Adv.

For the State : Mr. Partha Pratim Das, Adv.
Mrs. Manasi Roy, Adv.

Heard on : 30.03.2022

Judgment on : 30.03.2022

Joymalya Bagchi, J. :-

Appeal is directed against the judgment and order dated 09.09.2015 and 11.09.2015 passed by the learned Additional Sessions Judge, 5th Court, Krishnagar, Nadia, in Sessions Trial No. 11(VI)2014 arising out of Sessions Case No. 18(3)/2014 convicting the appellants for commission of offence punishable under Sections 498A/302/34 of the Indian Penal Code and sentencing them to suffer imprisonment for life and to pay fine of Rs.5,000/- each, in default, to suffer simple

imprisonment for six months more for the offence punishable under Section 302/34 of the Indian Penal Code and to suffer rigorous imprisonment for three years and to pay fine of Rs.2,000/- each, in default, to suffer simple imprisonment for two months more for the offence punishable under Sections 498A/34 of the Indian Penal Code; both the sentences to run concurrently.

The prosecution case as alleged against the appellants and one Raghunath Pal (brother-in-law of the victim housewife) is as follows :-

Victim Jashoda Pal was married to Sisir Paul (appellant no. 1) according to the Hindu rites and customs six years prior to the incident. Appellant demanded money and as the amount was not paid, they subjected the victim lady to torture. On 24.02.2013 at 6:00a.m., Khanta Pal, father of the deceased, (P.W. 1) received information that her daughter had expired. They went to the matrimonial home of the victim and found her lying with burn injuries in the verandah of the house. No other inmate of the house was present. P.W 1 suspected that the appellants had poured kerosene oil on her daughter and set her on fire. On the written complaint of Khanta Pal (P.W. 1), Kaliganj Police Station Case No. 123 of 2013 dated 24.02.2013, under Sections 498A/304B of the Indian Penal Code was registered for investigation. In conclusion of investigation, charge-sheet was filed against the appellants and one Raghunath Pal. However, Raghunath Pal could not be arrested and his case was filed. Charges were framed against the appellants under Sections 498A/304B/302/34 of the Indian Penal Code. Accused persons

pleaded not guilty and claimed to be tried. In the course of trial, prosecution examined thirteen witnesses and exhibited a number of documents. Defence of the appellants was one of innocence and false implication. It was the specific defence of the appellants that there was an altercation between Jashoda and her brother. Over such issue, she had committed suicide. In conclusion of trial, learned trial Judge by the impugned judgment and order dated 09.09.2015 and 11.09.2015 convicted and sentenced the appellants, as aforesaid.

Mr. Bakshi, learned Counsel appearing for the appellants submits that the version of the child witness (P.W. 10) is unreliable. She was barely four years old when the incident occurred. She did not tell the investigating officer that the accused persons had set her mother on fire. After the incident she was in custody of her maternal uncle, P.W. 2. After a fortnight, when her statement was recorded before Magistrate, she implicated all the accused persons. However, in Court she stated her father alone set her mother on fire. Evidence has come on record that the room was bolted from inside and was broken open with the help of a sabol. These circumstances militate against the version of the child (P.W. 10) that her mother had been set on fire by the appellant no. 1. There is hardly any evidence against the appellant no. 2 (mother-in-law of the victim lady). Evidence with regard to torture over dowry is general and omnibus in nature. Hence, appellants are entitled to an order of acquittal.

Mr. Das, learned Counsel appearing for the State, submits the victim housewife had suffered 100% burns all over her body. But no other articles in the room were burnt. Appellants did not make any effort to save the victim housewife. These circumstances support the prosecution case that the victim housewife was set on fire by the appellants. The fact that the room was closed from inside has been introduced for the first time by the hostile witnesses, P.Ws. 4 and 11 in court. Trial Judge rightly rejected their versions and recorded a finding of guilt against the appellants which does not call for any interference. Hence, the appeal is liable to be dismissed.

P.W. 10, Arpita Paul, is the minor daughter of the deceased lady. She is the star witness for the prosecution. When prosecution hinges primarily on the sole evidence of the child witness, an onerous duty is cast on the court to examine such evidence with great care and circumspection so as to erase out any possibility of tutoring. P.W. 10 was four years old at the time of the incident. She deposed on the date of the incident she was in the room with her parents. Her father had set her mother on fire. She also stated that she narrated the incident before the learned Magistrate which was recorded under Section 164 of the Code of Criminal Procedure. She further stated her father, grandparents and uncle were also present in the house at the time of the incident. In cross-examination, she stated that she had also narrated the incident to the police.

Let me examine whether the evidence of the minor child inspires confidence. Mr. Bakshi would argue P.W. 10, a minor child, was tutored by her maternal uncle (P.W. 2) who had taken over her custody after the incident. In order to examine the aforesaid challenge thrown by Mr. Bakshi, it is necessary to test the evidence of P.W. 10 on the anvil of probability and other attending circumstances of the case.

P.W. 13 (Nihar Ranjan Roy), Investigating officer of the case, deposed P.W. 10 did not state to him that her mother was set on fire by the accused persons. However, in her statement before the learned Magistrate recorded on 08.03.2013 i.e. about fortnight after the incident, P.W. 10 stated all the in-laws including mother-in-law had put kerosene oil on her mother and her father had set her mother on fire. However, in court the witness altered her stance and stated it was her father alone had set her mother on fire. None of the in-laws were present in the room.

Mr. Das, draws attention of this court to the evidence of PW1 and PW2 i.e the mother and brother of the deceased who stated that the minor (PW10) had disclosed to them at the police station that the accused persons had set the housewife on fire.

Upon analysis of the aforesaid pieces of evidence, I find the minor child (PW10) at the first instance did not inform the investigating officer that the accused persons had set her mother on fire. Though PW1 and PW2 claimed the minor had informed them about the incident at the police station, such vital fact is significantly absent in the F.I.R. lodged by PW1. Failure to disclose this vital fact in the F.I.R. renders the claim

of PW1 and PW2 that the minor had divulged to them at the police station that her mother had been set on fire by the accused persons vulnerable. It is argued that F.I.R. is not an encyclopaedia of facts. P.W.1 was in a mentally distressed state and may have failed to state this fact in his written complaint. I am unable to accept such plea. In the F.I.R. P.W.1 stated he suspected the appellants had murdered his daughter. Had his grand-daughter (P.W.10) disclosed to him that she had seen the appellants set fire on her mother, P.W.1 would not have rested his accusation on mere suspicion but would have disclosed such fact in the F.I.R. Failure to do so, therefore, is not a mere omission but militates against the very existence of such fact affecting the veracity of the prosecution case. (See ***Ram Kumar Pandey vs. State of Madhya Pradesh***¹) After the incident, the minor child was kept in the custody of P.W.2, her maternal uncle. After a fortnight when she was produced before the Magistrate she implicated the husband and all the in-laws in setting her mother on fire. This sudden change of stance by the child while in the custody of her maternal uncle (P.W.2), gives rise to a strong probability that she had been tutored by P.W. 2 to make such statement before Magistrate. Thereafter in court the minor again changed her stance and implicated her father i.e. appellant no. 1 alone in the murder. Such inconsistent and prevaricating stance of the minor with regard to the manner and circumstances in which her mother suffered burnt injuries throw serious doubt with regard to the veracity of her version.

¹ (1975) 3 SCC 815

I am further fortified to come to such a conclusion since the neighbours (P.W.s 4 and 11) claimed the door of the room where the victim lady was found was locked from inside. P.W.4 deposed around 6/6.30 a.m. in the morning he was brushing his teeth when he heard a loud sound from the house of the appellants. Father and brother of appellant no. 1 were on the road. He enquired from them the reason for such commotion. They rushed to their house. P.W.4 also came to the spot and saw father and brother of appellant no. 1 attempting to open the door of the room. They were unable to do so. Then, the door of the room was broken with the help of a sabol. Upon entering the room, the body of the victim lady was recovered.

Similarly PW 11 deposed on hearing hue and cry, he had come to the spot. The door of the room was bolted from inside. He brought a sabol and broke open the door. They found the victim in burnt condition. They dragged her outside the room.

Mr. Das argues P.W. 4 and P.W.11 had not supported the prosecution case and were declared hostile. Hence, their evidence ought not to be relied upon. On the other hand, post mortem doctor stated the victim suffered 100% burn injuries. But no other articles in the room were burnt. None of the inmates of the house had tried to save her. These circumstances show the victim was burnt to death.

It is trite law evidence of a hostile witness cannot be discarded in *toto*. When a witness is declared hostile, his evidence must be evaluated with due care and circumspection and such parts of the evidence which

is at variance or in contradiction to his previous statement before police or incompatible with other evidence on record, may be discarded. However, if portions of the evidence of a hostile witness appear to be unblemished and receive corroboration from independent sources such part of his evidence may be relied upon.

I have assessed the evidence of P.W.4 and P.W.11 from that perspective. Both the witnesses were confronted with their earlier statements before police but no contradiction with their statement in court that the room was bolted from inside was taken. On the other hand, evidence of investigating officer and other witnesses including P.W.10 show that the door of the room had been broken open.

P.W.13 investigating officer deposed on reaching the place of occurrence had found that the door of the bedroom was broken. He seized various articles including the broken pieces of the door under a seizure list Exhibit 1/1.

P.W.6 Kartick Biswas, a panchayat member and a co-villager who came to the spot after the incident noted a sabol at the place of occurrence which was seized by the police. The minor P.W.10 also stated the door of the room had been broken open. These pieces of evidence corroborate the version of P.W.4 and P.W.11 that the door was locked from inside and had been broken open by a 'sabool' brought by P.W.11.

I am also unable to accede to the submission of Mr. Das that the evidence of post mortem doctor indicate a case of homicidal death. In fact, post mortem doctor Dr. Utpal Kr. Nandy (PW3) categorically stated

he had not passed any opinion whether death was homicidal, suicidal or accidental. Nothing turns on the other circumstance relied upon by Mr. Das i.e no other article was burnt in the room. Such circumstance, in my estimation, does not either probabilise or improbabilise the prosecution case.

As the evidence of P.W.4 and P.W.11 receives corroboration from other sources, I am of the view defence has been able to create a strong possibility that the room was locked from inside and had to be broke open with the help of a 'sabol'. This circumstance wholly improbabilises the prosecution case that the appellant no. 1 had set his wife on fire as contended by PW 10. On the other hand, it lends support to the defence plea of suicidal death and explains why inmates of the house were unable to save the housewife.

Evidence on record also does not prove beyond doubt there was torture upon the housewife over demand of dowry soon before her death. Evidence with regard to torture over demands of money as led by P.W.1 and P.W.2 are general and omnibus in nature. P.W.1 claimed money was demanded to purchase a plot of land which, however, is not corroborated by P.W.2. In this background, I am constrained to hold even the allegation of cruelty over demand of dowry soon before the death has not been proved beyond doubt.

Thus, ingredients of the offence under section 304B IPC have also not been established.

In view of the aforesaid discussion, I am of the opinion prosecution has failed to prove its case beyond reasonable doubt. Conviction and sentence of the appellants are therefore set aside.

Appellant no. 2, namely, Sumitra Paul shall be discharged from bail bonds after six months in terms of section 437 A Cr.P.C.

Appellant no. 1, namely, Sisir Paul shall be forthwith released from custody, if not wanted in any other case upon executing a bond to the satisfaction of the trial Court which shall remain in force for a period of six months in terms of Section 437A Cr.P.C.

Let a copy of this judgment along with the lower court records be forthwith sent down to the trial court at once.

Photostat certified copy of this judgment, if applied for, shall be made available to the appellants within a week from the date of putting in the requisites.

I agree.

(Bivas Pattanayak, J.)

(Joymalya Bagchi, J.)