

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. 765 of 2012

Kanti Roy @ Kanu @ Kena

-Vs-

State of West Bengal & Anr.

For the Appellant : Mr. Debangana Bhattacharjee, Adv.
Mr. Arka Bhattacharyya, Adv.
Mr. Mehboob Rahman, Adv.
Ms. Swarnali Saha, Adv.
Mr. Rajdeep Sinha, Adv.

For the State : Ms. Anasuya Sinha, Adv.
Ms. Jonaki Saha, Adv.

Heard on : 20th April, 2022

Judgement on : 20th April, 2022

Joymalya Bagchi, J. :-

The appellant has assailed his conviction and sentence under Sections 498A/302 of the Indian Penal Code. Prosecution case against the appellant is as follows :

Appellant was married to Chandana Roy (the victim) on 2nd Magh, 1411 as per Hindu rites and customs. At the time of marriage dowry to the tune of Rs. 12,000/- in cash, two bhories of gold ornaments and

utensils had been given to the appellant. They demanded more money from the victim and tortured her. On 11.05.2009 the appellant set the housewife on fire and thereafter left his residence after closing the door of the room and putting the latch from outside. Local people came to the spot and after opening the latch recovered the victim. P.W. 9, a neighbour informed the family members of Chandana. His brother P.W. 1 and others came to the spot. Chandana disclosed to her relations that her husband had poured kerosene oil on her person and set her on fire. Thereafter, they went away after closing the door from outside. Chandana was shifted to Burdwan Medical College and Hospital where she ultimately expired in the night on 15.05.2009. On the next day her brother (P.W. 1) lodged written complaint at the police station resulting in registration of Khanda Ghosh Police Station Case No. 31 of 2009 dated 16.05.2009 under Sections 498A/304B/406 of the Indian Penal Code against the appellant and his mother, Kishori Roy. In the course of investigation, accused persons were arrested and charge-sheet was filed against them. Charges were framed under Sections 498A/302 of the Indian Penal Code against the accused persons. In the course of trial, prosecution examined 17 witnesses and exhibited a number of documents. Defence of the accused persons was one of innocence and false implication. In conclusion of trial learned trial Judge by the impugned judgment and order convicted the appellant under Sections 498A/302 of the Indian Penal Code and sentenced him to suffer rigorous imprisonment for life and also to pay fine of Rs.5,000/-, in default, to suffer further rigorous imprisonment for three months more for

the offence punishable under Section 302 of the Indian Penal Code and he is also sentenced to suffer rigorous imprisonment for three years and to pay fine of Rs. 2,000/- in default to suffer further rigorous imprisonment for one month more for the offence punishable under Section 498A of the Indian Penal Code. All the sentences to run concurrently. By the self-same judgment and order, co-accused Kishori Roy was acquitted of the charges levelled against her.

Mr. Bhattacharjee, learned Counsel appearing for the appellant argues there is no direct evidence to show the appellant had set the housewife on fire. No evidence is also forthcoming to prove the door of the room was locked from outside. It is also argued oral dying declaration of the victim to her relations ought to be taken with pinch of salt. P.W. 9, an independent witness, does not speak of any dying declaration. Medical records relating to the treatment of the victim has not been produced in Court. Treating doctor had also not been examined. Hence, it cannot be said with certainty that the victim was conscious and in a fit state of mind to make statement. Evidence with regard to torture over dowry is general and omnibus in nature. Hence, prosecution case has not been proved beyond doubt. Appellant is entitled to an order of acquittal.

Ms. Sinha, learned Counsel appearing for the State submits victim housewife suffered death due to burn injuries at the matrimonial home. After the incident appellant and her mother were not found in the residence. P.W. 9 found the victim was conscious and the latter told her to contact her family members over mobile phone. Immediately thereafter,

family members of the victim came to the spot and the victim narrated the incident to them. Postmortem doctor opined that the victim had suffered burn injuries and had died. Hence, the prosecution case is proved beyond doubt.

P.W 1 (Hiru Roy) is brother of the victim girl and the informant. P.W. 2 (Shibu Roy) is mother of the deceased. P.W 3 (Smt. Mithu Roy) is wife of P.W. 1. P.W. 4 (Sri Lakhan Roy) is uncle of the victim.

P.W. 1 stated the victim was married to the appellant. Dowry was given at the time of marriage. Over further demands of dowry, she was subjected to torture. She was even driven out of her matrimonial home frequently. On 11.05.2009 P.W. 1 received information that the victim had been set on fire at her matrimonial home. Though the victim was seriously injured, she was in a position to talk. She stated that her husband had poured kerosene oil on her person and set her on fire. Thereafter her husband closed the door from outside and left the spot. He along with others came to the spot and removed the victim to Burdwan Medical College and Hospital. Victim finally succumbed to her injuries four days after the incident. On the next day, he lodged F.I.R.

P.W 1 is corroborated by his wife (P.W. 3) who also spoke of the torture meted out upon the victim lady by the appellant and his mother during her life time for further demands of dowry. She further stated she accompanied her husband to the spot and found Chandana lying on the ground with burn injuries. Her wearing apparels were also burnt and she

was naked. She was able to speak. She told her husband i.e. the appellant had poured kerosene oil on her body and had set her on fire.

P.W. 4 is the uncle of Chandana. He had accompanied P.W. 1 to the place of occurrence. He stated that he found Chandana in burnt condition. Chandana made statement implicating her husband. She finally expired at the hospital four days after the incident. He was a witness to the inquest report prepared by the police as well as the learned Magistrate. He was also a signatory to the seizure of a plastic jar containing kerosene and a match stick from the place of occurrence.

P.W. 2 is the mother of the deceased. Though she did not accompany P.W. 1 to the place of occurrence she spoke of the torture on her daughter over demands of dowry. She also stated she heard from her son (P.W. 1) that her daughter had implicated her husband in her murder.

P.Ws. 6 and 7 (Sanjoy Dawn and Habal Roy) are independent witnesses who accompanied P.W. 1 to the spot. They have corroborated the relations with regard to the oral dying declaration made by the victim.

P.W. 9 (Smt. Alpana Santra) is a neighbour of the appellant. She deposed the victim had suffered burn injuries at the matrimonial home and died at Burdwan Medical College and Hospital. On the fateful day hearing hue and cry she went to the house of the appellant and found the victim lying on the ground with burn injuries and groaning in pain. Victim told her to contact her relations through mobile phone. From the mobile phone of the victim the witness gave information to the relations of Chandana. Subsequently, police came to the spot and interrogated her.

From the evidence of the aforesaid witnesses it is clear that the victim housewife had suffered burn injuries at the matrimonial home. She was lying alone in the room when her neighbour P.W. 9 arrived. She was conscious and able to speak. She requested her to contact her relations through her mobile phone. P.W. 9 contacted her relations. Thereafter, her brother (P.W. 1), sister-in-law (P.W. 3) and uncle (P.W. 4) came to the spot. Local villagers, (P.Ws. 6 and 7) also accompanied them. Victim narrated the incident to the aforesaid witnesses stating appellant had set her on fire and thereafter left the room after locking it from the outside. She was shifted to the Burdwan Medical College and Hospital where she breathed her last four days after the incident. Mr. Bhattacharjee has assailed the oral dying declaration of the victim at various counts. He contends the doctor who treated the victim at Burdwan Medical College and Hospital has not been examined. Physical condition of the victim and her capacity to make statement has not been proved. P.W. 9 did not state that the victim had made dying declaration. Thus, oral dying declaration made by the victim is unreliable.

I have considered the aforesaid submissions in the light of the evidence on record. The circumstances of the case reveal in spite of burn injuries the victim was conscious and in a position to make statement. When evidence on record establishes beyond doubt that the victim was conscious and in a fit to make statement, failure to produce certificate by

a doctor would not disentitle the Court from relying on such dying declaration. (See ***Laxman vs. State of Maharashtra***¹).

P.W. 9, Smt. Alpana Santra, a neighbour of the appellant had come to the spot immediately after the incident. She found the victim with burn injuries. The victim told her to contact her family members through her mobile phone. This shows the victim in spite of suffering burn injuries was not only conscious but capable of intelligent communication with others. Pursuant to such request by the victim, P.W. 9 contacted her relations. Soon thereafter they came to the spot and the victim made an oral dying declaration to them.

It is contended such oral dying declaration ought not to be relied upon as P.W. 9 has not corroborated the same. Scanning the evidence of P.W. 9 it appears though she had arrived the spot earlier than the relations, she was not present when the relations had conversation with the victim. Hence, she was not in a position to corroborate the dying declaration made by the victim to her relations. On the other hand, the relations of the victim were accompanied by neighbours (P.W. 6 and P.W. 7) who are disinterested witnesses. They came to the place of occurrence with her relations. They supported the prosecution case and stated that the victim made dying declaration implicating the appellant. Victim had made dying statement immediately after her relations had come to the spot and before she was shifted to the hospital.

¹ (2002) 6 SCC 710

From the evidence of the investigating officers particularly P.W. 15 it appears non-examination of the doctor who treated the victim was due to a misdescription of the name of the doctor in the list of witnesses. Dr. S Pan who had treated the victim had been incorrectly described as Dr. S Pal. This is a defect in the course of investigation. Such defect arising from a typographical error by the investigating agency cannot be treated as an inherent wedge in the prosecution case.

On the other hand, we note with concern the indifference of the trial Court who ought to have invoked powers under section 311 Cr.P.C. and summoned the treating doctor to depose in the course of trial. Bed-head ticket had been collected by the investigating officer P.W. 15. But, the investigating officer did not take steps to produce the same in court which in my view is another laxity on the part of the investigating agency. Oral dying declaration had been made by the victim to her relations as well as independent witnesses prior to her admission to the hospital. Hence, non examination of the doctor who had treated the victim at the hospital or failure to produce hospital records does not impact the prosecution case with regard to the credibility of the dying declaration. Dying declaration is corroborated by other evidence on record.

P.W. 15 investigating officer in the course of investigation seized a jar of kerosene oil as well as a match stick from the place of occurrence. These circumstances corroborate the dying declaration made by the victim and prove the same to be a truthful and voluntary one.

In ***Vijay Pal vs. State (Government of NCT of Delhi)***² the Apex Court held oral dying declaration if truthful and voluntary can be relied upon to bring home the guilt.

Dying declaration also finds corroboration from the notings in the inquest report which was prepared by P.W. 16, the police officer attached to Burdwan police station and the executive magistrate P.W. 8 which are marked as Exhibit 2 and Exhibit 3 respectively.

P.W. 14 Debasish Sarkar, post mortem doctor also found first and second degree burn injuries all over her body except forehead, eyes and lower half of both legs. He opined that death of the victim was due to effects of shock and septic absorption from the burn injuries and ante mortem in nature.

In the light of the aforesaid discussion, I am of the opinion prosecution case is proved beyond doubt. Conviction and sentence of the appellant is upheld.

Appeal is, accordingly, dismissed.

This Court is informed appellant is on parole.

Parole of the appellant is forthwith cancelled and he is directed to surrender before the trial court to serve out remainder of his sentence failing which the said Court shall take appropriate steps for his apprehension in accordance with law.

² (2015) 4 SCC 749 (para 16-22)

Period of detention suffered by the appellant during investigation, enquiry and trial shall be set off from the substantive sentence imposed upon him in terms of section 428 of the Code of Criminal Procedure.

Lower court records along with copies of this judgment be sent down at once to the learned trial court as well as the Superintendent of Correctional Home for necessary compliance.

Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

I agree.

(Bivas Pattanayak, J.)

(Joymalya Bagchi, J.)

tkm/sds/PA(Sohel)