

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Ajoy Kumar Mukherjee

C.R.A. 513 of 2010
With
C.R.A.36 of 2019

Nirapada Malick @Bhaja
Vs.
The State of West Bengal

For the Appellant(s) : Mr. Arunava Ganguly, Adv.

For the State : Mr. Ranadev Sengupta, Adv.

Heard on : 18.09.2023

Judgment on : 18.09.2023.

Joymalya Bagchi, J. :-

1. Report is placed on record. Appellant had preferred CRA 513 of 2010. He has also preferred a subsequent appeal being CRA 36 of 2019 against the self-same judgment and order. The subsequent appeal is dismissed as not maintainable. Paper book prepared in Criminal Appeal No.36 of 2019 may be utilised to dispose of CRA 513 of 2010.

2. Appellant has assailed judgment and order dated 22.06.2010 and 23.06.2010 passed by the learned Judge, Special Court (E. C. Act)-

cum-Additional Sessions Judge, Hooghly in Sessions Trial No. 137 of 2002 arising out of Sessions Case No. 39 of 2002 convicting the appellant for commission of offence punishable under Sections 498A/302 of the Indian Penal and sentencing him to suffer rigorous imprisonment for three years and to pay fine of Rs.2000/-, in default, to suffer rigorous imprisonment for two months more for the offence punishable under Section 498A IPC and to suffer rigorous imprisonment for life and to pay fine of Rs.5,000/-, in default to suffer rigorous imprisonment for six months more for the offence punishable under Section 302 IPC. Both the sentences shall run concurrently.

Prosecution case:-

3. Prosecution case alleged against the appellant is as follows:-

Appellant was married to one Laxmi Malik, the deceased on 9th Falgun, 1403 BS. Two months after the marriage, she was subjected to mental and physical torture. On 30th Kartik, she was physically assaulted and driven out from the matrimonial home. She took shelter at her maternal uncles' house within Dadpur Police Station. Her maternal uncles viz., Narayan Shee (PW 12), Buddhaddeb Shee (PW 11) and one Ganesh Ghosh (PW 7) went to her matrimonial home and requested the appellant not to subject her to torture. Thereafter, Laxmi was brought back to the matrimonial home by her grandfather, Badal Shee (PW 13) on 4th Agrahayan. On 14th Agrahayan, Manindra Malick PW 1), father of Laxmi received information that she had been set on fire by her husband. The information had been communicated to her

maternal uncle by one Beno Ghosh. Manindra and others reached Chinsurah I. B. Hospital where Laxmi was struggling for life. Her daughter stated that appellant had poured kerosene oil on her and set her on fire. Thereafter he ran away with one Bhaskar Malick.

4. On 3.12.1997, Manindra lodged written complaint against the appellant resulting in registration of Polba P. S. Case No.124 of 1997 dated 03.12.1997 under Sections 498A/326/307 IPC. On that day dying declaration of Laxmi was recorded by the Executive Magistrate, Hooghly (PW 20) in presence of the Superintendent of the Hospital and staff nurse Surachi Ganguli. Finally, Laxmi died in the hospital on 18.12.1997.

Proceedings before the trial Court:-

5. Charge sheet was filed against the appellant under Sections 498A/307/302 IPC. Charges were framed for the aforesaid offences. Appellant pleaded not guilty and claimed to be tried.

6. In the course of trial, prosecution examined 23 witnesses and exhibited a number of documents to prove its case.

7. In conclusion of trial, the trial Judge by the impugned judgment and order dated 22.06.2010 and 23.06.2010 convicted and sentenced the appellant, as aforesaid.

Evidence on record:-

8. Manindra Malick (PW 1) is the father and de-facto complainant. He deposed his daughter was married to the appellant. She was subjected to torture. On the fateful day, the appellant had set her on

fire. He received the information from his nephew viz., Pasupati Malick (PW 10). He went to the hospital. He proved his signature on the written complaint. The written complaint was proved by Baneswar Malik (PW 4) as the scribe was dead. Baneswar Malik (PW 4) also corroborated his brother Manindra with regard to torture on the housewife by the appellant at the matrimonial home. He stated appellant had set the victim on fire.

9. Buddhadeb Shee (PW 11) and Narayan Shee (PW 12) are the maternal uncles of Laxmi. They stated after marriage Laxmi was subjected to torture. Unable to bear the torture she took refuge at her maternal uncles' house. Both the witnesses visited Laxmi while she was admitted in the hospital. She disclosed to them her husband had set her on fire.

10. Badal Shee (PW 13) is the grandfather of the victim. He deposed Laxmi had been assaulted by her husband earlier. She took refuge at his residence. He took her back to matrimonial home. He visited Laxmi in the hospital and she informed him that her husband had set her on fire.

11. Pasupati Malick (PW 10) is a cousin of Laxmi. He stated he heard appellant had set his sister on fire. She died seventeen days after the admission in the hospital.

12. The depositions of the relations are corroborated by Ganesh Ghosh (PW 7). He stated that he is a Panchayat member. Laxmi had been assaulted and driven out by her husband. He had taken her back

to her matrimonial home. Subsequently, she was admitted in hospital with burn injuries. He went to the hospital and Laxmi told him that she had been set on fire by her husband.

13. Bimalendu Dutta (PW 20) is the Executive Magistrate who recorded the dying declaration of Laxmi on 03.12.1993. He deposed at 9.30 P.M. as per order of S.D.O. Sadar Hooghly he went to the hospital. The dying declaration was recorded in the presence of Superintendent of Sadar Hospital and staff nurse Surachi Ganguli. The Superintendent of the Hospital gave certificate that the patient was able to give her statement. He proved the dying declaration (Ext. 6). His deposition remains unshaken during cross-examination.

14. Post mortem report was exhibited as Ext.8. Post mortem report shows first degree burns on the body of the deceased. Post mortem doctor opined the cause of death was due to shock, complications from burn injuries and ante mortem in nature.

15. Swapan Chowdhury (PW 21) is an employee of Imambarah Sadar Hospital. He deposed bed head ticket of Laxmi Malick was seized in his presence while Samir Kumar Biswas (PW 22), Wardmaster of District Sadar Hospital proved the requisition from the hospital to police with regard to the death of Laxmi on 18.12.1997.

16. First Investigating Officer viz., Rammohan Banerjee was not alive and could not be examined. Nandan Kumar Panigrahi (PW 23), is the second Investigating Officer. He stated he collected bed head ticket,

inquest report, dying declaration and post mortem report. He examined witnesses and submitted charge-sheet.

Is cruelty on the housewife proved:-

17. Analysis of the aforesaid evidence would show during her matrimonial life Laxmi had been subjected to torture by the appellant. On an earlier occasion, she had been assaulted and driven out from the matrimonial home. She took refuge at her maternal uncles' residence. Badal Shee (PW 13), her grandfather and Ganesh Ghosh (PW 7), Panchayat Member took her back to her matrimonial home. Thereafter, on 30.11.1997 she was set on fire by the appellant and admitted to hospital. Torture on the housewife is proved through the evidence of her relations i.e. her father (PW 1), maternal uncles (PW 11 & 12), cousin (PW 10) and grandfather (PW 13). Though two neighbours Somnath Malick (PW 5) and Ratan Malick (PW 6) have been declared hostile, another neighbour and Panchayat Member (PW 7) corroborated the relations with regard to the torture on the housewife. The aforesaid evidence remained unshaken in cross-examination and proves the ingredients of the offence under Section 498A IPC.

Is the dying declaration reliable:-

18. Prosecution primarily relies on the dying declaration of the victim to prove that the appellant had committed the murder. Victim had survived for 18 days. While she was in hospital her maternal uncles (PWs.11 and 12) and Panchayat Member (PW 7) had visited her at the

hospital. All these witnesses stated that the victims told the appellant had poured kerosene oil on her body and set her on fire.

19. Learned Advocate for the appellant submits their evidence is improbable as her father (PW 1) (who also visited her at the hospital) did not state anything about the oral dying declaration.

20. I have given anxious consideration to this submission. Evidence on record shows victim was close to her maternal uncles' than her father. When she had been tortured earlier she took refuge at the residence of her maternal uncles. Her grandfather (PW 13) and not her father took her back to her matrimonial home. Her father received information about her hospitalization after three days through Pasupati, her cousin. These circumstances show father of the victim was not at the hospital from the time of her admission. Moreover, his involvement in the matrimonial woes of her daughter appears to be of a lesser degree than her maternal uncles and grandfather. Appreciation of evidence is to be done on the anvil of conduct of the witnesses and other attending circumstances. Omission of the father to depose regarding the dying declaration requires to be judged from this angle. It may also be an accidental slip on his part as his brother Baneswar Malik (PW 4) corroborated other witnesses regarding the dying declaration.

21. Accordingly, I am unwilling to discount the evidence of PWs. 11, 12 and 13 i.e. maternal uncles and grandfather corroborated by a local witness PW 7 with regard to the oral dying declaration made to them in

the hospital in the light of the accidental omission of PW 1 with regard to this circumstance.

22. This apparent dichotomy would have otherwise gained significance had not the oral dying declaration been backed by a written declaration (Ext.6) recorded by Executive Magistrate (PW 20). On 03.12.1997 FIR was registered. After registration of FIR, upon the direction of BDO, the Executive Magistrate (PW 20) went to the hospital. In the presence of the Superintendent of the Hospital and staff nurse, the dying declaration of the victim came to be recorded. In her dying declaration the victim has categorically stated on Sunday i.e. on 30.11.1997 at 12.00 noon, she was cooking in the kitchen. Her husband came into the kitchen and poured kerosene oil from a bottle and set her on fire with a kerosene oil lamp. Thereafter, he fled away with his friend Bhaskar. She cried out. Her mother-in-law intervened. She tried to extinguish the fire by wrapping her with a polythene bag. Thereafter, she was admitted to the hospital. The document Ext.6 bears the left LTI of the deceased. It also bears the certificate issued by the Superintendent of the hospital concerned that she was in a fit state to make the declaration.

23. To rely on a dying declaration, it must be shown that the maker was in a fit state to make the statement and the same is voluntary and truthful.

24. I have examined the dying declaration from this perspective. The declaration was recorded by the Executive Magistrate, a disinterested

public servant. He had no reason to concoct a false dying declaration to implicate the appellant. He deposed the victim made the dying declaration in the presence of the Superintendent of the Hospital. The said Superintendent made an endorsement on the dying declaration that the victim was capable to make the statement. Dying declaration has been exhibited as a whole which contains the said declamation. No question was put to PW 20 during cross-examination that the victim was not fit to make the declaration. The aforesaid evidence on record establishes beyond doubt that the victim was in a fit state to make the dying declaration and the same was voluntarily made before a disinterested public servant without any urging or prompting.

25. Truthfulness of the declaration is also established beyond doubt. Evidence on record shows appellant was in the habit of subjecting the victim to torture. Earlier she had been assaulted and driven out. On the intervention of her grandfather and the local Panchayat member, she was rehabilitated at the matrimonial home. This proves the motive to commit the crime.

26. The victim stated that the appellant had poured kerosene oil on her body and set her on fire with kerosene lamp. Her wearing apparels had been seized by the police. Seizure list notes smell of kerosene oil in the wearing apparels. Post mortem report (Ext. 7) records the victim had suffered first degree burn throughout her body and had died due to complications arising out of burn injuries.

27. These circumstances leave no doubt that the appellant had poured kerosene oil on the victim and set her on fire. It rules out any possibility of accidental or suicidal death.

Intention to kill:-

28. Finally, it is argued that the victim suffered first degree burns and survived for 18 days. Hence, the conviction may be modified from Section 302 to Section 304 IPC.

29. Appellant had poured kerosene oil on the helpless victim and set her on fire. His intention to kill the victim is clearly evident. No extenuating circumstance that is sudden or grave provocation or a sudden quarrel is emanating from the evidence on record.

30. Hence, I am unwilling to convert the conviction of the appellant from Section 302 to Section 304 IPC.

Conclusion:-

31. The appeals are accordingly dismissed.

32. Conviction and sentence of the appellant are upheld.

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

34. Appellant does not have criminal antecedents. He appears to have strong roots in the society. Upon completion of 14 years of actual imprisonment, it shall be open to the appellant to take out an application for remission of his sentence before the appropriate

authority. In the event, any application is made the said authority shall consider the application in accordance with law keeping in mind the aforesaid observation and conduct of the appellant in jail.

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

13. Photostat certified copy of this judgment, if applied for, shall be made available to the appellants upon completion of all formalities.

I agree.

(Ajoy Kumar Mukherjee, J.)

(Joymalya Bagchi, J.)

as/PA