

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Ajay Kumar Gupta

C.R.A. 315 of 2013

Basudev Sen

Vs.

The State of West Bengal

For the Appellant(s) : Md. Sabir Ahmed, Sr. Adv.
Mr. T. Ahmed, Adv.
Mr. Dhiman Banerjee, Adv.
Ms. Suman Biswas, Adv.
Mr. Soham Chakraborty, Adv.

For the State : Mr. Saibal Bapli, Adv.
Mr. Arani Bhattacharyya, Adv.

Heard on : 12.09.2023

Judgment on : 12.09.2023.

Joymalya Bagchi, J. :-

1. Appellant has assailed the judgment and order dated 31.03.2013 passed by the learned Additional Sessions Judge, Fast Track Court, Bolpur, Birbhum in Sessions Trial No. 6(August) of 2010 arising out of Sessions Case No. 144 of 2009 convicting the appellant

for commission of offence punishable under Section 302 of the Indian Penal Code and sentencing him to suffer imprisonment for life.

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

Shampa, the deceased was married to the appellant in January, 2002. Dowries to the tune of 8 bhories gold ornaments, Rs.60,000/- and other articles were given at the time of marriage. After a couple of years, a further demand Rs.50,000/- was made and Shampa was subjected to torture on such score. In the meantime, two daughters were born to the couple. On 30th July, 2008 Shampa was set ablaze by her husband, Basudev Sen i.e. the appellant herein and her parents-in-law Mahadeb Sen and Mamoni Sen. She was admitted at Sian Sub Divisional Hospital.

3. Four days later, on 04.07.2008 Heromba Nath Hati (PW 5), father of Shampa lodged written complaint resulting in registration of Illambazar P.S. Case No.48 of 2008 dated 04.07.2008 under Sections 498A/307 of the Indian Penal Code and Sections 3/4 of the Dowry Prohibition Act.

4. On 05.07.2008 dying declaration of the victim was recorded by the BDO (PW 3) in presence of the Dr. Tathagata Ghosh (PW 14) and Ashok Kumar Ghosh, Investigating Officer (PW 12). Her relations i.e. the father (PW 5) and brother (PW 8) were also present.

5. On the basis of the said dying declaration, appellant and his parents viz., Mahadeb Sen and Mamoni Sen were charged under Sections 498A/302/34 IPC.

6. During trial, prosecution examined 14 witnesses and exhibited the dying declaration as Ext.1.

7. In conclusion of trial, learned trial Judge by the impugned judgment and order dated 31.03.2013 convicted and sentenced the appellant, as aforesaid. By the self-same order, the Judge acquitted the parents-in-law of the deceased i.e. Mahadeb Sen and Mamoni Sen.

8. All the relations of the deceased had turned hostile during trial and did not support the prosecution case.

9. PW 5 Heromba Nath Hati is the de-facto complainant and father of the victim. He has not supported the prosecution case. He stated the relationship between couple was good. His daughter had committed suicide after pouring kerosene oil on her. He also did not support the prosecution case that his daughter had made dying declaration at Sian Sub Divisional Hospital.

10. Similarly, PW 8, Abhijit Hati, brother of the deceased has also not supported the prosecution case. He merely stated that his sister had died due to burn injuries suffered at the matrimonial home. He also remained silent with regard to the dying declaration made by his sister at the hospital.

11. PW 10 Rabindra Nath Hati is the uncle of the deceased. He also turned hostile.

12. PW 1 Naru Bagdi and PW 2 Pari Dom are co-villagers. They also turned hostile. PW 2 stated that the victim had died by pouring kerosene oil and setting herself on fire.

13. Faced with the lack of support from the aforesaid witnesses, the prosecution primarily hinges on the dying declaration recorded by BDO (PW 3). PW 3 stated on 05.07.2008 he came to Bolpur S. D. Hospital and recorded dying declaration of the patient. The patient was identified by her father (PW 5). Dr. Tathagata Ghosh (PW 14) gave certificate that patient was fit to give statement. The parents and brother of the patient were present. ASI of Police was also present. All of them were signatories to the dying declaration. As both hands of the patient were burnt, LTI of the patient could not be put on the document. The dying declaration was marked as Ext.1.

14. PW 14 Dr. Tathagata Ghosh deposed patient made dying declaration on 05.07.2008 from 2.30 P.M. to 2.40 PM. At that time, he gave certificate that the patient was fit to make dying declaration. He proved his signature (Ext.1/4).

15. PW 12 Ashok Kumar Ghosh, Investigating Officer stated the dying declaration was recorded by the Doctor at Bolpur S. D. Hospital and he was present. He signed on the dying declaration as Ext.1/3.

16. The trial Judge has relied on the evidence of the aforesaid witnesses who are public officers. The Judge noted that they were disinterested witnesses and could be relied upon though the relations have not supported the prosecution case.

17. I would have been otherwise persuaded to accept the reasoning of the trial Judge but for the deposition of another medical officer i.e. Dr. Apurba Sar (PW 13). He deposed he examined the victim in the Emergency Department at the time of admission. The victim was fully conscious and mentally alert. According to the patient, it was a case of self-inflicted burn. He proved his emergency injury report (Ext.13).

18. Prosecution has not made any effort to improbabilise the first dying declaration recorded by a medical officer. The said medical officer had examined the patient in the emergency department and recorded her statement in the ordinary course of his official duty. His deposition and the statement recorded by him has as much official credibility as the subsequent dying declaration recorded by BDO (PW 3) on 05.07.2008.

19. Trial Judge has completely glossed over the first dying declaration and recorded his conviction on the subsequent dying declaration holding the same to be reliable. Neither the prosecution nor the trial court has given any reason why the first dying declaration which speaks of suicide ought to be ignored.

20. Even if the subsequent dying declaration recorded by the BDO is believed, it does not unequivocally state that the appellant had set the victim on fire. The contents of the second dying declaration read as follows:-

“Q- এই অবস্থা কিভাবে হল

A- জালাইতো খুব। টাকা পয়সা চাইত। কেরোসিন তেল ছুঁড়ে দিত আমার উপরে। বার বার বলত মেরে দেব, পুড়িয়ে দেব। আমার স্বামী আমার উপরে সোমবার (১৫ই আষাঢ়) তেল ঢা আমার গায়ে ফেলল।”

“Q. *How did the situation arise?*

A. *I was tortured. Money was demanded. He used to throw kerosene oil upon me. He threatened that I would be assaulted and burnt. On Monday (15th Aashar i.e. 30th June) my husband threw kerosene oil on me.”*
(English translation)

21. Even if the aforesaid dying declaration is believed, it does not unequivocally state that the husband had set the housewife on fire. It states the housewife used to be ill-treated and tortured. She was also threatened that she would be assaulted and burnt alive. On the fateful day, her husband poured kerosene oil on her. Dying declaration is vague and does not indicate who set the housewife on fire after kerosene oil was poured on her.

22. Mr. Bhattacharyya would like this Court to believe that the conduct of the husband in pouring kerosene oil would lead to the irresistible inference that he had set his wife on fire. On the contrary, the first dying declaration (Ext.1/1) recorded by PW 13 shows she had set herself on fire. It is possible to reconcile both the dying declarations. In the subsequent dying declaration, the housewife stated she was

tortured over demands of money. She was threatened that she would be assaulted and set on fire. On the fateful day, her husband had even gone a step forward and thrown kerosene oil on her body. It is not improbable under such oppressive circumstances the housewife lost her composure and out of sheer agony and frustration she set herself on fire.

23. It is also pertinent to note there is a delay of four days in lodging the FIR.

24. In such view of the matter, I am constrained to hold prosecution has not been able to improbabilise the first dying declaration indicating the suicidal death. Second dying declaration does not unequivocally show the appellant had set the victim on fire and murdered her.

25. Accordingly, I am of the opinion the appellant is entitled to the benefit of the doubt.

26. Conviction and sentence of the appellant viz. Basudev Sen is set aside.

27. The appellant viz. Basudev Sen shall be released from custody forthwith, if not wanted in any other case, upon execution a bond to the satisfaction of the learned Trial Court which shall remain in force for a period of six months in terms of section 437A of the Code of Criminal Procedure.

28. The appeal is allowed.

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

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

I agree.

(Ajay Kumar Gupta, J.)

(Joymalya Bagchi, J.)

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