

IN THE HIGH COURT AT CALCUTTA
(CRIMINAL APPELLATE JURISDICTION)

PRESENT:

THE HON'BLE JUSTICE SIDDHARTHA ROY CHOWDHURY

CRA 511 of 2019

with

CRAN 1 of 2019

PRADIP DAS

VS.

STATE OF WEST BENGAL

For the Appellant : Mr. Samiran Mandal, Adv.
Mr. Abhinaba Dan, Adv.
Mr. Nitish Samanta, Adv.

For the State : Mr. Saryati Datta, Adv.

Hearing concluded on : 12th April, 2023

Judgement on : 21st April, 2023

Siddhartha Roy Chowdhury, J.:

1. This criminal appeal impeaches the judgement passed by learned Additional Sessions Judge, 1st Court, Hooghly Sadar on 30th July, 2019 in S.T. No. 17 (11)/ 2011 S.C. No. 02/2011.
2. Briefly stated, Smt. Bandana Chakraborty on 29th September, 2009 informed the Officer-in-charge of Balagarh Police Station, Hooghly that her daughter Mistu Chakraborty @ Punkai aged about 16 years one month fell in love with Pradip Das, a co-villager. Pradip Das used to take her daughter to different places defying the parents of Mistu Chakraborty. Her daughter told her that Pradip Das would marry her and she indulged in sexual relationship with said Pradip

Das on that consideration. On 28th September, 2009 at about 8.00 p.m. her daughter left the house in order to watch the immersion procession of Goddess Durga. At about 10.00 p.m. the informant came to know from the neighbours that her daughter was sniveling in front of the Saw Mill of Mani Debnath. She along with her husband and her brother-in-law Abhijit Mukherjee rushed there and found Mistu who was blubbering. Mistu disclosed that Pradip took her by his motorcycle for a ride. His friends Bhombal Biswas and Sukhen Debnath accompanied them. Sukhen and Bhombol outraged the modesty of Mistu while Pradip remained as spectator. Pradip also stated that he would marry her. On 29th September, 2009 at about 8.00 a.m. Mistu Chakraborty @ Punkai, scared of being scandalized, set herself on fire and was fighting for her life in Chinsurah Sadar Hospital.

3. The information since disclosed offence cognizable in nature Balagarh P.S. Case No. 121 of 2009 was registered under Section 493/376(f)/354/417/109 of the Indian Penal Code. Police took up investigation which culminated into submission of charge sheet against the accused persons.
4. Learned Trial Court framed charges under Section 376/366/417/306 of the I.P.C. against Pradip Das and charge under Section 366/354 of the I.P.C. was framed against the other two accused persons Bhombol Biswas @ Biswajit and Sukhen Debnath. The accused persons stood the trial pleading their innocence.

5. To crown success prosecution examined as many as 16 witnesses. Learned Trial Court after considering the evidence of prosecution witnesses was pleased to record an order of acquittal against Bhombol and Sukhen Debnagh. Pradip Das was found guilty to the charge under Section 366/417/306 of the I.P.C. and was sentenced to undergo imprisonment for three years for committing offence under Section 366 of the I.P.C. and to pay a fine of Rs. 5000/- with default clause, rigorous imprisonment for one year for the offence committed under Section 417 of the I.P.C. and rigorous imprisonment for seven years for committing offence under Section 306 of the I.P.C. subject to provision of Section 428 of the Cr.P.C. The sentences would run concurrently.
6. Mr. Samiran Mondal, learned Counsel for the appellant submits that the victim was admittedly not minor. According to mother of the victim, she was more than 16 years of age when the alleged incident took place. Prosecution did not produce any document to substantiate that the victim was below the age of 18 years. That apart the prosecution witnesses including the parents of the victim particularly P.W. 1, the mother, stated that the victim and the appellant were in romantic relationship and they used to roam around, not caring a fig for what the parents of the victim would say to them. On the fateful date the victim left her house, not with the accused person. After leaving her house she met the accused person. Therefore, it cannot be said that the accused person took the victim out of the lawful guardianship of her parents or without the consent

of the guardian. Thus the accused person cannot be held guilty for committing offence under Section 366 of the I.P.C. more so when the prosecution failed to prove the age of the victim. It is the specific case of the prosecution that accused person and the victim were in romantic relationship and the guardians of the victim were sure that that they would be getting married. This conduct of the parents of the victim is sufficient to presume that the victim was more than 18 years old which is why prosecution did not produce any document to prove the age of the victim.

7. According to Mr. Mondal, the victim since admittedly had attained the age of consent, it can be presumed that she knew the consequence of pre-marital sex. Therefore, it cannot be said that she was induced by the appellant to indulge in physical relationship on the promise of marriage. Therefore, it cannot be said that she was duped or cheated. She took the decision on her own by exercising her wisdom. The romantic relation is not a guarantee of perpetuity. May be the boy and the victim girl were in love and the boy had the liberty to walk out of the relationship at any point of time as it had happened in this case. The victim could not accept the decision of the appellant and committed suicide. Such action on the part of the victim indicates the sensitivity of her nature and the same cannot enchain the appellant with criminal liability within the meaning of Section 107 of the I.P.C. The decision of the appellant to walk out of such romantic relationship cannot be held to be act of instigation or abetment per se, that had goaded the victim to commit the suicide. In

support of his contention Mr. Mondal relied upon several judgements:- (i) **GANGULA MOHAN REDDY VS. STATE OF ANDHRA PRADESH** reported in **(2010) 1 SCC 750** wherein Hon'ble Hon'ble Apex Court held:-

"The learned counsel also placed reliance on another judgment of this court in [Ramesh Kumar v. State of Chhattisgarh](#) (2001) 9 SCC 618. A three-Judge bench of this court had an occasion to deal with a case of a similar nature. In a dispute between the husband and wife, the appellant husband uttered "you are free to do whatever you wish and go wherever you like". Thereafter, the wife of the appellant Ramesh Kumar committed suicide. The Court in paragraph 20 has examined different shades of the meaning of "instigation". Para 20 reads as under:

"20. Instigation is to goad, urge forward, provoke, incite or encourage to do "an act". To satisfy the requirement of instigation though it is not necessary that actual words must be used to that effect. or what constitutes instigation must necessarily and specifically be suggestive of the consequence. Yet a reasonable certainty to incite the consequence must be capable of being spelt out. the present one is not a case where the accused had by his acts or omission or by a continued course of conduct created such circumstances that the deceased was left with no other option except to commit suicide in which case an instigation may have been inferred. A word uttered in the fit of anger or emotion without intending the consequences to actually follow cannot be said to be instigation."

(ii) **GURCHARAN SINGH VS. STATE OF PUNJAB** reported in **(2017)**

2 CCr Lr (SC) 574 wherein Hon'ble Apex Court held:-

"22. It is thus manifest that the offence punishable is one of abetment of the commission of suicide by any person, predicated existence of a live link or nexus between the two, abetment being the propelling causative factor. The basic ingredients of this provision are suicidal death and the

abetment thereof. To constitute abetment, the intention and involvement of the accused to aid or instigate the commission of suicide is imperative. Any severance or absence of any of this constituents would militate against this indictment. Remoteness of the culpable acts or omissions rooted in the intention of the accused to actualize the suicide would fall short as well of the offence of abetment essential to attract the punitive mandate of Section 306, IPC. Contiguity, continuity, culpability and complicity of the indictable acts or omission are the concomitant indices of abetment. Section 306, IPC, thus criminalises the sustained incitement for suicide.

"107. Abetment of a thing. - A person abets the doing of a thing,

who --

First- Instigates any person to do that thing; or

Secondly- Engages with one or more other person or persons - in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

Thirdly- Intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation 1- A person, who by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures or attempts to cause or procure, a thing to be done, is said to instigate the doing of that doing.

Explanation 2- Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitate the commission thereof, is said to aid the doing of that act."

(iii) **GURCHARAN SINGH VS. STATE OF PUNJAB** reported in **(2020)**

10 SCC 200 wherein Hon'ble Apex Court held:-

"13. Section 107 IPC defines "abetment" and in this case, the following part of the section will bear consideration: -

"107. Abetment of a thing – A person abets the doing of a thing, who – First-Instigates any person to do that thing; or

Thirdly – Intentionally aids, by any act or illegal omission, the doing of that thing."

14. The definition quoted above makes it clear that whenever a person instigates or intentionally aids by any act or illegal omission, the doing of a thing, a person can be said to have abetted in doing that thing.

15. As in all crimes, mens rea has to be established. To prove the offence of abetment, as specified under Sec 107 of the IPC, the state of mind to commit a particular crime must be visible, to determine the culpability. In order to prove mens rea, there has to be something on record to establish or show that the appellant herein had a guilty mind and in furtherance of that state of mind, abetted the suicide of the deceased. The ingredient of mens rea cannot be assumed to be ostensibly present but has to be visible and conspicuous. However, what transpires in the present matter is that both the Trial Court as well as the High Court never examined whether appellant had the mens rea for the crime, he is held to have committed. The conviction of Appellant by the Trial Court as well as the High Court on the theory that the woman with two young kids might have committed suicide, possibly because of the harassment faced by her in the matrimonial house, is not at all borne out by the evidence in the case. Testimonies of the PWs do not show that the wife was unhappy because of the appellant and she was forced to take such a step on his account.

16. The necessary ingredients for the offence under section 306 IPC was considered in the case SS Chheena Vs. Vijay Kumar Mahajan¹ where explaining the concept of abetment, Justice Dalveer Bhandari wrote as under:-

"25. Abetment involves a mental process of instigating a person or intentionally aiding a 1 (2010) 12 SCC 190 person

in doing of a thing. Without a positive act on the part of the accused to instigate or aid in committing suicide, conviction cannot be sustained. The intention of the legislature and the ratio of the cases decided by this Court is clear that in order to convict a person under [Section 306](#) IPC there has to be a clear mens rea to commit the offence. It also requires an active act or direct act which led the deceased to commit suicide seeing no option and that act must have been intended to push the deceased into such a position that he committed suicide.”

17. While dealing with a case of abetment of suicide in *Amalendu Pal alias Jhantu vs. State of West Bengal*², Dr. Justice M.K. Sharma writing for the Division Bench explained the parameters of [Section 306](#) IPC in the following terms:

“12. Thus, this Court has consistently taken the view that before holding an accused guilty of an offence under [Section 306](#) IPC, the court must scrupulously examine the facts and circumstances of the case and also assess the evidence adduced before it in order to find out whether the cruelty and harassment meted out to the victim had left the victim with no other alternative but to put an end to her life. It is also to be borne in mind that in cases of alleged abetment of suicide there must be proof of direct or indirect acts of incitement to the commission of suicide. Merely on the allegation of harassment without there being any positive action proximate to the 2 (2010) 1 SCC 707 time of occurrence on the part of the accused which led or compelled the person to commit suicide, conviction in terms of [Section 306](#) IPC is not sustainable.

13. In order to bring a case within the purview of [Section 306](#) IPC there must be a case of suicide and in the commission of the said offence, the person who is said to have abetted the commission of suicide must have played an active role by an act of instigation or by doing certain act to facilitate the commission of suicide. Therefore, the act of abetment by the person charged with the said offence must be proved and established by the prosecution before he could be convicted under [Section 306](#) IPC.”

(iv) **UDE SINGH & ORS. VS. STATE OF HARYANA** reported in (2019)

17 SCC 301 wherein Hon’ble Apex Court held:-

“14.1. In the case of Ramesh Kumar (supra), a three-Judge bench of this Court held that the ingredients of [Section 306](#) IPC were not satisfactorily proved so as to implicate and punish the accused for the same. The facts of the case leading to the aforementioned decision had been that the deceased was married to the accused for about a year. The deceased committed suicide by pouring kerosene and setting herself on fire in the kitchen. On the day of incident, the accused had refused to take the deceased to her sister's house and in the quarrel that ensued, the accused-husband told the deceased-wife that she was free to do whatever she wished to and to go wherever she wanted to. The accused attempted to save her by putting a bedsheet around her body and himself suffered burns consequently. The deceased had written a letter to her husband-accused in her diary that he had made her free to go wherever she liked but she was not having any place to go and now she was free of her word not to commit suicide. In her dying declaration too, she stated that she had a quarrel with her husband who told her to go wherever she wanted to and thereafter, she set herself ablaze. The accused-appellant was convicted by the Trial Court for the offences under [Sections 306](#) and [498-A](#) IPC and his conviction was upheld by the High Court. In further appeal, after examining the evidence led in by the parties and taking note of all the surrounding factors, this Court, while maintaining the conviction of the appellant under [Section 498-A](#) IPC, set aside his conviction for offence under [Section 306](#). This Court observed and held inter alia, as under:

"19. Presumably the accused may have said some such thing – you are free to do whatever you wish and go wherever you like. The deceased being a pious Hindu wife felt that having being given in marriage by her parents to her husband, she had no other place to go excepting the house of her husband and if the husband had "freed" her she thought impulsively that the only thing which she could do was to kill herself, die peacefully and thus free herself according to her understanding of the husband's wish. Can this be called an abetment of suicide? Unfortunately, the trial court misspelt out

the meaning of the expression attributed by the deceased to her husband as suggesting that the accused had made her free to commit suicide. Making the deceased free – to go wherever she liked and to do whatever she wished, does not and cannot mean even by stretching that the accused had made the deceased free "to commit suicide" as held by the trial court and upheld by the High Court."

(v) **RAJESH VS. STATE OF HARYANA** reported in **2019 CRI L. J.**

2432 wherein Hon'ble Apex Court held:-

"12. We are not in agreement with the findings of the Trial Court that the deceased (Arvind) committed suicide in view of the continuous threats by the accused regarding his being implicated in a false case of demand of dowry. The evidence does not disclose that the Appellant instigated the deceased to commit suicide. There was neither a provocation nor encouragement by the Appellant to the deceased to commit an act of suicide. Therefore, the Appellant cannot be held guilty of abetting the suicide by the deceased."

(vi) **GEO VARGHESE VS. STATE OF RAJASTHAN & ANR.** reported

in **2021 SCC OnLine SC 873** wherein Hon'ble Apex Court held:-

"16. The ordinary dictionary meaning of the word 'instigate' is to bring about or initiate, incite someone to do something. This Court in the case of Ramesh Kumar Vs. State of Chhattisgarh¹ has defined the word 'instigate' as under :-

"Instigation is to goad, urge forward, provoke, incite or encourage to do an act."

17. The scope and ambit of [Section 107](#) IPC and its co-relation with [Section 306](#) IPC has been discussed repeatedly by this Court. In the case of S.S.Cheena Vs. Vijay Kumar Mahajan and Anr.², it was observed as under:-

"Abetment involves a mental process of instigating a person or intentionally aiding a person in doing of a thing. Without a positive act on the part of the accused to instigate or aid in committing suicide, conviction cannot be sustained. The intention of the legislature and the ratio of the cases decided by the Supreme Court is clear that in order to convict a person

under Section 306 IPC there has to be a clear mens rea to commit the offence. It also requires an active act or direct act which led the deceased to commit suicide seeing no option and that act must have been intended to push the deceased into such a position that he committed suicide.”

8. Refuting such contention Mr. Saryati Datta, learned Counsel representing the State submits that the victim admittedly reposed her faith on the appellant. They were in romantic relationship. The fault on the part of the victim was that she took the appellant on his face value and ignoring the advice of her parents, she even indulged in physical relationship with the appellant. But ultimately having found her partner who promised to marry her, to be a traitor, the entire world was bound to shatter before her. The girl became scared of being scandalized. She showed courage to defy her parents as she had her confidence in her partner, the appellant. The decision of the appellant to walk out of the relationship pushed her to the brink and she got scared of being stigmatized as a girl of easy virtue. Undoubtedly it was her decision to indulge in physical relationship with the appellant but rational behind such decision was her confidence on the boy. Therefore, the proclamation of the appellant to walk out of the relationship came as a disaster to the victim girl and goaded the girl to take the decision to put an end to her life by setting herself on fire. Learned Counsel for the respondent-State, however, fairly submits that there is no ingredient of offence within the meaning of Section 366 of the I.P.C. or Section 417 of the I.P.C. but learned Trial Court was absolutely justified in recording the order of

conviction under Section 306 of the I.P.C. which cannot be impeached and deserves to be maintained.

9. I have perused the judgements. It is rightly submitted by learned Counsel for the appellant that prosecution has not been able to produce any document to substantiate the age of the victim girl. In order to constitute an offence within the meaning of Section 361 of the I.P.C. punishable under Section 366 of the I.P.C. prosecution is under obligation to prove that the girl was below the age of 18 years. But the document Exhibit-9 indicates that the victim was 19 years old on 1st October, 2009, when her statement was recorded by Medical Officer Subhas Chandra Hazra. Though the mother of the victim as P.W. 1 stated that her daughter was 16 years one month old at the time of incident, in view of Exhibit-9, benefit of doubt should be extended to the appellant by holding *inter alia* that she was more than 18 years old. Therefore, charge under Section 366 of the Indian Penal Code cannot be said to have been proved beyond reasonable doubt. A 19 year old girl was in a relationship with the appellant. It is correct that a romantic relationship is not slavery per se and either of the partners can take a decision to come out of such relationship. Therefore, the appellant cannot be held to have committed offence of cheating within the meaning of Section 415 of the I.P.C. punishable under Section 417 of the I.P.C. particularly in absence of any evidence to show his *mens rea* since inception. Learned Trial Court relied upon the statement recorded by Doctor Subhas Chandra Hazra and admitted as Exhibit-9. In her statement made on 1st October,

2009, the victim stated that she poured kerosene oil on herself and set on fire as she had love affairs with a person named Pradip Das, son of Gokul Das of Balagarh Police Station and refused to marry her. The incident occurred on 29th October, 2009 at about 8.30 a.m. In my humble opinion, this statement cannot be considered as a statement relevant under Section 32 (1) of the Evidence Act. The Constitution Bench of Hon'ble Apex Court in the case of **LAXMAN VS. STATE OF MAHARASHTRA** reported in **2002 AIR SCW 3479** held:-

“.....A dying declaration can be oral or in writing and in any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a magistrate or a doctor or a police officer. When it is recorded, no oath is necessary nor is the presence of a magistrate is absolutely necessary, although to assure authenticity it is usual to call a magistrate, if available for recording the statement of a man about to die. There is no requirement of law that a dying declaration must necessarily be made to a magistrate and when such statement is recorded by a magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind....”

10. Such certificate regarding the mental health of the maker of the statement is glaringly missing in this case. This statement was recorded in presence of Madhu Mangal Das Sub-Inspector of Police and Investigating Officer of the case and in presence of Nursing Staff. The victim, from the statement as it appears, described her fiancé formally as son of Gokul Das of Balagarh Police Station which stands unnatural. When we refer to any person we never refer to the address

or the jurisdictional police station of that person. Exhibit-9, in my view cannot be considered to be a dying declaration per se particularly when the attending staff nurses stated before the I.O. that the victim was not in a position to speak.

11. However, even after discarding the probative value of Exhibit-9 when we consider the circumstances of the case it appears that the appellant, one time sweetheart of the victim girl having exploited the victim girl emotionally as well as physically toyed with her dignity that too at a public place. Her dream was shattered by such conduct of her partner with whom she spent couple of hours immediately before the advent of his proclamation of severing the relationship with the victim girl. She got intensely hurt, she broke down, started crying at the public place, even her parents could not console the girl. It is rightly suggested by Mr. Mondal that romantic relation cannot make either of the partners a slave, a bonded labourer. One may walk out of such relationship, but in a decent manner, maintaining the civility; without denting the dignity of the other, what was not followed by the accused person. Therefore, reaction of the victim girl, cannot lead a man of ordinary prudence to hold that she was hypersensitive and she acted in manner contrary to normal human conduct.

12. In my humble opinion, the conduct of the appellant was sufficient to goad the victim girl to take such a drastic step and it was an act of abetment or instigation within the meaning of Section 107 of the Indian Penal Code on the part of the accused person. The appellant, in my humble opinion, has committed an offence within the meaning

of Section 306 of the I.P.C. and has rightly been convicted by the learned Trial Court.

13. Under such circumstances, the appeal is allowed but in part. The appellant is found not guilty to the charge under Section 366/417 of the I.P.C. but is found guilty to the charge under Section 306 of the I.P.C. The appellant is directed to surrender before the learned Trial Court within 15 days from date to serve out sentence failing which learned Trial Court shall be at liberty to take coercive measure to make the appellant suffer the imprisonment subject to the provision of Section 428 of the Code of Criminal procedure. With the disposal of this appeal, pending application, if any, stands disposed of.
14. Let a copy of the judgement be sent to the learned Trial Court for information and necessary action.
15. Urgent photostat certified copy of this judgement, if applied therefor, should be made available to the parties upon compliance with the requisite formalities.

SIDDHARTHA
ROYCHOWDHURY

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ROYCHOWDHURY
Date: 2023.04.24 17:39:12 +05'30'

(SIDDHARTHA ROY CHOWDHURY, J.)