(2004) 01 JH CK 0022

Jharkhand High Court

Case No: Criminal Appeal No. 153 of 1999 (R)

Ram Lakhan Mandal and Others		APPELLANT
	Vs	
State of Bihar (Now Jharkhand)		RESPONDENT

Date of Decision: Jan. 20, 2004

Acts Referred:

- Penal Code, 1860 (IPC) - Section 304B, 498A

Citation: (2004) 3 Crimes 18 : (2005) 1 DMC 464 : (2005) 2 JCR 378

Hon'ble Judges: Vikramaditya Prasad, J

Bench: Single Bench

Advocate: Anil Kumar Sinha, No. 1, for the Appellant; Assistant Public Prosecutor for Respondent No. 1 and P.C. Roy, for the Respondent

Final Decision: Allowed

Judgement

Vikramaditya Prasad, J.

This criminal appeal is directed against the order of Shri Vinod Kumar Sinha, the 5th Additional Sessions Judge, Giridih dated 25.5.1999 and 26.5.1999 whereby and whereunder the learned Court held the appellants guilty in Sessions Trial No. 251 of 1994 and convicted all of them under Sections 304B and 498A of the Indian Penal Code and sentenced each of them to undergo rigorous imprisonment for nine years u/s 304B of the Indian Penal Code and fine of Rs. 2,000/- each and in default simple imprisonment for three months and further to undergo rigorous imprisonment for three years u/s 498A of the Indian Penal Code and a fine of Rs. 500/- and in default one month''s imprisonment. However, both the sentences were ordered to be run concurrently.

2. The conviction arose out of the following prosecution story as appearing in the Fardbeyan (Ext. 1) lodged by Ghanshyam Mandal, the father of the victim

3. It is not at all in dispute that the deceased Anita Devi was not married to appellant No. 1 and she did not die within seven years of the marriage. The autopsy of the

dead body of Anita Devi was conducted by P.W. 5 Doctor who also proved the Post-mortem report (Ex. 2) and found no evidence of any injury on the person of the deceased and he could not ascertain the cause of death and consequently preserved the viscera but the viscera report did never reach the Trial Court and, therefore, whether the viscera contained poison supporting the prosecution allegation of administering of poison to the deceased remains absence. The conviction is mainly based on the oral dying declaration of the deceased and its corroboration by the statement of doctor before the police (Ext. 8) who examined the deceased when she was first brought to him.

4. In the aforesaid circumstance the following questions do require answer in this appeal:

(1) Whether the oral dying declaration in the facts and circumstances of the case is reliable piece of evidence on which conviction can be based?

(2) Whether the Ext. 8 which is the statement of the doctor before police who examined the victim is admissible evidence and can be relied upon, when the doctor did not turn up before the Court to depose?

(3) Whether there is any nexus between the death and torture for the demand of dowry?

5. Fardbeyan (Ext. 1) was recorded on the statement of the father of the victim on 1.12.1992. This is a detailed Fardbeyan as it appears from the prosecution story (supra) but it does not disclose that the daughter of the informant had made any dying declaration before her death. This simply says that the informant got information (Pata chala) that her in-laws had administered some poison. The learned Counsel for the appellant has argued that since the Fardbeyan made much after the death of the victim and contains every detail even of the previous year happening then had there actually been a dying declaration this would have been mentioned specifically in the FIR and its non-mentioning makes the dying declaration subsequent concoction and doubtful. To the contrary the learned Counsel for the State has argued that a Fardbeyan is not the Bible and it may not contain the entire fact and, therefore, on this score alone the dying declaration cannot be disbelieved. But it is clear that the Fardbeyan does not make any mention as to in whose presence the girl made the dying declaration. Therefore, the specific evidence that has come on the record has to be scrutinized carefully.

6. P.W. 1 is the brother of the victim. In paragraph 2 he says that on 18.10.1992 in night he got information that his sister had consumed poison then he and his elder brother Jay Prakash Mandal P.W. 2 went to the sasural of their sister where they found her unconscious and they removed her to the dispensary of Dr. Ramashankar and during the course of treatment there she regained sense and she uttered that at about 9 p.m. her mother-in-law and father-in-law had throttled poison to her and then during treatment she died. In paragraph 10 in examination-in-chief he said

that the dying declaration if at all relates to the administration of poison by the mother-in-law and the father-in-law. In paragraph 6 of his cross-examination this witness says that when his sister made the aforesaid declaration that her mother-in-law and father-in-law had administered poison at that time there were his mother, his brother and father also present besides doctor Ramashankar From this evidence it is found that only the mother-in-law and father-in-law were named and at the time of that declaration the aforesaid three persons were also present including the father (informant). If he was present then in Fardbeyan the father in all fairness was expected to state that his daughter had made such a statement which he did not. This witness in further cross-examination (in para 12) says that he has stated before the police that after assaulting the mother-in-law and father-in-law had made Anita to drink poison. P.W. 9 is the I.O. in paragraph 13 he says that during investigation he (P.W. 1) had not stated specifically that her mother-in-law and father-in-law had administered poison rather he had stated that after assaulting, in-laws had administered poison. Thus it is found that his evidence before the I.O. was quite omnibus which became categorical in Court.

7. P.W. 2 is another brother of the victim who says that victim was removed to the clinic and there when she regained sense for some time she had declared that her mother-in-law and father-in-law and her husband had administered jahar and died then and there. In paragraph 10 of his cross-examination he says that he has stated before the police that after regaining sense she had disclosed that her mother-in-law and father-in-law and husband had jointly administered poison to her. P.W. 9 the I.O. in his evidence vide para 14 has said that this witness Jay Prakash had not stated before him that when Anita regained sense she said that the mother-in-law and father-in-law and Ram Lakhan (husband) had jointly administered poison rather he had stated before the police that she had made the statement that in-laws has committed atrocities and administered poison.

8. P.W. 3 is the father of the victim girl. In paragraph 3 of examination-in-chief he says that it was Ram Lakhan (appellant No. 1) who came and said that his daughter had consumed poison and then he started fleeing away. At that time it was 12 p.m. in night. Then Jay Prakash Mandal (P.W. 2) and Rajeev Mandal (P.W. 1) went to the sasural of his daughter and from there took her to Dr. Ramashankar and they also went there and the girl regained sense and stated that she has been put to atrocities and they had administered poison to her. According to him this was a dying declaration. To a Court question he clarified that among the administrators of the poison there was mother-in-law, father-in-law and husband then the girl died. In his cross-examination he says that he does not remember whether he made such statement before the police that when he reached the hospital her daughter regained sense and said that she was put to great julm and they had administered poison to her. In paragraph 4 at page 4 of cross-examination he says that the girl said the name of sas, sasur and pati and this was told to him by his sons (Bachhe). The I.O. vide paragraph 15 has said that he (father) had not given the statement

before him that in the meantime his daughter regained sense and told him that she was put to great atrocities and in his presence Anita had not stated that poison was administered to her. Thus from his evidence three things emerge; (1) As per his own statement in para 4 of cross-examination he got information of the alleged dying declaration from his sons. (2) Meaning thereby he was not present at that time when such declaration was made. (3) He also did not make such a statement before the I.O. or even in his Fardbeyan.

9. P.W. 4 is the mother of the victim girl. In paragraph 3 in examination-in-chief she says that after coming to know at about 2 a.m. in night (though according to P.W. 3 it was 1 a.m. in the night and P.W. 2 it was 12 p.m. in the night) from her damad, Rajeev Mandal (P.W. 1) and Jay Prakash Mandal (P.W. 2) went to her sasural and took her to Dr. Ramashankar''s clinic and when he regained sense she told that her father-in-law and mother-in-law and husband had administered poison to her and thereafter she died. In cross-examination (Para-8) she says that when she regained sense she had told her two sons that it was her mother-in-law, father-in-law and husband who had administered poison to her thereafter she died. In paragraph 10 of cross-examination she was confronted with her previous statement made before the I.O. The I.O. simply said in paragraph 16 that she has said only this much that her daughter had been married in the year 1986. Before the I.O. she did not say about the dying declaration, but as per own evidence it appears that Whatever dying declaration was made it was made in presence of two sons and she had got information from her sons regarding it.

Here I find that though in his examination-in-chief the father (P.W. 3) says that victim has said that her in-laws has committed julm and administered poison, but in his answer to a Court question on that very moment he became elaborate in telling the names of the persons. Evidence on oral dying declaration should come in the form in which it was heard and then the Court appreciating it may come to a conclusion as to what was the meaning and indications of the deceased when he or she made it. Any Court question at the time of recording the trial though intended to remove ambiguity but, in fact, spoils the chastity of the statement, because the witnesses may use such an opportunity for adding or substracting something which may give a entire different meaning to what was actually said.

10. Uptil now it appears that two persons P.W. 1 and P.W. 2 were the persons in whose presence the dying declaration was made which is clear from the evidence of P.W. 4 also. The presence of P.W. 3 appears to be doubtful but to be safe I wish to compare the statement (dying declaration) as was heard by these three witnesses. P.W. 1 categorically said that her sas, sasur had administered poison (paragraph 1 and paragraph 6) though he did not speak this before the police. P.W. 2 says (paragraph 3) that sas, sasur and husband administered poison while father P.W. 3 says that she said she was put to great atrocities and they had administered poison. The variation in the statement is not difficult to decipher. While P.W. 1 completely

excludes the husband, P.W. 2 includes the husband. P.W. 3 gives a general statement and that general statement was got specified by the Court. Anything said by the victim is expected to be heard in the same wards in which it was said. Here three witneses are hearing three things, therefore, I am of the view that these variations are due to conjectures and feeling of these three witnesses and not based on the real facts and, therefore, when the FIR was being drawn at that time also this dying declaration did not come in picture and, therefore, the father though he claims that he was present at the alleged time of dying declaration did not specifically disclose it though he gave every detail of the happenings right from the date of the marriage.

11. In the aforesaid circumstances it is held that their oral dying declaration is doubtful and not dependable and non-disclosure of such a dying declaration at the earliest in the Fardbeyan adds more doubt to this claim of the defence that no dying declaration was made. It is also held that the oral dying declaration when is stated before the Court by interested witnesses must come in its original form, a bit variation notwithstanding then it should be appreciated when the trial is concluded. The Court should not prompt a witness to give a particular meaning of that oral dying declaration and thus enlarging the scope of the dying declaration at the time of examination-in-chief of the witnesses. Such promptness, though may be inquisitive on the part of the Court but it helps the prosecution.

12. Question Nos. (2) Whether the Ext. 8 which is the statement of the doctor who examined first the victim can be admissible evidence and relied upon when doctor himself did not turn up before the Court to say it?

By now it is found that according to the P.W. 2, Doctor Ramashankar was also present when the dying declaration was made by the victim, when other witnesses aforesaid are the interested witnesses and could be prompted to concoct a story, the doctor was an independent witness, his statement before the police is contained in case diary. It has been admitted as (Ext. 8). The Trial Court used this statement (Ext. 8) as the corroborating evidence coming from an independent witness. This witness never was produced as a witness and on scanning the entire order sheet or the evidence I have not been able to find that this witness is either dead or untraceable or it was difficult to find out his whereabout. The statement recorded u/s 161 of the Cr.P.C. can be used for the purposes of contradicting the person who made the statement and not for corroborating him or any other witness. It is settled principle of law that the statement made during the police investigation are not substantive evidence and cannot be treated as such and it can be used for the purpose of contradiction of its manner. The proviso Section 162(1) can be used for the purposes of contradiction of the witnesses. Section 33 of the Evidence Act permits admission of such evidence given by a witness in judicial proceeding or before any person authorised by law to take it, when the witness is dead or cannot be found or incapable to give evidence or kept out of the way by the other party or

his presence cannot be obtained.

13. Here the statement before the police is not evidence and such statement cannot be treated as an evidence before person authorised by law to take it. The police is authorised by law to collect the statement but not to record the evidence. Therefore, Section 33 of the Evidence Act is not applicable, consequently the admission of Ext. 8 as evidence is illegal and so corroboration of the witnesses (supra) by this piece of evidence is also illegal. This second question is answered accordingly. Thus the learned Trial Court has erred in admitting this evidence and using it for the purpose of corroborating other witnesses in arriving at the finding.

14. Question No. (3): Whether there is any nexus between the death and torture for the demanded of dowry?

The FIR (Ext. 1) clearly states that one year prior to the occurrence the accused persons after assaulting Anita had. broken her leg and it were the parents who got her treated and in-laws had not even come to see her. This was the affair of one year ago, according to the FIR. According to the FIR further on 16.10.1992, two days prior to the occurrence the mother-in-law, father-in-law and husband had abused her. The FIR does not show that this abuse was for the purpose of demand of dowry.

15. P.W. 1 the brother in his examination-in-chief says the story of the fracture of leg one year earlier had made a general allegation that they used to torture her for dowry. He does not give any specific time of such torture though one year prior they fractured her leg is stated categorically. In paragraph 8 this witness says that he came to know from the neighbour that Anita was tortured time-to-time. No neighbour has been examined and even no name of such witness has been disclosed. In paragraph 10 he admits that no panchayati was even called for to deal with the situation and in his evidence before I.O. he did not say that Anita was being tortured from time-to-time (paragraph 13 of the I.O. read with paragraph 9). Thus he is making the statement for the first time before the Court that from time-to-time Anita was being tortured and he had come to know this fact from the neighbours.

16. P.W. 2, another brother of the victim girl in paragraph 3 states making the allegation of one year prior to death makes statement that from time-to-time she was put to cruelty by the in-laws and they also used to demand dowry and one room. He also says that no panchayati was done. In cross-examination he says that in-laws always used to demand one room and for that they caused cruelty. The father says that in-laws demanded land for constructing a house. To a Court question in his examination-in-chief he said that he had executed a sale deed of some land in the name of daughter in the year 1992. In paragraph 5 in cross-examination he says (para 4) that he had never spoken earlier that her in-laws had demanded land but actually he had given the land. While the other two brothers (supra) deny any panchayati this witness says in paragraph 8 that there was a panchayati but he does not remember in which year the panchayati was done.

In paragraph 13 he says that regarding the atrocities he came to know from the neighbour of the accused persons but he cannot say their names nor the date on which they said it. The mother P.W. 4 says in paragraph 6 that her daughter was tortured which was told by neighbour of the accused but she does not know the name of any person. In paragraph 12 she says that in-laws demanded dahej but no complaint was made against such demand. P.W. 7 through her wife came to know that she was being tortured but that wife has not come to say so and thus this witness is only hearsay witness on this point.

17. By now it appears that about the cruelty the knowledge was gained by the prosecution witnesses from the neighbour of the accused persons, but the prosecution failed to examine any such witness or even to name them as a witness. To the contrary the defence examined no witnesses. D.W. 1 proved that there was a partition though the partition deed was not proved it was simply marked for identification and said that accused persons were living at the same place but in the different houses and when the partition among the accused had taken place many other witnesses were also present (D.W. 1, Paras 2 and 3). The informant P.W. 3 was confronted with the question that whether the accused persons lived separately which he had denied. D.W. 2 also said that they lived separately and in this regard Ext. A was produced in which name of husband, wife and two children aged about 10 years and 7 years appears. This Ration Card is completely a doubtful document for the reasons that it appears to have been prepared in the year 1996 but it contains the name of the deceased who had already died in the year 1992. The sale deed by which the informant claims to have given land to his daughter on the demand for such by in-laws had not been brought on record which could have been a very convincing piece of evidence, that demand was made and corresponding to that such a deed was executed. Thus this withholding of the deed is not explained. Thus it is not proved that soon before the occurrence there was the atrocities to some demand of dowry, of course, one year prior to the death, there is allegation of fracture of leg by the in-laws but that time, distance and the death are wide apart. Under the aforesaid circumstances it is held that the most essential ingredient (soon before the occurrence) for proving the offence has not at all been proved. Thus it is held that there is no immediate nexus between the death and any cruelty perpetrated for demand of dowry.

18. Thus in the entirety of the discussion made above I find that the learned Trial Court''s reliance on oral dying declaration is unjust because there were inherent contradictions among the witnesses about the exact declaration made and that cannot be attributed to variation due to lapse of time and it was further vitiated by putting a question in the examination-in-chief whereby the prosecution witnesses got an opportunity to give a larger meaning to the dying declaration and it was further vitiated by its corroboration by a non-admissible evidence. The Trial Court also erred in finding that there was nexus between the death and demand of dowry and the atrocities pertaining thereto.

Thus I find that because of these errors, the learned Trial Court came to a wrong decision. The death of a young lady is no doubt is a cause of concern but in holding conviction the Court should be cautious that section is not misused.

19. In the result I find that prosecution has failed to prove the charge u/s 304B and also u/s 498A of the Indian Penal Code beyond all reasonable doubts and consequently the convictions under these sections and the sentence have to be set aside, which are hereby set aside. This appeal is allowed. The appellants are already on bail, they are acquitted of the charges and discharged from their bail bonds.