

(2011) 08 CAL CK 0020

Calcutta High Court

Case No: C.R.A. 299 of 2009

Anowara Bibi and Anr

APPELLANT

Vs

The State of West Bengal

RESPONDENT

Date of Decision: Aug. 11, 2011**Acts Referred:**

- Penal Code, 1860 (IPC) - Section 302, 304B, 498A

Citation: (2012) 1 CALLT 555**Hon'ble Judges:** Raghunath Ray, J; Girish Chandra Gupta, J**Bench:** Division Bench**Advocate:** Sandipan Ganguly and Mr. Ranadeb Senguptas, for the Appellant; Siladitya Sanyal and Ms. Rituparna De for State, for the Respondent**Final Decision:** Allowed

Judgement

Girish Chandra Gupta, J.

This appeal is directed against a Judgment dated 24th March, 2009 by which the accused Anowara Bibi and her son Sk. Gadai were both convicted of an offence punishable u/s 302 of the Indian Penal Code. By an order dated 25th March, 2009 both of them were sentenced to imprisonment for life as also to pay a fine of Rs. 10,000/- (Rs. Ten thousand only) each in default of such payment they were directed to undergo further imprisonment for a period of one year each. It is against this Judgment and Order that the present appeal was preferred. The facts and circumstances of the case briefly stated are that a written complaint dated 2nd November, 2004 was lodged with the Suit Police Station alleging that Rehana Bibi the daughter of the defacto-complainant Sk. Haradhan was set on fire at her matrimonial home by Anowara the mother in law and Gadai her husband. On 1st November, 2004, at about 11 a.m. the victim was shifted to the Suri hospital where she died on the same day at about 11 p.m. in the night. It was also alleged in the written complaint that ever since the marriage the victim was continuously tortured at the matrimonial home by the accused persons. It is on this basis that the Suri

Police Station Case No. 160 of 2004 u/s 498A/304B and 302 of the Indian Penal Code was started.

2. Mr. Ganguly, learned advocate, appearing in support of the appeal submitted that the judgment under challenge is perverse and cannot be sustained. He took us through the evidence adduced by the prosecution P.W. 1, is Sk. Haradhan, father of the deceased. He was declared hostile. He deposed that he did not know the contents of the written complaint. He also deposed that his daughter after the incident had no physical or mental capacity to make any statement to anyone. He also deposed that the relationship between the husband and the wife as also between the accused Anowara and the deceased was good and cordial. P.W. 2 is the mother of the deceased. She was also declared hostile. She deposed in the same line as did her husband. P.W. 3 Sadeka Bibi, a sister of the P.W. 1, deposed that the victim had a love affair with a boy of the village Dholtikuri. But the father of the victim was not agreeable to that match. She was instead given in marriage to the accused against her will. She as a result, was suffering from depression. P.Ws. 4 and 5 are mere signatories to the inquest report. P.W. 5.

3. The inquest report does not contain any indication as to how did the victim Rehana Bibi contact fire. P.W. 6, is also a signatory to the inquest report. P.W. 7, Sk. Alkash, and P.W. 8 Sk. Kamrul, were merely tendered. P.W. 9, Nurul Islam, is the scribe of the written complaint. He admitted that he did not have any personal knowledge about the matter. He also admitted during his cross-examination that he had drafted the written complaint on the request of the police officer and the villagers. He also admitted that the draft made by him was dictated by the police officer. P.W. 10, is a co-villager of the accused persons. He was declared hostile. During his cross-examination by the defence, he deposed that the victim did not want to stay with her husband because the marriage was contracted against her will. P.W. 11, is also a relation of the victim. He, as a matter of fact, is P.W. 1's sister's husband. He was also declared hostile. During his cross-examination he deposed that when he met the victim in hospital he found her in severe pain. P.W. 12, was merely tendered. P.W. 13, is the Autopsy Surgeon. He opined that the death was due to shock and sepsis following 90% burn. During his cross-examination he was unable to express any definite opinion as to whether it was a case of suicide or a case of homicide. P.W. 14, is a constable who identified the dead body at the morgue. P.W. 15, is a near relation of the victim. Her name is Aspia Bibi. She is the person who had identified the victim to the learned Magistrate who recorded the dying declaration of the deceased. She did not depose as regards any dying declaration allegedly made by the victim. She on the contrary deposed that she did not meet any learned Magistrate. She admitted that she was in the hospital. She deposed that she had not identified the victim before the learned Magistrate. P.W. 16, is an acquaintance of the P.W. 1. He is also a signatory to the dying declaration recorded by the learned Executive Magistrate. He identified his signature in the dying declaration but added at the same time that he did not know the cause of the

death.

4. Mr. Ganguly, submitted with some justification that if the P.W. 16 was present when the alleged dying declaration was made he could not have been unaware of the cause of death. He was expected at least to disclose the statement or the gist thereof made by the deceased to the learned Executive Magistrate. P.W. 17, is the Magistrate himself who recorded the dying declaration. He deposed that Aspia Bibi had identified the victim to him.

5. We already have noticed the deposition of Aspia Bibi. During cross-examination the P.W. 17 deposed that he did not have any recollection as regards the facts of the case except what appeared from the records. With regard to the presence of the doctor during recording of the statement of the deceased he deposed that there is no specific mention in the document that the doctor was all along present. According to him the statement of the deceased was recorded between 6.30 p.m. to 7.30 p.m. The case of the prosecution is that she died at 11 p.m. Rest of the witnesses who had visited the victim at the hospital deposed that she was in severe pain and was in no condition to make any statement.

6. Mr. Ganguly submitted that in the facts of the case veracity of the so-called dying declaration is highly questionable.

7. Mr. Ganguly, also drew our attention to the medical records which were tendered in evidence. They are Exhibit 7 collectively. Dr. Tathagata Ghosh was examined in this case as P.W. 19. He deposed during his cross examination that he had attended the victim. He also appears to have made the following endorsement as regards the case history "Homicidal burn by mother-in-law (as stated by patient) on 1.11.2004 at 12 noon".

8. Mr. Ganguly, contended that the so-called dying declaration is inconsistent with the statement made to the doctor by the patient herself. If the statement contemporaneously made to the doctor by the patient at the time of her admission and also recorded in the treatment sheet is accepted then what would follow is that the husband was no way connected with the alleged offence.

9. Mr. Sanyal. learned A.P.P. did not dispute this proposition advanced by Mr. Ganguly.

10. Mr. Ganguly added that the mother-in-law Anowara Bibi is no more. He produced before us a death certificate which goes to show that Anowara Bibi widow of Sk. Jardish died on 27th November, 2010. He therefore submitted that the appeal of the deceased Anowara Bibi has abated and the appeal of the appellant Sk. Gadai should be allowed.

11. Mr. Sanyal, did not raise any objection nor did he even try to support the judgment in so far as the same affected the accused Sk. Gadai.

12. Accordingly, the appeal in so far as the appellant No. 1, Anowara Bibi, since deceased is concerned stands abated. The appeal in so far as the appellant No. 2, Sk. Gadai, is concerned stands allowed. He is discharged of the bail bond furnished by him.

13. Let the operative portion of this Judgment and Order be communicated by the Criminal Section of this Court to the concerned learned Trial Court under Chapter XI Rule 8 of the Appellate Side Rules of this Court forthwith for information and necessary action. Let a copy of the Judgement along with the Lower Court records be sent down to the learned Trial Court forthwith.

Let a Photostat copy of the death certificate be kept on the record and the original be returned to Mr. Ganguly, learned advocate, appearing for the appellants.

Raghunath Ray, J.

I agree.