

(2014) 01 CAL CK 0059

Calcutta High Court

Case No: C.R.A. No. 291/2011

Smt. Sikha Dey and
Smt. Rupa Dey

APPELLANT

Vs

The State of West
Bengal

RESPONDENT

Date of Decision: Jan. 31, 2014

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 174
- Evidence Act, 1872 - Section 106
- Penal Code, 1860 (IPC) - Section 302, 307, 325, 326, 34

Citation: (2014) 1 CALLT 640 : (2014) 4 CHN 605 : (2014) 2 DMC 595

Hon'ble Judges: T. Sen, J; Shib Sadhan Sadhu, J

Bench: Division Bench

Advocate: Shiladitya Sanyal and Mr. Arindam Jana, Advocate for the Appellant; Manjit Singh, Ld. P.P. and Mr. Anand Keshri, Advocate for the Respondent

Judgement

Shib Sadhan Sadhu, J.

The Instant Criminal Appeal is directed against the judgment and order of conviction passed in Sessions Trial No. 1(3) of 2009 arising out of Sessions Case No. 18/2009 by the Ld. Additional Sessions Judge, Fast Track Court No. 4, Barrackpore, North 24-Parganas on 05.05.2011/06.05.2011 holding the appellants guilty of the offence u/s. 302 of the Indian Penal Code read with section 34 IPC and sentencing them to suffer imprisonment for life. The relevant fact of the prosecution case, sans unnecessary details, is as follows:

On 01.01.2008 at about 07.15 hours the de facto complainant Prasanta Dey lodged a written complaint before the I.C. Naihati P.S. to the effect that on 31.12.2007 at about 6 P.M. his father, mother and sister abused him and drove him out. After proceeding to a bit distance from their house, he heard cry raised by his wife Rani Dey and he returned

home and saw his wife was in flame and his father, mother and sister were trying to douse by pouring water. He then took his wife to Naihati hospital by a van rickshaw. On the way to hospital his wife stated to him that his father, mother and sister poured oil on her person and set her on fire. It has been further stated in the complaint that his victim wife Rani was lying admitted in Gandhi Memorial Hospital, Kalyani and she was struggling for life.

2. On the basis of such complaint Naihati P.S. Case No. 01/08 dated 01.01.2008 under sections 498A/325/326/307/34 IPC was registered. That case was investigated into and on completion of investigation charge sheet was submitted under sections 498A/325/326/307/34 IPC and also u/s 302 IPC. Thereafter, the case was placed for trial before the Ld. Additional Sessions Judge, Fast Track Court No. 4, Barrackpore, North-24-Parganas who framed charge under sections 498A/302 of the IPC read with section 34 of IPC against the present appellants and after conclusion of the trial he held the appellants guilty and convicted them as aforesaid.

3. Prosecution examined 11 witnesses in all in this case. Out of those witnesses P.W. 1 Prasanta Dey is the husband of the deceased and the de -facto complainant, P.W. 2 Gora Dey is the scribe of the said complaint, P.W. 3 Kalo Pal; P.W. 4 Ujjala Biswas and P.W. 5 Arati Barma are the neighbours; P.W. 6 is Dr. Utpal Kumar Nandy who held the post mortem, P.W. 7 Supriya Dutta is the staff nurse of J.N.M. Hospital, Kalyani in whose presence the I.O. recorded the dying declaration of the deceased, P.W. 8 Ganesh Saha and P.W. 9 Biswajit Debnath are the witnesses to the seizure; P.W. 10 is A.S.I., of Police Rajesh Kumar Tiwari who registered the case on receipt of the complaint and P.W. 11 S.I. of Police Rabindra Chandra Bhoumik is the Investigating Officer of this case.

4. We have heard Mr. Siladitya Sanyal appearing on behalf of the appellants while the respondent State has been represented by the Ld. Prosecutor Mr. Manjit Singh.

5. Ld. Advocate Mr. Sanyal appearing for the appellants has taken us through the oral testimonies of all the P.W. s. He has submitted that in the instant case the conviction is solely based on the Dying Declaration allegedly made by the deceased which is vulnerable and has no sanctity in the eye of law. He pointed that there is no signature or L.T.I., of the victim in the Dying Declaration nor it bears any endorsement to the effect that it was read over and explained to her after recording the same and she admitted its correctness. Further, it is devoid of medical certificate regarding mental fitness of the deceased to make such statement when the same was recorded although the Doctor had put his signature on it. The statement was not recorded in question-answer form and there is nothing to show how the I.O. was satisfied that the deceased was in a fit state of mind to make such statement. So when admittedly the deceased sustained 90% burn injuries she could not be expected to make statement at stretch. Therefore, according to him the alleged Dying Declaration suffers from basic infirmities and cannot be accepted as voluntary and true and it cannot be made the basis for conviction.

6. He thus emphatically contended that the prosecution has miserably failed to establish the chain of circumstances so as to make it complete and unerringly fixing the appellants with the alleged offence of murder of the deceased Rani Dey. So the conviction cannot be sustained and the appellants are entitled to an order of acquittal by setting aside the impugned judgment and order. He placed reliance on the decisions reported in [Kanti Lal Vs. State of Rajasthan](#), in support of his contention.

7. Mr. Anand Keshri Ld. Counsel for the State on the other hand wholeheartedly supported the judgment and order of conviction. According to him mere absence of certificate by Doctor about mental fitness of deceased when the declaration was recorded in presence of the Doctor will not cut any ice. He further contended that this is a case of bride burning in the matrimonial home in presence of the inmates. Therefore, the appellants had special knowledge and they are saddled with the burden of proving u/s 106 of the Evidence Act, 1872 how such occurrence took place and since they did not offer any explanation they cannot escape punishment for the crime perpetrated by them. Thus the Ld. Trial Court has rightly convicted the appellants u/s 302 IPC and passed the appropriate sentence which should be maintained. Mr. Keshri finally insisted upon dismissal of the appeal. He cited the decisions reported in 2006 AIR SCW 5300 : [Raj Kumar Prasad Tamarkar Vs. State of Bihar and Another](#), and [State of Rajasthan Vs. Parthu](#), to justify his contention.

8. We have perused the records and proceedings in the context of the rival submissions and in the light of the decisions placed. We have also meticulously scrutinized the evidence both oral and documentary brought on record by the prosecution. We find that there is no eye witness or direct evidence to the alleged incident of murder and the entire prosecution case rests on the alleged Dying Declaration made by the deceased.

9. In the case of [Surinder Kumar Vs. State of Haryana](#), the Hon"ble Supreme Court reiterated the observation made in the case of [Sham Shankar Kankaria Vs. State of Maharashtra](#), which is as follows:--

.....This is a case where basis of conviction of the accused is the Dying Declaration. The situation in which a person is on death-bed is so solemn and serene when he is dying that the grave position in which he is placed, is the reason in law to accept veracity of his statement. It is for this reason the requirements of oath and cross-examination are dispensed with. Besides, should the Dying Declaration be excluded it will result in miscarriage of justice because the victim being generally the only eye witness in serious crime, the exclusion of the statement could leave the Court without a scrap of evidence.

Though a Dying Declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross-examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the Court also insists that the Dying Declaration should be of such a nature as to inspire full confidence of the Court in its correctness. The Court has to be on guard that the statement of deceased was not as

a result of either tutoring or prompting or a product of imagination. The Court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailant. Once the Court is satisfied that the declaration was true and voluntary undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the Dying Declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence.

10. Further it has been made clear by the Hon"ble Apex Court in the case of [Darshana Devi Vs. State of Punjab](#), that even though an oral Dying Declaration can form basis of conviction in a given case, but such Dying Declaration has to be trustworthy and free from every blemish and inspire confidence.

11. So let us now consider the alleged Dying Declaration made by the deceased Rani Dey in the light of the aforesaid principles.

12. On giving a close and critical look into the Dying Declaration in question (Ext. 5/1), we find that it was recorded by the I.O. (P.W. 11) on 01.01.2008 at 20.10 hours in the Burn Ward of J.N.M. Hospital, Kalyani in presence of the staff nurse Supriya Duta and the Medical Officer Dr. Uttam Sarkar both of whom put their signatures on it. It is further seen that the statement is recorded in a narrative form and not in question and answer form. It further appears that there is no certificate appended by the Doctor as to the condition of the deceased or regarding her mental fitness to make such statement. It is not at all understood as to what prevented the said Medical Officer Dr. Uttam Sarkar to append such certificate, although he was present and signed the statement. Equally mysterious is the fact that the said Doctor has not been brought to the witness box by the prosecution and that too without offering any explanation whatsoever. On going through the evidence adduced by the I.O.(P.W. 11) we find that he has not at all enlightened the Court as to how he became satisfied about the mental fitness of the victim. He has also kept mum as to why he did not take such certificate from the Doctor concerned who was allegedly present at the time of recording such statement. Similarly he has not explained as to why he recorded the statement in narrative form in his own language without reproducing the exact words of the victim. Further the statement lacks any endorsement to the effect that after recording of the statement it was read over and explained to the declarant victim and she admitted its truth and correctness. Also in his evidence the I.O. made no whisper about such vital lapse. Yet another glaring incongruity which arrests the attention easily is the absence of any signature or L.T.I. of the victim. The Prosecution evidence including that of the recording officer i.e. the I.O.(P.W. 11) does not throw any light on that score. One more conspicuous thing is the wide spacing between the writing "in presence of" and the signature of the Doctor which cannot be lost sight of. Taken together, all these factors put the genuineness as well as the credibility of the statement allegedly made by the deceased at stake and undermines the evidentiary value of the statement.

13. In the Inquest Report prepared by the A.S.I. Of Police Chandan Datta of Kalyani P.S. over the dead body of the deceased Rani Dey on 09.01.2008 at J.N.M. Hospital, Kalyani it is noted that the victim set herself into fire due to mental sadness out of domestic disturbance. It is no doubt true that the statement contained in an Inquest Report is the record of what Investigating Officer himself observed and found and such an evidence is the primary evidence in the case and there is no need to record the details of the prosecution case. But at the same time when the inquest is followed by the registration of a First Information Report as regards to the incident then in that case the gist of the FIR or the cause of death as narrated by the witnesses are also required to be noted. In the case of [Meharaj Singh \(L/Nk.\) Vs. State of U.P.](#), one "of the observations of the Hon"ble Supreme Court which have been upheld by a Three-Judges Bench of the Hon"ble Supreme Court in the case of [Thanedar Singh Vs. State of Madhya Pradesh](#), in our opinion would be very useful in this context, where the Hon"ble Supreme Court observed as follows:

Even though the Inquest Report, prepared u/s 174. Cr.P.C., is aimed at serving a statutory function, to lend credence to the prosecution case, the details of the F.I.R. And the gist of statements recorded during inquest proceedings get reflected in the report. The absence of those details is indicative of the fact that the prosecution story was still in an embryo stage and had not been given any shape and that the F.I.R. came to be recorded later on after due deliberations and consultations and was then ante-timed to give it the colour of a promptly lodged F.I.R.

Now, coming back to the case in hand, we find that P.W. 1 Prasanta Dey who is none but the husband of the deceased lodged the written complaint on 01.01.2008 i.e. much before holding of the inquest and preparation of the Inquest Report and at the time of inquest said P.W. 1 Prasanta Dey and two other witnesses namely Shyamali Haider, elder sister of the deceased and one Monotosh Mandai were very much present. It is, therefore, beyond our comprehension when long before holding of inquest the F.I.R. was lodged by the husband of the deceased who categorically named the assailants in the F.I.R., then in that case as to why in the Inquest Report only it was noted that the victim herself set fire to her person. Mere non-mentioning of name of the assailants in the Inquest Report is one thing, but when before inquest, the name of the assailants have been transpired and they are named in the F.I.R. non-disclosure of their identities in the inquest is another thing. In other words, although it is not the law that Inquest Report must contain the name of the assailants but when before holding of the inquest the identity of the assailants were surfaced, a note in the Inquest Report that the victim herself set her person into fire, in our opinion certainly casts a great doubt as to the reliability of the prosecution case. The doubt gains momentum when it is seen that the other two witnesses of the inquest namely Shyamali Halder, elder sister of the deceased and Monotosh Mandal have not been even cited as witnesses in the charge sheet far to speak of examining them. Similar is the case of A.S.I. Chandan Datta who was though cited as a witness in the charge sheet but has not been examined as a witness.

14. From the totality of the aforesaid the picture reflected is gloomy. That is to say that the much trumpeted Dying Declaration heavily banked upon by the prosecution clearly appears to be the handiwork of the I.O.(P.W. 11) who was keenly interested in securing conviction of the appellants. Be that as it may the Dying Declaration (Ext. 5/1) suffers from inherent weakness and fails to withstand judicial scrutiny. Thus no reliance can be placed upon it and the conviction based on it cannot be sustained.

15. After visualising the prosecution evidence on record on anvil of law of appreciation of evidence and cardinal principle of criminal jurisprudence, we are unable to concur with the judgment of conviction passed by the Ld. Trial Court on the strength of fabricated story and on tainted investigation. As such we allow this appeal and set aside the conviction and sentence passed by the Ld. Trial Court.

16. The appellants Smt. Sikha Dey and Smt. Rupa Dey are acquitted of the charge u/s 302 IPC read with section 34 IPC. They are in jail and shall be released and be set at liberty forthwith unless wanted in any other case. Let the Lower Court Records be sent down to the Court below at once. Criminal Section is directed to deliver urgent photostat certified copy of this judgment to the parties, if applied for, as early as possible.

T. Sen, J.

I agree