

Rajendra Naik Vs. State

Rajendra Naik Vs. State

SooperKanoon Citation : sooperkanoon.com/367657

Court : Mumbai

Decided On : Aug-27-2001

Reported in : I(2002)DMC38

Judge : P.V. Hardas, J.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 107 and 306

Appeal No. : Criminal Appeal No. 25 of 2000

Appellant : Rajendra Naik

Respondent : State

Advocate for Def. : Winnie Coutinho, A.P.P.

Advocate for Pet/Ap. : Archana M. Dessai, Adv.

Disposition : Appeal allowed

Judgement :

P.V. Hardas, J.

1. The appellant stands convicted, for an offence punishable under Section 306 of the Indian Penal Code and is sentenced to undergo rigorous imprisonment for 5 years and for payment of fine of Rs. 2,000/-, in default Simple imprisonment for two months. It is this conviction and sentence which is assailed by the appellant in

the present appeal.

2. The facts necessary for the decision of the appeal are set out hereunder :

The appellant was married to the deceased on 18th April, 1998. The appellant was working as a Chemist in Tulip Company at Bambolim. After their marriage, the deceased Lata and the appellant started residing near a temple at Santa Cruz and thereafter shifted their residence to Mercedes. They had last resided at Calapur. The prosecution has alleged that since the solemnization of marriage, the appellant was treating his deceased wife Lata with cruelty and, therefore, the deceased on 5th November, 1998, poured kerosene oil on her person and set herself ablaze. The deceased Lata had suffered 89% burns. The deceased ultimately succumbed to her burn injuries on 9th November, 1998. A dying declaration of the deceased at Exh., 22 came to be recorded by P.W. 9, Vinayak Alornekar, Special Judicial Magistrate.

3. During the investigation, the police had recorded Exh. 7 which is the scene of offence Panchanama in the presence of P.W. 1, Girish Naik and M.O. No. 1, kerosene can was seized. The police had also recorded Exh. 16 which is the Inquest Panchanama in the presence of P.W. 5, Gururaj Joshi. P.W. 2, Dr. E.J. Rodrigues had performed the post mortem and the post mortem report is at Exh. 9. The cause of death given by Dr. E.J. Rodrigues is that death was due to Septicemia and Toxicemia consequent to flame burns.

4. The learned Trial Judge had framed a charge against the appellant for an offence punishable under Sections 498-A and 306 of the Indian Penal Code. The appellant had pleaded not guilty to the said charge and had claimed to be tried. In support of its case, the prosecution had examined 12 witnesses and the appellant had examined D.W. 1 Bosco Gonsalves as his witness. The evidence of the prosecution tendered through these witnesses can be grouped in the following categories :

A - PANCH WITNESSES

(i) Girish Naik - in whose presence scene of the offence Panchanama at Exh. 7 was recorded.

(ii) P.W. 5, Gururaj Joshi - in whose presence Inquest Panchama at Exh. 16 was recorded.

(iii) P.W. 11, Karan Singh, Deputy Collector and S.D.M., Panaji, who had conducted the Inquest Panchanama.

B - MEDICAL EVIDENCE

(i) P.W. 2, Dr. E.J. Rodrigues, who performed post mortem and the report is at Exh. 9.

C - WITNESSES RELATED TO DECEASED

(i) P.W. 3, Govind Rai Naik, paternal uncle of deceased.

(ii) P.W. 4, Shivram Naik, father of deceased,

(iii) P.W. 6, Laxmi Naik, mother of deceased.

(iv) P.W. 7, Anthony Raposo, owner of the house where accused and deceased last resided, and

(v) P.W. 8, Suhas Naik, elder brother of deceased.

D - WITNESS ON DYING DECLARATION

P.W. 9, Vinayak Alornekar, Special Judicial Magistrate, who recorded dying declaration at Exh. 22.

E - POLICE OFFICERS

P.W. 10, Baburao Sanadi.

P.W. 12, Anandu Naik.

5. The learned Trial Judge acquitted the appellant in respect of an offence punishable under Section 498-A of the Indian Penal Code but, however, convicted the appellant for an offence punishable under Section 306 of the Indian Penal Code and sentenced him as aforestated.

6. P.W. 3, Govind Rai Naik, who is the paternal uncle of the deceased has stated that on 6th November, 1998, at about 4.30 p.m., the deceased had told him that the appellant was harassing her and was also physically beating her. The main reason for the ill-treatment was that the appellant wanted a good job anywhere in Karnataka without appearing for any interview and the appointment being given to him. The deceased is also alleged to have informed P.W. 3, Govind Rai Naik, that on the night of 5th November, 1998, the appellant had caught her hair and had abused her family members and she got fed up and being unable to bear the harassment further, she burnt herself. P.W. 3, Govind Rai Naik, further stated that on one occasion at Ponda, the deceased had told him that the appellant was harassing her and more particularly for job and that she was fed up. In the cross-examination, the entire oral dying declaration alleged to have been made by the deceased to this witness on 6th November, 1998 has been proved as an omission. This witness offers an explanation that the police had recorded his statement prior to the deceased making the said disclosures. Similarly, the claim of this witness regarding what the deceased had told him once at Ponda was also proved as an omission. In the cross-examination, he has admitted that after the deceased had informed him on 6th November, 1998, he did not inform the police about the disclosures made by the deceased. This witness further admitted in the cross-examination that after her marriage, deceased Lata had stayed with her brother at Vasco for a period of 3 1/2% months.

7. P.W. 4, Shivram Naik, who is the father of the deceased states that the deceased had, during her visit to the house, informed him that the appellant was harassing her for a job. He further states that during his visit to Goa, to his son's place, his son had informed him that the appellant had assaulted deceased Lata while the appellant was staying at Mercedes and on the next day, the son of P.W. 4, Shivram Naik, had taken deceased Lata along with the appellant to a doctor for treatment. This witness further states that on 5th November, 1998, he had

received a telephone call from deceased Lata and deceased Lata had told him that the appellant was abusing her and harassing her for a job. She had further informed PW 4, Shivram Naik, that the appellant wanted a job without attending any interview with a ready appointment order in his hand. This witness also states that the appellant spoke to him on telephone and had angrily told him that the appellant wanted a job at Belgaum without any interview with a ready appointment order in his hand. This witness had stated that after receipt of the message that deceased Lata had received burn injuries, this witness along with his wife had gone to Goa Medical College, Bambolim and had reached the hospital on 6th November, 1998 at about 5.00 a.m. The staff nurse at the hospital did not allow this witness to talk to deceased Lata as deceased Lata was unconscious. After deceased Lata regained consciousness at about 1.30 p.m., deceased Lata is alleged to have informed this witness that after the telephone call on 5th November, 1998, the appellant became furious and started abusing her for the inability of the relatives of deceased Lata to provide the appellant with a job. Deceased Lata is further alleged to have informed him that she felt frustrated that she poured kerosene and put herself ablaze. In the cross-examination, this witness had admitted that he had stated to the police that his son had informed him that the appellant had assaulted deceased Lata and that deceased Lata had been taken to a doctor for treatment. This witness further admitted that he had not stated to the police that the appellant wanted a job without attending any interview and with a ready appointment order in his hand. This witness further admitted in the cross-examination that he had not stated to the police that deceased Lata had informed him that after the talk on telephone on 5th November, 1998, the appellant had become furious and started abusing for the inability of the relatives of deceased Lata to provide a job without any interview. Surprisingly, this witness admits in the cross-examination 'it is true that there is no mention of any harassment to the deceased by the accused in her telephone call on 5th November, 1998'. The statement of this witness was recorded by the police during investigation on 8th November, 1998.

P.W. 6, Laxmi Naik, states that the deceased had visited her on three occasions and the appellant had insisted that a job be provided to him at Belgaum. She also states that there used to be fights between the appellant and the deceased Lata.

She also refers to her son informing her that the appellant had assaulted the deceased Lata, due to which the deceased Lata had fainted and was taken to a doctor at Vasco. She states that on 5th November, 1998, she had received a telephone call from the deceased Lata who had enquired about the application submitted by the appellant for a job. The deceased Lata is alleged to have informed P.W. 6, Laxmi Naik, that the appellant was harassing her on account of job and was not giving her proper food. Thereafter, at about 10.45 p.m., in the night, the appellant had informed P.W. 6, Laxmi Naik, that deceased Lata had suffered burn injuries and was admitted in the Goa Medical College, Bambolim. This witness also states that on 6th November, 1998, at about 7.00 p.m., the deceased had told her that after making the telephone call on 5th November, 1998, the appellant was angry with her and started ridiculing her relatives. This witness also states that the deceased was fed up because of the ill-treatment and, therefore, she poured kerosene oil and set herself ablaze. This witness was present when the Special Judicial Magistrate, P.W. 9, Vinayak Alornekar had come for the dying declaration.

9. P.W. 8, Suhas Naik, brother of the deceased Lata states that in the premises in which the accused and the deceased Lata were residing after their marriage, did not have the facility of water and there was no toilet and bath room. So he had made an offer to the appellant that till the appellant secures better premises, the deceased Lata and the appellant should reside at his house at Vasco. According to this witness, therefore, the appellant and the deceased Lata began residing at his house at Vasco. He further states that on 28th May, 1998, the deceased Lata had phoned him and informed them that the accused was harassing her by making a demand for job and also that the accused had assaulted her. This witness, therefore, went to the room of the appellant at Mercedes and saw that the deceased Lata was lying on the ground crying and was not in a position to get up. On asking her, the deceased Lata told him as to what had happened. P.W. 8, Suhas Naik, states that thereafter, he took the appellant and the deceased Lata along with him to Vasco for treatment to one Dr. Kamat. The said Dr. Kamat after examining the deceased issued a prescription. This prescription was produced by P.W. 4, Shivram Naik, in his evidence and was marked as Exh. 15. The prosecution did not examine Dr. Kamat and, therefore, the prescription on the face

of it cannot be led in evidence. According to him, he had received a telephone call on 5th November, 1998, that the deceased Lata had sustained burn injuries and was admitted in the hospital. He, therefore, proceeded to the Goa Medical College, Bambolim and the deceased Lata then narrated to him that on the previous night at about 8.30 p.m. to 9.00 p.m., she had gone to make a telephone call to her father regarding a job for the appellant. The deceased Lata further informed this witness that her father had informed her about the interview on on 9th November, 1998 and that the appellant must come to Belgaum. This witness further states that the deceased Lata had informed him that on the way back, the appellant had started harassing her and had assaulted her when they had reached home. This witness further states that the deceased Lata informed him that after taking their meals, the deceased Lata had told the appellant that she would end her life upon which the appellant is said to have said that she cannot do anything. According to this witness, the deceased Lata then poured kerosene oil on her person and set herself ablaze. In the cross-examination, this witness admitted that he had not stated to the police that he had seen the deceased Lata lying on the ground crying and was not in a position to get up. He also admitted that he had not stated to the police that the deceased Lata had told him that the accused was making a demand for job and daily harassing her and that he had caught hold of her hair, banged her against the wall and slapped her on the neck. This witness also admitted that he had not stated the name of the doctor in his statement and also that he had kept the deceased Lata and the accused in his room at Vasco, since the deceased Lata was taking treatment of Dr. Kamat. Series of omissions have been brought out in the cross-examination of this witness regarding harassment and ill-treatment by the appellant to the deceased Lata while the deceased Lata had stayed in the house of this witness. There are omissions in the evidence of this witness in respect of the application said to have been given by the appellant for a job and Rs. 15,000/- alleged to have been given by this witness to the appellant.

10. In respect of the dying declaration, there are omissions on record that he had not stated to the police that the deceased Lata had told him that the appellant had started harassing her even though the appellant had asked for a job without any interview and was abusing the family members. He had also not stated to the

police that the deceased Lata had told him that on reaching home, the appellant had assaulted her after catching hold of her hair and after taking meals, he started harassing her again. He also admits not to have stated to the police that the deceased Lata had told the appellant that she would end her life and that thereafter, the accused was taunting her by saying that she cannot do anything and that she must actually commit suicide and that the accused had instigated her to pour kerosene on her person.

11. The evidence in respect of the oral dying declaration of the witnesses P.W. 3 Govind Rai Naik, P.W. 4. Shivram Naik, P.W. 6 Laxmi Naik and P.W. 8 Suhas Naik is full of omissions on material aspects of the dying declaration. These witnesses are closely related to the deceased Lata. Therefore, I had scrutinised their evidence and I find that it is difficult to accept their evidence in respect of the oral dying declaration. These witnesses, in view of the fact that deceased Lata is no more, have a motive to implicate the appellant.

12. This takes me to the written dying declaration at Exh. 22 recorded by P.W. 9, Vinayak Alornekar, Special Judicial Magistrate. P.W. 9, Vinayak Alornekar, states that before recording the dying declaration, the doctor attending the patient had given his opinion that the patient was in a fit condition to give her statement on Memo Exh. 21. Thereafter, P.W. 9, Vinayak Alornekar, approached the patient (deceased) and found that one lady was present there who was identified as the mother of the deceased Lata. The mother of the deceased Lata, P.W. 6, Laxmi Naik, was asked to withdraw from the room. In the dying declaration, the deceased had stated that she was married to the appellant who was employed in a chemical factory. After her marriage, she came and started residing at Goa. Initially for a period of four months, she had stayed at St. Cruz. The dying declaration further states that on the day of the incident, the appellant and the deceased had telephoned her parents soliciting information about the interview fixed at Belgaum on 9th and the parents of the deceased had requested them to come to Belgaum. After returning back, she states that her husband had taken his meals and when she had raised the issue of going to Belgaum, he began teasing her parents and began quarreling with her. She further stated in the dying declaration that she was upset and that in this state of mind, she poured kerosene over her body and set

herself ablaze. At that point of time, according to the dying declaration, the appellant was sitting in another room and on hearing her shouts, came running and tried to extinguish the fire by pouring water from a bucket. In the dying declaration, she further states that since her marriage, there used to be frequent quarrels amongst them on small issues and about a fortnight, prior to the incident, she had tried to set herself ablaze but because of the intervention of the appellant she could not light the match stick. She states in the dying declaration that due to frequent quarrels, she was fed up and, therefore, she had poured kerosene on her clothes and set herself ablaze. In the dying declaration, Exh. 22, after so recorded, P.W. 9, Vinayak Alornekar, also records what P.W. 6, Laxmi Naik had to say. It is recorded in the dying declaration after the statement was recorded the mother who was outside the room was called in. The mother did not make any grievance or complaint against her husband (Rajendra Naik)'.

13. Miss Archana M. Dessai, the learned Advocate appearing on behalf of the appellant has contended that this dying declaration is at variance with the oral dying declaration alleged to have been given by the deceased Lata to P.W. 3, Govind Rai Naik, P.W. 4, Shivram Naik, P.W. 6, Laxmi Naik and P.W. 8, Suhas Naik. Moreover, according to her, P.W. 6, Laxmi Naik, had stated that she had no grievance. She further states that P.W. 9, Vinayak Alornekar, has admitted that he had not specifically recorded the dying declaration in the language of the deceased Lata. She also submitted that the doctor who is alleged to have certified the fitness of the deceased Lata to give her statement has not been examined. According to her, the examination of the doctor was essential in view of the fact that P.W. 9, Vinayak Alornekar, has admitted that he had personally not given anything in writing to the doctor to confirm the fitness of the patient whose dying declaration was to be recorded by him. This witness had also added that the Memo was given by the Police Offices to the doctor who had made an endorsement regarding the fitness of the patient. She invited my attention to the evidence of P.W. 12, Anandu Naik, who was the Police Sub-Inspector, who has stated 'it is true that I have not mentioned Dr. C. Fernandes as a C.S. witn. in this case. I do not know Dr. C. Fernandes who had certified the fitness of the deceased to make her statement. The said doctor has not issued any certificate to me in this connection. I was not present when the said doctor had certified the

fitness of the deceased to make her statement to the S.J.M. I have also not seen Dr. Fernandes examining the deceased'.

14. In this case, the dying declaration suffers from the basic flaw that the prosecution has not been able to prove that the deceased was in a fit mental condition to give her statement. The deceased had admittedly sustained 89% burns as is noticed by P.W. 2 Dr. E.J. Rodrigues, in his post mortem report at Exh. 9. P.W. 9, Vinayak Alornekar, disclaims any knowledge whatsoever regarding the endorsement of the fitness of the deceased Lata to give her statement which is made at Exh. 21. P.W. 9 Vinayak Alornekar, further states that the Police Officer had given the Memo to the doctor who had made an endorsement thereon. This assertion of P.W. 9 Vinayak Alornekar, is completely falsified by the admission of P.W. 12, P.S.I. Anandu Naik, that he had obtained the endorsement of the doctor. According to P.W. 12, P.S.I. Anandu Naik, the said doctor had not issued any certificate to him nor was he present when the doctor had certified the fitness of the deceased for giving her statement. In view of this evidence, it is difficult to accept the dying declaration. It is incumbent for the prosecution to prove that the deceased Lata was mentally fit to give her statement. In each and every case, it is not necessary for the prosecution to examine the Medical Officer who has certified the fitness of the deceased to give her statement. In the present case, in view of the conflicting evidence, it was incumbent for the prosecution to have examined the Medical Officer who had certified the fitness of the deceased Lata. Since, this evidence is absent and the other evidence on record does not establish that the Medical Officer on examination had certified the deceased Lata fit to give her statement, I am not inclined to accept the dying declaration as proved by the prosecution. The dying declaration suffers from another flaw that it is not recorded in the language of the deceased. The dying declaration should be an ad verbatim reproduction of what the witness states to the Authority in her statement. This dying declaration is also not free from the doubt that the deceased was tutored by her mother as she was found near her before the dying declaration came to be recorded.

15. The accused in his defence had stated that the deceased Lata was having illicit relations with one Ravi Raj. The appellant has not been able to prove his

defence.

16. According to Mrs. Winnie Coutinho, the learned Additional Public Prosecutor appearing on behalf of the State, this false defence of the appellant should be taken into consideration while evaluating the material against him for conviction. The false defence by itself is not sufficient to establish the case of the prosecution. The prosecution has to either stand or fall on its own legs and it cannot take the benefit of the weakness or falsity of the defence. A false defence may be used as an additional circumstance if the other circumstances so proved by the prosecution point towards the guilt of the accused. In the present case, the prosecution has miserably failed to discharge its burden.

17. From the evidence of the related witnesses, at the most, it can be said that the appellant was asking that a job be provided to him without he being subjected to any interview. Because of this, apparently, it seems that there used to be frequent quarrels between the deceased Lata and the appellant. The learned Trial Court has acquitted the appellant for an offence punishable under Section 498-A of the Indian Penal Code. Merely because of the frequent quarrels, it cannot be held that the appellant has abetted the commission of suicide by the deceased Lata. There is absolutely no evidence to show that the appellant had treated the deceased Lata with cruelty within the meaning of Section 498-A and in fact, the Trial Court has acquitted the appellant of the charge under Section 498-A. 'Abetment' is defined in Section 107 of the Indian Penal Code to mean that a person abets the doing of a thing who firstly, instigates a person to do a thing, or secondly, engages with one or more persons in any conspiracy for 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. After giving my anxious consideration to the evidence on record, I am of the view that the prosecution has not been able to establish the ingredients of Section 107 of the Indian Penal Code. Merely because the deceased Lata committed suicide, it would be hazardous to convict an accused on the basis of frequent quarrels between them over trivial issues.

18. In the result, therefore, I find that the prosecution has not been able to establish the charge under Section 306 of the Indian Penal Code against the appellant. The appellant, therefore, deserves to be acquitted.

19. In the result, therefore, this criminal appeal is allowed. The appellant is acquitted of the offence punishable under Section 306 of the Indian Penal Code and the sentence imposed on him by the Additional Sessions Judge-II, Panaji, is set aside. The bail bonds of the appellant shall stand cancelled. Fine, if any, paid by the appellant shall be refunded to him.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com