

Durga Devi (Smt.) Vs. State of Rajasthan

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Court : Rajasthan

Decided On : Mar-20-2006

Reported in : RLW2006(2)Raj1659; 2006WLC(Raj)UC552

Judge : Narendra Kumar Jain, J.

Acts : [Evidence Act, 1872](#) - Sections 113B; Indian Penal Code (IPC) - Sections 302, 304B, 307 and 498A; Code of Criminal Procedure (CrPC) - Sections 313

Appeal No. : S.B. Criminal Appeal No. 315 of 2002

Appellant : Durga Devi (Smt.)

Respondent : State of Rajasthan

Advocate for Def. : B.S. Chhaba, Public Prosecutor

Advocate for Pet/Ap. : A.K. Gupta,; Rinesh Gupta,; Harsh Saini and;

Disposition : Appeal allowed

Judgement :

Narendra Kumar Jain, J.

1. The Additional Sessions Judge (Fast Track) No. 2, Jaipur City, Jaipur, vide its judgment dated 5.2.2002 in Sessions Case No. 5/2002 (56/2001), convicted and sentenced, both, accused-appellants Naveen Kumar and Smt. Durga Devi, under

Section 304B of the Indian Penal Code (for short, 'IPC') to seven years rigorous imprisonment and a fine of Rs. 1000/- in default of payment of fine, to further undergo three months' rigorous imprisonment; and under Section 498A IPC to three years rigorous imprisonment and a fine of Rs. 1000/-, in default of payment of fine, to further undergo three months' rigorous imprisonment. Being aggrieved with the same, the accused-appellants have preferred this appeal before this Court.

2. Briefly stated the facts relevant for disposal of this appeal are that PW-6 Govind Ram, the father of deceased. Maya, lodged a typed report (Exhibit P-5), to the Station House Officer, Police Station, Brahmpuri, Jaipur, wherein it was alleged that in the marriage of his daughter Maya, which was solemnized on 21.7.1999 with Naveen Kumar son of Jai Kishan, he gave sufficient dowry as per his capacity but her in-laws started harassing his daughter for not bringing sufficient dowry. He further stated that as and when his daughter came to her maternal home, she always complained of her in-laws about demand of scooter and cash of Rs. 50,000/- the members of her in-law's family used to beat her. It was further alleged that about four months ago the members of her in-law's family told her that she should bring scooter and cash of Rs, 50,000/- otherwise she need not come to their house. On 24.1.2001 he received a telephonic message from Ram Prasad, the uncle-in- law, of Maya, at about 5.00 P.M. that Maya has been admitted in hospital and she is in serious condition. Thereafter they reached at 9.00 P.M. in S.M.S. Hospital and saw that she had burnt badly. On asking, she stated that her mother-in-law and husband set her on fire by pouring kerosene oil on her body, therefore, in the written report he prayed that necessary action maybe taken in the matter.

3. The police registered F.I.R. No. 33/2001 under Section 498A and 307 IPC. During investigation of the case, the statement of Maya (Exhibit P-17) was recorded by PW-10 Shri Ajay Kumar Sharma, Additional Civil Judge (Junior Division) and Judicial Magistrate, First Class, No. 9, Jaipur City, Jaipur. She succumbed to the injuries and her postmortem was conducted. As per postmortem report (Exhibit P-15) the deceased sustained 60% burn injury. After completion of investigation the police submitted a charge- sheet against Naveen Kumar, the

husband, and Smt. Durga Devi, the mother-in-law of the deceased.

4. The learned Trial Court framed charge against the accused- appellants under Sections 498A and 304B and, in alternative, under Section 302 IPC. The accused-appellants denied the charge and claimed to be tried.

5. In support of the case, the prosecution examined 11 witnesses and produced documentary evidence Exhibit P-1 to Exhibit P-22. The accused persons, in their statements under Section 313 of the Code of Criminal Procedure (for short, 'Cr.P.C.') contended that they have falsely been implicated in the matter. After hearing both the parties, the learned Trial Court convicted and sentenced the accused persons, as mentioned above.

6. The learned Counsel for the accused-appellants contended that death of Maya was accidental death and not homicidal. Maya died as her 'saari' caught fire while she was preparing tea. He contended that there was no evidence of demand for dowry in the present case as well as cruelty and harassment or ill-treatment with deceased Maya by her in-laws. He referred the statements of PW-6 Govind Ram, the father, PW-7 Roop Narain, the uncle, PW-8 Shanti Devi, the mother, PW-9 Prem Chand, the brother, and PW-1 Laxmi Narain, the brother-in-law of the deceased, who all were declared hostile, except PW-7 Roop Narain. He contended that PW-7 Roop Narain has not supported the prosecution story and he was not declared hostile, therefore, his statement is binding on the prosecution. On the basis of the evidence of the prosecution, he contended that there is no iota of evidence about demand for dowry or cruelty and harassment with deceased and, therefore, the basic ingredients to prove the offence under Section 304B IPC are missing in the present case and the learned Trial Court has wrongly convicted the accused-appellants. He further contended that the learned Trial Court has convicted the accused persons only on the basis of dying-declaration of deceased (Exhibit P- 17), recorded by PW-10 Ajay Kumar Sharma, Judicial Magistrate, whereas, as per the contention of the learned Counsel for the accused-appellants, the statement of deceased Maya recorded by the Investigating Officer has not been placed on the record for the reasons best known to the prosecution. He referred the statement of PW-11 Ramesh Chand Sharma, the Investigating

Officer, who admitted that he recorded the statement of deceased but the same has not been placed on the record, meaning thereby the prosecution deliberately withheld the another dying-declaration of the deceased and, therefore, a presumption be drawn against the prosecution that, had the said dying-declaration been produced on the record, it would have been read against the prosecution. He also contended that there was third dying-declaration in the present case as when the deceased was admitted in the hospital then she narrated the story to her father, mother and uncle. The parents of the deceased have been declared hostile and PW-7 Roop Narain, the uncle, has not been declared hostile and he stated in the court that he asked Maya as to how she received burn injuries then she told that her 'saari' caught fire while preparing tea. He contended that there is oral dying-declaration of the deceased which is clear from the statement of PW-7 Roop Narain but the learned Trial Court has not considered the effect of non-tiling of dying-declaration recorded by PW-11 Ramesh Chand and oral dying-declaration, which is clear from the statement of PW-7 Roop Narain. He, therefore, contended that the learned Trial Court converted the accidental death of Maya into homicidal death and in this view of the matter the accused-appellants are entitled to be acquitted.

7. The learned Public Prosecutor, on the other hand, contended that Maya was married with accused Naveen on 21.7.1999 and she died within one-and-half year. He further contended that it was not a natural death of Maya. He also read the statement of PW-2 Prahlad to show the conduct of the accused-appellants that they did not come in her rescue when her 'saari' caught fire or she was set on fire. He further contended that the learned Trial Court has rightly believed the dying-declaration (Exhibit P-17), which has been proved by the PW-10 Ajay Kumar Sharma, the Judicial Magistrate. He contended that there is no reason to disbelieve the testimony of PW-10 Ajay Kumar Sharma in the facts and circumstances of the case and in these circumstances even if the parents and relatives of the deceased have been turned hostile during trial then still looking to the heinous crime relating society, the conviction of the accused persons recorded should be upheld.

8. I have considered the rival submissions and minutely scanned the record and the impugned judgment of the Trial Court.

9. Section 304-B IPC relates to dowry death wherein it is prescribed that where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called 'dowry death', and such husband or relative shall be deemed to have caused her death. Section 304-B IPC makes it clear that to connect an accused for the above offence it must be established in the case that (1) the death of a woman caused by any burns or bodily injury or in such circumstances which are not normal, (2) such death occurs within seven years from the date of her marriage, (3) that the victim was subjected to cruelty or harassment by her husband or any relative of her husband, (4) such cruelty of her husband should be for or in connection with demand for dowry, and (5) it is established that such cruelty and harassment was made soon before her death.

10. The Parliament has also inserted Section 113-B in the Indian Evidence Act with effect from 1st May 1986 relating to presumption as to dowry death where it is stated that when the question is whether a person has committed dowry death of a woman and it is shown that soon before her death such woman had been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the court shall presume that such person has caused the dowry death.

11. From a conjoint reading of Section 304-B of the IPC and Section 113-B of the Indian Evidence Act, it is apparent that a presumption arising there under will operate if the prosecution is able to establish the circumstances as set out in Section 304-B of the IPC.

12. Keeping in view the above legal position, now I examine the prosecution evidence in the present case.

13. So far as the death of Maya is concerned, it is established that her death was not a natural death and she died within seven years from the date of her marriage but so far as cruelty or harassment by her husband or any relative of her husband that too for or in connection with demand for dowry is concerned I find that PW-6 Govind Ram, the father of the deceased Maya, has stated that there is no system in their society of giving and taking dowry. He stated that he did not receive any complaint from her daughter Maya. Her daughter died as her 'saari' caught fire while preparing tea. He also stated that he did not make any complaint in the police. So far as Exhibit P-5, typed report given in his name, is concerned, he stated that one unknown person came with a typed report and got his thumb impression on it. Similar are the statements of PW-8 Shanti Devi, the mother and PW-9 Prem Chand, the brother of the deceased, who have stated that Maya did not make any complaint about any demand for dowry by her in-laws and she was very happy with her in-laws. The prosecution declared PW- 1 Laxmi Narain, PW-6 Govind Ram, PW-8 Shanti Devi and PW-9 Prem Chand, the brother of the deceased, hostile.

14. PW-7 Roop Narain, the uncle of the deceased Maya, stated that he asked Maya in the hospital as to how this incidence took place and she stated that it was an accident as her 'saari' caught fire while preparing tea. She did not allege any allegation against her mother-in-law or husband that they set her on fire. It is relevant to mention that PW-7 Roop Narain is prosecution witness and he has not been declared hostile and therefore his statement is binding on the prosecution.

15. The above referred prosecution evidence makes it clear that important and material prosecution witnesses have not supported the charge framed against accused-persons about demand for dowry or cruelty or ill-treatment by accused-persons with deceased Maya 'soon before' or 'at any point of time' before her death.

16. The accused persons, in their statements under Section 313 Cr.P.C. have stated that an unknown person, who was their enemy, got the thumb impression of Govind Ram on the typed report and compelled the deceased to give false statement before the Magistrate. They have also stated that the said person told

Maya that her treatment in hospital is possible only when she gives false statement before the Magistrate against her in-laws otherwise she will not be medically treated in the hospital.

17. After discussion of above evidence, now only evidence which remains to be considered and which has been made the basis by the Trial Court for conviction, is the dying-declaration of the deceased Exhibit P-17 recorded by PW-10 Ajay Kumar Sharma, the Judicial Magistrate. The sole question the present case is as to whether the dying-declaration of deceased Exhibit P-17 should be believed or not in the facts and circumstances of the present case. In this connection the statement of PW-11 Ramesh Chand Sharma, the Investigation Officer is very relevant, who has admitted in his cross-examination that it is correct that during investigation he recorded the statement/dying-declaration of Smt. Maya but the same has not been produced on the file of the court. He has stated as under: -

YAHA SAHI HAI KI MAYA SE PUCHHTAACHH KE DAURAN JO BAAT BATAI OR JO BAYAN LIKHE VAHA PATRAWALI MEIN MOUJUD NAHI HAIN.

18. The aforesaid admission of the Investigating Officer shows beyond any reasonable doubt that he also recorded the dying- declaration of Maya which has been withheld by the prosecution and in case this fact of withholding of important and relevant evidence is considered with the statement of PW-6 Govind Ram, PW-8 Smt. Shanti Devi and PW-9 Prem Chand, then it is clear that prosecution has hidden true facts from the court and it creates serious doubt on the prosecution case. A presumption can be drawn against the prosecution that in case the said dying-declaration would have been placed on the record then it would have gone against prosecution.

19. The statement of PW-7 Roop Narain, the uncle of the deceased is also important and relevant, and his statement is binding on the prosecution as he has not been declared hostile by the prosecution. He admitted in his cross-examination that they asked Maya and she told them that her 'saari' caught fire while preparing tea. This fact shows that there was oral dying- declaration of the deceased in the presence of PW-7 Roop Narain, the uncle of the deceased and he stated about the said dying-declaration of the deceased before the court. He has stated as

under: -

HAMNE MAYA SE PUCHHA TO USNE KAMRE KE ANDAR GAS CHULHE PAR CHAAY BANATE SAMAYA SAADI KA PALLU GAS PAR TIKNE SE KAPDE MEIN AAG LAGNAA BATAAYA THA

20. The above evidence shows that there was not only single dying declaration (Exhibit P-17) but two other dying-declarations were also there of the deceased, one recorded by PW-11 Ramesh Chand Sharma, Deputy Superintendent of Police, and another oral dying-declaration of the deceased gave before PW-7 Roop Narain. The learned Trial Court has considered only one dying-declaration Exhibit P-17.

21. Now I examine the dying-declaration Exhibit P-17. Exhibit P-16 is the letter written by S.H.O. to the Chief Judicial Magistrate, Jaipur City, Jaipur to appoint some Magistrate to record the statement of injured Smt. Maya and in the subject of the letter the Bed No. 10 was mentioned. However at the second page of Exhibit P-16 the Additional Civil Judge and Judicial Magistrate has mentioned that the statement has been taken at Bed No, 7. There is endorsement on Exhibit P-16 of one doctor that patient is fit for giving statement but the said doctor has not been examined by prosecution in the present case. PW-10 Ajay Kumar Sharma, the Judicial Magistrate, has not stated the name of the doctor in his statement. Exhibit P-17, the dying-declaration, shows that no time has been mentioned on it. It is also relevant to mention that even the bed ticket of the hospital has not been placed on the record by the prosecution. The compounder was also not examined. Exhibit P-17 shows that no one identified Maya on Bed No. 7 that she is the same Maya. This fact of identification of injured becomes relevant as there is variance in Bed number. The dying-declaration Exhibit P-17 is not corroborated by other surrounding evidence, therefore it becomes doubtful. Exhibit P-17 is contrary to oral dying-declaration as stated by PW-7 Roop Narain. The dying-declaration recorded by Investigating Officer has been withheld. Therefore it is unsafe to base conviction of the accused only on the basis of dying-declaration Exhibit P-17.

22. The Hon'ble Supreme Court in Dandu Lakshmi Reddy v. State of A.P. : 1999 CriLJ4287 , considered the case of bride burning itself where there was material

contradictions in between two dying-declarations pertaining to the context in which the deceased caught fire, and held that in the circumstances of the case the dying-declarations are not reliable. The Apex Court observed as under: -

16. Thus the High Court has sidelined such a noticeable discrepancy looming large as between the two different statements made by the same person. When the sphere of scrutiny of the dying-declaration is a restricted area, the court cannot afford to sideline such a material divergence relating to his very occasion of the crime. Either the context spoken to in one was wrong or that in the other was wrong. Both could be reconciled with each other only with much strain as it relates to the opportunity for the culprit to commit the offence. Adopting such a strain to the detriment of the accused in a criminal case is not a feasible course.

21. We are unable to concur with the manner in which the Division Bench of the High Court side stepped the crucial evidence of PW 7 Bali Reddy and PW 8 Thiru Palamma (father and mother of deceased Lakshmi Devi) which diametrically went against the version of the deceased in Ext.P-11 and Ext.P-14.

23. As the dying-declarations is tested thus on the touchstones available in evidence and permitted by law, it does not stand scrutiny. It will be unsafe to convict any person on the strength of such a fragile and rickety dying-declaration.

23. The evidence in the present case shows that PW-7 Roop Narain, the uncle of the deceased, stated that in the oral dying- declaration of the deceased she stated that her 'saari' caught fire while preparing tea whereas Exhibit P-17 shows that the accused persons set her on fire. The dying-declaration recorded by Investigating Officer has not been placed on record.

24. I have already discussed the evidence about demand for dowry, cruelty and harassment by in-laws with the deceased. The parents and brother of the deceased have stated that there was no harassment or cruelty with the deceased by her In-laws and there was no demand for dowry in connection with her marriage by in- laws of the deceased. PW-6 Govind Ram, the father, PW-8 Shanti Devi, the mother, and PW-9 Prem Chand, the brother of the deceased, have been declared hostile. PW-7 Roop Narain, the uncle of the deceased, has not supported

the prosecution story but still he was not declared hostile and his statement is binding on the prosecution case. In these circumstances I find that the prosecution has failed to prove the case against accused-persons beyond all reasonable doubt and accused-persons are entitled to get the benefit of doubt in the facts and circumstances of the present case. The learned Trial Court has committed a serious illegality in convicting the accused-appellants only on the basis of dying-declaration Exhibit P-17 in the facts and circumstances of the present case.

25. Consequently the appeal of both the appellants is allowed. Their conviction recorded by the learned Trial Court is set aside. The accused persons are acquitted. They are in jail, therefore, they may be set at liberty forthwith, if their custody is not required in any other case.

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