

Bijoy Kumar Sen Vs. the State

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Court : Kolkata

Decided On : Jan-29-1988

Reported in : 1988CriLJ1818

Judge : Sankar Bhattacharyya and; J.N. Hore, JJ.

Appellant : Bijoy Kumar Sen

Respondent : The State

Judgement :

Sankar Bhattacharyya, J.

1. Bijoy Kumar Sen alias Birju, the appellant before us, was arraigned before the learned Additional Sessions Judge, North 24 Paraganas, Barasat, to answer the following charges

First - That you, on or about the 12th day of May, 1982 at Michaelnagar, Janakalyan Hindu Hotel, P.S. Airport, did commit murder by intentionally or knowingly causing the death of your wife Smt. Gopa Sen and thereby committed an offence punishable under Section 302 of the Indian Penal Code.

Secondly - That you, on or about the same day of May, 1982 knowing that certain offence, to wit, murder punishable with death or imprisonment for life, had been committed knowingly gave false information, to wit, information that the deceased

Gopa Sen had caught fire owing to accidental burst of stove, with the intention of screening yourself from legal punishment and thereby committed an offence punishable under Section 201 of the Indian Penal Code.

2. On conclusion of the trial, the learned Additional Sessions Judge convicted the appellant of both the charges and for such conviction, sentenced him to imprisonment for life and to rigorous imprisonment for seven years respectively, with the direction that both the sentences were to run concurrently. This appeal by the appellant seeks to assail the above order of conviction and sentence.

3. The prosecution case, in a nut-shell, was that Gopa (deceased) was the wife of the appellant and at the material time was living with him in the back portion of Janakalyan Hindu Hotel at Michaelnagar within Police Station Air Port. The hotel was owned by the appellant's sister and its back portion was used for residential purpose of the owner and her relatives.

4. According to the prosecution, for about a month after the marriage the couple lived happily but thereafter, the relation between them became strained because of demand for dowry by the appellant's mother.

5. On 12-5-1982 around 10 a.m., being attracted by the screams of Gopa, some employees of the hotel including Sambhu Sarkar (P.W. 11) and a close neighbour Sm. Sefali Das (P.W. 2), rushed to her room and found her lying there with severe burn injuries all over her body. They, along with the appellant, at once removed her to the R.G. Kar Hospital in a taxi where she was admitted for treatment.

6. Gopa's parents were duly informed and they reached the hospital in the afternoon. When her father Dipak Biswas (P.W. 1) asked her about the cause of her injuries, she replied 'Father please let me live. If I survive, I will tell you everything'. Next morning, when he again met her she wanted to tell something but he said that the statement should be made before a Police Officer. He then went to Police Station, Chitpur and reported the incident there.

7. Sub-Inspector S.R. Seal (P.W. 4) of the Chitpur Police Station came to the hospital with him and recorded the dying declaration of Gopa (Ext. 2) at 10.25 a.m.

in presence of Dr. K. Haldar (P.W. 12). In her dying declaration, she accused the appellant of having set fire to her body during an altercation.

8. Gopa died in the hospital on 15-5-1982 at 7.20 a.m. On 16-5-82, at 9.10 p.m., the recorded dying declaration (Ext. 2) was received at the Air Port P.S. by Sub-Inspector S.K. Roy (P.W. 5) through constable A. Dutta (P.W. 6) of the Chitpur Police Station. Treating it as the first information report, the Airport Police registered a case against the appellant under Section 326/327, I.P.C. and took up investigation. On receipt of the death report of Gopa, the case was converted into one under Section 302/201, I.P.C.

9. On completion of the investigation the police submitted charge-sheet against the appellant, which in the usual course, ended in committal of the case to the Court of Session.

10. In defence, the appellant pleaded innocence and alleged that he had been falsely implicated by his father-in-law. It was his further defence that the dying declaration of Gopa was the result of tutoring by her father.

11. To prove its case, the prosecution examined all told 13 witnesses, while none was examined by the defence.

12. The death of Gopa as a result of burn injuries is not disputed before us and has also been proved by overwhelming evidence. Sm. Sefali Das (P.W. 2) and Sambhu Sarkar (P.W. 11) rushed to the appellant's room hearing the screams of Gopa and found her lying inside the room with severe burn injuries all over her body. Dr. N.K. Dey (P.W. 3) who first examined her in the Emergency Ward of the R.G. Kar Hospital on 12-5-1982 around 12.50 p.m., deposed to the effect that her whole body was burnt by fire.

13. The autopsy surgeon Dr. D.K. Debnath (P.W. 10) also found burn injuries on different parts of her body, as fully detailed in his evidence and was of the opinion that the death of Gopa was due to the effect of the burn injuries which were ante-mortem and homicidal in nature.

14. In support of his opinion that the injuries were homicidal in nature Dr. Debnath gave the following reasons:

(1) The victim was found pregnant and (2) the burnt areas showed sooty blackening of the affected parts and the areas involved did not appear to be consistent with suicidal infliction.

15. We are not at all impressed by the reasons given by the autopsy surgeon in support of his opinion that the injuries were homicidal in nature. As regards the first reason, he seems to have been influenced by the thought that a pregnant woman would ordinarily be loath to commit suicide. It is, however, the case of neither party that she committed suicide by burning herself. There could, therefore, be only two possibilities - the injuries were either accidental or homicidal in nature.

16. In cross-examination, Dr. Debnath conceded that there would be sooty blackening of the affected parts also in the case of self-immolation by fire but added that in that case, the parts affected would differ from homicidal burns without, however, elaborating the differences. He further conceded that in a case of death by accidental fire by coming in contact with Kerosene oil there may be sooty blackening of the affected parts. We, therefore, find that the opinion of the autopsy surgeon that the burn injuries were homicidal in nature is not at all dependable and to determine whether the injuries were accidental or homicidal in nature, we have necessarily to look to the dying declaration and other materials appearing from the evidence on record.

17. In the absence of direct evidence to prove the charges, the prosecution has relied upon - (1) motive and (2) dying declaration of Gopa as recorded by Sub-Inspector Seal (P.W. 4) in the hospital on 13-5-1982.

18. The only evidence of motive comes from Dipak Biswas (P.W. 1), father of Gopa. According to him he purchased a T.V. set as a marriage present for his daughter but her mother-in-law refused to accept it and instead demanded a sum of Rs. 5,000/-. He, however, paid her Rs. 4,000/- only and kept the T.V. set for himself.

19. His evidence further goes to show that he used to visit his daughter once or twice a month. One day, during one of such visits, he found her visibly perturbed. When asked why she was looking perturbed, she at first declined to say anything but being insisted upon, disclosed that her mother-in-law was demanding the T.V. set also and asked him not to give the T.V. set either to her husband or to her mother-in-law. She also disclosed that of late, she was not receiving good treatment from her husband and mother-in-law.

20. In cross-examination P.W. 1 admitted that in his statement under Section 161 of the Code of Criminal Procedure which was recorded on the night of 16-5-1982 after Gopa's death, he did not disclose to the investigating officer the alleged demand of rupees five thousand or the T.V. set by Gopa's mother-in-law or the alleged payment of rupees four thousand by him to Gopa's mother-in-law instead of the T.V. set. It was also elicited from the first investigating officer (PW 7) that apart from the above omissions which are quite material in nature, P. W. 1 did not also disclose during his examination under Section 161 of the Criminal Procedure Code that one day during his visit to his daughter he found her visibly perturbed, that on being asked she at first declined to say anything, that at his instance she ultimately disclosed that her mother-in-law was demanding the T.V. set also, that she asked him not to give the T.V. set either to her husband or to her-in-laws or that she told him that of late, all was not going well and she was not receiving good treatment from them.

21. It would thus appear that the motive for the alleged crime was introduced by the prosecution for the first time during trial which commenced on 28-8-86 that is, a little over 4 years and three months after Gopa's death. In such circumstances and in the absence of any corroboration from any other source, we are not prepared to place any reliance upon the testimony of P.W. 1 as regards the alleged motive and we discard it as nothing but a subsequent embellishment to prop up the prosecution case.

22. All that now remains of the prosecution case is the alleged dying declaration of Gopa. Mr. Dutta, learned Advocate for the accused appellant tried to argue that Gopa did not make the alleged statement and that it was manufactured

subsequent to her death by Sub-Inspector Seal (P.W. 4) at the instance of her father Dipak Biswas (P.W. 1). Mr. Dutt, did not, however, pursue the point in view of the categorical evidence of Dr. K. Haldar (P.W. 12), a completely independent witness, to the effect that Gopa was fully conscious at the time of making the statement and that he was present with Sub-Inspector Seal when the statement was made by her. In view of the evidence of Dr. Haldar, whom we see no reason to disbelieve, we are not prepared to accept the contention that the dying declaration was subsequently manufactured by P.W. 4 at the instance of P.W. 1.

23. The next point - and the most crucial one - for our consideration is whether the dying declaration (Ext. 2) is true and dependable and can safely be acted upon so as to form the basis of conviction of the appellant.

24. Before proceeding to deal with the dying declaration, we may profitably extract below the guidelines set out by the Supreme Court in *Khushal Rao v. State of Bombay* : 1958 CriLJ106 to test the reliability of a dying declaration. The Supreme Court pointed out that a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing an evidence; that a dying declaration which has been recorded by a competent magistrate in the proper manner, that is to say, in the form of questions and answers and as far as practicable in the words of the maker, stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character and that in order to test the reliability of a dying declaration the Court has to keep in view the circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed, at night, whether the capacity of the man to remember the facts stated has not been impaired at the time he was making the statement by circumstances beyond his control, that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the record of it; and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties.

(Emphasis supplied by us).

24A. The dying declaration (Ext. 2), when translated into English, reads as under:-

My name is Gopa Sen. My age is 20 years. My address is Jana Kalyan Hindu Hotel, Police Station Air Port. I was married about six months back, I had no unity of mind with my husband but I do not know why. On 12-5-82 at 10 A.M. I was in my room with my husband. An altercation was going on between me and my husband. Suddenly my husband poured kerosene oil on my body from a kerosene lamp, set fire to my body and closed the door. Out of fear, I started shouting and running. Thereafter, my husband brought me to the hospital (R.G. Kar.) On the way he told me that if anybody asked me about the cause of the fire I should say that the fire was caused by a stove. Earlier, I disclosed the cause of the fire to the doctor as tutored by my husband. Now I have disclosed the truth on being asked again by the police and the doctor about the cause of the fire. The police and the doctor have recorded my statement, read it over to me and I have affixed my thumb impression to it after being satisfied that my statement has been correctly recorded.

25. It may be pointed out that when Sm. Sefali Das (P.W. 2), a close neighbour of Gopa and Sambhu Sarkar (P.W. 11), an employee of the hotel, rushed to her room on hearing her screams, they did not find the door closed because, it appears from the evidence that after entering the room they saw Gopa there with burn injuries all over her body. Though conscious, she did not make any allegation against her husband or about the cause of the fire. According to Sm. Sefali Das (P.W. 2), the relation between Gopa and her husband was quite cordial. She accompanied Gopa to the hospital in the taxi and it appears from her cross-examination that during their journey to the hospital, she asked Gopa as to how she sustained the burn injuries and her reply was that she caught fire from a burning stove while doing some domestic work.

26. Sambhu Sarkar (P.W. 11) deposed to the effect that on 12-5-82, after performing night duty on the previous night, he was lying on a cot in an open space adjacent to the room where the appellant was living with his wife Gopa. Suddenly, hearing a hue and cry, he rushed to the appellant's room and found that Gopa had been burnt by fire. Thereafter, he, along with the appellant and several

others, removed her to the R.G. Kar hospital in a taxi.

27. It will be significant to note that he too did not speak of any tutoring of Gopa by the appellant either during her removal to the taxi from her room or during the journey from the hotel to the hospital. Also, we find it difficult to imagine that the appellant would tutor his wife in presence of his neighbour Sm. Sefali Das and his sister's employees Sambhu Sarkar to give out the cause of her injuries as accidental. Sm. Sefali Das is a completely independent witness and Sambhu Sarkar, as is seen from his cross-examination, left his job in the hotel 3/4 months after the occurrence that is, towards the end of 1982. There could, therefore, be no conceivable reason for him to oblige the appellant by suppressing the truth about four years he had already left his job. In such circumstance the alleged tutoring by the appellant, as appearing in the dying declaration, must be dismissed outright as an afterthought.

28. It is also seen from the evidence of Sambhu Sarkar (P.W. 11) that besides him certain other employees of the hotel rushed to the appellant's room hearing Gopa's screams. Although they were examined by the investigating officer and some of them namely, Sm. Puspā Roy and one Bhola Sengupta were named as witnesses in the charge-sheet, they were withheld by the prosecution without any explanation whatsoever.

29. It would be thus clear that Gopa did not make any allegation against the appellant at the earliest opportunity that is, while she was being removed to the taxi from her room and also during her journey to the hospital in the taxi. On the contrary, during her journey to the hospital, she disclosed to Sm. Sefali Qas (P.W. 2) on her query that the cause of the fire was accidental in nature.

30. We have mentioned already that she was taken to the hospital around 12.50 p.m. and was admitted by Dr. N.K. Dey (P.W. 3). It will appear from his evidence that although the victim was conscious she did not disclose the cause of her injuries. It was the appellant who stated that she accidentally caught fire from a burning stove but she did not open her mouth to contradict him. It is also seen from the evidence of Dr. Dey that even after Gopa's admission to the hospital, he tried to ascertain from her a number of times the cause of her injuries but she did

not say anything.

31. Dipak Biswas (P.W. 1), father of Gopa, rushed to the hospital with his wife on the same afternoon on receiving information of the incident. When he asked Gopa about the cause of the injuries, she did not disclose anything. She merely said 'father please let me live. If I survive, I will tell you every thing.' On the next day, his father-in-law and mother-in-law also visited the hospital but they were not examined by the prosecution. The mother of Gopa who was present with Dipak Biswas (P.W. 1) in the hospital was not also examined.

32. According to P.W. 1, when he visited his daughter on the next morning she wanted to tell something, but surprisingly enough, without caring to listen what she actually wanted to say, he immediately left for the Chitpur Police Station telling her that her statement should be made in presence of the police. This conduct of P.W. 1 appears to us to be highly unnatural because, he did not even know what his daughter wanted to say. He appears to have presumed that his daughter was going to make a dying declaration against her husband which ought to be made in presence of the police.

33. He came to the hospital with Sub-Inspector Seal (P.W. 4) who, as pointed out already, recorded the dying declaration at 10.25 a. m. It next appears from the evidence of P.W. 1 that after the police had left he again went to his daughter when she told him that her husband had set fire to her body after pouring kerosene oil.

34. It was, however, elicited from the cross-examination of the first investigating officer (P.W. 7) that P.W. 1 did not disclose to him that his daughter wanted to tell him something when he again met her on the following morning (13-5-82) that he told her that if she wanted to say something, the statement should be made before the police or that subsequent to the recording of her dying declaration by the police, she told him that her husband had set fire to her body after pouring Kerosene oil. It is thus manifestly clear that the above story was introduced for the first time more than four years after the occurrence. It surpasses our imagination as to why, even after such a statement of his daughter, he did not report the incident to Air Port Police Station. In fact, he did not lodge any complaint at all

accusing the appellant of having committed murder of his daughter. The first information report was recorded at the Air Port Police Station only on 16-5-1982 at 21.10 hours and that too, on the basis of the dying declaration (Ext. 2) which was received from the Chitpur Police Station. We fail to understand why the Chitpur Police Station took three days to send the dying declaration to the Air Port Police Station, although Gopa died on 15-5-1982 at 7.20 p.m.

35. On an ultimate analysis of the evidence, we find that no dying declaration was made by Gopa at the earliest opportunity; secondly, during her journey to the hospital in the taxi she made a dying declaration where she categorically stated that the cause of her injuries was accidental in nature which is totally inconsistent with her recorded dying declaration (Ext. 2); thirdly, in her presence her husband disclosed the injuries to Dr. N.K. Dey as accidental which she did not protest; fourthly, when after her admission Dr. Dey again asked her about the cause of her injury she did not give any reply; fifthly, even when her parents came to see her in the hospital on the same afternoon and enquired about the cause of her injury, she did not make any allegation against her husband.

36. For the first time after arrival of the police on the next day, she accused her husband of having set fire to her body. Before her dying declaration was recorded her parent's grandfather and grandmother had met her and there was, therefore, ample scope for tutoring her to implicate her husband. That apart, the allegation in the dying declaration that her husband tutored her to say if asked by any one, that she accidentally caught fire from a burning stove has been found to be false. So also her statement that earlier she had disclosed to the doctor the cause of her injuries as tutored by her husband because, we have already seen that she did not make any statement before the doctor. The alleged dying declaration made by her to father (P.W. 1) after her dying declaration (Ext. 2) was recorded by the police cannot also be accepted for the reasons already pointed out above.

37. The statement in the dying declaration that the appellant closed the door of the room after setting fire to her body has not also been substantiated because Sm. Sefali Das (P.W. 2) and Sambhu Sarkar (P.W. 11) who rushed to her room hearing her scream, did not find the door closed nor did they find her husband in

or around the room.

38. In his examination under Section 313 of the Code of Criminal Procedure, the appellant stated that he was in the hotel at the time of occurrence. Hearing the screams of his wife, he rushed to his room and found her in flames. In his attempt to save her life, he too sustained burn injuries on his hands and other parts of the body. Thereafter he took her to the hospital where she died. Though the defence did not examine any doctor to prove the injuries of the appellant, it was admitted by Gopa's father (P. W. 1) in cross-examination that while in the hospital he found both palms of the appellant under bandage. Sambhu Sarkar (P.W. 11) also admitted in cross-examination that he found burn injuries on different parts of the appellant's body. This gives the clearest indication that the appellant tried to put off the fire to save the life of his wife.

39. On an anxious consideration of the foregoing facts and circumstances, we find ourselves unable to accept the dying declaration (Ext. 2) as true and dependable. We are inclined to think that the alleged oral dying declaration made by Gopa to her father is nothing but a subsequent embellishment to secure the conviction of the appellant. We have also dismissed the alleged motive for the crime as untrue and nothing but an after thought.

40. There being no other evidence to sustain the charge under Section 302 of the Indian Penal Code, it must fail as not having been proved at all. As the prosecution has signally failed to prove that the death of Gopa was homicidal in nature and the possibility of her death by accidental fire cannot be ruled out, the charge under Section 201 of the Indian Penal Code must also necessary fail.

41. In the result, we allow the appeal and set aside the order of conviction and sentence passed by the lower Court against the appellant in respect of the charges under Sections 302 and 201 of the Indian Penal Code. The appellant be set at liberty forthwith, if not required in connection with any other case.