

GAHC010022772015



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Crl.A./253/2015

SRI DEBAJIT KALITA
S/O LATE BINOD CHANDRA KALITA, R/O MALIGAON, DIST. KAMRUP

VERSUS

THE STATE OF ASSAM AND ANR.
REPRESENTED BY PP, ASSAM.

2:ROJO KALITA
S/O- SRI SONO KALITA

DISPUR SUPER MARKET
DISPUR
PIN-781006

Advocate for the Petitioner : MS.P SAHA

Advocate for the Respondent : PP, ASSAM

BEFORE

HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA
HON'BLE MRS. JUSTICE MALASRI NANDI

For the appellant : Mr. B. Prasad Advocate

For the respondents : Ms. B. Bhuyan Additional PP, Assam.

Date of hearing : 18.07.2023
Date of judgment : 21.07.2023.

JUDGMENT AND ORDER (CAV)

(M. Zothankhuma, J)

Heard Mr. B. Prasad, learned counsel for the appellant. Also heard Ms. B. Bhuyan, learned Additional Public Prosecutor for the State.

2. This appeal has been preferred against the judgment & order dated 17.09.2014 passed by the learned Sessions Judge, Kamrup (M) in Sessions Case No. 38(K)/2013, by which the appellant has been convicted under Section 302 IPC and sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs. 5,000/-, in default, to undergo simple imprisonment for 6 (six) months.

3. The Prosecution case in brief is that an FIR dated 16.11.2012 was submitted at the Maligaon Police Outpost by the informant/ Prosecution Witness No. 2 (PW-2), who stated that her deceased sister married the appellant and started living with the appellant and her mother-in-law thereafter. The deceased suffered mental and physical torture due to dowry related demands and for which large amounts of money had been paid to the appellant. However, the deceased was set on fire by the appellant and his mother on 15.11.2012 at 9 p.m, which resulted in her death.

The appellant and his mother thereafter made an attempt to show that the burning of the deceased was an attempt to commit suicide by the deceased.

The deceased was admitted to the Gauhati Medical College Hospital (GMCH) by the appellant and thereafter the informant was informed of the same. On arrival at the hospital, severe burn injuries on the body of the deceased was noticed and she was still alive while being in unbearable pain. The FIR further states that the deceased thereafter informed them in a broken voice that she had been set ablaze by her husband and her mother-in-law after being tortured. The deceased thereafter succumbed to her injuries on 16.11.2012.

4. In pursuance to the FIR submitted by the informant (PW-2), Jalukbari P.S. Case No.808/2012 under Section 304(B) IPC was registered. After investigation was completed by the police, charge-sheet was submitted against the appellant only under Section 304(B) IPC. The learned Trial Court framed charge under Section 304(B) IPC against the appellant, to which the appellant pleaded not guilty and claimed to be tried.

5. During the trial proceedings, an additional charge under Section 302 IPC was framed against the appellant on 18.03.2013. 11 (eleven) prosecution witnesses were examined by the learned Trial Court. After the appellant was examined under Section 313 Cr.P.C., the learned Trial Court came to a finding that the death of the victim could not be called a dowry death. However, on the basis of the evidence adduced by the prosecution witnesses and the fact that the dying declaration had been recorded by a Doctor (PW-9) and witnessed by 3 other Doctors, two of them being PW-1 and PW-3, it came to a finding that the appellant had set ablaze the deceased, which resulted in her death. As such, the appellant was found guilty of the offence of murder of his wife under Section 300 IPC and accordingly convicted under Section 302 IPC. He was accordingly

sentenced to undergo imprisonment for life with a fine of Rs. 5000/-, in default to undergo simple imprisonment for six months.

6. The learned Counsel for the appellant has made a challenge to the impugned judgment dated 17.09.2014 passed by the learned Trial Court on the following grounds. Firstly, the original dying declaration recorded by the doctors was not produced before the learned Trial Court, inasmuch as, PW-1 and PW-9 had stated in their evidence that the recorded dying declaration, which was exhibited as Exbt.-1, was a carbon copy. Secondly, the doctors had only stated that the deceased was conscious at the time of giving his dying declaration, but had not given any certificate/certification to the effect that the victim was in a fit mental condition to give a dying declaration. As such, the dying declaration was not admissible as evidence and could not have been made the basis for convicting the appellant. Thirdly, though charge was framed under Section 304B IPC only, the appellant had been convicted under Section 302 IPC. Fourthly, the demand for dowry had not been proved by the prosecution and fifthly, the circumstantial evidence did not form a complete chain to prove the guilt of the appellant in the death of his wife. In support of his submission that a dying declaration can only be accepted if there is a certificate/certification to the effect that the victim was in a fit mental condition to give a dying declaration, the learned counsel has relied upon the judgment of the Supreme Court in the case of *Paparambaka Rosamma & Others vs. State of A.P.*, reported in (1999) 7 SCC 695 and in the Division Bench judgment of this Court in the case of *Sunil Tanti vs. State of Assam*, reported in 2022 (4) GLT 45. In respect of his submission that the circumstantial evidence could not establish the guilt of the appellant, as the same did not form a complete chain of circumstances, the

learned counsel for the appellant has relied upon the judgment of the Supreme Court in the case of *Reena Hazarika vs. State of Assam*, reported in (2019) 13 SCC 289. The learned counsel for the appellant thus prays for setting aside the impugned judgment passed by the learned Trial Court and acquitting the appellant.

7. Ms. B. Bhuyan, the learned Additional Public Prosecutor for the State however submits that though the dying declaration that had been submitted before the learned Trial Court was a carbon copy, the signatures of the witnesses to the dying declaration were original. She also submits that there is no dispute with regard to the victim having made the dying declaration. She also submits that there is no requirement of any certificate or certification being made by the doctors stating that the victim was in a fit state of mind to make the dying declaration. She also submits that the law laid down by the three Judges Bench of the Supreme Court in *Paparambaka Rosamma (supra)*, which has been relied upon by the learned counsel for the appellant, has been held to be not laying down the correct enunciation of law, as per the decision of the Constitution Bench of the Supreme Court in the case of *Laxman vs. State of Maharashtra*, reported in (2002) 6 SCC 710. The learned Additional Public Prosecutor also submits that the evidences of the doctors, who had recorded the dying declaration and who had witnessed the dying declaration, go to show that there was subjective satisfaction of the doctors that the deceased was capable and fit to make the dying declaration. The learned Additional Public Prosecutor also submits that the circumstantial evidence clearly proved the involvement of the appellant in the death of his wife, inasmuch as, the appellant while being present in the residence at the time of incident with his wife, has

not made any explanation as to how the deceased caught fire.

8. We have heard the learned counsels for the parties.

9. A perusal of the record shows that the dying declaration has been recorded by a doctor (PW-9), who had given treatment to the deceased when she was brought into the hospital. The dying declaration was recorded by PW-9 in the presence of three other doctors, i.e. Dr. Dibya Jyoti Bora (PW-1), Dr. Biswamoy Das and Dr. Asman Ali (PW-3). Dr. Biswamoy Das has however not been made a prosecution witness in this case.

10. The above being said, PW-1 has stated in his evidence that he was present when PW-9 recorded the dying declaration of the deceased. He also states that at the time of making the dying declaration, the deceased was fully conscious and had given her statement without any external pressure or influence. The deceased in her dying declaration also stated that her husband poured kerosene on her body and thereafter set her on fire by lighting a match stick around 9:30 p.m. on 15.11.2012, in her husband's residence at Maligaon. He also states that Exbt.-1 is the carbon copy of the said dying declaration which was prepared by PW-9, wherein Exbt.1(1) was his actual signature as a witness.

In his cross-examination, PW-1 states that the Medical Officer of Surgery Department Dr. Asman Ali (PW-3) was present at the time of recording of the dying declaration along with Dr. Biswamoy Das. He also states that no relative of the deceased was present at the time of recording of the dying declaration. In his cross-examination, PW-1 further states that the deceased was fully

conscious and her speech was also quite normal.

11. The evidence of PW-3 is that he was on duty as a Casual Officer on 15.11.2012 at GMCH. On the said date, the deceased was brought to the hospital at around 9:30 pm with more than 95% burn injuries. Further, the patient was nine months pregnant. As the condition of the patient was very serious, his junior colleague, PW-9 recorded the dying declaration of the deceased in his presence. He also identified and exhibited his signature in the dying declaration as Ext.1(2).

In his cross-examination, PW3 states that at the time of recording the dying declaration of the deceased, PW-1, PW-9 and Dr. Biswamoy Das were also present. He also states that the deceased gave the statement in the Assamese language and the same was recorded by PW-9 in the English language. He also denies the suggestion given to him that the deceased was not in a fit condition to give her statement because of her severe burn injuries.

12. PW-9 in his evidence states that he was on duty on 15.11.2012 when the deceased was brought to the casualty department with more than 90% burn injuries. After giving initial treatment to the deceased and after her health condition became a little bit stable, it was decided to record her dying declaration considering the serious condition of the patient. Accordingly, the dying declaration of the deceased was recorded by PW-9 in the presence of PW-1, PW-3 and Dr. Biswamoy Das. PW-9 also identified the carbon copy of the dying declaration as Ext-1 and Ext-1(3) as his carbon copy signature. PW-9 also states that the patient succumbed to her injuries on the next morning.

In his cross-examination, PW-9 states that there is no endorsement in the recorded dying declaration that the contents of the same was read over to the maker or that there was any certification made that the deceased was in a fit condition to give her dying declaration. However, in the report it had been mentioned that at that time she was fully conscious to give her statement. The questions were put to the deceased in the Assamese language and the

same was recorded by PW-9 in the English language in Ext-1. Though Ext.1 was a carbon copy with original signatures of the witnesses, the appellant has not raised any objection to the admissibility of the document before the learned Trial Court. As such, Ext.1 is admissible in evidence.

13. The appellant did not put any questions or suggestions to the three Doctors, i.e. PW1, PW3 and PW9 that the contents of the recorded dying declaration were wrong or fabricated. No questions or suggestions were put to the effect that the deceased had not made the dying declaration as reflected in Ext-1 or that the deceased was not in a fit state of mind to give the dying declaration. In view of the above and the fact that three Doctors have stated that the deceased was fully conscious when her statement was recorded, we are of the view that there is nothing to show that the deceased was not fit to make the dying declaration.

14. In the case of *Paparambaka Rosamma & Others Vs. State of A.P.*, reported in (1999) 7 SCC 695, a three Judges Bench of the Apex Court has held that in the absence of a medical certification that the injured was in a fit state of mind at the time of making a dying declaration, it would be very risky to accept the subjective satisfaction of a Magistrate who opined that the injured was in a fit state of mind to make the dying declaration. The Apex Court accordingly held that it would not be safe to accept a dying declaration as true and genuine, even if it had been stated by the Doctors or the Magistrate that the patient was conscious while recording the dying declaration, unless it had been clearly stated that the injured was in a fit state of mind to make the dying declaration. The above judgment of the three Judges Bench of the Supreme Court has however been held to be an incorrect enunciation of law by the Constitution Bench of the Hon'ble Supreme Court in the case of *Laxman Vs. State of Maharashtra (Supra)*. The Constitution Bench in *Laxman Vs. State of Maharashtra (Supra)* had to decide the correctness of conflicting decisions of equal Benches of the Hon'ble Supreme Court in *Paparambaka Rosamma & Others Vs. State of A.P.(Supra)* and in the case of *Koli Chunilal Savji & Another Vs. State of Gujarat, 1999 (9) SCC 562*. In *Koli Chunilal Savji & Another (Supra)*, another three Judges Bench of the Hon'ble Supreme Court held that if the materials on record indicate that the deceased was fully conscious and

was capable of making a statement, the recorded dying declaration of the deceased cannot be ignored merely because the Doctor had not made the endorsement that the deceased was in a fit state of mind to make the statement in question. On examining the conflicting stands taken by the two different Benches of equal strength of the Hon'ble Supreme Court, the Constitution Bench held that the Judgment passed in *Paparambaka Rosamma & Others Vs. State of A.P.(Supra)* was not correctly decided and it affirmed the law laid down in *Koli Chunilal Savji & Another (Supra)*.

15. In *Laxman Vs. State of Maharashtra (Supra)*, the Constitution Bench held that it cannot be said that since there is no certification of the Doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. When it is recorded, no oath is necessary nor is the presence of a Magistrate absolutely necessary, although to assure authenticity it is usual to call a Magistrate, if available, for recording the statement of a person about to die. There is no requirement of law that a dying declaration must necessarily be made by a Magistrate and when such statement is recorded by a Magistrate, there is no specified statutory form for such recording. Consequently, what is essentially required is that the person who records the dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the Magistrate that the declarant was fit to make the statement even without examination by the Doctor, the declaration can be acted upon, provided the Court ultimately holds the same to be voluntary and truthful. A certification by the Doctor is essentially a rule of caution and therefore, the voluntary and truthful nature of the declaration can be established otherwise.

16. In the case of *Sukanta Mohan Vs. State of Orissa, 2009 (9) SCC 163*, the Apex Court has held that a dying declaration recorded by a Doctor can be relied upon, as they are the most disinterested witness.

17. As can be seen from the testimony of the three Doctors, PW1, PW3 and PW9, the deceased at the time of recording of the dying declaration was fully conscious and the suggestion given to PW3 that the deceased was not in a fit condition to give her statement

was denied, which clearly implies that the deceased was in a fit state of mind to give a dying declaration. Thus, keeping in view the evidence of PW1, PW3 and PW9 and the law laid down by the Constitution Bench of the Hon'ble Supreme Court in the case of *Laxman Vs. State of Maharashtra (Supra)* and in the case of *Sukanta Mohan Vs. State of Orissa (Supra)*, we hold that the deceased was in a fit state of mind to give the dying declaration. Further, there is nothing to show that the dying declaration was not voluntary or truthful. As such, there is no infirmity in accepting the dying declaration as true and genuine.

18. PW2, who is the informant and brother of the deceased, in his evidence has stated that after the marriage of his sister with the appellant, dowry demands were made by the appellant on various occasions. On the date of the occurrence at around 9 pm, the appellant informed him that his sister had sustained burn injuries due to a fire. PW2 advised the appellant to shift his sister to a hospital and when he went and met his sister in the hospital, his sister told him that her husband (appellant) and mother-in-law had set her on fire.

19. The evidence of PW4, who is the landlord of the rented room occupied by the appellant and his wife, is to the effect that he was informed on 15.11.2012 by his wife that the room occupied by the appellant was on fire. On reaching the room of the appellant, he noticed the deceased lying on the bed with burn injuries. On asking the appellant as to how his wife sustained burn injuries, the appellant told him that while preparing tea in the kitchen, his wife's clothes somehow caught fire. Thereafter, the victim was taken to the hospital for treatment. He also stated in his evidence that he did not ask the deceased as to how she had sustained burn injuries on her body. At this stage, PW4 was declared a hostile witness and was cross examined by the prosecution. In the cross examination by the prosecution, PW4 denied making a statement before the police that the deceased had disclosed to him that she was set on fire by her appellant husband, by pouring kerosene oil on her body.

20. The evidence of PW5 is that he was the Landlord of the appellant and his wife earlier, i.e. prior to the appellant moving to a new rented house. Though he did not have any personal knowledge about any conflict between the appellant and his wife, PW5's wife told

him that they were always quarrelling with each other. PW5 also stated that he heard from the people of the locality that the deceased had been murdered by the appellant.

21. The evidence of PW6 is to the effect that on the date of the incident, she was ill and that she learnt from the people who gathered at the residence of the appellant that the wife of the appellant had expired as a result of burn injuries. PW6 also states that she did not have any personal knowledge about the said incident. At this stage, PW6 was declared a hostile witness. PW6 denied having made any statement before the Investigating Officer to the effect that the deceased had told her that her husband had set her on fire, by pouring kerosene oil on her.

22. The evidence of PW7 is to the effect that the appellant used to reside with his wife in one of their houses as a tenant. On the date of the incident at around 9 pm, while he was in a grocery shop, he heard a commotion in the residence of the appellant. On arriving at the said place, he saw the appellant's wife on flames. He splashed water on the body of the deceased to extinguish the fire on her body. Thereafter, the victim was sent to hospital in an Ambulance. At this stage, PW7 was declared a hostile witness. PW7 further states that he did not give any statement to the police, to the effect that the deceased had told him that her husband had set her on fire by pouring kerosene oil on her body from a stove.

23. The evidence of PW8, who is a Doctor and Head of the Department of the Forensic Medicine, Gauhati Medical College & Hospital, is to the effect that he performed post mortem examination on the dead body of the deceased and that there were burn injuries all over the body. In his opinion, the death of the victim was caused due to shock as a result of ante-mortem flame burn injuries.

24. The evidence of PW10, who is the I.O. of the case is to the effect that during investigation, he seized one stove, one nighty with blue and white check, a portion of half burnt black hair and one plastic bottle containing kerosene oil of 2 litres. He submitted a charge sheet against the appellant under Section 304(B) IPC. In his cross examination, he

states that he collected the dying declaration from the attending doctor on 16.11.2012 at around 2 pm and arrested the appellant on 17.11.2012 around 9 am. He also states that the appellant in his statement stated that the deceased had set herself on fire with an intention to commit suicide.

In the examination of the appellant under Section 313 CrPC, the appellant had basically made a blanket denial of having any involvement in the death of the deceased.

25. In the case of *Reena Hazarika Vs. State of Assam* (Supra), the Apex Court has held that in a case of circumstantial evidence, the prosecution is required to establish the continuity in the links of the chain of circumstances, so as to lead to the only and inescapable conclusion of the accused being the assailant, inconsistent or incompatible with the possibility of any other hypothesis compatible with the innocence of the accused. It further held that Section 313 CrPC confers a valuable right upon an accused to establish his innocence and can well be considered beyond a statutory right as a constitutional right to a fair trial under Article 21 of the Constitution, even if it is not to be considered as a piece of substantive evidence, not being on oath under Section 313(2) CrPC.

26. In the present case, no explanation has been forthcoming by the appellant in his examination under Section 313 CrPC, as to what had transpired within the four walls of the house occupied by the appellant and his wife. Section 106 of the Indian Evidence Act, 1872 states as follows:-

“106. Burden of Proving fact especially within knowledge:--when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

ILLUSTRATIONS

(a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon

him.

(b) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him."

27. The appellant has given a blanket denial with regard to all the questions put to him under Section 313 CrPC, except to state that at the time of the incident, he was in the bathroom and on hearing a hue and cry, he came out and poured water on the body of the deceased. In the case of *Trimukh Maroti Kirkan Vs. State of Maharashtra, 2006 10 SCC 681*, the Apex Court has held that if an offence takes place inside the privacy of a house, where the assailants have all the opportunities to plan and commit the offence, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused. It further held that a Judge presides over a criminal trial not merely to see that no innocent man is punished, but also to see that a guilty man does not escape.

28. In the case of *Rajkumar vs. State of M.P.*, reported in *(2014) 5 SCC 353*, the Apex Court has held that in the case of complete denial, silence or non-explanation of incriminating materials, the Courts would be entitled to draw an inference, including adverse inference, against the accused as may be permissible in accordance with law. As such, keeping in view the dying declaration of the deceased and the blanket denial of the evidence that has been adduced against the appellant, we are also of the view that the prosecution has been able to prove the case against the appellant beyond all reasonable doubt.

29. With regard to the contention of the appellant's counsel that no charge under Section 302 IPC had been framed by the learned Trial Court, we find that the additional charge under Section 302 IPC had been framed against the appellant in the order passed by the learned Trial Court on 18.03.2013 in the Trial Court records and which has been overlooked by the

learned counsel for the appellant.

30. In the present case, we do not find any reason to doubt the dying declaration of the deceased recorded by the Doctor, who is a disinterested independent witness. We also do not find any reason to doubt the genuineness of the contents of the dying declaration and we find that the deceased was fit to give the dying declaration. In view of the above reasons, we do not find any ground to interfere with the impugned Judgment passed by the learned Trial Court.

31. Accordingly, the appeal stands dismissed. Send back the LCR.

JUDGE

JUDGE

Comparing Assistant