

GAHC010057792023



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

Case No. : CRL.A(J)/42/2023

LALU KARMAKAR
S/O- SRI RAM CHARAN KARMAKAR, R/O- BADLABHATA T.E. SPRING
LINE, P.S. DOOMDOOMA, DIST. TINSUKIA, ASSAM

VERSUS

STATE OF ASSAM
REPRESENTED BY THE PUBLIC PROSECUTOR, ASSAM

Advocate for the Petitioner : MS R D MAZUMDAR (AMICUS CURIAE)

Advocate for the Respondent : MS. B. BHUYAN(ADDL.PP, ASSAM)

:::BEFORE:::

HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA
HON'BLE MRS. JUSTICE MITALI THAKURIA

Date of hearing : 28.09.2023

Date of judgment & order : 09.10.2023

JUDGMENT & ORDER (CAV)

(M. Thakuria, J)

Heard Ms. R. D. Mazumdar, learned counsel for the appellant. Also heard Ms. B. Bhuyan, learned Additional Public Prosecutor for the State respondent.

2. This jail appeal has been preferred against the judgment & order, dated 17.02.2023, passed by the Additional Sessions Judge Cum Special Judge, POCSO, Tinsukia, in Sessions Case No. 111 (T) of 2022, whereby, the learned Additional Sessions Judge, Tinsukia, has convicted the present appellant under Section 302 of the Indian Penal Code and thereby sentenced him to undergo Rigorous Imprisonment for life and also imposed fine of Rs. 5,000/- (Rupees five thousand) only and in default to undergo Simple Imprisonment for 1 (one) month.

3. The brief facts of the prosecution case is that on 22.05.2022, one Reena Muna, wife of Late Ram Charan Karmakar of Badlabhata T.E. Spring Line, had expired at Longswal Central Hospital. During her treatment at the hospital, the deceased stated before the nurses of the hospital that she was physically assaulted by her son- Lalu Karmakar (present appellant) in the evening of 18.05.2022, resultant to which she received injuries and on 19.05.2022, the deceased was taken to the hospital in an ambulance and thereafter she was shifted to Longswal Central Hospital in a critical condition, where she succumbed to her injuries on 20.05.2022. After coming to know about the same, one Dhiren Manki of Badlabhata T.E. Spring Line, lodged the F.I.R. before the Officer-In-Charge of Doomdoo Police Station and on the basis of which,

Doomdoo P.S. Case No. 155/2022, under Section 302 of the Indian Penal Code, was registered and on completion of investigation, the I.O. submitted the Charge-Sheet against the present accused/appellant under Section 302 of the Indian Penal Code.

4. The Charge was accordingly read over and explained to the convict appellant, to which he pleaded not guilty and claimed to be tried. The prosecution examined as many as 11 (eleven) numbers of witnesses in support of their case and also exhibited some documents. The accused appellant took the plea of total denial and he has not adduced any evidence in support of his case. The statement of the accused was also recorded under Section 313 Cr.P.C. where he pleaded not guilty.

5. After recording the evidence and hearing arguments forwarded by the learned counsel for both sides, the learned Additional Sessions Judge has passed the judgment and order and convicted the present accused/appellant under Section 302 of the Indian Penal Code and sentenced to undergo R.I. for life along with a fine of Rs. 5,000/- in default S.I. for another 1 (one) month.

6. On being aggrieved and dissatisfied with the judgment and order passed by the learned Additional Sessions Judge, the present appeal has been preferred by convict accused/appellant from jail.

7. The learned Amicus Curiae for the appellant, Ms. R. D. Mazumdar, has

submitted that there is no eye witness in the present case and the entire prosecution case is based only on oral dying declaration of the deceased which she reportedly gave before the nurses of the hospital where she was initially admitted for treatment. She further submitted that it is the claim of the prosecution that the deceased gave her dying declaration where she reported about the assault on her by her son (present accused/appellant) before the P.Ws.-3, 4 & 5, the nurses of the hospital where she was admitted for treatment, but there is no mention about the treatment given to her and apart from that, there is also no mention in the statement of the witnesses as to what kind of injury she had sustained, for which she had to be admitted in the hospital. From the statement of these witnesses, it only reveals that her condition was critical in the night hours on 19.05.2022, when she felt pain in her lower abdomen and she also faced difficulty in urinating. Thereafter, she was admitted in Longswal Central Hospital, but there is no evidence as to whether the deceased died only out of assault by her son as claimed by the prosecution. She further submitted that the dying declaration, allegedly made by the deceased before the prosecution witnesses, i.e. P.Ws.- 3, 4 & 5, cannot be considered as a dying declaration, as according to the prosecution story, the deceased was assaulted by her son (present appellant) on 18.05.2022, but she did not report anything about the assault on her to anyone and she remained in her own house on 18.05.2022 and on 19.05.2022 only, she informed the informant, asking him to arrange an ambulance to take her to the hospital. But, surprisingly, at that time also, she did not report anything about the assault on her or what kind of injuries or difficulties she was facing to be hospitalized on 19.05.2022. Accordingly, she submitted that there may be suspicion on the present appellant, but suspicion cannot take the place of proof to convict the

accused/appellant under Section 302 of the Indian Penal Code.

8. The learned Amicus Curiae for the appellant further relied on a decision of Hon'ble Supreme Court passed in **Criminal Appeal Nos. 825-826 of 2022 [Irfan @ Naka Vs. The State of Uttar Pradesh]**, wherein, in paragraph Nos. 62, 63 & 64, it has been held as under:

"62. There is no hard and fast rule for determining when a dying declaration should be accepted; the duty of the Court is to decide this question in the facts and surrounding circumstances of the case and be fully convinced of the truthfulness of the same. Certain factors below reproduced can be considered to determine the same, however, they will only affect the weight of the dying declaration and not its admissibility: -

- (i) Whether the person making the statement was in expectation of death?*
- (ii) Whether the dying declaration was made at the earliest opportunity?
"Rule of First Opportunity"*
- (iii) Whether there is any reasonable suspicion to believe the dying declaration was put in the mouth of the dying person?*
- (iv) Whether the dying declaration was a product of prompting, tutoring or leading at the instance of police or any interested party?*
- (v) Whether the statement was not recorded properly?*
- (vi) Whether, the dying declarant had opportunity to clearly observe the incident?*
- (vii) Whether, the dying declaration has been consistent throughout?*
- (viii) Whether, the dying declaration in itself is a manifestation / fiction of*

the dying person's imagination of what he thinks transpired?

- (ix) Whether, the dying declaration was itself voluntary?*
- (x) In case of multiple dying declarations, whether, the first one inspires truth and consistent with the other dying declaration?*
- (xi) Whether, as per the injuries, it would have been impossible for the deceased to make a dying declaration?*

63. It is the duty of the prosecution to establish the charge against the accused beyond the reasonable doubt. The benefit of doubt must always go in favour of the accused. It is true that dying declaration is a substantive piece of evidence to be relied on provided it is proved that the same was voluntary and truthful and the victim was in a fit state of mind. It is just not enough for the court to say that the dying declaration is reliable as the accused is named in the dying declaration as the assailant.

64. It is unsafe to record the conviction on the basis of a dying declaration alone in the cases where suspicion, like the case on hand is raised, as regards the correctness of the dying declaration. In such cases, the Court may have to look for some corroborative evidence by treating the dying declaration only as a piece of evidence. The evidence and material available on record must be properly weighed in each case to arrive at an appropriate conclusion. The reason why we say so is that in the case on 34 hand, although the appellant-convict has been named in the two dying declarations as a person who set the room on fire yet the surrounding circumstances render such statement of the declarants very doubtful."

9. The learned Amicus Curiae for the appellant further submitted that a person cannot be convicted only on suspicion and it is the duty of the Court to ensure that mere conjecture or suspicion do not take the place of legal proof. In

this context, she further relied on another decision of Hon'ble Apex Court reported in **(2013) 12 SCC 406 (Sujit Biswas Vs. State of Assam)**, wherein, it has been held that "*suspicion, however grave it may be, cannot take the place of proof. The large distance between 'may be' true and 'must be' true, must be covered by way of clear, cogent and unimpeachable evidence produced by the prosecution, before an accused is condemned as a convict. The court must maintain the vital distance between mere conjectures to be arrived at, on the touchstone of dispassionate judicial scrutiny, based upon a complete and comprehensive appreciation of all features of the case, as well as the quality and credibility of the evidence brought on record.*"

10. The learned Amicus Curiae for the appellant further submitted that as per the evidences of P.Ws.- 3, 4 & 5, the nurses of the hospital, the deceased reported before them that she was assaulted by her own son on the previous night, i.e. on 18.05.2022. But, surprisingly, all the P.Ws.- 3, 4 & 5, along with another nurse, remained silent and they did not disclose the fact to anyone in the hospital or to the police, though it is claimed that the deceased died out of the injury sustained by her due to assault by her own son. Accordingly, it is submitted that the oral dying declaration claimed to be made before P.Ws.- 3, 4 & 5 cannot be believed and the said dying declaration cannot be the sole basis of conviction of the accused/appellant.

11. In this context, Ms. B. Bhuyan, learned Additional Public Prosecutor, has submitted that the learned Additional Sessions Judge had rightly passed the order of conviction and there is nothing to disbelieve the version of P.Ws.- 3, 4 &

5, before whom the deceased made her dying declaration. There is no evidence that the P.Ws.- 3, 4 & 5 will give their statement falsely against the accused/appellant and there is no evidence that there is any previous enmity against the accused/appellant to give any false statement before the I.O. She further submitted that there is no eye witness to the incident as the accused appellant assaulted his own mother inside the house in the night hours and in that case, it is not possible for any other person to see the incident. Further it is submitted that the deceased was the mother of the accused/appellant and hence, it is quite probable for her not to disclose about the incident to others and as a mother, she might have the intention to save her son. But, after her admission in the hospital, she disclosed about the incident to the attending nurses before her condition was critical in the night hours. Accordingly, the learned Additional Public Prosecutor has submitted that there is no need for any interference of this Court in the judgment and order passed by the learned Court below.

12. After hearing the submissions made by the learned counsels for both sides, we have perused the case record and the judgment passed by the learned Court below and to arrive at a just decision, let us scrutinize the evidences on record.

13. P.W.- 1 is the Doctor, who conducted the Post-Mortem of the deceased and as per his report and evidence, it is seen that the deceased died due to shock and hemorrhage as a result of injury sustained. It is further opined by the Doctor (P.W.-1) that there is spleen rupture which is sufficient to cause death

and all the injuries are ante mortem in nature and caused by blunt force impact. On examination, P.W.-1 found the following injuries:-

- (i) Contusion of size 4 X 4 cm over left side of upper part of abdomen and 3 X 3 cm size over pelvic region.
- (ii) On dissection – Abdomen cavity contain blood. Peritoneum is congested. Spleen is ruptured. Lungs congested.
- (iii) Other organs were normal.

14. Thus, from the evidence and report of the medical officer (P.W.-1), it is seen that the death is homicidal in nature and death was caused due to shock and hemorrhage as a result of injury sustained by the deceased and it is also opined that the spleen rupture was sufficient to cause death of a person. So the question arises as to who committed the murder of the deceased.

15. P.W.-2 lodged the F.I.R. only after coming to know about the death of the deceased and also coming to know about the fact that the deceased was assaulted by her son- Lalu Karmakar (present appellant) on 19.05.2022. Initially, he did not lodge the F.I.R. and he arranged the ambulance for the deceased, as he was asked to arrange the same to go to hospital and thereafter, being a Line Chowkider and coming to know about the incident, he lodged the F.I.R. As per P.W.-2, he came to know about the incident from one Mamoni Saikia Hazarika and Radhika Tanti, who were in the hospital when the deceased was admitted for treatment.

16. P.W.-3 is one of the nurse's who was present at the time when the deceased was admitted in the hospital and the deceased reported to her that her son- Lalu Karmakar assaulted her at about 8.00 p.m. Thereafter, the other nurse- Mamoni Saikia Hazarika also joined the night duty and thereafter the deceased told them that she felt pain in her lower abdomen and also found difficulty in urinating. Thereafter she was referred to Longswal Central Hospital, but on the next day, she came to know about the death of the deceased. From her cross-examination, it reveals that she did not tell anyone that the son of the deceased assaulted the deceased on the previous night.

17. P.W.- 4 is another nurse and as per her evidence, the deceased was brought into the hospital at 9.00 a.m. on 19.05.2022 and on her admission in the hospital, she stated that she was assaulted by her own son and thereafter the P.W.- 4 again came for her night shift duty and when the deceased complained that she felt pain in her abdomen and was facing problem in urinating, she was shifted to Longswal Central Hospital. From the cross-evidence of P.W.- 3, it is seen that she did not inform anyone about the assault on the deceased, neither to police nor to the Garden Hospital authority. However, she made a statement that she did not inform anyone as her own son assaulted the deceased.

18. P.W.- 5 also corroborated the evidences of P.Ws.- 3 & 4 and deposed that she was also one of the attending nurse when the deceased was brought in the hospital and she was also present at the time when the deceased told P.W.- 4

that she was assaulted by her own son. In her cross-evidence, she also stated that she asked the deceased as to what happened to her when she reported that she was assaulted by her own son.

19. P.W.- 6 is a hearsay witness and as per his testimony, he came to know about the incident from the nurse that Lalu Karmakar (present appellant) assaulted the deceased and for which she went to Bokpara T.E. Hospital for treatment, wherefrom she was referred to Longswal Hospital. As per P.W.-6, he received the information about the death of the deceased from her daughter-Nita Karmakar and thereafter he along with informant (P.W.- 2) went to Bokpara Hospital where they came to know the reason for the death of the deceased.

20. P.W.- 7 is the daughter of the deceased and as per her evidence, she was informed by the Chowkider of Longswal Hospital that her mother was in serious condition and when she went to the hospital, she found that her mother had already died. Thereafter, she came to know from the Line Chowkider- Jiten Karmakar that her brother assaulted her mother, due to which she died.

21. P.W.- 8 is the husband of the P.W.- 7 and he also narrated the same story that after coming to know about the serious condition of his mother-in-law, he, along with his wife, went to the hospital, but they found that the deceased had already died in the hospital.

22. P.Ws.- 9 & 10 are the neighbours of the deceased/accused and they also

came to know from the nurse that the accused/ appellant committed murder of the deceased.

23. P.W.- 11 is the I.O. of the case who investigated the matter and he stated that on 20.05.2022, at about 9.30 a.m., the Officer-In-Charge of Doomdoo Police Station received a telephonic information that a man at Badlabhata T.E. reportedly killed his mother and after receiving the said information, he made a G.D. Entry No. 422, dated 20.05.2022, and he was asked to visit the place of occurrence for investigation. Accordingly, he proceeded to Badlabhata Garden Hospital along with his staff and opened MCD and also saw the dead body of the deceased in the hospital. Accordingly, he conducted the inquest, sent the dead body for post-mortem examination, recorded the statements of witnesses, drawn the sketch map and during investigation, he came to know from the witnesses that the deceased was physically assaulted by the accused and for which she received injuries on her belly region and initially she was hospitalized at Garden Hospital and later on, she was shifted to Longswal Central Hospital where she died. As per P.W.-11, the victim reportedly talked about the incident to the nurses, namely, Mamoni Saikia Hazarika, Smti Dipali Mahali and Smti Radhika Tanti, and he recorded the statements of those nurses and also got their statements recorded under Section 164 Cr.P.C. After collecting the post-mortem report and on completion of the investigation, he submitted Charge-Sheet against the present accused/appellant.

24. So, from the evidences of P.Ws., it is seen that the prosecution case is based entirely on the dying declaration of the deceased made before P.Ws.- 3, 4

& 5. It is a fact that there is no eye witness to the incident and it is also a fact that the deceased did not report about the assault on her to P.W.- 2, i.e. the informant, though she asked him to arrange for an ambulance to go to hospital for her treatment. But, when she was admitted in the hospital, she reported about the matter before the P.Ws.- 3, 4 & 5, the attending nurses, when the matter was enquired by them. But the P.Ws.- 3, 4 & 5 did not report the matter before the police or any Garden authority and it was came to the notice of everyone when the deceased died in Longswal Central Hospital, after she faced some complications in urinating as well as pain in the abdomen. Further it is seen that the other P.Ws. also came to know about the incident from the attending nurses only after the death of the deceased. But the P.Ws.- 3, 4 & 5 cannot be disbelieved only on the ground that they did not report the matter immediately to police officer or the Garden authority, though it was the duty of the nurses to report the matter before the police officer, as the deceased complained about the pain in her abdomen as well as complications in urinating, because of the assault on her by her son/appellant.

25. It is settled law that before accepting the dying declaration, the Court must be satisfied that the declaration was true, voluntary and not influenced by tutoring or prompting. Further the Court should also be satisfied that the declarant was in a fit state of mind at the time of making the declaration. Further, if the dying declaration is found reliable, conviction can be sustained on the basis of the dying declaration. In the present case, the declaration made before the P.Ws.- 3, 4 & 5 was the oral dying declaration, as the dying declaration was not recorded in a written form. From the evidences of the P.Ws., it is seen that the deceased made the declaration or gave the statement before

the attending nurses when she was brought in the hospital for treatment and at that very relevant time, she was also mentally and physically fit to make her declaration before the attending nurses and her condition became critical only in the night hours after 8.00 p.m., when she felt severe pain in her abdomen and also felt discomfort in urinating.

26. The Hon'ble Apex Court in the case of **Darshana Devi Vs. State of Punjab**, reported in **1995 Supp(4) SCC 126**, has held that even though an oral dying declaration can form the basis of conviction in a given case, but such a dying declaration has to be trustworthy and free from every blemish and should inspire confidence.

27. Here in the instant case, it is seen that the allegation is brought by a mother against her own son and it is her statement that she was assaulted by her son and for which, she had to come to hospital for treatment. It is also seen that when she made the statement before the attending nurses, she was mentally fit and was in a position to speak, as her condition become critical only in the night hours when she had to be shifted to Langswal Central Hospital for better treatment. And, it is expected that a mother will not bring any false allegation against her own children and will also try to save her children as long as it is possible. Here in the instant case also, it is seen that the deceased remained silent and she did not tell anyone about the injury sustained by her, due to the assault made on her by her son. She did not even report/tell anything to P.W.- 2, who was asked to arrange an ambulance for her. But she reported the matter only after she was admitted in the hospital and as the

matter was enquired by the attending nurses. More so, there is nothing to disbelieve all the P.Ws.- 3, 4 & 5, the attending nurses, reportedly before whom the deceased made her dying declaration, as there is no evidence that these P.Ws. had any enmity or grudge against the present appellant to falsely implicate him in the instant case.

28. The learned Sessions also elaborately discussed under what situation there may be a rupture of spleen. For ready reference, paragraph Nos. 51 & 52 of the judgment is quoted hereinbelow:

"51. Another injury found by PW1 was rupture of the spleen. It is opined by the Doctor that spleen rupture is sufficient to cause the death. Again, it is laid down in Chapter 29 of the Modi's Textbook of Medical Jurisprudence and Toxicology,

"rupture of a normal spleen may be caused by considerable crushing and grinding force, such as the passing of a carriage or motor car over the body, or by a crush in a railway accident, or by a fall from a very great height; in such cases it is usually associated with injuries to other solid organs or to the ribs overlying the spleen. A normal spleen may sometimes be ruptured by the broken ends of a rib, which may be fractured by a severe kick or by a blow from a blunt weapon. There may be frequently more than one rupture from a single blow, and its substance may rupture leaving the thickened capsule intact. In such a case, death may be delayed for some days, as the capsule limits the rupture or prevents excessive bleeding, and the small quantity of blood, which has already effused under the capsule forms into a clot, and presses on the rupture and prevents further bleeding. However, with the sudden muscular exertion or excitement, the clot is disturbed, further bleeding occurs and death takes place immediately.

52. From the above observation of Modi it comes out that when spleen rupture is caused by considerable crushing and grinding force, there are associated injuries to other solid organs or to the ribs overlying the spleen. But in this case there is no such associated injury. Hence, it is clear that in this case spleen rupture is not caused by considerable crushing or grinding force."

29. So, from the discussions made above, it is seen that the deceased died due to injury sustained on her belly region and rupture of spleen, which was caused by her own son, i.e. the present accused/appellant. Thus, it is established that the deceased died due to assault by the accused/appellant. But, it is to be seen as to whether the offence attracts Section 302 of the Indian Penal Code or some other Section of law. The nature of assault, reason behind, rustic nature of the people concerned, etc need to be considered to conclude under what category of penal section the offence falls.

30. From the discussion made above as well as from the medical report, it is seen that the deceased did not sustain multiple injury and she mainly sustained injury on her belly region and the cause of her death is rupture of the spleen. Thus, it can be concluded that there was a single blow from the accused/appellant on the belly region of the deceased. Had his intention been to kill her, he would in all probability have given more blows or would have used some kind of weapon to assault the victim. Further, there is no evidence that the accused/appellant had any premeditation to commit murder of the deceased. More so, there was no external grievous injury on the deceased. The accused/appellant might not have been aware that his assault or such blow

could have caused the death of his mother and thus, it is seen that the offence falls under Exception IV of Section 300 of Indian Penal Code.

31. To make out the offence punishable under Section 304 of the Indian Penal Code, the prosecution has to prove that death of the person in question was caused by an act of the accused and he knew that such act of his own was likely to cause death [**State Vs. Sanjeev Nanda (AIR 2012 SC 3104)**].

32. Here in the instant case also, it is seen that the accused might have the knowledge that his assault or blow on his mother may cause her death, but there may not be any intention to kill his mother.

33. Accordingly, we are of the view that modification is necessary in respect of the Section under which the present appellant was convicted, as we are of the view that the case against the present appellant is established under Section 304 Part-II of the Indian Penal Code.

34. In the result, the appeal succeeds in part. The conviction of the appellant under Section 302 of the Indian Penal Code stands converted to Section 304 Part-II of the Indian Penal Code. The appellant is accordingly sentenced to undergo Rigorous Imprisonment for 4 (four) years, instead of Rigorous Imprisonment for life and the fine, as imposed earlier by the learned Additional Sessions Judge, Tinsukia, will remain unaltered. The period of hazotee or imprisonment shall be set off from the punishment awarded by this Court.

35. Before parting, we put on record the appreciation for the valuable assistance rendered by Ms. R. D. Mazumdar, learned Amicus Curiae, and we recommend that she is entitled to a fee, as per the notified rate, to be paid by the State Legal Services Authority.

36. In terms of above, this criminal appeal stands disposed of.

37. Send back the case record.

JUDGE

JUDGE

Comparing Assistant