

GAHC010117012019



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

Case No. : CRL.A(J)/34/2019

Dipak Bordoloi,
Son of Late Bidyadhar Bordoloi,
Village-Katahguri, P.S. Raha,
District- Nagaon, Assam

.....Appellant

Versus

1. The State of Assam,
Represented by the PP, Assam

2. Mrs. Iramoni Bordoloi,
Wife of Sri Mihiram Bordoloi,
Village-Katahguri, P.S. Raha,
District- Nagaon, Assam

.....Respondents

BEFORE

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

For the appellant : Ms. M Barman, Amicus Curiae

For the State respondent No. 1 : Ms. S. Jahan

Addl. Public Prosecutor, Assam.

Date of hearing & Judgment : **20.07.202**

JUDGMENT AND ORDER (Oral)

(M. Zothankhuma, J)

Heard Ms. M Barman, learned Amicus Curiae appearing for the appellant. Also heard Ms. S. Jahan, learned Additional Prosecutor, appearing for the State respondent.

2. This appeal has been preferred against the Judgment dated 11.01.2019, passed by the court of the learned Sessions Judge, Nagaon in Sessions Case No. 417(N)/2011, by which the appellant has been convicted under Section 302 IPC and sentenced to undergo rigorous imprisonment for life and also to pay a fine of Rs. 10,000/-, in default rigorous imprisonment for 6 (six) months, on the ground that he had killed his wife by burning her with kerosene.

3. The prosecution case in brief is that the elder sister of the deceased, who is Prosecution Witness-1 (PW-1) filed an FIR dated 22.09.2011 before the Officer-In-Charge, Raha Police Station, stating that the husband of the deceased and the sister-in-law of

the deceased had been torturing her deceased younger sister, demanding dowry. Thereafter, on 21.09.2011 at around 6:00 pm, the appellant poured kerosene over her deceased sister and set her on fire inside their house. She was immediately taken to Nagaon Civil Hospital by an ambulance. The deceased succumbed to her injuries while being shifted to Guwahati for better treatment. In pursuance to the FIR submitted by PW-1, Raha P.S. Case 148/2011 under Section 304(B) IPC was registered. After investigation of the case by the Investigating Officer (IO), charge-sheet was filed, as a *prima facie* case had been found against the appellant under Sections 304(B) and 302 IPC. Charges were framed against the appellant under Sections 304(B) and 302 IPC, to which the appellant pleaded not guilty and claimed to be tried.

4. Thereafter, 11 (eleven) Prosecution Witnesses were examined by the learned Trial Court and after examining the appellant under Section 313 Cr.PC, the learned Trial Court found the appellant guilty of the offence under Section 302 IPC and convicted him under Section 302 IPC.

5. The learned Amicus Curiae submits that the learned Trial Court had convicted the appellant solely on the basis of the evidence given by PW-1 (elder sister of the deceased), PW-3 (another elder sister of the deceased) and PW-8, who was the sole eye-witness and minor daughter of the deceased and the

appellant.

6. The learned Amicus Curiae submits that though the evidence of PW-8, who is the eye-witness, is to the effect that she had seen her appellant/father pouring kerosene over her mother and setting her on fire, the dying declaration made by the deceased and which was recorded by a Doctor (PW-10) of BP Civil Hospital, Nagaon, shows that the deceased had admitted to having set herself on fire. She accordingly submits that as the dying declaration of the deceased had exonerated the appellant, the appellant could not be said to be responsible for the death of the deceased.

7. The learned Amicus Curiae also submits that though the Doctor(PW-9), who had attended upon the deceased in Civil Hospital, Nagaon had stated that the deceased suffered about 98% burn injuries, the same would not have prevented the deceased from making a dying declaration, as even a person suffering from 100% burn injuries is able to give a dying declaration. In support of her submission that a person suffering 100% burn injuries can give a dying declaration, she has relied upon the judgment of the Supreme Court in ***Suresh -vs- State of Madhya Pradesh***, reported **(1987) 2 SCC 32**. The learned Amicus Curiae also submits that if a Court can convict an accused on the basis of a dying declaration, when it inspires the full confidence of the Court, there is no reason why the same principle

should not be applied when a dying declaration exonerates an accused from the act of causing the death of a person. In support of her submission, the learned Amicus Curiae has relied upon the judgment of the Supreme Court in the case of ***Ramesh Kumar – vs- State of Chattisgarh***, reported in ***(2001) 9 SCC 618***.

8. The learned Amicus Curiae submits that as the dying declaration of the deceased has exonerated the appellant from causing the death of the deceased, the learned Trial Court erred in convicting the appellant under Section 302 IPC. She accordingly prays that the impugned judgment of the learned Trial Court should be set aside and the appellant should be acquitted of the charge under Section 302 IPC.

9. Ms. S Jahan, the learned Additional Public Prosecutor submits that in view of the evidence given by the elder sisters of the deceased and the evidence given by the Doctor(PW-9), who had attended upon the deceased and stated that a person having 98% burn injuries would not be able to speak, the making of the dying declaration by the deceased, allegedly recorded by a different Doctor (PW-10) was not possible. Further, the making of the dying declaration in the presence of the appellant could not have been said to be truthful or voluntary. The Addl. Public Prosecutor also submits that the evidence of the eye-witness (daughter of the appellant and the deceased), who is PW-8,

coupled with the evidence given by PW-1 and PW-3, which is to the effect that the appellant did not make any reply to their queries as to what he had done to the deceased, implied and proved that the appellant had been guilty of causing the death of the deceased. The learned Additional Public Prosecutor also submits that there being no contradiction in the statements made by the child witness (PW-8) under Section 161 Cr.PC, 164 Cr.PC and her testimony before the learned Trial Court, which is to the effect that she saw her father burning her mother, goes to the root of the matter. She accordingly submits that as there is no reason to interfere with the impugned judgment passed by the learned Trial Court, the impugned judgment should not be disturbed.

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

11. PW-1, who is the elder sister of the deceased, in her evidence has stated that when she heard that something had been done to her younger sister by the appellant, she went with her son to the house of the appellant and saw her younger sister lying down completely burnt. The deceased was somehow able to speak, but her words were unintelligible. PW-1 then asked the appellant as to what he had done, to which the appellant did not reply. Thereafter her sister was taken by the ambulance accompanied by the appellant along with the son of PW-1. Thereafter, another sister of PW-1 arrived and when they were

told that the deceased could not be treated at Nagaon Hospital, they took the deceased to Guwahati. However, the deceased breathed her last on the way to Guwahati. PW-1 also stated that the appellant used to torture the appellant mentally as well as physically, demanding dowry and threatened her that he would remarry. She also stated that her younger sister was killed after kerosene was poured over her, as dowry was not given to the appellant. PW-1 also states that two young children had been left behind by her deceased sister, who were now staying with her, i.e. one son aged 12 years, who was physically weak and one daughter(PW-8), who was 8 years and studying in Class-IV.

In her cross-examination, PW-1 admits that she did not see the appellant setting fire to her sister. The marriage between the deceased and the appellant had lasted for 13 years and as it was a love marriage against their consent, they were not present in the marriage ceremony. Further, they had no relation with them for five years after the marriage. Due to the torture meted by the appellant to the deceased, PW-1 had taken her deceased sister twice to her own house, but the appellant had taken her back. PW-1 also states that she had submitted the FIR.

12. PW-2, who is the younger brother of the appellant has stated in his evidence that his sister-in-law had been burnt by fire and had died as a result of the same. PW-2 also states that when he came back home from Mercy Nursing Home Nagoan, where his

father was admitted, his sister-in-law did not scream when he went to freshen up. Seeing his sister-in-law on fire, he screamed. His sister-in-law was thereafter taken to a hospital by an Ambulance and nobody from his family accompanied his sister in law to the hospital. His sister-in-law died thereafter. He also stated that he was a seizure witness with regard to the seizure of a gallon used for carrying kerosene, a partially burnt pillow and a partially burnt saree.

In his cross examination, PW-2 states that his sister-in-law was not in a position to speak.

13. The evidence of PW-3, who is the elder sister of the deceased, but younger sister of PW-1, is to the effect that 5 years after the marriage between the appellant and the deceased, the appellant started torturing the deceased mentally and physically, while demanding dowry. Due to the quarrels that broke out between the couple, the deceased used to come to the house of PW-3. However, the appellant used to take back the deceased to his house. PW-3 also states that the elder son of the deceased could not speak properly, but the daughter was a normal child. PW-3 also states that around 6.00 pm on 21.09.2011, she was told by one Nabakumar Gaonkhwa to go and see what the appellant had done. She accordingly followed PW-1 and her son and saw the burnt body of her sister lying down. When PW-1 asked the appellant what he had done, the appellant said nothing. An

Ambulance was called by PW-1, while PW-3 informed the police. The deceased was thereafter taken to the Hospital and PW-1 lodged the FIR. As the Doctor told them that the deceased could not be treated in Nagaon Civil Hospital, the deceased was being taken to Guwahati. The deceased succumbed to her injuries on the way to Guwahati.

14. The evidence of PW-4 is to the effect that he saw the deceased lying burnt in the courtyard. He also stated that the appellant was his nephew and that no quarrel had taken place between the deceased and the appellant.

15. The evidence of PW-5 is to the effect that she knew both the appellant and the deceased. She had heard that the deceased had been set on fire. She saw the burnt body of the deceased and also saw that the deceased was able to speak. She also states that she did not enquire as to how the deceased caught fire. The deceased was thereafter taken to hospital where she died. She also states that she signed the Inquest Report made in respect of the dead body of the deceased.

16. The evidence of PW-6 is that he heard about the death of the deceased.

17. The evidence of PW-7 is to the effect that he knew the

appellant and the deceased. He heard that the deceased had died due to being burnt by fire.

18. The evidence of PW-8, who is the daughter of the appellant and the deceased, is to the effect that she had peeped through a hole of the door of the house and saw her father seating her mother on a chair. He thereafter tied her and poured oil on her. He pressed her mouth with a pillow and then set her on fire. On seeing the scene, PW-8 raised a hue and cry and went to inform her uncle. After sometime, her father opened the door and came out weeping. PW-8 also stated that police brought her to the Court, where she gave her statement before the Magistrate.

In her cross examination, she stated that she now lived with PW-1.

19. The deposition of PW-9, who is the Doctor who had attended upon the deceased in Civil Hospital, Nagaon is to the effect that at about 11.45 am on 22.09.2011, he examined the deceased.

PW-9 stated that in his opinion, the cause of death was due to shock, as a result of about 98% deep burn to the whole body of the deceased. In his cross examination, he stated that if a person suffered from 98% burn injuries, the person cannot speak.

20. The evidence of PW-10 is to the effect that on 21.09.2011, while he was working as Senior Medical & Health Officer at BP Civil

Hospital, Nagaon, he recorded the dying declaration of the deceased in the presence of witnesses Mohiram Das and Suraj Huda. He also exhibited the dying declaration as Ext.5 and identified his signature as Ext.5(1). However, a perusal of Ext.5 shows that there is no Mohiram Das in the alleged dying declaration, but there is a name of one Mohiram Beg. In his cross examination, PW-10 stated that he had recorded the statement of the victim to the effect that her husband (appellant) was not responsible for her death and she was not set ablaze by her husband. The evidence adduced by PW-10 is reproduced herein below as follows:-

“On 21.09.2011, while I was serving as Sr. M&HO at BP Civil Hospital, Nagaon, I recorded the dying declaration in presence of witnesses Mohiram Das and Suraj Huda. Ext.5 is the dying declaration and Ext.5(1) is my signature.

XXXX

I have recorded the statement of the victim that, her husband is not responsible for her death and she was not set ablaze by her husband.”

21. The evidence of PW-11, who is the Investigating Officer/I.O., is to the effect that on receiving the FIR, he registered a case and started investigation. On coming to learn that the victim had been taken to BP Civil Hospital, Nagaon, he went to the hospital and saw the victim lying on a bed in a serious condition. He also found

the appellant in the hospital alongwith family members of the victim. He also went to the place of occurrence and seized one gallon of kerosene oil alongwith a half burnt pillow and a half burnt saree. He also seized one hardbound exercise book from BP Civil Hospital, Nagaon, containing the dying declaration of the victim, which was exhibited as Ext.5. Thereafter, he interrogated the appellant and arrested him. He also stated that he informed the Circle Officer for conducting an inquest over the dead body of the deceased, which was accordingly done. The body was also sent for post mortem examination and that the appellant's daughter had been sent to the learned Magistrate for recording her statement. He had also examined the daughter of the appellant.

In his cross examination, PW-11 stated that PW-8 did not make any statement before him to the effect that she saw the appellant holding the victim tightly, by pressing a pillow to her mouth or that PW-8 had witnessed the occurrence of the crime through the gap in the door.

22. As can be seen from the evidence recorded by the learned Trial Court, the only eye witness to the crime is the 7 year old daughter of the appellant and the deceased. There are certain inconsistencies in the statement made by PW-8 under Section 161 Cr.PC vis-à-vis, her statement made under Section 164 Cr.PC and testimony recorded before the learned Trial Court. In her

statement made under Section 161 Cr.PC, PW-8 did not mention that she was peeping through the gap in the door, while watching her father set fire to her mother. However, in her statement made under Section 164 Cr.PC and in her evidence, PW-8 stated that she was peeping through the gap in the door, while watching her father set fire to her mother. Similarly, in her Section 161 Cr.PC statement, PW-8 did not make any mention of the appellant pressing the mouth of her mother with a pillow, but with a piece of cloth. However, in her statement made under Section 164 Cr.PC and in her evidence, PW-8 stated that her father had been pressing her mother's mouth with a pillow. The fact that she saw the occurrence of the crime is clear. The only inconsistency is with regard to whether a pillow or cloth was used to press the mouth of the deceased and whether the crime was seen through a gap in the door. Though there are inconsistencies as indicated above, we are of the view that the above inconsistencies are minor inconsistencies and do not go to the root/core of the prosecution case, inasmuch as, the fact of the appellant having seated the deceased on a chair, tying her up, pouring kerosene over her body and setting her on fire is present in all the above three statements made by PW-8. There is also nothing in the cross examination of PW-8 to indicate that the child eye witness was tutored or that her statement was not believable.

23. A perusal of the dying declaration recorded by PW-10 also does not indicate who had made the dying declaration, as there is

nothing stated therein as to the maker of the dying declaration and before whom it was made.

24. The above facts give rise to issues as to whether the deceased was in a position to make a dying declaration and if made, whether the dying declaration of the deceased exonerating the appellant from the crime of setting the deceased on fire, which resulted in her death, could be accepted as being truthful and voluntary. As can be seen from the deposition of PW-1, though the deceased was able to speak, the words were unintelligible. However, PW-2 stated that the deceased was not in a position to speak. Further, PW-9, who is the Doctor who attended upon the deceased in the Civil Hospital, Nagaon, had stated that there was 98% deep burns all over the body of the victim and that such a person could not be able to speak. Interestingly, PW-10, who is another Doctor in Civil Hospital, Nagaon, had recorded the dying declaration of the deceased, which exonerated the appellant from the crime. The dying declaration recorded by PW-10 has been made in the hardbound Register Book of the hospital, alleged to be witnessed by two witnesses Mohiram Das/Mohiram Beg and Suraj Huda.

25. In the case of ***Karan Singh –vs- State of Uttar Pradesh***, reported in ***2022 LiveLaw (SC) 234***, the Hon'ble Supreme Court has held that the Court is not supposed to give undue importance

to omissions, contradictions and discrepancies, which do not go to the heart of the matter and shake the version of the prosecution witnesses. In the present case, the discrepancies in the statement made by PW-8 under Section 161 Cr.PC vis-à-vis, her statement made under Section 164 Cr.PC and evidence recorded in the learned Trial Court does not, in our view, go to the root of the matter and we are of the view that the minor discrepancies do not vitiate the case of the prosecution. Further, the seizure of the half burnt pillow clearly corroborates the statement of PW-8 made under Section 164 Cr.PC and her evidence that the appellant had gagged the mouth of his deceased wife with a pillow.

26. In the case of ***Suresh –vs- State of Madhya Pradesh (supra)***, the dying declaration had been made by the deceased, who had sustained 100% burn of 2nd degree. Though the accused therein had taken the stand that the dying declaration could not have been relied upon, as at the time the deceased had made the dying declaration, she was sinking and was unable to make any statement. However, the Supreme Court held that as the Doctor, who recorded the statement of the deceased, had stated that the deceased was in a fit state of health to make the declaration at the time of recording the same, the Supreme Court accepted the dying declaration. On considering the judgment of the Supreme Court in ***Suresh –vs- State of Madhya Pradesh (supra)*** and keeping in view the facts of the present case, we are of the view that each case has to be decided on the basis of the facts

pertaining to each individual case. A judgment passed in another case cannot be applied as a Euclid's theorem, which can be made applicable to each and every case, even if the facts are different. It is settled law that a decision is only an authority for what it decides and a little difference in facts changes the precedential value of a decision. In the present case nothing has been stated by PW-10 in his evidence nor in the recorded dying declaration, to the effect that the deceased was fully conscious and in her senses, or that she was capable of giving a dying declaration, while in ***Suresh –vs- State of Madhya Pradesh*** (*supra*) the Doctor therein had stated that the deceased was in a fit state of health to make the dying declaration. As the facts in this case is different from the facts in ***Suresh –vs- State of Madhya Pradesh*** (*supra*), we are of the view that the judgment of the Supreme Court in ***Suresh –vs- State of Madhya Pradesh*** (*supra*) is not applicable to the facts of this case.

27. We are aware of the law laid down by the Supreme Court in ***Ramesh Kumar –vs- State of Chattisgarh*** (*supra*) that a Court can acquit an accused when a dying declaration exonerates an accused from the act of causing the death of a person. However, in the facts of this case, we are of the view that the deceased could not have made the said dying declaration and even if we are to assume that the same was made, the same could not have been done unless the deceased was fully conscious

and in a fit state of mind to make the same.

28. No witness had been cited who had heard the dying declaration except for PW-10, who had recorded the same. It is surprising that PW-10 had recorded the dying declaration of the victim without any requisition being made by the police or any reasoning given by him as to why it was necessary to record the dying declaration. There is nothing stated by PW-10 in his evidence, as to whether the victim was fully conscious or whether she was in a fit state of mind to give a dying declaration. On perusing the concerned page in the hardbound Register in which the dying declaration has been recorded, we find that there is a signature of the appellant. It is surprising that while the evidence of the prosecution witnesses, including the evidence of the I.O, had clearly stated that while the appellant and family members of the deceased were present in the hospital, PW-10 has not made any of the above persons witnesses to the said dying declaration. Though in his evidence, PW-10 stated that the dying declaration was recorded in the presence of witnesses Mohiram Das/Mohiram Beg and Suraj Huda, neither has Mohiram Das/Mohiram Beg or Suraj Huda been made witnesses or examined by learned Trial Court. On perusing the dying declaration and keeping in view the above facts, we are not at all convinced that the deceased had made a dying declaration or could have made a dying declaration. Further, assuming the same was made, there is nothing to show that the same was made while the deceased was fully conscious

and fit to make it, besides the question whether the same was voluntary or truthful, keeping in view the opinion of the PW-9, i.e. the Doctor, who had attended upon the victim and stated that persons, who suffered 98% burn injuries, could not speak.

29. On considering the fact that there is no contradiction in the statements made by PW-8 under Sections 161 Cr.PC, 164 Cr.PC, and the testimony before the learned Trial Court, except for minor discrepancies as already indicated above, we are of the view that there is no infirmity with the finding of the learned Trial Court that the appellant was guilty of committing the offence under Section 302 IPC against his deceased wife. Consequently we do not find any reason to interfere with the impugned judgment.

30. The Appeal is accordingly dismissed.

31. In appreciation of the assistance provided by the learned Amicus Curiae, the appropriate fee payable to her should be paid by the State Legal Services Authority.

JUDGE

JUDGE