

GAHC010156242023



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

Case No. : I.A.(CrI.)/613/2023

NAZMUL HOQUE @ NAJMUL HOQUE
S/O KUDRAT ALI,
RESIDENT OF VILLAGE KHORAGAON PT II, PS JOGIGHOPA, DIST
BONGAIGAON, ASSAM

VERSUS

THE STATE OF ASSAM
REPRESENTED BY PP ASSAM

Advocate for the Petitioner : MR. A M BORA

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MR. JUSTICE MICHAEL ZOTHANKHUMA
HONOURABLE MRS. JUSTICE MALASRI NANDI

ORDER

Date : 25-09-2023

(M. Zothankhuma, J)

Heard Mr. AM Bora, learned senior counsel for the applicant. Also heard Ms. B Bhuyan, learned Additional Public Prosecutor appearing for the State respondent.

2. This application under Section 389(3) of the Cr.PC has been made to suspend the sentence imposed upon the applicant, as the applicant has been convicted vide judgment and order dated 24.08.2022, passed by the learned

Additional Sessions Judge (FTC), North Salmara, Abhayapuri in Sessions Case No. 126(J)/2012 under Section 302 IPC and sentenced to undergo rigorous imprisonment for life with a fine of Rs. 50,000/-, in default to undergo rigorous imprisonment for 3 (three) years.

3. The applicant had been convicted on the charge of having killed his wife, by pouring kerosene and setting her on fire on 31.05.2012 at around 09:00 p.m. The wife was thereafter taken to Hospital where she succumbed to her injuries on 12.06.2012. The learned Trial Court examined 18 prosecution witnesses, though only testimony of 15 prosecution witnesses have been annexed to the applicant's application.

4. The learned counsel for the applicant submits that a perusal of the evidence of PW Nos. 2, 5, 6, 8 and 11 is basically to the effect that on hearing a hue and cry in the house of the applicant, they went running to the said place, where they found the applicant's wife NurFatema on fire. After the fire was extinguished, the husband of NurFatema was called over phone. The applicant then arrived in his vehicle and took his wife to the Hospital. NurFatema thereafter succumbed to her injuries on 12.06.2012.

5. The learned counsel for the applicant submits that the wife of the applicant had been caught in a compromising position with one Siraj Ali and due to shame; she had apparently committed suicide by burning herself. He also submits that the learned Trial Court had convicted the applicant only on the basis of the dying declaration made by the deceased, which was apparently recorded by Dr. A Tham. As per the evidence recorded by the prosecution witnesses, the dying declaration had been made in Assamese/Bengali by the deceased and the same was recorded by Dr. A Tham, who then went to another room and had the same typed out in English. He submits that though the typed

out dying declaration, which was exhibited as Ext.3 was signed by one Dr. A Choudhury (PW-13), the Matron (PW-14) and Dr. A Tham, the original dying declaration which had been made by the declarant in Assamese and Bengali has not been produced in the Court. He submits that as the evidence of the prosecution witnesses is not consistent with the dying declaration made by the deceased, the dying declaration cannot be made the basis for convicting the applicant. He submits that the as the original dying declaration has not been produced and as the evidence of the Doctor with regard to recording the dying declaration creates a doubt on the contents of the dying declaration, which was not read over to the deceased, the sentence imposed upon the applicant should be suspended and the applicant should be released on bail. In support of his submissions, he has relied upon the judgments of the Supreme Court in the cases of ***KashiVishwanath vs. State of Karnataka***, reported in **(2013) 7 SCC 162** and ***Irfan alias Naka vs. State of Uttar Pradesh***, reported in **2023 SCC OnLine SC 1060**.

6. On the other hand, the learned Additional Public Prosecutor submits that when the dying declaration is found to be truthful and reliable and inspires the confidence of the Court, conviction can be safely made by the learned Trial Court. She submits that there is nothing to doubt the veracity of the dying declaration made by the deceased and in terms of the judgment of the Supreme Court in the cases of ***Prem Kumar Gulati vs. State of Haryana &Anr.***, reported in **(2014) 14 SCC 646** and ***Om Pal Singh vs. State of Uttar Pradesh***, reported in **(2010) 14 SCC 200**, there is no reason to interfere with the conviction and sentence imposed upon the applicant. She submits that the dying declaration of the deceased having been recorded by the Doctor, who was treating the applicant, the satisfaction of the said Doctor, who had recorded the

dying declaration was enough to come to a finding that the dying declaration was truthful and reliable and the deceased was in a fit state of mind. Thus she submits that the application should be dismissed accordingly.

7. In the case of ***Irfan alias Naka (supra)***, the Supreme Court had come to a conclusion that as the two dying declarations were not consistent and rather contradictory to the oral evidence of PWs 2 and 4, the same did not inspire the confidence of the Court, As such, the two dying declarations were not taken into consideration. In the case of ***Kashi Vishwanath (supra)***, the Supreme Court had held that it was not clear as to who amongst the Tehisldar, PSI or SI or the Doctors had signed the three dying declarations had knowledge of telugu and translated the same in Kannada. Further, it had not been mentioned that the dying declaration had been read over in Kannada or explained to the maker of the same in telugu. As such, a doubt was created in the mind of the Court as to the truthfulness of the contents of the dying declaration.

8. In the case of ***Prem Kumar Gulati (supra)***, the Supreme Court had held that a truthful and reliable dying declaration may form the sole basis of conviction, even though it is not corroborated. However, the reliability of the dying declaration should be subject to close scrutiny and the Courts must be satisfied that the dying declaration is truthful. In the case of ***Om Pal Singh (supra)***, the Supreme Court had held that the absence of a certificate of fitness by the Doctor that the declarant was fit to make a statement would not be sufficient to discard a dying declaration, as the certification by a Doctor is a Rule of caution.

9. In the present case, there is only one dying declaration. The dying declaration which had apparently been made in Assamese/Bengali by the

declarant and which had been translated into English had apparently not been read over to the declarant. There is also no signature of the declarant, which was however explained by Dr. A Tham, who stated in his evidence that he had not obtained the signature or thumb impression of the victim because it was not possible due to her hands being totally burnt. Though the dying declaration is not corroborated by the evidence of the prosecution witnesses, we find that the Doctor, who recorded the dying declaration, had given a certification to the effect that the declarant was in a sound state of mind.

10. On considering all the above and without considering the evidence in detail, we are of the view that the prayer made by the applicant for suspension of the sentence and release of the applicant on bail cannot be granted. Accordingly, the interlocutory application is dismissed.

JUDGE

JUDGE

Comparing Assistant