

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Bivas Pattanayak

**C.R.A. 216 of 2016
CRAN 2 of 2020 (Old No. CRAN 521/2020)**

**Anowara Bibi
-Vs-
State of West Bengal**

For the Appellant : Mr. Manas Kumar Das, Adv.

Ms. Sayanti Santra ... Adv. appears as
Amicus Curiae

For the State : Mr. Saibal Bapuli .. Ld. Addl. Public Prosecutor
Mr. Bibaswan Bhattacharya, Adv.

Heard on : 02.12.2021

Judgment on: 02.12.2021

Joymalya Bagchi, J. :-

The appeal is directed against judgment and order dated 27.01.2016 and 28.01.2016 passed by the learned Additional Sessions Judge, 17th Court, Alipore in Sessions Trial No. 02(05)2013 arising out of Sessions Case No.48(12)2012 convicting the appellant for commission of offence

punishable under Section 302 of the Indian Penal Code and sentencing her to suffer life imprisonment and to pay a fine of Rs.10,000/-, in default, to suffer further rigorous imprisonment for six months more for the offence punishable under Section 302 IPC.

The prosecution case as alleged against the appellant is to the effect that one Yasmina Bibi had suffered burn injury at her matrimonial home on 26.3.2011. She was rushed to the Calcutta National Medical College and Hospital where she breathed her last on 28.3.2011. At the time of admission, she made statement to the doctor in the emergency department that her mother-in-law i.e. the appellant herein had set her on fire. PW 8, Dr. Partha Pratim Chowdhury noted such fact in the injury report (Ext 4). On 27.3.2011, FIR was lodged by PW 1, uncle of the deceased wherein he alleged that father-in-law namely, Sukur Ali Molla had poured kerosene oil on her body and set her on fire while the appellant had held her mouth. In the course of investigation, PW 10, investigating officer also recorded the statement of the deceased in the presence of doctor and nursing staff wherein she stated that the appellant had set her on fire. Accordingly, appellant and other accused persons namely husband and father-in-law of the deceased were arrested. Charge sheet was filed against them and charges were framed against the appellant and other co-accused persons under sections 498A/34 IPC, 304B/34 IPC and under section 302 IPC against the appellant and the father-in-law namely, Sukur Ali Molla. In course of trial, prosecution examined 10 witnesses to prove the aforesaid charge. Defence of the accused persons was one of innocence and false implication. In conclusion

of trial the learned trial Judge by the judgment and order dated 27.01.2016 and 28.01.2016 acquitted the other accused persons but convicted and sentenced the appellant under section 302 IPC.

Mr. Das, learned advocate, appearing on behalf of the appellant argues that the dying declarations of the deceased are contradictory to one another and do not inspire confidence. PW 1 claimed that father-in-law namely, Sukur Ali Molla had set the housewife on fire. PW 5 who claimed to be present at the time when PW 10 recorded dying declaration states that the deceased named the appellant and her father-in-law as the persons who set her on fire. Learned advocate also relies on the evidence of PW 3, daughter of the deceased to prove the appellant was not present at the house on the date of incident. Hence, it is argued the prosecution case is riddled with contradictions and the appellant is entitled to benefit of doubt.

Ms. Santra as amicus curiae supports the submissions of Mr. Das.

Mr. Bapuli appearing for the State submits that the most reliable dying declaration was recorded by the doctor (PW 8) who admitted her in the hospital. In the said dying declaration the deceased had clearly implicated the appellant as the person who had set her on fire. Such dying declaration is corroborated by the evidence of PW 2 an independent witness who also stated that the deceased Yasmina Bibi told her that her mother-in-law had set her on fire. Hence, the prosecution case is proved beyond reasonable doubt.

I have examined the evidence on record in the light of the submission of the parties.

Victim lady suffered burn injuries at her matrimonial home on 26.3.2011. After the incident, she rushed out of her residence in flames. PW 2, a neighbour was washing dishes in the pond. Victim told her that her mother-in-law had set her on fire. This is the first oral dying declaration of the victim. It is argued that PW 2 had not made such statement to the police. In chief, I find the witness stated that her statement was videographed. She is a disinterested witness and denied suggestion that there was land dispute between her family and that of the accused persons. Thus, I find PW 2 to be a reliable witness with regard to the aforesaid dying declaration made by the victim.

Local people shifted the victim to Calcutta National Medical College and Hospital where she was admitted by Dr. Partha Pratim Chowdhury, emergency medical officer. Dr. Chowdhury has been examined as PW 8 and he stated that Yasmina told him that she had been set on fire by her mother-in-law. He recorded her statement in the injury report (Ext 4). In cross examination, he stated that the patient was alert and conscious and such fact was also noted in the medical papers. This is the second dying declaration of the deceased implicating the appellant.

Thereafter, PW1 (Raup Molla), uncle of the deceased and the first informant went to the hospital and he claims that the deceased told him that the mother-in-law held her mouth while father-in-law poured kerosene and set her on fire. He lodged FIR disclosing such fact but in court he stated the role of the father-in-law alone. Finally, in the course of investigation, Investigating Officer (PW10) recorded the statement of the victim (Exhibit-9) wherein she again implicated the appellant alone.

However, Saha Jamal Mallick (PW5), who is a neighbour of the appellant, claimed that he was present at the time when the police officer recorded such statement and in the statement the deceased had implicated both her mother-in-law and father-in-law in the incident.

These are the dying declarations which have come on record in the present case.

In a case of multiple dying declarations it is the duty of the court to sift the evidence on record and verify which of the dying declaration is reliable. This is all the more necessary when the dying declarations are contradictory or exonerative in nature. However, in the present case, all the dying declarations implicate the appellant. While the dying declarations made in front of PW2 or recorded by the doctor (PW8) or Investigating Officer (PW10) implicate the appellant alone, FIR recorded by PW1 or the evidence of PW5 implicate the appellant along with her husband as the persons who set the housewife on fire. In view of such fact, the multiple dying declarations in the present case cannot be construed to be exonerative of the appellant but subsequent dying declarations referred to in FIR or by PW5 seek to widen the net and implicate the father-in-law also.

In that perspective the trial Judge rightly acquitted the father-in-law of the charge of murder but convicted the appellant. I am of the opinion the appreciation of the dying declarations by the trial court in this regard is wholly justified.

It has been argued that the dying declarations ought not to be relied upon in the light of the evidence of PW3. PW3, Khadija Khatun is the

daughter of the deceased. She deposed on the fateful day, she had been taken by her grandmother i.e. the appellant herein to a *sunnat* ceremony and they were informed by one Mehetab that her mother had been burnt. Relying on the aforesaid evidence it is strenuously argued that the *alibi* of the appellant is established and the dying declaration implicating her ought not be believed.

One of the earliest dying declarations recorded in the instant case is by the Emergency doctor (PW8) at CNMC hospital. The doctor is a disinterested witness and recorded the statement immediately upon the arrival of the patient in the hospital. The dying declaration is endorsed in the injury report (Exhibit-4) prepared by the said witness.

PW8, Dr. Partha Pratim Chowdhury also deposed that the patient was in a fit, alert and conscious state. Such notings are also found in the injury report.

It is pertinent to note that the patient had not been brought to the hospital by her husband or in-laws but by one Rubel, who appears to be a local person and nothing has been placed on record to show that he was inimical to the appellant.

In view of the aforesaid facts, I am of the opinion that the dying declaration recorded by the doctor is a voluntary and truthful one and the deceased was in a fit state of mind to make such declaration. Hence, I find it difficult to disbelieve the aforesaid clinching piece of evidence on the sole version of PW3, a minor child who was 7-8 years at the time of the incident. It appears from the cross-examination of PW3 that she was in the control and custody of her father and had come to the court to depose

along with her father. Father of PW3 is the son of the appellant and therefore, one cannot rule out the possibility of tutoring of PW3 in the present case by the appellant and her family members. It is also pertinent to note that PW3 had neither been examined in the course of investigation by the police nor by the Magistrate. Hence, PW3 appears to be wholly unreliable witness who appears to have deposed for the first time in court on the tutoring of her father who brought her to court. It is also relevant to note that the defence had failed to corroborate the evidence of PW3 through independent evidence with regard to the presence of the appellant at the *sunnat* ceremony.

That apart, dying declaration of the victim finds corroboration from the medical evidence of PW9, post mortem doctor who found burn injuries on the body of the deceased. He opined that death was due to septic absorption from infected ulcer resulting from the burn injuries ante mortem in nature. He proved the injury report (Exhibit-5).

In the light of the aforesaid evidence, I am of the opinion that the dying declaration recorded by the medical officer (PW8) is most credible and unimpeachable in nature. It also finds corroboration from the evidence of PW2, a neighbour who spoke of an oral dying declaration on similar lines. That apart, as discussed earlier the medical evidence wholly corroborates the dying declaration. PW3 appears to be a tutored witness and there is no independent corroboration of her evidence from any source whatsoever.

Thus, I hold the dying declaration recorded by PW8 is a voluntary and truthful one. Deceased was in a fit and proper state of mind to make

such declaration and the same, therefore, can be relied upon to bring home the guilt against the appellant.

It is argued that the victim had suffered 30% burn injuries and had survived for two days. Hence, conviction may be altered to section 304 IPC.

Evidence of PW9 clearly shows that the septicaemia caused to the victim was due to burn injuries inflicted by the appellant. Thus, death of the victim was caused due to the effect of burn injuries and not other causes. Appellant had intentionally set the victim on fire and without any provocation. Hence, the case falls within clause 2 of section 300 of the Indian Penal Code and does not fall within any of its exception. In this regard, it may be profitable to refer to **Patel Hiralal Joitaram vs. State of Gujarat**¹ wherein the Apex Court while dealing with a case of bride burning where the victim survived 14 days held mere possibility of other supervening causes like septicaemia developing during hospitalization would not be safe premise to hold that the victim did not die due to burn sustained by her. The ratio in the said decision applies with full force to the facts of the present case.

Learned counsel for the appellant places reliance on **Banarsi Bass and others vs. State of Haryana**². In the said case, conviction had been recorded under Section 304B and the victim had survived for 1½ months.

The cited case does not deal with the clause 2 of section 300 of the Indian Penal Code. Thus, the cited case is clearly distinguishable on facts.

¹ (2002) 1 SCC 22

² (2014) 15 SCC 485

Hence, I am inclined to follow the ratio in **Patel Hiralal Joitaram** (supra) which is most apposite to the facts of this case.

The appeal is accordingly, dismissed.

In view of dismissal of the appeal, the connected application being CRAN 2 of 2020 (*Old No. CRAN 521/2020*) is also disposed of.

Lower court records along with a copy of this judgment be sent down at once to the learned trial court for necessary action.

I record my appreciation for the able assistance rendered by Ms. Sayanti Santra, learned advocate, as *Amicus Curiae* in disposing of the appeal.

Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

I agree.

(Bivas Pattanayak, J.)

(Joymalya Bagchi, J.)