

IN THE HIGH COURT AT CALCUTTA
Criminal Appellate Jurisdiction
Appellate side

PRESENT:

HON'BLE JUSTICE CHITTA RANJAN DASH
AND
HON'BLE JUSTICE PARTHA SARATHI SEN

CRA 31 OF 2003

Mohan Singh Modak & Ors.

vs.

The State of West Bengal

For the Appellants	:	Mr. Himanshu De, Adv. Mr. Navanil De, Adv. Mr. Rajeshwar Chakraborty, Adv. Mr. Srinjan Ghosh, Adv. Mr. Subhrajit Dey, Adv.
For the State	:	Mr. Saswata Gopal Mukherjee, Adv. Ms. Faria Hossain, Adv. Mr. Anand Kesari, Adv.
Heard on	:	02.08.2022, 23.08.2022 and 05.09.2022.
Judgment on	:	06.09.2022.

PARTHA SARATHI SEN, J.:-

1. The present appeal arises out of the Judgment and Order of conviction dated 16.01.2003 and 17.01.2003 passed by learned Additional Sessions Judge, First Court, Purulia in S.T. No.13 of 1995 (arising out of S.C. 3 of 1993, G.R. 1042 of 1989 and Barabazar P.S. Case No. 50 of 1989 dated 24.07.1989). By the impugned Judgment and Order learned Trial Court convicted all the 3 (three) accused persons under Section 302/34 of the Indian Penal Code and thus sentenced to suffer rigorous imprisonment for life each and to pay a fine of Rs. 1000/- each i.d. to suffer further R.I. for one month.
2. The convicts felt aggrieved and thus preferred the instant appeal.
3. In order to dispose of the instant appeal fairly and effectively the facts leading to the initiation of the criminal case as mentioned above before the Ld. Trial Court is required to be dealt with in a nutshell.
4. On 24.07.1989 one Tapas Nandi son of late Pachkari Nandi, Village Ladhurka P.S. Bhura lodged a written complaint with the Officer-in-Charge, Barabazar Police Station, District-Purulia stating *inter alia* that on 23.07.1989 at about 11 P.M. he came to learn from his uncle (pisemosai) one Bharat Singh Modak that his sister Doli Singh Modak was ablazed at her matrimonial home and thereafter she was transferred to Purulia Hospital for her treatment by the family members of her matrimonial home. It is the further version of the de-facto complainant in the said written complaint that her said sister was taken to the aforementioned hospital at 9 P.M. by the present Appellants in spite of the fact

that a hospital is there at Barabazar. It has been stated further in the said written complaint that after coming to learn about such incident he along with his friends rushed to Purulia Hospital and found her said sister had already succumbed to her burn injuries. In the said written complaint it has been disclosed further that his said sister was murdered by her brother-in-law (Bhasur) Mohan Singh Modak out of their conspiracy. He disclosed further that immediately after her sister's marriage which was solemnised on 15th Falgun 1395 BS, her brother-in-law and sister-in-law used to ill behave with her, even committed torture upon her. In the said written complaint it has been disclosed also that the present appellants are directly involved in the matter of the death of her said sister.

5. On the basis of such written complaint, Barabazar P.S. case No. 50 dated 24.07.1989 was started. Investigation was taken up and on completion of the same chargesheet was submitted under Sections 498A/302 IPC against the aforementioned appellants, namely; Mohan Singh Modak, Phatick Singh Modak and Smt. Dulali Singh Modak who are the appellants herein.

6. Lower Court record reveals that Ld. Trial Court after perusal of the entire materials of the case diary and other materials vide; order dated 16.03.1995 framed charges against the accused persons under Section 498A and 306/34 IPC alternatively under Section 302/34 IPC. Since, the aforementioned appellants pleaded their innocence the trial proceeded.

7. Lower Court record reveals further that on behalf of the prosecution 16 (sixteen) witnesses have been examined and 11 (eleven) documents have been exhibited and after conclusion of the evidence of the prosecution witnesses and

examination of the accused persons under Section 313 of the Criminal Procedure Code, learned Trial Court by the impugned Judgment and Order convicted the accused persons under Section 302/34 Indian Penal Code giving rise to the present appeal. It is pertinent to mention herein that during the pendency of the instant appeal the Appellant No. 3 Smt. Dulali Singh Modak expired which is evident from the order dated 23.08.2022 as passed in this appeal. In view of the death of the Appellant No. 3 during the pendency of the instant appeal, the instant appeal in respect of Appellant No. 3 Smt. Dulali Singh Modak, since deceased, abates.

8. Since by the impugned Judgment, Ld. Trial Court convicted the aforementioned appellants only under Section 302/34 IPC and by the self-same Judgment Ld. Trial Court found the Appellants are not guilty under Section 498A/306/34 IPC, this Court while disposing the instant appeal as preferred by the convicts shall only consider the legality and validity of the finding of the Ld. Trial Court in respect of Section 302/34 IPC only as against the Appellants herein.

9. In support of the instant appeal, Mr. Himanshu De, learned Advocate for the Appellants at the very outset draws attention of this Court to the impugned Judgment. Attention of this Court is also drawn to the evidence of the PWs as recorded by the Ld. Trial Court as well as to the exhibits both documentary and material. It is contended on behalf of the appellant that the impugned Judgment as passed by the Ld. Trial Court is not sustainable in law since Ld. Trial Judge while passing the impugned Judgement failed to appreciate the version of the prosecution witnesses in proper perspective. It is contended further that Ld. Trial

Court committed serious error of fact as well as in law in finding that the Appellants are guilty under Section 302/34 of the IPC. It is contended further that learned Trial Court has miserably failed to visualise that in the Trial Court record practically there is no material to attract the provision of Section 302 IPC as against the present Appellants. It is further argued that Ld. Trial Court while passing the impugned Judgment absolutely misguided himself to assess the evidence of PW-14 and the post-mortem report which was exhibited before the learned Trial Court being Exhibit-6. It is further contended that learned Trial Court has equally failed to consider that in the instant case no dying declaration was recorded in compliance with the provision of Section 32 of the Indian Evidence Act, 1872. It is further contended on behalf of the Appellants that learned Trial Court while passing the impugned Judgment misconstrued in holding that the deceased prior to her death had given an oral dying declaration. Attention of this Court is also drawn to the examination of the Appellants under Section 313 of Code of Criminal Procedure before the learned Trial Court. It is contended that while examining the accused persons under Section 313 Cr.P.C., learned Trial Court did not put any questions that the victim's death was homicidal in nature and that the accused persons committed such murder in furtherance of common intention of all by setting fire on the person. It is contended that in not doing so the salutary principle of Section 313 Cr.P.C. has been violated before the learned Trial Court and thus the impugned Judgment suffers from material defect which is apparent on the face of the record. It is thus contended that the impugned

Judgment as passed by the learned Trial Court is not sustainable in law and thus required to be set aside by allowing the instant appeal.

10. Ms. Faria Hossain, learned Advocate for the State, however, supports the impugned Judgment. It is contended by her that Ld. Trial Court while passing the impugned Judgment assessed the prosecution evidence both oral and documentary in proper perspective. It is contended further that the statement of the victim/deceased before the PW 5 and PW 14 must be construed as an oral dying declaration which has been proved by PW 5 and PW 14 in course of their respective examination-in-chiefs and in course of their respective cross-examination they could not be shaken at all in this regard. It is further contended that the learned Trial court while passing the impugned Judgment rightly observed that the present Appellants are guilty under Section 302 of the Indian Penal Code. It is further argued by her that on conjoint reading of the entire evidence of the PWs there is no hesitation to hold that the Appellants committed the crime under Section 302 of the Indian Penal Code pursuant to their common intention and thus there is no illegality and/or irregularity in the impugned Judgment. It is thus contended on behalf of the respondent State that it is a fit case for dismissal of the instant appeal and the impugned Judgment should be retained as it is.

11. We have meticulously gone through the lower Court records especially; the charges as framed by the Ld. Trial Court, the evidence as adduced by PWs and the exhibits; both oral and documentary as available in the lower Court record. We have also gone through the memorandum of appeal as filed by the Appellants. We

have given anxious consideration over the submission of the learned Advocates of both sides.

12. On perusal of the evidence of the prosecution witnesses, it appears to us that the oral evidence of PW-1, PW-2, PW-3, PW-6, PW-8, PW-11 and PW-12 are not much relevant, since in course of their respective examination-in-chiefs they have neither stated anything in favour of the prosecution nor in favour of the accused persons/Appellants herein and in view of such their evidence are not discussed since those are not relevant for effective disposal of the instant appeal.

13. However, it appears to us that the evidence of the following prosecution witnesses are very much relevant and they can be categorised under the following heads :-

Relative Witnesses	Medical Practitioner Witnesses	Police Officers
PW-4 – Neighbour of the victim's father.	PW-5 – First attending doctor of the victim who prepared injury report.	PW-7 – Asst. Sub-Inspector of Police who performed inquest over the dead body and prepared report.
PW-9 – Mother of the victim.	PW-14 – Doctor who performed autopsy over the dead body of the deceased.	PW-15 – Sub-Inspector of Police who diarised the incident and approached PW 5 to record dying declaration.
PW-10 – Father of the victim.		PW-16 – Investigating Officer.
PW-13 – Brother of the victim		

14. It appears to this Court that for effective disposal of the instant appeal, the evidence of the aforesaid material witnesses are to be discussed in a nutshell. It reveals from LCR that PW-4 in course of her examination-in-chief stated that the victim housewife was murdered by setting fire on her person but she has not stated it specifically as to who committed such crime. In course of her examination-in-chief, she further stated that during her life time the victim used to disclose that she was ill-treated at her matrimonial home and the present Appellants subjected her to cruelty, both physical and mental.

15. PW-9 being the mother of the victim housewife in course of her examination-in-chief stated that her daughter Doli Singh Modak, since deceased was married to Appellant No. 2 herein and thereafter she started living at her matrimonial home with her husband and the other in-laws. She further stated that after the marriage of her said daughter, the accused persons inflicted torture upon her said victim daughter on account of demand of money. It is pertinent to mention herein that though PW-9 remained very much vocal about such ill-treatment upon her said deceased daughter at the instance of the accused persons but peculiarly enough, she remained absolutely mum in her examination-in-chief about the alleged incident of murder of her daughter at the instance of the accused persons/Appellants herein.

16. PW-10 being the father of the victim housewife in course of his examination-in-chief also remained very vocal about the physical and mental torture upon his said deceased daughter at the instance of the accused persons and he also stated that the accused persons who are the Appellants herein used to demand money

from her daughter which they were compelled to pay. It is equally pertinent to mention herein that PW-10 though stated that his said deceased daughter Doli died on account of burn injury but peculiarly enough he also remained absolutely silent with regard to the alleged murder of her daughter by the accused persons (Appellants herein).

17. PW-13 being the brother of the victim housewife and the de-facto complainant in course of his examination-in-chief practically echoed the versions of his parents, namely; PW-9 and PW-10 with regard to the alleged torture upon her victim sister at the instance of the present Appellants and demand of money but in his examination-in-chief, he also stated nothing against the accused with regard to their involvement in the alleged murder of his deceased sister.

18. At this juncture this Court proposes to look to the oral evidence of PW-5 as well as Exhibit-1 (injury report of the victim) since in considered view of this Court those are very much correlated. In course of his examination-in-chief, PW-5 duly proved the injury report dated 31.07.1989 as prepared by Block Medical Officer of Barabazar, Primary Health Centre, Purulia. In course of his examination-in-chief PW-5 categorically stated that on 23.07.1989, he was also posted as Medical Officer at Barabazar, Primary Health Centre. It is the further version that on the said day at about 9 P.M. the victim housewife was brought by an ambassador with severe burn injury on her person. It is the further version that after examination of the burn injury, he called Dr. Suprobhat Sur, BMOH of Barabazar, Primary Health Centre, Purulia and that at that time the victim patient was conscious and on being asked the victim stated to him that she sustained burn injury by kerosene

oil but on further question the victim could not mention the name of the assailant. However, it is the further version that on being asked the victim stated to Dr. Suprohat Sur in his presence that she sustained burn injury and her Ja (sister-in-law) set fire on her person. It is the further version of PW-5 that on preliminary examination he noticed various percentage of the burn injuries on different parts of her body which has been recorded by the learned Trial Court. It is pertinent to mention herein that examination-in-chief of PW-5 gets due corroboration from Exhibit-1 (injury report of the victim). In course of his cross-examination PW-5 stated that in Exhibit-1, eye estimation percentage of burn injury was noted and other health parameters of the patient could not be examined due to her severe burn injuries. He stated further that in the injury report (Exhibit-1) it has been mentioned that the patient was at the material time was lying in the ambulance. He further stated that on the date of examination of the victim i.e. on 31.07.1989 neither he nor Dr. Suprohat Sur recorded any statement of the victim. He further stated that there is every possibility that patient's brain to be affected by the said 8% of burn injury on the head.

19. In considered view of this Court, for proper appreciation of the evidence PW-14, it would be prudent if we look to the Exhibit-6 i.e. the post-mortem report of the victim, Doli Singh Modak. As discussed earlier, PW-14 conducted autopsy over the dead body of the deceased and in his post-mortem report vide; Exhibit-6 the said doctor i.e.; PW-14 expressed the following opinion as to the cause of death of the victim and the same is reproduced hereunder in verbatim :-

“The cause of death in my opinion was due to shock as a result of extensive superficial burn injury of the body which was ante mortem and might be accidental or suicidal in nature.”

20. At this juncture the evidence of PW-14 is required to be looked into. In course of his examination-in-chief, PW-14 practically reproduced his finding as mentioned in his post-mortem report vide; Exhibit-6 and he categorically stated that the death of the victim might be accidental or suicidal in nature and at the same time he added that the case of Doli Singh Modak (victim housewife) may be homicidal in nature. The cross-examination of the PW-14 is very much interesting. In course of his cross-examination PW-14 categorically stated that in his post-mortem report (Exhibit-6), he opined that death of the victim may be accidental or suicidal. He further stated that injuries received by the victim may be caused by coming into contact with fire in course of offering Sandhya Pradip. He candidly admitted that in his post-mortem report there is no note that he got any smell of kerosene oil on the person of the deceased.

21. As discussed above PW-7 is a Sub-Inspector of Police who conducted inquest over the dead body of the deceased which has been exhibited as Exhibit-2.

22. In order to arrive at a logical finding as to whether the learned Trial Court is at all justified in holding the accused persons are guilty under Section 302 IPC, we consider it necessary to scrutinise the oral evidence of PW-5, PW-14 and PW-7 *vis-a-vis* Exhibit-6 and Exhibit-2 conjointly. As discussed earlier in Exhibit-6, PW-14 categorically opined that the death of the victim was ante mortem in nature and might be accidental or suicidal but suddenly in course of his examination-in-chief

he stated that the death of the victim may also be homicidal in nature. In support of his such contention PW-14 neither gave any logical explanation nor gave any reasoning as to how he arrived at such a contradictory finding which is absolutely absent in his own report i.e. the post-mortem report. PW-5 being the first attending doctor in course of his examination-in-chief stated that when the victim was brought before him at Barabazar, PHC in ablazed condition, the victim stated to him that she was burnt by kerosene but PW-14 in course of his cross-examination categorically stated that at the time of conducting autopsy he got no smell of kerosene oil in the person of the deceased. In Exhibit 2 (inquest report) as well as in the evidence of PW-7, this Court finds no whisper about any smell of kerosene oil in the person of the deceased. In view of such this Court has got no hesitation to hold that the oral evidence of PW-14 to the effect that cause of death of the victim might be homicidal in nature has practically no leg to stand upon and the same is unnecessarily exaggerated for which the accused persons ought to have been given the benefit of doubt.

23. On perusal of the impugned Judgment, it reveals to this Court that the learned Trial Court while passing the impugned Judgment placed his reliance upon the evidence of PW-5 and thus pleased to hold that statement of the victim housewife before PW-5 and Dr. Suprobhat Sur ought to have been considered as an oral dying declaration. In order to assess as to whether the finding of the learned Trial Court is justifiable in law or not this Court proposes to place its reliance upon a reported Judgment **‘Atbir Vs. Government, NCT of Delhi’**

reported in **(2010) 3 SCC (CR) 1110 : (2010) 9 SCC 1** wherein Hon'ble Apex Court held the following : -

- i) Dying declaration can be sole basis of conviction if it inspires full confidence of the Court.*
- ii) The Court should be satisfied that the deceased was in a fit state of mind at the time of making the statement and that it was not the result of torturing, prompting or imagination.*
- iii) Where the Court is satisfied that the declaration is true and voluntary, it can base its conviction without any further corroboration.*
- iv) It cannot be laid as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence.*
- v) Where the dying declaration is suspicious, it should not be acted upon without corroborative evidence.*
- vi) A dying declaration which suffers from infirmity such as the deceased was unconscious and could never make any statement cannot form the basis of conviction.*
- vii) Merely because, a dying declaration does not contain all the details as to the occurrence it is not to be rejected.*
- viii) Even if it is a brief statement, it is not to be discarded.*
- ix) When the witness affirms that the deceased was not in a fit and conscious state to make the dying declaration, medical opinion cannot prevail.*

x) If after careful scrutiny the Court is satisfied that it is true and free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal impediment to make it basis of conviction, even if there is no corroboration.

24. The same view was taken by our High Court in the case of **‘Jagat Taran Chakraborty Vs. The State’** reported in **(2011) 1CCr LR (Cal) 410**.

Keeping in mind the proposition of law as discussed herein above and as enunciated by the Hon’ble Supreme Court of India, it appears to this Court that in the case in hand the alleged oral dying declaration is very much suspicious since the evidence of PW-14 *vis-a-vis* Exhibit-1 (injury report), Exhibit-6 (post-mortem report) and Exhibit-2 (inquest report) do not disclose any smell of kerosene oil in the person of the deceased though according to PW-5 (the first attending doctor) the victim patient complained to him that she had been ablazed by her Ja (sister-in-law) with kerosene. In this regard the evidence of PW-15 is equally important since in his examination-in-chief he stated that he being the Sub-Inspector of Police of Raghunathpur P.S. requested the medical officer of Barabazar P.S. to record the dying declaration of Doli Singh Modak by sending a requisition being Exhibit-8 but for the reason best known to the prosecution, no such effort was made. In view of the aforesaid contradiction, this Court is thus constrained to hold that learned Trial Court was not at all right in placing his reliance upon the said alleged oral dying declaration for holding the present Appellants guilty under Section 302 IPC.

25. In order to assess as to whether learned Trial Court was at all justified in holding that the provision of Section 34 IPC can squarely be attracted in the case before him as against the accused persons, this Court considers that the relevant portion of the impugned Judgment is required to be looked into and the same is reproduced hereunder :-

“.....It appears that Dr. K. B. Sinha (P.W.14) held Post Mortem Examination over the dead body of Doli Singh Modak. He gave particulars of burn injury over the dead body of Doli and regarding cause of death he opined that it was ante mortem and might be accidental or suicidal in nature and he also says that death may be homicidal in nature. So, I have got no hesitation to hold that Doli was set on fire by accused – Dulali Singh Modak and having considered attending circumstances I am inclined to hold that in furtherance of common intention of all accused did commit murder of Doli by setting her on fire. In other words, Doli’s death is homicidal one.....”

26. In order to assess as to whether learned Trial Court’s aforementioned finding is correct or not, we propose to look into the Section 34 IPC and the same is as under :-

“34. Acts done by several persons in furtherance of common intention – *When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.”*

27. In course of his argument, learned Advocate for the appellants duly placed his reliance upon the reported decision '**Suravanan & Anr. Vs. State of Pondicherry**' reported in **(2004) 13 SCC 238** wherein the Hon'ble Apex Court expressed the following view :-

".....13. The principle in Barendra Kumar Ghosh had been reiterated by Indian courts including this Court in several cases. In Gurdatta Mal v. State of U.P. it was observed by this Court that Section 34 IPC contemplates the doing of an act by several persons in furtherance of common intention. The constructive liability under this provision would arise if the following two conditions are fulfilled:

- (1) There must be common intention to commit a criminal act; and*
- (2) There must be participation of all the persons in doing of such act in furtherance of that intention.*

If these two ingredients are established, all the accused would be liable for the offence which has been committed....."

28. On conjoint perusal of the aforesaid provision of law and the principle of law as enunciated by the Hon'ble Supreme Court of India in respect of Section 34 of Indian Penal Code, this Court noticed that before the learned Trial Court, none of the prosecution witnesses lead any evidence to the effect that the present Appellants in furtherance of their common intention committed the crime of commission of murder of the victim lady and in absence of such evidence, the finding of the learned Trial Court in this regard is equally faulty one.

29. Before parting with the instant case record, this Court feels it obligatory to mention that while examining the accused persons under Section 313 of Cr.P.C. The learned Trial Court asked no question to the accused persons regarding their role in the alleged murder pursuant to their common intention and thus a serious departure took place towards compliance of the salutary principle of Section 313 Code of Criminal Procedure.

30. In view of the discussion made hereinabove, the instant appeal succeeds. The Judgment and order of conviction dated 16.01.2003 and 17.01.2003 as passed by the learned Additional Sessions Judge, First Court, Purulia in S.T. 13 of 1995 as against the convicts namely; Mohan Singh Modak, Phatick Singh Modak and Smt. Dulali Singh Modak is hereby set aside. The present appellants namely; Mohan Singh Modak, Phatick Singh Modak and Smt. Dulali Singh Modak are thus not found guilty under Section 302/34 of the IPC and they are acquitted from S.T. 13 of 1995. The present Appellant No. 1 Mohan Singh Modak and Appellant No. 2 Phatick Singh Modak are thus discharged from their respective bail bonds and be set at liberty at once, if not detained in custody.

31. Let a copy of this Judgement along with the LCR be sent down at once.

32. Urgent Photostat certified copy of this Judgement, if applied for, be given to the parties on completion of usual formalities.

I agree.

(Chitta Ranjan Dash, J.)

(Partha Sarathi Sen, J.)