

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

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Ajay Kumar Gupta

C.R.A. 186 of 2011

***Akash Das @ Krishna Das
-Vs-
The State of West Bengal***

For the appellant : Ms. Sreyashee Biswas

For the State : Ms. Amita Gaur.

Heard on : 05.09.2022

Judgment on : 05.09.2022

Joymalya Bagchi, J. :-

Appellant has assailed the judgment and order dated 21.12.2010 and 22.12.2010 passed by the learned Sessions Judge, Howrah in Sessions Trial No.477 of convicting the appellant for commission of offence punishable under Section 302 of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for life and to pay fine of Rs.5,000/-, in default, to suffer rigorous imprisonment for one year more.

Prosecution case as alleged against the appellant is to the effect that on 7.8.2007 Sonali Chakraborty, the deceased went out to bring her daughter from school. They returned home at 2.30 P.M. She went to the kitchen to prepare meal for her daughter. At that time appellant who had surreptitiously entered the house went to the kitchen and put a napkin on her mouth, tied her legs with a rope and poured kerosene oil on her and set her on fire with the help of match stick. Her daughter viz., Tania Chakraborty (PW1) who was present in the house witnessed the incident. Local people rushed to the spot. Sonali narrated the incident to them. She was taken to Kolkata Medical College and Hospital. She narrated the incident to the doctors. In the meantime written complaint was lodged by Bikash Chakraborty, husband of the victim at the police station resulting in registration of first information report. During investigation statement of the victim was recorded by Subal Majumder, S.I. of Police (PW16) at the hospital in presence of Medical Officer (PW9). Subsequently, Sonali succumbed to her injuries and Section 302 IPC came to be added to the FIR. In conclusion of investigation, charge sheet was filed and charges under Sections 448/441/306/302 IPC were framed against the appellant. Appellant pleaded not guilty and claimed to be tried.

In course of trial, prosecution examined 16 witnesses. Defence of the appellant was one of innocence and false implication.

The court examined Dr. Prativa Biswas (CW1) who had attended Sonali in the Surgery Department at Kolkata Medical College and Hospital.

Upon appreciation of the evidence on record, trial Judge by the impugned judgment and order convicted and sentenced the appellant, as aforesaid.

Appeal was preferred by the appellant through the High Court Legal Services Authority. As the appellant is unrepresented, this Court requested Ms. Sreyashee Biswas, learned Advocate empanelled with the High Court Legal Services Authority to represent the appellant. Secretary, High Court Legal Services Authority shall regularise her appointment.

Ms. Biswas, learned Advocate for the appellant submits PW1 is the sole eyewitness. She was a six year old and a student of KG-I in Adarsha Path Bhawan School. Due to her tender age, she is prone to tutoring and her deposition ought to be taken with a pinch of salt. Oral dying declaration to local neighbours viz., PWs.3, 5 and 7 do not inspire confidence. Evidence of PW2, husband of the deceased also suffers from various contradictions and inconsistencies. PW8 attached to Emergency Department who recorded the declaration of the victim in injury report, Ext.5 does not state whether the victim was conscious or not. Dying declaration recorded in presence of PW9 was by the Investigating Officer (PW16) and does not inspire

confidence. There is no note in Ext.A that the history of incident was as per statement of the patient. Hence, the dying declarations suffer from legal infirmities and ought not to be relied upon. Accordingly, the appellant is entitled to an order of acquittal.

Ms. Amita Gaur, learned Advocate for the State submits daughter of the deceased (PW1) is the most natural witness. Her competence was assessed by the court and her evidence was recorded. Her deposition is corroborated by oral and written dying declarations of the victim. Prosecution case is proved beyond doubt and the appeal is liable to be dismissed.

Prosecution has primarily relied on the eyewitness version of PW1 and the dying declarations of the deceased Sonali to prove its case.

P.W.1 is the daughter of the deceased. She was a six year old child and a student of KG-I in Adarsha Path Bhawan School at the time of occurrence. Prior to her deposition, trial court posed questions to her to test her competence. Being satisfied, her deposition was recorded. She stated on the date of occurrence she had returned with her mother from school. Her mother went to the kitchen to make her meal. She was changing her dress. Appellant was hiding in the room. Appellant went to the kitchen and put a gamcha on the mouth of her mother, tied her legs with a rope and poured kerosene oil on her body and set her on fire with the help of

a match stick. She shouted for help. Local people came to the spot. Appellant fled away from the house leaving behind his slippers. Her mother was taken to hospital in a van rickshaw. Her mother died two days after the incident. She made statement before police as well as the Magistrate. She identified the accused in course of Test Identification Parade.

In cross-examination she stated appellant used to come to their house regularly. She had been told by her father what to depose.

PW2, Bikash Chakraborty is the husband of the deceased. He was not present at the house. He was informed over telephone. He rushed to the hospital and met his wife. His wife narrated the incident to him. He lodged written complaint. Police seized a pair of chappals, half burnt curtain, one match stick and plastic bottle containing kerosene oil from the house. He was a witness to the seizure and signed on the seizure list.

PW3, Gopal Kangsha Banik, PW5, Smt. Ruma Pramanik and PW7, Sujit Pramanik are neighbours of the deceased. On hearing hue and cry they came to the house and saw the deceased in burning condition. They also saw her daughter at the spot. The deceased told them that appellant had set her on fire and fled the spot. An ambulance was called and she was shifted to hospital.

PW8, Dr. Kunal Pan treated the victim at the Emergency Department of Kolkata Medical College and Hospital. He found she had suffered 60% burn injuries. Victim stated appellant had poured kerosene on her body and set her on fire. He proved the injury report, Ext.5.

PW9, Dipankar Ray was a clinical tutor of the Surgical Department at Kolkata Medical College and Hospital. On 8.8.2007 he found the victim conscious and oriented. In his presence PW16, SI, Subal Majumder recorded dying declaration of the victim. The victim put left thumb impression on the statement. PW9 also appended a certificate to the dying declaration of the victim which was exhibited as Ext.6.

PW10, S. S. Roy Chaudhury was an Assistant Profession attached to Surgery Department of Kolkata Medical College and Hospital. He proved a certificate which show Sonali was admitted in hospital on 7.8.2007 at 17.12 hrs. in Surgery Department under doctors viz., Dr. T. K. Chowdhury, Dr. U. Roy and himself.

PW12 held Test Identification Parade where the minor child (PW1) identified the appellant. He proved the Test Identification Parade, Ext.2 while PW13 recorded her statement under Section 164 of the Code of Criminal Procedure.

PW14, Dr. Dipankar Guha Roy held post mortem over the body of the deceased. He opined death was due to effect of burn

injuries as noted in the post mortem report which is ante mortem in nature. Deceased had suffered approximately 65% burn injuries. He proved the post mortem report, Ext.8.

PW15, Manojit Mandal proved the death certificate issued on 9.8.2007 at about 2.30 a.m.

PW16, Subal Majumder is the Investigating Officer of the case. He deposed on 8.8.2007 ASI Ajay Narayan Rakshit received an information from one Bikash Chakraborty. Investigation of the case was handed over to him. He went to the place of occurrence. He examined the daughter of the victim and other witnesses. From the kitchen he seized a plastic bottle containing blue kerosene oil, one match stick, half burnt curtain and one pair of chappal from the verandah. He went to the hospital and recorded the dying declaration of the deceased in presence of the doctor. He arrested the appellant from Delhi. He arranged for Test Identification Parade of the appellant where PW1 identified him. He collected post mortem report and filed charge sheet.

Evidence of PW1, sole eyewitness has been assailed on the ground she was barely six years old and admitted to have been tutored by her father. PW1 is the daughter of the deceased. She was at the house when the incident occurred. Her competence was tested by the Judge prior to recording her deposition. She is the most probable witness and her deposition has a ring of truth. She

withstood extensive cross-examination. Her statement that she deposed as per her father must be seen in proper perspective in the backdrop of the entire evidence on record. No question was put to her father (PW2) that he had tutored her daughter. On the other hand, the version of the minor daughter would mean that her father had told her daughter to state whatever she knew of the incident.

Deposition of the minor child finds corroboration from the multiple dying declarations of the deceased. Immediately after the incident local people viz., PWs.3, 5 and 7 came to the spot. They found the victim was in burnt condition. She was conscious and stated appellant had set her on fire. Subsequently, at the time of admission she made a dying declaration which was recorded by the doctor (PW8) at the Emergency Department. Injury report containing her declarations was marked as Ext.5. PW8 categorically stated the statement was made by the patient. In view of the aforesaid clinching evidence on record, plea that the victim was not conscious at the time of admission is patently absurd. Subsequently, victim made another dying declaration before her husband who visited her in the hospital. On the next day, her dying declaration was recorded by PW16, SI, Subal Majumder in presence of Medical Officer viz., PW9, Dr. Dipankar Roy. Dr. Roy deposed patient was conscious and oriented at the time of making statement. He also appended certificate to the dying declaration, Ext.6.

The aforesaid dying declaration has been contested on the ground it was recorded by a police officer. Ordinarily a dying declaration ought to have been recorded by a Magistrate. However, failure to take such a recourse would not in my estimation erode the authenticity of the dying declaration which finds support from the earlier oral declarations made by the deceased before the local people. Declaration was made in the presence of an uninterested medical officer who appended certificate of fitness to it. LTI of the victim was also endorsed on the declaration.

Defence sought to improbabilise the dying declarations by referring to the evidence of CW1 Dr. Prativa Biswas who was an intern in the Department. Dr. Biswas had proved the treatment sheet marked as Ext. A. History of incident in the treatment sheet categorically records the appellant had set the petitioner on fire.

Hence, I do not find any contradiction and/or inconsistency between the notings in the treatment sheet and the dying declaration (Ext.6) recorded by PW16. Evidence of PW8 as well as post mortem doctor (PW14) show that the victim had suffered 65% burn injuries. She survived for two days. There is nothing on record to show that the nature of injuries suffered by the victim or her health condition was of such nature that she was unable to make a statement. On the other hand, consistent evidence of medical officers who treated the victim at Kolkata Medical College and

Hospital show that the victim was conscious and oriented when she made the dying declarations.

In the light of the aforesaid evidence on record, I am of the view the dying declarations of the victim made before the local people as well as those recorded at the hospital were voluntary, truthful and do not suffer from any legal infirmity. They corroborate the version of the minor child of the deceased who was an eyewitness. The aforesaid evidence on record clearly establish the guilt of the appellant.

The appeal is, accordingly, dismissed.

Period of detention suffered by the appellant during investigation, enquiry and trial shall be set off against the substantive sentence imposed upon him in terms of Section 428 of the Code of Criminal Procedure.

Let a copy of this judgment along with the lower court records be forthwith sent down to the trial court at once.

Photostat certified copy of this judgment, if applied for, shall be made available to the appellant upon completion of all formalities.

I agree.

(Ajay Kumar Gupta, J.)

(Joymalya Bagchi, J.)