

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. 314 of 2006

Ratan Roy & Ors

-Vs-

State of West Bengal

For the Appellants : Md. Shahjahan Hossain, Adv.
Ms. Sanjida Sultana, Adv.

For the State : Mr. Neguive Ahmed, Ld. A.P.P.
Ms. Amita Gaur, Adv.

Heard on : 25.02.2022

Judgment on : 25.02.2022

Joymalya Bagchi, J. :-

We are informed during the pendency of the appeal the appellant No. 1, namely Ratan Roy has expired. Hence, the appeal abates so far as appellant No.1 is concerned.

Appeal is directed against judgment and order dated 28th March, 2006 and 29th March, 2006 passed by the learned Additional Sessions Judge, 5th Court, Barasat, North 24 Parganas in sessions Trial No. 2(5) 2002 in Sessions case No. 7(4) 2001 convicting the appellants for

commission of offence punishable under Section 302/34 of the Indian Penal Code and sentencing them to suffer imprisonment for life and to pay a fine of Rs.5,000/-, each in default, to suffer simple imprisonment for five months each more.

Prosecution case, as alleged against the appellants is to the effect that on 19.07.1997 between 1.30 p.m. to 1.45 p.m. the appellants being Ratan Roy elder brother-in-law of the victim, Tarun Roy, her younger brother-in-law and Padma Roy, wife of Ratan Roy jointly attacked the deceased Manju on the stair case of the house where all of them were residing in joint mess and after pouring kerosene oil on her body set her on fire. Victim cried for help. Hearing her cry, a neighbour (P.W. 10) rushed to the spot. Hearing cries, another sister-in-law of the victim, Aloka, who was sleeping in her room also came out and noticed the victim lying with burn injury in the stair case. She informed the incident to Ashok Manna, brother of the deceased (P.W. 1). Ashok came to the place of occurrence and found her sister lying with burn injuries. On enquiry, her sister stated the appellants tied her and poured kerosene oil and set her on fire. He went to Khardah police station and informed the police. Thereupon, police officer (P.W. 17) came to the spot. The victim stated before the police officer that the appellants poured kerosene oil on her body and set her on fire. P.W.17 reduced the aforesaid statement into writing (Exhibit 8). Victim was shifted to the B.N. Bose Hospital by her brother. At the time of admission, she again reiterated her statement

before the medical officer (P.W. 8) who reduced the same into writing (Exhibit 3). While she was struggling for life in the hospital, her husband (P.W. 14) came to the hospital and she narrated the incident to him. In the meantime, P.W. 1 went to the police station and lodged First Information Report resulting in registration of Kardah P.S. case No.299 dated 19.07.1997 under Section 336/307/34 of the Indian Penal Code. Subsequently, around 10.45 p.m. the victim succumbed to her injuries. Section 302 of the Indian Penal Code was added to the F.I.R.

In conclusion of investigation, charge-sheet was filed and charge was framed under Section 302/34 of the Indian Penal Code against the appellants. Appellants pleaded not guilty and claimed to be tried. In course of trial, prosecution examined 17 witnesses and exhibited number of documents.

Defence of the appellants was one of innocence and false implication. In conclusion of trial, the trial judge by the impugned judgment and order 28th March, 2006 and 29th March, 2006 convicted and sentenced the appellants, as aforesaid.

Learned Advocate appearing for the appellants submits that the appellants have been falsely implicated due to prior rivalry between the brothers over share in joint property. Victim suffered 100% burn injuries and could not have been in a position to make statement. Dying declarations relied by the prosecution are, therefore, concocted and ought not to be believed. Prior to lodging First Information Report, P.W.1 had

gone to the police station and had informed the police. P.W. 17 further claimed he recorded the statement of the victim Exhibit 8 prior to lodging of F.I.R. Hence, written complaint of P.W. 1 cannot be treated as first recorded report. Dying declaration by P.W. 17 (Exhibit 8) is a manufactured document. None of the witnesses have supported P.W. 17 with regard to the written dying declaration. This fact is also absent in the F.I.R. P.W. 8 medical officer in her cross-examination admitted she did not follow procedure while recording dying declaration. No certificate was given by P.W. 8 that the victim was conscious and was fit to make the declaration. On the other hand, notings in the medical papers show victim was precarious and she had suffered 100 per cent burn injuries. That apart, oral dying declarations made to P.W. 1 or P.W. 14 are not corroborated by any other witnesses. Thus, none of the dying declarations are unblemished and the possibility of false implication of the appellants due to prior enmity cannot be ruled out. Hence, the appeal is liable to be allowed.

Mr. Ahmed, appearing for the State argues prosecution has proved its case beyond doubt. There are four dying declarations in the case. The victim initially made an oral dying declaration to her brother P.W. 1. Thereafter, police came to the spot and the victim made the second dying declaration before the police in the presence of a number of witnesses. In the hospital at the time of admission her statement implicating the appellants was recorded in the injury report by the doctor, P.W. 8.

Thereafter, she again made similar statement to her husband P.W. 11 around 5.30 p.m. when he visited her in the hospital. All these dying declarations are consistent to one another and establish the role of the appellants in pouring kerosene oil and setting the housewife on fire. There is no hard and fast procedure in recording a dying declaration. Certificate by medical officer is not a *sine qua non* for its admissibility provided the evidence on record clearly establishes the victim was conscious and in a fit state to make the declaration. Extent of burn injuries is not the only determining factor to test the capacity of the victim to make such statement. Dying declarations receive corroboration from the attending facts and circumstances including the post mortem doctor who found that the victim had died due to burn injuries which were ante mortem in nature. Hence, the appeal is liable to be dismissed.

Prosecution case primarily hinges on the dying declarations made by the victim.

P.W. 1, Ashok Manna is the brother of the deceased and the informant in the case. He deposed his sister Manju was married to Khokan Roy. They used to reside in joint mess with the other in laws including the appellants. He was informed of the incident by Aloka Roy, elder sister in law of the deceased. Hearing the news, he went to her matrimonial home at noon. He found the victim lying in the staircase. She stated that the appellants poured kerosene oil on her and set her ablaze. Hearing this, he went to Khardah PS and reported the incident

verbally. Police came to the place of occurrence. He shifted his sister to BN Bose Hospital where she narrated the incident to the doctor. On that day, Manju died. He lodged F.I.R. which was scribed by P.W. 4. He was extensively cross examined but his deposition with regard to oral dying declaration made to him by his sister remained unshaken.

The second dying declaration was made by the victim to the police officer, P.W. 17 who came to the spot after being informed by P.W. 1. P.W. 17, Alok Kanti Lodh deposed on 19.07.97 at 14.25 hours he received RTM at Khardah police station to the effect that Manju Roy, wife of Khokan Roy was found with burn injuries lying in the staircase between the ground floor and first floor of the house. Duty officer recorded such information as GD entry no. 1416, Exhibit 7. Thereafter, he proceeded to the place of occurrence and in the presence of local witnesses, victim made a dying declaration. Victim stated her second brother-in-law, Ratan Roy, his wife Padma Roy and another brother-in-law, Tarun Roy poured kerosene oil on her and set her on fire. He reduced her statement into writing, Exhibit 8. Thereafter, victim was taken to the BN Bose Hospital.

P.W. 8 Dr. (Mrs.) Sovana Saha was on duty at the emergency department at the hospital. She admitted the patient and recorded in the injury report that the patient had stated to her that her brother in law Ratan Roy, his wife Padma Roy and another brother-in-law, Tarun Roy poured kerosene oil and set her on fire at her residence. She proved the injure report Exhibit 3. This is the third dying declaration of the victim.

The final dying declaration was made by the victim to her husband (P.W. 11) who visited her in the evening in the hospital.

Learned counsel for the appellants criticizing the dying declaration submits that the victim had suffered 100% burn injuries and there is no certificate by a doctor that she was in a fit state to make statement. Hence, the dying declarations ought not to be believed. In addition thereto, he submits that the oral dying declaration made to P.W. 1 and P.W. 11 is not corroborated by others and P.W. 1 is completely silent with regard to the dying declaration made by the victim to the police officer P.W. 17. This fact is also absent in the FIR.

In *Khushal Rao vs. State of Bombay*¹, the Apex Court was called upon to decide whether a dying declaration can be the sole basis of conviction. Upon analyzing the law, the Court summarized as follows:-

“...(1) that it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated; (2) that each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made; (3) that it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other pieces of evidence; (4) that a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence; (5) that a dying declaration which has been recorded by a competent Magistrate in the proper manner, that is to say, in the form of questions and answers, and, as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character, and (6) that in order to test the

¹ AIR 1958 SC 22

reliability of a dying declaration, the court has to keep in view, the circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the facts stated, had not been impaired at the time he was making the statement, by circumstances beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties.”

In *Padmaben Shamalbhai Patel vs. State of Gujarat*² a three-Judge Bench of the Apex Court held that a dying declaration, if voluntary and truthful, can be the sole basis for conviction. However, to do so, the court must satisfy itself whether the victim was in a position to identify her assailants and had made a truthful and voluntary disclosure of the same. It was not a product of prompting or tutoring. The court must also satisfy itself whether the victim was conscious and in a fit state to make statement. However, in order to arrive at such satisfaction it is not mandatory that a certificate by a medical officer is to be produced.

In *Laxman vs. State of Maharashtra*³ a Constitution Bench of the Apex court, inter alia, held as follows:

“...Normally, therefore, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration looks up to the medical opinion. But where the eye witnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and any adequate method

² (1991) 1 SCC 744

³ (2002) 6 SCC 710

of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. There is no requirement of law that a dying declaration must necessarily be made to a magistrate and when such statement is recorded by a magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstance of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony by the magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise.”

If the ocular version of witnesses and other attending circumstances establish the fact that the victim was conscious and in a fit state of mind, to make the statement absence of certificate to that effect by a medical personnel would not affect the credibility of the dying declaration.

Percentage or degree of burns would, not , by itself, be decisive of the credibility of a dying declaration. In ***Purshottam Chopra and Another vs. State (NCT of Delhi)***⁴, the Apex Court while dealing with the reliability of dying declaration made by a victim with 100% burn injuries, held as follows:-

“21.1. A dying declaration could be the sole basis of conviction even without corroboration, if it inspires confidence of the court.

21.2. The court should be satisfied that the declarant was in a fit state of mind at the time of making the statement; and that it was a voluntary statement, which was not the result of tutoring, prompting or imagination.

⁴ (2020) 11 SCC 489

21.3. Where a dying declaration is suspicious or is suffering from any infirmity such as want of fit state of mind of the declarant or of like nature, it should not be acted upon without corroborative evidence.

21.4. When the eyewitnesses affirm that the deceased was not in a fit and conscious state to make the statement, the medical opinion cannot prevail.

21.5. The law does not provide as to who could record dying declaration nor there is any prescribed format or procedure for the same but the person recording dying declaration must be satisfied that the maker is in a fit state of mind and is capable of making the statement.

21.6. Although presence of a Magistrate is not absolutely necessary for recording of a dying declaration but to ensure authenticity and credibility, it is expected that a Magistrate be requested to record such dying declaration and/or attestation be obtained from other persons present at the time of recording the dying declaration.

21.7. As regards a burns case, the percentage and degree of burns would not, by itself, be decisive of the credibility of dying declaration; and the decisive factor would be the quality of evidence about the fit and conscious state of the declarant to make the statement.

21.8. If after careful scrutiny, the court finds the statement placed as dying declaration to be voluntary and also finds it coherent and consistent, there is no legal impediment in recording conviction on its basis even without corroboration.”

(emphasis supplied)

In the event the declaration is found to be voluntary, truthful and does not suffer from any blemish it can form the sole basis of conviction. There is neither any rule of law nor rule of caution which requires corroboration to sustain conviction on the basis of such declaration.

In the light of the aforesaid legal propositions, let me test the credibility of the dying declarations made by the victim. First dying declaration was made by the victim to her brother, P.W. 1. It is argued P.W. 9 and P.W. 10 arrived at the spot earlier than P.W. 1 but no

declaration had been made to them. This renders this dying declaration improbable and a manufactured one.

I have considered the aforesaid submissions in the light of the evidence on record. Hearing hue and cry, P.W. 9, another sister-in-law of the victim rushed out of her room and found the latter lying with burn injuries on the staircase. Similarly, P.W. 10, a neighbour came to the spot. Immediately, P.W. 9 informed P.W. 1, brother of the victim who promptly arrived at the spot. Thereafter, victim narrated the incident to her brother. This conduct of the victim to confide in her brother after he had arrived at the spot is most natural. Assailants were her in laws and the incident occurred at the matrimonial home. Only upon her brother arriving at the spot, the victim gathered courage to narrate the incident to him at the earliest opportunity. There is hardly any time lag between the incident and the statement made by the victim to her brother, P.W. 1. It is also apposite to note that the oral dying declaration made to P.W. 1 is disclosed by him in the F.I.R. which was lodged shortly after the incident. Thus, I am of the opinion victim made the oral dying declaration to her brother, P.W. 1 at the earliest opportunity which is voluntary, truthful and does not suffer from any infirmity.

Thereafter, P.W. 1 informed the police and the fact was diarized at the police station. Investigating officer P.W. 17 came to the spot and the victim made similar oral declaration to him. Oral declaration to P.W. 17 is corroborated by most of the witnesses including independent witnesses,

namely, P.Ws. 3, 5, 6 and 10. It is contended P.W. 1 is silent in Court about any statement by the victim to P.W. 17. There is no reference in the F.I.R. too. Scanning the F.I.R., I find P.W. 1 stated her sister had talk with the police. However, in Court he omitted to state such fact. This omission is not of much consequence as all other witnesses present at the spot has corroborated this fact. Hence, I am of the opinion, fact that the victim made oral dying declaration to P.W. 17 is proved.

However, I am unwilling to give credence to the document exhibited as Exhibit 8, namely, written dying declaration scribed by P.W. 17. None of the witnesses has stated P.W. 17 had reduced the oral dying declaration in writing. Even the so-called signatories to the said written declaration, namely, Dilip De Sarkar (P.W. 5) and Badal Mukherjee (P.W. 6) have not corroborated P.W. 17 in this regard. P.W. 17 may have subsequently manufactured the written dying declaration which does not inspire confidence.

It is trite law if the evidence of a witness is partly true and partly false, it is the duty of the court to separate the grain from the chaff and rely upon it to the extent it inspires confidence. Distilling the evidence of P.W. 17 in the backdrop of the other evidence on record, I hold though his deposition with regard to oral dying declaration is convincing but I am unable to accept his version that he had transmitted the oral declaration of the victim into writing also.

The third and most vital dying declaration, in my estimation, was recorded by the medical officer (P.W. 8). Victim was brought to the hospital around 3.30 p.m. and her statement was reduced into writing by P.W. 8 in the injury report, Exhibit 3 in discharge of her official duties. P.W. 8 is an independent witness and that too a medical personnel. Though she noted victim had suffered 100% burn injuries and her condition was poor, her deposition shows that the victim was conscious and capable of making a cogent statement with regard to the cause of death. She also states no one was present when the victim made the declaration ruling out any possibility of tutoring. Thus, all the parameters to test the reliability of a dying declaration, namely, voluntariness and capacity to make the statement are clearly satisfied in the written dying declaration recorded by the medical officer in the injury report.

It has been argued the medical officer did not follow due procedure in recording statement. P.W. 8 has clarified the position. She stated condition of the victim was very serious and therefore, she felt it imperative to record the statement immediately. There was no time to summon a Magistrate to record the statement. Conduct of the medical officer in promptly recording the statement of a dying lady as she felt there was no time to summon a magistrate clearly discloses her authentic and genuine effort to record the truthful version of the victim which would otherwise have been lost forever.

Finally, the victim made an oral dying declaration to her husband (P.W. 11) who visited her in the hospital during visiting hours. This was her last statement which is consistent with her earlier dying declarations and implicate the appellants.

Evidence of all the prosecution witnesses including that of the medical officer (P.W. 8) shows that the victim was conscious at all points of time and in spite of her very serious injuries and grave condition was in a fit state to make cogent statements implicating the appellants.

In view of the law declared in **Laxman** (supra), authorities relied on by the appellants, namely, **Paparambaka Rosamma & Ors. vs. State of Andhra Pradesh**⁵ and **Ramilaben Hasmukhbhai Khristi & Anr. vs. State of Gujarat**⁶ are inapposite and I am inclined to follow the ratio in of **Laxman** (supra) in that regard.

Nallapati Sivaiah vs. Sub-Divisional Officer, Guntur, Andhra Pradesh⁷, relied on by the appellants is also factually distinguishable. In the cited case post mortem doctor had opined the victim was not in a fit state to make a statement and the dying declarations recorded therein were inconsistent to one another. None of the aforesaid factors are evident in the present case. On the contrary, evidence of medical officer (P.W. 8) shows that the victim in a conscious and fit state made statements to her which she reduced into writing. The other prosecution

⁵ AIR 1999 SC 3455

⁶ AIR 2002 SC 2996

⁷ (2007) 15 SCC 465

witnesses also consistently state the victim was conscious and fit to make statement. All the dying declarations are consistent to one another and receive corroboration from the attending circumstances of the case.

In the present case, dying declarations made by the deceased are not only voluntary, truthful and consistent but are corroborated by other evidence on record. The appellants are relations of the victim. Appellant no. 1 (since deceased) was her elder brother-in-law, the appellant no. 2 was his wife and appellant no. 3 is another brother-in-law of the deceased. They used to reside with the victim and her husband in joint mess. Evidence has come on record there was inimical relationship between the brothers giving rise to motive to commit the crime. In the afternoon on the fateful day, the victim was set ablaze in the staircase of the house occupied by her and the appellants. The manner and circumstances in which the victim was set ablaze leave no doubt in one's mind that she was able to identify her assailants. Immediately after the incident another sister-in-law of the victim (P.W. 9) who woke up by the hue and cry, came out of her room and found the victim lying with burn injuries in the staircase. P.W. 10, a neighbour also heard cries and came to the spot. These witnesses have corroborated the circumstances in which the victim had suffered burn injuries in the staircase of the house. They found the victim lying on the staircase of the house with 100% burn injuries. Extent of injuries suffered by the victim and the place of occurrence clearly establish that the burn injuries suffered by her could

neither be accidental nor suicidal. On the other hand, the aforesaid circumstances leave no doubt in one's mind that she have been set on fire in the staircase of the house. It is argued that the appellants were not seen by P.W. 9/10 in the staircase. One must not lose sight of the fact that the rooms of the appellants were in the ground floor of the building and, therefore, immediately after commission of the offence, they had taken refuge in their rooms and were not found in the staircase. Hence, failure of P.W. 9 and P.W. 10 to notice the presence of the appellants in the staircase does not militate against the truthfulness of the dying declarations. Appellants ordinarily resided in the aforesaid house and no defence plea of alibi has been raised by the appellants. These circumstances coming out from the evidence on record substantially corroborate the consistent dying declarations made by the victim that the appellants after holding her in the staircase had poured kerosene oil and set her on fire. Thus, the aforesaid dying declarations receive substantial corroboration from the other materials on record.

In the light of the aforesaid discussion, I hold that the victim was conscious and in a fit state to make the dying declarations in question. All the dying declarations made by her are voluntary, truthful and consistent to one another. They also receive corroboration from other evidence and the attending circumstances of the case.

Thus, I consider it safe to rely on the aforesaid dying declarations to record a finding of guilt against the appellants.

Conviction and sentence of the appellants are upheld.

Appeal so far as it relates to appellant Nos. 2 and 3 is accordingly dismissed.

Period of detention suffered by the appellant Nos. 2 and 3 during investigation, enquiry and trial shall be set off from the substantive sentence imposed upon the appellant Nos. 2 and 3 in terms of Section 428 of the Code of Criminal Procedure.

Copy of the judgment along with Lower Court Records be sent down to the trial court at once for necessary compliance.

Urgent Photostat Certified copy of this order, if applied for, be supplied expeditiously after complying with all necessary legal formalities.

I agree.

(Bivas Pattanayak, J.)

(Joymalya Bagchi, J.)