

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 451 of 2003
With
CRAN 3 of 2021

Sasti Bouri
-Vs-
The State of West Bengal

For the Appellant	:	Mr. Satadru Lahiri, Adv. Mr. Sourav Paul, Adv.
For the State	:	Mr. Saibal Bapuli, Id. A.P.P., Mrs. Sreyashee Biswas, Adv. Mr. Bibaswan Bhattacharya, Adv.
Heard on	:	19.05.2022
Judgment on	:	19.05.2022

Joymalya Bagchi, J. :-

Appeal is directed against the judgment and order dated 26.08.2003 passed by the learned Additional Sessions Judge, Fast Track 1st Court, Asansol in Sessions Trial No.18 of 2003 arising out of Sessions Case No.8 of 1995 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 simple imprisonment for five months more.

Archana Bauri was married to Kandan Bauri in 1989. In the night of 16.03.1993 while her husband was away, appellant who is her brother-in-law gave indecent proposal to her. She resisted him. Appellant became enraged and poured kerosene oil and set her on fire. She was admitted to Asansol S.D. Hospital. At the time of admission, she was examined by one Dr. B. N. Banerjea. Dr. Banerjea noted burn injuries on her body and recorded the history of assault as “cooking in the evening”. On and from 17.03.1993 she was treated by Dr. Utpal Nandi (P.W.15). On 25.03.1993 Dr. Nandi informed police through Superintendent of the hospital to record statement of the victim. On the next day i.e. on 26.03.1993, one S. I. Mihir Kumar Banerjee recorded statement of the victim, marked as Ext.6, in the presence of Dr. Nandi and staff nurse. Dr. Nandi also endorsed the gist of the statement of the victim in the treatment sheet marked as Ext. 2/1. Unfortunately, the victim died on 29.03.1993. Two days later, her brother Durlav Bauri (P.W.1) lodged FIR against the appellant, inter alia, alleging that his sister had been subjected to mental and physical torture at the matrimonial home. Appellant used to give indecent proposal to her. On 17.03.1993 he was informed that his sister had suffered burn injuries. He met her in the hospital when her sister stated she committed

suicide unable to bear the torture inflicted by her husband and the appellant who had given indecent proposal to her. On the written complaint of P.W.1, Hirapur P. S. Case No. 31 of 1993 dated 31.03.1993 under Sections 498A/306 IPC was registered for investigation against the appellant and Kandan Barui, husband of the deceased. In course of investigation, the medical papers of the deceased enclosing her dying declaration were collected and charge-sheet was filed under Sections 498A/302/34 IPC against the appellant and Kandan Bauri. Kandan absconded and charges were framed under the aforesaid sections against the appellant. Appellant pleaded not guilty and claimed to be tried. Prosecution examined 15 witnesses to prove its case. Defence of the appellant was one of innocence and false implication.

In conclusion of trial, the trial Judge by the impugned judgment and order convicted and sentenced the appellant, as aforesaid. Appellant was acquitted of the charge under Section 498A IPC.

Mr. Satadru Lahiri, learned Advocate for the appellant submits the incriminating dying declaration recorded by SI, Mihir Kumar Banerjee, marked as Ext.6, has not been proved. The police officer was not examined. Neither the staff nurse nor Kalo Moni Bauri (P.W.11) who was present at the time of recording statement of the deceased supported the prosecution case. At the time of admission, it is noted in the medical papers that the victim suffered accidental burn while

cooking. Dying declaration is not reflected in the first information report lodged by P.W.1. P.W.1 and other witnesses did not support the prosecution case and stated that the relationship between the couple was good. P.W.3 stated that the appellant was present in his house watching video show at the time of occurrence which wholly demolishes the incriminating dying declaration. Appellant ought not to be convicted on the basis of the so called dying declaration. He is entitled to an order of acquittal.

Mr. Bibaswan Bhattacharya, learned Advocate for the State submits the dying declaration of the victim recorded on 26.3.1993 is most convincing. It was recorded in the presence of the treating doctor (P.W.15). Though police officer who recorded the dying declaration was not examined, he had recorded the statement in presence of the treating doctor who proved the document. In addition thereto, gist of the dying declaration was noted by the treating doctor in the treatment sheet and has been proved and marked as Ext.2/1. Non-examination of S.I. Mihir Banerjee or the Investigating officer does not affect the truthfulness of the dying declaration which has been proved by the treating doctor (P.W.15). Source of information with regard to the earlier exonerative statement recorded by Dr. B. N. Banerjea at the time of admission of the patient is unclear. Hence, such statement cannot be treated as a dying declaration. The ambivalent stance of the prosecution witnesses who remained mum with regard to the facts and

circumstances leading to the unfortunate demise of the victim housewife may have been prompted through allurement but did not erode the intrinsic truth of the dying declaration of the housewife implicating the appellant recorded in the hospital. Evidence of P.W.3 with regard to presence of the appellant in his house is vague and non-specific. He is a neighbour of the appellant and it is possible after the incident, the appellant had come to his house. Be that as it may, appellant did not raise any plea of alibi during his examination under Section 313 Cr.P.C. Hence, the prosecution case is proved beyond doubt and the appeal is liable to be dismissed.

The instant case depicts an extremely sad state of affairs. Though Archana suffered a grisly death at her matrimonial home, during trial her own relations through evasive responses have sought to hide the truth regarding her unfortunate demise.

P.W.1, Durlav Barui remained silent with regard to the dying declaration of the victim which was recorded on 26.03.1993 in the hospital much prior to lodging of the first information report. In his report he sought to dilute the case by claiming that the victim housewife had committed suicide being vexed by ill-treatment of her husband and indecent proposals held out by the appellant. In Court, the witness went a step further. He disowned the FIR and came out with an innocuous version that the victim had caught fire while cooking. He claimed he had put LTI on a blank document. Similarly, his

wife Kalo Moni Bauri (P.W.11) though present while the dying declaration of the victim lady was recorded in the hospital on 26.03.1993 remained silent with regard to such incriminating fact. Her husband (P.W.1) claimed that his wife had been made to sign a blank document by police. However, in cross-examination, Kalo Moni admitted deceased had told something in the hospital but she could not recollect the contents. It is unfortunate to note, though the witnesses had not supported the prosecution case and even resiled away for the FIR, they were not declared hostile and cross-examined.

Relying on the deposition of these witnesses Mr. Lahiri strenuously argues the dying declaration recorded in the presence of treating doctor (P.W.15) is bereft from material corroboration and ought not to be believed. In my estimation, lack of corroboration from the aforesaid witnesses does not affect the intrinsic truth of the aforesaid statement of the deceased. None of these witnesses were present at the place of occurrence, when the incident occurred. Hence, corroboration with regard to the manner in which the victim lady suffered burn injuries as narrated in her dying statement cannot be expected from these witnesses.

Let me now examine the truthfulness of the dying declaration in the instant case. It is contended by the appellant, there are three conflicting dying declarations. First dying declaration is said to have been recorded at the time of admission of the victim lady in the

hospital. She was admitted by one Dr. B. N. Banerjee. The doctor noted she caught fire while cooking. Second statement of the victim was recorded on 26.03.1993. On request of the treating doctor (P.W. 15), Police Officer, SI Mihir Kumar Banerjee recorded her statement. She stated appellant gave indecent proposal to her in the absence of her husband. She resisted. Thereafter appellant got enraged and poured kerosene oil and set her on fire. She cried for help and rushed out of the house and fell in a pond. She was removed to the hospital by local people. This is the second dying declaration. Third dying declaration appears to have been recorded in the F.I.R. lodged by P.W. 1 wherein it is claimed victim committed suicide on the instigation of the appellant and her husband. This version, however, has not been supported by P.W. 1 in Court.

When multiple dying declarations came to the fore, an onerous duty is cast on the Court to examine in the facts and circumstances of the case which of the dying statements is most reliable and consistent with the broad probabilities of the case. Incompatibility between the dying statements is not a ground to reject all of them. Each declaration is to be judged on its own merits¹. It is not the requirement of law nor a matter of prudence that the declaration recorded at the earliest point of time is to be given preference.

¹ Nagabhushan Vs. State of Karnataka, (2021) 5 SCC 222; Kashmira Devi Vs. State of Uttarakhand And Others, (2020) 11 SCC 43

First declaration recorded in the medical papers by Dr. Banerjee is an exonerative one. At the time of admission it was noted the victim had caught fire while cooking in the evening. I have examined the medical records wherein the said statement is recorded. There is no noting in the statement that the declaration was of the victim herself. In the absence of such noting the said statement cannot be treated as a dying declaration of the victim at all. On the contrary, it transpires from the document that the victim had been brought to the hospital by her husband Kandan Bauri. It is possible that the history of the assault noted at the time of admission was at the behest of Kandan Bauri, brother of the appellant, who being eager to protect the latter from legal punishment had given an exonerative version of the incident. Thereafter the victim was treated in the hospital by doctor Nandi (P.W. 15). As her condition stabilized, on 25.03.1993 Dr. Nandi made a request for her statement be recorded through the Superintendent of the hospital. Upon such request a Police Officer viz., SI Mihir Kumar Banerjee came to the hospital and recorded statement of the victim lady in the presence of P.W. 15. Though SI Mihir Kumar Banerjee was not examined, the statement of the victim was proved by the treating doctor (P.W. 15). Dr. Nandi also recorded the gist of the dying declaration in the treatment sheet by his own hand which was marked as "Exbt.-2/1". In the dying declaration so recorded in presence of Dr. Nandi victim categorically implicated the appellant as the person who set her on fire.

Mr. Lahiri has assailed the dying declaration on multiple grounds. He contends the author who recorded the dying declaration i.e. SI Mihir Kumar Banerjee was not examined. He also submits Kalo Moni Bauri who was present at the time of recording of dying declaration is silent with regard to the statement. Identity of the staff nurse who was present at the time of recording dying declaration has not come on record. Dying declaration is not reflected in the subsequent F.I.R. registered by P.W. 1. Finally it is argued dying declaration is improbable as P.W. 3, a neighbour, stated that the appellant was at his house watching video show when the incident occurred.

I have examined the aforesaid caveats in the backdrop of the evidence on record. Before relying on a dying declaration it is important to test whether the maker of the statement was conscious and in a fit state to make the statement. In ***Laxman vs. State of Maharashtra***² a Constitution Bench of the Hon'ble Apex Court held certificate of a doctor is not *sine qua non* for admissibility of a dying declaration. A dying statement may be admissible if from the attending facts and circumstances it appears that the victim was conscious and in a fit state to make the statement. I have little doubt with regard to the consciousness and the ability of the victim to make a cogent statement before SI Mihir Kumar Banerjee on 26.03.1993 as such statement was

² (2002) 6 SCC 710

made in the presence of her treating doctor. Dr. Nandi had been treating the victim lady since 17.03.1993. Being satisfied that the victim was in a fit state to make statement he requested to record the dying declaration of the victim. On his request declaration was recorded by a police officer in the presence of the doctor and staff nurse. In this backdrop, failure to endorse in the treatment sheet that the victim was in a fit state to make statement does not affect the admissibility of the dying declaration in any way. It is true, examination of SI Mihir Kumar Banerjee would have further bolstered the prosecution case. Non-examination of the said police officer, however, does not create an irreparable dent in the prosecution in view of the deposition of Dr. Nandi who was present when the police recorded the statement. Section 47 of the Evidence Act provides that a document may be proved by a person in whose presence the same is executed. Dr. Nandi stated the police officer SI Mihir Kumar Banerjee recorded dying declaration in his presence. Hence, he was a competent witness to prove the dying declaration marked as "Exbt.-6". Be that as it may, the doctor endorsed the gist of the dying declaration in the treatment sheet in his own writing which is duly proved and marked as "Exbt.-2/1".

In view of the aforesaid facts, I am of the opinion non-examination of SI Mihir Kumar Banerjee or the investigating officer does not affect the proof of the incriminating dying declaration or unfolding of the prosecution case.

It has been argued neither Kalo Moni Bauri nor her husband (P.W. 1) stated about the dying declaration in the F.I.R. in Court. On the first blush such omission would have created doubt with regard to the dying declaration. However, factual matrix of the case prompts me to rely on the declaration recorded by an independent medical officer in the hospital than the prevaricative and evasive relations of the deceased who appear to have been won over by the appellant and made every effort during trial to hide the truth. It may not be out of place to note, the dying declaration in the present case came into being much prior to the registration of the F.I.R. and had been recorded in the presence of the treating doctor who, in my estimation, was prompted to do so in his zeal to unravel the truth and not to falsely implicate any person. On the other hand, subsequent watering down of the dying declaration from one of homicide to suicide in F.I.R. and thereafter evasive depositions of the relations and other witnesses in Court show their scant respect for truth or any genuine concern to punish the real offender. Had it not been for the conscientious and timely intervention of the treating doctor, truth would have been an unfortunate casualty in the hands of conniving relations.

Failure to identify the staff nurse who was present during recording of the dying declaration is also of little consequence. Evidence of the treating doctor is truthful and reliable in nature. It discloses his earnest endeavour to preserve evidence with regard to circumstances

leading to the death of the hapless lady. Quality and quantity of the evidence is the guiding factor to prove a fact and arrive at the truth. Examination of the staff nurse would have merely increased the number of witnesses and not the quality of evidence. Thus, I am of the opinion dying declaration marked as “Exbt.-6” and “Exbt.-2/1” has been clearly proved through the evidence of P.W. 15 and is wholly reliable in nature.

A faint plea of alibi has been raised with reference to P.W. 3. P.W. 3, a neighbour, contended the appellant was attending video show in his residence when a boy informed that the victim had suffered burn injuries. P.W. 3 has not spoken when the appellant had joined the video show. He is a neighbour and his house was close to that of the appellant. Even if the said witness is believed, it is possible that the appellant after committing the crime in order to cover his tracks went to the residence of P.W. 3 and pretended ignorance when the matter was reported. That is the most charitable interpretation of the evidence of P.W. 3. However, in the factual matrix of the case when relations of the victim housewife appear to have won over and had tried to hide the truth by giving out vague and innocuous statements, it is too much to expect that a neighbour of the appellant would speak the truth. It appears P.W. 3 is a zeal of clannish solidarity came out with this untrue version to save his neighbour. In the face of the clear and unequivocal evidence of the independent medical personnel (P.W. 15)

who proved the incriminating dying declaration, I do not wish to give credence to P.W. 3 with regard to the alibi of the appellant. It may not be out of place to note even the appellant during his examination under Section 313 of the Code of Criminal Procedure did not raise such alibi in his defence.

The so-called dying declaration pertaining to suicide recorded in the F.I.R. does not deserve any serious consideration. It was not even supported by its maker P.W. 1 during trial. P.W. 1, being influenced by some unseen malevolent force, had at various stages of the case sought to obfuscate the unravelling of truth by coming out with a diluted version of culpability in the F.I.R. and thereafter a complete clean chit during trial.

In view of the aforesaid facts and circumstances of the case, I am of the opinion the incriminating dying declaration of the victim recorded in Exbts. 4 and 2/1 respectively in the presence of treating doctor (P.W. 15) is wholly reliable, truthful and inspires confidence. It can form the sole basis of conviction of the appellant.

In the light of the aforesaid discussion, I uphold the conviction and sentence of the appellant.

The appeal is, accordingly, dismissed.

In view of dismissal of the appeal, connected application being CRAN 3 of 2021 is also 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.

Appellant has no criminal antecedents. He appears to have roots in society. Though he has committed a grave crime, his criminal act does not portray any potentiality to recidivism. In the event, upon completion of 14 years of actual imprisonment he makes an application for remission of sentence under section 432 read with section 433A of Cr.P.C. before the appropriate Government, the said Government shall consider his application in the light of the aforesaid circumstances and other relevant factors including his conduct in the correctional home.

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.

(Ananya Bandyopadhyay J.)

(Joymalya Bagchi, J.)