

**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. 625 of 2012

Sri Manas Maity & Anr.

-Vs-

State of West Bengal

For the Appellant : Mr. Sumanta Ganguly Amicus curiae

For the State : Ms. Amita Gaur, Adv.

Heard on : 08.09.2022

Judgment on: 08.09.2022

Joymalya Bagchi, J. :-

Appellant has assailed judgment and order dated 29.09.2012 and 01.10.2012 passed by the learned Additional Sessions Judge, 6th court, Paschim Medinipur in Sessions Trial Case No. XXV/July/2004 convicting the appellant no.1 for commission of offence punishable under Section 498A/302/34 of the Indian Penal Code and sentencing the appellant no. 1 to suffer rigorous imprisonment for life and to pay a

fine of Rs.2,000/- in default to suffer rigorous imprisonment for one year for the offence punishable under Section 302 of the Indian Penal Code and to suffer rigorous imprisonment for three years for the offence punishable under Section 498A of the Indian Penal Code and sentencing appellant No. 2 to suffer simple imprisonment for life and to pay a fine of Rs. 2000/-, in default, to suffer simple imprisonment for one year for the offence punishable under section 302 of the Indian Penal Code and to suffer simple imprisonment for three years for the offence punishable under section 498A IPC, both the sentences to run concurrently.

Prosecution case as alleged against the appellants is to the effect that the victim Aparna @ Pudu was married to appellant no.1 viz., Manas Maity in June, 1989. Two sons and a daughter were born to the couple. Soon after the marriage Aparna was subjected to mental and physical torture by her husband and other in-laws including her mother-in-law viz., Usha Rani Maity, appellant no.2 herein. Salishes were held over such dispute. Manas developed illicit relationship with one Shyamali Jana. Aparna objected and was subjected to torture. Due to differences Manas and Aparna started living separately from the in-laws. On 24.7.2002 one Shyamal Nayek along with Shyamali Jana came to the matrimonial home of Aparna. Aparna raised protest over illicit relationship between Manas and Shyamali. She was assaulted. On 29.7.2002 at 12.30 A.M. it is alleged Manas and other in-laws

including Usha Rani and Shyamali set her on fire. With the help of one Sima Ram (PW6), a neighbour, Aparna came to the residence of Madan Mondal, her brother-in-law (PW1). Aparna disclosed the incident to Madan and his wife viz, Saraswati Mondal. They took Aparna to Kalaikunda beat house attached to Kharagpur Local Police Station. Aparna made a statement before the police officer. Police officer told them to take Aparna to hospital. Madan took Aparna to the residence of her father-in-law, Kalipada. Thereafter Aparna was shifted to Kharagpur S. D. Hospital and admitted. In the meantime, written complaint was lodged by Mandan Mondal (PW1) resulting in registration of Kharagpur Local Police Station Case No.160 of 2002 dated 29.7.2002 under Sections 498A/326/307/34 of the Indian Penal Code. At the hospital dying declaration of Aparna was recorded by the treating doctors. Unfortunately, on 31.7.2002, Aparna died and Section 302 of the Indian Penal Code was added to the first information report. In conclusion of investigation, charge-sheet was filed and charges were framed against the appellants and other in-laws including Shyamali Jana under sections 498A/302 of the Indian Penal Code. In course of trial, charges were amended and Section 34 IPC was added to the charge.

During trial, prosecution examined 13 witnesses and exhibited a number of documents. Defence of the appellants was one of innocence and false implication. In conclusion of trial, trial Judge by the

impugned judgment and order convicted the appellants, as aforesaid. Co-accuseds were acquitted of the charges levelled against them.

Nobody appears for the appellant. Mr. Sumanta Ganguly, is requested to assist the Court as amicus curiae.

Mr. Sumanta Ganguly, learned Advocate for the appellants argues prosecution case suffers from various improbabilities. It is alleged Aparna suffered 80% burn injury. It is impossible for a victim with 80% burns to run for a considerable distance and reach the house of PW1. PW1 stated he had lodged FIR at Kalaikunda Beat House immediately after Aparna had come to his house. However, endorsement on the FIR, Ext.1 shows it was registered at 17.45 hours after Aparna was admitted to hospital. Trial court disbelieved the oral dying declarations and acquitted the co-accuseds. It also did not believe the dying declaration to the investigation officer (PW13). So-called dying declaration recorded by treating doctor, Ext.6 was not proved in accordance with law. Doctor who recorded the dying declaration had not been examined. There is nothing on record to show that the victim was conscious and in a fit state of mind to make the dying declaration. Hence, the conviction is liable to be set aside and the appeal may be allowed.

Mrs. Amita Gaur, learned Advocate for the State submits evidence of the prosecution witnesses including neighbours i.e. PWs.6 and 7 show Aparna suffered burn injuries at the matrimonial home.

With the help of PW6, she came to the residence of her brother-in-law and narrated the incident. Subsequently, she was shifted to hospital where she made dying declarations before treating doctors. Post mortem doctor (PW10) and GDA attached to the hospital proved the dying declarations. Trial court rightly relied on the dying declarations and recorded the conviction of the appellants. The appeal is liable to be dismissed.

PW1, Madan Mondal is the brother-in-law and complainant. He deposed Aparna was married to Manas Maity in June, 1989. Incident occurred in 2002. Aparna was subjected to torture by Manas and his in-laws. Salishes were held over such issue. Around 12.30 A.M. on 29.7.2002 she was set on fire at the matrimonial home. With the help of a neighbour viz., Sima Ram (PW6) she came to the residence of Madan Mondal. She narrated the incident to him. He took her to Kalaikunda Beat House and lodged complaint. He thereafter took her to the residence of her father-in-law. Therefrom Aparna was taken to hospital. She was talking normally in the hospital.

PW1 is corroborated by his wife (PW3) viz., Saraswati Mondal.

PW2, Smt. Bhagya Lakshmi Das is the mother of the deceased. She stated Aparna had been set on fire at the matrimonial home. She was shifted to Kharagpur S. D. Hospital. P.W.2 did not talk with her daughter. She was a signatory to the inquest report.

PW4, Smt. Gita Das is a sister of Aparna. She deposed with regard to torture upon her sister at the matrimonial home. She also stated Aparna made oral dying declaration implicating the accused persons including Shyamali Jana.

PW6, Sima Ram and PW7, Smt. Usha Das are neighbours. They stated Aparna was set on fire at the matrimonial home. They ran to the spot. Aparna narrated the incident to them. Sima took her to the residence of her brother-in-law. Thereafter she was taken to Kalaikunda Beat House. Then she was shifted to the residence of her father-in-law and thereafter to hospital.

These witnesses have spoken of oral dying declarations by the deceased at the place of occurrence, residence of PW1, at Kalaikunda Beat House and thereafter when she was brought back to the residence of her father-in-law Kalipada. In the aforesaid oral dying declarations Aparna had implicated all the accused persons including the appellants. Trial court did not believe the aforesaid dying declarations and acquitted the co-accuseds. It is the prosecution case after Aparna was admitted to hospital she made dying declarations before the treating doctors viz., Dr. Satyabrata Roy and Dr. Kanupada Pandit. None of these doctors have been examined but the dying declarations have been proved through PW10, Dr. Santosh Kr. Prodhan who was their colleague and PW12, Gautam Sahoo, GDA attached Kharagpur SD Hospital. Both the witnesses claimed they were acquainted with the

hand writings of the said doctors and proved the dying declarations recorded by Dr. Satyabrata Roy, as Ext.6. History of the patient and prescription prepared by Dr. Satyabrat Roy is proved by Ext.9, notings by Dr. Kanupada Pandit in the treatment-sheet disclosing another statement of the patient was also proved as Ext.10. Dying declaration recorded by the investigating officer (PW13 at the hospital) was marked as Ext.14 but the trial Court did not believe the same.

Mr. Ganguly has challenged the dying declarations recorded by the medical officers at the hospital on various grounds. He submits the dying declarations have not been proved in accordance with law. Doctors who recorded the dying declaration have not been examined. Even if the dying declarations are believed, they are not consistent with one another. Notings by Dr. Kanupada Pandit in the treatment-sheet marked as Ext.10 show the victim had implicated her husband Manas Maity alone. This is at variance with the other declarations of the patient recorded by Dr. Satyabrata Roy and marked as Exts.6 and 9 respectively.

With regard to the admissibility of the dying declarations, I note from the record in spite of effort attendance of the doctors who recorded the declarations could not be secured. Hence, the doctors were not examined. The declarations were proved through their colleague, PW10 and GDA, PW12.

Clause (2) of Section 32 of the Evidence Act read as follows:-

“32. Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant.- Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:-

(1) * *** *****

(2) or is made in course of business.- When the statement was made by such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business, or in the discharge of professional duty; or of an acknowledgement written or signed by him of the receipt of money, goods, securities of property of any kind; or of a document used in commerce, written or signed by him; or of the date of a letter or other document usually dated, written or signed by him.”

Doctors Satyabrata Roy and Kanupada Pandit are medical officers attached to a Government hospital. They recorded the dying declarations in discharge of their professional duty. Their presence could not be secured in spite of all efforts and the declarations were proved through their colleague and an officer of the hospital who were acquainted with their hand writings.

In *Prithi Chand vs. State of Himachal Pradesh*¹ the Apex Court held if the attendance of a medical officer cannot be procured inspite of due diligence, her findings in the treatment-sheet may be proved by her colleague who is conversant with her handwriting in view of section 32(2) of the Evidence Act. It is nobody's case that the doctors

¹ (1989) 1 SCC 432

who recorded the dying declarations were readily available and were intentionally withheld by the prosecution. Moreover, no objection was raised with regard the dying declaration recorded by Dr. Satyabrata Roy, marked as Ext.6.

In view of the aforesaid, I am of the opinion the dying declarations recorded by Dr. Satyabrata Roy and Dr. Kanupada Pandit have been proved in accordance with law.

The other issue raised is whether the victim was conscious and capable of making statement. PW1 stated that the victim was conscious when she was admitted in the hospital. PW2, her mother, also stated she was conscious and shouting in pain.

In view of the aforesaid evidence on record, we are of the opinion there is independent evidence apart from the noting by Dr. Satyabrata Roy that the victim was conscious at the time of making declarations. Hypothetical propositions opined by PW10 in the course of cross-examination with regard to the capacity of a patient with 80% burn injury to speak is of little consequence in view of the clear findings all the treating doctors and other evidence on record that the victim was conscious and in a position to speak. Hence, I am of the opinion that the victim was conscious and in a fit state to make statement before the doctors at the hospital have been recorded by the medical officers at the hospital.

It is settled law conviction may be recorded on the basis of dying declaration alone. However, before recording conviction on the basis of dying declaration it is the duty of the court not only to examine whether the maker was conscious and capable to speak but that the statement made by the victim is voluntary and truthful. A declaration which is procured through tutoring and suffers from inherent improbabilities and contradictions cannot form the basis of conviction.

I have made an endeavour to examine the dying declarations made by the victim before the treating doctors on the score of truthfulness and compatibility with the broad probabilities of the case. I note the dying declarations recorded by Dr. Satyabrata Roy viz., Exts.6 and 9 victim implicate both the appellants. But the dying declaration noted by Dr. Kanupada Pandit in the treatment-sheet at 5.25 A.M. immediately after her admission as an indoor patient, implicates only her husband, Manas Maity. It is possible that the victim had subsequently exaggerated the accusation and implicated her mother-in-law in the subsequent declaration. Attending circumstances resulting in the death of the victim also probabalises this proposition. Dispute had cropped up between the victim and her husband over the latter's illicit relationship with Shyamali Jana. Over this issue, she was set on fire. These circumstances probabalise the initial statement of the victim recorded by Dr. Pandit in the treatment-sheet (Ext. 10) which

implicates the husband alone. Subsequently, victim may have tried to implicate her mother-in-law in the crime.

If the dichotomy in the dying declarations recorded by medical officers at the hospital is judged from the aforesaid perspective, it may not be safe to rely on the subsequent exaggerated statement of the victim which seeks to rope her mother-in-law in the crime. However implication of her husband in the murder is consistent in all the dying statements and compatible with the attending circumstances of the case.

Accordingly, I upheld the conviction of appellant No.1, Manas Maity for the offences punishable under sections 498A/302 of the Indian Penal Code. Sentences imposed upon him by the trial Court are also upheld.

However, I am inclined to extent the benefit of doubt to the appellant no.2, Usha Rani Maity and acquit her of the charges levelled against her.

Conviction and sentence imposed upon appellant no.2, Usha Rani Maity are set aside.

Appellant No.2, Smt. Usha Rani Maity shall be forthwith released from custody, if not wanted in any other case, upon execution of a bond to the satisfaction of the trial court which shall remain in force for a period of six months in terms of Section 437A of the Code of Criminal Procedure.

Period of detention suffered by the appellant no.1, Manas Maity during investigation, enquiry and trial shall be set off from the substantive sentence imposed upon him in terms of section 428 of the Code of Criminal Procedure.

I record my appreciation for the able assistance rendered by Mr. Sumanta Ganguly in disposing of the appeal.

Lower court records along with copies of this judgment be sent down at once to the learned trial Court as well as the Superintendent of Correctional Home for necessary compliance.

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

I agree.

(Ajay Kumar Gupta, J.)

(Joymalya Bagchi, J.)

As/sdas