

IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLA No.602 of 2007

Santilata Pradhan

....

Appellant

Mr. Abhisek Pradhan, Advocate

-versus-

State of Odisha

....

Respondent

Mr. Janmejaya Katikia, Additional Government Advocate

CORAM:

THE CHIEF JUSTICE

JUSTICE CHITTARANJAN DASH

ORDER

24.09.2022

Order No.

09.

1. The present appeal is directed against the judgment dated 18th May, 2007 passed by the Adhoc Additional Sessions Judge (Fast Track Court), Chatrapur in Sessions Case No.15 of 2005/ Sessions Case No.15 of 2005 of GDC convicting the present Appellant along with two others for the offence punishable under Section 302 read with 34 IPC and sentencing each of them to undergo rigorous imprisonment (RI) for life and to pay a fine of Rs.5,000/- and in default to undergo further R.I. for six months.

2. At the outset, it requires to notice that during the pendency of the present appeal, Appellants 1 and 2 expired and it was recorded by this Court in its order dated 11th December, 2019. Thus, the appeal abated as far as Appellants 1 and 2 were concerned and continued as far as Appellant No.3 (the present Appellant) was concerned.

3. Appellants 1 and 2 are the parents of Appellant No.3. She happens to be the sister-in-law of the deceased - Jhuli Nahak, who married to Krushna Nahak, the brother of Appellant No.3.

4. The case of the prosecution is that the three Appellants poured kerosene over the bodies of Jhuli Nahak as well as her daughter-Mamini, aged about 1 and half years while they were asleep and set them on fire. Mamini Nahak died an instantaneous death. Jhuli Nahak was admitted to the Hospital at Berhampur on that date itself i.e. 6th January, 2004 but died almost one and half months later on 26th February, 2004.

5. It must be also mentioned that by the impugned judgment, the trial Court acquitted all the Appellants of the offences under Sections 498A/304(B)/406 IPC read with Section 4 of Dowry Prohibition Act but sustained their conviction under Sections 302/34 IPC.

6. This Court has heard the submissions of Mr. Abhisek Pradhan, learned counsel for the present Appellant and Mr. Janmejaya Katikia, learned Additional Government Advocate for the State.

7. The main plank of the case of the prosecution is the dying declaration of the deceased—Jhuli Nahak, which was recorded on 9th January, 2004 after certification of her sound mental condition as well as physical condition by Dr. Bhupati Bhusan Das, a Lecturer of MKCG Medical College, Berhampur. The dying

declaration itself was recorded by the Additional Tahasildar-cum-Executive Magistrate, Berhampur (P.W.5) of Jhuli Nahak took place on 26th February, 2004.

8. Learned counsel for the Appellant pointed out that the said dying declaration was not signed by the deceased and, therefore, could not be relied upon to bring home the guilt of the Appellants. Secondly, that although the deceased had named one Nandini along with the three Appellants, the said Nandini was not arraigned as an accused. Thirdly, that Dr. Bhupati, the Medical Officer, who certified the mental condition of the deceased to depose, was not examined.

9. The law in regard to the recording of dying declaration is well settled. It was explained in *Laxman v. State of Maharashtra (2002) 6 SCC 710*, as under:

“3. The juristic theory regarding acceptability of a dying declaration is that such declaration is made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the man is induced by the most powerful consideration to speak only the truth. Notwithstanding the same, great caution must be exercised in considering the weight to be given to this species of evidence on account of the existence of many circumstances which may affect their truth. The situation in which a man is on the deathbed is so solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason the requirements of oath and cross-examination are dispensed with. Since the accused has no power of cross-examination, the courts insist that the dying declaration

should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The court, however, has always to be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. The court also must further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. 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 eyewitnesses 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 of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a Magistrate or a doctor or a police officer. When it is recorded, no oath is necessary nor is the presence of a Magistrate absolutely necessary, although to assure authenticity it is usual to call a Magistrate, if available for recording the statement of a man about to die. 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 circumstances 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 of 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.

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5. The Court also in the aforesaid case relied upon the decision of this Court in *Harjit Kaur v. State of Punjab* (1999) 6 SCC 545 wherein the Magistrate in his evidence had stated that he had ascertained from the doctor whether she was in a fit condition to make a statement and obtained an endorsement to that effect and merely because an endorsement was made not on the declaration but on the application would not render the dying declaration suspicious in any manner. For the reasons already indicated earlier, we have no hesitation in coming to the conclusion that the observations of this Court in *Paparambaka Rosamma v. State of A.P.* (1999) 7 SCC 695 (at SCC p. 701, para 8) to the effect that “in the absence of a medical certification that the injured was in a fit state of mind at the time of making the declaration, it would be very much risky to accept the subjective satisfaction of a Magistrate who opined that the injured was in a fit state of mind at the time of making a declaration” has been too broadly stated and is not the correct enunciation of law. It is indeed a hypertechnical view that the certification of the doctor was to the effect that the patient is conscious and there was no certification that the patient was in a fit state of mind especially when the Magistrate categorically stated in his evidence indicating the questions he had put to the patient and from the answers elicited was satisfied that the patient was in a fit state of mind whereafter he recorded the dying declaration. Therefore, the judgment of this Court in *Paparambaka Rosamma v. State of A.P.* (1999) 7 SCC 695 must be held to be not correctly decided and we affirm the law laid down by this Court in *Koli Chunilal Savji v. State of Gujarat* (1999) 9 SCC 562.”

10. Consequently, it is not necessary for the deceased to have herself signed the dying declaration or even affixed her thumb impression.

11. The evidence of PW-5, i.e., the Additional Tahasildar, who recorded the dying declaration, reveals that she was indeed in a fit state to make it. He had read over to the deceased the contents of the dying declaration in the presence of the witnesses and there is an endorsement to that effect. PW-5 also has recognized the endorsement made by Dr. Bhupati Bhushan Das in his presence and identified the signature as well. PW-5 was also present when the inquest was held after the death of the deceased on 26th February, 2004. The cross-examination of PW-5 has not brought out any inconsistency or contradiction in his evidence. He has reiterated that it is only after the doctor was satisfied that Jhuli Nahak was mentally sound and that her voice was audible that PW-5 proceeded to record her dying declaration.

12. PW-5 being a Government official, his evidence can be viewed as being objective as he had no particular animosity against any of the accused. Moreover, his cross-examination has not shaken in his evidence.

13. Learned counsel for the Appellant argued that even if the dying declaration was to be taken as one of the pieces of

evidence, it did not bring home the guilt of the present Appellant in the absence of any motive for the crime.

14. This is a case of double murder with not only the sister-in-law of the present Appellant, being one of the deceased, but her own one and half year niece was sleeping with her mother being the other victim of the crime. In fact, the young baby died an instantaneous death having been burnt alive with the Appellant having thrown kerosene on her body and having set it on fire. The dying declaration is absolutely clear and it names the present Appellant as being one of the three accused who committed the ghastly crime.

15. It is significant that while eighteen witnesses were examined on behalf of the prosecution and none was examined on behalf of the defence. The medical evidence of Mr. Sachidananda Murty (PW-12) who conducted the autopsy confirms that the death of the deceased Jhuli Nahak on account of extensive burns. The evidence of Dr. Umashankar Mishra (PW-14) confirms the death of the one and half year baby, Mamini Nahak on account of deep burn injuries. It is in the above context of the unimpeachable evidence pointing to the guilt of the accused that the aspect of motive has to be examined. On this aspect, the following observations of the Supreme Court in *State of U.P. v. Kishanpal (2008) 16 SCC 73*:

"The motive may be considered as a circumstance which is relevant for assessing the evidence but if the evidence is clear and unambiguous and the circumstances prove the guilt of the accused, the same is not weakened even if the motive is not a very strong one. It is also settled law that the motive loses all its importance in a case where direct evidence of eyewitnesses is available, because even if there may be a very strong motive for the accused persons to commit a particular crime, they cannot be convicted if the evidence of eyewitnesses is not convincing. In the same way, even if there may not be an apparent motive but if the evidence of the eyewitnesses is clear and reliable, the absence or inadequacy of motive cannot stand in the way of conviction."

16. The Court is satisfied in the present case that the prosecution has been able to prove the guilt of the present Appellant for the offence punishable under Section 302 read with 34 IPC.

17. Consequently, the impugned judgment of the trial Court is affirmed. The appeal is accordingly dismissed but, in the circumstances with no order as to costs.

(Dr. S. Muralidhar)
Chief Justice

(Chittaranjan Dash)
Judge