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IN THE HIGH COURT OF ORISSA AT CUTTACK

JCRLA No.9 of 2012

Kalia @ Kartika Nayak

....

Appellant

-versus-

State of Odisha

....

Respondent

Advocates appeared in the cases:

For Appellant

:

Ms. Susmita Pattnaik
Advocate

For Respondent

:

Mr. Janmejaya Katikia
Additional Government Advocate

CORAM:

THE CHIEF JUSTICE

JUSTICE CHITTARANJAN DASH

JUDGMENT

20.10.2022

Dr. S. Muralidhar, CJ.

1. The present appeal is directed against the judgment of conviction and order of sentence dated 21st January 2011, passed by the learned Sessions Judge, Puri in S.T. Case No.150 of 2008 convicting the Appellant for the offence punishable under Section 302 IPC and sentencing him to undergo Rigorous Imprisonment (RI) for life and to pay a fine of Rs.10,000/- and in default to undergo RI for two years.

2. It must be noted at the outset that although the Appellant was charged with murdering his wife, the deceased-Mamata, he was

also charged with the offences punishable under Sections 498-A and 304-B IPC and Section 4 of the Dowry Prohibition Act, 1961 (DP Act). By the impugned judgment, he was acquitted of the later offences while being convicted for the offence punishable under Section 302 IPC.

3. The case of the prosecution was that sometime in 2004, the Appellant and the deceased Mamata had married and after her marriage, the deceased was living with the accused and his family members. Soon after the marriage, the Appellant and his family members started ill-treating the deceased on demand of dowry. On the intervening night of 16th/17th December 2007, the accused along with his family members poured kerosene over Mamata while she was asleep and set her on fire. The deceased suffered severe burn injuries and was shifted to the District Headquarters Hospital (DHH) Puri for treatment.

4. On receipt of the above information, Krushna Chandra Nayak (P.W.5), the brother of the deceased rushed to the DHH Hospital and found the deceased in a severe burnt condition. In response to a query posed by him, the deceased informed him that on the previous night when she was sleeping with her daughter in her matrimonial home, her brother-in-law took away the daughter and later, the accused sprinkled kerosene all over her body and set her afire. While undergoing treatment, the deceased died in the evening hours of 17th December, 2007 in the DHH. P.W.5

informed the Police that prior to her death, the deceased had been subjected to physical as well as mental torture at the hands of the accused. This information was reduced to writing and an FIR was registered.

5. The evidence of Dr. Abhiram Mohapatra (P.W.29) is significant. On 17th December 2007, he was attached to the DHH, Puri as Surgery Specialist. At 6.50 am, the deceased was brought in to the DHH with 90% burns. P.W.29 prepared the bed ticket. He stated in his examination-in-chief as under:

"She sustained burn injury due to assault by pouring kerosene oil. The smell of kerosene was coming out of her body. There was burn injury over her scalp hair, face, both arm, chest wall, back side of chest wall and both legs. The patient was conscious and was talking.

2. On the same day at 7.10 AM, the patient was referred to SCB Medical College and Hospital, Cuttack for better treatment. On my query, the patient disclosed that after pouring down kerosene oil on her, fire was set on her."

6. According to P.W. 29, the deceased became unconscious at 7.30 pm and expired at 8.45 pm on 17th December, 2012. In his cross-examination, he reiterated as under:

"9. I ascertained the history of the case from the mouth of the patient. But I have not reflected in the bed head ticket that I ascertained the same from her."

7. Therefore, it is plain that as soon as she was brought in, the deceased was able to speak and disclosed not only to P.W.29, but also to Smt. Bijayalaxmi Patasani (P.W.15), who was the Additional Tahasildar-cum-Executive Magistrate, Puri about her being set on fire by the accused. It was stated by P.W. 15 in her examination-in-chief as under:

"The I.O. of this case namely Umashankar Singh of Kumbharapara PS led me to the near of the bed of Mamata. Reaching the bed I found that the patient- Mamata had severe burn injuries on her person. She was in a position to talk then. No doctor was available by the side of the bed of the patient then. Other relations of the patient were there. I asked the patient Mamata about as to how she received the injuries. She told me that on the morning of that day, there had occurred a quarrel between her and her husband and in course of that quarrel her husband poured kerosene over her and set her on fire. I recorded that fact on a sheet of paper. This that statement which I recorded in the hospital near the bed of the injured patient. The statement is marked Ext.5. This is my signature marked Ext.5/1."

8. In her cross-examination, P.W.15 stated as under:

"2.No doctor was available in the ward at the time of my arrival and during recording of the dying declaration. I have not consulted any doctor regarding the condition of the patient before recording the dying declaration of Mamata. I have not recorded the statement in question-answer form. At the time of recording the dying declaration, some persons were present near the bed of the injured but I have not taken their signatures on the paper on which I recorded the statement of the injured.

3. I cannot say if the patient was very serious when I recorded her statement, but the patient was having severe injuries on her person then.”

9. Dr. Subhakanta Ojha (P.W.23) conducted the postmortem on the dead body of the deceased and noted the following injuries:

"i. Dark discoloration of skin below the umbilicus below the umbilicus up to the upper part of the thigh covering the entire lower abdomen. The rest part of the body was deficient in skin exposing the under lying sub-cutaneous tissue with dark brown blood clots like patches present all over the body. The body hairs were partially burnt. The lips were deeply cyanosed.

ii. The right nostrils contained thick yellowish mucoid plugs.

iii. There was absence of skin on the lower part of face. The skin of upper part of face was burnt and had turned dark with irregular margins.

iv. The pubic and scalp hairs were burnt.

On dissection I found the following inter internal injuries:

i. Both the lungs had contracted and contained dark black petechial spots.

ii. The walls of the trachea and pharynx were oedematous. On dissection it was found that trachea and pharynx found contained dark brown coloured thick mucoid materials causing obstruction almost to the extent 70% of the tracheal passage.

iii. The liver was contracted, cyanosed and congested.

iv. The spleen is deeply cyanosed and congested and the kidney were cyanosed and congested.

v. The sub-cutaneous tissues of the skull was hyperaemic and congested. The membranes were congested and adhered to brain materials."

10. The cause of death was due to shock resulting from 90% burns which were ante-mortem in nature. It was further clarified by P.W.23 that even the internal injuries were ante mortem.

11. It must be noted here that the accused also suffered burn injuries and was examined by Dr. Arjun Panda (P.W.21). He was discharged on 7th January, 2008. He noted that the Appellant had burn injuries on his hands and face.

12. A charge sheet was laid against the Appellant for the aforementioned offences to which he pleaded not guilty and claimed trial. On behalf of the prosecution, 31 witnesses were examined. No witness was examined for the defence.

13. On an analysis of the evidence, the trial court came to the conclusion that the prosecution had proved the guilt of the Appellant for the offence punishable under Section 302 IPC, but not for the offences under Sections 498-A/304-B of IPC and Section 4 of the DP Act. Consequently, the trial court proceeded

to convict the Appellant for the offence punishable under Section 302 IPC and sentenced him in the manner indicated hereinbefore.

14. The trial court discussed the evidence of P.Ws.5, 10 to 14, all of whom denied in the cross-examination that the deceased had committed suicide by setting fire to herself. Further, the trial Court noted the evidence of P.Ws.8 and 9, neighbours of the accused who had rushed to the house of the accused to see the deceased lying on the floor with burn injuries on her person. They then shifted her to the hospital. When they reached the house of the accused, seeing them, he fled away from the back door of the house. An adverse inference was drawn against the accused by the trial Court for this conduct.

15. The trial Court next discussed the dying declaration recorded at 2.30 pm on 17th December, 2007 by P.W.15. The deceased disclosed that between 5 and 6 am, in the bedroom, a quarrel took place between her and her husband and in the course of that quarrel, he poured kerosene over her and set her body on fire. The trial Court also discussed the evidence of P.W.29 who deposed that the patient was conscious and in a position to talk when she was admitted.

16. The evidence of P.W.28, the Scientific Officer attached to the District Forensic Science Laboratory (DFS�), Puri who visited the spot at 3.30 pm on 17th December 2007, at the instance of the

Investigating Officer (IO) (P.W.31) was also discussed by the trial Court. P.W.28 found the following materials at the spot:

“(i) One 5 litres capacity plastic jerrycan containing $\frac{1}{2}$ litre of kerosene marked as “A” from the cement floor of the bedroom, near the door (M.O.I).

(ii) Some portion of half-burnt cloth marked as “B” from the floor of the said room (M.O.II).

(iii) Some portion of the half-burnt cloth marked as “C” from the floor of the verandah (M.O.III).

(iv) Five pieces of broken bangles marked as “D” from the floor of the verandah (M.O.IV).”

17. The seizure of the said articles was proved in the evidence. The chemical examination showed that the jerrycan contained blue dyed kerosene which was also found in the half burnt cloth of the deceased.

18. The trial Court also discussed the evidence of P.W.21 who treated the accused for the burn suffered by him and his answer that the possibility of receiving such injuries by the accused while setting his wife on fire could not be ruled out.

19. The trial court found that the prosecution had been able to prove the case against the Appellant beyond all reasonable doubt and proceeded to convict him in the manner indicated hereinbefore.

20. It was submitted on behalf of the Appellant that P.W.5, who was the informant and brother of the deceased, did not mention in the FIR anything about the dying declaration. However, as noted by the trial court, in his cross-examination, P.W.5 volunteered as under:

"I have not stated that I heard from my sister that the accused sprinkled kerosene on her body and then set fire to her body volunteers:- He had stated the same to scribe but the same has not been reflected in the report. It is a fact that most part of the body of my sister was burnt, and her condition was serious. My sister gave the declaration regarding the accused setting fire on her body at about 11 AM on the date of my report."

21. Further, P.W.15 is a government servant and there is no need for her to depose falsely regarding the making of the dying declaration by the deceased. While the fact remains that no doctor was available by the bedside when P.W.15 recorded the dying declaration, there is nothing to doubt the fact that the deceased in fact made such dying declaration to P.W.15. Merely because LTI was not taken of the deceased on the dying declaration and a doctor's certificate was not appended thereto, would not in any manner detract from the probative value of the dying declaration.

22. The law in relation to dying declaration is fairly well-settled. In this context, the following observation in ***Ravi Chander v. State of Punjab (1998) 9 SCC 303*** are relevant:

"6...The statements given by the deceased have been recorded without any overwriting or without

any interpolation. Initials have been put by the Executive Magistrate at the bottom of the first leaf and only a part of the signature has touched some writing in respect of Question No. 8 for which no doubt can be entertained about the correctness of recording. So far as the flow of writing is concerned, it also appears that all the questions and answers have been recorded in the same flow. We have also looked at the reverse side of the page and considering the same it does not appear to us that there is any occasion to doubt that such writing was subsequently made by the Executive Magistrate. The Executive Magistrate has also deposed in the case and he has specifically deposed that he recorded the dying declaration in question and answer form. He has denied the suggestion in the cross-examination that there was any antedating or fabrication on his part in recording the dying declaration. The Executive Magistrate is a disinterested witness and is a responsible officer. There is no circumstance or any material on record to suspect that he had any animus against the accused or was in any way interested in fabricating the dying declaration. The dying declaration recorded by him tallies substantially with the dying declaration said to have been made orally to the brother Prem Chand PW 4. Simply because the offence under Sections 498A and 304B IPC could not be established beyond doubt by the prosecution for which the accused were acquitted of the said charges, it cannot be held that the accused had no motive for committing the said murder.”

23. In *Laxman v. State of Maharashtra (2002) 6 SCC 710*, the legal position was explained 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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24. Again in *State of U.P. v. Veerpal (2022) 4 SCC 741*, the above legal position was reiterated. Further, in *Jagbir Singh v. State (NCT of Delhi) (2019) 8 SCC 779*, the legal position was summarized as under:

"31. A survey of the decisions would show that the principles can be culled out as follows:

31.1. (i) Conviction of a person can be made solely on the basis of a dying declaration which inspires confidence of the court;

31.2. (ii) If there is nothing suspicious about the declaration, no corroboration may be necessary;

31.3. (iii) No doubt, the court must be satisfied that there is no tutoring or prompting;

31.4.(iv) The court must also analyse and come to the conclusion that imagination of the deceased was not at play in making the declaration. In this regard, the court must look to the entirety of the language of the dying declaration;

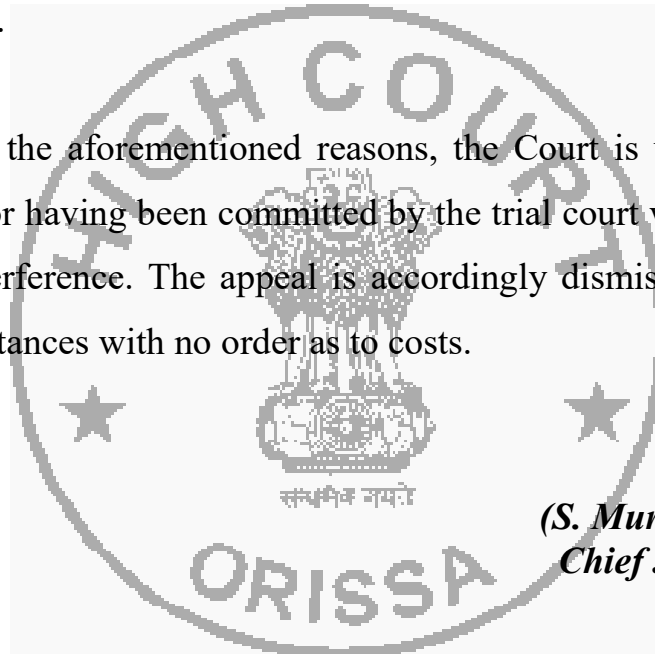
31.5.(v). Considering material before it, both in the form of oral and documentary evidence, the court must be satisfied that the version is compatible with the reality and the truth as can be gleaned from the facts established..."

25. In the present case, the Court is satisfied that the aforementioned dying declaration by the deceased to P.W.15 was properly recorded and there is no means to doubt its veracity. It clearly points to the guilt of the accused for the offence punishable under Section 302 IPC.

26. Another circumstance that relevant is the injury sustained by the accused. PW 21 Dr. Arjun Panda, Asst. Surgeon examined Kartika Nayak, the accused, who sustained burn injuries and was admitted to the hospital as an indoor patient on 17th December, 2007 and was discharged on 7th January, 2008. According to PW 21, the accused had sustained burn injury on both his hands and face. In absence of a plausible explanation from the side of the accused for his injuries, since it is proximate to the time of injuries sustained by the deceased, the only inference that appears

probable for the Court to draw from the nature and place of injury is that the accused had directly come in contact with the deceased while she was suffering from the burn injuries. The explanation offered by the accused in reply to the question under Section 313 Cr.P.C. that he was not present in the house when his wife sustained injuries, in the face of the injuries sustained by him, leads unmistakably to the conclusion that he was putting forth a false plea. This is one more circumstance that goes against the accused.

27. For the aforementioned reasons, the Court is unable to find any error having been committed by the trial court which calls for any interference. The appeal is accordingly dismissed but in the circumstances with no order as to costs.



(S. Muralidhar)
Chief Justice

(Chittaranjan Dash)
Judge

S. Behera/ Jr. Steno.