

IN THE HIGH COURT OF ORISSA AT CUTTACK

JCRLA NO.40 OF 2011

From the judgment of conviction and order of sentence dated 26.02.2011 passed by the learned Additional Sessions Judge, Bolangir in Sessions Case No.154/42 of 2009 arising out of G.R. Case No.265 of 2009 corresponding to Bolangir Sadar P.S. Case No.100 of 2009 of the Court of learned S.D.J.M., Bolangir.

Purandar Mahaling & Two Others ***Appellants***

-versus-

State of Odisha ***Respondent***

**Appeared in this case by Hybrid Arrangement
(Virtual/Physical Mode:**

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For Appellants - M/s. M.K. Pati, Advocates.

For Respondent - Mr. S.S. Kanungo,
Additional Govt. Advocate.

CORAM:

MR. JUSTICE D.DASH

DR. JUSTICE S.K. PANIGRAHI

DATE OF HEARING : 25.11.2022, DATE OF JUDGMENT: 08.12.2022

D.Dash,J. The Appellants, by filing this Appeal, from inside the jail, has called in question the judgment of conviction and order of sentence dated 26.02.2011 passed by the learned Additional Sessions Judge, Bolangir in Sessions Case No.154/42 of 2009 arising out of G.R. Case

No.265 of 2009 corresponding to Bolangir Sadar P.S. Case No.100 of 2009 of the Court of learned S.D.J.M., Bolangir.

The Appellant No.2-(accused) namely, Suna Mahaling is the father of accused-Appellant No.1- Purandar Mahaling and accused-Appellant No.3- Banalata Mahaling is the mother of the Appellant No.1. All have been convicted for commission of offence under section-302/34 of the Indian Penal Code, 1860 (for short hereinafter called as “the IPC”) and sentenced to undergo imprisonment for life and pay fine of Rs.1,000/- each with the default stipulation to undergo rigorous imprisonment for six (6) months each.

2. The prosecution case is that accused-Purandar had married the deceased namely, Dhanamati, the daughter of Amar Singh Majhi (P.W.2), 6 to 7 years prior her death. The accused-Appellant No.1- Purandar being the husband, accused-Appellant No.2-Suna being the father-in-law and accused-Appellant No. 3-Banalata being the mother-in-law of the deceased, as alleged, were torturing the deceased and subjecting her to cruelty. One year before the death of the deceased, once these accused persons had driven out the deceased from their house for being not provided with a Television as demanded by them. The deceased then had gone to live with her father (Informant-P.W.2).

The accused persons thereafter took back the deceased with them. A meeting had been convened for the purpose and in that meeting a document (Ext.1) had been prepared. It is stated that on 22.09.2009 around 9 pm, the accused persons set the deceased ablaze by dowsing her with kerosene and she was then taken to Bolangir Government Hospital for treatment. The accused persons sent the information that the deceased committed suicide in that way.

The father of the deceased (Informant, P.W.2) having received such information went to Bolangir Hospital and saw the deceased lying with burn injuries on her neck and her treatment to be going on. The deceased remained hospitalized as an indoor patient for treatment of such burn wounds for a long period of five (5) months. However, ultimately all the attempts to save her failed and she succumbed to those injuries.

The father of the deceased (Informant, P.W.2) when saw the deceased in the hospital, in that condition on his arrival from village getting the information; he went to Bolangir Sadar Police Station on 23.04.2009 and lodged the written report at 7 pm.

The Inspector-in-Charge of Police(IIC), Bolangir Sadar P.S. having received the report, treated the same as F.I.R., and immediately

registered as Bolangir P.S. Case No.100 of 2009. The IIC then took up investigation. In course of investigation, he examined the Complainant and issued requisition to the Medical Officer, District Headquarter Hospital, Bolangir for recording the dying declaration of the deceased who was then under treatment in that hospital. The IIC (P.W.14) then visited the spot, prepared the spot map. On 28.04.2009, he arrested the accused-Appellant No.1-Purandar Mahaling, forwarded him in custody to the Court. On transfer of this P.W.14, P.W.12 another Sub-Inspector attached to the Sadar Police Station, Balangir took charge of investigation. On 16.08.2009, he received the report from the treating Doctor about the factum of death of the deceased. He after holding the inquest through the Executive Magistrate on requisition sent the requisition for postmortem examination over the dead body. He also seized some incriminating materials by preparing seizure list and finally on completion of investigation submitted the final form placing the accused persons to face the trial for commission of offence under section-498-A/302/34 of the IPC.

3. Learned Sub-Divisional Judicial Magistrate (S.D.J.M.), Bolangir on receipt of the police report having taken cognizance of the said offences, after observing the formalities committed the case to the

Court of Sessions for trial. That is how the trial commenced by framing charges against the accused persons for offence under section-498-A/302/34/of the IPC.

4. Accused persons took the plea of complete denial and false implication.

5. In the trial, the prosecution in total has examined fourteen (14) witnesses. Out of them, P.W. 2 is the Informant and he is the father of the deceased, who has lodged the F.I.R., Ext.2, which has led to the registration of the case against accused persons. As already stated, P.Ws. 12 and 14 are the two Investigating Officers. P.W.4 is the mother of the deceased and P.W.13 is the Doctor who had the occasion treat the deceased and had recorded the dying declaration of the deceased on receiving the requisition from P.W.14 which has been proved through him as Ext.8/2. P.W.1 is a witness who has stated about the earlier dissension in the family of the accused persons concerning the deceased and regarding the convening of the meeting to settle the matter. P.Ws.6 and 7 are two formal witnesses to the seizure of the bed sheet and command certificate; whereas P.W.8 is another witness to seizure. The Doctor who conducted postmortem examination over the dead body of the deceased is P.W.10 and P.W.9

is the Doctor who had admitted the deceased in the hospital as an indoor patient. Besides leading the oral evidence through the above witness, the prosecution has also proved several document which have been admitted in evidence and marked Ext.1 to 10; important of those are the proceeding of the village meeting, Ext.1; F.I.R., Ext.2; inquest report, Ext.3, medical examination report, Ext.6, postmortem report, Ext.7 and the dying declaration said to have been recorded by P.W.11 as Ext.8/2.

6. The Trial Court having examined the evidence let in by the prosecution and upon their evaluations has found the prosecution to have failed to prove the charge under Section-498-A of the IPC against the accused persons beyond reasonable doubt. Proceeding to find out the establishment of the charge under section-304-B of the IPC, the evidence being discussed, the Trial Court's answer has again gone against the prosecution. Lastly, coming to find out the establishment of the charge under section-302 of the IPC against the accused persons holding the death of the deceased to be homicidal; on going through the evidence of the Doctor holding the postmortem examination and the other treating Doctor as well as other evidence on record, the death of the deceased has been found to be on account of the burn injuries

sustained by him. This finding was not under challenge before the Trial Court and it is also not questioned before us.

Admittedly, the death having taken place on account of severe burn injuries sustained by the deceased after prolonged treatment in the hospital being shifted from the house of the accused persons, we are where wholly in agreement with the said conclusion of the Trial Court.

7. Learned Counsel for the Appellants submitted that the finding of the Trial Court fastening the guilt upon the accused persons to be the author of the crime in committing the murder of the deceased by dowsing her with kerosene and setting her ablaze is untenable. According to him, the evidence on record; more importantly the dying declaration (Ext.8/2) ought not to have been relied upon to record a finding of guilt against the accused persons that it is they who are responsible for the death of the deceased by setting her ablaze. In this connection, he has taken us through the evidence of the prosecution witnesses as well as the relevant documents especially, Ext.8/2 the so called dying declaration. He submitted that the suspicious circumstances surrounding that dying declaration as those emerge in the evidence are enough to eschew the said dying declaration from the arena of consideration. According to him, the Trial Court has erred in

accepting the said dying declaration as the basis for recording the conviction.

8. Learned Counsel for the State giving emphasis on the evidence of the Doctor, P.W.13 and the dying declaration which has been admitted in evidence and marked Ext.8/2 submits that the same have been rightly upon accepted by the Trial Court. According to him, there is no such circumstance available on record to entertain any doubt with regard to the dying declaration recorded by P.W.13 on police requisition. He further submitted that even that dying declaration receives corroboration from the other evidence and when the dissension in the family of the accused persons with the accused persons in the one hand and deceased on the other has been proved the accused persons have been rightly convicted for commission of offence under section-302/34 of the IPC for the role played by them as it reveals from the very dying declaration, Ext.8/2.

9. Keeping in view the submissions made; We have carefully gone through the judgment passed by the Trial Court. We have read the depositions of the witnesses (P.W.1 to 14) and have perused the documents admitted in evidence and marked Exts. 1 to 10.

10. In the present case, the sole point for determination stands as to whether these accused persons have caused the death of the deceased by dowsing her with kerosene and setting her ablaze. Indisputably, on 22.04.2009 around 9 pm, the deceased received the burn injuries when she was in her matrimonial home. The F.I.R. has been lodged by P.W.2 on 23.04.2009 around 7 pm and the Informant is none other than the father of the deceased. In the F.I.R., Ext.2, it is stated that P.W. 2 had received the information that his daughter was taken to Bolangir Government Hospital for treatment. His evidence is that, he having received the information around 11 am from a distant relation of accused Purandar that the deceased had been taken to Bolangir Hospital; rushed to the Bolangir Hospital and saw his daughter with burn injuries on her neck. She was then alive and under treatment. He states that his daughter remained under treatment for about five months in the hospital and thereafter died. This witness is not stating anything as to if when he saw, his daughter, she was unconscious and unable to talk. He does not say to have even asked anything to his daughter which is the normal and most ordinary response from a father, seeing the daughter in that condition. He is also silent as to if his daughter seeing him, volunteered and told anything as to how she got burnt.

Thus, his evidence is wholly on the score that he was told by a related brother of accused-Purandar that the accused persons had set her daughter ablaze. The name of that person is not stated by this P.W.2 nor it has been so mentioned in the F.I.R., Ext.2 and the prosecution has also examined that person by disclosing his identity as such.

The mother of the deceased (P.W.4) however has stated that having received information, she with P.W.2 had gone to village Kharlikani where the house of the accused persons situates and from there to the Bolangir Government Hospital. She has stated to have seen her daughter lying with burn injuries on her neck up to waist and she was then conscious and able to talk. This witness is stating that on being asked, the deceased told that accused Purandar poured kerosene over her body and ignited fire which caused the injuries and the reason was for non-fulfillment of his demand for being provided with a Television. This is not told by P.W.2 who too is said to have gone with P.W.4. When We go through the F.I.R., Ext.2, it is not ascertainable there from that P.W. 4 had accompanied P.W.2. When that P.W.2 says that having gone to the hospital, he had been to Police Station and lodged the F.I.R. P.W.4 is not stating in her evidence that when the deceased told her about the incident on being asked implicating

accused-Purandar to be the person to have set her ablaze; whether P.W.2 was present with her or it was after he left for P.S. As noted, P.W.2 in his evidence does not say that P.W.4 had accompanied him to the hospital. It is his positive evidence that he came to the hospital and saw the deceased with burn injuries. He does not say to have either he or anyone else had asked the deceased anything about the incident. Nowhere else in his deposition, he states to have asked the deceased as to how she sustained the burn injuries. When it is said by this P.W.4 that her daughter was conscious and able to talk and as such told her about the incident implicating accused-Purandar; P.W.9, being the Doctor attached to the hospital who had examined the deceased on 23.04.2009 on police requisition while on duty is stating that the patient had not disclosed before him about the cause of the burn injuries. The Investigating Officer, P.W.14 says that on receiving the F.I.R., he issued the requisition for recording the dying declaration. Furthermore, this P.W.4 when was examined by police on 23.04.2009 after P.W.14 arrived at the hospital, she has not at all stated about the declaration of her daughter on her asking about accused-Purandar (husband's) role in sprinkling kerosene on her and setting her ablaze in her statement before Police as recorded under section-161 Cr.P.C.

which has been proved by the defence through P.W.14. So, this P.W.4 for the first time has stated in Court on 06.07.2010 and the omission in her previous statement being material one, she has improved it later which cannot for that reason as well as for the above analysis of evidence is not believable.

11. The Doctor, P.W.13, says to have recorded the statement of deceased on 30.04.2009. The dying declaration Ext.8/2 has been recorded on 23.04.2009 at 8.20 pm as indicated therein. But that is not said so by P.W.13 in his evidence. P.W.14 says to have visited the hospital after receiving the F.I.R. around 8 pm and at that time, the deceased was unconscious. This on perusal of the case diary which We had to do to clarify the ambiguity and confusion is seen to have been duly noted with a further note that the condition was precarious and it further reveals that he issued requisition to the M.O., DHQ Hospital, Bolangir to record the dying declaration at 8.10 pm while in the hospital whereafter, she examined the mother of the deceased (P.W.4) in the hospital. The dying declaration as finds mention in Ext.2 being recorded at 8.20 pm, the same has not been seized by P.W.14 immediately thereafter and even till 15.08.2009 when he handed over the charge of investigation to P.W.12 and P.W.13 gave it to P.W.12 on

20.08.2009. Till that date where was that dying declaration and in whose custody is no said either by P.W.12 or P.W.14 and most interestingly, the doctor (P.W.13) even is not saying that he had kept it with him and gave it to P.W.12 who also does not say to have received from P.W.13. This P.W.14 says that when he saw deceased on the solitary occasion, she was not only unconscious but also his condition was serious. He, therefore, states to have examined the victim in course of treatment on 30.04.2009 and had recorded her statement. However that statement has not been proved during trial. Moreover, when P.W.14 says that her daughter simply implicated her son-in-law accused-Purandar, the evidence of P.W.13 is that the deceased stated before him that her husband, father-in-law and mother-in-law sprinkled kerosene over her body and her husband lighted the match stick and set her ablaze. Thus clearly there appears the tendency to rope in two more i.e. parent-in-laws in addition to the husband. This P.W.13 further states that the deceased also told which he recorded hearing her shout, neighbours came to her rescue and sent her to the hospital. Thus, there surfaces the exaggeration in the dying declaration before P.W.13 as to the role of the father-in-law and mother-in-law of the deceased when before P.W.4, the declaration is silent as to the role of the father-in-law

and mother-in-law and that declaration before P.W.4 was only describing the role of accused –Purandar, the husband of the deceased. The bed head ticket of the deceased has not been proved from the side of the prosecution to show as to when she gained her sense and could be able to talk on 23.04.2009 after 11.20 am when P.W.9, the Doctor examining the deceased on police requisition has deposed that she did not disclose anything about the cause of burn injury and when P.W.14, the Investigating Officer says that around 8 pm he found the deceased to be unconscious and lying in a serious condition. P.W.13 is also not saying as to at what time he received the police requisition for recording the dying declaration. Moreover, the statement recorded by P.W.14 after few days when he examined her i.e. on 30.04.2009 has not seen the light of the day which leads for drawal of adverse inference that had that been produced that would have gone against the prosecution as to involvement of the accused persons..

12. At this juncture, We must take note of the settled position of holding the field.

A dying declaration is relevant and material evidence and a truthful and reliable dying declaration may form the sole basis of conviction, even though it is not corroborated. But the Court must be

satisfied that the declaration is truthful. The reliability of the declaration must be subjected to a close scrutiny considering that it was made in the absence of the accused who had no opportunity to test its veracity by cross-examination. If the Court finds that the declaration is not wholly reliable and a material and integral portion of the deceased's version of the entire occurrence is untrue, the Court may, in all the circumstances of the case, consider it unsafe to convict the accused on the basis of the declaration alone without further corroboration. (*Thurukanni Pompiah And Anr. vs State Of Mysore: AIR 1965 SC 939*)

13. Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross-examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the Court also insists that the dying declaration should be of such a nature as to inspire full confidence of the Court in its correctness. The Court has to be on guard that the statement of deceased was not as a result of either torturing, or prompting or a product of imagination. The Court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailant. Once the Court is

satisfied that the declaration was true and voluntary, undoubtedly, it can base the conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence. (*Smt. Shakuntala Vrs. State of Haryana*: 2008(3) Crimes 265 (SC) 2007 Cri.L.J. 3747: AIR 2007 SC 2709, 2009(59)).

14. It is now well settled that conviction can be recorded on the basis of a dying declaration alone, if the same is wholly reliable, but in the event there exists any suspicion as regards correctness or otherwise of the said dying declaration, the Courts in arriving at the judgment of conviction shall look for some corroborating evidence. It is also well known that in a case where in consistencies in the dying declarations, in relation to the active role played by one or the other accuse persons, exist, the Court shall lean more towards the first dying declaration than the second one. (*Ranjit Singh Vrs. State of Punjab*; 2007(1) Crimes 175 (179) SC).

15. It is thus necessary for the prosecution to prove that the dying declaration is direct, voluntary and free from any such suspicious feature to give rise to any doubt in the mind. The evidence as to the

dying declaration has to be just appreciation in the light of the surrounding circumstances and its weight is required to be determined with reference to the principle governing of weighing the evidence. The dying declaration must be closely scrutinized as to its truthfulness like any other important piece of evidence in the light of surrounding facts and circumstances of the case bearing in mind on the other hand that the statement is by a person who has not been examined in Court and on the other hand that a dying man is not likely to implicate the innocent persons. Conviction can be founded even on the sole dying declaration of the deceased, if it is successfully noticed to be voluntary true, unprompted and natural version of the deceased with regard to the incident which resulted into his death.

16. Viewed in the light of the above legal principles, on a conspectus analysis of the evidence made hereinbefore, We find ourselves to be not in a situation to say that the two dying declarations; one before P.W.4 and the other one before P.W.13 as recorded under Ext.8/2 successfully pass through the tests of voluntariness, truthfulness and reliability even with regard to the consistent part as to implication of accused-Purandar only. Therefore, We feel it unsafe to convict the accused persons solely on the dying declaration as deposed

to by P.W.4 and later on recorded by P.W.13 by merely saying that the same receives corroboration from the fact that there was prior dissention and bitter relationship of the deceased with the accused persons. The impugned judgment of conviction and order of sentence are vulnerable.

17. In the wake of aforesaid, the Appeal stands allowed. The judgment of conviction and order of sentence dated 26.02.2011 passed by the learned Additional Sessions Judge, Bolangir in Sessions Case No.154/42 of 2009 arising out of G.R. Case No.265 of 2009 corresponding to Bolangir Sadar P.S. Case No.100 of 2009 of the Court of learned S.D.J.M., Bolangir are hereby set aside. The Appellants (accused persons) be set at liberty forthwith in case their detention is not so wanted in any other case.

**(D. Dash),
Judge.**

Dr.S.K. Panigrahi, J. I Agree.

**(Dr.S.K. Panigrahi),
Judge.**

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