

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. 346 of 2012

Santosh Das & Anr.

Vs.

State of West Bengal

For the Appellant(s) : Mr. Partha Sarathi Bhattacharya, Advocate
Mr. Sukla Das Chandra, Advocate,
Ms. Swarnali Saha, Advocate.

For the State : Mr. Swapan Banerjee, Advocate,
Md. Kutb Uddin, Advocate.

Heard on : 20th April, 2023.

Judgment on : 20th April, 2023

Joymalya Bagchi, J. :-

Appellants have assailed the judgment and order dated 25.06.2008 and 26.06.2008 passed by the learned Additional Sessions Judge, Fast Track Court no. 4, Barrackpore, North 24 Parganas in Sessions Case No.24(3)/2005 convicting them for commission of offence punishable under Section 302 read with Section 34 of the Indian Penal Code and sentencing them to suffer imprisonment for life each and to pay

a fine of Rs. 10,000/- each, in default, to suffer rigorous imprisonment for one year more.

Prosecution case, as alleged against the appellants is to the effect that Rita was married to Santosh on 09.02.2003. Subhas was the husband of her sister-in-law. At the time of marriage, gold and silver ornaments, brass utensils and a cash of Rs. 50,000/- were given as dowry. After marriage the appellants and other in-laws including her father-in-law Jagadish used to subject the housewife to torture over further demands of dowry. Several times attempts were made to settle the matter peacefully but to no avail. Finally, on 18.05.2004 victim-housewife suffered burn injuries at the matrimonial home. Local people including PWs 3, 5 and 6 shifted her to hospital. At the hospital victim made dying declaration before the treating doctor namely Dr. Bhabaranjan Sikdar (PW2) and in presence of staff nurse (PW 8). Hearing the news her father Shambhu Das (PW 1) came to the hospital where she made another statement to him. On the same day victim was shifted to R G Kar Medical College and Hospital where she breathed her last at 6.10 p.m.

In the meantime Shambhu Das (PW1) lodged written complaint at Jagaddal P.S being Jagaddal P.S case no. 188 dated 18.5.2004 under sections 498A/36/307 IPC against the appellants and other in-laws including father-in-law Jagadish Das. After the death of the lady, section 302 IPC was added.

In conclusion of investigation charge sheet was filed and charges were framed under sections 302/34 IPC against the appellants and other in laws including father-in-law Jagadish Das. During trial, her father-in-law Jagadish Das and sister in law Anita Das expired. In course of trial, prosecution examined 13 witnesses and exhibited a number of documents including the dying declaration (Ext 5).

In conclusion of trial, learned trial Judge convicted and sentenced the appellants, as aforesaid. By the self-same judgment and order co-accused Karan Das i.e. elder brother-in-law was acquitted.

Mr. Bhattacharya for the appellants submits the prosecution case is based on the dying declarations of the victim (Ext 5). Victim had suffered 95% burn injuries and was not in a position to make statement before the treating doctor Dr. Bhabaranjan Sikdar (PW2). Rupa Mukherjee, staff nurse (PW8) who is said to be been present when dying declaration was recorded is silent with regard to its contents. Her signature also does not appear on the document. PW 2 admitted before police earlier the lady had only implicated her father-in-law Jagadish Das and not the appellants. Hence, the written dying declaration even if believed, appears to be an embellished attempt to implicate the appellants apart from her father-in-law. In support of his contention he refers to PW 6 Laxmi Das who took the victim to hospital. The said witness stated that the victim had implicated her father in law alone in the incident. He also refers to the FIR lodged by the father of the deceased, PW1. In the said

report PW1 stated that he came to know from his daughter that her father-in-law had set her on fire. Hence, he prays for acquittal.

Mr. Swapan Banerjee, learned Senior Government Advocate for the State submits PW2 is an disinterested witness. He was the treating doctor and best witness to depose with regard to competence of the victim to make dying statement. Dying statement was exhibited as Ext. 5 and implicated the appellants. PW 5 Jugraj Das who accompanied the victim to the hospital also stated the victim told him that accused persons had set her on fire. This corroborates the written dying declaration. Hence, prosecution case is proved beyond reasonable doubt.

Analysis of the evidence on record in the light of the aforesaid submissions show there are two sets of dying declarations. While the written dying declaration recorded by the treating doctor namely Dr. Bhabaranjan Sikdar (PW2) implicates the appellants, the oral dying declarations said to have been made by the victim before Laxmi Das (PW6) and her father (PW1) only implicated her father-in-law. When a prosecution case is based on multiple dying declarations and the declarations are at variance to one another it is the duty of the judge to shift the evidence and examine whether the inconsistencies are material or not. In **Amol Singh vs. State of Madhya Pradesh**¹ the Apex Court held:-

“13. ... if there are more than one dying declaration they should be consistent. (See Kundula Bala Subrahmanyam v. State of A.P. [(1993) 2 SCC 684 : 1993 SCC (Cri) 655]) However, if some inconsistencies are noticed between one dying declaration and the other, the court has to examine the nature of the inconsistencies,

¹ (2008) 5 SCC 468

namely, whether they are material or not. While scrutinising the contents of various dying declarations, in such a situation, the court has to examine the same in the light of the various surrounding facts and circumstances.”

Dr. Bhabaranjan Sikdar (PW2) treated the victim at Bhatpara State General Hospital. He stated the victim told him that on 18.5.2004 at 4 am while she was coming back from latrine, her father –in-law, husband, sister-in-law and brother-in-law poured kerosene oil on her body. He reduced the statement in writing (Ext 5). The statement was recorded in presence of staff nurse, PW8. He also deposed that the patient was conscious but restless due to pain all over body. She had 95% burn injuries but she was in a position to speak.

Rupa Mukherjee, staff nurse (PW8) deposed on 18.5.2004 a burnt patient was admitted to the hospital. Dr. Sikdar spoke to the patient but she could not recollect what that patient had said. Her signature is also not found on the dying declaration.

Mr. Banerjee emphatically argues PW2 is a disinterested medical witness. He is the best witness to prove competence of the victim to make the dying statement. Even if PW8 is unable to narrate the contents of the dying statement, the same is proved through the treating doctor PW2. There is considerable force in the submission of the learned counsel vis a vis the competence of the victim to make the aforesaid dying statement. But in addition to the competence of the victim to make the statement, its intrinsic truthfulness must also be evaluated before the said statement

can become the basis for conviction. To do so, it may be profitable to refer to the cross examination of PW2 as well as the investigating officer PW13. PW2 in his cross examination admitted that the victim stated to him that at 4 a.m when she came out of the room, her father-in-law poured kerosene oil all over her body and set her on fire. Investigating officer PW13 also stated PW2 had made similar statement to him during interrogation. The aforesaid pieces of evidence cast serious doubt with regard to truthfulness of the dying declaration recorded as Ext 5. During the cross examination of PWs 2 and 13 it transpires after admission that the victim had made an oral statement to PW 2 implicating her father-in-law in the crime. Thereafter, when her statement was reduced into writing by PW2 she embellished her version and implicated the appellants, her sister-in-law Anita in addition to her father-in-law in the incident.

The dichotomy in the prosecution case is further compounded by the contradictory version coming from Laxmi Das (PW6) and Jugraj Das (PW5). Both these witnesses are neighbours. Immediately after the incident they rushed to the matrimonial home of the victim. While Jugraj Das (PW5) stated the victim made a statement implicating all the accused including the appellants, PW6 contended that the victim stated her father-in-law alone had set her on fire. Even father of the victim (PW1) stated in the FIR (Ext 10) as well as in his statement before magistrate (Ext 2/1) that upon hearing the news he had gone to Bhatpara State General Hospital where his daughter told him that her father-in-law had

set her on fire. However, in Court the said witnesses tried to be evasive and claimed someone had told him about the incident.

From the aforesaid materials on record, I am unable to convince myself that the contents of the written dying declaration (Ext 5) is worthy of credence so far as the appellants are concerned. Other evidence on record including FIR gives an impression that the victim had made oral dying declaration implicating her father-in-law alone. When there are multiple dying declarations and the contents of the incriminating dying declaration appear to be an embellishment vis-à-vis the appellants, it may not be safe to rely on the said embellished dying declaration and convict them.

For the aforesaid reasons I extend the benefit of doubt to the appellants and acquit them of the charges levelled against them.

The appellants 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.

The appeal is, accordingly, allowed.

In view of disposal of the appeals, connected application being CRAN 1 of 2012 (Old CRAN 2078 of 2012) is also disposed of.

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 appellants upon completion of all formalities.

I agree.

(Ajay Kumar Gupta, J.)

(Joymalya Bagchi, J.)

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