

IN THE HIGH COURT AT CALCUTTA
Criminal Miscellaneous Jurisdiction
Appellate Side

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Md. Shabbar Rashidi

CRA (DB) 164 of 2022

With

CRAN 1 of 2022

Pinky Khatoon @ Begum

Vs.

The State of West Bengal

For the Appellant : Mr. Tanmoy Chattopadhyay, Adv.

For the State : Mr. Madhusudan Sur, Ld. App
Mr. Dipankar Pramanick, Adv.

Hearing Concluded on : January 30, 2023

Judgement on : February 3, 2023

DEBANGSU BASAK, J.:-

1. The appellant has assailed the judgement of conviction dated July 15, 2022 and the order of sentence dated July 18, 2022 passed by the learned Additional Sessions Judge, 3rd Court, South 24 Parganas, Alipore in Sessions Trial No. 5 (8) 2014 arising out of Sessions Case No. 9 (6) 2014.

2. By the impugned judgement of conviction and the order of sentence, the learned judge has convicted the appellant under Section 302 of the Indian Penal Code, 1860 and sentenced the appellant to suffer imprisonment for life

and a fine of Rs. 10,000 in default of rigorous imprisonment for 6 months.

3. At the trial, the persecution had contended that, the appellant on July 31, 2010 at about 12:30 hours at premises no. 61, Alif Nagar, Kolkata - 700024 intentionally caused the death of the victim by setting her on fire. The trial Court had framed charges against the appellant on August 30, 2014 under Section 302 of the Indian Penal Code, 1860.

4. Learned advocate appearing for the appellant has contended that, the records of the case disclosed that there were 3 dying declarations of which 2 had been written down. He has referred to Exhibits 2 and 4 which according to him allegedly contains the dying declaration in the written form. He has referred to the testimony of PW 6. He has contended that, PW 6 has given a different version of the alleged dying declaration of the victim. In such conspectus, he has contended that, none of the dying declaration should be relied upon.

5. Learned advocate appearing for the appellant has submitted that, the incident happened on July 31, 2010. He has drawn the attention of the Court particularly to the time and the dates on which, Exhibit 4 and Exhibit 2 had been

written down. He has contended that, there was sufficient time gap between the incident and the alleged dying declarations. Moreover, referring to the contradictions in the dying declarations, and relying upon **2007 volume 8 SCR 713 (Mehiboobsab Abbasabi Nadaf Vs. State of Karnataka)** and **2010 volume 6 Supreme Court Cases 566 (Puran Chand Vs. State of Haryana)** he has contended that, the learned trial Court erred in convicting the appellant.

6. Learned advocate appearing for the appellant has referred to the forensic science laboratory report being Exhibit 10. He has submitted that, the claim of the prosecution that, the appellant had poured kerosene oil over the victim and set her on fire, is belied by such report. No splashing of kerosene oil had been found on the wall of the place of occurrence. The victim had been sitting at the corner of the room. He has referred to the photographs which were tendered in evidence. He has submitted that, such photographs were taken after 8 PM on the date of the incident with a considerable time lapse from the time of the incident till the time when the photographs were taken.

7. Learned advocate appearing for the appellant has submitted that, the seizure list is suspect. The same had been

made at 7 PM. It is inconceivable that such seizure was made on the date of the incident given the fact that the victim was at the hospital at that material point of time.

8. Learned advocate appearing for the state has submitted that, the dying declaration was robust and should be relied upon in order to find the guilt of the appellant. He has contended that, the Investigating Officer being PW 11 had recorded the dying declaration in presence of the Doctor being PW 2. He has referred to the oral testimony of PW 10. He has also relied upon the testimony of PW 6. He has submitted that, PW 6 also implicates the appellant.

9. At the trial, to bring home the charges, the prosecution had examined 12 witnesses and relied upon several documentary and material evidences. The police personnel who had taken the photographs of the place of occurrence had deposed as PW 1. He had tendered the photographs which he took, in evidence and the same were marked collectively as material Exhibit I.

10. The Doctor posted at the Plastic Surgery Department of SSKM Hospital had deposed as PW 2. He had stated that, the victim was admitted with 80% burn injury. As per his senior, he had attended the case. He had given admission

order and medical advice. He had stated that on July 31, 2010, one police officer came and recorded the statement of the victim in his presence. After the police officer had read over and translated it to him in English, he had put his signature on the statement as witness. He had also certified that the patient was conscious and gave a statement in his presence. He had identified his signature on the statement along with the certification.

11. In cross-examination, PW 2 had stated that, he did not read Bengali. He understood Bengali conversation a little bit.

12. An uncle of the victim had deposed as PW 3. He had stated that, in the evening when he was gossiping with some neighbours, he heard some hue and cry from the house of his elder brother. He rushed to the source of the hue and cry and found the wife of his elder brother to be lying on the ground in the passage. He had crossed over her and entered the room and found the victim was in sitting position and badly burnt. He had covered the victim with some clothes and took the victim on his lap and thereafter rushed to the hospital. He had brought the victim to SSKM hospital where the victim was admitted. He had identified the signature on the document regarding admission of the victim at the hospital.

13. The biological mother of the victim had deposed as PW 4. She did not add any value to the case of either the prosecution or the defence.

14. The stepmother of the victim had deposed as PW 5. She had identified the appellant in Court and said that the appellant was her next door neighbour. She had stated that, the victim used to complain that the appellant used to quarrel with her on flimsy pretext regularly. On the day prior to the incident there had been quarrel between the victim and the appellant. They had tried to pacify the victim though the appellant and her mother-in-law abused them. On the next morning, she and her husband had left the house for their duty. At about 11:30 they had returned home from their duty. After half-an-hour she had left for searching another room to change their residence and her husband left the house in search of another job. There was some quarrel between children of the locality when she had stopped to look into the matter. At that time, she had heard some of the neighbours shouting her name and saying that the victim was burning. She had run back to her house and found the victim was ablaze in a sitting position. She had lost her sense and suffered a blackout. She had regained consciousness after

half-an-hour. She had gone to the police station after the incident.

15. The father of the victim had deposed as PW 6. He had stated that the victim was his daughter born out of his first marriage. He had identified the appellant in Court. He had stated that on July 29, 2010, when the victim went to fetch water from the tap and while she was returning, a portion of the water spilled in front of the door of the appellant for which reason, the appellant had beaten the victim. He had stated that on July 30, 2010 there was another dispute between the victim and the appellant when the appellant had beaten the victim again. He had decided to change the residence in order to avoid such quarrels. In the evening, when he went out of the house, at the time of returning, he had noticed some people with lathi when apprehended that he may be beaten by them. He had been abused by the husband of the appellant and her mother-in-law in the evening.

16. PW6 had stated that, when he returned home on July 31, 2010, he was informed that appellant had set the victim ablaze. By that time, the victim had been admitted to the hospital. He had met the victim in the hospital where the victim stated to him that while she was cooking, the appellant

came from behind and poured kerosene oil over her by pushing her to the floor. Thereafter, the appellant had set the victim ablaze with match stick.

17. In cross-examination, PW 6 had stated that, he never raised any complaint to the police or otherwise against the appellant in respect of the dispute with the victim before that.

18. An aunty of the victim had deposed as PW 7. She had stated that, she went with the victim to the hospital. During the journey, the victim did not disclose how she caught fire.

19. Another uncle of the victim had deposed as PW 8. He had identified the appellant in Court. He had stated that at the time when the victim caught fire he was in his house. He had come out after hearing the hue and cry. He had put out the fire with others and thereafter helped in putting the victim in a rickshaw. He had informed the father of the victim about the incident. The incident had taken place at about 12 o'clock in the midday. In cross-examination, he had stated that, he did not put out the fire from the body of the victim.

20. A doctor posted with SSKM hospital had deposed as PW 9. He had stated that, without referring to necessary documents he could not say if he had examined the victim at the emergency of the hospital in the night of July 30, 2010.

21. Another doctor posted at SSKM hospital had deposed as PW 10. He had stated that on July 31, 2010 at about 2:25 PM in the afternoon, the victim was admitted in the Plastic Surgery Department through Emergency. He had stated that, as per the statement given by the victim herself, the victim had a quarrel with the appellant on that date at about 12 noon following which she poured kerosene over her body and set herself to fire. Thereafter, the victim had been brought to the hospital and was admitted there. He had tendered the patient history sheet which was recorded by him and signed by him. Such document had been marked as Exhibit 4.

22. In cross-examination, PW 10 had stated that, the victim stated while he was taking the history that, she set herself on fire after quarrel with the appellant. The victim did not state that she was set on fire by the appellant. He also stated that, the condition of the burn injuries on the victim was such that it was not possible for her to sign or give left thumb impression on any document.

23. The Investigating Officer had deposed as PW 11. He had stated that, he recorded the statement of the victim at the hospital under Section 161 of the Criminal Procedure Code in the question answer form in presence of the attending doctor

being PW 2. He had seized the kerosene stove, match sticks, kerosene drum, 2 plastic jar, one capacity of 2 litres and another of 3 litres, wearing apparel of bottom portion of maroon coloured with knitting embroidery, one broken matchbox with few sticks, one broken soil container, under a seizure list prepared by him which was tendered in evidence and marked as Exhibit 5. He had identified the appellant in Court. He had spoken about the conduct of the investigations.

24. The doctor who had conducted the post-mortem on the dead body of the victim had deposed as PW 12. He had stated that, another doctor conducted the post-mortem examination under his direction. After such examination, such doctor had opined that the death was due to the effects of burn injury as noted in the report and ante mortem in nature. She had kept further opinion reserved till receipt of forensic science laboratory report. He had tendered the original post-mortem report prepared by such doctor containing the signature of such doctor as also his signature as the conquering superior authority in evidence and the same was marked as Exhibit 8.

25. The appellant had been examined under Section 313 of the Criminal Procedure Code, on conclusion of the evidence of the prosecution. In such examination, she had claimed that

she was falsely implicated and that she was innocent. She had declined to adduce any defence witness.

26. The post-mortem report being Exhibit 8 and the oral testimony of PW 12 who was the superior authority conducting the post-mortem on the body of the victim, read together established that the victim died due to effects of burn injury as noted in Exhibit 8. The burn injuries had been ante mortem in nature. However, neither Exhibit 8 nor the oral testimony of one of the doctors conducting the post-mortem on the dead body of the victim had classified the death as homicidal. In fact, they have not pronounced conclusively on the issue as to whether the death was homicidal or otherwise.

27. Exhibit 4 is the bed head ticket of the victim which has a history sheet. The history given by the victim to the doctor attending her at the hospital on July 31, 2010, being PW 10 had recorded that as per the statement given by the victim, she had a quarrel with the appellant on July 31, 2010 at around 12 noon following which she poured kerosene oil over her body and set herself on fire. In his cross examination, PW 10 clarified that the victim did not state that she was set on fire by the appellant. This history had been recorded by PW 10 at 2:25 PM.

28. The Investigating Officer being PW 11 had stated that, he recorded the statement of the victim at the hospital under Section 161 of the Criminal Procedure Code in the question answer form in presence of the attending doctor being PW 2. PW 11 did not tender the statement of the victim as he had claimed to have recorded, in evidence during his testimony at the trial. PW 2 had identified his signature on such statement and the certificate that he gave to the effect that, the victim was conscious when she gave a statement in his presence, during his testimony at the trial. Such portion of the statement had been marked as Exhibit 2.

29. Exhibit 2 is a document which contains questions allegedly put to the victim and the answers allegedly given by the victim. The victim had allegedly claimed that, the appellant poured kerosene oil over the victim from the stove and then using the matchstick set her ablaze. The victim had allegedly put her left thumb impression on Exhibit 2.

30. PW 2 in whose presence, Exhibit 2 had been written, did not say in his oral testimony that, the victim had subscribed her left thumb impression on Exhibit 2. Another doctor who had attended to the victim, being PW 10 had stated that, both the hands of the victim were burnt and that

in such condition it was not possible for the victim to sign or give left thumb impression on any documents. In support of such claim, he had referred to the drawings on the bed head ticket made by him, of the injuries suffered by the victim. The bed head ticket had been marked as Exhibit 4 at the trial.

31. Exhibit 4 has drawings detailing the portions of the body that the victim had suffered burn injuries. It has quantified the percentage of burn on the body of the victim as 81%. The drawings of the body of the victim delineating the burn injuries suffered by the victim corroborate the oral testimony of PW 10 that, the victim was not in a position to give a left thumb impression or sign a document. Therefore, such evidence on record, cast a justifiable doubt as to whether the victim had made the statement recorded by the Investigating Officer and whether she had put her left thumb impression on the same.

32. The question and answers had been recorded in Bengali vernacular in presence of PW 2. In cross examination, PW 2 had stated that, he cannot read Bengali and that, he understands Bengali conversation a little bit. Therefore, it would be presumptuous to hold that PW 2 had understood the conversation between the Investigating Officer and the victim

while the statement of the victim was being recorded and that he read and understood the contents of the statement of the victim.

33. These therefore, according to us, raise justifiable doubts as to the veracity of the contents of Exhibit 2 assuming that one was to evaluate the contents thereof as if, the entirety of the document had been marked as an Exhibit at the trial.

34. The records of the case has depicted that, the signature of PW 2 along with his certification was directed to be marked as Exhibit 2. We had examined Exhibit 2 and found that the signature of PW 2 along with his certification had been encircled in red ink and marked as Exhibit 2. Other portions of the document on which Exhibit 2 appears was not tendered in evidence and was not marked as an Exhibit at the trial. In particular, the portion of the document where the questions of the Investigating Officer and the answers given by the victim had been recorded was not tendered in evidence and marked as an Exhibit. In absence of such portion being tendered in evidence and marked as an Exhibit, it would be incautious on our part to evaluate the contents of such portion of the document on which Exhibit 2 appears.

35. Reliance should not also be placed upon the oral testimony of the father of the victim to the effect that, the victim had told him at the hospital that, the appellant poured kerosene oil over the victim by pushing the victim on the floor and thereafter set ablaze as, such statement is not corroborated by any of the other prosecution witnesses who were present at the hospital. PW 3, 7, and 8 had gone to the hospital along with the victim. None of them had said that, the victim made the statement as claimed by her father being PW 6. Only PW 5 was the stepmother of the victim had stated that, the victim gave a statement in the hospital that she was set ablaze by the appellant. However, she did not go to the hospital at all. Therefore, the claim of PW 6 that the victim made the statement implicating the appellant has remained uncorroborated. The claim of PW 6 is also contrary to and inconsistent with the contents of Exhibit 4. Moreover, it has come out in evidence that, there were frequent quarrels between the appellant and the victim prior to the incident. At one instance, PW 6 had felt threatened and intimidated by the appellant and family members. Therefore, the possibility of PW 6 falsely implicating the appellant due to prior enmity should not be discounted.

36. In the facts of the present case, the prosecution had failed to place any medical record to establish conclusively that the injuries suffered by the victim were homicidal in nature and not otherwise. Nobody had seen the appellant to set the victim ablaze. PW 3 who had claimed to reach the place of occurrence, did not see the appellant at the place of occurrence. He had seen the victim in a sitting position and to be badly burnt. PW 8 had reached the place of occurrence and helped in dousing the flames and in helping others to put the victim on a vehicle to be shifted to a hospital. He had also not seen the appellant at the place of occurrence. His testimony with regard to the involvement of the appellant in the incident is hearsay.

37. The forensic examination report of the place of occurrence had been tendered in evidence and marked as Exhibit 10. The report states that, from the pattern of funding it appeared that the burning body remained stationary under the shelf. No sign of fire could be observed on any other part of the room. Splashing sign also could not be observed on the wall below the shelf.

38. Although Exhibit 10 was available to the prosecution, the same was not shown to the post-mortem doctor who had

deposed as PW 12 despite him saying that, the doctor who conducted the post-mortem reserved her opinion till she received the forensic science laboratory report.

39. In ***Mehiboobsab Abbasabi Nadaf (supra)*** the victim had made 4 dying declarations which were contradictory and inconsistent with each other. In the facts of that case, the Supreme Court had reversed a judgement of conviction and acquitted the accused. It had held that, conviction can indisputably be based on a dying declaration. But before it can be acted upon, the same must be held to have been rendered voluntarily and truthfully. Consistency in the dying declaration is a relevant factor for placing full reliance thereupon.

40. The Supreme Court in ***Puran Chand (supra)*** had observed that, Courts have to be extremely careful when they deal with the dying declaration as the maker thereof is not available for the cross examination which poses a great difficulty to the accused person. A mechanical approach in relying upon a dying declaration just because it is there is extremely dangerous. The Court has to examine a dying declaration scrupulously with the microscopic eye to find out whether the dying declaration is voluntary, truthful, made in a

conscious state of mind and without being influenced by the relatives present or by the investigating agency who may be interested in the success of investigation or which may be negligent while recording the dying declaration. When there are more than one dying declarations, the intrinsic contradictions in those dying declarations are extremely important. It cannot be that a dying declaration which supports the prosecution alone can be accepted while the other dying declarations have to be rejected. However, the Courts are fully entitled to act on the dying declarations and make them the basis of conviction, where the dying declaration passes all the tests. The Court has to weigh all the attendant circumstances and come to the independent finding whether the dying declaration was properly recorded and whether it was voluntary and truthful. Once the Court is convinced that the dying declaration is so recorded, it may be acted upon and can be made a basis of conviction.

41. Strictly speaking, in the facts of the present case, the prosecution had produced one written dying declaration at the trial being Exhibit 4 which exonerates the appellant. The statement of the victim recorded under Section 161 of the Criminal Procedure Code, by the Investigating Officer, was not

tendered in evidence and marked as an Exhibit save and except the portion where the signature of PW 2 and his certification appear. As has been noted above, it would be incautious to treat the question and answers as a dying declaration, the same not having been duly tendered in evidence and marked as an Exhibit at the trial. Moreover, the contents of the two dying declarations are contradictory to each other. One is of the exoneration while the other implicates the appellant.

42. In such circumstances, it has to be held that, the prosecution failed to establish the charge against the appellant beyond reasonable doubt. At the very least, the appellant is entitled to the benefit of the doubt.

43. Consequently, the impugned judgement of conviction and the order of sentence cannot be sustained. The same are hereby set aside. The appellant is acquitted of the charges. The appellant if in custody, be released forthwith if not required in connection with any other case. The appellant shall, however, furnish a bail bond to the satisfaction of the trial Court which shall continue for six months from date in terms of Section 437A of the Criminal Procedure Code.

44. CRA (DB) No. 164 of 2022 is allowed. CRAN 1 of 2022 is disposed of accordingly.

45. Trial court records along with a copy of this judgement and order be sent down at once to the appropriate court for necessary action.

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

[DEBANGSU BASAK, J.]

47. I agree.

[MD. SHABBAR RASHIDI, J]