
(2007) 09 GAU CK 0042
In the Gauhati High Court

Bhabanand Kakoti

APPELLANT

Vs

State of Meghalaya

RESPONDENT

Date of Decision : 25-09-2007

Acts Referred:

Penal Code, 1860 (IPC) — Section 302

Citation : (2008) CriLJ 194 : (2007) 4 GLT 9

Hon'ble Judges : B.D. Agarwal, J;A.P. Subba, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

A.P. Subba, J.—This criminal appeal is directed against the judgment and order dated 18-8-2004 and 24-8-2004 respectively passed by the learned Judge, Fast Track Court, Shillong in FTC Case No. 33 of 2003 convicting the appellant u/s 302 of the Indian Penal Code (IPC) and sentencing him to life imprisonment.

2. Briefly stated, the prosecution case is as follows:

On 5-12-96 an information was received at Madanryting PS to the effect that a fire had broken out at the quarters in occupation of the accused appellant. PW-1 who rushed to the spot along with the other police personnel to put out the fire found the deceased lying on the floor of the bedroom with burn injuries all over her body. Since she had sustained serious burn injuries in the incident she was immediately removed to Civil Hospital, Shillong for medical care and attention. She was later removed to Ganesh Das Hospital where she made a dying declaration implicating her husband (accused appellant) before she succumbed to her injuries. An FIR in connection with the incident was lodged by Mr. K.A. Sangma, Sub-Inspector of Police (PW-15) before the Madanryting Police Station. On the basis of the FIR Madanryting PS Case No. 67 (12) 96 was registered and investigation carried out revealed prima facie case u/s 302, I.P.C. against the accused appellant and accordingly a charge sheet was filed and the accused appellant was placed on trial.

3. The plea of the appellant at the trial was one of denial.
4. In order to prove their case the prosecution examined as many as 15 witnesses. In his defence the appellant examined two defence witnesses.
5. Upon consideration of the materials on record and on hearing the prosecution as well as the defence, the learned Judge, Fast Track Court came to the conclusion that the prosecution had proved the guilt of the accused appellant u/s 302, I P.C. beyond reasonable doubt and convicted him and sentenced him to life imprisonment as already stated above.
6. Aggrieved by the aforesaid conviction and sentence passed by the learned Judge, Fast Track Court, the accused appellant has come up before this Court in the present appeal.
7. We have heard Mr. J.M. Choudhury, the learned senior counsel assisted by Mr. K. Khan, learned Counsel appearing for the accused appellant and Mr. N.D. Chullai, learned Public Prosecutor appearing for the State.
8. The submission urged by the learned Counsel for the accused appellant in sum and substance was Lhat the evidence brought on record by the prosecution was not clear and consistent inasmuch as one set of prosecution witnesses supported the prosecution case while the other set was against it. Thus, the evidence being self contradictory the prosecution had miserably failed to prove the guilt of the accused beyond reasonable doubt. Per contra, the submission of the learned PP is that the materials brought on record by the prosecution were sufficient to prove the case against the accused appellant beyond any shadow of doubt and as such the appeal was liable to be rejected as being devoid of any merit.
9. In order to appreciate the rival contention of the parties, it would be essential to glance through the evidence of material witnesses examined by the prosecution in support of its case.
10. Shri G.W. Momin, Sub-Inspector (PW-1) stated that on receiving information from Shri O. Synrem, Constable No. 805 at about 4 p.m. on 5th December, 1996 that a fire had broken out in the quarters in occupation of Shri B.N. Kakati (accused appellant) he rushed to the spot with available staff to put out the fire. On reaching the spot they noticed fire razing in the bedroom of the accused appellant and on entering the bedroom they found one lady, the deceased, lying on the floor with her face downwards with burn injuries all over the body. The clothes worn by the deceased were all burnt down with the burnt pieces of the clothes lying scattered on the floor. The mattress, the blanket and the curtain were still on fire which they put out with water taking the help of the neighbours. Having thus put out the fire he got the deceased removed to the Civil Hospital with Sl. K. Sangama, (PW-15) and other staff. At that point of time he saw accused appellant sitting on the steps of the quarters outside from where he brought him to the thana for interrogation. He later learnt that the deceased was shifted to Ganesh Das Hospital for better medical care and treatment. Later, a

case u/s 302, I.P. C. against the accused appellant was registered by Inspector SN Gogoi (PW-12), the then OC, Madanryting Police Station on the basis of FIR lodged by SI K.A. Sangma (PW-15).

11. Mr. A. Islam, Assistant Sub-Inspector (PW-4) stated that he along with R.P. Joshi, Assistant Sub-Inspector (PW-3) reached Ganesh Das Hospital on hearing that the deceased, who was the wife of the appellant, had sustained serious burn injuries and had been admitted there. After reaching the hospital, ASI R.P. Joshi (PW-3) contacted Shri S. Sangma, 2nd O.C. Madanryting PS who instructed them to call a Magistrate to record the dying declaration of the victim. Both of them then proceeded to the residence of the Executive-cum-Judicial Magistrate Smt. R.M. Kurbah (PW-10), brought her along to the hospital. On reaching the hospital the Magistrate recorded the dying declaration made by the victim. Shri R.P. Joshi, Sub-Inspector (PW-3) in his statement confirmed the above statement made by A. Islam (PW-4). Sub-inspector K.R. Marak (PW-6), Constable No. 805 O Synrem (PW-7), Constable No. 390 B. Khondait (PW-9) and Constable No. 1725 P.G. Momin (PW-13) who also reached the spot with PW-1 stated that on reaching there they saw the victim lying on the floor of the bedroom with burn injuries and the accused appellant sitting on the steps outside the house under the influence of liquor.

12. Dr. R.V. Suchiang (PW-5) deposed that when the victim was brought to Ganesh Das Hospital on 5th December, 1996 she was on duty. According to her, the deceased was fully conscious and in her senses when she was brought to hospital at 7 p.m. However, she could survive only for one hour in spite of all efforts made to save her life. Within this period she made her dying declaration which was recorded by Mrs. Kurbah (PW-10).

13. Smt. R.M. Kurbah (PW-10), the Magistrate who had recorded the dying declaration of the victim stated that on reaching Ganesh Das Hospital where the victim was admitted, talked to her in the emergency ward, asked her name, her husband's name and residence. Upon her making a query as to how the incident happened, the victim told her in Hindi that in the evening that day her husband, the appellant, returned home, poured kerosene oil on her and set her ablaze. According to the witness, she was conversant with Hindi and accordingly recorded the statement in English as per her understanding of what the victim had said in Hindi.

14. Dr. A.A. Dkhar (PW-11) who had conducted the post mortem examination found the following injuries on the dead body:

1. Whole body surface burn injuries, except the upper part of the Nape, and at axillae, groin and anus.
2. AnulSION of skin surfaces all over the body with blisters on the upper limbs and face.
3. Singing of Hair, Hair line of upper Head, burn hairs of whole of the Head

except right parietal and temporal regions.

4. Burnt crack muscle areas found over the soles, heels and lips.

15. The following further observation noted by the doctor are also relevant:

The brain was congested liver congested chest pleural were congested black soots were found in the Trachea. Right lung congested and Haemorrhaging left lung also congested and hemorrhaging. Fluid found in both the lungs. Pericardium, Heart and vessels were congested.

Abdomen:--Peritoneum was congested carbon particle found in the oesophagus liver, spleen and kidneys and bladder were all congested.

Uterus was pregnant and a viable (fully formed) female dead unborn baby was removed from the uterus and handed over to the relatives for last rites.

Description of injuries:

The dead body was that of a Adult female person in advance stage of pregnancy, sustaining severe whole body surface burn injuries on her person which are ante mortem in nature.

In my opinion the cause of death was due to shock and septicemia following whole body surface burn injuries.

16. Inspector S.N. Gogoi (PW-12) who was OC of the concerned Police Station deposed that the incident of burning took place on 5th of December, 1996. He received the FIR regarding the incident on the next day and accordingly registered PS Case No. 67(12)/96 u/s 302.

17. Smt. Sabitri Gill (PW-14) who is the elder sister of the deceased stated that her deceased sister came to her crying early in the morning of 2nd December, 1996 and told her that her husband/appellant was harassing her day in and day out for the loan amount of Rs. 5,000/- which their father had taken from her husband and asked her if she could spare the amount for her so that she could repay the amount. Since she had no money with her, she expressed her regrets to her. On 5th morning the deceased asked her to fetch the appellant. Accordingly, she reached the residence of the appellant at Alogodown around 10 to 10.30 a.m., but the appellant refused to oblige and she had to return back to her home. However, on reaching back she found that her sister (the deceased) had already left for her house. She then came to know that her sister was admitted in hospital only at 4/4.30 p.m. when the Police came and enquired if she was the sister of the deceased. She then rushed to hospital and on reaching there she found the deceased full of burn injuries. However, her deceased sister spoke to her clearly and wanted to know as to how she came to know about her being admitted in hospital. The deceased told her (PW-14) that the incident happened when her husband, the appellant poured kerosene over her body and set her ablaze.

18. The above is the undemolished evidence brought on record by the prosecution. The story that emerges on the basis of the above evidence is that the appellant and his wife the deceased had not been leading a happy and contented marital life. On the day of the incident, the appellant was at home till 10.30 to 11 a.m. At around 11 a.m. the deceased who was then staying with her sister Smt. Sabitri Gill (PW-14) returned home after having failed to arrange the loan amount of Rs. 5,000/- which her father had taken from the appellant and for which the accused appellant had been harassing her. At about 4/4.30 p.m. fire was seen blazing in the quarters in occupation of the appellant and when PW-1 accompanied by other staff members reached there to put out the fire, they found the deceased lying on the floor of the bedroom with serious burn injuries on her person and the appellant sitting on the steps outside. The deceased who was immediately rushed to hospital succumbed to her burn injuries after making a dying declaration implicating her husband, the appellant.

19. The question for determination is whether the above evidence is sufficient to prove the case of the prosecution beyond reasonable doubt. In order to come to any conclusion, it would be essential to take note of the dying declaration made by the deceased which constitutes another substantive piece of evidence on record. It has already been noted above that the dying declaration made by the deceased was recorded by Smt. R.M. Kurbah (PW-10). The dying declaration along with remarks of the Magistrate, which has been marked as, Ext. 2, are as follows:

Dying declaration of Smt. L. Kakati. aged 22 years. W/o. Bhabhanandan Kakoti, S.I. of Police S.B.C.I.D. Hqr. Shillong and a resident of Madanryting taken today the 5th December 1996 at Ganesh Das Hospital at 7 p.m.

(The Declarant was still conscious and made the Declaration in the presence of the following witness and recorded by me, Smt. R.K. Kurbah).

Today at about 3.30 p.m. (pause) while I was in the house (pause) my husband in a drunken state (pause) came home and had a quarrel (pause) with me. He started beating me (pause) and then poured kerosene oil (pause) on my body and then lighted fire (pause).

The declarant could not give further statement as she became unconscious and succumbed to her injuries at 7.30 p.m.)

Certified that the patient is conscious and at sound mind at the time of recording the dying declaration.

20. It would be pertinent to mention here that the above dying declaration has been relied on by the learned trial Court while passing the impugned order of conviction. The main objection raised by the learned defence counsel with regard to the dying declaration is that it is not admissible in evidence as it does not reflect the exact words spoken by the deceased. Relying on the decision of the Apex Court in Ram Nath Madhoprasad and Others Vs. State of Madhya Pradesh,

and in Munnu Raja and Another Vs. The State of Madhya Pradesh, the learned Counsel submitted that unless one is certain about the exact words uttered by the deceased, no reliance should be placed on verbal statements of witnesses and the oral declaration made by the deceased.

21. There is no doubt that if the dying declaration is recorded in the words of the injured, it would be the best dying declaration. It however appears that exact words of the injured cannot be always insisted upon. It has been held by the Apex Court in Bakhshish Singh Vs. The State of Punjab, that simply because the very words uttered by the injured are not reproduced, it is no reason to reject the dying declaration if the Court is otherwise satisfied that the dying declaration, as recorded, correctly reproduces what was stated by the injured. The Supreme Court in Tehal Singh and Others Vs. State of Punjab, has held that the substance of the dying declaration written in the words of the writer attaches no infirmity. Relying on the law laid down in this case, the H.P. High Court in State of H.P. v. Gopi 1985 CriLJ 984 (sic) has held that statement made in one language and recorded in another language is legal. In Srinivasa and ors. v. State (2005) 9 SCC 327 the declarant and recorder of dying declaration were not speaking the same language. The dying declaration was therefore recorded with the help of a translator. The correctness of the translation was confirmed by the Doctor who knew both languages. In the circumstances, it was held by the Apex Court that the veracity of the dying declaration stands established.

21.1 It would be clear from the above that it is not the law that the exact words uttered by the injured need always be reproduced. Even a translated version, if the same is found to be a correct version of the statement of the injured can be acted upon. In this view of the matter the contention that no reliance can be placed on the dying declaration since the exact words uttered by the injured have not been reproduced cannot be accepted.

22. The next submission made by the learned defence counsel was that no conviction can be based on an uncorroborated dying declaration. It is true that as per the law laid down by the Apex Court in Ram Nath 1953 CriLJ 1772 (supra) it is not safe, to convict an accused person merely on the evidence furnished by a dying declaration without corroboration because such a statement is not made on oath and is not subject to cross examination. It must however be noted that this view no longer holds the field. The Supreme Court, as far back as in the year 1958 : Khushal Rao Vs. The State of Bombay, in the case of Khushal Rao Vs. The State of Bombay, , held that a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of the surrounding circumstances and with reference to principle governing the weighing of evidence."

23. Again in Harbans Singh and Another Vs. State of Punjab, . it was held that evidence furnished by dying declaration must be considered just as the evidence of any other witnesses.

24. It is thus clear that a dying declaration has to be weighed as any other evidence and also that a dying declaration can alone be the basis of conviction. Bearing this in mind we may now turn to the question as to whether the dying declaration (Ext. 2) is reliable and can alone be the basis for conviction.

25. Admittedly, the dying declaration Ext. 2 is not a verbatim reproduction of what the injured had stated. The injured had made the original statement in Hindi which was recorded in English by the Magistrate (PW-10) as per her understanding of the language. The Magistrate in her statement as PW-10 stated as follows:

I talked to the lady asked her name her residence and husband's name, and put some question to her and how this had happened to her, and the lady stated that in the evening of the same day her husband came home and pour kerosene oil on her body and torched her. The lady was very badly burnt and both her limbs were bandaged for which reason I could not take her thumb impression after her dying declaration. The lady was very much conscious and her voice was crystal clear. The lady spoke in Hindi. I can understand Hindi very well. The Doctor was also present when I recorded the dying declaration, so also the Police Personnel who picked me and also the nurses. The patient expired after 7.30 p.m. I have also taken the signature of the Doctor after recording the Dying declaration. Exhibit-2 is the dying declaration. The Patient while giving her dying declaration broke the sentences that is why have noted in my Exhibit-2 (pause). Exhibit-2(2) is my signature. The lady was 8 months pregnant as per information given to me.

26. In her cross examination, she stated as follows:

The Doctor told me that the Patient can speak, and I myself had inter act with the lady by speaking to her. I did not probe further from the lady regarding her relationship with her husband. The husband of the lady was not present at that time. When I recorded the dying declaration the contents of Exhibit-2 reflects only my understanding of what the lady declared had stated and is not a verbatim of what the lady actually stated. I did not asked any other person present on that day to clarify the exact contents of what the lady stated that day.

27. The dying declaration recorded by Smt. Kurbah (PW-10) and marked as Ext. 2 has already been reproduced in paragraph 17 above. The testimony of PW-10 makes it clear that Ext. 2 is not a verbatim reproduction of the statement made by the injured. However, it is clear from the legal position already highlighted above that a dying declaration need not always be recorded in the exact words and in the same language in which it is made by an injured. A dying declaration recorded in as far as practicable in the words of the maker is certainly the best dying declaration. It is however not the law that a dying declaration ought in all cases to be rejected simply because the very words uttered by the injured are not reproduced.

28. At this stage, it is appropriate to notice some of the decisions which lay down the requisites of a valid dying declaration. Laying down the manner in which a

dying declaration is to be recorded, the Apex Court in *Laxman Vs. State of Maharashtra*, observed as follows:

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. 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.

29. In the above case the Court departing from the earlier view taken in *Paparambika Rosamma and Others Vs. State of Andhra Pradesh*, which was to the effect that a medical certificate was essential to ascertain the state of mind of the injured held as follows:

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.

30. In para 3 of the judgment, the Court further observed as follows:

The juristic theory regarding acceptability of a dying 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 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.

31. In *Koli Chunilal Savji and Another Vs. State of Gujarat*, , it was held that the ultimate test is whether the dying declaration can be held to be truthful one and voluntarily given. It was further held that before recording the declaration the officer concerned must find that the declarant was in a fit condition to make the statement.

32. In *Shanmugam @ Kulandaivelu Vs. State of Tamil Nadu*, :the Apex Court observed as follows:

That the dying declaration can form the sole basis for conviction is too well settled by a catena of decisions.

33. Thus, there is no doubt that a dying declaration, if found truthful can be the sole basis of conviction. In the present case the dying declaration has been recorded by the Magistrate shortly after the victim was admitted in the hospital. The Magistrate in her statement categorically stated that the injured was conscious and her voice was crystal clear. It is only after satisfying herself that the injured was in conscious state of mind that she recorded the statement in presence of Dr. R.V. Suchiang (PW-5), the Police personnel who had taken her to hospital and the nurses. The doctor who was present also nodded the Magistrate for recording the dying statement saying it was "okay" without issuing any certificate. In the above *Shanmugam's* case, where the dying declaration was recorded by Magistrate in presence of doctor who had endorsed that the victim was conscious, it was held that mere non-examination of doctor does not affect evidentiary value of the dying declaration.

34. In *Ravi Chander and Others Vs. State of Punjab*, , it was observed that the Magistrate being a disinterested witness, question of doubt on the declaration recorded by the Magistrate does not arise.

35. Thus, viewed in the light of the legal principles as noted above, we have no hesitation to hold that the dying declaration (Ext. 2) in question cannot be discarded for any of the reasons put forward by the learned defence counsel.

36. One specific ground taken by the learned defence counsel that requires to be taken note of is that the prosecution version about occurrence was different from the version given in the dying declaration. Referring to the statement of Smt. Sabitri Gill (PW-14), elder sister of the deceased, it was submitted that according to this witness the appellant was at home at 10/11.30 a.m. in the morning when she reached the residence of the deceased to bring him along and he was at home when she left. In this view of the matter, the version given in the dying declaration that the appellant came home at about 3.30 p.m., picked up a quarrel with the deceased before pouring kerosene over her body and before setting her on fire was contradictory and the dying declaration was not worthy of credence on this account. We, however, do not find any force in the submission

inasmuch as the possibility of the accused leaving home for a short period after 10.30 to 11 a.m. cannot be ruled out. There is no evidence or any circumstance to suggest that the accused appellant confined himself to his quarters. Therefore, we find no substance in the submission that there is contradiction on this account.

37. We are not impressed by the further argument addressed by the learned defence counsel that the prosecution case suffers from serious infirmity in so far as some of the witnesses named in the charge sheet were not examined and one witness, particularly PW-14, who was not named in the charge sheet was examined. Our foregoing discussion makes it amply clear that the evidence which has been brought on record is sufficient to prove the prosecution case.

38. One other significant aspect which requires to be taken note of is the conduct of the accused. It is in evidence that the accused appellant was very much present in the house albeit outside the bedroom, where the incident had taken place. As already noted above, he was found sitting on the steps when PW-1 and his team extinguished the fire and came out of the bedroom. When PW-7 asked him as to why he did not come to the rescue of the deceased, the reply he gave was "let her die". According to PW-15 the accused did not help in shifting the body to the hospital. Such conduct on the part of the accused appellant is, to say the least, not compatible with innocence. Indeed, such conduct on the part of the appellant has no reasonable explanation except on the hypothesis that he is guilty. Such conduct, therefore, destroys the presumption of innocence. We are fortified in this view by the law laid down by the Supreme Court in *Anant Chintaman Lagu Vs. The State of Bombay*,

39. Now, coming to the defence evidence it may be noted that the defence examined two witnesses in their defence. We have gone through their evidence but could hardly find anything that can demolish the prosecution case. We have already noted above that the dying declaration Ext. 2 which constitutes substantive piece of evidence could not be discarded for any of the reasons put forward by the defence. Thus, this dying declaration coupled with other evidence on record including the conduct of the accused appellant hardly leaves any room for doubt that the accused appellant is not responsible for the death of the deceased.

40. In view of the above, it is difficult to say that the learned trial Court was not justified in taking the view that the prosecution had proved the case against the accused appellant beyond reasonable doubt. This view seems to us, to be the only possible view in the facts and circumstances of the case. In the result, we affirm the impugned order of conviction and sentence and dismiss the appeal.