

(2003) 09 OHC CK 0019
In the Orissa High Court
Case No : Criminal Appeal No. 242 of 1994

Pokani alias Prakashini Mohapatra and Others	APPELLANT
Vs	
State of Orissa	RESPONDENT

Date of Decision : 09-09-2003

Acts Referred:

Evidence Act, 1872 — Section 5
Penal Code, 1860 (IPC) — Section 300, 302, 34

Citation : (2003) CLT 1134 (Suppl CrI) : (2004) CriLJ 689 : (2003) 26 OCR 433

Hon'ble Judges : Sujit Barman Roy, C.J; L. Mohapatra, J

Bench : Division Bench

Advocate : B. Panda, D. Panda, D. Das and A.K. Ray, for the Appellant; M.R. Dhal, A.S.C., for the Respondent

Final Decision : Dismissed

Judgement

L. Mohapatra, J.—This appeal is directed against the judgment and order of conviction and sentences passed by the learned Sessions Judge, Cuttack convicting the appellants for commission of offence u/s 302/34 of the Penal Code.

As it appears from the record, the appellants and one Pitabas Maharana faced trial for commission of offences under Sections 498-A/304-B read with Section 302/34 of the Penal Code. Learned Sessions Judge on consideration of the evidence on record acquitted Pitabas Maharana from the charges and convicted the appellants for commission of offences as aforesaid.

2. Case of the prosecution is that the deceased Amani Moharana had married to accused Pitabas Moharana, son of appellants 2 and 3 five years prior to the date of occurrence. It is alleged that after marriage deceased was being assaulted by the accused person and on the date of occurrence at about 7 P.M. in the evening the informant heard that the deceased has got burn injuries and when he went to the house of the deceased, villagers informed him that the deceased had been carried to Nuagaon P.H.C. When the informant reached Nuagaon P.H.C. he found the deceased being treated by Dr. Jena (P.W. 4). On being questioned by P.W. 4,

it is alleged that with much difficulty the deceased stated that her husband Pitabas assaulted her and thereafter the present appellants who are father-in-law, mother-in-law and sister-in-law poured kerosene on her and set fire to her body. The deceased was completely burnt and a towel found on her neck was also burnt. On these allegations, F.I.R. having been lodged by the uncle of the deceased (P.W. 1), case was registered for commission of offence under Sections 498-A/307/34 of the Penal Code. From the record, it further appears that the deceased was shifted to S.C.B. Medical College & Hospital, Cuttack from Nuagaon P.H.C. where she died of burn injuries.

3. In order to prove the charges leveled against the accused persons, prosecution examined ten witnesses. Out of the said witnesses examined on behalf of the prosecution, P.W. 1 is the informant, P.W. 2 is the doctor who conducted post-mortem examination, P.W. 8 is the doctor who recorded dying declaration, P.W. 9 is the O.I.C. Nuagaon Police Station who recorded statement of the deceased u/s 161, Cr.P.C.

4. Plea of the accused Pitabas who has been acquitted is that on the date of occurrence the deceased was sleeping on the bed after putting a Mosquito net and near the mosquito net, an open lantern was kept and the mosquito net caught fire from the said lantern, as a result of which the deceased got burn injuries. Plea of the appellant No. 1, who is sister-in-law of the deceased, is that on the date of occurrence she was not at home and she had gone to her maternal uncle house. So far as appellants 2 and 3 are concerned, they have denied the allegations. In order to prove the defence plea as stated above, three witnesses were examined on behalf of the accused persons.

5. Learned Sessions Judge relying on the deposition of witnesses recorded during trial including the dying declaration recorded by P.Ws. 8 and 9, convicted the appellants of the charges u/s 302/34 of the Penal Code. Since there was no material on record to show that at the time of incident accused Pitabas Moharana was present or participated in the incident, he was acquitted of the charges. So far as charges under Sections 498-A and 304-B of the Penal Code are concerned, learned Sessions Judge did not find any material in support of the same.

6. Shri Panda, learned counsel appearing for the appellants submitted that there is no evidence on record to show that the appellants committed the alleged offence except dying declaration stated to have been made by the deceased before P.Ws. 8 and 9. Shri Panda further submitted that there is variation of evidence so far as place where the dying declaration is supposed to have been recorded by P.W. 8. According to Sri Panda, the evidence of P.W. 8 so far as it relates to dying declaration, is unreliable and unacceptable. In this connection, he further submitted that the dying declaration recorded by P.W. 8 was never produced before the Court during trial and only a Xerox copy of the so-called dying declaration was produced during trial. Despite defence objection, the learned Sessions Judge accepted the Xerox copy of the dying declaration in absence of any evidence to show as to what happened to the original and on the

basis of such Xerox copy, order of conviction was made. Shri Panda also challenged the statement u/s 161, Cr.P.C. of the deceased stated to have been recorded by the I.O. (P.W. 9) on the ground that the I.O. in his evidence has specifically admitted that at the time he recorded the statements under Section 161, Cr.P.C. the deceased was in unconscious state. On the basis of such argument the learned counsel prayed for allowing the appeal as there is no other evidence on record to prove the appellants involvement with the alleged crime.

Learned Additional Standing Counsel, on the other hand, submitted that P.W. 8 who recorded dying declaration himself has proved that the dying declaration of the deceased made before him and therefore in absence of the original of Ext. 6 (dying declaration) statements of witnesses to be relied upon for the purpose of conviction. Referring to the evidence of P.W. 9 also learned counsel for the State submitted that though the I.O. has stated that at the time of recording statement u/s 161, Cr.P.C. of the deceased, she was in an unconscious state, later he clarified that the deceased was in a position to talk and declared that the three appellants before this Court committed the offence. Learned Addl. Standing Counsel further submitted that apart from the evidence of these two witnesses who recorded dying declaration, the other witnesses who have been examined on behalf of the prosecution also supported the dying declaration and the same remains unchallenged.

7. In order to appreciate the rival contention of the parties, it is necessary to look into the evidence recorded by the learned Sessions Judge during trial. P.W. 1 is the informant and uncle of the deceased. In his evidence he has stated that on the date of occurrence when he was returning from work he heard deceased had got burn injuries and taken to hospital. Hearing this news he proceeded to the hospital. This witness has further stated that in his presence, to the query made by the medical officer (P.W. 8), the deceased stated that her husband after assaulting her left towards Courtyard and thereafter the present appellants caught hold her. Appellant No. 1 stuffed her mouth by a napkin, appellant No. 3 poured kerosene on her and appellant No. 2 set fire on her body. This witness also found half burnt napkin hanging on the neck of the deceased. Learned counsel appearing for the appellants challenged version of this witness on the ground that this witness was hard of hearing and therefore could not have heard dying declaration of the deceased stated to have been made before P.W. 8. True it is, in cross-examination he has stated that if someone speaks loudly then alone he can hear. This witness has again expressed in cross-examination that he is able to hear clearly from a distance of one cubit and the voice becomes feeble as the distance increases. P.W. 2 who has conducted postmortem examination found 95 per cent burn injuries over the body of the deceased. P.W. 3 in the witness in whose presence the I.O. has recorded statement u/s 161, Cr.P.C. of the deceased. The witness has stated that hearing about the incident he came to the Nuagaon P.H.C. at about 8 to 8.30 P.M. and the deceased was surrounded by man people of different villages. Soon thereafter police reached the hospital and issued requisition. This witness further stated that the deceased told that her

father-in-law, mother-in-law and sister-in-law burnt her with kerosene. P.W. 5 is the Asstt. Professor of F.M.T. Department, Cuttack who was also present during post-mortem examination. P.W. 7 is the father of the deceased. In his deposition this witness has stated that after marriage the deceased was being ill-treated and assaulted by her in-laws and one year prior to her death she had come to his house and by that time she was pregnant. She gave birth to a female child in his house and none of the in-laws' family members came to see her. After a panchayat was held in the village the deceased was sent back to her in-law's house but months thereafter he got information that his daughter had got burn injuries. He immediately proceeded to the P.H.C. and saw his daughter (deceased) had received burn injuries. On being questioned the deceased replied that she was burnt by her in-laws namely, father-in-law, mother-in-law, and sister-in-law and so also declared that by the time the incident took place her husband was not present at home. This witness has been cross-examined at length, but we do not find any reasons to disbelieve the said witness. P.W. 8 is the doctor who recorded dying declaration of the deceased in S.C.B. Medical College and Hospital, Cuttack. This witness in his deposition has stated that when the deceased was brought to the hospital he was in agony, but was capable enough to give statement. Thereafter, he recorded dying declaration in question and answer form. He has also stated that he recorded dying declaration of the deceased in presence of one Dr. Mohanty and he could not obtain the LTI of the deceased as she had got burn injuries on both the hands. Xerox copies of the dying declaration of the deceased and the Bed Head ticket were marked as Exts. 6 and 7 respectively with objection raised by the defence counsel since originals have not been produced. P.W. 9 is the Officer-in-charge, Nuagaon Police Station who recorded statement u/s 161, Cr.P.C. of the deceased marked Ext. 8. Though reliance has been placed by the learned counsel for the State on the evidence of this witness, Sri Panda, learned counsel for the appellants challenged the version of this witness on the ground that the I.O. in his cross-examination has admitted that at the time he recorded statement of the deceased u/s 161, Cr.P.C. the deceased was in a state of unconsciousness and was not able to talk. P.W. 10 is the A.S.I. of Police, Mangalabag Police Station who was informed about the death of the deceased by the S.C.B. Medical College, Cuttack and registered an U.D. case and took up the enquiry. He has stated in his evidence that on 4-12-1990 he along with P.W. 8 perused the Bed Head Ticket attached with dying declaration recorded by P.W. 8 and made a verbatim reproduction of the said statement in the case diary.

8. Shri Panda, learned counsel for the appellants challenged the findings of the learned Sessions Judge basically on the following grounds. Evidence of P.W. 1 so far as it relates to dying declaration of the deceased cannot be accepted in view of the fact that this witness is not only hard of hearing and could not have heard the dying declaration made by the deceased in a feeble voice but also gave a different story than that of P.W. 4 with regard to statement of the deceased. This witness has also admitted that by the time he arrived at hospital and heard the

dying declaration, the deceased was laid down in the verandah of the Hospital, whereas P.W. 4 in his deposition has stated that in view of the conditions of the deceased, she was not shifted from the Auto rickshaw in which she had been to the P.H.C., Nuagaon. Evidence of P.W. 4 was also challenged on the ground that in the injury report he did not indicate about the statement of the deceased made before him. This witness also has stated that till the police arrived in the P.H.C. the deceased was in Auto rickshaw since her condition was critical, whereas P.W. 1 admitted that the deceased had been shifted to the verandah of the hospital. Evidence of P.W. 9 is challenged on the ground that he could not have recorded the statement u/s 161, Cr.P.C. of the deceased since he himself admitted that by the time he recorded the statement the deceased was in an unconscious state. Ext. 8 is the statement of the deceased supposed to have been recorded u/s 161, Cr.P.C. does not bear signature of P.W. 4 who admitted his presence at the time of recording of such statement. It is also challenged on the ground that this witness (P.W. 9) is stated to have recorded statement of the deceased u/s 161, Cr.P.C. when she was lying on the verandah of P.H.C., whereas P.W. 4 has specifically stated that since the condition of the deceased was critical, he did not shift her from Auto rickshaw. Evidence of P.W. 8 is also challenged on the ground that the Xerox copies of the dying declaration of the deceased was produced before the Court and marked exhibit in spite of objection by the defence. It was contended by " Sri Panda that Xerox copies of the documents are not admissible in evidence and therefore relying on the Xerox copies, marked as Exhibits 6 and 7, no order of conviction could be made.

9. Learned Additional Standing Counsel appearing on behalf of the State supported the findings of the learned Sessions Judge stating that the dying declaration reported by P. 8 is supported by independent witnesses and therefore there is no reason to disbelieve P.W. 8. He also contended that P.W. 9 who recorded statement of the deceased u/s 161, Cr.P.C. though at one stage stated that at the time of recording the statement the deceased was in an unconscious state of mind, later he has explained that the deceased was able to talk. In view of such evidence available on record, the only basis of some minor contradictions pointed by the learned counsel for the appellants, the dying declaration cannot be thrown out and there is no reason for this Court to interfere with the findings arrived at by the learned Sessions Judge.

10. Before discussing the question raised as to whether the dying declaration made by the deceased should be accepted or not, law in that regard should be looked into. The Apex Court in the case of Smt. Kamla Vs. State of Punjab, observed as follows (para 5) :

"It is well settled that dying declaration can form the sole basis of conviction provided that it is free from infirmities and satisfies various tests Khushal Rao Vs. The State of Bombay, The ratio laid down in this case has been referred to in a number of subsequent cases with approval. It is also settled in all those cases that the statement should be consistent throughout if the deceased had several

opportunities of making such dying declarations, that is to say, if there are more than one dying declaration they should be consistent. If a dying declaration is found to be voluntary, reliable and made in fit mental condition it can be relied upon without even any corroboration. In a case where there are more than one dying declarations of some inconsistencies are noticed between one and the other, the Court has to examine the nature of the inconsistencies namely whether they are material or not. In 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."

Learned counsel for the appellants referred to the above decision since dying declaration has been recorded not only by the doctor but also by the I.O. (P.W. 9) at two stages. The Apex Court in the case of Smt. Laxmi Vs. Om Prakash and Others, observed that though conviction can solely be based on dying declaration the Court can look for corroboration if it suffers from infirmities. The main test of reliability of a dying declaration is mental and physical fitness and capability of make statement at that point of time. In the facts and circumstances of each case, the Court is to be satisfied as to whether the deceased making a dying declaration was in a fit mental and physical condition and was capable of making a statement. The Apex Court in the case of Laxman Vs. State of Maharashtra, observed that absence of certification of doctor as to fitness of mind of declarant would not render dying declaration not acceptable. What is essentially required is that person who records it must be satisfied that the deceased was in fit state of mind. Certification by doctor is rule of caution. Voluntary and truthful nature of declaration can be established otherwise.

11. This being the position of law, we now proceed to examine the evidence available on record with regard to dying declaration. There is no dispute that the dying declaration was made at two stages; one before the doctor (P.W. 8) and other before the I.O. (P.W. 9). At the relevant time P.W. 8 was working in S.C.B. Medical College, Cuttack where the deceased was brought in for treatment. He has stated in his evidence that though the deceased was in agony, but he was satisfied that she was capable enough to give statement. Thereafter he recorded dying declaration in question and answer form and the dying declaration recorded the said witnesses (P.W. 8) is quoted below :

"On 28-11-90 at about 8 P.M. night my father-in-law, mother-in-law and Nanada told me as to why I am not committing suicide by hanging. As my husband went to outer Court yard, she took rest by burning a "Dibiri" after completing kitchen work. My mother-in-law came, dragged and assaulted me. My Nanada tied my mouth by a towel. My father-in-law closed the door from inside. He tied my hands. My mother-in-law splashed kerosene through out my body. In a glass bottle, there were about 200 ml. kerosene inside the room. My father-in-law set fire to my body with the help of a "Dibiri". I ran inside the room helplessly. They all unchained the door and went outside. I came outside and fell near the door step. I do not know when my husband returned. I do not know where I was

thereafter carried in a cut since I was feeling burning sensation through out my body."

Paragraph 2 of the examination-in-chief of this witness indicates that xerox copies of the dying declaration of the deceased and the Bed Head ticket were produced before the Court and marked as Exhibits 6 and 7 respectively with objection raised by the learned defence counsel. There is no evidence on record to show that the original was neither lost or destroyed, as a matter of fact, this witness has not whispered a word as to what happened to the original of the dying declaration as well as Bed-Head ticket. In this connection, reference may be made to a decision of this High Court in the case of Prabhu " Prabhu Dayal Agrawalla v. State, reported in (1989) 2 OLR 574. In the aforesaid case, this Court while interpreting Section 65 of the Evidence Act observed that when primary evidence has not been proved in accordance with law nor any basis has been shown for admission of secondary evidence, secondary evidence is not admissible. We have not referred to several other decisions in this regard since the law is well settled. Exts. 6 and 7 being xerox copies of the dying declaration recorded by P.W. 8 as well as Bed Head ticket and there being no explanation as to what happened to original, said secondary evidence produced before the Court and marked exhibits in spite of objection by the defence counsel are not admissible in evidence and therefore no reliance can be placed on the Exhibits 6 or 7. We are, therefore, constrained to discard the evidence of P.W. 8 so far as it relates to dying declaration made before him. P.W. 9 is the I.O. who in his evidence has stated that on receipt of casualty memo (Ext. 4) he proceeded to Nuagaon P.H.C. and examined the deceased and recorded her statement u/s 161, Cr.P.C. which was marked as Exhibit 8. In cross-examination he has stated that the deceased was lying on the varandah and her condition was serious. Though she was not able to talk, but she spoke in unconscious state and this witness recorded her statement u/s 161, Cr.P.C. Much reliance is placed by the learned counsel for the appellants on this part of the statement made in cross-examination and it is argued that since the P.W. 9 admits that the deceased in unconscious state, she could not have made any statement or declaration as claimed by this witness. In the very same paragraph this witness has again explained that the deceased had not totally lost her sense or was unable to talk, this witness has further stated that he recorded statement of the deceased u/s 161, Cr.P.C. in presence of the witness including the doctor.

To find out as to whether this witness is truthful or not, it is necessary to look into the evidence of other witnesses who were also present when the dying declaration of the deceased was recorded by this witness. P.W. 3 in his evidence has stated that after hearing about the incident when he reached at the spot Nagaon police was present and was recording dying declaration. The deceased was explaining the police that Brundaban Moharana, Gurubari Dei and their daughter Pokani caught hold of her, Pokani stuffed her mouth with a napkin, Gorubari Moharana poured kerosene over the body and Brundaban set fire. This witness has further stated that the deceased told police that before setting she

was assaulted by her husband and after assaulting her husband left the house. Nothing is brought out in cross-examination to disbelieve this witness. In view of evidence of P.W. 3 as stated above, we do not find any reason to disbelieve P.W. 9 merely because at one stage in cross-examination he stated that he recorded statement of the deceased u/s 161, Cr.P.C. when she was in an unconscious state but explained later in the same paragraph that the deceased was in a position to talk. Apart from the above P.W. 7 is the father of the deceased. In his evidence he has categorically stated that when he asked deceased as to how she received burn injuries, the deceased replied that she had been burnt by her in-laws, such as husband's sister, father-in-law and mother-in-law and she also declared that by the time of the incident her husband was absent at home. After careful examination of evidence of this witness, we do not find any reason to disbelieve her. The discussions made above clearly indicate that the dying declaration recorded by P.W. 9 supported by evidence of P.W.3 and the dying declaration made before P.W. 7 are acceptable. Some minor contradictions were pointed out by the learned counsel for the appellants with regard to place where the deceased was lying when P.W. 9 recorded her statement u/s 161, Cr.P.C. We do not think that the contradictions pointed out by the learned counsel for the appellants are so material that this Court should disbelieve P.W. 9 or P.W. 3 with regard to dying declaration.

12. Apart from dying declaration of the deceased, it also appears from the evidence of P.W. 7 that during stay of the deceased in matrimonial home, she was being ill-treated and assaulted by in-laws. One year prior to her death she was brought to her father's house and by then she was pregnant. She gave birth to a female child and none of the members of her in-law's family including her husband turned up to see her. Panchayat was held in the village of the accused persons and only after the decision of the Panchayat the deceased was sent back to her in-law's house and a month thereafter the incident took place. From such evidence, it is clear that after marriage the deceased was being tortured by her in-laws and because of the decision of the Panchayat they were forced to take her back. This being the relationship between the deceased and her in-laws, dying declaration made by her implicating the present three appellants in commission of the offence gets corroboration. The Court also cannot lose sight of the fact that offences of this nature are increasing in number day-by-day and the Courts should not act upon minor contradictions in the evidence laid down by the prosecution and if there are acceptable materials, Courts should act upon it. In the present case, we have found the dying declaration made before P.W. 9 and P.W. 7 not only reliable but also acceptable and corroborated by evidence of P.W. 7 with regard to the relationship of the deceased with her in-laws. We, therefore, do not find any reason to differ with the findings of the learned Sessions Judge in this regard.

13. So far as defence plea of appellant No. 1 is concerned, three witnesses have been examined on behalf of the defence. Appellant No. 3 had taken the plea that on the date of occurrence she was not in the house and she had gone to her

maternal uncle's house. In support of such pleas, D.W. 3 has stated that the appellant No. 1 was in his house on the date the deceased received burn injuries. In cross-examination, this witness has stated that the appellant No. 1 returned back home 8 to 10 days after the incident when news was received in his house. This witness has further stated that he came to the house of the appellant 8 to 10 days after appellant No. 1 left his house and when he came to the house of the appellants, the appellant No. 1 was absent. This witness was not in a position to say where the appellant No. 1 had gone. Except evidence of this witness, there is no other material to show that on the date of occurrence the appellant No. 1 was staying in her maternal uncle's house. On the other hand, dying declaration made by the deceased and recorded by P.W. 9 and heard by other witnesses, such as, PWs. 3 and 7, clearly shows that on the date of occurrence the appellant No. 1 not only present at home but also participated in commission of offences. The very-fact that the appellant No. 1 was absconding is not only gets strength from the evidence of the I.O. but also from the evidence of P.W. 3. We are, therefore, not in a position to accept the defence plea of the appellant No. 3.

14. Accordingly, we do not find any merit in the appeal and the same stands dismissed. The appellants who are on bail are directed to surrender and serve the remaining part of the sentence, failing which the learned Sessions Judge shall take appropriate steps for apprehending the appellants to serve the remaining part of the sentences.

Sujit Barman Roy, C.J.

15. I agree.