

(2001) 12 OHC CK 0013
In the Orissa High Court
Case No : Criminal Appeal No. 208 of 2000

Prafulla Das and Others	Vs	APPELLANT
State of Orissa		RESPONDENT

Date of Decision : 19-12-2001

Acts Referred:

Penal Code, 1860 (IPC) — Section 302, 34

Citation : (2002) 1 OLR 212

Hon'ble Judges : Pradipta Ray, J;A.S. Naidu, J

Bench : Division Bench

Advocate : A.R. Dash, N. Lenka, N. Das and R.N. Behera, for the Appellant;
Standing Counsel, for the Respondent

Final Decision : Allowed

Judgement

A.S. Naidu, J.—The three appellants related as father and sons aged about 72 years, 51 years and 37 years respectively, have been convicted u/s 302 read with Section 34 of the Indian Penal Code for committing murder of Charulata Das, wife of Rabindra Das, who is the son of appellant No. 1-Prafulla Das. in furtherance of their common intention by pouring Kerosene and setting fire on her body. The learned Sessions Judge, Mayurbhanj in S. T. Case No. 3 of 1996 held the accused persons guilty and convicted them thereunder and sentenced each of the accused persons to undergo rigorous imprisonment for life. The said order is impugned in this appeal.

2. Bereft of all unnecessary details, the short facts as unfolded by the prosecution, are as follows :

In or about June, 1993 the deceased-Charulata Das married Rabindra (P.W.I). After marriage, Charulata stayed in her in- law's house and once in a while visited her parents along with her husband. On May 25. 1994, at about 7 A.M. accused-Kali Charan Das along with two others, came in a Car and disclosed to the parents of Charulata that their daughter had set fire to her own body and

some portions of her wearing apparel and leg has been burnt. Appellant Kali Charan requested the father of Charulata (P.W.9) to accompany him to their house. P.W.9 proceeded with him and found that about 200 people were assembling near the house of appellants and the deceased was lying on the ground and her body was covered with cloth and she was unconscious. A portion of her body was burnt. It is alleged that the appellants and some of the villagers took the thumb impression of the father of the deceased on a piece of paper which contained some writings. At that time, Rabindra, the husband of the deceased, came and Charulata was immediately shifted to Baripada Hospital, where she was admitted as an indoor patient for treatment of burn injuries. On May 28, 1994 the mother of the deceased came to Baripada Hospital. By then Charulata had regained her sense and was able to talk. On being questioned, Charulata disclosed to her mother (P.W.7) that on May 25, 1994 at about 3 A.M., her husband left the house for business purpose and thereafter, appellant-Prafulla and appellant Antaryami abused her and threatened to drive her out of the house. They directed her to take away the wearing apparels and leave their house through the back door. She got frightened and put on 3 to 4 blouses, 2 Sayas and Sarees and as it was still dark, waited for her husband, so that she would leave the house. While she was sitting thoughtfully, wife of appellant Kalicharan came to the room and consoled her and told her not to bother about the abuses hurled by her in-laws and asked her not to leave the house alone. Thereafter, it is alleged, that all the accused persons came together and accused-appellant Kali Charan waited in the court-yard and other appellants entered into the room, tied her face and eyes with a Chaddar, tied her hands on her backside, appellant Prafulla and Antaryami poured Kerosene on her body and set fire by lighting two match sticks. Thereafter, appellant Prafulla and Antaryami went away by their bi-cycles. After their departure, one woman came and untied her hands and thereafter, she became unconscious.

After knowing the aforesaid facts, the mother of the deceased (P.W.7) sent a written report to the Superintendent of Police, Mayurbhanj on June 30, 1994 (Ext-5). A copy of Ext-5 was also sent to Bangiriposi police station with instruction to lodge an F.I.R., register a case and to investigate into the matter.

Charulata was treated at Baripada Hospital for about 5 months and thereafter, she was taken to the house of her parents. On October 31, 1994, Charulata expired. The Officer-in-charge after completion of investigation, submitted charge sheet against three appellants, who faced the trial.

3. The plea of the accused-appellants is one of complete denial.

4. In order to substantiate the case, the prosecution examined as many as 11 witnesses. P.W. 1 is the husband of the deceased, P.Ws. 2 and 3 are the co-villagers, P.W.4 is the doctor who conducted the post mortem examination, P.W.5 is the Sarpanch, P.W.6 is the Lady doctor of Baripada Hospital, P.W.7 is the mother of the deceased, P.W.8 is the sister of the deceased, P.W.9 is the father of the deceased and P.Ws. 10 and 11 are the investigating officers.

5. The trial Court on the basis of the post mortem report and the evidence of the doctor (P.W.4) who conducted autopsy and opined the cause of the death to be shock with toxemia following the burn injuries, arrived at a finding that the death was homicidal in nature and was caused on account of burn injuries.

The learned Sessions Judge, relying upon the dying declaration said to have been made by Charulata before P.Ws. 7,8 and 9. held that the appellants in furtherance of their common intention have killed the deceased by pouring Kerosene and setting fire on her body.

6. In course of hearing, Mr. A. Das, learned counsel for the appellants, contended that there being series of infirmities and inconsistencies in the evidence of prosecution witnesses, who are also interested in the case, the mother, sister and father respectively, their evidence should have been more closely scrutinised and discarded by the trial Court as unconvincing. It is contended that the trial Court had unfortunately over-looked the inconsistencies and contradictions and has mechanically passed the order of conviction against the appellants solely on the basis of the dying declaration. It was also stressed in course of argument that there was no dying declaration in the eye of law inasmuch as neither the declaration said to have been made by the deceased, has been recorded in verbatim nor any signature of the deceased was obtained. The declaration was also not recorded in presence of a Magistrate, doctor or any other independent witness. The main grievance of the appellants is that though the occurrence took place on May 25, 1994 and the statement said to have been made by the deceased before her mother, on May 28, 1994, the death occurred on 31.10.1994. It is submitted that death having taken place 5 months after the alleged declaration, the said statement cannot be treated as dying declaration. Even otherwise,- it is submitted that the death, as opined by the doctor, was due to Toxaemia and occurred almost 5 months after the alleged occurrence, the same cannot be attributed to the appellants. In fact, after Charulata was cured, she left the hospital and died at her parental place, five months after.

In order to substantiate the contentions raised, the learned counsel for the appellants relied upon the decisions in the case of Uka Ram v. State of Rajasthan 2001 (2) O.C.R. 52 (State of Orissa v. Parsuram Naik) 85 (1993) C.L.T. (SC) 105 Maniram Vs. State of M.P.,

7. At the other hand, Mr. Mishra, learned standing counsel has placed relevant paragraphs of the judgment before us and contended tht in a criminal case, some minor discrepancies are bound to occur in oral evidence. However, if such discrepancies and inconsistencies do not touch the veracity of the prosecution case, the same are of no consequence and should be ignored. It is submitted that in the case at hand, the deceased had made a dying declaration and the same is admissible u/s 32 of the Indian Evidence Act and that there is no reason to disbelieve the dying declaration of the deceased. Law is well settled that if the dying declaration is accepted to be truthful, solely relying upon such dying declaration, the accused should be convicted.

8. Being the final Court of facts, we have carefully scrutinised the oral and documentary evidence adduced in the case. It is no more *res integrata* that if the Court is satisfied, on the close scrutiny of the dying declaration that it is truthful and not vitiated in any other manner, it is open to the Court to convict the accused without seeking any independent corroboration. (See. *Lallubhai Devchand Shah and Others Vs. The State of Gujarat*, . Therefore, the primary effort of the Court is to find out whether the dying declaration is true, if it is, no question of corroboration arises. In the present case, admittedly, the dying declaration is said to have been made before the mother and the sister.

The Apex Court in the case of *Sukhar v. State of U.P.* 1999 (8) SC 568, observed as follows :

"Section 6 of the Evidence Act is an exception to the general rule whereunder the hearsay evidence becomes admissible. But for bringing such hearsay evidence within the provisions of Section 6, what is required to be established is that it must be almost contemporaneous with the acts and there should not be an interval which would allow fabrication. The statements sought to be admitted, therefore, as forming part of *res gesta*, must have been made contemporaneously with the acts or immediately thereafter."

9. Keeping in mind the observations made by the Apex Court quoted *supra*, the statement said to have been made by the deceased, 5 months prior to her death, is to be scrutinised. It appears that the statement was made to P.W.7. the mother, on May 28, 1994 in the hospital where the deceased was under treatment. Thereafter, the mother (P.W.7) said to have narrated the statement to another daughter, i.e. Manjulata (P.W.8) who scribed a complaint and the same was submitted by P.W.8 before the Superintendent of Police. Said report is marked as Ext-5. Ext-5 is dated May 30, 1994 i.e. two days after the statement was alleged to have been made. Though admittedly the condition of Charulata improved by then, she has not signed the statement. P.W.7 in her deposition has clearly admitted that prior to her death, though she was present, the deceased had not made any other statement.

P.W.8, the other daughter-Manjulata, also stated that 3 or 4 days after the deceased was admitted to the hospital, she had narrated the incident to her. If the statement of P.W.8 is believed, then the facts stated by P.W.7 that on being told by her, P.W.8 prepared a report (Ext-5) which was submitted before the Superintendent of Police, appears to be improbable. If, in fact. P.W.8 was aware of the fact and had learnt the same from Charulata, there was no necessity for P.W.7 to narrate the same thing before P.W.8 once again. P.W.9 is the father of Charulata. In his deposition, he has also narrated the facts, more or less in a parrot like fashion, stating that on being asked, his daughter told him about the incident. Surprisingly. P.W.9 has neither told the facts to his wife (P.W.7) nor to her daughter (P.W.8). In his evidence, he has clearly stated that after death of the deceased, he has lodged a report at Bangeriposi P.S. The said report has not been produced by the prosecution.

P.W.1 is the husband of the deceased. He has deposed that after the marriage, he and his wife Charulata remained separate from his father and brothers (Appellants). He has clearly stated that his wife has not stated anything implicating the accused- appellants. He has further stated that after his wife was fully cured, the hospital authorities discharged her. P.W.2 is the next-door neighbour who rescued Charulata. It is stated that on hearing hullah, he rushed to the house along with Hari Gochhayat (P.W.3) and Malati and found that the wearing sarees of the deceased had caught fire. Malati put out the fire by throwing a bucket of water. The deceased was found wearing two Sayas, 3 Sarees and four to 5 blouses and was also covering herself with a bed-sheet. She was senseless and was shifted to the hospital. In cross-examination, said witness has stated as follows :

"x xx On my arrival near the house of Rabindra, the door of his house was found closed from inside."

P.W.3 is also a neighbour who rushed to the spot after hearing noise made by Malati. In his examination-in-chief, he has made the following statements :

"xx xx in the early morning at about 6 A.M. to 6.30 A.M.while I was in village "Danda", I heard the hullah of Malati about the fire in the house of Rabindra. At this I rushed to the house of Rabindra and the door of the house was found closed from inside. I pushed the door. The entire house was filled with smoke."

In paragraph-3 of the cross-examination, he has stated as follows :

"There is only one entrance door of the house of Rabindra. I gave a push with force to the door of Rabindra and entered inside."

It is the admitted fact that inside the room there was no one else except Charulata. the deceased. Surprisingly, Malati.the lady who first arrived at the spot and a material witness, has not been examined by the prosecution and due to her non-examination, many details remained unexplained. P.W.4, the doctor who conducted post mortem, opined that the cause of death was due to shock and toxemia due to burn injuries. In cross-examination, he has stated that "Toxaemia" can be possible by Toxic drugs or poisonous liquid substance and that the stomach contained 100 ml of whitish liquid substance. This fact is neither mentioned in the post moterm report, nor the viscera of the deceased was sent for chemical examination, which throws a cloud of suspicion, regarding the cause of death. P.W.5 is the Sarpanch who was a witness to the inquest and P.Ws.10 and 11 are two police officers who conducted the investigation.

This is a case where there is no eye-witness P.Ws.2 and 3 are only post-occurrence witnesses. None of them have seen any of the accused persons at the place of occurrence. The prosecution has totally failed to attribute any motive. In case of this nature where there is no direct evidence motive assumes pertinent significance as existence of the motive is an elighting factor in a process of presumptive reasoning. The absence of motive, however, puts the Courts on its

guard to scrutinise the circumstances more carefully to ensure that suspicion and conjecture do not take place of legal proof.

10. Over all scrutiny of oral evidence as narrated in the preceding paragraphs, clearly reveal that, if the dying declaration is taken out of consideration, there does not remain any convincing evidence worth the name implicating the appellants with the alleged offence. There is no dispute to the legal proposition, that the prosecution is under obligation to prove its case beyond all reasonable doubt, and the accused on the other hand, are only to probabilise their defence. From the evidence on record, we find that the statement made by the deceased before her close relatives 5 months prior to her death, cannot be accepted, in absence of further corroboration. Though the statement is said to have been made before three witnesses, who are close relatives, even they have not disclosed the fact to each other. At the other hand, after hearing the narration said to have been made by P.W.7 (mother), P.W.8 said to have reduced it to writing. At the cost of repetition, it is reiterated that if the deceased had already narrated the same facts to P.W.8, there was no necessity of P.W.7 reciting the same before her once again. To add to it, P.W.8 had not disclosed before any person that the deceased also told the same facts to him. There are also certain material discrepancy between the statements made under Ext-5, dying declaration and the deposition of P.Ws. 2 and 3 who arrived at the spot soon after the occurrence and rescued Charulata. Both, P.Ws.2 and 3 did not state in their deposition that the hands of Charulata were tied. Malati the most material witness, who was first to arrive at the scene was not examined. Last but not the least, neither any dying declaration nor any statement of Charulata, while she was under treatment in hospital, was recorded by any independent witness like the doctor, Investigating Officer or the Magistrate, though there was enough opportunity to do so. The death occurred, as stated earlier, 5 months after the incident. The cause of death is also suspicious in view of the statement made by the doctor who conducted autopsy and found 100 ml. whitish liquid in the stomach of the deceased. The viscera has not been examined to arrive at a conclusion though the same is the surest test for arriving at a conclusion regarding death due to Toxaemia.

11. After going through the whole evidence, perusing the records and hearing the submissions of the learned counsel for the parties, we have no hesitation to come to a conclusion that the prosecution has failed to prove beyond reasonable doubt, that the alleged dying declaration was actually given by the deceased. Despite of the fact that the deceased remained as indoor patient at Baripada hospital, the investigating agency did not take any steps to record her statement regarding the incident. The statement made by P.Ws. 2 and 3, who arrived at the spot immediately reveal that the front door was closed, and P.W.3 had to put force to open the door. These facts do not eliminate the possibility of committing suicide. There also exists a doubt about the cause of death 5 months, after Charulata was discharged, specially in view of the statement made by the husband that after his wife recovered fully, she was discharged from the hospital.

The prosecution has also not taken any step to chemically examine the 100 ml of whitish liquid found in the stomach of the deceased and/or the viscera. The trial Court appears to have ignored this aspect of the matter and simply believing the statement stated to have been made by the deceased 5 months prior to her death and treating it as dying declaration, convicted and sentenced the appellants. It appears to us that it is a case where the appellants are entitled to the benefit of doubt, more so, when the prosecution has not led any evidence regarding any motive to prove the mens rea.

12. Accordingly, the appeal is allowed, the impugned judgment is set aside and the appellants are acquitted of the charges and are directed to be set at liberty forthwith, unless their detention is required in some other case.

Pradipta Ray, J.

I agree.