

(2023) 08 OHC CK 0205
In the Orissa High Court
Case No : Criminal Appeal No. 364 Of 2016

Sana Mali @ Padmanav Naik

APPELLANT

Vs

State Of Odisha

RESPONDENT

Date of Decision : 28-08-2023

Acts Referred:

Code of Criminal Procedure, 1973 — Section 374(2)
Indian Penal Code, 1860 — Section 302, 326

Citation : (2023) 08 OHC CK 0205

Hon'ble Judges : D.Dash, J;Dr. S.K. Panigrahi, J

Bench : Division Bench

Advocate : Subodh Kumar Mohanty, Sonak Mishra

Final Decision : Allowed

Judgement

D.Dash, J

1. The Appellant by filing this Appeal has assailed the judgment of conviction and order of sentence dated 17th May, 2016 passed by the learned Additional Sessions Judge, Bhawanipatna in Criminal Trial No.23 of 2015 (Sessions) arising out of C.T. Case No.52 of 2015 corresponding to Bhawanipatna Town P.S. Case No.16 of 2015.

The Appellant (accused) thereunder has been convicted for commission of offence under section-302/326 of the Indian Penal Code, 1860 (for short called as the IPC). Accordingly, the Appellant (accused) has been sentenced to undergo imprisonment for life and pay fine of Rs.10,000/- in default to undergo rigorous imprisonment for a period of six (6) months for offence under section-302 of the IPC. Further, he is sentenced to undergo rigorous imprisonment for a period of ten (10) years and to pay a fine of Rs.5,000/- only in default to undergo rigorous imprisonment for six (6) months for the offence under section-326 of the IPC.

2. Prosecution Case:-

On 24.01.2015 at about 9 am, one Budu Goud (Informant-P.W.14) submitted a written report with the Inspector-In-Charge (IIC), Bhawanipatna Town Police Station, stating therein that his niece Pichi @ Debanti Goud after the death of her parents was staying with him and he was taking her care in maintaining her. It is stated that this Appellant, who was residing in the nearby area was in love with his niece and he was regularly visiting their house. On 16th January, 2015 around 7 pm after Budu (Informant-P.W.14) returned home; he was served with food by Pichi @ Debanti and thereafter, she with other girls of the area left home. After some time, accused having assaulted Pichi @ Debanti brought her to the house. The accused was threatening to kill Pichi @ Debanti by setting fire at her. Thereafter, the accused pouring Kerosene over the body of Pichi @ Debanti is said to have set her ablaze. Pichi @ Debanti being set to fire raised hullah saying "Marigali Go Bua" and come out of her house, when her entire body was burning. Budu, the Informant (P.W.14) made all attempts to put out the fire and during that period, the accused left the place. An Ambulance being called by the neighbours, Pichi @ Debanti was shifted to the Hospital and there while undergoing treatment she died on the 23rd January, 2015.

3. Receiving the above written report from the Informant (P.W.14), the Inspector-In-Charge (IIC) of Bhawanipatna Town P.S., treated the same as F.I.R. and registering the case, took up investigation.

The Investigating Officer (I.O.-P.W.18) in course of investigation, examined the Informant (P.W.14) and other witnesses. He then visited the spot and prepared the spot map, Ext.8. The I.O. (P.W.18) held inquest over the dead body in presence of witnesses and the report i.e. Ext.3. The dead body was sent for postmortem examination, incriminating articles such as the half burnt wearing apparels of the deceased, bottle containing kerosene oil and match box with sticks were seized under seizure lists. On that day around 7 pm, the accused was arrested. On the next day, the accused was forwarded in the custody to the Court. In the meantime, when the deceased was undergoing treatment, the Doctor (P.W.5) had recorded the statement of the deceased (dying declaration). The said dying declaration along with the bed head ticket maintained during treatment of the deceased were also seized. On completion of investigation, the Final Form was submitted placing this accused with his parents to face the trial for commission of offence under section-302/326 of the IPC.

4. Learned S.D.J.M., Bhawanipatna, having received the report as above, took cognizance of the said offences and after observing formalities, committed the case to the Court of Sessions for trial. That is how the trial commenced by framing of charge of the said offences against the accused.

5. In the trial, the prosecution examined in total nineteen (19) witnesses. Out of whom, as already stated, the Informant who is the uncle of deceased and who had lodged the written report, Ext.7 is P.W.14. The Doctor who had treated the deceased and recorded her statement which is said to be the dying declaration has come to the witness box as P.W.5. P.W.10 and P.W.16 are the Staff Nurse and

Pharmacist, who had attended the deceased in course of treatment. The Doctor who had conducted postmortem examination over the dead body of the deceased has been examined as P.W.11. The Investigating Officer has come to the witness box at the end as P.W.18.

6. The prosecution besides leading evidence by examining the above witnesses has also proved several documents which have been admitted in evidence and marked Exts.1 to 10. Out of those, the important are the F.I.R. (Ext.7), spot map, Ext.8, inquest report, Ext. 3, postmortem report, Ext.10/2. The so called dying declaration of the deceased recorded by P.W.5 has been admitted in evidence and marked Ext.2.

7. The accused in support of his defence of denial and false implication has however not tendered any evidence.

8. The Trial Court on going through the evidence of prosecution witnesses and embarking upon the exercise of their critical examination has arrived at a finding that the prosecution has established the charges against the accused beyond reasonable doubt. Accordingly, the accused has been sentenced as aforesaid.

9. Learned Counsel for the Appellant (accused) submitted that here in the case, the F.I.R. has been lodged only on 24.01.2015 as against the incident which had taken place on 16.01.2015 and there remains no such explanation for the delay. He further submitted that the Informant examined as P.W.14 having remained silent for all these period and come to lodge the F.I.R. on the day following the death of the deceased; his evidence is to be looked with suspicion to the effect that implication of this accused is the outcome of a well thought out plan. He further submitted that the evidence of P.W.14 is in great variance with what he had stated in the F.I.R., Ext.6. It was submitted that when the role played by the accused as stated by P.W.14 during trial, is completely different and so also all other surrounding circumstances as narrated above, which he had pointed out in the F.I.R.; his evidence cannot be relied upon. He further submitted that the so called dying declaration recorded by P.W.5 has not been proved in accordance with law in as much as P.W.5 is not stating as to what he asked to the deceased and what the deceased told. According to him, simply proving the document which P.W.5 states to have prepared won't suffice the purpose of proving the contents in coming to a conclusion that the deceased has stated those facts before P.W.5. He further submitted that the witness to the dying declaration P.W.10 having not stated that the deceased had implicated this accused to be the person to have set fire at her by pouring kerosene, the Trial Court ought not to have relied upon the so called dying declaration, Ext.2. He also submitted that P.W.1 being not a truthful witness as would be seen on scrutiny of his evidence in the backdrop of the circumstances prior to an after the incident of burning, his evidence is not to be relied upon. He, therefore, submitted that the judgment of conviction and order of sentence are liable to be set aside that the finding returned by the Trial Court holding accused to perpetrator of the crime cannot be sustained.

9. Learned Additional Standing Counsel submitted all in favour of the finding of guilt against the accused as has been returned by the Trial Court. Inviting the attention of this Court to the evidence of the Informant (P.W.14), he a that the same being wholly reliable even without taking the aid of said dying declaration, Ext.2; the conviction recorded by the Trial Court is not liable to be interfered with. He also submitted that when the prosecution has proved the dying declaration (Ext.2) through P.W.5 the Doctor who had no axe to grind against the accused and therein the accused is said to be perpetrator of the crime, merely because, the P.W.5 has not stated all detail and the other witnesses to the dying declaration, P.W. 10 has remained silent in not naming the accused, the dying declaration; Ext.2 is not liable to be pushed out of the arena of the consideration.

10. Keeping in view the submissions made; we have carefully read the judgment passed by the Trial Court and we have also extensively travelled through the evidence adduced by the prosecution witnesses i.e. P.Ws. 1 to 19 and marked Exts.1 to 10 from the side of the prosecution have been perused.

11. Admittedly, in the present case, the incident having taking place on 16.01.2015, the Informant (P.W.14) has lodged the F.I.R. on 24.01.2015. after death of the deceased occurred on 23.01.2015 while undergoing treatment in the Hospital, when the fact remains that the Police Station and the Hospital are in the same town and even till the lodging of the F.I.R., no information has come from the Hospital to the Police Station that it was a medico legal case, more importantly even after this dying declaration (Ext.2) come into being.

The Informant (P.W.14) simply states in the F.I.R. that as he was busy in treatment of the deceased, he could not lodge the F.I.R. That explanation is however not forthcoming in his evidence in the Trial. It is stated in the F.I.R. lodged by P.W.14 that when he was in the house, the deceased was brought by the accused after being assaulted and thereafter, her set fire at her by sprinkling kerosene on her body. The evidence during trial is that the accused brought the deceased to the house by dragging her and there set fire at her by pouring kerosene. Though it is stated in the F.I.R. that there was some amount of push and pull between the accused and the deceased and thereafter the accused set the deceased at fire, that is given a good bye being not stated by P.W.14 during Trial. None of the villagers were told about the occurrence by P.W.14; even though it is said that villagers had come and the deceased was shifted to the Hospital thereafter.

P.W.14 during cross-examination has started in clear terms to have not seen the accused, pouring kerosene on the deceased as he was setting outside and he saw the accused only when the deceased came out of the house with the burning condition. So how the deceased got ignited by fire was not known to this P.W.14 who also does not say to have then asked anything to the accused or about his conduct thereafter.

P.W.18 (I.O.) is also silent on the score that he had received in information with

regard to said burning incident in the house of P.W.14 prior to the receipt of the F.I.R. In the above state of affairs, we feel that it hazardous to rely upon the evidence of P.W.14 to fasten the guilt upon the accused as the perpetrator of the crime to have burnt the deceased to death.

12. Now coming to dying declaration, Ext.2; it is seen to have been recorded by P.W.5 that the patient being 80% burn injuries were brought to the hospital and had been admitted by her at the first instance and then she was identified by one Shakuntala Pal (P.W.9). This P.W.9 states that when she found the deceased to have sustained burn injuries, she was able to talk and thereafter she was taken to the Hospital. This witness however does not state as to whether she had then asked the deceased as to how she sustained burn injuries on her person and who was responsible for the same. This P.W.9 states that two to three days after the victim was able to talk, she told that the accused had burnt her which she refers to the recorded dying declaration as it appears in the very next sentences. She states that Doctor has recorded the dying declaration in her presence that dying declaration being dated 16.01.2015, this witness P.W.9 states that it was two to three days after the admission of the deceased in the Hospital.

13. P.W.5, the Doctor is not stating as to what she asked the deceased and what the deceased replied. She has simply proved the writing that she had made in terming it to be the dying declaration as Ext.2.

P.W.3, the other witness to the dying declaration has stated that the deceased after three days of occurrence regained sense and was able to talk, and then she had stated before him as well as the Doctor and uncle that the accused had quarreled with her and set her ablaze by pouring kerosene. The uncle (P.W.14) however is totally silent about that. The Doctor (P.W.5) having recorded the dying declaration has also not given any intimation to any quarter including the Police. The bed head ticket does not find mention of recording of such dying declaration. The Doctor P.W.5 does not state about the presence of P.W.3. When this P.W.5 states that one Sasmita Sasmal Staff Nurse was present, the Staff Nurse has been examined during the trial was not Sasmita Sasmal but Sabita Sasmal. This P.W. 5 although states to have informed the Police regarding the case. The I.O. (P.W.18) does not state so to have received any intimation from the Hospital. The I.O. (P.W.18) having held inquest over the dead body on 24.01.2015 has seized the bed head ticket on 02.02.2015 and it is not forthcoming in evidence as to where these documents were there during this period and from whose custody, he seized those documents. In view of aforesaid discussion, being not specified about the truthfulness of dying declaration and that the said declaration was made by the deceased while she was in a fit condition to make the statement; we feel it unsafe to rely upon the evidence let in by the prosecution that the deceased in course of her treatment had stated before P.W.5 or others that it is the accused, who had set fire at her.

In that view of the matter, the finding of the Trial Court holding accused guilty of commission of the offence under section-326/302 of the IPC cannot be

sustained. Therefore, we hold that the judgment of conviction and the order of sentence impugned in this Appeal are liable to be set aside.

14. In the wake of aforesaid, the Appeal stands allowed. The judgment of conviction and order of sentence dated 17th May, 2016 passed by the learned Additional Sessions Judge, Bhawanipatna in Criminal Trial No.23 of 2015 (Sessions) arising out of C.T. Case No.52 of 2015 are hereby set aside.

Since the Appellant (accused) namely, Sana Mali @ Padmanav Naik is in custody, he be set at liberty forthwith, if his detention in custody is not so required in connection with any other case.

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