

(2023) 07 OHC CK 0192
In the Orissa High Court
Case No : Criminal Appeal No. 317 Of 2016

Sumanta Singh

APPELLANT

Vs

State Of Orissa

RESPONDENT

Date of Decision : 24-07-2023

Acts Referred:

Code of Criminal Procedure, 1973 — Section 374(2)
Indian Penal Code, 1860 — Section 302, 351, 451
Evidence Act, 1872 — Section 32

Citation : (2023) 07 OHC CK 0192

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

Bench : Division Bench

Advocate : Sk. Zafarulla, Siti Kanta Mishra

Final Decision : Allowed

Judgement

D.Dash, J

1. The Appellant, by filing this Appeal, has challenged the judgment of conviction and order of sentence dated 04.04.2016 passed by the learned Additional Sessions Judge-II, Baripada, Mayurbnahj in S.T. Case No.181 of 2015 arising out of C.T. Case No.70 of 2015 corresponding to Karanjia P.S. Case No.26/15 (T.C. No.516/15) of the Court of the learned Sub-Divisional Judicial Magistrate (S.D.J.M.), Karanjia.

The Appellant (accused) thereunder has been convicted for committing the offence under section 302/451 of the Indian Penal Code, 1860 (for short, 'the IPC'). Accordingly, he has been sentenced to undergo imprisonment for life and pay fine of Rs.10,000/- (Rupees Ten Thousand) in default to undergo rigorous imprisonment for one year for the offence under section 302 of the I.P.C. and rigorous imprisonment for one year with fine of Rs.5,000/- (Rupees Five Thousand) in default to undergo rigorous imprisonment for six months for the offence under section 451 of the I.P.C. with further stipulation that the substantive sentences would run concurrently.

2. On 18.02.2015 the Inspector-in-Charge of Karanjia Police Station (I.O.-P.W.18) received a written report from one Sardu Singh (P.W.1), who happens to be the father of the deceased, namely, Jasoda. The report was to the effect that on 01.02.2015 when he was working in the brick kiln, it was around 8.30- to 9 p.m., he received the information from Laxman Singh (P.W.2) who runs a brick kiln that his daughter had been burnt and her condition was critical.

Receiving the said information, he reached his house and found his daughter Jasoda with burn injuries on her waist and downwards. It is stated that Jasoda was then not able to speak. One Ambulance being called, Jasoda was taken to Sub-Divisional Hospital (S.D. Hospital) at Karanjia for treatment and thereafter being referred to the District Headquarter Hospital (in short, 'the DHQ Hospital'), at Baripada for better treatment, she was so shifted. In course of her treatment at DHH, Baripada when the Informant (P.W.1) asked as to how, she sustained burn injuries; Jasoda disclosed that on the relevant night, the accused forcibly entered into their house and attempted to outrage her modesty and when she protested, the accused gagged her mouth with a Chadar and thereafter set fire at her by lighting a matchstick after sprinkling kerosene over her body.

The written report of P.W.1 being received by P.W.18, the same was treated as the F.I.R. and case being registered; the Investigating Officer (I.O.-P.W.18) took up investigation.

3. In course of investigation, the I.I.C. (P.W.18), examined the Informant (P.W.1) and other witnesses. He visited the spot and seized some incriminating materials, such as, the wooden plank, two pairs of chappal of the accused and a plastic bottle emitting the smell of kerosene. He also held inquest over the dead body of the deceased and prepared a report to that effect. P.W.18 then sent the dead body of the deceased for Post Mortem Examination. The I.O. (P.W.18) having received the F.I.R. on 18.02.2015; on 19.02.2015 had got the dying declaration of the deceased recorded by the Executive Magistrate (P.W.6) in presence of the Doctor (P.W.13) and two other witnesses. The incriminating materials were sent for chemical examination through court. On completion of investigation, Final Form was submitted placing the accused to face the Trial for commission of offence under section 451/351/302 of the I.P.C.

4. Learned S.D.J.M., Karanjia having received the Final Form as above took cognizance of the said offences and after observing the formalities committed the case to the Court of Sessions for Trial. That is how the trial commenced by framing the charges for the said offences against these accused persons.

5. The prosecution, in course of Trial, has examined in total eighteen (18) witnesses. Out of whom, as already stated, P.W.1 happens to be the father of the deceased and had lodged the F.I.R. (Ext.1) and P.W.2 is the employer of P.W.1 from whom he received the information about the happening and suffering of P.W.1's daughter-Jasoda and he is also the scribe of the F.I.R. (Ext.1). P.W.3,4,5,9 and 15 are the witnesses, who had proceeded to the spot soon after

the occurrence. The Executive Magistrate, who is said to have recorded the dying declaration of the deceased in the DHH, Baripada has been examined as P.W.6 whereas the Doctor, who was present at that time, is P.W.13. Other two other witnesses present while said recording are P.W.7 and P.W.8. P.W.12 is the Doctor who had conducted post mortem examination over the dead body of the deceased and the Investigating Officer has come to the witness box at the end as P.W.18.

Besides leading the evidence by examining the above witnesses, the prosecution has proved several documents which have been admitted in evidence and marked Exts.1 to 12. Out of those, the F.I.R. is Ext.1 whereas the inquest report is Ext.2. The so-called dying declaration recorded by P.W.6 in the District Headquarter Hospital, Baripada has been admitted in evidence and marked Ext.4. The bedhead tickets of the deceased as well as the accused who too was under treatment in both the Hospitals have been admitted in evidence and marked Ext.6/2 and 6/3 respectively.

6. The defence in support of the plea of denial and false implication and the specific plea that the deceased while on deep sleep had accidentally caught fire from a Dibri (a type of locally made open lamp) when the accused being called was also present in the house and had attempted to save her and in the process had received severe burn injuries has examined three witnesses who are

D.W.1,2 and 3. A document which is a list showing the expenditure regarding performance of certain puja has been admitted in evidence and marked as Ext.A.

7. The Trial Court having gone through the evidence of the witnesses mainly the Doctor (P.W.12) and the Post Mortem Examination Report (Ext.7) as well as the inquest report and the evidence of I.O. (P.W.18) has rendered the finding that the deceased died on account of severe burn injuries to the extent of about 50%. In fact, this aspect of the case was not under challenge before the Trial Court and that is also the situation before us.

The prosecution case from the beginning is that the deceased having received burn injuries has finally died in course of treatment. The defence also admits the said fact while saying that it was not at the instance of the accused and he had played no role therein but had accidentally, took place wherein he rather had made all such attempt to save the life of the deceased and in the process had sustained severe burn injuries on his person for which he too was treated in the S.D. Hospital as well as in the D.H. Hospital, Baripada for quite some time.

8. In the backdrop of above, the point for determination here in the case is whether it is the accused who is the author of the crime and had set fire at the deceased which had led to her death.

9. Learned counsel for the Appellants (accused) submitted that here in the case, the incident having taken place on 1st day of February, 2015, the F.I.R. has been lodged by none other than the father of the deceased on 18.02.2015, i.e., 16

days after the occurrence when in the meantime, the deceased was treated in the S.D. Hospital at Karanjia as well as in the DHQ Hospital at Baripada which are about 120 kilometers or even little more apart. He submitted that when during this period there is no whisper before anybody or any authority that the accused had any role in the said incident wherein the deceased received the burn injuries, for such delayed disclosure which is said to be after the deceased said about it before P.W.1, and when such explanation falls flat, the implication of the accused therein is highly suspicious. According to him all these above clearly point out that after long time and with much discussion and after due deliberation, the accused has been falsely arraigned for the grudge that P.W.1 was carrying against him. He further submitted that the oral dying declaration before P.W.1 as well as the recorded dying declaration before the Executive Magistrate (P.W.6), the Doctor (P.W.13) and others (P.W.7 and P.W.8) are not at all acceptable for a moment as it is surrounded by suspicious circumstances, which are of such nature, that those do not at all get explained. He further submitted that there being no acceptable evidence on record that the deceased from the very beginning was not in a condition to speak for 16 (sixteen) days, all of a sudden she having spoken before P.W.1 and then before the Executive Magistrate, Doctor and others is absolutely unbelievable when the medical evidence on that score does not come to the aid. He further submitted that the prosecution having not led any evidence that for all these period, the deceased was not at all in a condition to speak and for that she having not examined by the Doctor at S.D. Hospital at Karanjia Hospital, who treated the deceased first and when the bedhead ticket (Ext.6/2) mentions nothing about it, the evidence as to the dying declaration after so many days at D.H. Hospital, Baripada that too only a day before her death is extremely hard to believe and appears to be a created one which cannot be accepted. He also submitted that simply by admitting the dying declaration recorded by P.W.6 in evidence and getting it marked as Ext.4 is of no aid to the prosecution when no such evidence is forthcoming from the lips of P.W.6-the Executive Magistrate. P.W.13-the Doctor and P.W.7 and P.W. 8 the independent witnesses what the deceased in clear terms had spoken before them and all what have been written in Ext.4.

10. Learned counsel for the Respondent-State submitted all in favour of the finding returned by the Trial Court. According to him, it being the evidence of P.w.1 (father of the deceased) that her daughter Jasoda (deceased) was not in a condition to speak and no sooner did she tell, the F.I.R. (Ext.1) implicating this accused was lodged and as that evidence in the absence of any material on record cannot be disbelieved; the evidence of P.W.1 coupled with the evidence of P.W.6 (Executive Magistrate), P.W.13 (Doctor), P.W.7 and 8 in support of the recorded dying declaration (Ext.4) are enough to hold that the prosecution has established the charges against the accused beyond reasonable doubt whose explanation has not been proved by preponderance of probability. He submitted that since accused admits his presence by the side of the deceased at the relevant time in that house, he having failed to prove the defence set up by

leading evidence for acceptance with the standard of preponderance of probability, the conclusion of the Trial Court is fastening the guilt upon the accused is in order.

11. At the risk of repetition, some background facts which are not in dispute are required to be placed at this stage. The deceased received the burn injuries in her house in the night of 01.02.2015, which was a Saturday. During that night, she was shifted to S.D. Hospital, Karanjia. On the next day being referred by the treating Doctor at S.D. Hospital, Karanjia, the deceased was shifted to D.H. Hospital, Baripada. The father of the deceased (P.W.1) lodged the F.I.R. on 18.02.2015 by stating therein that her daughter (deceased) being able to talk after improvement of her health condition during treatment on being asked by him disclosed that on the night of 01.02.2015, the accused having gone to their house by breaking open the door wanted to sexually assault her and when he failed the accused having gagged a Chadar in the mouth of the deceased and sprinkling kerosene had set fire at her by lighting the matchstick. The F.I.R. was lodged on 18.02.2015 at about 2.30 p.m. at Karanjia, which is at a distance of about 120 kilometers away when the deceased was under treatment and the case was registered for the first time. Prior to that as there was no disclosure as to the involvement of any one in causing those burn injuries upon the deceased, there was not even any information either to the I.I.C. Karanjia Police Station or Baripada Police Station. The treating doctors and staffs were all unaware. This information in writing (Ext.1) to the police with regard to the said incident is the first one.

Then it is said that, the I.O. (P.W.18) after examining P.W.1 (Informant) at Karanjia to which place P.W.1 had gone to lodge the F.I.R. from Baripada by travelling 120 kilometers leaving his daughter under treatment at D.H. Hospital first visited the spot, i.e., the house where the incident took place and then on the next day, he went to the D.H. Hospital, Baripada where around 9 a.m., he made a requisition to the Sub-Divisional Magistrate, Baripada to depute an Executive Magistrate for recording the dying declaration of Jasoda, which is said to have been recorded on 19.02.2015 at 4.15 p.m as written by the Executive Magistrate (P.W.6), which is now a piece of important evidence in support of the charge against the accused.

12. Before we advert to the actual admissibility and credibility of the dying declaration (Ext.4), it would be beneficial to brass ourselves of the case laws on the evidentiary value of a dying declaration and the sustenance of a conviction solely based thereupon. We may hasten to add that while there is too much of wealth of case laws and incredible jurisprudential contribution by the Hon'ble Apex Court on the subject; we, however, would refer to only few which are closure to the facts of the case in hand.

13. In *Sham Shankar Kankaria v. State of Maharashtra*, it was restated that the dying declaration is only a piece of untested evidence and must like any other evidence satisfy the Court that what is stated therein is the unalloyed truth and

that it is absolutely safe to act upon it. Further, relying upon the decision in *Paniben v. State of Gujarat* wherein this Court (at SCC pp. 480-81, para-18) summed up several previous judgments governing dying declaration, this Court in *Sham Shankar Kankaria* reiterated: (*Sham Shankar Kankaria*, SCC pp. 172-73, para 11)

"11. (i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. (See *Munnu Raja v. State of M.P.*[(1976) 3 SCC 104]);

(ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. (See *State of U.P. v. Ram Sagar Yadav and Ramawati Devi V. State of Bihar.*)

(iii) The Court has to scrutinize the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had an opportunity to observe and identify the assailants and was in a fit state to make the declaration. (See *K. Ramachandra Reddy v. Public Prosecutor.*);

(iv) Where dying acted upon without *Beg v. State of M.P.*); declaration is suspicious, it should not be corroborative evidence. (See *Rasheed Beg v. State of M.P.*);

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. (see *Kake Singh v. State of M.P.* [1981 Supp SCC 25]);

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. (See *Ram Manorath v. State of U.P.*);

(vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected. (See *State of Maharashtra v. Krishnamuri Laxmipati Naidu.*);

(viii) Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth. (See *Surajdeo Ojha v. State of Bihar*);

(ix) Normally the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eyewitness has said that the deceased was in a fit and conscious state to make the dying declaration, the medical opinion cannot prevail. (see *Nanhau Ram v. State of M.P.*);

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. (See *State of U.P. v. Madan Mohan*);

(xi) Where there are more than one statement in the nature of dying declaration,

one first in point of time must be preferred. Of course, if the plurality of dying declaration could be held to be trustworthy and reliable, it has to be accepted. (See Mohanlal Gangarom Gehani v. State of Maharashtra.)”

It goes without saying that when the dying declaration has been recorded in accordance with law, and it gives a cogent and plausible explanation of the occurrence, the Court can rely upon it as the solitary piece of evidence to convict the accused. It is for this reason that Section 32 of the Evidence Act, 1872 is an exception to the general rule against the admissibility of hearsay evidence and its Clause (1) makes the statement of the deceased admissible. Such statement, classified as a “dying declaration” is made by a person as to the cause of his death or the circumstances under which injuries were inflicted. A dying declaration is thus admitted in evidence on the premise that the anticipation of brewing death breeds the same human feelings as that of a conscientious and guiltless person under oath. It is a statement comprising of last words of a person before his death which are presumed to be truthful, and not infected by any motive or malice. The dying declaration is therefore admissible in evidence on the principle of necessity as there is very little hope of survival of the maker, and if found reliable, it can certainly form the basis of conviction.

The litmus test, therefore, is whether the deceased had made the statement (Ext.4) and if so, whether such statement can be the solitary foundation for conviction of the Appellant.

14. Having mediated towards the issue, to the extent, it is possible and on a minute examination of the original document (Ext.4) and other surrounding evidence let in by the prosecution which emanate the attending circumstances, we do not find it safe to convict the accused on the basis of said dying declaration (Ext.4). We say so for the several reasons which are summarized hereinafter.

Firstly, the deceased having received the burn injuries, which have been initially assessed at 50% was taken to S.D. Hospital, Karanjia. The Doctor, who had admitted the patient in the said hospital at 8.30 p.m. on 01.02.2015 had prepared the bed head ticket. On the next day, the patient had been referred to D.H. Hospital, Baripada at a distance of 120 kilometers. The bedhead ticket (Ext.6/2) of S.D. Hospital, however, does not find mention of the time of discharge. It is clearly written in the said bedhead ticket that the patient was conscious, pulse rate was 110 bpm and it was regular and the blood pressure was 100/70 mmgh. The doctor has noted that the dehydration at that point of time was moderate. On next day, the patient was found to be conscious, pulse rate was 108 bpm and it was regular. The Doctor who had treated the patient has indicated in the said bed head ticket that the patient had accidentally caught fire from the kitchen and received the burn injuries on upper limb, lower limb and back of trunks. This fact that the patient sustained burn injuries accidentally has not only been noted by one Doctor but the two who treated the patient at S.D. Hospital, Karanjia as can be seen from Ext.6/2. These bedhead tickets have been

admitted in evidence through P.W.11, who was working as a Home Guard at Karanjia Police Station since that was seized in his presence on 29.04.20215. The S.D. Hospital bedhead ticket of the accused who has assessed to be having burn injuries of 30% has also been proved through this P.W.11 in whose presence it was seized by the I.O. (P.W.18). The bedhead ticket of the accused (Ext.6/3) also finds mention in the hands of the two Doctors that the accused had accidentally sustained burn injuries on both his hand while trying to put off the fire which had gutted Jasoda (deceased).

Surprisingly the prosecution has not chosen to examine any of the Doctors who had the occasion to treat the deceased at S.D. Hospital, Karanjia. Yet, when the bedhead tickets have been proved from the side of the prosecution, they cannot wriggle out all the contents and must explain those when they project a case in a different manner as the present one.

15. Secondly, in this bedhead ticket (Ext.6/2) it has not at all been mentioned that the patient Jasoda who long thereafter died on account of the burn injuries was not in a condition to speak and it was also not been indicated in the said bedhead ticket that the deceased sustained burn injuries on account of accident also was not her version but the version of someone else or someone who is had either carried Jasoda to the S.D.Hospital or any of her attendants.

16. Thirdly, when admittedly the patient has been admitted in the DHQ Hospital, Bariapda on 02.02.20215, he having remained there under treatment from that date till her death, i.e., on 21.02.2015. 21.02.2015, the prosecution has not proved the bedhead ticket of DHQ Hospital, Baripada which could have given the clear picture as to whether the patient was at any point of time there in the DHQ Hospital was in a condition either to speak. For this suppression of the bedhead ticket of DHQ Hospital, Baripada relating to the deceased, the prosecution has to be blamed as for such withholding the required evidence before the Trial Court to ascertain the genuineness of the version of P.W.1 when P.W.1 does not indicate in the F.I.R. as to on which particular date and from what point of time his daughter began to speak and till which date and time she was not in a condition to speak for which he could not ask her about what happened in the said incident when fact remains that the accused was all along being treated in the same Hospitals where the deceased was being treated. Therefore, it is extremely unsafe and rather would be hazardous to rely the version of P.W.1 that the deceased being not in a position to speak, the happenings in the incident was not known and thus there was delay in informing the police as to the complicity of the accused as it could be known after such a long time from the deceased who spoke out on a fine morning on being asked after regaining sense.

17. Fourthly, the I.O. (Ext.18) having visited the D.H. Hospital, Baripada on 19.02.2015 does not state to have met the deceased and seen her in a condition to speak before making the requisition to the S.D.M. for deputing an Executive Magistrate and also requisitioning the ADMO, D.H. Hospital, for deputing the Doctor to assist the Executive Magistrate during recording of such dying

declaration. This creates genuine doubt in mind as to whether the deceased then was in a condition to speak or not.

18. Fifthly, the dying declaration has been admitted in evidence and marked as Ext.4 through the Executive Magistrate (P.W.6) when it has been written in Ext.4 that to as the answer to the question No.11 as to how the deceased sustained burn injuries; that on 01.02.2015 around 6 p.m. when she was alone in the house and there was power cut and when she was cooking food, the accused came throttled her and then assaulted her by means of a stick/wood and thereafter having sprinkled kerosene over her body, set fire at her with the help of a Dibri, which was lighting. Such version of the deceased when accepted for a moment as to have been so stated before P.W.6 in presence of the Doctor (P.W.13) as noted in Ext.4 completely stands in variance with what P.W.1 has stated to have been told by the deceased on his asking as has been narrated in the F.I.R. and deposed by him during his examination. P.W.1 appears to have then suppressing the fact as to the engagement of the deceased in cooking food in the kitchen when the incident took place and then throttling her and assaulting her. P.W.1 is not stating as to how the accused set fire at the deceased: whether by lighting a match stick or by that Dibri which was lighting or by bringing the fire from the hearth. These rather probabilises the case of the defence which finds noted in the bedhead ticket (Ext.6/2) to good extent. The prosecution has examined P.W.6 and P.W.13 as well P.W.7 and 8 as its star witnesses in support of the said dying declaration recorded under Ext.4. P.W.6 in his evidence in-chief does not state anything as to what the deceased had stated before him about her receiving the burn injuries and how it so happened. He simply says that on that day, he recorded the statement of the deceased as under Ext.4 in the absence of the substantive evidence falling from the lips of P.W.6, are inadmissible. The contents of the Ext.4 especially, the reply to question No.11 is thus inadmissible since P.W.6 does neither depose to have asked that question nor the reply to have been so got so that Ext.4 cannot take the place of substantive evidence when the suggestion of the defence is that it is a manipulated one. P.W.13, the Doctor, has also stated in the same vein that the deceased narrated about the incident when asked by P.w.6 and that was reduced into writing by P.W.6 as at Ext.4. She too is silent as to what the deceased narrated before them. This P.W.13 does not state before the Doctor who was treating the deceased in the D.H. Hospital so as to an entry to that effect being made in the bedhead ticket of D.H. Hospital. In fact the prosecution for best reasons/s known to it, has again withheld those bedhead tickets which would have cleared the sky.

P.W.7 simply says that the P.w.6 asked some question and those were reduced into writing. What question he has asked, what answers the deceased gave is not stated by P.W.7. But then he for the first time states that the I.O. (P.W.18) had gone to the deceased and asked her about the cause of injury when she had disclosed the name of one person which the deceased was unable to recollect and say. This reveals a very sorry state of affair that the Public Prosecutor did

not even take care to prove the dying declaration by piloting the evidence through P.W.6,7,8 and 13, who are wholly supportive to the prosecution.

19. Sixthly, Ext.4 also reveals that on a question being asked by P.W.6, once the deceased had stated that one boy at that time came and had pressed her neck when there was power failure in the locality and then on subsequent question she is stated to have disclosed the name of the accused to be that boy.

20. In view of all these what have been discussed above, it is seen that the Trial Court has not even discussed the ocular evidence as well as the documentary evidence being alive to the settled position of law with regard to the admissibility of the dying declaration and its acceptance by recording the certificate as to his credibility.

21. Thus, we find a case that when the prosecution has not been serious in piloting the evidence for the reason best known to it, the Trial Court has been equally callous and dealt the matter in a very cavalier fashion and convicted the accused notwithstanding the actual state of affairs which stand in the evidence let in.

22. Resultantly, the Appeal stands allowed. The judgment of conviction and order of sentence dated 04.04.2016 passed by the learned Additional Sessions Judge-II, Baripada, Mayurbnahj in S.T. Case No.181 of 2015are hereby set aside.

The Appellant (accused), namely, Sumanta Singh be set at liberty forthwith, if his detention is not required in connection with any other case.

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