IN THE HIGH COURT OF ORISSA AT CUTTACK
JCRLA No.88 of 2006

AFR

Anjari Rout .... ***Appellant***
Mr. D. Das, Amicus Curiae

-Versus-

State of Odisha .... ***Respondent***
Mr. J. Katikia, AGA

CORAM:
THE CHIEF JUSTICE
JUSTICE R.K. PATTANAIK

DATE OF JUDGMENT:04.05.2022

R.K. Pattanaik, J.

1. Instant appeal is preferred by the Appellant assailing the impugned judgment dated 19th November, 2004 passed in Sessions Case No.37/11 of 2004 by the learned Additional Sessions Judge, Nuapada for having been convicted under Section 302 IPC and sentenced for life imprisonment on the grounds *inter alia* that it is untenable in law and therefore, deserves to be set aside.

2. Briefly stated, the informant lodged the F.I.R. dated 29th October, 2003 describing therein about the alleged incident, where after, Nuapada P.S. Case No. 99(19) was registered under Section 307 IPC. Later on, the Appellant being the husband of the victim, who succumbed to the burn injuries she received during the incident, was charge sheeted under Section 302 IPC. The prosecution adduced oral and documentary evidence during the trial. On the other hand, the Appellant did not lead any

evidence. The learned court below considered the evidence of the prosecution and defence plea of the Appellant and finally concluded that the deceased suffered a homicidal death and for that, held the Appellant to be liable. As a consequence, the Appellant was convicted under Section 302 IPC and sentenced accordingly.

3. Heard Mr. D. Das, learned Amicus Curiae for the Appellant and Mr. J. Katikia, learned AGA for the State.

4. As per the contention of Mr. Das, the learned court below fell into serious error by holding the Appellant guilty without properly appreciating the evidence on record and for being ignorant of the settled position of law vis-à-vis admissibility of the dying declarations. It is further contended that the dying declaration before the doctor was not worthy of acceptance since it did not have any endorsement to indicate that the deceased was by then in a fit state of mind. Mr. Das would contend that though there was sufficient time for the doctor to examine the condition of the victim and record her dying declaration in presence of the I.O. or a Magistrate but it was not done so. According to Mr. Das, the translator, who rendered assistance while recording the statement of the deceased, was not examined and therefore, adverse inference should have been drawn by the learned court below. Lastly, it is contended that the claim of pouring kerosene on the body of the victim is an afterthought since neither the I.O. nor the doctor ever found smell of any such substance and that apart, when the Appellant himself doused the fire, he can be said

to have no intention to cause her death and for the above reasons, the impugned order of conviction is bad in law.

5. Per contra, Mr. Katikia contended that learned court below did not commit any error or illegality and as such, the impugned order of conviction vis-à-vis the Appellant is absolutely justified and in accordance with law. It is contended by Mr. Katikia that the deceased disclosed to her family regarding the fact that the Appellant was responsible for setting her to flame by pouring kerosene on her body which could not have been discarded by the learned court below and besides that, she even made a statement before the I.O. reiterating it and furthermore, revealed the same to the doctor just prior to her death. According to Mr. Katikia, the above dying declarations having been on record, it could not have been brushed aside and therefore, were rightly taken cognizance of by the learned court below, when the law is well settled that a dying declaration can be the sole basis of conviction, if it is otherwise found to be true and voluntary. While responding to the submission of Mr. Das that the doctor did not append any certificate to the dying declaration nor it was recorded in presence of the I.O. or a Magistrate, it is contended that in absence thereof, the same does not lose its probative value.

6. The F.I.R. was lodged by the informant father, wherein, he alleged that on 16th October, 2003, the Appellant set the victim to fire by pouring kerosene and also made an attempt to put it off with water but for such overt act, she received burn injuries and later died, which was done with an intention to kill her. The

alleged incident took place on 16th October, 2003, whereas, the F.I.R. was lodged on 29th October, 2003. As it appears, after the revelation made by the victim regarding the overt act of the Appellant, the informant reported it to the police on 29th October, 2003. Initially, the Appellant had admitted the victim in the hospital by claiming that the incident of fire had taken place accidentally. Only after the disclosure made by the victim, the F.I.R. was lodged. Furthermore, the statement of the deceased under Section 161 Cr.P.C. was treated as a dying declaration besides another recorded by the doctor at the hospital, while she was under treatment. Admittedly, there is no direct evidence vis-a-vis the alleged incident. The prosecution's version is based on the dying declarations besides the oral testimony.

7. The informant as P.W.1 deposed that the Appellant and the victim led a happy conjugal life but one and half month later to their living together, he received information that the deceased sustained burn injuries, where after, they shifted her to the hospital, where on being asked, she disclosed that the Appellant after having picked up quarrel, poured kerosene on her body and then set her to fire. P.W.1 claimed that till such disclosure, the deceased was not able to speak and after that, the F.I.R. was lodged and proved it as Ext.1 and further deposed that six to seven days thereafter, she succumbed to the burn injuries. While under examination by the prosecution, it was elicited from P.W.1 that he had also made a statement before the police that the victim had disclosed about the Appellant having set her to blaze by pouring kerosene on her body. P.W.1 during cross-

examination claimed to have received the information about the incident on being informed by some villagers. It was also claimed by P.W.1 that the victim regained her sense while under treatment as an indoor patient but survived for seven days thereafter. Though P.W.1 was cross-examined but nothing tangible could be elicited in order to discredit him. Likewise, P.W.2, the mother of the deceased deposed that the Appellant stayed with the victim for nearly three months and then one fine day, they received information regarding the incident, where after, she and P.W.1 visited the house of the Appellant and shifted her to the hospital for treatment and during that time, she disclosed the fact that after the Appellant after having picked up a quarrel, assaulted and then set her to flame. Similarly, P.W.2 while being examined by the prosecution admitted about the fact that she had stated before the police regarding the disclosure made by the victim. The defence cross-examined P.W.2 but again nothing adverse could be elicited from her. P.W.3 deposed that P.W.1 during inquest had claimed about the Appellant having poured kerosene over the body of the deceased and set her to flame. The endorsement and signature of P.W.3 on the inquest report stands proved by him as Ext.2/1. P.W.5, a deed writer, happens to be the scribe of the F.I.R. Quite strangely, P.W.6, who is the sister of the victim, was declared hostile, however, while being examined by the prosecution, she admitted to have stated to be police that the deceased on being asked had disclosed before her that she was set to fire by the Appellant after pouring kerosene on her body. P.W.6 though claimed that she did not know the reason as to the cause of the death of the victim but on

being confronted by the prosecution, admitted the alleged revelation having been made by the deceased. The M.O. as P.W.10, who medically examined the victim, deposed that on 16th October, 2003, she had been brought to the hospital by the Appellant and others and was admitted as an indoor patient for extensive burn over half of chest, back and upper extremities up to the neck. P.W.10 further deposed that on 29th October, 2003, he received a police requisition for examination and report vis-a-vis the deceased and at that time, he had noticed second degree burn injuries. P.W.10 recorded the statement of the deceased on 4th November, 2003 and by then, as deposed by him, she was able to speak and had claimed that the Appellant had set her to fire. The above dying declaration of the deceased recorded by P.W.10 has been proved as Ext.4. P.W.10 further deposed that on 5th November, 2003, the condition of the victim deteriorated for which she had to completely depend on her attendants and at the end, he formed an opinion as to the injuries being grievous in nature which stands proved as Ext.5. In cross-examination, P.W.10 admitted that he had not smelled kerosene or petrol at the time of medical examination of the victim. It was elicited from P.W.10 that he was able to underhand the language of the victim. In fact, the deceased was admitted on 16th October, 2003 but her dying declaration was recorded on 4th November, 2003. From the evidence of P.W.1 and P.W.2, it is made to realize that the victim was not in a position to speak for some days but thereafter, having regained her sense, she revealed the mischief of the Appellant which stands corroborated by the evidence of P.W.10 responsible for recording her dying declaration. P.W.11

conducted the *postmortem* over the body the deceased and he opined that the extent burn was 63% and all the injuries to be *ante mortem* in nature and the cause of death was on account of Septicemia and proved the P.M. report as Ext.6. In cross-examination, P.W.11 could not submit any opinion as to when a person would lose the capacity to speak with what percentage of burn injuries. Admittedly, the death of the deceased is on account of infections from burn injuries and while under treatment, almost after fifteen days, her statement was recorded by P.W.10, when she was able to speak. It means that at a time when the deceased was in a condition to respond, her dying declaration was recorded by P.W.10. Of course, there is no certificate appended to Ext.4 regarding the deceased to be in a fit mental condition by then. P.W.13 as the I.O. recorded the statement of the victim under Section 161 Cr.P.C. wherein she claimed the Appellant to have set her to flame. Said statement of the deceased has been proved as Ext.9 which has been treated as a dying declaration. P.W.13 also deposed about the examination of P.Ws.6, 7, 8 & 9, who stated to have claimed before him about the alleged mischief committed by the Appellant. P.W.13 was cross-examined but nothing specific could be elicited in order to impeach his testimony. However, during cross-examination of P.W.13, it was elicited that the victim's statement was recorded with the assistance of an interpreter, who has admittedly not been examined. Considering the evidence of P.W.13, it is made to suggest that the statement of the victim was recorded when she was in a condition to make it. During cross-examination, P.W.13 admitted that he had not consulted any doctor before recording

the victim's statement. The question is, whether, the dying declarations under Ext.4 and Ext.9 are reliable and worthy of acceptance?

8. According to Mr. Das, P.W.10 did not any append any certificate to Ext.4 regarding the mental state of the deceased and there was also sufficient time to get it recorded in presence of a Magistrate or P.W.13. In this regard, Mr. Das cited the following decisions in ***Shyam Shankar Kankaria v. State of Maharashtra 2006 (II) OLR (SC) 708*** and ***Rupa Tiria v. State of Odisha 2012 (I) ILR- CUT Cuttack 334*** contending that the dying declarations under Ext.4 and Ext.9 are not dependable as P.W.10 besides P.W.13 did not follow the procedure which one is legally required to do and comply. In ***Shyam Shankar Kankaria*** case, the Supreme Court held that the dying declaration can be the sole basis of conviction but the court has to be on guard to ensure that it was not on account of tutoring or prompting or a product of imagination, as it has to be further satisfied that the deceased was in a fit state of mind. In the instant case, the deceased made her statement before P.W.10 and by then, she had already been in the hospital for more than fifteen days. That apart, P.W.10 was able to understand the language of the victim and being a doctor, he was the best person to assess her mental state. It is not that somebody else recorded the dying declaration of the victim and its acceptance is hence suspected for want of certificate of a doctor. Absence of a certificate on Ext.4 with regard to the mental state of the deceased, according to the Court, is not of much concern, when it was recorded by none other than a doctor

himself. Furthermore, the evidence of P.W.10, if read along with P.W.1 and P.W.2, it would suggest that initially the deceased was not in a condition to speak but after having gained sense, she disclosed the conduct of the Appellant and during that time, the dying declaration under Ext.4 was recorded. The Court does not find any reason not to accept Ext.4 recorded by P.W.10. Not only that, it receives confirmation from the statement of the victim recorded under Ext.9 by P.W.13 while she was under treatment in the hospital which was later treated as yet another dying declaration. The statement in Ext.9 is a version of the victim recorded under Section 161 Cr.P.C. and therefore, the compliance by P.W.13 to ensure presence of P.W.10 or a Magistrate does not arise at all. Indeed, Ext.9 was treated as a dying declaration later to the death of the victim which is acceptable in law. In plethora of decisions and in recent past, the Supreme Court in ***Sri Bhagwan v. State of U.P. (2013)12 SCC 137*** reiterated that a statement recorded under Section 161 Cr.P.C. may be relied upon as a dying declaration as per section 32 of Indian Evidence Act, 1872. In view of the above, the Court finds no basis not to accept the dying declaration in question.

9. Mr. Katikia referred to a decision of Supreme Court in ***Laxman v. State of Maharastra (2002)6 SCC 710*** contending that a certification of doctor is a rule of caution and therefore, the truthfulness of the declaration can be established otherwise. In the decision (supra), the dying declaration was recorded by a Magistrate and there was no certification by the doctor regarding the fitness of the victim's state of mind and in that context held

that it would not ifso facto render the declaration unacceptable, inasmuch as, its evidentiary value would rather depend on the facts and circumstances of the case. However, in the present situation, P.W.10 is the doctor, who recorded the dying declaration of the deceased and therefore, he was the right person to assess the mental condition of the victim. Since couple of days before the death of the deceased, when she was in a condition to speak, her dying declaration was recorded by P.W.10, the Court does not find any such ground not to accept it merely for the reason that it has not been endorsed with a certificate. Mr. Katikia further cited the following decisions of the Apex Court, such as, ***Sohan Lal @ Sohan Singh and others v. State of Punjab (2003)11 SCC 534***; ***Kushal Rao v. State of Bombay AIR 1958 SC 22*** and ***State of U.P. v. Veerpal and another (2022) SCC online SC 129***, wherein, the settled principle of law with regard to dying declaration and its evidentiary value has been precisely stated. In ***Sohan Lal*** case, it is held that irrespective of having no endorsement of doctor on the fitness of mental condition of the deceased, there can be no reason to discard it especially when nothing was on record to suspect *bona fide* of the Tahasildar, who recorded the same. In ***Kushal Rao*** case, the Supreme Court held that a dying declaration if found to be a truthful version of declarent, no further corroboration would be necessary and reiterated the settled principle of law that a dying declaration has to clear the test of reliability. Similarly, in ***Veerpal*** case, the Apex Court referring to the decision in ***Kushal Rao*** observed that a dying declaration would be acceptable if the

court is satisfied that the deceased was in a fit mental condition to depose and it was made truthfully and voluntarily.

10. Having regard to the above facts and law and considering the evidence of P.W.1 and P.W.2 in particular and that of P.W.10, who recorded the dying declaration of the victim, the Court is of the view that such disclosure of the deceased appears to have been made at a time when she was in a condition to make it. The testimony of P.W.13 also adds to the veracity of the claim of the prosecution as to the dying declaration. P.W.13, in usual course of investigation, recorded the statement of the deceased under Section 161 Cr.P.C. which has subsequently been treated as a dying declaration upon her death. It is a matter of wide knowledge that when statements are recorded under section 161 Cr.P.C., it is not recorded in presence of a Magistrate or doctor but under peculiar circumstances stands converted into a dying declaration by a deeming fiction in view of section 32(1) of the Indian Evidence Act. The learned court below has duly taken notice of the legal position regarding acceptance of statement recorded under Section 161 Cr.P.C. as a dying declaration by citing a decision in the case of ***Tellu v. State (Delhi) 1988 CrLJ 1062***. In so far as smell of kerosene having not been noticed by P.W.10 while treating the victim at the hospital is concerned, it may have gone undetected for certain reasons. The absence of any such evidence could even be on account of lesser quantity of inflammable substance used. Without being engaged in any kind of wild guess work, the Court considers it to be no such ground sufficient to entirely demolish the case which is based on dying

declarations of the victim found to have been acceptable and trustworthy. As to the contention that the translator was not examined and therefore, adverse inference was required to be drawn, in the opinion of the Court, it does not really create any dent in the testimony of P.W.13. To an extent, it has lost relevance considering the claim of P.W.10 for having the knowledge of the spoken language of the victim whose dying declaration he recorded finally. In view of the above analysis, the Court is of the conclusion that the evidence of the prosecution was properly appreciated by the learned court below to hold the Appellant guilty for having caused death of the deceased. The defence plea of the Appellant cannot be sustained in view of the overwhelming evidence led by the prosecution. In other words, the prosecution was able to prove its case beyond reasonable doubt and therefore, the Court finds no reason to disturb the order of conviction.

11. But, a question arises as to if the mischief of the Appellant falls in the category of culpable homicide amounting to murder? The death of the victim is due to burn injuries on account of the alleged mischief of the Appellant which was revealed by the victim at the hospital while receiving treatment. The evidence shows that the Appellant with others had shifted the victim to the hospital. According to the informant, the Appellant himself doused the fire after setting her to flame which was revealed to him by the deceased. As per the materials on record, the incident was preceded by a quarrel between the Appellant and the victim, which said to have taken place in a fit of anger. The Appellant

appears to have realized the mistake he did and then made the efforts to put off the fire. It does appear to be a situation, where there was no premeditation and the overt act was the result of a sudden quarrel and with the consequence after being instantly realized by the Appellant, attempt was made by him to rescue the victim. The burn injuries were of 30% of the body surface and initially found to be simple in nature but thereafter, the victim died due to Septicemia although the medical opinion towards the end held it to be grievous. The fact of the matter is that the excess was committed by the Appellant under the circumstances narrated by the victim, which was on the spur of the moment out of a sudden quarrel followed by an effort by him to save her. In such view of the matter, the Court is of the humble view that the mischief of the Appellant would fall in one of the exceptions of Section 300 IPC. It is settled law that the factor which distinguishes culpable homicide from murder is the presence of special *mens rea* which consists of the mental attitudes indicated in Section 300 IPC and unless one of it is attributable to the act, no offence of murder is made out. In the instant case, the Appellant appears to have had an apologetic conduct for trying to save the victim, who however could not survive and died on account of Septicemia after undergoing treatment for over a fortnight. Under the above facts and circumstances of the case, the Court being aware of the settled position of law so lucidly explained by the Apex Court in one of its judgment in ***State of Andhra Pradesh v. R. Punnyaya and another AIR 1977 SC 45*** concerning the subtle distinction between murder and culpable homicide arrives at a logical conclusion that the act of the

Appellant is indeed a culpable homicide not amounting to murder falling under Exception 4 of Section 300 IPC and hence, would be punishable under Section 304, Part I, IPC.

12. Accordingly, it is ordered.

13. In the result, the JCRLA stands partly allowed. For the aforementioned reasons, the impugned judgment dated 19th November, 2004 passed in Sessions Case No.37/11 of 2004 by the learned Additional Sessions Judge, Nuapada is hereby modified to the extent that the Appellant is held guilty for culpable homicide punishable under Section 304, Part I, IPC and accordingly, sentenced to R.I. for 10 years and pay a fine of Rs.2000/- and further in default to undergo R.I. for 3 months.

(R.K. Pattanaik)
Judge

(Dr. S. Muralidhar)
Chief Justice

TUDU