

PRADIP MOHANTY, J & B. K. NAYAK, J.

JCRA NO.7 OF 2000 (Decided on 31.03.2011)

RAGHAB NAIK

..... Appellant.

. Vrs.

STATE OF ORISSA

..... Respondent.

EVIDENCE ACT, 1872 (ACT NO.1 OF 1872) – S.32.

For Appellant -Mr. Akshaya Kumar Sahoo.

For Respondent- Additional Government Advocate.

B.K.NAYAK, J. The appellant assails the judgment and order dated 16th November, 1999 passed by the learned Sessions Judge, Ganjam-Gajapati, Berhampur in Sessions Case No.359 of 1998 convicting him under Section 302 of the I.P.C. and sentencing him to undergo imprisonment for life.

2. The prosecution case in brief is that the accused and the deceased-Mamata Padhi @ Naik fell in love with each other and had regular sexual contact that resulted in her pregnancy. The accused did not accede immediately to the proposal of the deceased for marriage, but on his suggestion she continued to live with him in a rented house in the Industrial Estate, Ankoli adjoining to the rented house of the uncle and aunt of the accused. While so living the accused suspected the character of the deceased and continued to quarrel with her. A few days thereafter on 25.4.1998 he poured kerosene on the deceased and set her on fire, as a result she sustained extensive burn injuries. She was hospitalized in the M.K.C.G. Medical College & Hospital without there being any one to attend to her. But in spite of treatment she succumbed to the injuries on 4.5.1998. The A.S.I. of Medical College Campus Outpost, Berhampur on 30.04.1998 having learnt about the incident met the deceased in the hospital. There the deceased lodged the oral report, which was reduced to writing by the A.S.I. Immediately, the services of a Magistrate was requisitioned by the police officer and the dying declaration of the deceased was recorded. The F.I.R. was forwarded and registered in the Berhampur Mahila Police Station and investigation was conducted and ultimately charge-sheet was filed against the accused for commission of offences under Sections 493/302 of the I.P.C.

The defence plea is completely denial of the prosecution case.

3. In order to establish its case, the prosecution examined seven witnesses. P.W.1 is the Executive Magistrate, who recorded the dying declaration of the deceased. P.W.2 is an employee of the M.K.C.G. Medical College & Hospital, who was a witness to the seizure of the bed head ticket of the deceased. P.W.3 is the A.S.I. of police of the Medical College Campus Outpost, who recorded the F.I.R. of the deceased. P.W.4 is the landlord in whose house the deceased and the accused were living together on rent.

P.W.5 is a lady constable, who took the dead body of the deceased for post mortem examination. P.W.6 is the Surgery Specialist, who treated the deceased in the hospital for burn injuries. P.W.7 is the Investigating Officer.

Apart from oral evidence, the prosecution also proved documents like the F.I.R., dying declaration, seizure list, bed head ticket, inquest report, etc.

The accused did not lead any evidence in defence. On consideration of the evidence, the trial court while acquitting the appellant of the charge under Section 493 of the I.P.C., convicted him under Section 302 of the I.P.C. as aforesaid.

4. Assailing the impugned judgment, the learned counsel for the appellant contended that there being no eyewitness to the occurrence, the proof of the prosecution case is based on only dying declaration recorded by the Magistrate (P.W.1), which is very suspicious inasmuch as neither any doctor nor any hospital staff is a witness to the recording of dying declaration and that while in the F.I.R., the deceased put her signature, she has not put her signature in the dying declaration. It is his further submission that the deceased having not made any disclosure about the occurrence before the doctor, who treated her at the earliest opportunity, the allegation that she made declaration four days after the occurrence is a mere concoction and hence unreliable.

Learned Additional Government, on the other hand, contends that the deceased was in a fit state of mind to make a declaration and, therefore, the recording of her dying declaration on 30.04.1998 by the Magistrate cannot be doubted merely because no doctor has recorded her statement earlier. The genuineness of the dying declaration cannot be also doubted merely because the deceased has not put her signature on the same. His further contention is that even if the dying declaration recorded by the Magistrate is left out of consideration, the F.I.R. of the deceased which has been recorded by the A.S.I.(P.W.3) can also be treated and relied upon as a dying declaration and it would be sufficient to base a conviction on the same.

5. Law is well settled that even in the absence of any other corroboration, the conviction can be based on the dying declaration, if the declaration is found to be a reliable. (See **Khushal Rao v. State of Bombay**; AIR 1958 SC 22 and **Munnu Raja and another v. The State of Madhya Pradesh**; (1976) 3 SCC 104).

6. It is true that there is no eyewitness to the occurrence and that though as per the F.I.R. allegation uncle and aunt of the accused, namely, Bulu Parida and Manju Parida are the immediate post occurrence witnesses, who extinguished fire from the body of the deceased and left her in the hospital unattended, they could not be examined as their attendance could not be procured for want of their whereabouts. The F.I.R. lodged by the deceased herself has been marked as Ext.3 and proved by P.W.3, the A.S.I. of Medical College Campus Outpost. The dying declaration recorded by the Magistrate (P.W.1) is proved as Ext.1. In both these documents deceased-Mamata Padhi @ Naik has clearly described that the accused and herself fell in love with each other and had regular sexual contact, as a result of which, she became pregnant. It is further stated that the accused, whom she has described as her husband, kept her in a rented house in the Industrial Estate area and that her pregnancy was aborted by the accused by administering some medicines. When she insisted that the accused should marry her,

the mother of the accused promised that the marriage would be solemnized some time later, as there was financial stringency at that time. It is further stated that ten days before the occurrence, the accused assaulted the deceased suspecting her character and leaving her in the rented house went away to his own house in Gate Bazar area. It is further stated that on the date of occurrence the deceased went to Gate Bazar area and requested him to come back but the accused abused her for which she returned alone to the rented house. In the evening on that day, the accused came to the rented house and his aunt asked the deceased to cook dinner for which the deceased went to the shop for some purchases and returned to the rented house whereafter, the accused closed the door, poured kerosene on her and set her on fire lighting a match and then fled away. On hearing cries of the deceased, the uncle and aunt of the accused came inside and extinguished the fire. The aunt of the accused thereafter brought the deceased to the Gate Bazar house of the accused and from there to the City Hospital and from the City Hospital to M.K.C.G. Medical College and Hospital.

7. P.W.3 the A.S.I of the Medical College Campus Outpost has stated in his evidence that being directed by the Inspector-in-charge of B.N.Pur Police Station, he went to the Surgical Ward No.4 of the M.K.C.G. Medical College & Hospital had found Mamata Padhi @ Naik in bed No.354. On being asked Mamata Padhi @ Naik described the occurrence, as has been noted in the F.I.R. P.W.3 recorded her statement, read over and explained the contents to her which she admitted to be correct and put her signature. Signature of the deceased has been proved as Ext.3/1 and the signature and endorsement of P.W.3 marked as Ext.3/2. It is the further evidence of P.W.3 that he sent a requisition to the Sub-Collector, Berhampur for recording of dying declaration of the deceased and then sent the F.I.R. to I.I.C. of B.N.Pur Police Station. The Sub-Collector, Berhampur deputed Nizarat Officer-cum-Executive Magistrate, Mr. Satapathy (P.W.1). He has proved the order of the Sub-Collector, Ext.4. The Executive Magistrate recorded the dying declaration of the deceased at the Medical College & Hospital in presence of P.W.3, who identified the deceased. P.W.3 has also signed on the dying declaration. He has proved the dying declaration, Ext.1 and his signature thereon, Ext.1/2. In cross-examination P.W.3 stated that he could not remember if any staff were present when he recorded the F.I.R. of the deceased. However, two witnesses named in the F.I.R. and some patients and their attendants were present in the ward. He also does not remember whether any doctor or medical staff was present while the Magistrate recorded the dying declaration. Although a suggestion was given to him that the deceased did not lodge the report before him, which he has denied, the signature of the deceased on the F.I.R. has not been challenged by the defence. Nothing substantial has been brought out in the cross-examination to disbelieve the evidence of P.W.3 with regard to the lodging of the F.I.R. by the deceased. His evidence that he was directed by the I.I.C., B.N. Pur Police Station to go to the hospital and find out the deceased in the surgical ward receives corroboration from the bed head ticket with history sheet, which was seized by the I.O. under seizure list, Ext.2 in presence of the Statistical Investigator of the Medical College and Hospital P.W.2. The bed head ticket has been proved as Ext.5. P.W.6 is the residential surgeon of M.K.C.G. Medical College and Hospital, who examined and treated the deceased has also proved bed head ticket along with the case history. The bed head ticket shows that the deceased was admitted in the Medical College and Hospital with 60% deep burn injuries on both lower limbs and back and front of abdomen and lower chest. The deceased was admitted in Hospital on 26.4.1998 and died on 04.05.1998. The bed head ticket also reveals that the deceased had no

attendant and she had no money to purchase medicine and other materials and was treated totally at the cost of the Hospital. Page-6 of the bed head ticket is a copy of the letter dated 26.4.1998 addressed by the residential Surgeon, Dr. S.P. Patnaik (P.W.6) to the Superintendent of the Medical College and Hospital to make arrangement for a Magistrate to record dying declaration of the patient (deceased). It further appears from page-9 of the bed head ticket, which is the copy of another letter dated 27.4.1998 written by the residential surgeon to the Superintendent of the Hospital for purchase of necessary drugs for the patient and for asking the I.I.C., B.N.Pur Police Station to arrange a Magistrate to record the dying declaration of the patient. Page-11 of the bed head ticket further reveals that the B.N. Pur Police Station was informed to arrange a Magistrate for recording dying declaration of the deceased. Page-13 of Ext.5 is a reminder letter sent by the residential surgeon to B.N. Pur Police Station for recording the dying declaration of the patient (deceased) on an urgent basis by a Magistrate. It has been mentioned in the said letter that the case appears to be one of bride burning. It is not known whether the letters addressed to the Superintendent of the Hospital on 26/27.4.1998 for arranging a Magistrate for recording a dying declaration of the deceased were acted upon promptly or not, but it is quite apparent that pursuant to the repeated letters and the reminder dated 29.4.1998 the I.I.C., B.N. Pur Police Station directed P.W.3 to go to the Hospital and find out the deceased and do the further needful. The doctor (P.W.6) has stated in his evidence that the patient was conscious during the treatment period. Therefore, the evidence of P.W.3 that on his query the deceased described the occurrence which he reduced to writing and the deceased put her signature cannot be doubted.

8. P.W.1 is the Nizarat Officer-cum-Executive Magistrate, who stated in his evidence that on the direction of the Sub-Collector he proceeded to Berhampur Medical College and Hospital to record the dying declaration of the deceased. He went to the hospital in Ward No.4 of Female Surgery Wing, where the A.S.I. (P.W.3) identified the patient. He tested the patient by putting her some questions to which she gave proper and rational answers and as such he was satisfied that she was in a fit state of mind to give a statement. There were burn injuries on her body. He disclosed his identity to the deceased and asked her if she desired to give the statement. She expressed her willingness and gave her dying declaration in oriya, which he verbatim translated into English and recorded the same. P.W.1 then explained the contents of the statement in oriya, which the deceased admitted to be correct. After recording the statement he handed over the same to P.W.3. He has proved the dying declaration, Ext.1 and his signature and endorsement as Ext.1/1. In his cross-examination, he has admitted that no doctor or any attendant of the deceased was present when he recorded the dying declaration of the deceased. He has also admitted that he did not consult the treating doctor about the mental condition of the patient. He also produced copy of the order of the Sub-Collector, whereby he was directed to proceed to the hospital and record the dying declaration of the patient. The order of the Sub-Collector has been proved by P.W.3 as Ext.4, which shows that P.W.1 was directed by the Sub-Collector come to the hospital for recording dying declaration. In his cross-examination P.W.1 has further stated that he could not take the signature or LTI of Mamata Padhi @ Naik (deceased) on her declaration because her hands were badly burnt and she was not able to write or put her LTI.

9. Learned counsel for the appellant contends that in view of the evidence of P.W.1 that the deceased was not able to put her signature or LTI as because her hands had been burnt, it is doubtful whether the F.I.R. (Ext.3) is a genuine document, which bears the purported signature of the deceased. In this context, it may be stated that P.W.3 has stated in his evidence that he recorded the statement of the deceased, read over and explained contents of the same to her which she admitted to be correct and put her signature, which has been proved as Ext.3/1. No question has been put to P.W.3 in cross-examination whether the deceased was able to write or not and whether her hand has been burnt or not. No suggestion has also been given that the deceased had sustained burn injuries on her hand and was incapable of putting her signature. The signature of the deceased (Ext.3/1) has not at all been disputed by the defence. The bed head ticket of the deceased shows that she suffered 60% deep burn injuries on both lower limbs and back and front of abdomen and the lower chest. The bed head ticket does not show any serious burn injuries on the hands of the deceased which might have incapacitated her for putting the signature. P.W.6, the residential surgeon also does not speak about any serious injuries on the hands of the deceased. In the circumstances, we are of the view that having failed to take the signature or mark of the deceased on the dying declaration (Ext.1), in order to cover up the laches on his part. P.W.1 has stated in his cross-examination that the hands of the deceased were badly burnt. We are not in a position to accept this part of the evidence of P.W.1.

10. Merely because P.W.1 has not taken the signature of the deceased on Ext.1, his evidence cannot be thrown away. He is an Executive Magistrate and a responsible Government Officer and on the direction of the superior authority he came to the hospital and recorded the dying declaration of the deceased and has proved the same. There is no reason as to why he would speak falsehood against the accused with whom he has no animosity. About the fitness of the deceased to make statement it is clear from the evidence of P.Ws.1, 3 and 6 that the patient was conscious during treatment. The bed head ticket also shows that the patient was conscious and oriented till 1.05.1998. It is, therefore, clear that the deceased was in a fit state of mind to make a statement on 29.04.1998. Of course, there has been some delay in lodging of the F.I.R. and recording of the dying declaration, but that by itself would not be a ground to suspect the genuineness of the F.I.R. or the dying declaration. It is clear from the bed head ticket, Ext.5 that the deceased was brought with deep burn injuries to the hospital and there was no attendant to look after her. This shows that some body, may be the aunt of the accused as has been described in the F.I.R., brought her to the hospital and then left. As per the bed head ticket, since there was no attendant at any point of time, the deceased was given treatment by the hospital getting medicines from the hospital stock and local purchases. The several requisitions addressed by the treating surgeon to the hospital superintendent bear testimony to this fact. In such situation, it could not be expected that the F.I.R. and dying declaration would have been made earlier. Hospitalization of the deceased for burn injuries was brought to the notice of the I.I.C., B.N.Pur Police Station by the hospital authorities where after the I.I.C. directed P.W.3 to proceed to the hospital. It is only after P.W.3 came to the hospital that he got the report of the deceased recorded and requisitioned the services of the Executive Magistrate (P.w.1). In the circumstances, the genuineness of the F.I.R. (Ext.3) and the dying declaration (Ext.1) cannot be doubted.

11. Apart from Ext.1, the F.I.R (Ext.3) which bears the undisputed signature of the deceased can also be treated as a dying declaration as has been held in **Munnu Raja and another v. The State of Madhya Pradesh**; (1976) 3 SCC 104, **Dharampal and others v. State of Uttar Pradesh**; (2008) 17 SCC 337 and **Babulal and others v. State of M.P.**; (2003) 12 SCC 490.

Both Exts.1 and 3 are fully reliable dying declarations on which the conviction of the appellant can rest without any requirement of corroboration.

12. P.W.7 is the O.I.C. of Mahila Police Station, Berhampur, who is the Investigating Officer. The F.I.R. (Ext.3) being forwarded, she registered the case on 30.04.1998 under Sections 493/307 of the I.P.C. Four days thereafter, the deceased succumbed to the burn injuries, whereupon the case turned to one under Section 302 of the I.P.C. P.W.7 has stated in her evidence that during investigation, she visited the Medical College & Hospital and examined the victim-Mamata Padhi @ Naik and the A.S.I. (P.W.3). She also visited the Industrial Estate area where the occurrence took place and prepared the spot map (Ext.6). On 4.5.1998, she received report from the Medical Officer that Mamata Padhi @ Naik died while undergoing treatment. She then went and held inquest over the dead body. She has proved the inquest report (Ext.7).

13. Basing on the dying declaration (Ext.1) and the F.I.R. (Ext.3) which can also be treated as another dying declaration, coupled with the evidence of P.Ws.1 and 3 and the medical evidence of P.W.6 and Ext.5, we hold that the conviction of the appellant is well founded and needs no interference.

The Jail Criminal Appeal is accordingly dismissed.

Appeal dismissed.