HIGH COURT OF ORISSA, CUTTACK

JAIL CRIMINAL APPEAL NO. 23 OF 2006

From the judgment dated 17.02.2004 passed by Shri S.P.Rao, Ad hoc Additional Sessions Judge (FTC), Keonjhar in S.T. Case No. 143/12 of 2003/04.

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Jadumani Naik …. Appellant.

Versus

State of Orissa …… Respondent

For the Appellant … Smt. Susamarani Sahoo,
Mr. Chitaranjan Sahu, advocates

For the Respondent … Mr. A.K.Mishra,
Standing Counsel.

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PRESENT:

THE HON'BLE MR. JUSTICE D. DASH

Date of hearing : 28.10.2014 : Date of judgment : 30.10.2014

The appellant from inside the jail has preferred this appeal challenging the judgment of conviction and order of sentence passed by the learned Adhoc Additional Sessions Judge, Fast Track, Keonjhar (FTC) in S.T. No.143/12 of 2003/04. By the said judgment the appellant has been found guilty for commission of offence punishable under section 304 Part-II, I.P.C. and thus having been convicted thereunder, he has been ordered to undergo rigorous imprisonment for a period of 10 years.

2. Prosecution case is that on 24.03.2003 around 2 P.M. the appellant set her wife Jatri Naik (deceased) to fire after sprinkling

kerosene on her and then to have fled away from the spot. Prior to the said incident, the appellant is said to have brought a doctor, who had pushed two injections to the deceased as she was ill.

The brother of the deceased having lodged the F.I.R. at Ghatgaon police station, necessary case was registered and the investigation commenced. On completion of investigation, charge-sheet having been submitted against the appellant placing him to be tried in the court of law for offence punishable under section 302, I.P.C., he faced the same.

3. The case of the defence is that of complete denial and false implication.

The prosecution in order to establish its case when examined ten witnesses, the defence has examined none. The doctor who conducted the autopsy over the dead body of Jatri has been examined as P.W.7. P.W.1 is the brother of the deceased and the informant whereas P.W.2 is deceased's mother. Brother's wife of the deceased has come to the dock as P.W.3. P.Ws.4 and 5 are two neighbours. Another doctor has been examined for proving the dying declaration in course of treatment as P.W.6. P.W.8 is the other doctor, who had recorded the dying declaration as per the dictation of P.W.6. The doctor conducting the post-mortem examination is P.W.7. The I.O. has come to the dock at last as P.W.10. Prosecution more importantly has proved the F.I.R. (Ext.1), dying

declaration (Ext.3), bed head ticket (Ext.5) and post mortem examination report (Ext.6).

4. On evaluation of evidence the trial court has found the prosecution to have proved the factual aspect of the case that it is the appellant who had set his wife (Jatri Naik) ablaze and had lit the fire over the clothings put on her after sprinkling kerosene upon her. However, taking into account that the deceased had sustained burn injuries and was making improvement in course of treatment when she left the hospital, when other features like enlargement of liver, spleen etc. have not been ruled out to be on account of prior ailment and having not been shown as only due to burn injuries, the trial court taking a view that the death cannot be said to have been the direct connection with such burn injury has found the appellant guilty of offence under section 304, Part-II IPC. Therefore, the trial court has recorded conviction for offence under section 304, Part-II, I.P.C. and has accordingly sentenced.

5. Learned counsel for the appellant submits that the appreciation of evidence on the score that it is the appellant, who had set his wife ablaze having lit the fire over her after sprinkling kerosene, is not believable. It is further stated that the dying declaration proved in the case in view of the infirmity and in view of the evidence on record ought not to have been believed to have been the true version of the deceased and as such ought not to have been relied upon. He further submits that the delay in lodging of the F.I.R. ought to have been viewed as a

circumstance against the prosecution case that they have ultimately done so by concocting a story.

6. Learned counsel for the State, on the other hand, supports the finding. He contends that the trial court did commit no mistake in accepting the prosecution case with regard to the role of the appellant in the said incident. It is also his submission that here as there is direct evidence on record which clearly go to show that it was the appellant, who was inside the room when his wife was burning and then he fled away on the spot the complicity gets well established in the absence of any explanation by the appellant. Therefore, he contends that such evidence is enough to establish the guilt of the appellant. So, he urges that the appeal bears no merit. However, he submits that as per the informations gathered, the State has not preferred any appeal challenging the acquittal of the appellant of the offence under section 302 IPC.

7. Keeping in mind the above submission now the evidence adduced from the side of the prosecution are required to be examined. As regards the nature of death, the trial court has held the death to be homicidal in nature. It is seen from the evidence of P.W.7 that the deceased had sustained seventy percent burn injuries. However, despite of burn injuries he has not given any definite opinion with regard to cause of death in the particular case, since other organs like lever, spleen and kidney were enlarged which according to him might have also been

due to malaria and malnutrition. That apart the admitted fact stands that the deceased was ailing at the time of the incident. When the treatment was continuing in the hospital and was improving in her condition as stated by P.W.6 the deceased was taken to the house and she died there. She had survived for about fifteen days after the incident. It has also been stated by P.W.6 that taking note of her condition on 27.03.2003 and her condition on 06.04.2003, on account of lack of proper treatment, thereafter, the fatal consequence as met is not ruled out with all other existing and intervening factors.

7. Now coming to the evidence as regards the complicity of the appellant, it is seen from the evidence of P.W.1, the younger brother of the deceased that at the time of the incident she was not present in the house but she was informed about the incident by his wife and others and he asked the deceased, who was then in her sense and able to communicate, when she disclosed before him that it is the appellant, who had caused burn injuries. So, he had lodged the F.I.R. During cross-examination, he has stated that he had asked her sister about the reason of her sustaining the burn injuries when she was in the hospital as by the time he arrived at the home, deceased was shifted to the hospital. In spite of scathing cross-examination, no such material has emerged out to discard his evidence as regards declaration made by the deceased before him implicating the appellant to have set her to fire. The evidence of P.W.2, who is the mother of the deceased is also to the effect that on her

return home she found her to have sustained burn injuries and on being asked the deceased disclosed that the appellant had called the doctor who gave two injections and after the departure of the doctor, the appellant put some clothing materials over her body, then sprinkling kerosene had set fire to it and fled away from the spot. This witness has further stated that on her asking the deceased had given the answer implicating the appellant as above. P.W.3, who is the wife of P.W.1 has clearly stated that the appellant came along with the doctor, who pushed two injections to the deceased and after he left, the appellant spread clothing materials over the deceased, poured kerosene and lit fire. She has stated to have raised immediate alarm when the neighbours arrived and put off the fire. It is also stated that the appellant then fled away from the place. During cross-examination she has further reiterated that she had seen the appellant in the room on her arrival getting the smell of kerosene and no sooner did she arrive there, the appellant fled away. P.W.4 a neighbour has further stated that when she rushed to the house hearing hue and cry, he found that the body of the deceased had caught fire and saw the appellant running away towards jungle. He has withstood the searching cross-examination successfully in further stating that he found appellant coming out of the house and running towards the jungle as soon as he came out of the house. He as it appears has truthfully given an explanation that as he and others remained engaged in sending the victim to the hospital immediately no search for the appellant was made. The evidence of P.W.5 is also in the same line, that

on reaching near the house of P.Ws.1 and 2, he saw the appellant running away from the place towards the jungle and immediately on entering into the house, he noticed smoke to have been filled with emission of of kerosene smell out and at that time P.W.3 was very much there in the house by the side of the deceased. He has also stated the presence of P.W.4 and about subsequent arrival of other villagers. No such material is forthcoming in his evidence to disbelieve his version in any way It may be stated that nothing has been shown or culled out to infer even for a moment that these witnesses had any such reason to falsely implicate the appellant being enemically disposed of towards him.

The doctor P.W.6 was present while recording of the dying declaration of the deceased, which has been marked as Ext.3. He has stated that as it was a case of burn injury of more than fifty percent, it was thought proper to immediately record her version. As per his evidence P.W.8, the other doctor so recorded Ext.3 as proved by him. He has also stated that such recording was with prior intimation to the Police Station and with prior permission of A.D.M.O, Medical. He claims that such recording was made by P.W.8 to his dictation and LTI of Jatri Naik was taken. The narration therein remains the same as has been stated by the P.Ws.1 and 2. The doctor, P.W.8 has recorded Ext.6. He has clearly stated that they found the deceased to be in a fit condition to depose and there was clarity in her mind. He stated to have translated the Oriya version of deceased into English and to have accordingly written. It is also his evidence that he has read over the contents to the

deceased, who having admitted the narration to be her true version put her L.T.I. He has proved the signature of P.W.6. During further cross-examination, he has assertively stated that before recording the statement, he asked Jatri, her name and husband's name which she bluntly replied being conscious.

Learned counsel for the appellant attacks the dying declaration (Ext.3) on the ground that it carries no such certificate that the deceased was in a fit state to speak and that P.W.8 has not given any endorsement that he wrote it as dictated by P.W.6. In view of clear evidence of P.Ws.6 and 8, who have no such apparent reason to falsely implicate the respondent non attachment of such a certificate is of no significance to reject their testimony saying that the deceased was not in a position to talk. It may be stated that it has also not been stated by other prosecution witnesses like P.Ws.1 and 2 that during treatment she had no sense. Similarly absence of endorsement of P.W.8 cannot be taken as a circumstance to outweigh the positive evidence of P.Ws. 6 and 8. The incident having taken place on 24.03.2003, on that very day the dying declaration has been recorded. The next challenge to this dying declaration is that it is not in question and answer form. In the facts and circumstances of the case when the doctors as well as the prosecution witnesses have stated that the deceased was in a position to clearly talk such non-recording of dying declaration in question and answer form pales into insignificance. Such a course in my considered view may be

insisted upon to examine the truthfulness and voluntariness of the declarant in making the version if the condition of the declarant is so serious that the talking is feeble, with pain and difficulty. The evidence of P.Ws. 6 and 8 thus inspire confidence. There is no reason why they should make up a story when they have no prior acquaintance with the deceased and her family and the appellant as well. Both have stated that deceased was in a fit state of mind and gave out the declaration with clarity.

The certification of the doctor about fitness is a rule of caution. When the doctor states that deceased was in a fit state of mind being in a position to make statement which was made and recorded accordingly, the absence of endorsement on the statement to that effect is of no consequence. Moreover, the deceased died fifteen days after and thus it is not possible to hold that she could not have made any dying declaration which is ordinarily not expected from a patient with burn injury when facial portion is not severally burnt making it difficult to open mouth which is not the case here. In view of above discussion, this Court find no hesitation to record that both the doctors are truthful and their evidence are safe to be relied upon for acceptance of the dying declaration as truthful and voluntary. The settled law is that a conviction can be recorded on a dying declaration recorded properly when the declarant is in a fit mental state to make it and it passes the test of

truthfulness land voluntariness. Thus the appellant's complicity is established beyond reasonable doubt.

8. The other circumstance as has been established that the appellant was seen running away from the spot is of great importance. This has been proved by all the witnesses such as P.W. 3 and other independent witnesses who arrived there on hearing cry. This conduct of appellant shows that had there been no apprehension in his mind seeing wife having caught fire, he being husband how would run away instead of providing or facilitating for putting off the fire and then for treatment.

9. For the aforesaid discussion of evidence and their reappreciation, this Court agree with the finding of the trial court as regards the complicity of the appellant to have been established beyond reasonable doubt through clear, cogent and reliable evidence. Therefore, the judgment and conviction and order of sentence are hereby confirmed.

10. Resultantly, the JCRLA stands dismissed. The appellant if not in jail custody be forthwith taken to custody to serve out the remaining part of the sentence.

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D. Dash, J.

Orissa High Court, Cuttack
Date 30th October, 2014/Himansu.