

Bhola Sha @ Bhola Sah Vs State of Assam

Court: Gauhati High Court

Date of Decision: Feb. 18, 2005

Acts Referred: Evidence Act, 1872 " Section 32, 32(1), 32(2), 32(3), 32(4)
Penal Code, 1860 (IPC) " Section 300, 302, 307

Citation: (2005) GLT 158 Supp

Hon'ble Judges: P.G. Agarwal, J; A. Hazarika, J

Bench: Division Bench

Advocate: S.R. Bhattacharjee, B.D. Konwar, H.A. Sarkar and S. Chakraborty, for the Appellant; F.H. Laskar, for the Respondent

Final Decision: Dismissed

Judgement

P.G. Agarwal, J.

Heard Mr. B.D. Konwar, the learned Counsel for the accused Appellant and Mr. F.H. Laskar, the learned P.P.

2. This appeal is directed against the judgment and order dated 30.11.2000 passed by the Sessions Judge, Dhubri in Sessions Case No. 4/2000

(GR GPR 13/99) whereby the accused Appellant was convicted u/s 302, IPC and sentenced to imprisonment for life and to pay a fine of Rs.

2,000/- in default further imprisonment for one month.

3. This is a case of unfortunate death of a young housewife within six months of the marriage which was solemnized after love affairs between the

couple. Dulu Shah was married to the accused Appellant Bhola Shah and while she was living in her husband's place along with her mother-in-law

on the ill-fated day of 7.2.1999 at about 11.30 p.m., the accused Appellant Bhola Sha poured kerosene oil on her body and set her on fire. On

alarm being raised the other inmates of the house-mother-in-law as well as the neighbours were informed about the incident and she was taken to

hospital where she succumbed to the injuries.

4. Shymal Kr. Dutta (P.W. 1), Jhumur Sarkar (P.W. 2), Bimal Kr. Roy (P.W. 3), Smt. Ranu Mandal (P.W. 4), Smt. Bharati Mandal (P.W. 5)

and Smt. Mithu Dey (P.W. 7) are all neighbouring witnesses having residence near the house of the accused Appellant and on the night of

occurrence on hearing commotion they came to the house of the accused Appellant Bhola Sha and found his wife Dulu in burn condition and she

reported that the accused Bholu Sha had set her on fire after pouring kerosene oil. She was removed to hospital but she succumbed to the injuries.

5. P.W. 9 is Dr. Kochid Ali Ahmed who treated the victim at Dhubri Civil Hospital. P.W. 10 is Dr. Anukul Chandra Mandal who held the autopsy

over the dead body and he found as follows:

On examination I found as follows:

(1) Rigor mortis-Present

(2) Eyes-Open

(3) Mouth-Open

(4) Face-Swollen

(5) Nails-Blue

(6) Hair-Singed

Burnt injuries were present over the face, abdomen, chest (thorax), both upper limbs, both ankles the back and buttock, upper thigh.

The margins of the burnt injuries are red and charred.

The blisters are found over the margin in some areas.

The percentage of burnt injuries is above 70.

Both lungs congested. Pleurae congested. Other organs were normal.

The burnt injuries described above are ante-mortem in nature.

6. In the opinion of the doctor the cause of death is due to shock as a result of burn injuries sustained by the deceased.

7. In view of the overwhelming oral and medical evidence on record we concur with the finding of the trial Court that this is a case of homicide as

this is not a case of accidental fire and as the burn injury is to the extent of 70%.

8. In the present case, there is no eyewitness to the occurrence as the incident had taken place at night and that too in the house of the accused

Appellant where besides the accused Appellant, the deceased and the mother of the accused used to reside. The mother and son were arrayed as

accused and the victim is no more in this world. The entire prosecution case is based on the dying declaration of the deceased. The Investigating

Police Officer has submitted that while the victim was undergoing medical treatment at Dhubri Civil Hospital, he sent a requisition to depute a

Magistrate to record the dying declaration and accordingly Gauri Sankar Sarma (P.W. 8), the Executive Magistrate recorded the dying

declaration. It maybe mentioned here that the incident took place on the night of 7.2.1999 and the dying declaration was recorded on 8.2.1999

and the victim died on 14.2.1999 i.e. after six days of the recording of dying declaration. The Executive Magistrate (P.W. 8) has deposed that he

found Dulu Shah lying in the hospital bed with burnt injuries. She was in a position to speak and capable of making statement. The Executive

Magistrate, however, consulted the attending doctor P.W. 9 who gave a certificate that the patient was fit and capable to make a statement and

thereafter the dying declaration was recorded. Ext. 3 is the said dying declaration. P.W. 9 deposed that at the time when the dying declaration was

recorded, the patient was fully conscious and she could speak properly and as desired by P.W. 8, P.W. 9 gave a certificate Ext. 3(2).

The Dying Declaration reads as follows:

Dying Declaration of Smti. Dulu Sah (Mandal)

Ref: Gauripur P.S. Case No. 13/99 u/s 307 IPC.

My name is Srimati Dulu Sah, D/o Late Kanai Mandal and W/o Shri Bhola Sah, Gauripur, Ward No. 4, where I am a permanent resident. My

thana is Gauripur.

At about 11 p.m. on 7.2.1999 (yesterday) my husband who was drunk, quarrelled with me and dealt a slap on me. After that he poured kerosene

oil on me from a white kerosene oil gallon and set fire to me with a match-stick. I had not had any quarrel with him before.

He said set fire to me inside my room. There had been none in the room at that time. Later, when I cried out, my mother-in-law came out from her

room.

The above statement is recorded in presence of following witness.

1. Tarun Ch. Das., T.S.I., Gauripur P.S.

I have recorded the above declaration at 6. p.m. on 8-2-1999.

Ext. 3(1), Sd/-

Illegible,

Sd/-

illegible,

8/2/1999

(G.S. Sarmah)

(E.M.DBB)

Ext. 3(2) Sd/-

Illegible.

Certified that the patient is fully conscious at the time of recording this dying declaration and she could speak properly.

Ext. 3(3), Sd/-Illegible

Sd/-Illegible, 08/2/1999 6 p.m.

(Dr. K.A. Ahmed M.S.)

on duty M and HO-I Dhubri.

9. Thus we find that besides the oral dying declaration made soon after the incident, there is a recorded dying declaration recorded in presence of

the doctor by an Executive Magistrate and a certificate to that effect has been given by the doctor that the deceased was in a proper condition to

make statement.

10. In the case *Kundula Bala Subrahmanyam and Another Vs. State of Andhra Pradesh*, the Apex Court held as follows:

Section 32(1) of the Evidence Act is an exception to the general rule that hearsay evidence is not admissible evidence and unless evidence is tested

by cross-examination, it is not creditworthy. u/s 32, when a statement is made by a person, as to the cause of death or as to any of the

circumstances which result in his death, in cases in which the cause of that person's death comes into question, such a statement, oral or in writing,

made by the deceased to the witness is a relevant fact and is admissible in evidence. The statement by the deceased, called the dying declaration,

falls in that category provided it has been made by the deceased while in a fit mental condition. A dying declaration made by person on the verge

of his death has a special sanctity as at that solemn moment, a person is most unlikely to make any untrue statement. The shadow of impending

death is by itself the guarantee of the truth of the statement made by the deceased regarding the causes or circumstances leading to his death. A

dying declaration, therefore, enjoys almost sacrosanct status, as a piece of evidence, coming as it does from the mouth of the deceased victim.

Once the statement of the dying person and the evidence of the witnesses testifying to the same passes the test of careful scrutiny of the Courts, it

becomes a very important and a reliable piece of evidence and if the Court is satisfied that the dying declaration is true and free from any

embellishment such a dying declaration, by itself, can be sufficient for recording conviction even without looking for any corroboration. If there are

more than one dying declarations then the Court has also to scrutinize all the dying declarations to find out if each one of these passes the test of

being trustworthy. The Court must further find out whether the different dying declarations are consistent with each other in material particulars

before accepting and relying upon the same.

11. In the case of *Smt. Laxmi Vs. Om Prakash and Others*, the Apex Court reiterated its earlier decision in the following words:

The law is well settled that dying declaration is admissible in evidence. The admissibility is found on principle of necessity. A dying declaration, if

founded reliable, can form the basis of conviction. A Court of facts is not excluded from acting upon an uncorroborated dying declaration for

finding conviction. A dying declaration, as a piece of evidence, stands on the same footing as any other piece of evidence. It has to be judged and

appreciated in the light of the surrounding circumstances and its weight determined by reference to the principles governing the weighting of

evidence. It is, as if the maker of the dying declaration was present in the Court, making a statement, stating the facts contained in the declaration,

with the difference that the declaration is not a statement on oath and the maker thereof cannot be subjected to cross-examination. If in a given

case a particular dying declaration suffers from any infirmities, either of its own or as disclosed by other evidence adduced in the case or

circumstances coming to its notice, the Court may as a rule of prudence look for corroboration and if the infirmities be such as render the dying

declaration so infirm as to prick the conscience of the Court, the same may be refused to be accepted as forming safe basis for conviction. In the

case at hand, the dying declarations are five. However, it is not the number of dying declarations which will weigh with the Court. A singular dying

declaration not suffering from any infirmity and found worthy of being relied on may form the basis of conviction. On the other hand, if every

individual dying declaration consisting in a plurality is found to be infirm, the Court would not be persuaded to act thereon merely because the dying

declarations are more than one and apparently consistent.

12. The law on the above point was further explained by the Apex Court in the case of Uka Ram Vs. State of Rajasthan, wherein the Apex Court

held as follows:

Statements, written or verbal of relevant facts made by a person who is dead, or who cannot be found or who has become incapable of giving

evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to

the Court unreasonable, are themselves relevant facts under the circumstances enumerated under Sub-sections (1) to (8) of Section 32 of the Act.

When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his

death, in cases in which the cause of that person's death comes into question, is admissible in evidence being relevant whether the person was or

was not, at the time when they were made, under expectation of death and whatever may be the nature of the proceeding in which the cause of his

death comes into question. Such statements in law are compendiously called dying declarations. The admissibility of the dying declaration rests

upon the principle that a sense of impending death produces in a man's mind the same feeling as that of a conscientious and virtuous man under

oath-nemo moriturus praesumitur mentire. Such statements are admitted, upon consideration that their declarations are made in extremity, when the

maker is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced and the mind induced by the

most powerful consideration to speak the truth. The principle on which the dying declarations are admitted in evidence, is based upon the legal

maxim nemo moriturus praesumitur mentire i.e. a man will not meet his Maker with a lie in his mouth. It has always to be kept in mind though a

dying declaration is entitled great weight, yet it is worthwhile to note that as the maker of the statement is not subjected to cross-examination, it is

essential for the Court to insist that the dying declaration should be of such nature as to inspire full confidence of the Court in its correctness. The

Court is obliged to rule out the possibility of the statement being the result of either tutoring, prompting or vindictive or a product of imagination.

Before relying upon a dying declaration, the Court should be satisfied that the deceased was in a fit state of mind - to make the statement. Once

the Court is satisfied that the dying declaration was true, voluntary and not influenced by any extraneous consideration, it can base its conviction

without any further corroboration as a rule requiring corroboration is not a rule of law but only a rule of prudence.

13. Now coming to the fact of the present case, we find that the physical and mental capacity of the victim has been certified to be fit by the doctor

and the confessional statement was recorded by the Magistrate. Moreover, it is consistent with the oral dying declaration made immediately after

the incident. Thus the dying declaration is not the result of any prompting or tutoring by relations and we find that Ext. 3 satisfies all the

requirements of law and the trial Court has rightly relied upon the same.

14. In this case, the prosecution also brought on record to show that this is not the first time where the husband has gone on assaulting his married

wife. On an earlier occasion some time in October, 1998 the victim was administered poison but because of timely medical help made available to

her, she survived.

15. The learned Counsel for the accused Appellant has tried to impress upon us that this may not be a case of murder u/s 300 IPC. On perusal of

the materials available on record and considering the medical evidence that the deceased sustained burn injury to the extent of 70% we are not

inclined to grant any benefit to the accused on this count and this being a case of bride burning, no sympathy to the accused is called for.

16. In the result, we find no merit in this appeal and the appeal is accordingly dismissed.