
(2014) 3 CALLT 379

Calcutta High Court

Case No: CRA No. 804 of 2009

Sudip Mazumdar

APPELLANT

Vs

State of W. Bengal

RESPONDENT

Date of Decision: Dec. 24, 2013

Citation: (2014) 3 CALLT 379

Hon'ble Judges: Tapen Sen, J; Arijit Banerjee, J

Bench: Division Bench

Final Decision: Allowed

Judgement

Arijit Banerjee, J.

This is an appeal against the judgment dated 10th December, 2009, by the Additional Sessions Judge, 4th Court, Nadia

passed in Sessions Trial No. 1(8) of 2006 (Sessions Case No. 104(11) of 2005), whereby the Learned Trial Judge has held the appellants herein

guilty of charges under sections 302/34 of the IPC and sentenced the appellants to life imprisonment and has also imposed fine on them. The

appellant No. 1 Sudip Majumdar is the brother of the deceased namely Mahua Das @ Maman. The appellant No. 2 Manos Das is the husband of

the deceased. The prosecution case arises out of a first information report lodged on 3rd June, 2005, at about 11.35 hours. The written complaint

was filed at the instance of one Shankar Saha, who is a tenant in the ground floor of the building where the mother of the deceased resides and

where the deceased resided with her mother for about a year prior to her death. It is alleged in the written complaint that on 3rd June, 2005 at

about 1 a.m., on hearing hue and cry, the said Shankar Saha went to the first floor of the said building and found that the deceased was lying near

the door of the kitchen and that she was ablaze. It is further alleged that the mother of the deceased poured water on the body of the deceased to

put off fire while Sudip and Manos were standing in front of the door and abusing the deceased and her mother Anjana. On seeing the deceased

on fire Shankar raised an alarm and some people of the neighbourhood rushed to the spot. The mother of the deceased and one Gitarani Sarkar,

another tenant on the ground floor of the said building carried the deceased in burned condition to Pratap Nagar Hospital. The deceased Mahua

told at Pratap Nagar Hospital that her elder brother and husband had set fire on her. This is the crux of the written complaint.

2. Mahua was subsequently referred to Shakti Nagar Hospital and then to SSKM Hospital, Calcutta, where Mahua succumbed to her burn

injuries and died on 23rd June, 2005. The post mortem report records that her death was due to the effects of burn with secondary infection, ante-

mortem in nature.

3. The entire case hinges on multiple dying declarations/statements made by the deceased to different persons at different times. Exhibit-5 and

Exhibit 5/1 is a recording by the doctor at the Nabadwip State General Hospital made on 3rd June, 2005 at about 1.45 a.m. It records that the

extent of burn is about 70 per cent. In the said document it is also recorded as follows:

She gives the statement that her elder brother and her husband put Koil on her and gave fire. Her mother also gives same statement.

4. It appears that the words "and husband" have been subsequently inserted.

5. The second so called dying declaration/statement is referred to in the FIR as indicated above.

6. The third dying declaration/statement was made before doctor Subhas Chandra Pal (PW-9) who in his evidence said that in the emergency

room the patient Mahua Das made a statement to him that her elder brother and her husband put kerosene oil on her and set her on fire. He also

said that Mahua"s mother also made the same statement. In fact, Exhibit-5 recording the dying declaration/statement was signed by PW-9.

7. The PW-10 Dr. Amalesh Chandra Saha in his evidence said that Mahua Das made statement before him that ""She was caught fire by her

husband and elder brother."" He also said in his evidence that at the time the patient made the statement before him she was conscious and restless

and that at that time the ward sister Reshmi Mondol and Dr. Subhas chandra Pal (PW-9) were also present.

8. The official dying declaration/statement if one may describe it as such, was recorded by the PW-18, Sri A.K. Mookherjee, who was at the

relevant time Deputy Magistrate-cum-Deputy Collector, Nadia, Krishnanagar. In his evidence PW-18 stated as follows:

On 3.6.2005 I recorded dying declaration of Smt. Mahua Das, W/o Sri Manos Das.....on that date at about 2 p.m. I reported at Sadar

Hospital, Nadia for the purpose of recording dying declaration of Mahua das and showed the requisitions to the doctor present at the emergency

section of the Hospital. The doctor took me to the female psychological ward (burn ward) of Sadar Hospital, one staff nurse Arati Rani Saha was

also present and identified Mahua Das to me. The ward master certified to the effect that the patient was mentally fit. I do not know the name and

particular of the person whether he is a doctor or not. At the time I examined Mahua Das, the patient was under the constraints of suffering and

was restless. She was gasping and could hardly speak. I can recollect that the patient Mahua Das made dying declaration before me in disjuncted

manner. It could be made out that she was in a suffering and pain at the relevant time..... The statement was recorded by me on 3.6.2005 from

2.45 p.m. to 3.20 p.m. During this period the patient uttered "Kerosene tel dhele agun dharia dieche husband"." In cross-examination PW-18 said

that before recording the dying declaration of Mahua Das, he did not make any endorsement in his report that she was mentally fit to make any

statement before him.

9. Mr. Milon Mookherjee, learned Senior Counsel appearing for the appellants has submitted that dying declarations or statements have been

made to different persons over a period of more than 12 hours after the alleged incident. The First Information Report was lodged on 3rd June,

2005 at about 11-35 hours by P.W. 1 and the same was scribed by P.W 2. In the said First Information Report, there is a mention of a dying

declaration made for the first time before the doctor at the Hospital which rules out the possibility of the deceased having made any statement

about how she caught fire to P.Ws. 1, 2, 6 or 7. He urged that this fact attains importance in view of the evidence laid by P.Ws. 1, 2, 6 and 7 that

the deceased, at the first point of time, when the alleged incident took place i.e. at 1.00 a.m. on 3rd June, 2005, told them as to how she had

received the burn injury on her body. This according to Learned Counsel, goes to show that there is serious embellishment/exaggeration on the

part of the above referred witnesses to state something which was never said at the first point of time. Further, when the First Information Report

was lodged by P.W. 1, there is no whisper about the presence of P.Ws. 2, 6, 7 or 8 at the scene of occurrence and there is only mention of

presence of P.W 3 and P.W. 16.

10. As regards Exhibit-V which contains the dying statement made allegedly by the deceased to P.W 9, Mr. Mookherjee submits that the same is

devoid of a very important particular i.e. whether the lady was capable of making a statement. Exhibit-V initially speaks of history of burn of 70

per cent and then the treatment chart is given. There is no detail as to the victim's mental condition and whether she was in a fit state of mind to

make such statement. Furthermore, the statement recorded by the doctor is not in question and answer form but in the form of narration wherein

the name of the appellant No. 2 has been subsequently inserted. He submits that this dying statement, even if accepted to be true, cannot be taken

into account because this circumstance was not put to the appellants during the course of their examination u/s 313 of the Code of Criminal

Procedure. No conviction can lie if such circumstance, on which the prosecution intends to rely, is not put to the accused persons. In this

connection, Mr. Mookherjee relies on the Supreme Court decision in the case of Sharad Birdhichand Sarda Vs. State of Maharashtra, In

paragraph 142 of the said judgment the Supreme Court observed as follows:

Apart from the aforesaid comments there is one vital defect in some of the circumstances mentioned above and relied upon by the High Court,

viz., circumstances Nos. 4, 5, 6, 8, 9, 11, 12, 13, 16 and 17. As these circumstances were not put to the appellant in his statement u/s 313 of the

Criminal Procedure Code they must be completely excluded from consideration because the appellant did not have any chance to explain them.

This has been consistently held by this Court as far back as 1953 where in the case of Hate Singh Bhagat Singh Vs. State of Madhya Bharat, this

Court held that any circumstance in respect of which an accused was not examined u/s 342 of the Criminal Procedure Code cannot be used

against him. Ever since this decision, there is a catena of authorities of this Court uniformly taking the view that unless the circumstances appearing

against an accused is put to him in his examination u/s 342 or section 313 of the Criminal Procedure Code, the same cannot be used against him.

In Shamu Balu Chaugule Vs. State of Maharashtra, this Court held thus:

The fact that the appellant was said to be absconding, not having been put to him u/s 342, Criminal Procedure Code, could not be used against

him.

11. As regards the dying statement allegedly made to P.W 10, Mr. Mookherjee submits that the same cannot be taken into account also as the

question put to the appellant No. 1 in his examination u/s 313 of the Code of Criminal Procedure relating to P.W 10 was -""Your sister told

something to him as dying statement."" The exact words allegedly spoken by the deceased were never put to the appellants and the appellants lost

their valuable right, as guaranteed to them, to explain the circumstance against them, submitted Mr. Mookherjee.

12. Mr. Mookherjee then submitted that the only dying declaration, the rest being mere statements, is the one which the deceased made to the

Executive Magistrate i.e. P.W 18 on the self-same day at 2.45 p.m.-3.20 p.m. i.e. 13 hours after the alleged incident. The statement was recorded

in the presence of a Ward Master who was never examined, nor was the lady who had identified Mahua Das, examined. Even, accepting the

statement to be true, what was put to the appellant No. 1 u/s 313 of the Code of Criminal Procedure was - ""Kerosene tel dhele agun dhorie

dieche her husband"", while what was put to the appellant No. 2 u/s 313 of the Code of Criminal Procedure was - ""The witness No. 18 Arindam

Sengupta recorded dying declaration of your wife and she stated that his brother poured kerosene oil on her body and you set fire. What do you

want to say about it?"" Mr. Mookherjee submitted that the aforesaid would go to show that the dying declaration is either manufactured or was

never made at all. Furthermore, the learned Counsel has specifically stated that Mahua was gasping for breath and no endorsement was made in

the report that she was mentally fit to make a statement.

13. Mr. Mookherjee further submitted that the dying declarations vary in their content and are not consistent. The statements made to the doctor

speak about the participation of both the appellants, while the dying declaration made to the Executive Magistrate which has been relied upon by

the Learned Judge for conviction talks of participation only of the husband.

14. Mahua died on 23rd June, 2005 while the incident took place on 3rd June, 2005. Even though she had shown signs of improvement while in

hospital as per P.W. 14, no statement was recorded when she was in hospital for 20 days. In view of the above, Mr. Mookherjee submitted that

there is no basis for convicting the appellants.

15. Mr. Mookherjee then submitted that in the instant case four witnesses were declared hostile namely, Gitarani Sarkar (P.W.-3), Indira Sarkar

(P.W. -4), and daughter of P.W.-3, Laxmi Sarkar (P.W.-5) and daughter of P.W.-3 and Anjana Majumdar (P.W.-16) who is the mother of the

deceased and the appellant No. 1 and the mother-in-law of the appellant No. 2. These witnesses who were declared hostile are witnesses whose

presence has been accepted by the other witnesses. Relying on sections 154 and 145 of the Evidence Act, Mr. Mookherjee argued that no

contradiction was taken by the Public Prosecutor from P.W. 16 as to her statement made previously to P.W. 19 being the Investigating Officer.

As such, the evidence of P.W. 16 becomes substantive piece of evidence and the appellants are entitled to an order of acquittal on this score alone

if the evidence of P.W. 16 is taken in its entirety.

16. In this connection, it is important to note that P.W. 16 in her evidence stated, inter alia, as follows:

The occurrence took place at about 1.00 to 1.30 a.m. in the night between 2.6.2005 and 3.6.2005. On 2.6.2005 at about 10.30 a.m. my son-in-

law Manos Das had come to my house at Banacharibagan. At the relevant time my son-in-law Manos Das used to reside in a rented house at

Narkelia within P.S. Gaighata. On 2.6.2005 we had our dinner and went to bed at about 11 to 11.30 p.m. At about 1.00 to 1.30 a.m. I heard my

daughter Mahua raising alarm "ma bachao", "Dada bachao", "Manos bachao". Mahua was crying for help from the kitchen situated on the first

floor of the house on its western side. When I left my room and went out I saw Mahua was burning inside the kitchen room. I also started crying

and asked my daughter "Mana ki korli, mana ki korli". I opened the lock of the grill gate, and ran down stairs to call people from down stairs for

help. I called Gitarani Sarkar. My son Sudip and Manos, the son-in-law poured water on Mahua, she was crying out of pain. Later, Gitarani

Sarkar and I took Mahua to Pratapnagar Hospital. Sudip, Manos and Gitarani Sarkar brought down Mahua from the first floor. Thereafter,

Gitarani Sarkar and I proceeded to S.G. Hospital, Nabadwip with Mahua. My daughter was treated by Dr. Pal at Nabadwip hospital and,

thereafter, she was referred to Shaktinagar Hospital. My daughter Mahua died at SSKM Hospital on 23.6.2005 due to her burn injuries.

17. In her cross-examination, P.W. 16 stated that it is not a fact that Mahua had bad relationship with her husband and her brother and it is not a

fact that the accused persons set Mahua to fire and killed her.

18. Mr. Mookherjee submitted that P.W.s 3, 4 and 5 corroborated the statements of P.W. 16 and no contradiction was taken from them by the

Public Prosecutor. He submitted that the evidence of P.W.s 3, 4, 5 and 16 should be accepted in their entirety and if such evidence is accepted

there will be no other alternative but to set aside the order of conviction. In this connection, Mr. Mookherjee relied on the Division Bench decision

of this Court in the case of Emperor Vs. Ajit Kumar Ghosh and Others,

19. Mr. Mookherjee then submitted that when a case rests entirely on circumstantial evidence, like the present case, a motive has to be attributed

to the accused persons. In the instant case, admittedly there is no eye witness and even though the husband is convicted, there is no evidence of

motive behind such act. It is not a case of dowry death and hence, there is total absence of motive. He relied on the Supreme Court decision in the

case of Sharad v. State of Maharashtra supra and submitted that in a case based on circumstantial evidence the following conditions have to be

fulfilled for conviction as laid down by the Supreme Court of India:

i) The circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned "must or should"

and not "may be" established.

ii) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explained on

any other hypothesis except that the accused is guilty.

iii) The circumstances should be of a conclusive nature and tendency.

iv) They should exclude every possible hypothesis except the one to be proved, and

v) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the

accused and must show that in all human probability the act must have been done by the accused.

20. Mr. Mookherjee submitted that going by the above guidelines also conviction of the accused persons must necessarily be set aside and they should be acquitted.

21. Finally Mr. Mookherjee submitted that P.W.s 1, 2, 6, 7 and 8 cannot be trusted at all. It is the specific case of the said witnesses that before

the victim was taken to hospital the appellants were arrested by the Police i.e. between 1 a.m. to 1.45 a.m. When the Investigating Officer (P.W.

20) was confronted, he specifically stated that he arrested the appellants from their house at 13.40 hours that is to say after the First Information

Report was lodged at 11.35 hours. Mr. Mookherjee further submitted that the said witnesses who are relatives of each other had an axe to grind

against the present appellants as they had tenancy dispute with P.W. 16 and this fact has been stated by the appellant No. 1 in his examination u/s

313 of the Code of Criminal Procedure.

22. Appearing for the State, Mr. Prasun Dutta, Learned Advocate has submitted that if a dying declaration is made voluntarily and truthfully by a

person who is physically in a condition to make such statement then there is impediment to relying on such a declaration. He submitted that some

degree of inconsistency between more than one dying declarations/statements would not render the same invalid. He relied on the decisions of the

Hon"ble Supreme Court in the cases of Kanaksingh Raisingh Rav Vs. State of Gujarat, Harbans Lal and another Vs. State of Haryana, and

Hiraman Vs. State of Maharashtra, which are all decisions on section 32 of the Evidence Act and submitted that the conviction of the appellants

should be upheld.

23. We have carefully considered the submissions made by the respected Counsels for the parties and we find considerable merit and substance in

the submissions made by Learned Counsel for the appellants. The conviction is based entirely on the dying declarations/statements. It is trite law

that for a dying declaration to be the bases of a conviction, the same must be clear and unambiguous. As noticed above, in the instant case, there

are multiple dying declarations and there is inconsistency between the same. This creates a reasonable doubt in our mind as regards the authenticity

and or reliability of such dying declarations/statements. It is elementary law that in a criminal action the standard of proof is "beyond reasonable

doubt". This is so because the consequences for the accused if convicted, are very severe.

24. We find no reason to disbelieve the evidence of P.W. 16 being the mother of the deceased. If such evidence is to be believed, it appears that

this was a case of suicide where the deceased set herself on fire on a moment of rage and it is an admitted fact that on the date of incident there

was a quarrel between the deceased and her brother. The evidence of P.W. 16 also indicates that the deceased was calling out for help from her

brother and husband being the appellants herein and the appellants were trying to put out the fire by pouring water on the deceased.

25. We also find complete absence of motive on the part of the appellants in murdering the deceased. This was not a case of dowry death and the

prosecution has not been able to ascribe any motive to the appellants.

26. The conviction is based on circumstantial evidence and admittedly, there are no eye-witnesses. Going by the guideline laid down by the

Hon"ble Supreme Court of India in the case of Sharad v. State of Maharashtra supra, it cannot be said that in the instant case there is a chain of

evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and necessarily shows

that in all human probability the act must have been done by the appellants.

27. In a criminal appeal against conviction like the present one, in order to succeed, all that the appellant/accused needs to do is to create a

shadow of doubt in the mind of the Court as regards the correctness of the Trial Court"s decision. In our view, in the present case the appellant"s

Learned Counsel have succeed in doing so and we are unable to say that the alleged guilt of the appellants have been proved beyond reasonable

doubt. For the reasons afore stated, we feel compelled to give benefit of doubt to the appellants. Accordingly, the judgment and order of the

Learned Trial Court is set aside and the appellants stand acquitted of the charges brought against them. The appellants will be released if they are

still in jail. The appeal thus stands allowed.

Let the Lower Court Records be sent down forthwith.

Tapen Sen, J.

I agree.