

GAHC010282242019



**THE GAUHATI HIGH COURT**  
**(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)**

**Case No. : CRL.A(J)/117/2019**

MANISH KUMAR DAS @ RAJA  
GOALPARA, ASSAM.

VERSUS

THE STATE OF ASSAM AND ANR.  
REP. BY PP, ASSAM.

2:SRI DHARANI KANTA KALITA  
S/O- LATE KHARGESWAR KALITA  
VILL.- FOFONGA PART-II  
PS- AGIA  
DISTRICT- GOALPARA  
ASSA

**BEFORE**

**HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA**

**HON'BLE MR. JUSTICE PARTHIVJYOTI SAIKIA**

For the appellant : Ms. B. Sharma .... Amicus Curiae.

For the respondent no.1 : Ms. S. Jahan .... Additional PP, Assam.

For the respondent no.2 : Mr. S. Dutta .... Advocate

Date of hearing : 14.02.2023

Date of judgment : 16.02.2023

## **JUDGMENT AND ORDER (CAV)**

(M. Zothankhuma, J)

Heard Ms. B Sharma, learned Amicus Curiae and Ms. S Jahan, learned Addl. Public Prosecutor. Also heard Mr. S Dutta for the respondent (Informant).

2. This appeal has been filed against the Judgment & Order dated 22.07.2019 passed by the learned Sessions Judge, Goalpara in Sessions Case No. 289/2017, by which the appellant has been convicted under Section 302 IPC and sentenced to undergo imprisonment for life and to pay a fine of Rs. 10,000/-, in default, to undergo Simple Imprisonment for 6 (six) months.

3. The learned Amicus Curiae submits that there was no eye witness to the incident and that the statement of the daughter of the deceased, recorded under Section 164 Cr.P.C cannot be admissible as evidence, as the daughter of the deceased was not examined by the learned Trial Court. The learned Amicus Curiae also submits that the neighbours of the appellant have also adduced evidence, to the effect that, they did not know as to how the deceased got burnt. Further, as the husband (appellant) had taken the deceased to the Hospital, the same would imply that the appellant was, in fact trying to save the deceased from the injuries sustained by the deceased. She accordingly prays that the impugned judgment & order should be set aside.

4. Ms. S. Jahan, learned Addl. Public Prosecutor submits that she does not have any quarrel with the submission made by the learned Amicus Curiae, that the statement given by the daughter of the deceased under Section 164 Cr.P.C

cannot be admissible as evidence, in view of the fact that the daughter of the deceased was not examined by the learned Trial Court and neither was the statement under Section 164 Cr.P.C exhibited by the Ld. Magistrate, who recorded the statement. She however submits that the dying declaration of the deceased was recorded by the Doctor Somser Ali (PW-7) on 20.04.2011 and witnessed by a male-nurse (PW-11), which states that the appellant had burnt his deceased wife, by pouring kerosene over her and setting her ablaze. The learned Addl. Public Prosecutor also submits that the deceased had told PW-2, 3 & 10 that that she had been burnt by the appellant (her husband), who had poured kerosene over her. She also submits that the evidence of the I.O (PW-12) and the evidence of the Doctor Dipak Kr. Sarma (PW-8), who conducted the post-mortem on the deceased on 21.04.2011, clearly shows that the death of the deceased was caused due to the burn injuries suffered by the deceased. As the ingredients of 302 IPC were present in the case, there was no infirmity with the impugned judgment & order. Accordingly, the appeal should be dismissed.

5. Mr. S. Dutta, learned counsel for the respondent No. 2 reiterates the same submissions made by the learned Addl. Public Prosecutor.

6. We have heard the learned counsels for the parties.

7. The prosecution story of the case is that the father of the deceased submitted an FIR dated 20.04.2011 before the Officer-in-Charge, Goalpara Police Station, stating that the informant's daughter was set on fire by her husband after pouring kerosene oil on her. The informant's daughter was then taken to the Goalpara Civil Hospital. As the condition of the victim was critical, she was referred to the Gauhati Medial College & Hospital. However, on the way

to Gauhati Medial College & Hospital from Goalpara Civil Hospital, the victim passed away in Bako. The deceased was then brought back to Goalpara Civil Hospital, where Post Mortem was done.

8. On the basis of the FIR submitted by the informant, Goalpara P.S. Case No.145/2011 under Sections 302/304B/34 of IPC was registered. The Investigating Officer investigated the matter and on finding that a *prima facie* case was found against the appellant under Sections 304B IPC and 302 IPC, charge-sheet was filed.

9. The learned Sessions Court/Trial Court framed 2 (two) charges against the appellant under Sections 304B IPC and 302 IPC, to which the appellant pleaded "not guilty" and claimed trial. Thereafter the learned Trial Court examined 12 (twelve) Prosecution witnesses during trial. The accused appellant was also examined under Section 313 Cr.P.C. wherein he said that he had nothing to say in respect of the 13 questions put to him.

10. The learned Trial Court thereafter came to a finding that the appellant was guilty of the offence under Section 302 IPC and convicted him under Section 302 IPC, vide the impugned Judgment & Order dated 22.07.2019 passed in Sessions Case No. 289/2017.

The appellant was sentenced to undergo imprisonment for life and to pay a fine of Rs. 10,000/-, in default, to undergo Simple Imprisonment for 6 (six) months.

11. With regard to the stand taken by the learned Amicus Curiae, which has not been controverted by the learned Additional Public Prosecutor, that the statement given by the daughter of the deceased under Section 164 Cr.P.C. is in-admissible in evidence, this Court is also of the view that the same is in-admissible in evidence. The reason being that the said statement made by the daughter of the deceased was not exhibited by the person who recorded the statement and also due to the fact that the maker of the statement was not examined by the learned Trial Court.

12. With regard to the stand taken by the learned Amicus Curiae that the fact that the appellant had taken the deceased to the hospital implies that the appellant was in fact trying to save the deceased, is not borne out by the evidence adduced by the witnesses in the learned Trial Court. The evidence of PW-7 Dr. Somser Ali, who was the Senior Medical & Health Officer at Goalpara Civil Hospital in attendance on 20.04.2011, is to the effect that he recorded the dying declaration of the deceased, which is to the effect that the deceased had stated, that the appellant who was under the influence of alcohol beat her and set her on fire, after pouring kerosene on her body. The dying declaration was recorded by PW-7 and was exhibited as Ext.4. The signature of the PW-7 was also exhibited as Ext.4(1).

The dying declaration which was recorded by PW—7 and witnessed by PW-11 is as follows :

*“Dying Declaration*

*I am Nibha Das, W/o Manish Das, Swaraj Road, Goalpara (Police Station). Around 10 a.m. today he returned home in inebriated state, assaulted me, poured kerosene oil on me and set me ablaze. After that he brought me to the*

*hospital."*

13. The evidence of PW-11, who was the male-nurse in attendance in Goalpara Civil Hospital is to the effect that he provided first aid to the deceased, while PW-7 attended to the deceased prior to her death. PW-11 also states that PW-7 recorded the statement of the deceased, wherein she disclosed that her husband, under the influence of alcohol had beaten her and poured kerosene oil and set fire to her. He also identified the dying declaration, which was exhibited as Ext.4 and identified his signature, which was exhibited as Ext.4(2). The evidence of PW-7 and PW-11 has not been shaken or controverted by the appellant in cross-examination. Further, we find the evidence of PW-7 and PW-11 to be truthful and inspires the confidence of the Court, inasmuch as, they are both independent public witnesses and not interested witnesses.

14. The evidence of the mother of the deceased (PW-2), elder brother of the deceased (PW-3) and uncle of the deceased (PW-10), is to the effect that they had seen the deceased in the hospital while she was alive, with burn injuries on her body and she was able to speak. They also stated in their evidence that the deceased had told them that her husband (appellant) had poured kerosene oil on her and set her on fire.

15. The evidence of the Investigating Officer (IO), who is PW-12, is to the effect that he proceeded to Goalpara Civil Hospital, where he interrogated and recorded the statement of the deceased. PW-12 also states that he submitted a prayer before the doctor to record the dying declaration of the deceased. Thereafter the doctor recorded the dying declaration of the deceased.

Subsequently, PW-12 also examined the other witnesses and visited the place of occurrence. He also states that the deceased died on the way to Gauhati Medical College & Hospital, for which the dead body was brought back to Goalpara Civil Hospital. An inquest was held by an Executive Magistrate and Post Mortem was done thereafter.

16. The evidence of Dr. Dipak Kr. Sarma (PW-8), Senior Medical & Health Officer at Goalpara Civil Hospital is to the effect that he performed the post mortem examination on the dead body of the deceased on 21.04.2011 and in his opinion, death was due to neurogenic and hypovolumic shock as a result of 80% superficial burn which was ante mortem in nature. He also exhibited the Post Mortem Report as Ext.5 and his signature as Ext.5(1). He also states in his cross-examination that a patient having an injury of such a nature may talk for a certain period before death.

17. The evidence adduced by the other witnesses need not be gone into as there is nothing in their evidence which contradicts the evidence given by PW-2, PW-3, PW-7, PW-8, PW-10, PW-11 and PW-12.

18. The evidence adduced clearly show that the appellant had set the deceased on fire and that the deceased had died due to burn injuries suffered by her. On considering the dying declaration and the corroboration of the same by the evidence adduced by PW-7 and PW-11, besides the evidence of PW-2, PW-3, PW-10 and PW-12, we are of the view that the dying declaration was voluntary and truthful, so as to considered to be a dying declaration of the

deceased. No evidence has been adduced, which is inconsistent with the dying declaration.

19. The Apex Court in the case of ***Mehiboobsab Abbasabi Nadaf vs State of Karnataka***, reported in ***(2007) 13 SCC 112*** has held that conviction can indisputably be based on a dying declaration. However, before it can be acted upon, the same must be held to have been rendered voluntarily and truthfully. Consistency in the dying declaration is the relevant factor for placing full reliance thereupon.

20. Further, in view of the complete denial and silence on the part of the appellant, with regard to the questions put to him under Section 313 Cr.P.C., this Court is of the view that an adverse inference can be drawn against the appellant that he was guilty of the offence under Section 302 IPC, besides keeping in view the fact that the dying declaration of the deceased inspires the confidence of this Court. We are also of the view that dying declaration of the deceased was correctly recorded by the PW-7 Dr. Somser Ali.

21. In view of the reasons stated above, we do not find any ground to interfere with the Judgment & Order dated 22.07.2019 passed by the learned Sessions Judge, Goalpara in Sessions Case No. 289/2017.

22. The appeal is accordingly dismissed. Send back the LCR.

23. In appreciation of the assistance provided by the learned Amicus Curiae,



her fee is fixed at Rs.8,500/-, which should be paid by the State Legal Services Authority.

**JUDGE**

**JUDGE**

**Comparing Assistant**