

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 470 OF 2015

KAMAL KHUDAL

...APPELLANT

Versus

STATE OF ASSAM

...RESPONDENT

J U D G M E N T

J.B. PARDIWALA, J. :

1. This appeal, by special leave, is at the instance of a convict accused of the offence of murder and is directed against the judgment and order passed by the Gauhati High Court dismissing the Criminal Appeal No. 86 of 2010 by which it affirmed the judgment and order of conviction passed by the Additional Sessions Judge (FTC), Sivasagar in the Sessions Case No. 57 of 2008 dated 10.06.2010.

2. It appears from the materials on record that in all three accused persons were put on trial in the Court of the Additional Sessions Judge (FTC), Sivasagar, including the appellant herein. All the three accused were charged with the offence punishable under Section 302 read with Section 34 of the Indian Penal Code (for short, "IPC"). The

trial court, vide its judgment dated 10.06.2010, held the appellant herein along with one Munna Bhoi (A-1) guilty of the offence of murder punishable under Section 302 IPC and sentenced them to undergo life imprisonment with fine of Rs. 2,000/- each and in default of payment of fine, further rigorous imprisonment for a period of two months. The third co-accused Bipon Bhoi was given the benefit of doubt and he came to be acquitted.

3. The case of the prosecution may be summarized as under:

4. On 15.07.2007 at about 7 o'clock in the morning the appellant herein along with the co-accused (Munna Bhoi) came to the house of the deceased, namely, Uttam Dutta. The accused persons took the deceased along with them for the purpose of paddy plantation. When the deceased left with the accused persons in the morning, his brother Utpal Dutta was present at the house. The deceased did not return to his house till late evening. The family members of the deceased got worried and started searching for him. The dead body of the deceased was found lying in a drain of Duribam Tea Estate with various injuries on the body, including burn injuries. No sooner the dead body of the deceased was recovered, then his brother Utpal Dutta went to the police station and registered the First Information Report (FIR). The FIR was registered as Kakatibari P.S. Case No. 24/2007 for the offence punishable under Section 302 of the IPC.

5. Upon registration of the FIR, the investigation started. The investigation revealed that the co-accused Munna Bhoi was running a liquor (local) factory situated adjacent to his paddy field. The deceased after working for sometime in the paddy field accompanied the accused persons to the liquor factory. Something went wrong while the accused persons and the deceased were in the liquor factory. The locals working in the vicinity of the liquor factory heard some commotion coming from the liquor factory. After sometime, the locals saw the deceased coming out of the factory with burn injuries on his body. One of the prosecution witnesses Hanu Khetrapal (PW-2), who was present in the nearby agricultural field, enquired with the deceased as to what had happened. At that point of time, the deceased is said to have informed the PW-2 that the accused persons had poured hot *lali* (raw material used for preparing local liquor) on his body as a result of which he had suffered burn injuries. Saying so, the deceased left and thereafter his dead body was recovered from the drain of Duribam Tea Estate.

6. During the course of investigation, the investigating agency arrested three persons, namely, Munna Bhoi, Kamal Khudal (appellant herein) and Bapon Bhoi. On completion of the investigation, charge sheet was filed against all the three accused for the offence of murder. As the offence was exclusively triable by the Sessions Court,

the Magistrate in whose court the charge sheet was filed committed the case to the court of the Sessions Judge, Sivasagar under Section 209 of the Code of Criminal Procedure, 1973 (for short, "CrPC"). The trial court proceeded to frame charge against all the three accused persons for the offence punishable under Section 302 read with Section 34 of the IPC vide order dated 11.09.2008.

7. It appears from the materials on record that the prosecution in all examined 8 witnesses. At the end of the trial, the trial court held the appellant herein, along with Munna Bhoi, guilty of the offence of murder of the deceased and sentenced them to undergo life imprisonment with fine of Rs. 2,000/- each. As noted above, the third accused, namely, Bipun Bhoi came to be acquitted.

8. The appellant herein being dissatisfied with the judgment and order of conviction passed by the trial court preferred the Criminal Appeal No. 86 of 2010 in the Gauhati High Court. The co-accused Munna Bhoi also preferred an appeal which was registered as the Criminal Appeal No. 87 of 2010. Both the appeals were heard together and by a common judgment dated 20.12.2013 both were ordered to be dismissed.

9. In such circumstances referred to above, the appellant is here before this Court with the present appeal. We are informed that the co-accused Munna Bhoi thought fit not to question the judgment of

the High Court.

SUBMISSIONS :-

10. Mr. Vivek Sharma, the learned counsel appearing for the appellant, vehemently submitted that the trial court committed a serious error in holding the appellant accused guilty of the offence of murder. He would submit that the High Court also committed a serious error in upholding the judgment and order of conviction passed by the trial court. According to the learned counsel, the case on hand is one of “not reliable legal evidence”. He would submit that the entire conviction of the appellant is based on a oral dying declaration alleged to have been made by the deceased before the PW-2, namely, Hanu Khetrapal. This so called oral dying declaration of the deceased ought not to have been relied upon by the trial court as well as by the High Court as the same does not inspire any confidence. The learned counsel would submit that as a rule of prudence the courts below should have insisted for corroboration before relying upon an oral dying declaration which otherwise is a weak piece of evidence. He would submit that had the dying declaration been recorded in writing by an Executive Magistrate some sanctity could have been attached to the same. However, it would be too dangerous to place any reliance on an uncorroborated oral dying declaration made before a local person.

11. The learned counsel would further submit that the case at hand

is one of circumstantial evidence. Conviction can be based on circumstantial evidence provided there are incriminating circumstances pointing only towards the guilt of the accused. He would further submit that although the first informant, PW-1 Utpal Dutta (brother of the deceased) has deposed that early in the morning the accused persons had come at his house and had asked the deceased to join them for the paddy plantation, yet this circumstance, by itself, cannot be termed as an incriminating circumstance. It cannot be said to be a circumstance of last seen together.

12. In such circumstances referred to above, the learned counsel for the appellant prays that there being merit his appeal, the same may be allowed and the impugned judgment and order passed by the High Court as well as by the trial court be quashed and set aside and the accused appellant be acquitted of the charge of murder.

13. The State of Assam, although served with the notice issued by this Court, yet thought fit not to oppose the present appeal.

ANALYSIS :

14. Having heard the learned counsel appearing for the appellant and having gone through materials on record, the only question that falls for our consideration is whether the High Court committed any error in dismissing the criminal appeal filed by the appellant herein against the judgment and order of conviction passed by the trial

court ?

15. We must first look into the medical evidence on record. The prosecution has examined Dr. Nirmal Ch. Chutia (PW-9) as one of its witnesses to prove the post mortem report of the deceased. Dr. Chutia at the relevant point of time was serving as the Senior Medical & Health Officer at the Civil Hospital, Sivasagar. In his examination-in-chief, he has deposed that the dead body of one Uttam Dutta (deceased) aged 36 years was brought at the hospital for the purpose of post mortem. In the post mortem report, the following injuries were noted :-

“1) External appearance :

A male dead body, aged approximately 36 years, rigormortis present.

2) Wounds :-

There are multiple dark achimost areas—seen on left side of the chest wall, Chest and forehead. Approximately 75% of body surface area are burnt. Superficial skin is burnt off. Wound are antemortem in nature.

3) Cranium and Spinal Canal :

All organ are healthy.

4) Thorax :

Multiple fractures on the left side and haemothorax with laceration of left lungs.

5) Abdoman :

Organs are healthy.

6) Muscles, bones and joints---healthy.”

16. Dr. Chutia (PW-9) further deposed that there were 75% burn injuries on the body of the victim. The superficial skin was found burnt. Multiple dark ecchymosis were to be seen on the left side of the chest and forehead. Ecchymosis means discolouring of skin resulting from blood underneath. He had deposed that the injuries were ante mortem in nature. He certified the cause of death due to shock and haemorrhage resulting from chest & skull injuries and skull injuries. He had also deposed that multiple injuries on the thorax of the victim were also noticed.

17. Hanu Khetrapal (PW-2) in his examination-in-chief had deposed that on the date of incident at about 10 in the morning he was ploughing his field. He saw that the deceased was also ploughing the agricultural field of Munna Bhoi along with the other accused persons. He had deposed that there was a liquor (local) factory owned by Munna Bhoi situated adjacent to his agricultural field. PW-2 further deposed that he saw all the accused persons along with the deceased going towards the liquor factory. After some time, he heard some noise coming from the factory. The deceased came to the field of PW-2 and informed him that the accused persons had poured hot *lali* (raw material used for preparing local liquor) on his body as a result he had suffered burn injuries. According to the PW-2, the deceased thereafter

left the place. The defence has not been able to elicit anything substantial in the cross examination of PW-2 rendering his evidence doubtful in any manner.

18. The trial court placed reliance on the following circumstances, as noted in para 19 of its judgment, to hold the accused appellant guilty of the offence of murder:

“(i) Accused Munna and Kamal went to the house of the victim at about 7 a.m. on 15.7.2007 and brought the victim along with him.

(ii) P.W. 2 saw the victim along with all the accused persons in the paddy field of the accused Munna Bhui till 10 a.m. on the date of occurrence. According to P.W. 2 all the accused persons and the victim left the field and went to the liquor factory of the Munna Bhui. He heard some noise there. After a while, the victim returned back and P.W. 2 saw some injury on his body. The victim was in abnormal state at that time.

(iii) The dead body was recovered in a drain of Duribam Tea Estate. P.Ws. have clearly stated that the skin of the victim was removed from the body and according to them, the skin was removed due to burnt injuries caused by hot water.

(iv) The doctor has opined that about 75% of the body was burnt and the superficial skin was burnt off due to application of hot water.

(v) Ext. 1 was prepared on 15.7.2007 by the I.O. had detected burnt injuries on the body of the victim caused by hot water.

(vi) Accused Munna Bhui was arrested on 18.7.2007, accused Bipon was arrested on 19.7.2007 and Kamal was arrested on 23.7.2007. All the accused were absconding themselves in order to avoid arrest.”

19. The High Court, upon re-appreciation of the entire evidence, concurred with the reasons assigned by the trial court in its judgment and order holding the appellant herein guilty of the offence of murder. The High Court accepted the oral dying declaration to be true and trustworthy said to have been made by the deceased to the PW-2.

20. We are of the view, having regard to the evidence on record, that High Court was justified in accepting the oral dying declaration made by the deceased before the PW-2 as one reliable and inspiring confidence.

21. The law regarding the nature, scope and value as a piece of evidence of oral and written dying declarations is now fairly well settled by various judicial decisions of this Court. A dying declaration, oral or written, before it could be relied upon, must pass a test of reliability as it is a statement made in the absence of the accused and there is no opportunity to the accused even to put it through the fire of cross examination to test its genuinity or veracity. The court has, therefore, to subject it to close scrutiny. But once the court is satisfied that it is a truthful version as to the circumstances in which the death resulted and the persons causing injuries, the law does not expect that there should be corroboration before it can be relied upon. However, if there are infirmities and the court does not find it safe to base any conclusion on it without some further evidence to support it,

the question of corroboration arises.

22. We may refer to one of the decisions of this Court in the case of ***Heikrujam Chaoba Singh v. State of Manipur***, (1999) 8 SCC 458, wherein in para 3 this Court observed as under:

“3. An oral dying declaration no doubt can form the basis of conviction, though the Courts seek for corroboration as a rule of prudence. But before the said declaration can be acted upon, the Court must be satisfied about the truthfulness of the same and that the said declaration was made by the deceased while he was in a fit condition to make the statement. The dying declaration has to be taken as a whole and the witness who deposes about such oral declaration to him must pass the scrutiny of reliability. ...”

23. ***“Truth sits upon the lips of a dying man.”***

- Matthew Arnold

24. The whole idea of accepting a statement in the name of dying declaration comes from a maxim *“Nemo moriturus praesumitur mentire”* which means that a man will not meet his maker with a lie in his mouth. It is believed that when a man is at the point of death and when every expectation of this world is gone, it hushes away every motive of lie.

25. In our view, the oral evidence of the PW-2, namely, Hanu Khetrupal is quite natural. On the day of occurrence, he was working in his agricultural field. His presence in his field could be said to be natural. There is no good reason for Hanu Khetrupal (PW-2) to come

before the trial court and depose falsely against the accused persons. It is not even the case of the accused appellant herein that Hanu Khetrapal (PW-2) had some axe to grind against him, including the other co-accused and, therefore, fabricated the entire story of an oral dying declaration. Besides the same, the oral dying declaration of the deceased made before Hanu Khetrapal (PW-2) stands corroborated with the medical evidence on record. The medical evidence on record would suggest that there were 75% burn injuries on the chest of the deceased. The burn injuries were suffered by the deceased as the accused persons are said to have poured hot *lali* (raw material used for preparing liquor).

26. We also take notice of the fact that the appellant herein came to be arrested on 23rd of July, 2007, that is, almost after about 8 days from the date of incident. He was absconding. He was not available at his house. The appellant accused in his further statement recorded under Section 313 of the CrPC has not explained where he was between 15.07.2007 and 23.07.2007, that is, till the date of his arrest. This is one another incriminating circumstance and, if taken into consideration with the other circumstances on record, would bear some relevance while deciding the guilt of the accused.

27. It appears from the materials on record, more particularly from the nature of the oral evidence, that something went wrong while the

deceased and the accused persons were inside the liquor factory. It appears to be a case of sudden fight. It could be on account of some verbal altercation between the deceased and the accused persons while they were inside the liquor factory.

28. In the overall view of the matter, we are convinced that there is no good reason to interfere in the present appeal. We do not find any fundamental or basic infirmity in the impugned judgment of the High Court going to the root of the matter calling for any interference by this Court.

29. In the result, this appeal fails and is hereby dismissed.

.....J.
(SURYA KANT)

.....J.
(J.B. PARDIWALA)

**NEW DELHI;
JULY 14, 2022**