

**IN THE GAUHATI HIGH COURT
(THE HIGH COURT OF ASSAM; NAGALAND; MIZORAM & ARUNACHAL
PRADESH)**

**ITANAGAR PERMANENT BENCH
NAHARLAGUN**

Crl. A. No.03 (AP) of 2017

Shri Tapujya @ Jaan @ Probin Hazarika,

S/o Shri Modan Hazarika, Village – Tarajuli,

P.O. – Pathalipahar, PS- Bihpuria,

District – North Lakhimpur, Assam,

Presently in Jail custody at District Jail, Jolly, Itanagar

.....Appellant.

Advocates for the Appellant:

Mr. M. G. Singh,

Mr. N. Kago,

Mr. M. K. Dutta,

Ms. S. Khumukcham,

-VERSUS-

1. The State of Arunachal Pradesh,

represented through the learned Public Prosecutor,
Arunachal Pradesh.

2. Shri Sriram Barua,

S/o Late Bapai Barua

Village – Tarajuli, P.S. – Bhipuria,

P.O. – Pathali Pahar,

District – Lakhimpur.

.....Respondents.

Advocates for the respondents:

Ms. M. Tang, learned Additional Public Prosecutor, Arunachal Pradesh,

Ms. D. Yoka,

Mr. K. Bagra,

Mr. B. Lego,

:::BEFORE:::

HON'BLE MR. JUSTICE SONGKHUPCHUNG SERTO

HON'BLE MR. JUSTICE AJIT BORTHAKUR

Date of hearing - **30.10.2017.**

Date of judgment - **10.11.2017.**

JUDGMENT & ORDER (CAV)

(AJIT BORTHAKUR, J)

This appeal under Section 374 (2) CrPC has been preferred against the judgment and order, dated 17.01.2017, passed in Sessions Case No.28/2012 (YPA) under Sections 302/304B of the IPC by the learned Sessions Judge, West Sessions Division, Yupia, Arunachal Pradesh, whereby the accused/appellant has been held guilty under Section 304 Part-1 of the IPC and sentenced him to undergo rigorous imprisonment for 10(ten) years and to pay fine of Rs.20,000/-(Rupees Twenty Thousand) only, in default to undergo rigorous imprisonment for 2(two) years.

2. We have heard Mr. M. G. Singh, learned counsel appearing for the accused/appellant and Ms. M. Tang, learned Additional Public Prosecutor, Arunachal Pradesh for the respondent No. 1 as well as Ms. D. Yoka, learned counsel appearing for the respondent No. 2/the informant.

3. The respondent No. 2, Sriram Baruah lodged an FIR before the Officer-in-Charge of Naharlagun P.S. on 05.07.2012, alleging that his daughter, namely, Jyoti Baruah, aged about 21(twenty one) years, who got married with the accused/appellant, only 02(two) years back and stayed together at the Industrial Area at Naharlagun, Arunachal Pradesh for the last 01(one) year, was set on fire by her husband/the accused on 04.07.2012, at about 23:30 hours after pouring diesel oil on her. His daughter Jyoti sustained severe burn injury and was admitted at R.K. Mission Hospital, Itanagar, Arunachal Pradesh in serious condition.

4. Based on the above FIR, Naharlagun P.S. Case No.86/2012, under Sections 307/498A IPC was registered and the Officer-in-Charge endorsed the case to S.I. Techhi Naga to investigate. S.I. Techhi Naga, the Investigating Officer, visited the place of occurrence, seized some materials, recorded the statement of the victim, namely, Jyoti at R. K. Mission Hospital, Itanagar, where she was undergoing treatment and also recorded the statements of the witnesses. In course of medical treatment, the victim Jyoti succumbed to her burn injuries and thereupon, the I.O. held inquest at the said hospital. After completion of investigation, the I.O. submitted the Charge-sheet under Section 304B IPC against the accused/appellant. Thereafter, as the charge sheeted offence is exclusively triable by the Court of Sessions, the learned Judicial Magistrate, First Class, Yupia, Papum Pare district by an order, dated

14.10.2012, passed in GR Case No.257/2012, after complying necessary formalities required under Section 207 CrPC, committed the case under Section 209 CrPC to the Court of learned Sessions Judge, West Sessions Division, Yupia for trial.

5. On hearing the learned counsel of both the sides and examination of the materials available on the case diary, the learned Sessions Judge framed charges under Sections 302/304B IPC against the accused, vide order, dated 15.02.2013. The charges were read over and explained to the accused, to which he pleaded not guilty and claimed to be tried. Thereafter, the prosecution, in order to establish the charges, examined 09(nine) witnesses. After closing the evidence of the prosecution side, the accused was examined under Section 313 CrPC, vide order, dated 17.03.2015. He denied all the incriminating evidence that emerged against him and declined to examine any witness in defence. The learned trial Court, after hearing the learned counsel of both the sides and appreciation of evidence on record held the accused guilty of the charge under Section 304 Part-1 IPC and convicted and sentenced him, as stated above.

6. The appellant father of the convicted accused, in his memo of appeal and Mr. M. Singh, learned counsel appearing on his behalf submitted that the learned trial Court failed to appreciate the evidence led by the prosecution from proper perspective and totally ignored the defence evidence. Mr. Singh, pointing out the purported

dying declaration of the victim, submitted that despite the same being not admissible under Section 32 of the Evidence Act, the learned trial Court relied on it and further, that the prosecution has failed to examine the material witnesses, who witnessed the victim disclosing that she caught burn injury accidentally. As such, Mr. Singh submitted that there is no cogent and convincing evidence on record to warrant a conviction of the accused under Section 304 Part-1 IPC.

7. Ms. M. Tang, learned Additional Public Prosecutor for the State respondent No. 1 and Ms. D. Yoka, learned counsel appearing on behalf of the respondent No.2/ the informant have relied on P. Ext.-3, the purported dying declaration of the victim, recorded by PW-5, the doctor, with reference to the principles laid by the Supreme Court in (2014) 10 SCC 336 and (2014) 12 SCC 646.

8. Section 304 creates no offence, but provides the punishment for culpable homicide not amounting to murder. A plain reading of the first part of the Section makes it clear that it is punishable where the accused causes bodily injury to the victim with intention to cause death; or with intention to cause such bodily injury as is likely to cause death.

9. In the instant case, P. Ext.-1 is the First Information Report (FIR), dated 05.07.2012, lodged by the victim's father PW-1, Sriram Baruah, on the following day of the incident of burning of his daughter Jyoti Baruah, who was married 02(two) years ago to the

accused. PW-1, the informant, who is a resident of North Lakhimpur, at the relevant time of the incident, was at Guwahati and on receipt of the information about the incident, he rushed to Naharlagun and after visiting her daughter at R. K. Mission Hospital, where she was undergoing treatment and having come to know about the incident in detail from her, he lodged the FIR accordingly. His (PW-1) evidence shows that at the time of his visit to the hospital, the victim could not speak properly, but, with difficulty, she narrated the incident to him to the effect that her husband, the accused poured oil on her body and then, set fire with match stick to her. The victim died on 12.07.2012 at about 12.45 pm. His evidence further reveals that the police, after completion of necessary formalities, handed over the dead body to him. He recognized P. Ext.-2, the inquest report, M. Ext.-1(a), and M. Ext. 1(b), the photographs of the victim.

10. The cross-examination of the informant (PW-1), reveals, *interalia*, that the accused, took away his deceased daughter, Jyoti, as his wife, on 15.07.2010, from his house and he had never visited their house at Naharlagun, but, his wife (PW-2) visited their place of stay.

11. The evidence of PW-2, Putuli Baruah, the mother of the victim Jyoti, is akin to the evidence of her husband PW-1. In the relevant night of the incident, she was at Tarajuli and having learnt about the incident from the employer of the accused, i.e. the owner of the Best Baker, namely, Chaku, she rushed to Itanagar along with her

son and one village elderly person. At Itanagar, she went to R. K. Mission Hospital, where her daughter was admitted and found her daughter receiving burn injury on her whole body. Thus, from the evidence of PWs-1 & 2, the father and mother of the deceased respectively, it is seen that they did not witness the alleged incident and therefore, their evidence is based on, what they came to know from their deceased daughter Jyoti, while she was undergoing treatment in R. K. Mission Hospital at Itanagar for about 09(nine) days.

12. Now, let us turn to the evidence of the neighbors of the house of the accused and the deceased, namely, PW-3, Pulin Basumatary, PW- 4, Mahendra Gogoi, PW – 6, Diganta Boro, and PW- 7, Sarat Baruah. There is no dispute that the incident occurred in one room of the quarters of the employees, where the accused and his deceased wife and the witnesses, aforementioned, stayed. The place of occurrence, located at A- Sector, Naharlagun town, is indicated in the rough sketch map of the place of occurrence vide Ext.-7, prepared by PW-9, S.I. Techhi Naga, the I.O., during investigation. From the evidence of PWs-3, 4 & 6, it is noticed that in the relevant evening at around 8-9 pm, the accused visited their rooms of stay twice for tobacco and then, for 'tiranga', a kind of manufactured tobacco and then he went back to his room. The evidence of PW-4, Mahendra Gogoi also reveals similar behavior of the accused at around 8.30 pm, who visited their house and took tobacco. After a

little while thereof, commotion broke out at the room of the accused and thereupon, they stepped out and saw the accused holding his wife, who had received extensive burn injury, by her back. They brought a vehicle through PW-3 and forthwith shifted the victim, Jyoti to R. K. Mission Hospital at Itanagar for treatment and got her admitted there. The accused also accompanied them to the Hospital. The cross-examination of the PWs-3 & 4 reveal that at the Hospital, the victim told before the attending doctor that she caught fire accidentally from a burning candle by herself. From their (PWs-3, 4 & 6) evidence, it transpires that they did not witness any incident of quarrel between the accused and his deceased wife Jyoti, just before the incident.

13. The above ocular testimony of the relevant prosecution witnesses, thus, does not reveal beyond doubt that the accused, in fact, harboured any criminal intention to cause death by burning of his wife Jyoti which is further deciphered from the various other circumstantial evidence discussed below.

14. PW-8, Dr. T. Darang, the doctor, who attended the deceased on 04.07.2012 at about 10.30 pm, at R.K. Mission Hospital at Itanagar, deposed that he came to know from the attendant, who accompanied the victim that she sustained burn injury accidentally. It is, therefore, clear from the evidence of the neighboring witnesses, namely, PWs-3, 4 & 6, that they did not witness the actual incident while taking place at their adjacent room occupied by

the victim, but, corroborated the fact of sustaining burn injury by the deceased, when her husband/the accused was present. PW-7, Sarat Baruah, was also an adjacent resident to the place of occurrence, but, at the relevant time, he was not at his room and on the following day morning at his work place, he heard about the incident that took place on the previous night at the accused's house to the effect that the wife of the accused sustained burn injury and then she was taken to the hospital for treatment. According to him, later on, the police came and seized one jerkin containing diesel oil and one bottle by police by P. Ext.-5, the seizure memo from the place of occurrence. PW-9, S.I. Techhi Naga, the I.O., corroborated this fact of seizure of diesel oil containing jerkin and one bottle, but in cross-examination, stated that those seized materials were not seen in the Court and those articles were not sent to the Forensic Science Laboratory (FSL) for examination by finger print expert. It is also noticed that those seized articles were not even shown to the PW-7, the seizure witness for identification. Therefore, we find that Ext.-5, the seizure memo is not proved and on the other hand, it could not be inferred legally that those seized containers contained any diesel oil, which is an inflammable substance for want of the chemical examiner's report.

15. Turning to the evidence of PW-8, Dr. T. Darang, the doctor of R. K. Mission Hospital, who examined the victim Jyoti on 04.07.2012 at about 10.30 pm, found that she sustained 80% burn injury on her

head, neck and all over the body and limbs, vide P. Ext.-6, the injury report and M. Ext.-1(a) & 1(b) are the photographs of the injured. In cross-examination, the doctor (PW-8), stated that as recorded in his report vide P. Ext.-6, the burn injury was sustained accidentally as per statements of the victim and her husband-the accused. Therefore, the said first doctor's (PW-8) evidence is consistent with the evidence of PWs-3 & 6, so far their statement that as stated by the victim at Hospital, she sustained burn injury from a burning candle accidentally.

16. The evidence of PW-5, Dr. Sunny Hage, the doctor, recorded the dying declaration of the patient Jyoti Hazarika @ Maina Hazarika, on 09.07.2012, vide P. Ext.-3, which reads as follows:

"I Jyoti Hazarika D/o Sriram Baruah give this statement without any undue pressure, knowing the critical state of my health, give this statement. My husband Tapujya Hazarika @ Probin Hazarika, after having a fight with me on 04.07.2012 at around 10.30 Pm at our residence, poured diesel over my clothes and set fire with a match stick. He has been physically abusive previously and a previous police report was also filed about 1 year back in Banderdewa P.S."

17. The doctor (PW-5) stated that at the time of recording the dying declaration, one sister of the Hospital namely, Deepsikha Das, was present and she put her signature, vide P. Ext.-3(d). He (PW-5) further stated that after recording the statement of the victim, she

put her signature in full, vide P.Ext.-3(e). The doctor (PW-5) also prepared the medico-legal report of the victim and found as follows:

"Alleged history of accidental burns on 04.07.2012 at around 11.00 pm. Fire accidentally by a candle.

No breathlessness, pain on abdomen, patient conscious, oriented, 2nd degree burns over whole body. Lower part of face, burn area 85 %. Nature of injury:- Dangerous".

18. The doctor (PW-5) recognized P. Ext.-4, the above injury report prepared by him. According to the doctor, as the patient sustained more than 85% injury, so, she was under critical condition and over the time, her condition deteriorated and ultimately, she expired on 12.07.2012 at about 2.45 am.

19. In cross-examination, the doctor (PW-5), *interalia*, stated that he did not obtain any order from the Magistrate for recording the dying declaration. However, the I.O. by his letter, dated 06.07.2012, requested the emergency Medical Officer of the R. K. Mission Hospital, which is, of course, not found on case record. The doctor further stated that at the time of recording her dying declaration, the patient was in a fit state of mind and the victim spoke in Hindi language to which he understands and translated into English and reduced into writing. The dying declaration was not recorded in the form of questionnaire. The doctor (PW-5) enquired from the victim, as to what had happened leading her to that position, she gave the statement accordingly. The accused was not present at the time of recording her dying declaration.

20. The Apex Court in the case of ***Prempal Vs. State of Haryana*** reported in, ***(2014) 10 SCC 336*** held that:

"12. When reliance is placed upon dying declaration, the Court must be satisfied that the dying declaration is true, voluntary and not as a result of either tutoring or prompting or a product of imagination. The Court must be further satisfied that the deceased was in a fit state of mind. In State of U.P. V. Ram Sagar Yadav, reported in (1985) 1 SCC 552 this Court held that if the Court is satisfied that the dying declaration is true and voluntary, it can base conviction on it without corroboration. In this context, the observations made in para 13 of the judgment are relevant to be noted:

"13. It is well settled that, as a matter of law, a dying declaration can be acted upon without corroboration. There is not even a rule of prudence which has hardened into a rule of law that a dying declaration cannot be acted upon unless it is corroborated. The primary effort of the Court has to be to find out whether the dying declaration is true. If it is, no question of corroboration arises. It is only if the circumstances surrounding the dying declaration are not clear or convincing that the Court may, for its assurance, look for corroboration to the dying declaration."

21. The Apex Court in another case of ***Perm Kumar Gulati Vs. State of Haryana & Anr.***, reported in ***(2014) 14 SCC 646*** held that:

"13. It is well settled that a truthful and eligible dying declaration may form the sole basis of conviction even though it is not corroborated. However, the reliability of dying declaration should be subjected to close scrutiny and the Courts must be satisfied that the dying declaration is truthful."

22. In the case of ***Suresh Vs. State***, reported in, ***AIR 1987 SCC 860***, the Apex Court held that where a doctor recorded the dying declaration and deposed to the effect that the deceased dying of burns, was capable of deposing and was in senses when the dying declaration was recorded, conviction based on such declaration cannot be interfered with.

23. Yet in another case of ***Sayarabano Vs. State of Maharashtra***, reported in ***(2007) 12 SCC 562***, the Supreme Court held that the criminal cases are decided on factual merit assessed on the basis of evidence rather than on law and precedence and that a dying declaration becomes acceptable, which fits in with other available evidence and conviction thereon would be sustainable. On the other hand, in ***Lella Srinivasa Rao Vs. State of A.P.***, reported in, ***(2004) 9 SCC 713***, the Apex Court held that it is not safe to rely on inconsistent dying declarations to convict the accused.

24. In the instant case, it appears to us that PW-8, Dr. T. Darang, the doctor who prepared the injury report, vide P.Ext.-6, on

04.07.2012, as about 10.30 pm, i.e. immediately after the victim woman was brought to the Hospital, recorded that as per statements of the victim and her husband, the victim sustained 80% burn injury accidentally from a candle, which is corroborated by PWs-3 & 6, the adjacent residents quoting the version of the victim herself disclosed immediately after the incident at the hospital. However, this material piece of evidence has been contradicted by PW-5, another doctor, who recorded the victim's dying declaration after 04(four) days of the occurrence on 09.07.2012, vide P. Ext.-3, wherein, the victim gave a different narration of the incident implicating her husband the accused as the perpetrator of the offence of burning of his wife. The prosecution appears to have not examined the Sister of the hospital namely, Deepsikha Das, who was present at the time of recording the said dying declaration, without explaining the reason for keeping her out of the witness box. Although the doctor has claimed to have recorded the aforesaid dying declaration as per requisition of the I.O. by his letter, dated 06.07.2012, requesting the emergency Medical Officer to record the victim's dying declaration, but, the same is admittedly not available on the case record. PW-9, the I.O. in his cross-examination, however, contradicted PW-5, the doctor deposing that he requested the doctor for recording the dying declaration, but, did not authorise for the purpose as the victim, as reported by the doctor, was in critical condition. We are not inclined to emphasize much on this

insignificant contradiction as in the backdrop of the life of the victim was on risk, there was nothing wrong on the part of the doctor in recording the victim's dying declaration, although she died after 02(two) days on 12.07.2012 at 2.45 am.

25. It is further noticed that PW-5, the doctor recorded the dying declaration in English, although the victim gave the statement in Hindi language and not in question and answer form. However, there is no evidence to show that after so recording of the dying declaration, the doctor read the same over to the victim and on admission of the victim that it was recorded as per her version, her signature vide Ext.-3(e) was obtained thereon. Thus, unfortunately, the aforesaid dying declaration of the victim suffers from inherent infirmities to inspire us to rely on, which are summarized below:

1. There appears apparent contradiction between the statements of the victim-woman, regarding the cause of sustaining burn injury, recorded in P. Ext.-6, dated 04.07.2012 by PW-8, the first doctor and in the dying declaration vide P. Ext.-3, dated 09.07.2012, recorded by PW-5, the second doctor, i.e. after 04(four) days of the incident, during the period of treatment.

2. The evidence of adjacent residents, namely, PW-3 Pulin Basumatary and PW-6 Diganta Basumatary is consistent to the cause of sustaining burn injury as recorded in P. Ext. 6, based on victim's statement, whereas there is no corroborative

testimony in support of the cause recorded in the purported dying declaration, vide P. Ext.-3.

3. The sister of R. K. Mission Hospital, namely, Deepsikha Das, who was allegedly present at the time of recording the dying declaration vide P. Ext.-3 was not examined, despite being a material witness, in absence of any corroborative testimony thereto, without any explanation.

4. PW-5, the second doctor, noted that at the time of recording the dying declaration vide P. Ext. -3, the victim was in 'critical state of health', meaning thereby at a time when she was passing through a time of danger or confusion to her life, obviously as opposed to 'fit state of mind' to satisfy that she consciously made the statement understanding the implication of the words, she used.

5. It is also noticed that the actual words used by the deceased were not recorded in P. Ext.-3 and it is merely a memorandum of what the deceased stated, rendering the statement not reliable beyond any shadow of doubt.

6. The prosecution appears to have not made any effort to prove the signature of the victim, vide P. Ext.-3(e), on her purported dying declaration to satisfy our conscience.

7. The prosecution has not explained the reason for not bringing on evidence the material facts stated by the victim in

regard to the incident in her statement recorded under Section 161 CrPC. during investigation.

8. There is no explanation as to why the seized gallon containing suspected diesel and the bottle and also the wearing partly burnt clothes of the victim were not forwarded to the FSL for chemical examination to ascertain whether the aforesaid seized liquid substance was in fact diesel and that it was used to set the victim on fire as recorded in the purported dying declaration vide Ext.-3. There was not even any iota of evidence to show that smell of diesel was present at the place of occurrence or in the seized clothes of the victim.

9. PW-9, S.I. Techhi Naga, the I.O. in his cross-examination admitted that he did not send the corpse of the victim for post mortem examination to ascertain the actual cause of her death i.e. whether by any inflammable substance like diesel oil or any other inflammable substance.

10. The evidence is clear enough showing that the deceased was admitted in hospital on 14.07.2012 at around 11 p.m., with history of accidental burn by a candle.

26. Having regard to the above attending facts and circumstances of inconsistency in evidence, we are of the opinion that the dying declaration vide Ext.-3, is not free from confusion and in such circumstances, presumption of innocence of the accused could not be ruled out. In the instant case, the entire prosecution case rests

on circumstantial evidence, giving rise to 02(two) different inferences, the one in favour of the accused that the victim caught fire accidentally from a burning candle or may be an intentional act of burning by her husband/the accused himself, of which two presumptions, it is well settled that the view which goes in favour of the accused should be accepted in principle.

27. We have also taken into consideration of the evidence tendered by DW-1, Bhuban Borah, the Gaonbura of Tripling village under Pathalipahar P.S in Lakhimpur district, Assam and DW-2 Basanta Hazarika of Titling village (Tarajuli) under Bihpuria P.S. in Lakhimpur district, Assam, who have cast on the previous history of possibility of the victim suffering from some kind of mental illness to bring an end to her life and soundness of behavior of the accused, although we are hesitant to put any reliance on the aforesaid defence evidence in the absence of some other independent credible evidence on such count.

28. From the statement of the accused, recorded under Section 313 CrPC, it appears that the victim herself poured water on herself to put out the fire and he also poured one bucket of water on an attempt to extinguish the fire and then he also shouted for help of neighbors, whereupon the neighbors rushed to the spot. According to him, he also sustained burn injury on both the hands. PW-9, the I.O., in his cross-examination stated that the accused was admitted in hospital for sustaining burn injury on his hands and so he was

arrested, after he was released from the hospital. There is no explanation on evidence to show that the accused sustained the injuries otherwise than in the incident and therefore, it casts a doubt on the genesis of the prosecution case since the evidence shows that he also sustained burn injury when attempt was made to extinguish the fire that caught in the clothes of his wife the victim was wearing at the relevant time, in course of the same incident.

29. Thus, considering the evidence in its entirety, we are constrained to hold the view that the prosecution case is not proved beyond all reasonable doubt and accordingly, we are of the opinion that the accused cannot rightly be held guilty of the charges.

30. Accordingly, the impugned judgment and order, is set aside and the accused convict is acquitted under Section 304 Part-1 IPC and set at liberty giving the benefit of doubt.

31. The appeal stands allowed accordingly.

Send back the LCRs along with a copy of this judgment and order.

JUDGE

JUDGE

Cha Gang