State of Assam

Vs

Mafizuddin Ahmed

Criminal Appeal No. 401 of 1976

(D.A. Desai, R.B. Misra JJ)

14.01.1983

JUDGMENT

MISRA, J.-

1. The present appeal by special leave has been filed by the State of Assam against the judgment of the Gauhati High Court dated September 25, 1975 whereby it set aside the conviction of the respondent Mafizuddin Ahmed and acquitted him of the charge of murder.

2. The prosecution case as unfolded in the first information report and the evidence is that the respondent Mafizuddin Ahmed was a Sub- Inspector of Police posted at Gauhati. His wife and children lived at his village home at Bholagaon within the Palashbari Police Station. The respondent had first married Jaygun Bibi and had one son and two daughters from her. Later on he married another lady Smt. Lal Bari and thereafter he started maltreating Jaygun Bibi. On April 10, 1973 he went to his village home and at about 2 p. m. he poured kerosene on his wife Jaygun Bibi and set fire to her body with the help of a matchbox. When she screamed the accused gagged her mouth and then wrapped her with a quilt and threw her on the floor. In so doing the respondent himself received some burn injuries on his hands. The village people hearing the cries came there and they took Jaygun Bibi as well as the respondent-accused to the Gauhati Medical College Hospital where they were admitted for treatment.

3. Alimuddin Ahmed was the uncle of Jaygun Bibi and lived at a distance of six miles from the house of the respondent. He received a news that the house of the respondent had burnt and that Mafizuddin and Jaygun Bibi had sustained burn injuries. A few days thereafter Alimuddin Ahmed's brother developed tetanus. He got him admitted in the Isolation Hospital at Kalapahar, Gauhati. From there he went to Gauhati Medical College Hospital on April 18, 1973 to see how Jaygun Bibi was faring. He met Jaygun Bibi and asked her how it happened and then he told that her husband had poured kerosene on her body and set fire. He, there upon went to the Sadar Police Station and made a report (Ex. 3). On receipt of the report police arrange for recording the dying declaration of Jaygun Bibi by a Magistrate as her condition was considered percarious. Shri A. C. Bhuyan (PW 2) recorded the dying declaration of Jaygun Bibi. Eventually Jaygun Bibi succumbed to her injuries on that very day.

4. The accused pleaded not guilty to the charge. His plea was one of denial. He, however, admitted that on April 10, 1973 his wife received serious burn injuries and later died an a result of her injuries at the Gauhati Medical College Hospital. His case was that on April 10, 1973 his house at Bholagaon caught the and at that time his wife wearing garments also accidentally caught fire. Having seen this he tried to extinguish the fire on her body by covering her with a quilt and in doing

so he himself received some burn injuries. He flatly denied that he poured kerosene on her body and then set fire as alleged.

5. The only eye-witness in the case in Mantaz Ali the son of the deceased Jaygun Bibi and the accused-respondent. He was of only 5 years and odd at the time of occurrence and of 7 years and add at the time of his deposition. The other material evidence relied upon by the prosecution are the two dying declarations, one being oral made to Alimuddin Ahmed, the uncle, and the other being written dying declaration recorded by the Magistrate Shri A. C. Bhuyan, PW 2.

6. The Sessions Judge on a consideration of the evidence adduced by the prosecution found that the charge under Section 302, IPC was fully brought home to the accused and accordingly convicted him thereunder and sentenced him to life imprisonment. On appeal, the High Court set aside the order of conviction and acquitted the respondent of the charge. The State of Assam, has as stated earlier, filed the above appeal by obtaining a special leave.

7. The contention raised before the High Court on behalf of the respondent was that the evidence was too meager and unreliable to sustain the conviction and the learned Sessions Judge failed to properly appreciate the same. The evidence which has been relied upon by the Sessions Judge for convicting the respondent was the evidence of the eye-witness Mantaz Ali, the child witness, and the two dying declarations, one oral and the other written for convicting the respondent. The High Court however, did not find it safe to convict the respondent on the basis of dying declaration and the statement of PW 7.

8. It has been contended for the State of Assam that the conviction could be based upon the dying declaration even if there is no other corroborating evidence on the record and reference was made to Tarachand Damu Sutar v. State of Maharashtra((1962) 2 SCR 775 : AIR 1962 SC 130 : 91963) 2 SCJ 17 : (1962) 1 Cri LJ 196) and Muniappan v. State of Madras((1962) 3 SCR 869 : AIR 1962 SC 1252 : (1962) 2 SCJ 21 : (1962) 2 Cri LJ 404) Mr. Goburdhan, counsel for the respondents accused, on the other hand contends that the dying declaration alone without corroboration cannot be made the basis of convicting that respondent and referred to Ram Nath Madhoprasad v. State of M. P.(AIR 1953 SC 420 : 1953 Cri LJ 1772)

9. This Court has consistently taken the view that conviction can be based upon the dying declaration alone. In Muniappan Case((1962) 3 SCR 869 : AIR 1962 SC 1252 : (1962) 2 SCJ 21 : (1962) 2 Cri LJ 404) the dying declaration was a completed statement which was categorical in character and there was nothing to show that the victim had anything more to say. This Court held that the dying declaration needed no corroboration and could be relied upon. In Khushal Rao v. State of Bombay(1958 SCR 552 : AIR 1958 SC 22 : 1958 SCJ 198 : 1958 Cri LJ 106) this Court held :

> .... in our opinion, there is no absolute rule of law, or even a rule of prudence which has ripened into a rule of law, that a dying declaration unless corroborated by other independent evidence, is not fit to be acted upon, and made the basis of a conviction.

The Court referred to the following observation made in Madhoprasad case (AIR 1953 SC 420 : 1953 Cri LJ 1772):

> It is settled law that it is not safe to convict an accused person merely on the evidence furnished by a dying declaration without further corroborate because such a

> statement is not made on oath and is not subject to cross-examination and because the maker of it might be mentally and physically in a state of confusion and might well be drawing upon his imagination while be was making the declaration. It is in this light that the different dying declarations made by the deceased and sought to be proved to the case have to be considered.
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> and observed that they were in the nature of obiter dicta.

10. In Lallubhai Devchand Sahai v. State of Gujarat(AIR 1972 SC 1776 : (1971) 3 SCC 767 : 1972 SCC (Cri) 13 : 1972 Cri LJ 828) dealing with a dying declaration this Court laid down : [SCC para S. p. 771; SCC (Cri) p. 17]

> The law with regard to dying declarations is very clear. A dying declaration must be closely scrutinised as to its truthfulness like any other important piece of evidence in the light of the surrounding facts and circumstances of the case, bearing in mind, on the one hand, that the statement is by a person who has not been examined in court on oath and, on the other hand, that the dying man is normally not likely to implicate innocent persons falsely.

Thus, the law is now well settled that there can be conviction on the basis of dying declaration and it is not at all necessary to have a corroboration provided the Court is satisfied that the dying declaration is a truthful dying declaration and not vitiated in any other manner.

11. We, therefore, find considerable force in the contention of the counsel for the State of Assam that there can be a conviction on the basis of of dying declaration even in the absence of other corroboration evidence but before doing so, the Court has to be satisfied about the truthfulness of the dying declaration.

12. In the instant case, the occurrence took place on April 10, 1973. The deceased was alive up to April 18, 1973. She did not disclose earlier to anyone she met in the hospital that her husband sprinkled kerosene and set her on fire. She met so many people after the occurrence - she met the village people who appeared on the scene just after the occurrence and who took her to hospital. She did not disclose the story to the doctor or the nurse attending on her. There is no evidence of the doctor on the record that she was not in a position to speak or that she had become unconscious between April 10 and April 18. It is only when her uncle met her on April 18 that she made on oral dying declaration to him and later to the Magistrate who recorded her statement. This throws doubt on the dying declaration made by Jaygun Bibi and this circumstance weighed with the High Court in disarming the dying declaration of the deceased. The High Court discarded the dying declaration on yet another ground that the name of the husband of the deceased given in the dying declaration was Mohsin Ali not Mafizuddin Ahmed and therefore, the identity of the lady Jaygun Bibi was itself doubtful. Dr. Ramananda Das, Registrar of the Surgical Unit No. 1 of the Gauhati Medical College Hospital, PW 6, in whose presence the statement was recorded, has not stated that the declarant was Jaygun Bibi. He has simply stated that the Magistrate recorded the statement of a patient of his unit who received the dying declaration of the Jaygun Bibi stated that the Daroga and a constable were present nearby when the statement was recorded. Coupled with these is the absence of the thumb impression of the deceased on the declaration.

13. The cumulative effect of all the circumstances which weighed with the High Court is that they cast doubt about the truthfulness of the dying declaration. It is not outside the realm of probability

that her statement may have been inspired by her uncle and, will not be so the conviction of respondent on such a dying declaration.

14. The other direct evidence is the deposition of PW 7, the son of the deceased, a lad of 7 years. The High Court has observed in its judgment :

> ... the evidence of a child witness is always dangerous unless it is available immediately after the occurrence an before there were any possibility of coaching and tutoring.

15. A bare perusal of the deposition of PW 7 convinces us that he was vacillating throughout and has deposed as he was asked to depose either by his nana or by his own uncle. It is true that we cannot expect much consistency in the deposition of this witness who was only a lad of 7 years. But from the tenor of his deposition it is evident that he was not a free agent and has been tutored at all stages by someone or the other.

16. He had told the police that he was in the mango grove at the time of occurrence. If this be a fact then he could not be an eye-witness of the occurrence but when he came to depose before the Court he said :

> Ahmed is my father's brother. He was not at home at the time of the occurrence. He came later. He taught me to tell police that I had been in the mango prove at the time of occurrence. That is why I told police so. Lather, in company with any maternal grandfather. Alimuddin I said what I had seen.

Again, the first thing that he uttered when the house caught fire is "Gharat Jui Lagil" (the house has caught fire). This statement is more in consonance with the defence theory. His mother was more important for him and if it was is fact that his father had set fire to his mother by sprinkling kerosene to which he was a witness be would not have omitted to say so. In the next breath he deposed that his father poured scented oil on his mother's body and not kerosene.

17. The fact that he was tutored is fully borne out by his own statement, as will be clear from the following portion of his deposition :

> "Nana" accompanied me when I came to depose in the Lower court, but stayed outside. I stated in that court that I had stated what "Nana" asked me to. The day before I came to depose I had told "Nana" what I would say.

18. It is also clear from the materials on the record that on the advice of the police Alimuddin Ahmed, the Nana of PW 7 applied for his custody during the enquiry proceedings but the Magistrate instead of giving custody to the Nana gave the custody of PW 7 to his Nani, who was no other than the wife of Alimuddin. So to all intents and purpose the custody of the boy remained with Alimuddin Ahmed, the Nana. Indeed, he took the boy for giving evidence in court. PW 7 was in the full control of the Nana and deposed as he was asked to depose. In this setting the observations made by the High Court is fully justified.

19. There are two other circumstances which also cannot be lost slight of. Covering the burning body of the Jaygun Bibi with quilt will help in extinguishing the fire. That will stop the passing of oxygen to the fire and the fire will automatically extinguish. The further fact that in so doing the husband also got burns on his hands goes a long way to support the defence version.

20. For the reasons given above the appeal must fail. It is accordingly dismissed.

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