A BRUNDABAN MOHARANA & ANR.

v.

THE STATE OF ORISSA

(Criminal Appeal 170 of 2006)

SEPTEMBER 28, 2010

B

[HARJIT SINGH BEDI AND CHANDRAMAULI KR. PRASAD, JJ.]

INDIAN PENAL CODE, 1860:

C *s.302/34 – Death of a married woman by burn injuries – Conviction by trail court of in-laws of deceased on the basis of dying declarations – High Court though discarding one dying declaration, but affirming the conviction relying on the dying declaration which was recorded by I.O. u/s.161 CrPC –* D *Held: In a murder case, no presumption in favour of the prosecution arises – The primary pieces of evidence against the accused are the two dying declarations, one made to PW-8 which has been disbelieved by the High Court and the other to PW-9, the I.O., which has been relied upon by the High* E *Court basing its opinion on the fact that this dying declaration was supported by the evidence of PW-3 and PW-7 as well – Both PW-3 and PW-7 were categoric that they had been present when the dying declaration was being recorded by PW-9 and were, therefore, witnesses to the contents of the* F *dying declaration – If a doubt can be cast by the defence that the injured was not in a position to make a dying declaration or that the dying declaration was itself shrouded in mysterious circumstances, the evidence of PW-3 and PW-7 would automatically fall through – The I.O. recorded the dying* G *declaration as a statement u/s 161 Cr.P.C. – In his cross-examination, he stated that condition of the victim was serious, though she was not able to talk, but she spoke in unconscious state – He also admitted that he had not recorded the statement of the Doctor who was treating the*

H

injured – No reliance can, therefore, be placed on this dying declaration as well – The statements of PW-3 and PW-7 allegedly supporting the dying declaration, would, ipso-facto, fall – Even assuming that PW-3 and PW-7 had indeed been present when the dying declaration was recorded, no credence could be attached to such a declaration as it would have been tantamount to tutoring of the injured by these two witnesses who were her uncle and father – The judgment of the High Court cannot be sustained and is set aside – Accused are acquitted – Evidence Act, 1872 – s.32 – Dying declaration – Code of Criminal Procedure, 1973 – s.161.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No(s). 170 of 2006.

From the Judgment & Order dated 09.09.2003 of the High Court of Orissa at Cuttack in Criminal Appeal No. 242 of 1994.

G. Prakash for the Appellants.

Shibashish Misra for the Respondent.

ORDER

This appeal arises out of the following facts.

1. Amani Moharana, since deceased had been married to Pitabas Moharana, son of appellants 2 and 3 about 5 years prior to the incident. It appears that the in-laws and the family members of the deceased started misbehaving with her soon after the marriage, and at about 7 pm. on 28th October 1990, in the course of a family quarrel Pitabas Moharana assaulted her and then moved towards the outer courtyard. Immediately thereafter, the in-laws of the deceased, that is the present appellants and their daughter Pokani came there and while Pokani caught hold of the deceased and tied her mouth with a towel, Gurubari, the mother-in-law sprinkled kerosene on her body and Brundaban, the father-in-law, set her ablaze. Unable to bear the pain, the deceased ran for her life and fell down near the door steps. She was, however, removed to the Naugaon dispensary where she was given first aid but as her

A condition was serious, she was moved to Jagatsinghpur hospital and thereafter to the S.C.B. Medical College & Hospital for treatment where she ultimately died. It is the case of the prosecution that while the deceased was being treated in the Naugaon dispensary she made a statement to Dr. Jena PW-4 B and told him that she had been first assaulted by her husband Pitabas Moharana and then set a fire by her-in-laws and sister-in-law. This information was conveyed to PW-1, the uncle of the deceased who lodged a First Information Report under Section 498A, 307/34 of the IPC. It appears that while the deceased C was admitted in the S.C.B. Medical College & Hospital PW-8, the attending Doctor, recorded another dying declaration of the deceased whereas PW-9, the Officer In-charge of the Naugaon Police Station had recorded yet another statement under Section 161 of the Cr.P.C. in the Naugaon dispensary. Amani, D however, died a short while later on which the offence was converted into one under Section 304-B of the IPC along with the other Sections mentioned above and after investigation the accused were charged for offences punishable under Section 302/34 and in the alternative under Section 304-B/34 and 498-A of the IPC. The trial court relying on the dying declarations E recorded by PW-8 and PW-9 convicted the appellants herein and the daughter Pokani under Section 302/34 of the IPC but acquitted the husband Pitabas Moharana. The trial court also found that in the absence of any material, the charge under Sections 498-A and 304-B of the IPC was not made out. An F appeal was thereafter taken to the High Court. The High Court observed that the only evidence with regard to the murder were the two dying declarations that had been recorded, one by PW-8, the Doctor in the Medical College and Hospital and the other by PW-9, the Investigating Officer who had recorded her G statement also in the Medical Hospital in the form a statement under Section 161 of the Cr.P.C. The Court, however, observed that the dying declaration recorded by PW-8 (Mark 6) had been produced in evidence in the form of a Xerox copy and as there was no evidence to show that the original had been destroyed H this document could not be taken in evidence as secondary

evidence. The High Court, accordingly, observed that it was constrained to discard the evidence of PW-8 in so far as it related to the dying declaration made before him. The High Court then examined the dying declaration made to PW-9 and marked as Ex.8. The Court noted that PW-9 had admitted in his cross-examination that though the injured was not in a position to talk, she had nevertheless spoken while in an unconscious state and her statement had, accordingly, been recorded as he was under the impression that she was not completely out of her senses. The Court observed that the dying declaration Ex.8 was also supported by the evidence of PW-3, a relative of the deceased who had been present there and confirmed the contents thereof which were to the effect that Pokani had caught hold of her and stuffed her mouth with a napkin whereas the other two had set her on fire. The Court also observed that a dying declaration had also been made by the deceased to her father PW-7 in similar terms and accordingly concluded that the dying declaration made to PW-9 was supported by the evidence of PW-3 and PW-7. The High Court, accordingly, dismissed the appeal. The present appeal by way of special leave has been filed by the in-laws of the deceased.

2. We see that we are dealing with a case of murder. No presumption in favour of the prosecution thus arises in this case. The primary pieces of evidence against the appellants are the two dying declarations, one made to PW-8 which has been disbelieved by the High Court and the other to PW-9, the Investigating Officer which has been relied upon by the High Court basing its opinion on the fact that this dying declaration was supported by the evidence of PW-3 and PW-7 as well. Both PW-3 and PW-7 were categoric that they had been present when the dying declaration was being recorded by PW-9 and were therefore witnesses to the contents of the dying declarations. In other words, if a doubt can be cast by the defence that the injured was not in a position to make a dying declaration or that the dying declaration was itself shrouded in

A mysterious circumstances, the evidence of PW-3 and 7 would automatically fall through. We have, accordingly, gone through the evidence of PW-9 very carefully. In his examination-in-chief, he deposed that on the 28th November 1990, he had received written information about a cognizable offence and a case
B under Section 498-A and 307 read with Section 34 of the IPC had been registered by him at the Naugaon Police Station and that he had thereafter proceeded to the Naugaon Primary Health Centre and recorded the dying declaration as a statement under Section 161 of the Cr.P.C. In his cross-
C examination, he stated as under:

> "Amani was lying on the verandah of the P.H.C. When I first reached the P.H.C. I found Amani lying on the verandah, her condition was serious, though she was not able to talk but she spoke in unconscious state and I
D recorded her statement U/s 161 Cr.P.C. At very first of my asking she did not tell anything but I told near her ear in a little bit loud voice that I am Bada Babu (O.I.C of Police Station) and I had come to know as to how she received injury. Thereafter, she gave her statement which I recorded.
E This fact I have not noted in my case diary but I replied so when the defence counsel cross examined me about her state of mind."

3. He also admitted that he had not recorded the statement
F of the Doctor who was treating the injured. We are of the opinion that in the light of the aforesaid statement as the very capacity of the injured to make a statement was in doubt, some support could have been found by the prosecution had the attending doctor been examined or an endorsement taken from
G him that the injured was fit to make a statement. On the contrary, however, the PW-9 admitted that though the statement had been recorded in the presence of PW-3 and PW-7 as well as the doctor, he had still not taken his opinion. No reliance can, therefore, be placed on this dying declaration as well.

H 4. As already indicated above, if the dying declaration Ex.8

falls through, the statements of PW-3 and PW-7 allegedly supporting the dying declaration, would, ipso-facto, fall. Even assuming for a moment that PW-3 and PW-7 had indeed been present when the dying declaration was recorded, no credence could be attached to such a declaration as it would have been tantamount to tutoring of the injured by these two witnesses who were her uncle and father. We are, therefore, of the opinion that the judgment cannot be sustained. We, accordingly, allow this appeal, set aside the order of the High Court and direct the appellants to be acquitted.

A B C

R.P. Appeal allowed.