

**In the High Court at Calcutta
Criminal Appellate Jurisdiction
Appellate Side**

The Hon'ble Justice Sabyasachi Bhattacharyya

C.R.A. No.199 of 2017

**Md. Makshud and others
Vs.
The State of West Bengal**

<i>Amicus Curaie</i>	:	Ms. Debadrita Mondal
For the State	:	Mr. Ranabir Roy Chowdhury, Mr. Iqbal Kabir
Hearing concluded on	:	15.09.2021
Judgment on	:	24.09.2021

Sabyasachi Bhattacharyya, J:-

1. The present challenge has been preferred against an order of conviction under Sections 308 and 34 of the Indian Penal Code (IPC) and consequential sentence.
2. Learned *Amicus Curiae* submits that the Trial Court proceeded primarily on the basis of a purported Dying Declaration (DD) of the victim which was vitiated by several factors. It is contended that the DD does not contain any allegation regarding the other charges initially levelled against the accused persons, that is, demand of dowry and torture on the victim.

3. Moreover, the Doctor who conducted post-mortem examination of the victim was not examined, nor was the post-mortem report exhibited. That apart, there was lack of proximity of the date of death of the victim from the date of incident alleged, of setting fire on the person of the victim. Without expert evidence, it is submitted, the expiry of the victim cannot be directly connected with the alleged incident of setting fire.
4. Over and above, the DD was in two different hand-writings and did not contain any mention about the mental state of the patient at the relevant point of time. Even the prosecution witnesses, including the Doctor who signed the DD and the Investigating Officer (IO), who were allegedly present at the time of such recording, did not state in their evidence that the victim was in appropriate mental state to give the DD at the relevant point of time.
5. The victim's signature or thumb impression does not appear in the statement. None of the other witnesses alleged to be present at the time of such recording have put their signatures in the DD as witnesses.
6. It is submitted that there is sufficient scope of doubt as to whether the victim succumbed to death due to the alleged incident of setting fire, which negates the alleged guilt of the accused persons beyond reasonable doubt.
7. Learned counsel for the State supports the impugned judgment and order of conviction, arguing that it is well-settled that the DD of the

victim, if otherwise credible, can be relied on solely to convict the accused persons. In the present case, the role of the appellants was clearly made out from the DD itself. That apart, the mere use of different inks and/or hand writings in noting down the DD cannot, *ipso facto*, be fatal to the credibility of the same, in view of both the Investigating Officer and the Doctor who examined the victim having signed the same.

8. That apart, there is sufficient evidence on record, as revealed from the corroborative evidence of the prosecution witness, to clinch the case against the accused.
9. The records reveal that, although initial several charges were clamped against the accused persons, the convict was awarded under Sections 308 and 34 of the IPC.
10. A mere reading of the DD (Exhibit 3/1) clearly reveals the active participation of all the appellants in the alleged incident of setting fire to the victim's body.
11. The role of Md. Makshud, who is the first appellant and the husband of the victim (since deceased), was present at the spot but did not do anything to prevent the other co-accused from setting the victim ablaze by pouring kerosene oil on her body. The DD further reveals that, for the past few days prior to the incident, altercations were going on between the victim and the co-accused persons. The expression "with them" in the final sentence of the DD further corroborates the motive of the appellants for setting the victim on fire.

- 12.** Although the victim's husband himself suffered "little" burn injuries and poured water on the victim, apparently to douse the fire, such act of pouring water could very well have been an afterthought. The abstinence of the victim's husband from protesting or obstructing the other co-accused in any manner from setting fire to the victim's body is itself sufficient to incriminate the husband both under Sections 308 and 34 of the IPC.
- 13.** The key words in Section 34 of the IPC are "common intention of all", which is clearly revealed from the deliberate inaction of the husband while the oil was being poured on his wife and she was being set on fire.
- 14.** Section 308 of the IPC, that is, attempt to commit culpable homicide, is also revealed clearly not only from the DD but also from the deposition of the prosecution witnesses.
- 15.** The primary argument of the appellants is that the DD itself ought not to have been relied upon for convicting the appellants.
- 16.** Such arguments cannot be accepted for several reasons. First, the statement made in the DD was cogent and succinct, making it all the more credible. An elaborate exposition of relevant details would rather be an indicator that the same had been recorded on instigation to the victim by others, as opposed to the present case.
- 17.** Secondly, the statement of the victim was taken on May 24, 2010, that is, three days after the occurrence of the alleged incident on May

21, 2010. Although the IO stated that initially he could not take the statement from the victim due to her physical condition, the statement was taken three days thereafter and sufficiently prior to the expiry of the victim (she died on June 24, 2010) to indicate her stable mental condition at the juncture of issuing the DD and, consequently, its credibility.

18. Moreover, both the IO and the concerned doctor signed on the DD. The mere depiction of two different hand writings in the DD *ipso facto* cannot vitiate its veracity. As per the deposition of the IO (PW6), the top portion of the statement, which enumerated the relevant details, was written by him and the second part was written by the doctor. The second part is the most relevant portion of the said statement. Since the same was jotted down by an expert in the field of medical practice, it can easily be presumed that the doctor was well aware about the mental state of the victim being sufficient to give such declaration; otherwise he would not have corroborated the DD in his oral evidence as well.
19. Under Section 14, Illustration (e) of the Evidence Act, 1872, it can be presumed that judicial and official acts have been regularly performed. In the present case, the transcription of the DD, which was an official act, gives rise to a presumption of correctness, which was never rebutted or shaken by any cogent evidence or in the cross-examinations of the relevant witnesses. Both the IO and the doctor

signed the DD as well as corroborated that the statement was given by the victim himself of her own volition, in their oral evidence.

- 20.** PW2, the victim's mother, also corroborated that similar statements as that of the DD were made by the victim herself to the PW2 as well.
- 21.** It is to be noted that, in the cross-examination of PW5 (the Doctor) and PW6 (the IO), no suggestion was put by the defence as to the actual mental state of the victim when her statement was taken. The only suggestion made to both the said witnesses in cross-examination was, whether the concerned mental state had been given in writing, which does not prove or disprove anything relevant. The absence of a specific statement in writing as regards the mental state of the patient at the relevant juncture is not fatal to the probative value of the DD, nor is the absence of the signature or thumb impression of the patient thereon a necessary ingredient thereof. Particularly, in cases of death from burn injuries, it is, more often than not, physically possible for the patient either to sign or put her left thumb impression (LTI) on the DD.
- 22.** PW4, the sister of the victim, corroborated in her evidence that the victim issued the DD in the presence of her family, when PW4 herself was there. PW3, the brother of the victim also corroborated that the victim was interrogated by the police in the presence of the Doctor.
- 23.** Although the post-mortem report was allegedly not exhibited, a copy of the same ought to have been sought to be exhibited by the defence itself, since it is the positive assertion of the defence that the death of

the victim did not occur due to the burn injuries inflicted from the alleged incident. It has been proved beyond reasonable doubt by corroborative evidence that the victim had been hospitalized immediately after the alleged incident on May 25, 2010 and breathed her last in the hospital itself on June 25, 2010, during continuation of such treatment and was never discharged in the interregnum.

- 24.** As such, the presumption of correctness of the reason of death of the victim can be taken in view of the chain of events as indicated above, applying the principle embodied in Section 114, illustration (d) of the Evidence Act, 1872. Since the treatment of the victim due to the burn injuries inflicted by the alleged incident was shown to be in continuation till her death after about a month thereafter, it was for the defence to rebut such presumption by calling for the Doctor who carried out the post-mortem and/or the post-mortem report or any other evidence to disprove that the continuation of the burn injuries was the reason of demise of the victim.
- 25.** The post-mortem report dated June 26, 2010, although not exhibited, is a part of the paper book, which indicates death due to septic absorption from infected burn ulcers.
- 26.** Although the appellant no. 1, the husband of the victim, apparently sustained burn injuries as well, those were minor in nature and were not proved to have been serious by the defence. The mere subsequent pretention of pouring fire on the body of the burning victim, who had previously been doused with kerosene oil and set ablaze without any protest from the husband, was a feeble afterthought to cover up the

direct involvement of the husband in his chosen inaction in not protesting or obstructing the co-accused from committing the brutal act in any manner whatsoever.

- 27.** In view of the aforesaid corroborative evidence, no doubt can be cast on the authenticity of the DD. Hence, the court below was perfectly justified in convicting the appellants on the charges under Section 308 and Section 34 of the IPC, which were the least of the charges which could be brought against them. There is no irregularity or lack of proportion in the sentence awarded against the appellants. As such, the impugned judgment and orders cannot be vitiated on such score as well.
- 28.** In the light of the above discussion, C.R.A. No. 199 of 2017 is dismissed, thereby affirming the judgment and orders of conviction and sentence dated February 28, 2018 and March 1, 2018 passed by the Additional Sessions Judge, First Track Court No. 1, at Barrackpore, in Sessions Trial No. 6(12)12, arising out of Sessions Case No. 165/2011 and confirming such conviction of sentence awarded against the appellant.
- 29.** Urgent certified copies of this order shall be supplied to the parties applying for the same, upon due compliance of all requisite formalities.

(Sabyasachi Bhattacharyya, J.)