

GAHC010023752021



**THE GAUHATI HIGH COURT**  
**(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)**

**Case No. : CrI.A./46/2021**

MD. HAFIJUR RAHMAN  
S/O- MD. SAHIDUL ISLAM, R/O- DHALIGAON, P.S. DHALIGAON, DIST.-  
CHIRANG.

VERSUS

THE STATE OF ASSAM AND ANR.  
REP. BY THE P.P., ASSAM

2:GUDDU ALI  
S/O- MONIRUDDIN  
R/O- NEW BONGAIGAON  
CHINESE MARKET  
P.S. AND DIST.- BONGAIGAON  
ASSA

**Advocate for the Petitioner : MR H R A CHOUDHURY**  
**Advocate for the Respondent : MS. S JAHAN(ADDL.PP, ASSAM)**

**BEFORE**  
**HONOURABLE MR. JUSTICE SUMAN SHYAM**  
**HONOURABLE MRS. JUSTICE MITALI THAKURIA**

**JUDGMENT & ORDER (CAV)**

**Date : 21-12-2022**  
***(Suman Shyam, J)***

Heard Mr. H.R.A. Choudhury, learned Sr. counsel assisted by Mr. A. Ahmed, learned counsel for the appellant. We have also heard Ms. S. Jahan, learned Addl. P.P. Assam

appearing for the State/ respondent No. 1. None has appeared for the respondent No. 2.

2. By the judgment and order dated 11-12-2020 passed by the learned Sessions Judge, Bongaigaon in connection with Sessions Case No. 17(BGN)/2017 the sole appellant was convicted under Section 302 read with Section 498(A) of the IPC. For the offence committed under section 302 IPC, the appellant was sentenced to undergo rigorous imprisonment for life and also to pay fine of Rs 5000/- , in default, to suffer simple imprisonment for 3 (three) months. For the offence committed under section 498-A IPC, the appellant was sentenced to undergo imprisonment for 2 (two) years and to pay fine of Rs 2000/- with default stipulation.

3. On 24-12-2016, an FIR was lodged by Sri. Guddu Ali, the younger brother of the victim, informing the Officer-in-Charge of the North Bongaigaon Police Station that the appellant/ accused No. 1 had got married with his elder sister *viz.* Musstt. Mamata Khatun (victim) about three months back. Since the time of her marriage the accused person has been torturing his sister physically and mentally, demanding properties. On 19-12-2016, at about 02:00 a.m. the accused No. 1, with the assistance of accused No. 2, had poured kerosene oil on the body of the victim and set her on fire with the intention of killing her. At present the victim was undergoing medical treatment in a critical condition in the Lower Assam Hospital. In the ejahar dated 24-12-2016, the appellant Md. Hafizur Rahman was shown as accused No. 1 whereas Md. Saifor Ali was named as the accused No. 2.

4. On receipt of the ejahar, North Bongaigaon PP GDE No. 614 dated 24-12-2016 was made and the ejahar was forwarded to the Officer-in-Charge of the Bongaigaon Police

Station for registering a case. Based on the ejahar dated 24-12-2016, Bongaigaon P.S. Case No. 822/2016 was registered under Sections 498(A)/307 of the IPC and Asstt. Sub-Inspector Police (ASI), Siba Prasad Kalita was entrusted with the responsibility of carrying out investigation. Two days thereafter, i.e. on 26-12-2016, the victim died in the hospital, as a result of which, Section 302 of the IPC was added. Upon completion of investigation, charge-sheet was submitted by the police against the appellant Hafijur, i.e. the husband of the victim, under Section 302 read with Section 498(A) of the IPC. However, the co-accused Safiur Ali was not sent up for trial due to want of evidence against him. The case was then committed for trial by the Session Judge. The learned trial court had framed charges against the appellant/ accused under Sections 302/498(A) of the IPC. The charges so framed, were read over and explained to the accused, to which, he had pleaded not guilty and claimed to be tried. As such, the matter went up for trial.

5. During trial, the prosecution had examined as many as 14 witnesses. Md. Sofiur Ali i.e. the accused No.2 named in the ejahar, was examined as a Court Witness (CW-1). The IO (PW-13) had recorded the statement of the victim in the hospital which was treated as her dying declaration. After recording the evidence of the prosecution side, statement of the accused was recorded under Section 313 Cr.P.C. In his statement u/s 313 the accused, while denying the incriminating circumstances put to him, had further stated that he was not present in his house when Mamata had caught fire. He was in the nearby house of his sister. Hearing the 'hulla' he came and saw Mamata was on fire. He doused the fire and took her to the hospital. As he ran out of money, a case was instituted against him and he was arrested.

6. Upon analyzing the evidence available on record including the dying declaration of the victim, the learned trial court had convicted the appellant under Sections 302/ 498(A) of the IPC and sentenced him as aforesaid.

7. Mr. H.R.A. Choudhury, learned Sr. counsel for the appellant has argued that the conviction of the appellant is entirely based on the dying declaration of the victim which was not recorded by following the due procedure laid down by law. Mr. Choudhury, submits that the dying declaration was recorded by the I/O in presence of the victim's family members and there is nothing to indicate the mental and physical state of the victim at the time of recording the dying declaration. Since there is no corroborating evidence available on record, hence, submits Mr. Choudhury, conviction of the accused person solely on the basis of the dying declaration of the victim would be impermissible in law. It is also the submission of the appellant's counsel that the evidence adduced by the prosecution projects two mutually contradictory versions causing serious dent in the prosecution case. In support of his above arguments, the appellant's counsel has placed reliance in the cases of ***Balak Ram Vs. State of UP***, reported in ***(1975) 3 SCC 219*** and ***Dalip Singh & Ors. Vs. State of Punjab***, reported in ***(1979) 4 SCC 332***.

8. Contending that the oral dying declaration recorded in presence of relatives would not have any probative value, Mr. Choudhury has also relied upon a decision of the Supreme Court rendered in the case of ***Mohan Lal & Ors. Vs. State of Haryana***, reported in ***(2007) 9 SCC 151***. By referring to ***State of Gujrat Vs. Jayrajbhai Punjabhai Varu***, reported in ***(2016) 14 SCC 151***, Mr. Choudhury has further argued that the court has to examine a dying declaration scrupulously, with a microscopic eye, so

as to find out whether the dying declaration is voluntary, truthful and has been made in a conscious state of mind and without being influenced by the relatives present or by the investigating agency. The learned senior counsel has also argued that the un-explained delay in lodging the FIR raises serious doubt on the prosecution story and hence, the present is a fit case for acquittal of the accused by giving him the benefit of doubt.

9. By referring to ***Lakhan Vs. State of MP***, reported in **(2010) 8 SCC 514** Ms. S. Jahan, learned Addl. P.P. Assam, on the other hand, has argued that in the Indian society a women would be reluctant to implicate her husband very promptly and therefore, this could be the reason for the delay in lodging the ejahar. In so far as the failure on the part of the investigating agency to have the dying declaration of the victim recorded by a Magistrate or in presence of a doctor, Ms. Jahan submits that it has come out from the evidence of the I/O (PW-14) that he did not expect the victim to die and therefore, in all probability, the statement of the victim was not recorded treating the same as dying declaration but as a statement of the victim recorded under Section 161 Cr.P.C. Ms. Jahan has further argued that conviction only on the basis of dying declaration of the victim is permissible in the eye of law, if the same is found to be truthful and voluntary.

10. By referring to a decision of the Supreme Court in the case of ***Laxman Vs. State of Maharashtra***, reported in **(2002) 6 SCC 710**, Ms. Jahan has further argued that the question of fitness certificate so as to assess the conscious state of mind of the victim while making the dying declaration would not arise, if there are eye witnesses account available on record which goes to show that she was mentally and physically fit to make such statement. Unless it is found that the victim was not in a condition to communicate

either by words or by signs what he/ she intended to do, mere non-availability of fitness certificate would not render the dying declaration as invalid. In support of her argument, Ms. Jahan has also relied upon and referred to decisions in the cases of ***Chirra Shivraj Vs. State of Andhra Pradesh***, reported in ***(2010) 14 SCC 444***, ***Ramawati Devi Vs. State of Bihar***, reported in ***(1983) 1 SCC 211*** and ***Sher Singh & Anr. Vs. State of Punjab***, reported in ***(2008) 4 SCC 265***.

11. We have considered the submissions made by the learned counsel for both the sides and have also carefully gone through the materials available on record.

12. The fact that the victim had died due to 'septicemia' on account of burn injuries suffered by her is evident from the postmortem report (Exhibit-5). Dr. Diganta Choudhury (PW-10) who was working as a Medical & Health Officer at Bongaigaon Civil Hospital had conducted the postmortem examination on the dead body of the victim Monowara Begum @ Mamata Khatun on 27-12-2016. PW-10 has proved the postmortem report (Exhibit-5) by identifying his signature therein. The Doctor has deposed that the burn injuries on the body of the victim were around 07 days old and there was slough formation of skin on both upper and lower limbs, chest, abdomen and face. The Doctor has opined that the approximate time since death was 24 to 30 hours.

13. There is no direct evidence in this case. The incident took place in the middle of the night, inside the house of the victim. Therefore, the prosecution has heavily relied upon the dying declaration of the victim recorded by the I/O (PW-13) on 24-12-2016, at around 04:40 p.m. when the victim was in the hospital receiving medical treatment for her burn injuries. The dying declaration, recorded in vernacular 'Assamese', would have a

relevant bearing in the outcome of this appeal. Hence, we propose to reproduce the English translation of thereof, as available in the paper book of the appeal, for ready reference:-

*“Statement of (Injures) Musstt. Monowara Begam alias Moniota, W/o Md. Hafijur Rahman recorded u/s 161 Cr.P.C.*

*My name and address are as mentioned above. I am aged about 23. I am a housewife. In connection with the incident I want to state that accused Hafijur Rahman is my husband. I got married to him about 5 months back. My name is Monowara Begum. But the members of my family call me Mamata. My husband Hafijur Rahman is a drunkard. Since after some days of our marriage, my husband had been torturing me both physically and mentally demanding dowry. He demanded Rs. 1,50,000/- as dowry. We stay in a rented house of Joynuddin at Bhawlaguri. Around 7:00 p.m. on 19/12/2016, my husband and his friend Sofiur Rahman consumed liquor in our rented house. Our brother-in-law (husband of younger sister) Kashem stays near our rented house. They visited Kashem's house and started consuming liquor there too. I threw away the liquor which was kept in the glass. Then, my husband assaulted me. Later, we all three had our dinner. Sofiur wanted to return home but since it was night, we did not let him go. My husband and I slept on a bed and Sofiur slept on the pucca floor of the same room by covering himself with a blanket. Sofiur fell asleep. Around 1:00 a.m., my husband assaulted me telling about the dowry which he had demanded previously. Being unable to endure the torture meted out by my husband, I poured kerosene on my person. After pouring the kerosene, I thought for some time whether I should die or not. I thought if I poured kerosene, my husband would come to pacify me but he did not. After thinking for a while, I decided to live and came close to my husband again. Then, telling me, "You have not died yet" my husband, with an intention of killing me, lit a matchstick and set fire on me. I tried to extinguish the fire. At first, my husband did not come forward to extinguish the fire but he came forward after a long time. Hearing my scream, Sofiur Rahman woke up and tried to extinguish the fire. Sofiur Rahman is innocent. Later, my brother-in-law Kashem called 108 ambulance. My husband and my younger sister Rahima Begum took me to Bongaigaon Civil Hospital for treatment that day itself. On the following day, i.e. 20/12/2016, my husband and the members of my family took me to the Lower Assam Hospital and got me admitted there. Now, I am undergoing treatment in Lower Assam Hospital. Since I was set ablaze, I sustained burn in my mouth, hand, leg, stomach, chest and different parts of my body. My husband works as a contractor in BRPL. He has sufficient money but he has not spent any amount of money for my treatment. The members of my family are very poor. They do not have sufficient money. Due to the shortage of money, my bandage could not be changed from yesterday. My husband has not paid any attention to my treatment. He set fire to me with an intention of killing me. I have to say this much only.*

*Recorded by me*

*S.P. Kalita, ASI*

*Date 24/12/2016"*

14. Turning to the evidence lead by the prosecution, we have noticed that the informant Guddu Ali, i.e. the brother of the deceased was examined as PW-1. This witness has deposed that his elder sister Mamata got married to the accused Hafijur Rahman. After about 04 months of the marriage, the accused had demanded an amount of Rs. 1,50,000/- as dowry from their family. Since they were poor people, hence, they could not give the money, as a result of which, the accused had assaulted his elder sister. On the date of the incident, at around 02:00 a.m., the accused had assaulted his elder sister (victim) then his sister poured kerosene on her person. Believing that the accused would pacify her, she was waiting but instead of doing so, the accused had said "die, if you intend to die" and thereafter, lit a matchstick and set his sister on fire. When they got the information about the incident from the neighbours, his elder sister was taken to the Civil Hospital and from there to the Lower Assam Hospital. The PW-1 has stated that since he was busy with the treatment of his sister, the FIR was lodged after 05 days. PW-1 has also stated that his sister (victim) had made statements before the Police while she had some consciousness. According to this witness, Police had also video-graphed her statement. This witness has proved Exhibit-1 as the ejahar lodged by him and has further stated that the Police had seized a 'Kabin-nama', an agreement of marriage, executed before the Notary, by means of seizure list Exhibit- 2. Exhibit- 3 is the inquest report which bears his signature.

15. During cross-examination, PW-1 has replied that the deceased was his only sibling

and his elder sister got married to the accused on her own will, following a love affair. They were residing in a rented house since the time of their marriage. The accused worked as contractor under the BRPL. PW-1 has also clarified that there was no demand for dowry at the time of marriage and that there was no mention in the ejahar about the fact that the accused had demanded a sum of Rs. 1,50,000/- after 04 months of their marriage. Rather, the PW-1 has stated that he had seen the accused and the victim living a happy and peaceful conjugal life.

16. PW-2 Smti. Kamala Begum is the mother of the deceased. She has deposed that the accused had assaulted her daughter and demanded an amount of Rs. 1,50,000/- but as she could not give the money, the accused used to assault and torture her daughter. About 5/6 months ago, a boy from the neighbourhood of the accused came and informed her that her daughter got burnt. Then they went to the house of the accused. Her daughter was first taken to the Civil Hospital and then to the Lower Assam Hospital. When the Police questioned her daughter (victim) in her presence, she had stated that the accused had assaulted her since the evening, which was related to the money and then, being unable to bear the torture, she had poured kerosene on her person in the midnight and was crying. PW-2 has deposed about her daughter having stated before the Police that she thought that the accused would pacify her but instead of pacifying her, he said, "*You have not died yet, still waiting*". He then lit a matchstick and set her on fire. PW-2 has also stated that her daughter had died after a week while undergoing treatment at the Lower Assam Hospital. Her son had lodged an ejahar with the Police. This witness has also stated that the Police had recorded her (victim's) statement before her death.

17. During her cross-examination, PW-2 has denied the suggestion that she did not state before the Police in the manner deposed. This witness has replied that her daughter had a love affair with the accused for about 02 years and that dowry was not demanded in the marriage. The accused used to work as a contractor in BRPL. She has admitted that no complaint was lodged nor any medical treatment was provided to her daughter when she was assaulted. The witness has denied that the accused had paid all expenses in the hospital.

18. PW-3 Smti. Khatun Bibi is the aunt of the victim. PW-3 has stated that having got the information that Mamata has been burnt, she first went to the rented house of the accused and thereafter, to the Civil Hospital and then to the Lower Assam Hospital. When Police recorded the statement of Mamata at the Lower Assam Hospital, she was present there. According to PW-3, Mamata had stated before the Police that the accused had demanded an amount of Rs. 1½ Lakh from her after their marriage and that he had tortured her since she could not give the money. This witness has further stated that Mamata had told the Police that after consuming liquor, as the accused had assaulted her, she had poured kerosene on her person. Mamata had further stated that she thought the accused would save her but after coming back about an hour later, the accused said, "you have not yet died" and then set her on fire by lighting a matchstick. According to this witness also, the accused did not bear the expenses of the hospital. During her cross-examination, the PW-3 has denied the suggestion that Mamata was unable to speak so as to make the statement. PW-3 has also stated that her husband and another niece had called a 108 ambulance and took Mamata to the hospital. The accused had also

accompanied them.

19. Smti. Basiran Bibi is the grandmother of the victim. She was examined as PW-4. This witness has stated that since the time of the marriage of Mamata with the accused Hafijur, he used to torture and assault her (Mamata). The accused had demanded an amount of Rs. 1,50,000/- from Mamata's father, but since they could not pay the amount due to poverty, the accused used to assault Mamata. Being unable to endure the torture meted out by her husband, one day Mamata had poured kerosene on her person and was waiting for her husband to come and rescue her. But instead of doing so, her husband has said "you have not yet died, die now" and thereafter, set her on fire by lighting a matchstick. This is how Mamata got burnt and was later taken to the Lower Assam Hospital. The witness has also stated that the accused had taken a sum of Rs. 20,000/- from her so as to meet the hospital expenses. PW-4 has further confirmed that Mamata had made a statement before the Police prior to her death and at that time, she was present. However, the accused did not visit the hospital to enquire about Mamata's condition. During her cross-examination, PW-4 has denied the suggestion that the fire had spread from the stove accidentally, which caught on Mamata.

20. PW-5 Jaynuddin Seikh is the landlord of the house where the accused Hafijur Rahman and deceased Mamata Khatun had lived as tenants for 07 days. PW-5 has stated that on the day of occurrence, having heard the hue and cry at about 01:00 a.m. while he was sleeping, he along with his other tenants came forward and saw Mamata in flames and her husband Hafijur Rahman was trying to extinguish the fire by covering her with a blanket. When he asked as to who set her on fire, Mamata did not reply. Then he had

asked Mamata's younger sister Malati and Malati's husband Kashem Ali, who are also his tenants in another room within the same compound, to call for a 108 ambulance. When the vehicle arrived, he had sent Mamata to the hospital. During his cross-examination, PW-5 has stated that Mamata and her husband had taken a single room on rent and they had their entire arrangements, including provisions for cooking and sleeping, in that room. He did not see any quarrel between the couple during their stay in the house. According to PW-5, the accused had also accompanied Mamata to the hospital.

21. Smti. Deljan Bibi is the wife of (PW-5) Jaynuddin Seikh. She was examined as PW-6. This witness has also deposed in the similar lines as her husband and has confirmed that on hearing the scream, when they came out and went to the house of Mamata, she had seen Mamata in a burnt condition. Mamata was screaming to save her. Her husband, i.e. the accused Hafijur Rahman was covering her with a blanket. On being asked by her, Mamata had only asked to save her while the accused had said nothing. This witness has also stated that prior to the incident, she did not hear any 'hulla' or quarrel in the house of the accused.

22. PW-7, Kasem Ali is the husband of cousin (sister) of Mamata. He was also residing in the same campus as a tenant under PW-5 along with his wife Rahima Begum (PW-12). This witness has deposed that on the day of the occurrence, at about 01:00 a.m. in the midnight, hearing 'hulla', he came out of the house and saw Mamata in a burnt condition, while accused Hafijur was trying to put out the fire by covering Mamata with a blanket. He has deposed that his wife had caught hold on Mamata and he had called 108 ambulance. According to this witness, on the day of the incident, at around 09:30 p.m.

Mamata, Hafijur and Hafijur's friend Safiur were all watching television in his house and in the process, they got late. As such, Mamata had asked the accused to leave his house as it could cause disturbance to the children. At that, the accused had replied that he would be going and asked Mamata to proceed. At that time, the accused had pushed Mamata by hand due to which her head had hit the wall of his house and she sustained injuries. This witness has also stated that Mamata told him in the hospital that she had herself set her on fire. This witness was declared hostile and was cross-examined both by the prosecution and the defense side.

23. PW-8 Dr. Dharmeswar Hazarika was working as a Sr. Consultant Surgeon at the Lower Assam Hospital and Research Centre, Bongaigaon. He was examined by the prosecution as PW-8. This witness has confirmed that the victim Mamata Begum was admitted in the Lower Assam Hospital on 20-12-2016 with complains of mixed flame burn over her body. The patient died on 26-12-2016 at around 01:30 p.m. while undergoing treatment. He had advised the police to carry out postmortem examination on the dead body. This witness has proved Exhibit- 4 which is a report issued by him in respect of the victim.

24. PW-9, Sri Anwarul Hussain, who lived in the neighbourhood, had not seen the occurrence but he has stated that a quarrel took place between Mamata and her husband Hafijur and then the accused set her on fire. PW-9 is an inquest witness who had identified his signature Exhibit-3(2) in the inquest report Exhibit-3.

25. Sri Partha Pratim Khanikar was working as the Asstt. Commissioner and Executive Magistrate, Bongaigaon on 27-12-2016. He had conducted inquest over the dead body of

the victim. This witness was examined as PW-11. He has proved the inquest report Exhibit-3. PW-11 has stated that there were burn marks on the face, chest, right and left hand, right leg and left leg of the dead body. As per the opinion of the witness and the Police, the deceased had died due to burn injuries. However, in order to ascertain the real cause of death, the I/O was directed to send the body for postmortem.

26. Smti. Rahima Begum, who is the cousin of the victim and wife of PW-7, was examined as PW-12. She has stated that at around 09:00 – 09:30 p.m. on the day of the occurrence, accused Hafijur and his friend Safiur had visited their house and had left after having food. Later on, at about 01:00 a.m. when Safiur called them, she along with her husband went and saw many people had gathered. When they went there, they saw Mamata had caught fire. She had told them to take her to the hospital and accordingly, she had called an ambulance and took her (Mamata) to the Civil Hospital. This witness has also stated that she had asked Mamata several times as to how she had caught fire but Mamata did not tell her anything. She (Mamata) had only asked her to take her to the hospital. She knew nothing more than this. This witness was also declared as a hostile witness and cross-examined both by the prosecution and the defense side.

27. ASI Siba Prasad Kalita, who had conducted investigation in connection with Bongaigaon P.S. Case No. 822/2016, was examined as PW-13. The I/O has spoken about the usual formalities carried out by him upon receipt of the ejahar. PW-13 has confirmed that the ejahar was lodged by Guddu Ali (PW-1) following which, GD Entry No. 614 dated 24-12-2016 was made and the ejahar was sent to the O/C, Bongaigaon Police Station for registering a case. As per the FIR, the date of occurrence was 19-12-2016 at 02:00 a.m.

and the ejahar was lodged on 24-12-2016. This witness has confirmed that he had visited the hospital and recorded the statement of the victim (Exhibit-9). The I/O had proved Exhibit-9 by identifying his signature therein. He has further stated that when he met the victim and talked to her, he found her in a stable frame of mind and while talking to her, he never thought that she would die. PW-13 has further stated that he had seen bandages over the face, hands, legs, stomach, chest and other parts of the body of the victim. He had also recorded the statement of the witnesses who were present there at the time of recording the statement of victim Monowara Begum @ Mamata Khatun. During his cross-examination, PW-13 has stated that nurses were available in the Burn Unit where the victim was admitted and visitors were allowed to go inside the Burn Unit. When he visited the Unit, Doctor was not present. He took permission from the Nurse and recorded the statement of the victim. However, he did not collect the mental and physical fitness certificate of the injured from the Doctor before recording the statement of the victim nor was the signature of the victim taken below her statement. This witness has, however, remained firm that he had visited the Lower Assam Hospital on 24-12-2016 and recorded the statement of victim Mamata Khatun and other witnesses present in the hospital.

28. PW-14 Sri Khirod Dey was the Second Officer posted at the Bongaigaon Police Station on 12-01-2017. He had collected the postmortem report from the hospital and submitted charge-sheet on 20-01-2017 against accused Hafijur Rahman. This witness has proved the charge-sheet Exhibit-8 by identifying his signature therein.

29. As noted above, Md. Safiur Rahman was named as accused No. 2 in the ejahar

dated 24-12-2016 but he was not charge-sheeted by the Police. Safiur was examined as a court witness (CW-1). While deposing before the court, CW-1 has stated that he was acquainted with the accused as he is also from the same village. The wife of the accused Mamata had expired about 03 years back due to burn injuries. At that time, the accused was staying with his wife in a rented house at Bhowlaguri. He was working as Contractor in the BRPL plant along with the accused. At around, 07:30 p.m. on that day, both he and the accused had left the BRPL plant and came to his (accused's) house in a motorcycle. Mamata's sister was staying with her husband Kasem Ali in the adjacent tenanted premise. Mamata prepared food in a room. He, along with Hafijur, sat in the house of Kasem Ali and was watching television till 10:00 p.m. The landlord was also watching television with them. Thereafter, he had dinner in the room of Hafijur. After dinner, he wanted to go to his house but Hafijur and his wife (victim) had asked him to stay there as it was very late. So he stayed back. They all slept in the same room. Hafijur and his wife Mamata slept on the bed whereas he slept on the bed prepared on the floor. There was a partition of curtain between them. At around 12:00 midnight, he woke up from sleep hearing Mamata and Hafijur screaming. They were shouting 'bachao' bachao'. He saw fire on the cloths of Mamata and accused Hafijur had put a blanket over her so as to douse the fire. According to CW-1, Hafijur succeeded in putting out the fire. He then called Kasem and his wife and they came. He went to New Bongaigaon Station along with Kasem to bring a vehicle. But at that time, Hafijur rang and told him not to bring the vehicle as the landlord has provided his vehicle. By the time, he returned back home, Hafijur and Mamata had already left for hospital along with Mamata's sister. He came back

to take some money. When he rang Hafijur, he told that Mamata was stable and therefore, he need not come during the night. In the morning Mamata was released from the Civil Hospital and admitted at the Lower Assam Hospital. CW-1 has further stated that he talked to Mamata but since Mamata was under bandage all over her body and head, he did not talk too much as the Doctor had restrained her from doing so. He had asked her as to how she caught fire but Doctor asked him not to disturb the patient. CW-1 has deposed that Mamata's sister told that she had caught fire while heating water in a stove. CW-1 has also stated that he had enquired with Hafijur as to how Mamata had caught fire and he told that Mamata was heating water in the stove and caught fire. CW-1 has also confirmed that there was no quarrel between Hafijur and his wife Mamata on that day and they had dinner together at night.

30. During his cross-examination, CW-1 has stated that initially, expenses of treatment were borne by the accused. However, the brother of Mamata had insisted that Hafijur should provide better treatment to her at Guwahati. Mamata's brother, along with some AAMSU members, brought Hafijur to the Outpost and insisted that he should call his guardian. During that time, there was scarcity of cash due to demonetization.

31. After an in depth analysis of the evidence available on record, we find that none of the prosecution witnesses had actually seen the occurrence. From the statement of the victim recorded by the I/O on 24-12-2016 what transpires is that the victim had poured kerosene oil on herself out of anger and frustration due to the misbehavior of her husband, i.e. the appellant but she did not set herself on fire. According to the dying declaration, while the victim was expecting her husband to pacify her, the appellant

instead of calming her down, had lit the fire. The incident evidently took place around mid-night and in the confines of the house of the accused and the victim. The accused has claimed innocence and stated that he was not in his house when Mamata had caught fire. CW-1, who was sleeping inside the room also did not see as to how Mamata had caught fire but when he woke up hearing the 'hulla', he had seen the accused trying to douse the fire. There is also no reliable evidence to suggest that there was a quarrel between the accused and the victim just before the occurrence. The prosecution has also failed to lead any cogent evidence on record in support of the allegation of dowry demand and torture of the victim by her husband/ appellant. Therefore, we find that save and except the dying declaration of the victim there is nothing on record to implicate the accused. The question is, can the dying declaration of the victim form the sole basis of conviction of the appellant in this case.

32. Law is well settled that dying declaration can be the sole basis of conviction if the same is found to have been recorded in accordance with law and appears to be truthful and voluntary. In the case of **Jayamma & Anr. Vs. State of Karnataka** reported in **(2021) 6 SCC 213**, it has been held that recording of dying declaration in presence of a Judicial or Executive Magistrate was not compulsory. It is only a rule of prudence and if permitted by the facts and circumstances of the case, it should preferably be recorded by a Judicial or Executive Magistrate so as to muster additional strength to the prosecution case. On the evidentiary value of dying declaration, the Supreme Court, after considering a number of previous decisions on the issue, had further observed that when the dying declaration has been recorded in accordance with law and it gives a cogent and plausible

explanation of the occurrence, the court can rely upon it as the solitary piece of evidence to convict the accused.

33. As noted here-in-above, the dying declaration in this case was recorded by the I/O (PW-13). From a careful examination of the dying declaration, in the light of evidence brought on record the following facts have been observed :-

33.1 The dying declaration was recorded by the I.O. during the course of investigation, without obtaining any certificate from the doctor as regards the mental and physical state of the victim. The same would bear special significance since it has come out from the medical evidence that the victim had suffered severe burn injuries on various parts of the body including her face, stomach and chest. The dying declaration of the victim was recorded four/five days after the incident when she was undergoing treatment in the hospital. During that period, in all likelihood, the victim was under the influence of various drugs including pain killers. She died within two days thereafter due to septicemia. Under the circumstances, it is doubtful if the victim was actually in a proper physical and mental condition to speak.

33.2 It was a case of burn injuries suffered by the victim under mysterious circumstances. The victim was admitted in the hospital in an urban locality for nearly a week before her death. Yet, no attempt was made to get her dying declaration recorded by a Judicial or Executive Magistrate all though there was

ample opportunity for doing so. Not even after she had allegedly implicated the accused.

33.3 In a big hospital such as the Lower Assam Hospital, there are a number of doctors on duty round the clock, yet, not to speak of a doctor, even a nurse was not present when the dying declaration was recorded and there is no plausible explanation from the I/O for not doing so.

33.4 The accused had been implicated for the first time in the dying declaration of the victim which was admittedly recorded in presence of the relatives of the victim such as the PWs- 2, 3 and 4. Therefore, the possibility of tutoring cannot be ruled out in this case.

33.5 The dying declaration was neither recorded in presence of any independent witness nor was the victim's signature/ thumb impression obtained there-in. There is also no explanation for not doing so.

33.6 For a person who had suffered severe burn injuries in various parts of her body including her face and chest and was struggling for life, the contents of the dying declaration (Ext-9) appears to be little too accurate and detailed to be true. It would be significant to mention here that in her dying declaration (Ext-9), the victim appears to have given minute details of numerous facts including facts such as who had called the ambulance after the incident, that her husband had sufficient money but he did not spend the same for her treatment, that due to want of money her bandages could not be changed the previous day etc. Such

details coming from a person critically injured due to burn injuries appear to be highly improbable to us.

34. In the case of ***Balak Ram (Supra)*** the Supreme Court has cautioned that it is not prudent to base the conviction on the dying declaration made to the Investigating Officer.

35. In ***Dalip Singh And Others (Supra)*** the Supreme Court has observed that although dying declaration recorded by the Investigating Officer is admissible but better and more reliable methods of recording dying declarations should be taken recourse to and the one recorded by the police officer may be relied upon if there was no time or facility available to the prosecution for adopting better methods. In the present case, although there was sufficient time and opportunity to get the dying declaration recorded through a Magistrate, the same has not been done thereby, raising a serious doubt on the credibility of Exhibit-9.

36. From the materials available on record, we do not find any evidence to corroborate the dying declaration. Rather, we have noted the following non-corroborative factors, which in our opinion, would not only cause a serious dent in the prosecution case but in a way, would also go to disprove the prosecution case:-

36.1 The incident took place in the wee hours of 19-12-2016 and the family members of the victim including the informant came to know about the incident within hours thereafter. Yet, the FIR was lodged only on 24-12-2016 after about five days.

36.2 The explanation for the delay in lodging the FIR, as furnished by the

informant, which is that he was busy with the treatment of his sister, does not appear to be a reasonable and plausible. Hence, we find that there was unexplained delay in lodging the FIR.

36.3 CW-1 was sleeping in the same room with the accused and the victim, separated only with a curtain, when the incident happened. He has stated that when he woke up hearing the scream he had seen that the accused had already doused the fire. His statement finds corroboration from the evidence of PWs- 5, 6 and 7 who have also stated that the accused had put a blanket on the victim to put out the flame. This would go to show that the accused was trying to save the victim rather than to cause death to her.

36.4 CW-1 has stated that after dinner, he wanted to go home but the accused and the victim had asked him to stay back. So he had stayed back. CW-1 did not mention about any quarrel taking place between the accused and the victim on that evening. Moreover, had the accused harboured any intention of causing death to the victim then he would not have asked the CW-1 to stay back that night.

36.5 It has come out from the evidence on record that soon after the incident, the victim was in a position to speak and she had also communicated to the persons who had taken her to the hospital. But at that time the victim did not implicate her husband. It was on 24-12-2016 when the I/O had recorded her statement that she had for the first time implicated her husband. If it was really a case of a woman acting in the spirit of Indian society and trying to shield her husband, as suggested by the learned Addl. P.P. Assam, then also, it defies logic as

to why, the victim would disclose such facts to the Investigating Officer, an unknown person and not to her known people who were along with her after the incident.

36.6 From Ext-9 dying declaration it appears that the victim had poured kerosene on herself. Therefore, the onus of proof was on the prosecution to establish the culpability of the accused by dispelling the notion that it could be a case of suicide or accident, which burden, the prosecution has failed to discharge.

36.7 In his statement recorded under Section 313 the accused has stated that as he ran out of money for treatment of his wife due to demonitisation a case was filed against him. The statement of PW-4 that the accused had taken a sum of Rs. 20,000/- from her for meeting the medical expenses not only lends credence to the statement of the accused but also goes to show that he was making serious efforts to bear the expenses of his wife's medical treatment.

36.8 It has come out from the evidence of CW-1 that the accused had met the expenses of the treatment and he also gave him Rs 2000/- for the purpose. The brother of the victim, with the help of AAMSU (Students' Organization) members had put pressure on the accused to provide better treatment to her at Guwahati.

36.9 The vague allegation of dowry demand and assault could not be established by the prosecution. Neither any complaint nor injury report regarding demand of dowry and torture made to the victim, as alleged in the FIR, is available which raises a further question on the *bonafide* of the informant, in so far as the contents

of the FIR is concerned.

36.10 The statement of PWs- 2, 3 and 4, who have supported the dying declaration, appears to have been recorded immediately after the I/O had recorded the victims' statement. PWs- 2, 3 and 4 are interested witnesses. As such, their testimonies do not appear to be trustworthy.

36.11 There is no evidence to show that the accused had a strained relationship with his wife (victim). The motive behind the offences has not been established by the prosecution.

37. Due to the reasons mentioned hereinabove we are of the opinion that the prosecution has failed to prove the charges brought against the accused, both under Sections 302 and 498-A of the IPC, beyond reasonable doubt. We are also of the opinion that it would be highly unsafe to convict the accused solely on the basis of the dying declaration (Ext-9) recorded by the Investigating Officer. Rather, we are of the view that there is sufficient doubt as to the involvement of the accused in commission of any offence under Section 302/498-A of the IPC. Therefore, giving him the benefit of doubt, the accused/ appellant is hereby acquitted.

The appeal stands allowed.

If the appellant is in custody, he shall be released forthwith, if not required in connection with any other case.

Send back the LCR.

**JUDGE**

**JUDGE**

GS

**Comparing Assistant**