

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Md. Shabbar Rashidi

C.R.A. 11 OF 2020

**Md. Pervez @ Md. Parvez Alam @ Parvez Alam @ Kalki Rajesh
VS.**

The State of West Bengal

For the appellant : Md. Khairul, Advocate
Md. Irfan, Advocate

For the State : Mr. Swapan Banerjee, Ld. APP
Ms. Purnima Ghosh, Advocate

Heard on : November 17, 2022, December 5, 2022 and
December 19, 2022

Judgment on : December 19, 2022

DEBANGSU BASAK, J.:-

1. The appeal is directed against the judgment of conviction dated June 27, 2019 and the order of sentence dated June 28, 2019 passed by the learned Additional District and Sessions Judge, Fast Track Court - I, Sealdah, South 24-Parganas, in Sessions Trial No.5 (4) of 2015.

2. By the impugned judgment of conviction, the learned Judge convicted the appellant under Section 302 of the Indian Penal Code, 1860.

3. By the impugned judgment and order of sentence dated June 28, 2019, the learned Judge awarded a sentence of life imprisonment for the offence punishable under Section 302 of the Indian Penal Code, 1860 and to pay fine of Rs.5,000/-. In default, the appellant was directed to undergo rigorous imprisonment for six months more.

4. The case of the prosecution before the trial court was that, the appellant after his marriage with the victim, subjected the victim to cruelty by physical and mental torture. Moreover, the appellant committed murder of the victim by intentionally and knowingly causing death of the victim on November 4, 2014 at about 21.50 hours at their residence.

5. The trial court framed charges as against the appellant under Section 498A of the Indian Penal Code, 1860 and under Section 302 thereof. The appellant pleaded not guilty and claimed to be tried.

6. Learned Advocate appearing for the appellant submits that, the prosecution did not prove the case beyond reasonable doubt. He submits that, there are three so-called dying declarations Exhibit 13, Exhibit 12 and Exhibit 20. He

submits that, the so-called dying declarations are contradictory to each other.

7. Learned Advocate appearing for the appellant submits that, the brother of the victim escorted the victim to the hospital. He draws the attention of the Court to the deposition of the brother of the victim and submits that, he does not say that, the appellant was involved in the incident. He refers to the evidence of P.W.3 and P.W.4 and submits that, P.W.4 was present at the spot at the time of the incident and stated that, the victim committed suicide. He submits that, the presence of P.W.4 at the spot at the time of the incident, was established by the evidence of P.W.s 9 and 11. He submits that P.W.3 is also an eye-witness. Neither P.W.3 nor P.W.4 implicates the appellant as the murderer. Rather, they stated that, the victim committed suicide.

8. Referring to the evidence-on-record, learned Advocate appearing for the appellant submits that, there is a shift in the place of occurrence. At times, the prosecution witnesses stated in their testimonies that, the incident occurred at the bedroom while it was stated by one of the prosecution

witnesses, namely, P.W.3 that the incident occurred at the kitchen.

9. Referring to the evidence of the P.W.3, learned Advocate appearing for the appellant submits that, P.W.3 is the daughter of the victim. The prosecution did not declare P.W.3 as a hostile witness. Therefore, the evidence of P.W.3 to the incident stating that the place of occurrence was the kitchen is binding upon the prosecution.

10. Again referring to the evidence of P.W.3, learned Advocate appearing for the appellant submits that, the P.W.3 stated that, the victim committed suicide by pouring kerosene oil on her. Her father, the appellant herein, poured water upon the victim. Therefore, he submits that, the appellant did not commit murder of his wife, the victim. Rather, the evidence of the prosecution establishes that the victim committed suicide.

11. Referring to the post-mortem report of the victim, being Exhibit 11, learned Advocate appearing for the appellant submits that, the victim committed suicide.

12. Learned Advocate appearing for the appellant submits that, the so-called dying declarations are contradictory and,

therefore, no reliance can be placed therein. In support of such contention, he relies upon **2019 4 SCC 739 (Sampat Babso Kale & Anr. Vs. The State of Maharashtra), 2021 SCC Online Supreme Court 260 (Naresh Kumar vs. Kalawati and Others)** and **1999 7 SCC 695 (Paparambaka Rosamma & Ors. Vs. State of Andhra Pradesh).**

13. Consequently, learned Advocate appearing for the appellant submits that, since the prosecution could not establish the case beyond all reasonable doubts, the appeal should be allowed.

14. Learned Advocate appearing for the State submits that, the prosecution was able to establish the case beyond all reasonable doubts. It is submitted that, the daughter of the victim recorded her statement under Section 164 of the Code of Criminal Procedure being Exhibit 20. Her signature on the statement recorded under Section 164 of the Code of Criminal Procedure was exhibited as Exhibit 5 series. In such statement, P.W.3 stated that, the father poured kerosene on the victim.

15. Referring to the dying declarations of the victim, which was recorded under Section 164 of the Code of Criminal Procedure, being Exhibit 21, learned Advocate for the State submits that, the victim also stated that, the appellant poured kerosene on her. Therefore, the dying declarations of the victim being Exhibit 21, was corroborated by the statement of the daughter of the victim being Exhibit 20. The medical evidence produced at the trial corroborates that the victim died out of burn injuries. Therefore, it is contended on behalf of the State that, there was overwhelming materials before the trial court to establish that the appellant murdered the victim.

16. So far as the two dying declarations being Exhibit 3 and Exhibit 4 are concerned, learned Advocate appearing for the State contends that, there were recordings made by the doctor. In view of the categorical statements of the victim as appearing from Exhibit 21 and corroborated by her daughter, in Exhibit 20, he submits that, the conviction and the order of sentence should be upheld.

17. Prosecution examined 26 witnesses at the trial. Prosecution also relied upon various documentary and

material evidences at the trial. The appellant was examined under Section 313 of the Criminal Procedure Code, on the conclusion of the evidence of the prosecution. The appellant claimed to be innocent in such examination and stated that he would not adduce evidence in defence. The appellant did not adduce any evidence at the trial.

18. A Sub-Inspector of Police, who made the rough sketch map and the final sketch map of the place of occurrence, deposed as P.W. 1. He tendered the rough sketch map as Exhibit-1 and the final sketch map that he prepared as 'Exhibit-2'.

19. Another police personnel, who took photographs of the premises containing bedroom and the kitchen and the entrance of the flat deposed as P.W. 2. Eleven photographs along with their negatives, which he took of the place of occurrence, was marked as Exhibit-3 series. His endorsement was marked as 'Exhibit-4' series.

20. The daughter of the victim deposed as P.W. 3. In her deposition, she stated that, on the fateful day and time, she was playing with a friend. She also stated that there was a quarrel between her father and her mother. Her father is the

appellant while the victim was her mother. She stated that, when her mother went to the kitchen to break her bangles, then her mother put kerosene oil on her body and got burnt. Thereafter, her father poured water on the body of her mother. Then her mother came to the room when she gave her one nighty to wear. Thereafter, she wore the nighty and came out from the room and walked one step but she fell down and sat down on the staircase.

21. P.W. 3 was not declared hostile by the prosecution. At least, the materials placed on record, do not suggest that P.W. 3 was declared hostile. However, in her deposition, P.W. 3 was shown her statement recorded under Section 164 of the Criminal Procedure. She admitted her signatures therein. It was marked as 'Exhibit-5' series. She was not confronted with the contents of the statement she recorded under Section 164 of the Criminal Procedure Code. No suggestion was put to her that the statements she recorded under Section 164 of the Criminal Procedure Code were incorrect or false.

22. P.W. 4 identified the appellant in Court. He stated that the victim was his sister. He stated that, the victim stayed at her matrimonial house. A quarrel took place between the

victim and her husband for such reason she committed suicide. He stated that, he admitted the victim in the Nursing Home at about 10:45 P.M and on the following Tuesday, the victim died.

23. P.W. 5 is a neighbour of the appellant. He claimed at the trial that, he went to the house of victim and arranged to send the victim to the hospital by a rickshaw and after sometime he also went to the Chittaranjan Hospital and came to know, on the same day that the victim was shifted to 'Repose Nursing Home' and he went to Repose Nursing Home.

24. Another neighbour of the appellant deposed as P.W. 6. He stated that he never heard about the relationship between the appellant and the victim. About the incident, he narrated that he was about to take dinner when he heard shouting 'save me', 'save me' and when he opened the door, he saw the victim in a naked condition and she pulled her nighty on her own. The victim was shifted to the hospital. He identified the appellant in Court.

25. Another neighbour of the appellant deposed as P.W.-7. He did not add any value to the case of either the appellant or the prosecution.

26. P.W. 8 stated that she is not aware of the case of the death of the victim. She, however, stated that, after marriage, the victim was in peace with her husband.

27. P.W. 9 is a relative of the victim. He stated that, at the time of the incident, he was in his room when he heard one cry. He saw the brothers of the victim and the appellant. He received the victim with burn injuries on her person. He along with the brothers of the victim went to Chittaranjan Hospital. Thereafter, the victim was admitted to the hospital. He stated that initially after the marriage, the relationship between the victim and the appellant was good but subsequently, their relationship became strained and disputes cropped up. He was not aware of the disputes.

28. P.W.-10. knew the victim. She deposed that, she visited the victim at the hospital. She stated that, since the death of the victim, her brother, P.W.-3 herein, used to reside with her. She stated that she was not aware of the relationship between the victim and the appellant.

29. The sister-in-law of the victim deposed as P.W. 11. She stated that, she saw the brother of the victim and P.W. 3 with local boys, bringing down the victim in burnt condition. She

went to the hospital along with the brother of the victim. She filed an application before the hospital for discharge of the victim for better treatment in another Hospital. The victim was shifted from Chittaranjan Hospital to Repose Nursing Home where she was treated for a week and she died. She stated that when she shifted the victim to Chittaranjan Hospital, she was senseless.

30. P.W.-12 claimed that, she knew the victim. She did not witness the incident. She did not add any value to the case of either the prosecution or the appellant.

31. A friend of P.W. 3, the daughter of the victim deposed as P.W. 13. She did not add any value to the case of either the prosecution or the appellant.

32. An employee attached to the Kolkata Police, deposed as P.W. 14. He was present when the members of the family of the victim identified the body of the victim for the purpose of the post mortem examination.

33. The forensic expert, who visited the place of occurrence, deposed as P.W. 14. He stated that, on November 7, 2014, he visited the place of occurrence at about 4.30 p.m. He tendered

a report, which was marked as exhibit 8. He has stated that, manifestation of fire incident was quite evident at the flat. He also found a wick fitted stove kept aside in partially opened condition with liquid bearing the smell of kerosene oil. He made certain seizures from the spot.

34. The doctor in whose presence the bed head ticket of the victim admitted at the hospital was seized deposed as P.W. 16. The doctor, who conducted the post mortem on the body of the victim, deposed as P.W. 17. He described the injuries found on the body of the victim. He tendered the post mortem report, which was marked as exhibit 11. He stated that, in his opinion, if anybody poured kerosene oil and set herself on fire, then such person will suffer the type of burn injuries appearing on the dead body of the victim.

35. The doctor, who treated the victim at the Repose Nursing Home, deposed as P.W. 18. He stated that, the patient was examined on November 5, 2014. On such examination, at first glance, he saw that the patient was in shock. According to him, on clinical assessment and on instruction it turned out to him that, the victim suffered burn injury of 85 per cent to 92 per cent. He stated that, the victim was set on fire by her

husband. He also stated that the patient was full of sense because she answered all her questions when she was asked. She was asked as to how the incident happened, when the victim answered clearly and in an audible speech that it was her husband, who poured kerosene oil on her person and then her husband set her ablaze.

36. The doctor, who was posted at the Kolkata National Medical College, where the victim was initially admitted, deposed as P.W. 19. He stated that the patient gave her statement to the police personnel who was present there in his presence. He tendered the statement given by the patient to the police, which was marked as exhibit 13/1.

37. The doctor, who did not examine the victim at the Kolkata National Medical College, deposed as P.W. 20. He stated that, when he came for his round to check all the patients, he found that the victim was discharged on risk bond on November 4, 2014 on 11.25 p.m.

38. The police personnel, who conducted the inquest report, deposed as P.W. 21. The police personnel, who was a part of

the raid party, which arrested the appellant deposed as P.W. 22.

39. The Judicial Magistrate, before whom the daughter of the victim recorded statement, deposed as P.W. 23. She tendered the 164 Cr.P.C. statement of the daughter of the victim as exhibit 20.

40. P.W. 24 is the Judicial Magistrate, before whom the victim recorded her statement under Section 164 Cr.P.C. The statement of the victim was tendered in evidence and marked as exhibit 21.

41. The doctor, before whom the 164 Cr.P.C. statement of victim was recorded, deposed as P.W. 25. He stated that, at the time of recording of the statement, the victim was in a fit state of mind for giving her statement. The victim stated all the facts in the 164 Cr.P.C. statement in her own language and the same was recorded according to her version. During recording of her statement, no one interested was present except himself, learned Magistrate and the victim. At the time of recording of the statement of the victim, he was present as

the Resident Medical Officer of Repose Nursing Home. He was cross-examined by the appellant.

42. The Investigating Officer, deposed as P.W.26. He narrated about the steps taken during the investigations. He also narrated how the statements of various witnesses were recorded and the seizures made. He was cross examined at length on behalf of the appellant.

43. On conclusion of the evidence of the prosecution, the appellant was examined under Section 313 of the Cr.P.C., where, the appellant claimed to be innocent. He stated that he will not adduce any evidence at the trial.

44. The post mortem report of the victim, exhibit 11 states that, the victim died out of burn injuries. The post mortem doctor, being P.W. 17 stated in his deposition that, if anybody pours kerosene oil and set herself on fire then such type of burn injuries as noted on the body of the victim may occur.

45. The post mortem doctor, P.W. 17, in the post mortem report being exhibit 17 stated that, the body of the victim contained the following injuries :-

“Infected (ulcerated) burn injury over the whole body of surface area except both soles.

The base of the injury were congested.

Ulcerated burn injuries were covered with pus and slough.

All the injuries showed evidence of vital reaction. No other injury could have been detected even on thorough dissection and careful examination by a hand lens (Magnifying glass).”

46. Therefore, the report of the post mortem doctor Exhibit – 11 and his evidence at the trial, established beyond reasonable doubts that the victim died out of burn injuries.

47. It is the contention of the appellant that the victim committed suicide while the prosecution claims that, the appellant murdered the victim.

48. The motive for the murder so far as the prosecution is concerned, is unfulfilled demand for dowry. The charge under Section 498A of the Indian Penal Code, 1860, levelled as against the appellant was found to be not proved by the learned Trial Judge. We are not informed as to the pendency of any appeal on such score.

49. According to the prosecution, the victim recorded a dying declaration which is sufficient to establish the guilt of the appellant.

50. In **Parambaka Rosamma & Ors. (Supra)** the victim there sustained 90% burn injuries. There the case of the prosecution rested on the dying declaration. It was held that in absence of medical certification that the victim was in a fit state of mind at the time of making the declaration, it would be risky to accept subjective satisfaction of a Magistrate who opined that the injured was in a fit state of mind at the time of making declaration.

51. **Sampat Babso Kale & Anr. (Supra)** is of the view that a dying declaration is an extremely important piece of evidence and where the court is satisfied that the dying declaration is truthful, voluntary and not a result of any extraneous influence, the court can convict the accused only on the basis of a dying declaration.

52. **Naresh Kumar vs. Kalawati & Ors. Breported in 2021 3 SCC 111** the Court found that the statement of the deceased vacillated and that there was no evidence about fitness of mind of the deceased to make the dying declaration. The

presence of the doctor while making the dying declaration did not come out in evidence. The veracity and truthfulness of the dying declaration remained suspect. In such circumstances, it would not be safe to reject the probable defence of suspect. The facts and circumstances in the presence case are different.

53. The daughter of the victim recorded a statement under Section 164 of the Code of Criminal Procedure which was tendered in evidence and marked as Exhibit – 20. P.W. 3 in her statement recorded under Section 164 of the Code of Criminal Procedure, marked as Exhibit-20, stated that the appellant poured kerosene over the victim and set her on fire. P. W. 3 however in her testimony before the trial Court sought to introduce a case that the victim poured kerosene and set her on fire while the appellant poured water on the body.

54. The date of the incident is November 4, 2014. P.W. 3 deposed at the trial that on August 3, 2015, when she was in the custody of another person. The possibility of P.W. 3 being tutored, in order to exonerate her father cannot be ruled out. Contemporaneously P.W. 3 implicated the appellant in Exhibit

20. Exhibit-21 being the statement of P.W. 3, corroborates Exhibit – 20, being the statement of the victim recorded under Section 164 of the Code of Criminal Procedure.

55. Exhibit – 13 is a statement made by the victim on November 4, 2014. The victim recorded a statement with the Police in presence of a doctor. The doctor who was present at the time of recording of such statement, deposed as P.W. 19. He stated that, the victim recorded a statement with the police in his presence. He said that, the victim was fully conscious, alert and cooperative. The victim was also well oriented to the time, place and the person.

56. In Exhibit-13 also, the victim stated that, her husband poured kerosene over her and set her on fire. Exhibit-12 is a statement which is recorded by a doctor. There, also, the doctor stated that, the victim stated that her husband put her on fire by using kerosene.

57. The victim recorded a statement under Section 164 of the Code of Criminal Procedure being Exhibit – 21. The statement was recorded in presence of a doctor being P.W. 25. In his examination-in-chief, P.W. 25 stated that, at the time of

recording the statement, the victim was in a fit state of mind for giving her statement. He also stated that the victim stated everything in her own language and the statement was recorded according to her version. Moreover, no interested person except the doctor and the learned Magistrate were present at the time of recording the statement.

58. The Magistrate who recorded the statement of the victim under Section 164 of the Code of Criminal Procedure deposed as P.W. 24. She stated that, immediately before recording the statement of the victim, the attending doctor, being P.W. 25 checked the victim. The victim was conscious and was able to make her statement.

59. Therefore, P.W. 24 and P.W. 25 established conclusively that, the victim was conscious and in a fit state of mind to make her statement. The statement was made which was marked as Exhibit 21 in her language and according to her version. In Exhibit 21, being the statement of the victim, she stated that, the appellant poured kerosene over her and set her on fire.

60. As noted in the authorities cited at the bar, a dying declaration is an important piece of evidence. An accused can be convicted on the basis of a dying declaration if the Court finds the same to be truthful, voluntary and not a result of any extraneous influence.

61. In the facts of the present case, Exhibit 21 was recorded by a Magistrate in presence of a doctor who certified the fitness of the victim to make the statement. He also stated that no other person apart from the victim, the Magistrate and himself as the doctor were present at that time. The dying declarations corroborated each other. They were made by the victim consciously, voluntarily, truthfully and without any extraneous influence.

62. The common statements of Exhibits 20, 21, 13 and 12 are that, the victim was set on fire by her husband who is the appellant herein. P.W.3, who made the statement under Section 164 of the Code of Criminal Procedure, being Exhibit 20, in her testimony in Court, tried to take a different stand.

63. We need to take into consideration the age of P.W.3, her relationship with the appellant as the daughter of the appellant and also the time elapsed between the date of the

incident and the date when she went to the witness box to depose. P.W.3 was shown her statement recorded under Section 164 in cross examination. The defence, therefore, acknowledged the contents of the statements made by her in the Section 164 statement when the defence put questions to her on such statement. Such statement was not marked as an exhibit by the prosecution during the examination in chief of P.W.3. The version, therefore, of P.W.3 in the witness box with regard to the incident, as it is contradictory to Exhibit 20, needs to be disbelieved and is, therefore, disbelieved.

64. There is overwhelming evidence in the nature of dying declarations of the victim as well as of the doctors implicating the appellant in setting the victim on fire after pouring kerosene over her. The Forensic Expert, being P.W.15 corroborated the case of the prosecution that, the victim was set on fire by using kerosene. The Forensic Expert found a wick fitted stove kept aside in a partially open condition at the place of occurrence. He also found kerosene oil thereat. He seized unused match sticks and the match box containing the same.

65. The Forensic Expert, P.W.15, who visited the spot, stated that he found manifestation of fire at the kitchen with heat scorched plastic articles, partly burnt and heat scorched synthetic dress materials that hanged from the grill in between the living room and the kitchen. Therefore, the place of occurrence was also established conclusively by the prosecution.

66. In such circumstances, the prosecution was able to establish beyond all reasonable doubts that, the appellant poured kerosene over the victim and set her on fire and that the victim died out of the injuries suffered from such fire. Therefore, the prosecution was able to prove beyond all reasonable doubt that the appellant murdered the victim.

67. By the impugned order of conviction, the appellant was convicted under Section 302 of the Indian Penal Code, 1860. By the impugned order of sentence, the appellant was directed to undergo imprisonment for life for the offence punishable under Section 302 of the Indian Penal code, 1860 and to pay a fine of Rs.5,000/-. In default of payment, he was directed to undergo rigorous imprisonment for six months more.

68. In such circumstances, we find no ground to interfere with the impugned judgment of conviction and the order of the sentence. We affirm the same.

69. C.R.A. 11 of 2020 is dismissed accordingly.

70. All pending applications, including application for bail, if any, shall stand disposed of on the above terms.

71. Trial Court records along with a copy of this judgement be sent down at once to the learned trial Court for necessary action.

72. Period of detention already undergone during enquiry and/or trial shall be set off against the substantive sentence in terms of the provisions under Section 428 of Cr.P.C.

73. Urgent Photostat certified copy of this order, if applied for, be supplied to the parties expeditiously after complying with all necessary legal formalities.

(Debangsu Basak, J.)

74. I agree.

(Md. Shabbar Rashidi, J.)