IN THE HIGH COURT AT CALCUTTA

(Criminal Appellate Jurisdiction)

Appellate Side

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Bibhas Ranjan De

C.R.A 29 of 2020

Ganesh Guria & Anr.

Vs

The State of West Bengal

For the appellants :Mr. Arindam Jana, Advocate
Mr. Soumajit Chatterjee, Advocate
Mr. Prithish Bandyopadhyay, Advocate

For the State :Mr. Prasun Kr. Datta, Ld. APP
Mr. Subrata Roy, Advocate
Mr. Nirupam Dhali, Advocate

Heard on : July 20, 2022
Judgment on : August 12, 2022

Bibhas Ranjan De, J.:-

1. This appeal is directed against the judgment of conviction and order of sentence dated 23.12.2019 and 24.12.2019

passed by Learned Additional Sessions Judge Fast Track, 1st Court, Contai, Purba Medinipur in Sessions Trial No. 25/December/2007 arising out of Marishda PS Case No.107 /2005 dated 19.12.2005 under Section(s) 498A/302/ 34 of the Indian penal Code (for short IPC) read with Section 3/4 Dowry Prohibition Act (for short DP Act), corresponding GR Case No. 632/2005, whereby both the appellants were convicted and sentenced to suffer rigorous imprisonment for life and to pay fine of Rs. 5000/- each in default to suffer further rigorous imprisonment for one year for the offence punishable under Section 302/34 IPC. They were further sentenced to suffer rigorous imprisonment for three (3) years each and also to pay a fine of Rs. 3000/- each in default to suffer further rigorous imprisonment for one (1) year for commission of offence punishable under Section 498A/34 of IPC. Both the sentences were directed to run concurrently.

2. Accordingly to prosecution case, after marriage of the Ganesh Guria (appellant) with Lamxi Guria (deceased) on 28th Jaishtya, 1411, Bengali Calendar, she was being harassed and ill treated by the appellant, in connection

with demand of Rs. 30,000/-which was not given to the in-laws of the deceased, as a result of which Laxmi Guria was beaten by the appellants and set her on fire after pouring kerosene oil on 18.12.2005 and also fled away from the place. On hearing noise neighbours came and doused the fire with water. One of the neighbour informed the complainant who rushed to the house of appellant and found her daughter in almost completely burnt condition. Immediately she was taken to Contai Sub Division Hospital. It was further alleged that on way to Hospital they found appellants on the road and they were forcibly taken into the car.

3. On receipt of the said written complaint (exhibit-2) addressed to officer-in-charge, Marishda Police Station, District Purba Medinipur, the same was registered under Marishda Police Station Case No. 107/2005 dated 19/12/2005 under Section 498A/307/349 IPC. Further case of the prosecution is that Laxmi Guria was shifted to NRS Medical College and Hospital where she succumbed to her injuries.

4. After completion of usual investigation charge sheet was filed against four (4) accused persons including the appellants under Section 498A/307/302/34 of the IPC read with Section 3 & 4 of the DP Act. Trial Court framed charge under Section 498A/302/34 of the IPC against all four (4) accused including appellants, which was denied by them, they pleaded innocence and prayed for trial. So, as to hold the accused persons guilty, prosecution examined as many as 15 witnesses namely Hrishikesh Giri as PW-1, who is brother of deceased, Manoranjan Kala as PW-2, who is a neighbor of accused persons , Madan Kumar Guria as PW-3, another neighbor of accused persons, Gautam Maity as PW-4, who is a law clerk attached Kontai Court, Ashoke Kumar Giri as PW-5, who is cousin brother of deceased, Shankar Dwibedi as PW-6, who is a priest, resident of village Sijua, Abihijit Maitra as PW-7, District planning Officer attached to Tamluk DM Office, Bhim Charan Giri as PW-8, father of deceased, Matangini Giri as PW-9, mother of deceased, Debi Pradhan as PW-10, sister of deceased, S.I Saikat Ray as PW-11, who made arrangement for inquest by the Ld. Magistrate, Bhagyadhar Khila as PW-12,

a photographer, Dr. Bidhan Chandra Bhunia as PW-13 who claimed himself as witness to the recording of dying declaration of deceased in Contai sub Hospital, Pradip Banerjee as PW-14, who also claimed himself to a witness to recording dying declaration of deceased and Amit Hati as PW-15, who investigated this case. A good number of documents were admitted in this case as exhibit 1 to 10/1.

5. After examination of accused persons one witness namely Chandi Charan Kar has been examined as defence witness no. 1. In course of his evidence he has stated that on the date of incident, on hearing hue and cry he rushed to the house of accused persons and saw that while cooking tiffin some how she caught fire on her body. In cross-examination he denied the suggestions.

6. The Trial Court after hearing counsel for the respective parties and considering the material available on record, by the impugned judgment convicted and sentenced two (2) accused persons (appellants of this case) and acquitted the accused Anjali Guria and Gautam Guria from all charges framed in this case.

7. Mr. Arindam Jana, Ld. Advocate appearing on behalf of the appellants has strenuously contended as under:

- Investigating Officer (for short I.O) (PW-15) prepared the rough sketch map pointing out the entire house of the appellants as place of occurrence (for short P.O) instead of particular room where the incident alleged to have been committed thereby, Mr. Jana has tried to establish that actual place of occurrence has not been ascertained.
- Though it is specific case of the persecution that victim was immolated using a gas lighter but unfortunately no such gas lighter was ever seized by the I.O from the house of the appellants.
- Mr. Jana referring to evidence of witnesses, has submitted that all the relatives were present at the time of recording of alleged dying declaration and such declaration cannot be taken as sacrosanct and without being influenced by tutoring .
- Mr. Jana has further contended that from the evidence and injury report (exhibit-10) it is clear that strong sedative medicines were administered to the victim and

in that case level of consciousness of the victim cannot be presumed to be fit for recording dying declaration as there was no such certificate of fit state of mind is found in the record.

- Referring to evidence on record, Mr. Jana has submitted that left thumb impression of the victim on the dying declaration (exhibit-4) cannot be accepted by any stretch of imagination in terms of inquest report.
- Mr. Jana has submitted the prosecution story of igniting the victim by a gas lighter, is contradictory to dying declaration alleged to have been given by the victim. It has been further submitted that Post Mortem Report was admitted in evidence as exhibit-6 with the assistance of the provision of Section 294 of the Criminal Procedure Code (for short Cr.P.C) but Post Mortem doctor has not been examined in this case.
- Mr. Jana has submitted that in this case it is admitted position that appellant no. 2 (Ratnakar Bhunia) suffered burn injury on his person and admitted to Contai SD Hospital for treatment. It is specific case of the appellants that the appellant no.2 sustained burn

injury in an attempt to douse the fire to save the victim for burning. Mr. Jana has specifically contended that according to prosecution case one Pijush Maity saw the incident of burning and informed the de facto complaint, but he was not examined in this case.

- Before parting with, Mr. Jana has submitted that neighbours were declared hostile by the prosecution and in support of his contentions he relied on the following cases:

a. 1971 (3) S.C.C.-436 Yudhishtir Vs. State of Madhya Pradesh,

b. 2011 (10) S.C.C-173 Surinder Kumar Vs. State of Haryana,

c. 2019 (9) S.C.C.-1 Atbir Vs. Government of NCT of Delhi,

d. 2019 (4) S.C.C.-739 Sampat Babso Kale & Another Vs. State of Maharastra,

e. (1999) 5 SCC.- 96 State of Haryana Vs. Bhagirath & Others and

f. (1997) 6 S.C.C.- 171 Vijender Vs. State of Delhi

8. Mr. Prasun Kumar Dutta learned Additional Public Prosecutor has submitted on behalf of the state that the PM report, (exhibit-6) inquest report (exhibit-3) and dying declaration (exhibit-4) clearly suggest that victim was brutally assaulted by her husband she became senseless.

9. Mr. Dutta further relied on the evidence of PW-10, brother of the deceased who stated in his evidence that victim disclosed all the incident to him while she was shifted to Contai SD Hospital. It has been further submitted that the injury report (exhibit 10/1) of the appellant cannot suggest that appellant no. 2 was trying to douse the fire as it is expected to douse the fire by pouring water or putting any blanket or quilt instead of touching the burnt body. Thereby, Mr. Dutta supported the impugned judgment passed by the Learned Trial Judge.

Decision

10. To attract the penal provision of Section 498A IPC prosecution has to show that married wife was subjected to cruelty within the meaning of following explanations to the provision of Section 498A IPC i.e

> *(a) Any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to*

cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(b) Harassment of the woman where such harassment is with a view to coercing her or by any person related to her to meet any unlawful demand for any property or valuable security is on account of failure by her or any person related to her to meet such demand.

11. In this case, PW-1, PW-5, PW-8, PW-9 and PW-10 have stated in their respective evidence that after marriage disturbance cropped up while accused person demanded a cash of Rs. 30,000/- from the victim and for that reason victim was subjected to physical and mental torture. PW-1(brother of the deceased), could not say either about a purpose of demand or about specific name out of four accused persons, who demanded the money. He even did not make any query from his sister as to the particular person who demanded the money.

12. PW-5 (brother of the deceased) in her evidence has stated that regarding demand of Rs.30,000/- he along with PW-1 tried to settled the dispute at the instance of villagers but no result was yielded. PW-5 has further stated that he informed the incident of torture to the Gram Panchayat of

the village where accused person resided, with a request to take appropriate steps.

13. PW-8 (father of the deceased) has also harped on the same string of torture on demand of cash of Rs. 30,000/-. He further stated that they tried to settle the dispute 3/4 times at the instance of Panchayat in the locality of the appellants, but inspite of 'Sailish' his daughter (victim) was again subjected to torture.

14. PW-9 (mother of the deceased) also corroborated the evidence of PW-8 with regard to torture on demand of money as well as 'sailish'.

15. PW-10 (sister of the deceased) has testified that the deceased was subjected to torture on demand of cash Rs. 30,000/-and her father along with his elder brother and other members of the family went to matrimonial home of the deceased and tried to settled the dispute on 2/3 of the occasion but to no effect.

16. From the entire evidence of PWs 1,5,8,9 and 10 it is clear that none of the witnesses could disclose either any specific date or any specific name among the accused persons who demanded the money or the purpose of

demand. From their evidence it appears that they involved local Panchayat to settle the dispute for which deceased was subjected to torture on demand of money. Unfortunately, neither any oral evidence nor any document has ever been produced regarding alleged 'sailish'. No one from Panchayat came to Court to corroborate the 'sailish'. It would have been otherwise if there is an effort to settle the dispute between the two families, but in our case aforesaid witnesses has tried to prove 'sailish' at the instance of village Panchayat. But, no one from village panchayat was cited as witness in the charge sheet far to speak of examining as witness. Prosecution examined two witnesses being residents of the village of appellants, but none of them supported either factum of torture or other incident alleged in this case and consequently both of them were declared hostile by the prosecution. Both of them denied all the suggestion relating to torture on demand of money.

17. In the aforesaid view of the matter, we are constrained to hold that appreciation of evidence by the learned Trial Judge in coming to return the findings to convict the appellants under Section 498-A IPC, is not correct.

18. To prove the charge under Section 302/34 IPC, prosecution relied upon the evidence of PW-1, PW-5, PW-8, PW-9 and PW-10, regarding direct participation of the appellants in the crime in one hand. On the other hand prosecution has relied upon the dying declared (exhibit -4) of the victim seems to have been recorded by PW-7 in presence of PW-13 & PW-14.

19. ***Yuthisthir*** (supra) held as under:

> *" 22. In the statements before the police P. Ws. 1 and 6 have not referred to their having mentioned to P.W. 9 about the incident of coming out of the house of Bamdeo. They have also not mentioned that the appellants had killed Surajkunwar. Again they have not mentioned in the statements before the police that both accused No. 1 and Rajkumar, accused No.3 had pressed the neck of Surajkunwar; not they have stated that accused No. 2 Yudhishtir had trusted a cloth in the mouth of Surajkunwar, not about Shivkumar catching hold of her legs. In the Statements before the police they have merely stated that after coming out of the house they saw several persons outside, but they went away. This statement is quite consistent with the information given in Ex. P. 3 that these witnesses never talked to anybody about the incident.*
>
> *23. When confronted with these omissions in the police statements, P.Ws. 1 and 6 stated before the Court that though they mentioned all the details*

about the crime to the police, the latter has not properly recorded their statements. But the Investigating Officer, P.W. 17 has given evidence to the effect that he has recorded the statements of P.Ws 1 and 6 as given by them and that they did not mention anything about the part played by the appellants in the crime.

24. Mr. Shroff, learned counsel for the State, has attempted to explain away these circumstances on the ground that they are only minor omissions which will not affect the credibility of their evidence given before the Court. We cannot accept this contention of the learned counsel. We are of the opinion that these omissions, pointed out above, are not minor, but they are omissions of a very substantial nature, which affect the truth of the evidence given before the Court. On the earliest occasion these witnesses have omitted to refer to the decisive role stated to have been played by the appellants in the commission of murder. Therefore, the statement before the Court implicating appellants must, in the circumstances, be considered to have an improvement."

20. In our case, written complaint (exhibit-1) speaks about the incident of assault of the victim and setting her on fire by the all accused persons including the appellants. It is further alleged that one of the villagers informed the defacto complainant over telephone. From the cross-examination of PW-15 (I.O) it appears that none of the witnesses i.e PW-1 (brother of deceased) and PW-5 (cousin brother of the

deceased) disclosed any such incident to the Investigating Officer at the time recording statement under Section 161 Cr.PC. Such omission cannot be accepted as trivial in nature.

21. From the evidence of PW-1, PW-5 and PW-8 (complainant) on oath it appears that Piyush Maity, resident of the same village where accused persons resided, witnessed the crime and informed the defacto complainant (PW-8).

22. Before evaluating the evidence of witnesses it would be appropriate to lay out the following provisions of the Evidence Act:

> *" S.59. Proof of facts by oral evidence.- All facts, except the [contents of documents or electronic records, may be proved by oral evidence."*
>
> *" 60. Oral evidence must be direct.- Oral evidence must, in all cases whatever, be direct; that is to say-*
>
> *If it refers to a fact which could be seen, it must be the evidence of a witness who says he saw*
>
> *If it refers to a fact which could be heard, it must be the evidence of a witness who says he heard*
>
> *If it refers to a fact which could be perceived by any other sense or in any other manner, it must the evidence of a witness who says he perceived by that sense or in that manner;*

If it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds:

Provided that the opinions of experts expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held, may be proved by the production of such treatises if the author is dead or cannot be found, or has become incapable of giving evidence or cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable:

Provided also that, if oral evidence refers to the existence or condition of any material thing other than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection.”

23. This part of the prosecution case referring to a fact that one Piyush Maity saw the crime, has to be proved by the oral evidence of Piyush Maity himself within the meaning of Section 60 of the Evidence Act. But, prosecution neither examined said Piyush Maity nor explained as to why Piyush Maity was not examined. It is true that non examination of any witness does not matter to the prosecution case. But, in the backdrop of our case Piyush Maity was the only witness who saw the crime alleged in this case. Therefore, non examination of that particular witness is really fatal to the instant prosecution case,

specially regarding claim that one Piyush Maity saw the crime.

24. Looking back to the evidence of PW-1,PW-5, PW-8, PW-9 and PW-10 we find that at the time of shifting Laxmi Guria (since deceased) to hospital by a trecker, those witnesses found appellants standing on the road and they were dragged into the trecker and went to Police Station first. If that be the situation witnesses might have informed to Police as to the cognizable offence alleged to have been committed by the appellants. In that case, Police should have acted upon that information as to cognizable offence under Section 154 (1) of Cr.P.C. and also arrested the appellants. But, prosecution has failed to explain the reason behind such inaction either on the part of the defacto complainant or on the part of the Police. Such conduct has surely created a reasonable doubt in mind of this Court.

25. Next part of the prosecution case is dying declaration. According to prosecution case Laxmi Guria (since deceased) made her dying declaration twice. Firstly, she made statement while she was being shifted to hospital by a

trecker driven by one Biswajit Maity and she made further statement later before the Deputy Magistrate (PW-7) in Contai Sub Division Hospital.

26. From the evidence it appears that the PW-1 (brother of the deceased) PW-5 (cousin brother of the deceased), PW-8 (father of the deceased) and PW-10 sister of the deceased) accompanied victim to a Hospital by a trecker driven by one Biswajit Maity. PW-1 has deposed in his evidence that he heard all the incident from the mouth of his sister on way to Hospital. Surprisingly, PW-5 and PW-8 did not testify as to any such statement given by the victim in course of her shifting to Hospital. Again, PW-10 stated in her evidence that the deceased stated all facts of crime committed by the accused persons on her way to Hospital. She further deposed that she disclosed all such facts to the Investigation Officer. But, I.O (PW-15) clearly negated the claim by saying that none of the PW-1, PW-5 and PW-10 stated about any such declaration made by the deceased on her way to Hospital, at the time of recording their statement under Section 161 Cr.P.C. It is needless to mention that prosecution did not examine said Biswajit Maity who drove

the trecker. Witnesses were expected to disclose such material facts before the Investigating Officer at the time of recoding their initial statement in connection with this case.

27. In the above conspectus, we, by any stretch of imagination, can hold that Laxmi Guria (since deceased) made any statement before the witnesses on her way to Hospital.

28. Next, we propose to proceed to the dying declaration alleged to have been made by the deceased before the Deputy Magistrate (PW-7).

29. ***Surinder*** (supra) laid down the principles for accepting dying declaration and observation thereon as under:

> *"10. Before considering the acceptability of dying declaration (Ext. PD), it would be useful to refer the legal position.*
>
> *11. In Sham Shankar* ***Kankaria v. State of Maharashtra (2006) 13 SCC 165*** *this Court held as under: (SCC pp. 171-73, paras 10 &11)*
>
> *"10. This is a case where the basis of conviction of the accused is the dying declaration. The situation in which a person is on deathbed is so selemn and serene when he is dying that the grave position in which he is placed, is the reason in law to accept*

veracity of his statement. It is for this reason the requirements of oath and cross-examination are dispensed with. Besides, should the dying declaration be excluded it will result in miscarriage of justice because the victim being generally the only eyewitness in a serious crime, the exclusion of the statement would leave the court without a scrap of evidence.

11. Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross-examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the court also insists that the dying declaration should be of such a nature as to inspire full confidence of the court in its correctness. The court has to be on guard that the statement of deceased was not as a result of either tutoring or prompting or a product of imagination. The court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailant. Once the court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence. This Court has laid down in several judgments the principles governing dying declaration, which could be summed up as under as indicated in ***Paniben v. State of Gujarat (1992) 2 SCC 474 (SCC pp.480-81, para 18)****.*

(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. ***(See Munnu Raja v. State of M.P (1976) 3 SCC 104)****.*

(ii) If the court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. ***(See State of u.p. v. Ram Sagar Yadav (1985) 1 SCC 552 and Ramawati Devi v. State of Bihar (1983) 1 SCC 211)****.*

(iii) The court has to scrutinize the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had an opportunity to observe and identify the assailants and was in a fit state to make the declaration. ***(See K. Ramachandra Reddy v. Public Prosecutor (1976) 3 SCC618)****.*

(iv) Where dying declaration is suspicious, it should not be acted upon without corroborative evidence ***(See Rasheed Beg v. State of M.P. (1974) 4 SCC 264)****.*

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected ***(See Kake Singh v. State of M.P. 1981 Supp SCC 25)****.*

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction ***(Ram Manorath v. State of U.P (1981) 2 SCC 654****).*

(vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected ***(See State of Maharashtra v. Krishnamurti Laxmipati Naidu 1980 Supp SCC 455)****.*

(viii) Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth. ***(See Surajdeo Ojha v. State of Bihar 1980 Supp SCC 769)****.*

(ix) Normally the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. Buy where the eyewitness has said that the deceased was in a fit and conscious state to make the dying declaration, the medical opinion cannot prevail. ***(See Nanhau Ram v. State of M.P. 1988 Supp SCC 152)****.*

(x) Where the prosecution version differs from the version as given in the dying declaration, the said de claration cannot be acted upon. ***(See State of U.P. v . Madan Mohan (1989) 3 SCC 390)****.*

(xi) Where there are more than one statement in th e nature of dying declaration, one first in point of time must be preferred. Of course, if the plurality of dying declaration could be held to be trustworthy and reliab le, it has to be accepted. ***(See Mohanlal Gangaram Gehani v. State of Maharashtra (1982) 1 SCC 70 0****.”*

30. ***Atbir*** (supra) also laid down the following principles before relying upon the dying declaration as follows:

“22. The analysis of the above decisions clearly shows that:

(i) Dying declaration can be the sole basis of conviction if it inspires the full confidence of the court.

(ii) The court should be satisfied that the deceased was in a fit state of mind at the time of making the statement and that it was not the result of tutoring, prompting or imagination.

(iii) Where the court is satisfied that the declaration is true and voluntary, it can base its conviction without any further corroboration.

(iv) It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence.

(v) Where the dying declaration is suspicious, it should not be acted upon without corroborative evidence.

(vi) A dying declaration which suffers from infirmity such as the deceased was unconscious and could never make any statement cannot form the basis of conviction.

(vii) Merely because a dying declaration does not contain all the details as to the occurrence, it is not to be rejected.

(viii) Even if it is a brief statement, it is not to be discarded.

(ix) When the eyewitness affirms that the deceased was not in a fit and conscious state to make the dying declaration, medical opinion cannot prevail.

(x) If after careful scrutiny, the court is satisfied that it is true and free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal

impediment to make it the basis of conviction, even if there is no corroboration."

31. In ***Sampat Babso Kale*** (supra) Hon'ble Apex Court held as under:

> *"14. In our view, though dying declarations stand proved, the issue is whether we can convict the accused only on the basis of these dying declarations. In a case of the present nature where the victim had 98% burns and the doctor has stated from the record that a painkiller was injected at 3.30 a.m. and the dying declaration had been recorded thereafter, there is a serious doubt whether the victim was in a fit state of mind to make the statement. She was suffering from 98% burns. She must have been in great agony and once a sedative had been injected, the possibility of her being in a state of delusion cannot be completely ruled out. It would also be pertinent to mention that the endorsement made by the doctor that the victim was in a fit state of mind to make the statement has been made not before the statement but after the statement was recorded. Normally it should be the other way round."*

32. In view of the ratio of the aforesaid decisions of the Hon'ble Apex Court, a dying declaration can be the basis of conviction even without corroboration but in that case Court must be satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and indentify the assailant. Once the Court is satisfied

that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. But, when the dying declaration is suspicious, it should not be acted upon without corroboration.

33. In our case, prosecution has made an effort to prove the dying declaration (exhibit-4) by adducing evidence of PW-7, PW-13, PW-14 & PW-7 has stated in his evidence he recorded dying decoration under his signature which has been admitted in evidence as exhibit-4. In Cross-examination PW-7 stated that he did not find any injury on the person of victim who was in burnt condition. At the time of recording statement her family member namely Hirishkesh Giri and Debi Pradhan were present. He denied the suggestion that the victim was not in a position to speak anything. PW-13 (Dr. Bihan Chandra Bhunia) has testified in his evidence that on 19.12.2005 he was posted at Contai Sub Divisional Hospital as emergency medical officer. On that day executive Magistrate Abhijit Maitra (PW-7) recorded statement of patient Laxmi Guria in his

presence and he signed on that recorded statement as competent witness. In cross-examination PW-13 has stated that he had not given any note on the statement regarding fit state of mind of the deceased. He also did not identify the patient before the Executive Magistrate. He could not say the bed number of patient from the document (exhibit-4) itself. PW-14 ASI of Police attached to Contai Police station has deposed that he witnessed recording of dying declaration of Laxmi Rani Guria by one Executive Magistrate and he put his signature (exhibit 4/3) on the document. In cross-examination he has stated that as per order of the Inspector-in-charge of the Contai PS he remained in the Hospital.

34. PW-11, SI of Police attached to Entally PS, Calcutta, made arrangement for inquest over the dead body of Laxmi Guria by one Executive Magistrate of Alipur 24 Parganas (South). Inquest report was admitted in evidence as exhibit -3.

35. Post Mortem Report was admitted in evidence as exhibit-6. But, PM Doctor has not examined in this case.

36. In ***Vijendra*** (supra) it was held as follows:

> *"18. However, the most glaring infirmity appearing on the record relates to the evidence led by the prosecution to prove the homicidal death of Khurshid. The only witness examined by the prosecution in this regard was Satish Kumar (PW-21), a record clerk of the District Hospital, Ghaziabad. His testimony reads as follows:*
>
> *" I have brought the post-mortem report of an unknown male sent by PS Loni, Ghaziabad on 28-6-1992by Dr. U.C. Gupta. The date of sending is not known to me and is not given on record. Dr. U.C. Gupta was transferred from District Hospital earlier. He has been now transferred back. I identify his signature and handwriting from the post-mortem report. The copy of P/M report is Ext. 21/A (objected to). I have seen Dr. U.C Gupta writing and signing.*
>
> *Cross-examination*
>
> *Original copy is not on record. The original copy is sent to SSP, Ghaziabad. Second copy is sent to PS and third copy is maintained in record."*
>
> *19. It passes our comprehension how the Trial Judge entertained the post-mortem report as a piece of documentary evidence on the basis of the above testimony of a clerk in spite of legitimate objection raised by the defence. In view of Section 60 of the Evidence Act, referred to earlier, the prosecution is bound to lead the best evidence available to prove a*

certain fact; and in the instant case, needless to say, it was that of Dr U.C Gupta, who held the post-mortem examination. It is of course true that in an exceptional case where any of the prerequisites of Section 32 of the Evidence Act is fulfilled a post-mortem report can be admitted in evidence as a relevant fact under Sub-Section (2) thereof by proving the same through some other competent witness but this section had no manner of application here for the evidence of PW 21 clearly reveals that on the day he was deposing Dr. Gupta was in that hospital. The other reason for which the trial Judge ought not to have allowed the prosecution to prove the post-mortem report is that it was not the original report but only a carbon copy thereof, and that too not certified. Under Section 64 of the Evidence Act document must be proved by primary evidence, that is to say, by producing the document itself except in the cases mentioned in Section 65 thereof. Since the copy of the post-mortem report did not come within the purview of any of the clauses of Section 65 it was not admissible on this score also."

37. In our case, prosecution failed to explain as to why the Post Mortem Doctor has not been examined in this case. However from the Post Mortem Report (exhibit-6) it is found that death was due to the effect of burn injury and ante mortem in nature. If we put both Post Mortem Report and inquest report in juxta position we find that entire body including hands legs and palm of

the deceased were burnt. According to Post Mortem Report injury as found as 1st degree, 2nd degree and 3rd degree and whole of the face and neck and scalp were burnt. Both upper limbs including palms and both ankle were burnt. From the inquest report it is found that almost the entire body was burnt. Face, both arms, both legs were also found burnt.

38. Considering the aforesaid injuries we cannot come to any conclusion that deceased was in a condition to speak without any specific certificate of doctor that deceased was at least conscious or in fit state of mind before giving dying declaration. It further takes us aback that while entire body of the deceased including her hands and palms were burnt, how could left thumb impression be given by the deceased on the statement alleged to have been recorded by the Executive Magistrate. It is also surprising to note that what prevented the doctor (PW-13) to make an endorsement with regard to fit state of mind or consciousness of the deceased at the time of dying declaration alleged to have been recorded by the Executive Magistrate (PW-7)

in his presence. Therefore, the dying declaration (exhibit-4) cannot be said to inspire full confidence of this Court in its correctness.

39. In view of the discussions made above, conviction of the appellants under Section 498-A/302/34 of the IPC cannot be sustained in the absence of any evidence to show that the deceased was subjected to cruelty or she was murdered in furtherance of common intention of both the appellants. Hence, the conviction of the appellants under Section 498-A/302/34 is liable to be set aside and they are entitled to be acquitted of the said charges.

40. In the result, appeal is allowed. Conviction and Sentenced imposed on the appellants under Section 498-A/302/34 are set-aside and they are acquitted of the said charges. The appellant no. 2 (Ratnakar Guria)) is reported to be on bail, therefore, his bail bond shall continue for a period of six (6) months from today in view of provision of Section 437A Cr.P.C. Appellant No. 1(Ganesh Guria) is reported to be in jail, therefore, appellants no. 1 be released from Correctional Home on

execution of a bail bond with surety to the satisfaction of the Ld. Trial Court. The bond so executed shall be in force for six (6) months under the provision of Section 437-A Cr.P.C.

41. All pending applications, if any, stand disposed of accordingly.

42. Let a copy this judgment along with the Trial Courts record be sent back forthwith.

43. All parties shall act on the server copies of this judgment duly downloaded from the official website of this Court.

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

[BIBHAS RANJAN DE, J.]

45. I Agree.

[DEBANGSU BASAK, J.]