

**IN THE HIGH COURT AT CALCUTTA**

**Criminal Application**

**Appellate Side**

Present:

**The Hon'ble Justice Debangsu Basak**

And

**The Hon'ble Justice Md. Shabbar Rashidi**

**CRA 199 of 2020**

**Samaresh Biswas**

**Versus**

**The State of West Bengal**

For the appellant : Mr. Arnab Chatterjee, Adv.  
: D. Biswas, Adv.

For the State : Mr. Madhusudan Sur, Id. APP  
: Ms. Sreyashee Biswas, Adv.

Heard on : 11<sup>th</sup> November, 2022

Judgment on : 30<sup>th</sup> November, 2022

**Md. Shabbar Rashidi, J.:**

**1.** The appeal is directed against the judgment of conviction dated 24.02.2020 and consequential order of sentence dated 26.02.2020 passed by learned 2<sup>nd</sup> Additional District & Sessions Judge, Krishnanagar, Nadia in Sessions Trial No. XI (II) of 2018 corresponding to Sessions Case No. 27 (02) of 2018 under section 302 of the Indian Penal Code.

**2.** The victim i.e. the wife of the de facto complainant used to reside alone and developed a relationship with the accused Samaresh Kirtonia. Owing to his employment, the de facto complainant then, used to reside outside.

**3.** On 08/11/2017 at about 11 pm, the accused entered into the house of the victim and had an altercation with her. Hearing the shouting, the elder brother of the de facto complainant rushed to the room of the victim and saw her blazing. Samaresh then fled away. The victim was taken to Krishnaganj hospital for her treatment and she

was referred to Saktinagar hospital and thereafter, she was further referred to Kalyani Jahar Lal Nehru Hospital in a precarious condition. The victim is said to have narrated the incident to the de facto complainant in course of her treatment and is said to have reported that she was set ablaze by accused Samaresh with an intention to kill her. Being informed by his elder brother of the de facto complainant came back and lodged the written complaint with Krishnaganj police.

**4.** On the basis of such written complaint lodged by the de facto complainant, Krishnaganj P.S. Case No.370 dated 11.11.2017 under section 326/307 of the Indian Penal Code was started against the convict Samaresh Kirtonia.

**5.** The police took up investigation and on completion thereof submitted charge sheet against the convict under section 302 of the Indian Penal Code.

**6.** Pursuant to the compliance of the provisions under section 207 of the Code of Criminal Procedure and

the case, having been committed to Court of Sessions, charge under section 302 of the Indian Penal Code was framed to which the convict pleaded not guilty and claimed to be tried. The convict stood trial.

**7.** In course of trial, prosecution altogether adduced as many as 24 witnesses. In addition, prosecution also adduced documentary evidences as well.

**8.** The appellant was examined under section 313 of the Code of Criminal Procedure where he pleaded innocence. No defense witness was adduced by the appellant.

**9.** PW1 is the de facto complainant. He has stated that on the date of incident i.e. 08/11/2017, he was at Pune and came down the next day. He attended his wife at JNM Hospital, Kalyani. He came to know from Puja that on the date of incident, accused Samaresh came to his house in his absence, assaulted her, poured kerosene oil over her body and set her on fire. He further stated that his mother, elder brother and his wife used to reside in the

same house but in separate rooms. He also came to know about the incident from his elder brother Rabindranath Kirtonia. Subsequently, he lodged a written complaint with the police and proved his signature thereon **(Ext.1/1)**. He further stated that his wife died after 10 days of the incident at JNM Hospital, Kalyani. He also proved his signature on the report prepared over the dead body **(Ext.2/1)**.

**10.** In his cross-examination, PW1 stated that when he came from Pune, he visited his wife in the hospital and found her in precarious condition and on that very day, he lodged the written complaint. He admitted in his cross-examination that he had no good relations and visiting terms with the accused.

**11.** The elder brother of de facto complainant, Rabindranath Kirtonia deposed as PW2. He stated that he along with his wife and son went to bed at 7.30 pm. While asleep, he heard hue and cry. Coming out, he saw his brother's wife Puja ablaze in the courtyard and the

accused Samaresh fleeing away. PW2 poured water to douse the fire, thereafter she was lying down on the ground and then PW2 took her to Krishnaganj hospital for treatment. PW2 also recorded his statement under Section 164 of the Code of Criminal Procedure and proved the statement **(Ext. 3)** and his signatures thereon **(Ext. 3/1, 3/2 and 3/3 respectively)**. He also proved his signature on the seizure list through which a bottle containing kerosene oil was seized **(Ext. 4/1)** and the bottle **(Mat Ext. 1)**. PW2 also proved his signature on the seizure list through which mosquito net etc. was seized by the investigating officer **(Ext. 5/1)** and the aforesaid articles **(Mat Ext. II)**.

**12.** In his cross-examination, PW2 admitted that the seized articles were not labeled.

**13.** Wife of PW2 deposed as PW3. She also stated that at the relevant time she was sleeping with her husband (PW2). Upon hearing hue and cry, she came out and found Puja Kirtonia in flames in the midst of the

courtyard. Her husband tried to douse the fire by pouring water. Thereafter, they brought the victim to Krishnaganj Hospital, where PW3 was reported by the victim that accused Samaresh set her on fire. PW3 also stated that Puja had earlier informed her that Samaresh used to disturb her and try to make a relation with her but she did not care to such proposals. Without naming her informant, PW3 stated that she heard on the date of incident that the occurrence was perpetrated by Samaresh. Puja died in 7/8 days of the occurrence. In her cross-examination, PW3 stated that none of the neighbouring people came to her house at the date and time of the incident.

**14.** PW4 is the father of the de facto complainant. He has not supported the case of the prosecution and was declared hostile.

**15.** The doctor of Krishnaganj Hospital was examined as PW5. He treated the victim on 09.11.2017 and referred her to Saktinagar Hospital. He proved the

report prepared by him (Ext. 6). PW5 also stated that when the victim was brought with history of burn injuries, she was not able to speak but she could answer the leading question put to her by nodding her head and like.

**16.** Another doctor of Nadia District Hospital deposed as PW6. He stated that on 09.11.2017, he examined the victim Puja Kirtonia referred from Krishnaganj BPHC brought by her brother-in-law Rabindranath Kirtonia. She had sustained 70% burn injuries. She was admitted in the hospital. Thereafter, police was informed and her statement was recorded. PW6 deposed to the effect that as per the statement of victim Puja Kirtonia, she was beaten by one Samaresh Biswas and set on fire. Thereafter, he himself put out the fire after which Puja Kirtonia herself set her on fire. PW6 also referred the patient to Jawahar Lal Nehru Medical College & Hospital or NRS Hospital, Kolkata. He also informed the police for recording her dying declaration.

PW6 proved his endorsements on the Bed Head Ticket **(Ext.7/1)**.

**17.** The doctor of Jawahar Lal Nehru Medical College & Hospital deposed as PW 7. He stated that on 10.11.2017, one patient Puja Kirtonia, admitted under Dr. Subikash Biswas, Dr. Chinmoy Mallick, Dr. Nipun Roy and Dr. H. Hassa of burn unit, made a statement before police in his presence and he signed on the statement after recording of such statement which he proved **(Ext. 8/1)**. In his cross-examination, PW7 admitted that there was no note as to who scribed the statement and under whose instructions. He further admitted that there was no endorsement in the statement so recorded that the patient was in a fit state to give statement and that his signature did not contain the date.

**18.** One staff nurse of Jawahar Lal Nehru Medical College & Hospital deposed as PW8. She stated that on 10.11.2017 one Puja Kirtonia gave her dying

declaration before the police. She proved her signature on the statement **(Ext. 8/2)**.

**19.** In her cross-examination, PW8 admitted that there was no date beneath her signature on the alleged dying declaration recorded by the police and that she was never interrogated by the police.

**20.** PW9 accompanied the witness Rabindranath Kirtonia for recording his statement under Section 164 of the Code of Criminal Procedure.

**21.** PW10 is the Magistrate who conducted inquest over the dead body of the victim. She proved the inquest report **(Ext. 9)**.

**22.** PW 11 is a police constable who collected the viscera of Puja Kirtonia from Jawahar Lal Nehru Medical College & Hospital under direction from S.I. Snehasish Das of Krishnaganj police station. This witness has proved the viscera requisition **(Ext. 10)** and his signature on the

seizure list through which the viscera was seized (**Ext. 11/1**).

**23.** PW12 is another witness to the seizure list through which the viscera was seized (**Ext. 11/2**).

**24.** PW13 is the toto driver who carried accused Samaresh Biswas to Krishnaganj Hospital being called by him at about 10.00 pm 5/6 months ago (from 31.05.2018). He has also stated that he found that Samaresh Biswas had sustained burn injuries on both his hands.

**25.** PW14 is another toto driver. He stated that about 6 months ago (from 31.05.2018) he was called by Rabindranath Kirtonia and carried Puja Kirtonia to Krishnagang BPHC as she sustained burn injuries.

**26.** The mother of the victim was examined as PW15. She stated that her daughter Puja Kirtonia was married to Bishu@ Biswanath Kirtonia. Her son-in-law used to reside at Dubai for his job. She also stated that

Samaresh set her daughter on fire. She rushed to the hospital and saw her daughter in burnt condition. She also came to know that Samaresh set her on fire and after 9 days of the incident, Puja died. In her cross-examination, PW15 admitted having come to court for deposition with her son-in-law and another witness (PW16).

**27.** PW16 did not support the case of the prosecution and was declared hostile.

**28.** PW17 though, was not declared hostile but has not supported the case of the prosecution.

**29.** PW18 also did not support the case of the prosecution and was declared hostile witness.

**30.** PW19 is the sister of de facto complainant. She stated that she was reported by the victim in the hospital that she was set ablaze by Samaresh.

**31.** The autopsy surgeon was examined as PW20. He conducted post-mortem examination on the dead body

of the victim and found no other injury on her person except the burn injuries. He proved the Post-mortem report **(Ext. 12)**.

**32.** PW21 is the recording officer. He received the written complaint on 11.11.2017 and started Krishnaganj P.S. Case No.370 dated 11.11.2017 under Section 326/307 of the Indian Penal Code. He has proved the endorsement of receipt **(Ext. 1/2)** and the formal First Information Report **(Ext. 13)**.

**33.** PW 22 is an ASI of police who conducted inquest on the dead body of the victim in connection with U.D. Case No. 558/2017 dated 19.11.2017. He has proved the inquest report **(Ext. 2)**, the dead body challan **(Ext. 14)** as well as requisition for the inquest **(Ext. 15)** and his signature on the inquest was conducted by the S.D.O. Kalyani **(Ext. 9/1)**.

**34.** PW 23 is a Sub-Inspector of police who recorded the dying declaration of the victim on 10.11.2017. He stated that on 10.11.2017, he visited

Jawahar Lal Nehru Medical College & Hospital, Kalyani and recorded the dying declaration of the victim in presence of Krishna Rout, duty staff and Dr. Sabuj Pal of JNM Hospital, Kalyani and obtained their signatures on the statement so recorded **(Ext. 8)**.

**35.** In his cross-examination, PW23 admitted that the contents of the statement recorded by him and his signature thereon were in two different inks without any explanation to this effect. Admittedly, there was no note as to who identified the victim and that PW23 did not take necessary permission from the superintendent of the hospital or the attending doctors for recording such statement. PW 23 also admitted that there was no note to the effect that he disclosed his identity before the victim prior to recording her statement or that the victim was physically capable of giving such statement. PW 23 also admitted that he did not make any note of the location of the victim in the hospital or the exact place where the statement was recorded. It was also admitted that the

statement so recorded did not contain any note that it was recorded as per the statement of the victim and it was read over and explained to her after recording. Admittedly, the victim was not in position to put her signature or thumb impression. He has also stated that PW23 did not make any entry in the G.D.E. book maintained at the police station regarding his exit and return to the Police Station, for the purpose of recording the dying declaration of the victim.

**36.** The Investigating Officer was examined by the prosecution as PW 24. He has proved the rough sketch map of the Place of occurrence with index **(Ext. 16 & 16/1 respectively)**, seizure list through which mosquito net etc. were seized **(Ext. 5)** and photograph of the victim and place of occurrence **(Mat Ext. III & IV respectively)**. In course of investigation, PW 24 examined available witnesses and recorded their statements. He also collected and seized the viscera of the victim under a seizure list **(Ext. 11)**. On completion of investigation PW 24, he

submitted charge sheet under section 302 of the Indian Penal Code.

**37.** The convict stood the trial and upon conclusion of the trial, the learned trial court, by the impugned judgment and order convicted the accused for the offence punishable under Section 302 of the Indian Penal Code and sentenced him to undergo life imprisonment and to pay a fine of Rs.20,000/-

**38.** The appellant has sought to assail the judgment and order of conviction and sentence on the ground that learned Trial Court did not consider the delay in lodging the First Information Report. It has also been pointed out that the impugned judgment is perverse so far as in spite of presence of several houses in the vicinity, no independent witness has been examined or has supported the case of prosecution, rendering its veracity highly doubtful. The appellant has also challenged the genuineness of the alleged dying declarations of the victim

banking upon the contradictory accounts narrated by the victim at different times.

**39.** According to the narrative set out by the prosecution, on the fateful day i.e. on 08/11/2017 at about 11 pm, the victim was sleeping in her room. The husband of the victim was at Pune. The brother-in-law, wife of brother-in-law and other relatives of the victim were also sleeping in the adjoining rooms of the self-same house. Suddenly, the relatives of the victim heard a hue and cry. Coming out, they saw the victim in flames. The brother-in-law of the victim (PW 2) claims to have seen the convict, fleeing away from there. The husband and wife of the brother-in-law of the victim have claimed that they were reported by the victim herself that she was set ablaze by the convict.

**40.** The victim was first taken to Krishnaganj Hospital, wherefrom she was referred to Saktinagar Hospital and ultimately, she was shifted to Jawahar Lal Nehru Medical College and Hospital, Kalyani on

09.11.2017. The wife of the brother-in-law of the victim (PW 3) has categorically stated in her deposition that she met the victim in Krishnaganj Hospital where she reported to her that she was set on fire by the convict. However, neither the brother-in-law of the victim (PW 2) nor his wife (PW 3) reported the matter to police instantly. The hospital authorities, received a patient with burn injuries of critical nature and referring her for better treatment, recorded her statement which is relied by the prosecution as dying declaration, yet no steps appear to have been taken for reporting the matter to the police which ought to have been done in usual course.

**41.** The husband of the victim was allegedly informed of the incidence at Pune and he is said to have returned on the day following the incident i.e. on 09.11.2017. Upon return, he met his wife at JNM Hospital, Kalyani where he was reported by his victim wife that on the date of incidence, the convict, Samarash

entered into the room of his wife, assaulted her, poured kerosene oil and set her on fire.

**42.** From the story set up by the prosecution, it is evident that the victim died of burn injuries and that the injuries so inflicted were the outcome of the overtact perpetrated by the convict Samaresh. For the aforesaid reasons, the said Samaresh was put to trial for causing death of the victim and was ultimately, convicted for the offences punishable under Section 302 of the Indian Penal Code, 1860.

**43.** So far as the death of the victim is concerned, it is not challenged from any corner. There are ample evidences that the victim was found on fire on the fateful night. She sustained burn injuries in the incidence and was taken to Krishnaganj Primary Health Centre for her treatment. She was later moved to Saktinagar Hospital and owing to her precarious condition; she had to be moved to Jawahar Lal Nehru Medical College & Hospital for better treatment. In course of her treatment, she

succumbed to the injuries so inflicted in the incidence. The oral evidence of PW 1, PW 2, PW 20 and other witnesses together with the testimony of Ext.-12 (Post-mortem Report) and Ext. 2 (inquest report) goes to prove that the victim died at JNM Hospital on 19.11.2017. Exhibit 12 is explicit that the death was due to septic absorption from infected ulcer resulting from burn injuries which were ante-mortem.

**44.** As regards the cause of injuries so inflicted, it is the case of the prosecution, that convict entered into the room of the victim, assaulted her, poured kerosene oil and set her on fire.

**45.** PW 2 is the only person, who has claimed that he saw the convict Samaresh fleeing away from the scene of occurrence. According to his version, on 08.11.2017 at about 11 pm, while he was sleeping in his room with his wife (PW 3) and child, he heard hue and cry and coming out of his room, he saw the victim in flames. He also saw the accused Samaresh fleeing away He tried to douse the

fire by pouring water and brought the victim to the hospital. PW 3 the wife of PW 2 also came out of her room hearing the screams. She, though, did not claim to have seen the accused at that time, however, she stated to have been reported by the victim in the Primary Health Centre itself that she was set on fire by accused Samaresh.

**46.** Neither PW 2 nor PW 3 reported the incident to the police. It appears that they just waited for the arrival of the husband of the victim and did not take any steps to inform the police about the incidence. It seems quite astounding that the hospital received a patient with serious burn injuries and that too with the history of culpability by someone and yet no steps were taken to inform the police. Not only that, the de facto complainant i.e. the husband of the victim who was allegedly at Pune on the date and time of incidence came back on the following day being informed about the occurrence. He met his wife in JNM Hospital on the following day where she reported her that she was set ablaze by accused

Samaresh. Nevertheless, no police complaint was lodged by the husband of the victim (PW 1) on the day he was reported i.e. 09.11.2017. There is also no explanation as to why the police report was not made on the following day as well i.e. on 10.11.2017 and the entire day of 11.11.2017 until 16.25 hrs.

**47.** The police complaint appears to have been lodged after two days i.e. on 11.11.2017 at 16.25 hrs. No explanation, whatsoever, appears to have been advanced on the part of the prosecution as to the delay in lodging the First Information Report. Such an inordinate delay in lodging the First Information Report casts serious doubts.

**48.** According to the testimony of PW1, he returned from Pune on the day following the occurrence. He alleged that on return, he handed over the air tickets to the investigating officer to substantiate his bona fide absence on the date and time of incident. However, no such document has been brought forth by the prosecution. Neither the said air tickets appear to have

been seized by the investigating officer nor has the same been proved on the part of the prosecution.

**49.** For prosecuting the appellant, the prosecution has relied upon the evidence of PW 2 who alleged to have seen him fleeing away from the place of occurrence just after the incident. However, the testimony of PW 2 has not been corroborated by any independent witness. Evidence is forthcoming that there are so many houses around that of the victim and there was a hue and cry which drew PW2 and PW3 but no one from the locality came forward to support the version of PW2.

**50.** In order to bring home the charges levelled against the appellant, the prosecution has also banked upon the dying declarations given by the victim. In the instant case, the victim is said to have given three different statements at different point of time which are sought to be utilized as dying declarations of the victim. The first dying declaration was recorded by Dr. Ramprasad Mallick (PW5), the Medical Officer of Krishnaganj BPHC (Ext. 6).

The testimony of PW5 as well as Exhibit 6 goes to show that the victim was not in a position to talk and she answered the leading questions put to her by nodding. In such statement, the victim stated that she poured kerosene oil on her body and put on fire herself. The incident happened at her house on 08.11.2017 at 10 pm. She, however, kept silent when asked about the reason. Exhibit 6 also goes to show that the victim was brought to Krishnaganj Block Primary Health Centre on 09.11.2017 at 12.10 a.m. and at that time, she was not able to speak. This belies the statement of PW3 that the victim reported her in the said Krishnaganj BPHC that she was set on fire by the appellant.

**51.** The second dying declaration (Exhibit 7/1) was recorded by Dr. Nobarun Banerjee (PW6) of Nadia District Hospital. The victim was admitted in the said hospital at 1.30 a.m. on 09.11.2017 and she was examined by PW6 at 01.40 a.m. The victim made a statement before PW6 to the effect that she was beaten by Samaresh Biswas and he set

fire upon her body. Then he put out the fire himself after which the victim set fire upon herself and brought herself to the present condition. At the time of such examination of the victim, PW6 found the patient sustained 70% total body surface area mixed burn.

**52.** The third dying declaration was recorded by SI of police Prosenjit Ghosal (PW23) on 10.11.2017 at 01.45.am at JNM Hospital in presence of on duty staff Krishna Rahul (PW8) and on-duty medical officer Dr. Sabuj Pal (PW7). In such statement, the victim stated that her neighbor, Samaresh used to love her but she did not pay any heed. For this reason, she called the said Samaresh over phone to her house for compromise talks. There she was assaulted by Samaresh. In order to terrify him, the victim herself poured kerosene on her body. Samaresh was not scared and put her on fire. She used to be loved by her husband.

**53.** It has been contended on the part of the appellant that there are material-contradictions in the

three dying declarations and such statements on the part of the victim cast serious doubts over the veracity of the prosecution story and cannot be relied upon to secure conviction. The impugned judgment of conviction is therefore perverse.

**54.** In at least two of the dying declarations, the victim appears to have stated that she herself poured kerosene on her person and self immolated herself. In two of her such statements, she appears to have stated that she was assaulted by the appellant. However, the story of alleged assault is not corroborated by the medical evidence.

**55.** Moreover, the victim herself called the appellant to her residence at considerable late hours of evening for a settlement. This shows some kind of relationship between the victim and the appellant.

**56.** In this context, the appellant has relied upon the decision reported in **(2009) 1 SCC (Cri)287**

**(Mehiboobsab Abbasbai Nadaf vs State of Karnataka).** In the aforesaid case, it was observed that,

***“7. Conviction can indisputably be based on a dying declaration. But, before it can be acted upon, the same must be held to have been rendered voluntarily and truthfully. Consistency in the dying declaration is the relevant factor for placing full reliance thereupon. In this case, the deceased herself had taken contradictory and inconsistent stand in different dying declarations. They, therefore, should not be accepted on their face value. Caution, in this behalf, is required to be applied.”***

**57.** Appellant also relied upon the judgment in the case of **Kashi Vishwanath vs State of Karnataka (2013)3 SCC (Cri) 257**. The facts of the case are very identical to the case at hand. The reliability of the three dying declarations in the afore-cited case was negated by

the Hon'ble Apex Court on two counts. First, there were material-contradictions in the statements so recorded and secondly, the same was recorded in a language which the victim did not speak. The Hon'ble Court also took into account the possibility of the victim being influenced by somebody in making the dying declarations. So is the case in the present case. The victim gave her first statement by nodding which was taken down in English. The second dying declaration was recorded on the same day i.e. 09.11.2017. Whereas, the third dying declaration was recorded on the following day when her husband had arrived and met her. Such inconsistencies in the three statements create reasonable doubts regarding its reliability and a conviction based on such inconsistent dying declarations does not seem to be safe.

**58.** The appellant has also taken a stand that in the facts and circumstances of the case, intention to kill was not explicit. The appellant tried to drench the fire and in doing so sustained burn injuries himself. Therefore, the

conviction under Section 302 of the Indian Penal Code was not justified. He could have been guilty of abetment of suicide punishable under Section 306 of the Indian Penal Code since the first dying declaration discloses that the victim herself put her on fire with a view to scaring the appellant. In the event of other two dying declarations being considered, a case punishable under Section 302 was not made out. Rather, at the best, a case punishable under Section 304 Part II of the Indian Penal Code. It has also been contended that the learned Trial Court could have legally convicted the appellant under Section 306 of the Indian Penal Code instead of section 302 of the Indian Penal Code even if no charge was framed therein. In this regard, the appellant has relied on the decision of Hon'ble Supreme Court in the case of **Dalbair Singh v State of UP (2004) 5 SCC 334**, wherein it was held that,

***“17. There are a catena of decisions of this Court on the same lines and it is not necessary to burden this judgment by making reference to***

*each one of them. Therefore, in view of Section 464 CrPC, it is possible for the appellate or revisional court to convict an accused for an offence for which no charge was framed unless the court is of the opinion that a failure of justice would in fact occasion. In order to judge whether a failure of justice has been occasioned, it will be relevant to examine whether the accused was aware of the basic ingredients of the offence for which he is being convicted and whether the main facts sought to be established against him were explained to him clearly and whether he got a fair chance to defend himself. We are, therefore, of the opinion that Sangaraboina Sreenu [(1997) 5 SCC 348 : 1997 SCC (Cri) 690] was not correctly decided as it purports to lay down as a principle of law that where the accused is charged under Section 302 IPC, he cannot be*

***convicted for the offence under Section 306 IPC.”***

**59.** In support of his contention, learned Advocate for the appellant also relied upon the judgment reported **in (2009)8 SCC 796 Maniben v State of Gujrat**. In the aforesaid judgment, the Hon’ble Apex Court was pleased to hold that,

***“20. There is also evidence on record to prove and establish that the action of the appellant to throw the burning tonsil was preceded by a quarrel between the deceased and the appellant. From the aforesaid evidence on record it cannot be said that the appellant had the intention that such action on her part would cause the death or such bodily injury to the deceased, which was sufficient in the ordinary course of nature to cause the death of the deceased. Therefore, in our considered opinion, the case cannot be said to be covered***

***under clause (4) of Section 300 IPC. We are, however, of the considered opinion that the case of the appellant is covered under Section 304 Part II IPC.”***

**60.** Eliciting the similar point, the appellant also relied upon a decision reported in **(2005) 10 SCC 737 Sree Vijaykumar & Anr. V State, by Inspector of Police.** In the said case also, the accused were tried and convicted for the offence punishable under Section 302 of the Indian Penal Code. However, in appeal, the Hon’ble Supreme Court observed that in absence of clear intentions, the case came under Section 304 Part II of the said Code, in the following terms, that’s to say:

***“17. The next question is what are the conclusions to be drawn as regards the offences committed by the two appellants, going by the version in the dying declaration coupled with the evidence of PW 1 to the extent it is in conformity with the dying declaration. Accused***

*1 hit the deceased on his head with a bottle. Assuming that some liquid spread over the body, there is no satisfactory evidence to establish that it was petrol or kerosene or such other highly inflammable liquid. This aspect we have already adverted to. If the idea of A-1 was to pour some inflammable liquid on the body of the deceased, in all probability, he would not have resorted to the odd way of hitting the bottle containing the offensive liquid on his head. In the dying declaration there is no reference to the fact that any inflammable liquid spilled over from the bottle. Even if some liquid came out of the bottle as per the version of PW 1, it cannot be taken for granted that it was inflammable liquid. Coming to the act of the second accused in throwing a burning kerosene lamp soon after the attack of A-1 with bottle, we are inclined to think that it was a random act resorted to by the second accused*

*on the spur of the moment, apparently to cause harm to the deceased. It was not a pre-planned act done with the definite intention of causing death. It is not the case of the prosecution that A-2 went close to the deceased and lit up his clothes with the kerosene lamp. Hurling a small burning lamp towards a person may not definitely cause fire to the clothes. No doubt it was a dangerous act and it was likely to cause fire. But in view of the fact that the candle-like lamp comes into contact with the clothes of the targeted person for a split second, it may or may not be in a position to ignite the fire. A person throwing the kerosene lamp in that fashion cannot at any rate be imputed with the intention to cause the death or causing such bodily injury as is likely to cause death. He can only be imputed with the knowledge that by such a dangerous act, he was likely to cause death. The overt act of Accused 2 in throwing*

*the burning kerosene lamp at the deceased would, in our view, give rise to the offence of culpable homicide not amounting to murder punishable under Part II of Section 304. The discussion supra also leads to the inference that the appellants would not have shared the common intention though the common intention could spring up at the spot. One accused hitting the deceased with a bottle on his head which did not cause even a visible injury and the other accused throwing a burning kerosene lamp from a distance cannot be said to be acts done in furtherance of common intention to cause the death of Rajeswaran. These are random acts done without meeting of minds. They can only be held guilty for the individual overt acts. A-2 is, therefore, liable to be convicted under Section 304 (Part II). Accordingly, he is convicted and sentenced to undergo imprisonment for seven years and to pay a fine*

***of Rs 500. In default of payment of fine, he shall undergo imprisonment for a further period of three months. His conviction and sentence under Section 302 IPC is set aside.”***

**61.** The appellant has challenged the very conviction in a case based on the testimony of three contradictory dying declarations. In the alternative, it has been contended that if the dying declarations are taken to be true and reliable, at the best, the appellant could have been convicted under Section 306 or 304 Part II of the Indian Penal Code.

**62.** On the contrary, learned Advocate for the state has submitted that the conviction of the appellant for the offence punishable under Section 302 of the Indian Penal Code is well founded based on reliable dying declarations and deserves no interference. In support of his contention, learned Advocate has relied upon the decision in **Laxman v State of Maharashtra reported in 2002 C Cr. L R (SC)1022** corresponding to **(2002) 6 SCC 710**. In the

aforesaid decision, it was laid down by the Hon'ble Apex Court that,

***“3. The juristic theory regarding.....***

***What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the Magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise.”***

**63.** Although, recording of dying declaration by a police officer has not been challenged by the appellants in the present appeal but learned Advocate for the State, in his wisdom, has opted to rely upon a decision reported in

**(2000) 7 SCC 254 Gulam Hussain v State of Delhi.** In the said case, statement recorded by an ASI of Police even before the investigation actually started was held to be a dying declaration.

**64.** So far as the present case is concerned, we have concluded on the basis of evidence on record that the victim died of burn injuries. The cause of the injuries so inflicted, according to the First Information Report, is said to be an altercation between the victim and the appellant.

**65.** PW 2 claimed to have seen the appellant fleeing away from the scene just after the occurrence. No independent witness has come forward to support the statement of PW 2, though, there is evidence on record that there were several houses in the locality. PW 3 claims to have been reported by the victim herself that she was set on fire by the appellant, at a time when, according to the doctor, the victim was not in a position to speak and gave her statement by nodding. The circumstances raises

serious doubts with regard to the case implicating the appellant.

**66.** We have already considered hereinbefore, that in her statements which have been considered by the prosecution as well as the learned Trial Court as dying declarations (Exhibits 6, 7 and 8), the victim appears to have made undulating statements. She herself claimed to have called the appellant for a settlement. In, at least, two of the statements so recorded, she claimed that she herself poured kerosene on her person. In her first and second statements, she stated her self-immolation. The story of assault by the appellant is not supported by any medical evidence. In one of such statements, the victim has stated in unambiguous terms that the appellant put her on fire and then doused it and, thereafter, she herself put her on fire. In the wake of such swindling statements by the victim, the dying declaration does not stir much reliability about its veracity, sufficient enough, to secure conviction

of the appellant for an offence like 302 of the Indian Penal Code.

**67.** It is well settled that in order to achieve a conviction, the evidence must point to one and only proposition and that in every probability, it points to the guilt of the accused. It is also settled principle that where there can be two or more propositions possible, the one which is in favor of the accused should be accepted and the accused should be extended with the benefit of doubt.

**68.** The present case falls in the second category. There appears to be serious doubts with regard to veracity of the story set out by the prosecution and the evidence adduced to bring home the story so set forth. The appellant deserves the benefit of doubts. For the aforesaid reasons, the impugned judgment of conviction dated 24.02.2018 and order of sentence dated 26.02.2018 are liable to be set aside.

**69.** Accordingly, the appeal being CRA (DB) 199 of 2020 is allowed. The appellants shall be released from

custody, if not wanted in any other case, upon execution of a bond to the satisfaction of the Trial Court which shall remain in force for a period of six months in terms of Section 437A of the Code of Criminal Procedure.

**70.** Lower Court Records along with a copy of this judgment be sent down at once to the learned Trial Court for necessary action.

**71.** Photostat certified copy of this order, if applied for, be given to the parties on priority basis upon compliance of all formalities.

**[MD. SHABBAR RASHIDI, J.]**

**72.** I agree.

**[DEBANGSU BASAK, J.]**