

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 370 of 2010

Ganesh Mali

Vs

The State of West Bengal

For the appellants :Mr. Aniruddha Bhattacharyya, Advocate

For the State :Mr. Sanjay Bardhan, Advocate
Mr. Arani Bhattacharyya, Advocate

Heard on : July 18, 2022

Judgment on : August 10, 2022

Bibhas Ranjan De, J.:-

1. Under challenge in the present appeals is the judgment and order of 30th day of April, 2010 passed by Learned Sessions Judge, Dakshin Dinajpur at Balurghat in Sessions Trial No. 81 of 2007 arising out of Hili PS Case No. 54/2007 dated 07.04.2007 under Section 498-A/302 of the Indian Penal

Code (for short IPC) whereby, appellant was convicted under Section 498-A/302 of the IPC and was sentenced to rigorous imprisonment for two (2) years and fine of Rs. 1000/- (Rupees one thousand) only with default stipulation of additional rigorous imprisonment for three (3) months for the offence punishable under Section 498-A IPC and also sentenced to rigorous imprisonment for life and to pay a fine of Rs. 5,000/- (Rupees five thousand) failing which directed to suffer further rigorous imprisonment for 6 (six) months for the offence punishable under Section 302 IPC.

Facts and evidence

2. The case of the prosecution, as unfolded from the First Information Report dated 07.04.2007 arising out of Hili PS Case No. 54/2007 under Section 498-A /302 IPC, is that the informant Alok Mali son of late Rabin Mali gave an application in the Hili Police Station on 07.04.2007 that his sister Namita Mali daughter of Rabin Mali was married to Ganesh Mali, appellant of this case, in the year 2003. Her husband (appellant) suspected her wife (deceased) and used to beat her. On 05.04.2007 at about 12.00 in the night appellant beat her wife and set her ablaze after pouring

kerosene oil. Appellant tried to shift the body of his sister with the help of a wrapper. Neighbours' saw the incident and made noise and rushed to the spot and shifted his sister to Balurghat Sadar Hospital and informed the complainant on 06.04.2007 at 09.00 p.m. his sister died living behind her daughter aged about 2 (two) years.

- 3.** On receipt of the aforementioned written complaint Hili PS Case No. 54/2007 under Section 498-A/302 IPC was started and S.I Kenneth Foning was endorsed the case for investigation. During investigation he visited P.O prepared rough sketch map with index (exhibit- 11). He seized some burnt pieces of cloths, one thin partially burnt mattress and one brown colour bottle with smell of kerosene under a seizure list 4/1. He examined and recorded the statement of available witnesses under Section 161 of the Criminal Procedure Code (for short Cr.P.C) and arrested the accused. On his prayer statements of Manju Mali, Renuka Mali and Subodh Mali were recorded under Section 164 of the Cr.P.C. He collected bed- head tickets. Thereafter, on completion of investigation he submitted charge sheet under Section 498-A/302 of the IPC.

- 4.** The case was committed to the Court of Sessions, Dakshin Dinajpur at Balurghat, for trial. Learned Sessions Judge, himself took up the case for trial and framed charges under Section 498-A/302 IPC against the accused Ganesh Mali in Sessions Trial No. 81 of 2007, to which accused Ganesh Mali pleaded not guilty and claimed to be tried.
- 5.** In order to prove its case the prosecution had testified PW-1 the informant, PW-2 Supad @ Subodh Mali neighbour of PW-1, PW-3 Sakina Bibi another neighbor of the informant, PW-4 Lata Das, first wife of the appellant, PW-5, Basudeb Nath, Executive Magistrate who conducted inquest over the dead body of Namita Mali (deceased), PW-6 Khagen Mali, neighbor of Namita Mali (deceased), PW-7, Renubala Mali, another neighbour of Namita Mali (deceased), PW-8 Manju Mali, another neighbour of Namita Mali (deceased), PW-9 Pradip Bhowmik, home guard no. 1473 who carried the dead body to morgue after inquest and he deposited two polas, Two churies, one nose pin of the deceased two Assistant Sub Inspector Ainul Hq. who seized all those articles under a seizure list, (exhibit 5/1), PW-10 ASI Ainul Hq. who investigated the Balurghat Police Station Case UD

No. 117/2007. He also prepared inquest report (exhibit 3/1) PW-11 Basanti Mali, neighbor of Namita Mali (deceased), PW-12 Anukul Mali, brother of deceased, PW-13 doctor Ritesh Chakraborty who conducted Post mortem (exhibit-6) over the dead body of Namita Mali, PW-14 Tarun Chakraborty, ward master attached to Balurghat Sadar Hospital, who proved bed-head tickets of Namita Mali (exhibit-7), PW-15 doctor Amitava Banerjee who was Medical Officer surgeon attached to P.L. Jaiswal Hospital, Howrah, who examined Namita Mali and he prepared report (exhibit-8) thereon. PW-16 S.I Santanu Maitra, who put formal FIR (exhibit-9), PW-17 Kenneth Foning who investigated this case and submitted charge sheet and PW-18 Melissa Gurung, Civil Judge (Junior Division) who proved statements recorded under Section 164 of the Cr.P.C (exhibit-10/1 & 12). During evidence a good number of documents were admitted in evidence as exhibit 1 to 12 and material exhibit A to C on behalf of the prosecution. On behalf of the accused one witness namely Dr. Manatosh Sutradhar was examined as DW-1. On behalf of the accused

one prescription and medical reports were admitted in evidence as exhibit A to C.

- 6.** In his examination under Section 313 Cr.P.C. the appellant Ganesh Mali had denied the charges against him and alleged that he is being falsely implicated. It is further alleged that he would love Namita Mali and she set herself on fire while cooking. It is further alleged that he took her to hospital for treatment but Khagen and other restrained him and informed two relatives of Tuntuni. It is further alleged that he tried to take her wife for treatment he sustained burn injury on his hand and legs.

Argument Advanced

- 7.** Mr. Aniruddha Bhattacharyya, Learned Counsel for the appellant submits as under:

- From the evidence of PW-10 it appears that none of the family members present at the time of inquest supported the incident of murder. From the statement of witnesses it appears that death was caused by fire set by Namita Mali herself due to quarrel.

- PW-1 stated in his examination in chief that on way to hospital victim disclosed that appellant had set on fire but in cross-examination PW-1 stated that sister of the victim had told the fact to him.
- PW-2 was a signatory to the inquest report but he did not stated that Namita (victim) told him that she was set on fire by the appellant, rather PW-10 and PW-5 stated that at the time of inquest witnesses present there told about an incident of suicide.
- Evidence of PW-5 and PW-10 clearly show that victim committed suicide.
- From the evidence of PW-7 and PW-8 it appears that appellant tried to rescue his wife and also tried to make arrangement for treatment and appellant did not flee away from the spot.
- Evidence of PW-12 has not been supported by that of PW-1 regarding the attempt by the appellant to flee away from the place.

- PW-12 stated about the dying declaration given by the deceased implicating the appellant who set her ablaze. PW-12 disclosed the same to PW-1 and PW-2 but they have not supported the evidence of disclosure. Moreover, investigating Officer PW-17 stated in his evidence that PW-12 never stated about any statement disclosed by the deceased to him.
- Investigating Officer did not seize the articles accordingly to procedure prescribed therefor. From the evidence of PW-17 as well as evidence of DW-1 it is clear that appellant also sustained burn injury who tried to rescue his wife and such injuries sustained by the appellant has not been explained in its true perspective by the prosecution.
- Learned Trial Judge convicted the appellant only on the cryptic dying declaration alleged to have been made before the doctor (PW-15) who did not certify the fit state of mind of the deceased at the time of giving dying declaration. In support of his

contention he has relied on a case of ***Atbir v.***

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Court Cases 1.

8. On the other hand, Mr. Sanjay Bardhan Ld. Advocate appearing on behalf of the state relied on the evidence of witnesses in this case and submitted that prosecution has succeeded to prove the fact that the appellant set the victim on fire after pouring kerosene oil.
9. Mr. Bardhan further relied on the evidence of PW-15 who recorded the statement of victim in clinical notes showing cause of injury.
10. Mr. Bardhan has further submitted that though a defense of false implication due to animosity has been taken by the appellant side but that was not taken care of Mr. Bardhan has further submitted that improvement in the subsequent evidence of a particular witness cannot be taken into account to throw out his entire evidence.
11. Before parting with, Mr. Bardhan supported the impugned judgment and submits that conviction of the appellant is strictly in accordance with law and there is no

illegality and infirmity in the same warranting interference by this court.

- 12.** We have heard Learned Counsel for the parties and peruse the material available on record.

Decision

498A IPC

- 13.** Before evaluation of evidence of this issue it would be profitable to recap the Provision of Section 498-A of IPC which runs as follows:

“498A Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

Explanation.- For the purposes of this section, ‘cruelty’ means-

- (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 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.”

14. From the evidence of prosecution witnesses particularly PW-4 (Lata Das) it appears that previously appellant was married with said Lata Das and their marriage is not yet dissolved. From that point of view defence by putting suggestions to the witnesses tried to prove that Namita Mali is not ‘wife’ of appellant. That apart appellant himself took a plea in course of his examination under Section 313 Cr.P.C that Namita Mali (deceased) was not his legally married wife. In these circumstances, definition of ‘wife’ in terms of Section 498A IPC is required to be discussed first.

15. In this trying situation, we find it appropriate to refer to the case of ***Reema Aggarwal v. Anupam, (2004) 3 SCC 199*** wherein Hon’ble Apex Court observed that the expression “husband” covers a person who enters into a marital relationship and under the colour of such proclaimed or feigned status of husband subjects the woman concerned to cruelty in the manner provided under

Section 498-A, whatever be the legitimacy of the marriage itself for the limited purpose of Section 498-A. The absence of a definition of “husband” to specifically include such persons who contract marriages ostensibly and cohabits with such woman, in the purported exercise of their role and status as “husband” is no ground to exclude them from the purview of 498-A IPC. Hon’ble Apex Court has further held that even second wife can file a complaint under Section 498-A IPC.

16. In ***Reema Aggarwal*** (supra) Hon’ble Supreme Court has further opined as follows:

“ ... The legislature has taken care of children born from invalid marriages. Section 16 of the Marriage Act deals with legitimacy of children of void and voidable marriages. Can it be said that the legislature which was conscious of the social stigma attached to children of void and voidable marriages closed its eyes to the plight of a woman who unknowingly or unconscious of the legal consequences entered into the marital relationship? If such restricted meaning is given, it would not further the legislative intent...”

17. From the evidence of all the PWs as well as examination of accused under Section 313 of Cr.P.C it is not disputed that both the appellant and victim were married and residing together as husband and wife. From the written complaint (exhibit-1) lodged by the brother of victim it appears that after marriage they used to live happily but thereafter appellant started to suspect his wife (victim) and used to beat her. Complainant (PW-1) in his evidence also corroborated the fact of torture and further deposed that whenever his sister would come to their house she disclosed the facts of assault. They tried to make the appellant understand and sent his sister back to her in-laws house. It has been further deposed that appellants elder brother took them to Dangapara 3/4 kilometers away from the house of the complainant but torture continued. PW-2 another brother of deceased also deposed as to the marriage of his sister with the appellant. His sister was subject to physical and mental torture. His sister reported all the factum of torture to him but somehow she was made understand and sent back to her in-laws house. On several occasions his

sister was subjected to torture and his sister reported the same to him.

- 18.** PW-3 residence of Teor village also corroborated the factum of marriage and tortured. PW-3 has stated in her evidence that appellant and deceased resided in village Teor for 2/3 years and thereafter shifted to village Dangapara. She specifically stated that appellant was driver and he used to assault Namita (deceased) after returning home. She further stated that appellant was previously married to one lady but that wife left him as appellant poured hot starch of rice on her body. PW-4 (Lata Das) also claimed herself as first wife of appellant. She stated in her evidence:

“One day in the afternoon Ganesh prayed for rice (Bhat) to me. While I asked to wait for sometimes he began to assault me and thereafter poured hot starch of rice in my person. I out of fear fled away to my parent’s house. I did not return to Ganesh.”

- 19.** PW-6 another co-villager of appellant, in his cross-examination stated about torture and assault inflicted upon

the deceased by the appellant who suspected her. PW-11, resident of Dangapara, has deposed that after marriage of Namita and appellant they were residing at Teor Village and thereafter at Dangapara. Namita Mali is her niece. He has deposed that appellant used to assault Namita. PW-12 also corroborated the factum of torture upon the deceased by the appellant.

20. Mr. Bhattacharya, in course of his argument, has contended that factum of alleged torture cannot be believed in absence of any specific date, time or place. He has further submitted that none of the witnesses ever reported to Police regarding alleged torture.

21. Looking to the evidence of PW-1, PW-2, PW-3, PW-4, PW-6, PW-11 and PW-12 we find hardly any material discrepancies to disbelieve their evidence especially in terms of their cross-examination wherefrom nothing material was elicited and PW-2 specially explained that he did not report this because of fear of torture.

22. Aforesaid oral evidence of relatives and neighbours together with written complaint we find that prosecution has been able to prove that Namita Mali (deceased) was

being continuously tortured by her husband i.e. the appellant.

302 IPC

23. To bring home charge under Section 302 IPC prosecution relied on evidence of witnesses examined in this case. From the evidence and exhibited documents it is undisputed that Namita Mali (since deceased) succumbed to her burn injuries on 05.04.2007 at about 12.00 night and she was taken to Balurghat Hospital where she was admitted at 01.29 hours on 06.04.2007. Namita Mali expired on 06.04.2007 at 8.30 p.m. It is also not disputed that at the time of incident appellant Ganesh Mali and Namita Mali used to reside at Dangapara under PS Hili as husband and wife.

24. PW-1 Alope Mali, brother of deceased deposed in his examination in chief that on that night his cousin brother Anukul Mali (PW-12) informed him that Ganesh (appellant) set his sister on fire. Then he along with his brother Subodh (PW-2) went there and they found a Maruti Car and Ganesh was about to lift his sister in that car. His sister was in totally burnt condition. He inquired about the matter and

his sister (deceased) disclosed that she was taking dinner with Ganesh and one altercation took place and Ganesh set her on fire. She was admitted in the hospital and his sister also disclosed before the doctor that her husband set her on fire. On Friday his sister succumbed to injuries at about 8.00 p.m. On the next day he reported the matter at the Police Station at about 07.00 a.m. The written complaint was written by one Shankar Deshmukh as per his instruction in his presence. Contents of the complaint were read over to him and that complaint was admitted in evidence as exhibit-1. He denied the suggestion that his sister sustained burn injury accidentally at the time of cooking.

- 25.** PW-2 (another brother of deceased), Subodh @ Supad Mali, in almost identical testimonies, deposed that on the alleged date of incident and time the incident was informed by maternal brother. Then he along with elder brother (PW-1) rushed to Dangapara and found that an attempt was making to lift his sister in a car. He along with PW-1, PW-12, PW-11 and PW-7 accompanied Namita Mali to Balurghat Hospital. On the way on queries they came to

know that his sister was assaulted by Ganesh (appellant) and set her on fire after pouring kerosene oil. She was admitted at Balurghat Hosptial and she succumbed to her injuries. He put his signature on the inquest reports made by the Executive Magistrate as well as by the Police. In his cross-examination he denied the suggestion regarding his statement before the Police or Magistrate that his sister set herself on fire due to family dispute in cross-examination he specifically stated that initially his sister was taken to emergency room and after treatment she was taken to bed where other doctor treated her. None of the relatives was allowed to enter to that place.

- 26.** PW- 5 (Executive Magistrate), conducted inquest over the dead body of Namita Mali at Balurghat Hospital on 07.04.2007. Inquest report was admitted in evidence of exhibit 2/1. In his cross-examination he has stated that witnesses present there did not complaint that deceased was set on fire by anybody. This answer in cross-examination cannot necessarily suggest that witnesses present at the time of inquest told about any accidental fire or suicide by setting herself on fire.

27. PW-10, ASI of Police attached to Balurghat PS, has testified in his evidence that on 06.04.2007 he entrusted with the investigation of Balurghat PS UD Case No. 117/2007. He made arrangement for inquest by the Executive Magistrate. He also made inquest over the dead body and prepared a report (exhibit 3/1) thereon. In cross-examination he has deposed that Subodh Mali (PW-2) was present and he came to know that she herself set her on fire out of family dispute. But Subodh Mali (PW-2), categorically denied the suggestion in his cross-examination regarding such statement of 'suicide' either before Police or before Executive Magistrate.

28. PW-6 (Khagen Mali), a resident of Dangapara , has deposed in his evidence that at the time of incident at about 11.00 p.m. he suddenly heard a sound and came out of his house and found wife of Ganesh (appellant) lying with burn injury. At that time he found Ganesh to carry his wife on his shoulder and told him that he was carrying his wife to the Hospital. This witness was declared hostile. In his cross-examination on behalf of the prosecution he has deposed that on 05.04.2007 at about 11.00 p.m. his neighbour

Ganesh Mali return home and started quarrel with his wife. He did not give any importance as quarrel between them happened almost all the days. Later he found fire from the house of Namita Mali and her crying. At that time his wife also cried out by saying Ganesh Mali set his wife on fire. In the mean time Ganesh was carrying his wife and running and they raised alarm 'dhoru dhoru'. They made arrangement for sending Namita to Balurghat Hospital. He identified the material exhibits (Mat I and Mat II) in respect of burnt shari, burnt kantha and a bottle of kerosene oil seized by the Police. In cross-examination by defence he stated that he apprehended Ganesh and on that day they surrendered him to Police Station.

- 29.** PW-7 (Renubala Mali), resident of Dangapara, has deposed in her evidence that on the alleged date of incident and time she was sleeping. Her son cried out raised alarm of 'fire on Namita'. Two years old daughter of Ganesh was crying. She found Namita in burnt condition. Subsequently, Namita was taken to Hospital and on the way to Hospital Namita told that her husband set her on fire. In cross-examination she stated as follows:

“May be some portion of Ganesh’s body was burnt out because he tried to carry his wife.”

In cross-examination he denied all suggestions put to her.

30. PW-8 (Manju Mali) wife of PW-6 also corroborated that at the relevant point of time Namita told her that her husband set her on fire after pouring kerosene oil. But in cross-examination she deposed otherwise and she has deposed that she did not go to the place of occurrence even to see Namita. She could not say about any conversation between Namita and other persons.

31. PW-11, (Basanti Mali), another resident of Dangapara, also corroborated the other evidence on record that on hearing hue and cry she found that Namita was totally burnt and she asked to give air and water. She also told her on way to Balurghat Hospital that her husband set her on fire after pouring kerosene oil. In cross-examination she denied all suggestions put to him.

32. PW-12 (Anukul Mali), a resident of Dangapara , has also testified that on the alleged date of incident and time he woke up hearing hue and cry and found Ganesh fleeing away. He chased him but failed. Thereafter he returned to

place of occurrence and found Namita Mali in burnt condition. He heard from Namita Mali that Ganesh Mali set her on fire after pouring kerosene oil. He informed PW-1 and PW-2. They all took away Namita to Hospital. In cross-examination he has stated that no conversation directly in between himself and Namita. Again he denied the suggestion that Namita told him that Ganesh set her on fire. He denied other suggestion put to him.

33. Therefore, we see good and sound reasons to believe the evidence of PW-1, PW-2, PW-6, PW-11 and PW-12 regarding statement of Namita Mali (deceased) implicating her husband on the way to hospital. From the cross-examination we do not find any material discrepancy in this regard excepting suggestions put to the aforesaid witnesses denying any such statement of deceased.

34. Now coming to other evidence on record we find PW-9 has deposed that on 07.04.2007 he accompanied ASI Ainul Haque (PW-10) to Balurghat Sadar Hospital. After inquest he carried the dead body to morgue. He handed over wearing apparels to the deceased to the PW-10 who seized under a seizure list (exhibit-5).

- 35.** PW-13 (Post Mortem Doctor), stated about injuries sustained by Namita Mali (deceased) and he opined as follows:

“Opinion:- The cause of death in aforesaid case is due to the effect of burn injuries as noted above which is antimortem in nature.

This burnt injuries may cause death. This is the post mortem report repared by me in same carbon processes. This report also bears my seal and signature marked Exhibit-6.”

- 36.** PW-14, ward master attached to Balurghat Sadar Hospital, proved the bed head tickets (exhibit-7) of the deceased. PW-15, (Dr. Amitava Banerjee), surgeon attached to Balurghat Sadar Hospital, attended Namita Mali who was admitted under him. He testified as follows:

“ I am M.O surgeon now posted at P.L. Jaiswal Hospital Howrah. On 06.04.2007 I was posted in the Balurghat (S) hospital as Surgeon. On that date at 01.29 hours patient Namita Mali 18 years age., female of Dangapara Trimohini P.S. Hili was admitted under me with history of homicidal burn as stated by patient with kerosene by her husband at night.

On examination the patient was found conscious with pulse rate 100 p.m. There was extensive burnt injuries over whole body excepting portion of lower abdomen and part of scalp approximately 80% prognosis of the deceased was bad and was explained to the parties and patient expired on 06.04.2007 at 8.30 p.m. This is my report bearing my signature marked ext.8.”

- 37.** In cross-examination doctor (PW-15) further clarified as follows:

“ When I visited the patient in indoor I prescribed injections forthwith and caimpose which is analgesic and sedative for relieves of pain and induce sleep. After administration of this medicine the patient will get relief according to status the patient. Reaction of the medicines starts after 30 minutes. In general patient it will take no such time.”

- 38.** In ***Atbir*** (supra) the Honble Apex Court has propounded the following parameters before accepting a dying declaration:

“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.”*

39. Section 32 (1) of the Indian Evidence Act enjoins that, when the statement is made by a person as to the cause of his death, or as any of the circumstances of the transaction which resulted in his lost of life, in cases in which the cause of that person’s death comes into question. Such statements made by the person are relevant whether the person who made them was alive or not, at the time when they were made, under the expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question. The statement made by the deceased person will be treated as admissible in evidence in a court of law. The reason behind this can be followed by *Latin maxim memo marituras presumuntur mentri* which

means that “the dying man can never lie and truth sits on the lips dying man. Hence, the dying declaration is admissible and considered as evidence in court, and can be used as a weapon to punish the culprit.”

40. In this case, we find from the evidence that Namita Mali (deceased) stated before the witnesses who accompanied her to Balurghat Sadar Hospital that her husband (appellant) poured kerosene oil on her person and set her ablaze. PW-15 (Dr. Amitava Banerjee) specifically deposed that on 06.04.2007 Namita Mali was admitted under him at Balurghat Sadar Hospital and Namita Mali told the doctor about her homicidal death with kerosene by her husband at night. Such endorsement in the report of the doctor has been admitted in evidence as exhibit 8.

41. Mr. Bhattacharyya, in course of his argument submitted that the doctor (PW-15) did not certify the fit state of mind of the deceased at the time of giving dying declaration. In support of his contention he relied on the case of **Atbir** (supra).

42. PW-15 specifically stated in his evidence that when he was treating Namita Mali (since deceased) he found patient was conscious pulse rate was 100 p.m. and she was suffering 80% burnt. PW-15 also explained effect of medicine administer at the time of treatment.

43. PW-13 (Dr. Ritesh Chakraborty) P.M. doctor in his evidence , has deposed as follows:

“ First and second degree burn injury all over body front of chest, abdomen both upper limb and lower limb and upper part of thigh not burnt. Also burnt injury of first and second degree found back of chest. Upper arm and lower limb.

All the injuries showing evidence of vital reaction. The margin and the base of the injuries are congested and showing evidences of formation of listers at places. No other injuries, except those are noted above to have been detected even after careful dissection and examination with the help of magnifying glass her is liters found in the affected side.”

44. If we take the evidence of two doctor's i.e PW-13 and PW-15 together we find that at the time of giving statement before the doctor (PW-15) she was conscious. The person who records the dying declaration must be

satisfied that the maker is in a fit state of mind and conscious while making the statement. From the exhibit 8 and evidence of PW-15 we are unable to come to any conclusion that at the time of giving statement deceased was not in a fit state of mind or unconscious. Furthermore, such statement was corroborated by the witnesses before whom deceased made same statement while she was being shifted to Hospital by car.

45. According to ***Atbir*** (supra) even a statement is in brief or does not contain all details as to the occurrence, that cannot be discarded. So, after careful perusal of the evidence available on record we cannot discard the dying declaration made by the deceased.

46. Mr. Bhattacharyya, has further tried to impress this court by referring to the evidence of PW-10 and PW-5 that victim committed suicide. It is submitted that at the time of inquest (exhibit 2/1 & 3/1) PW-2 was present along with other witnesses stated before the PW-5 and PW-10 that Namita Mali committed suicide by setting herself on fire.

47. It is true that PW-2 (Subodh Mali) signed the inquest report along with other three (3) witnesses. From the inquest reports prepared by PW-5 and PW-10 we do not find any statement made by any of the particular witness. On the other hand PW-2 Supad @ Subodh Mali specifically denied the suggestion in course of cross-examination that he stated about commission of suicide by Namita Mali (deceased) at the time of inquest. Therefore, on this score, we cannot disbelieve evidence of PW-2 on oath.

48. Mr. Bhattacharyya, in course of his argument, has drawn our attention to the evidence of DW-1 in support of injury sustained by the appellant who tried to rescue his wife.

49. From the evidence of PW-1 in his evidence stated that after reaching there they found one Maruti Car and Ganesh (appellant) was about to lift his sister in that car. PW-2 stated in his evidence that on reaching there he found that an attempt was being made to lift his sister in a car.

50. PW-6 stated in his evidence that he found Ganesh (appellant) to carry his wife on his shoulder and Ganesh told him that he was carrying his wife to the Hospital. This witness was declared hostile. But in his cross-examination on behalf of the prosecution he stated that he gave statement before the police that he found Ganesh carrying his wife and running then they cried by saying 'dhoru dhoru'. PW-8 (Manju Mali), has stated in her evidence that she found Namita (deceased) in burnt condition and Ganesh was carrying her on his shoulder.

51. PW-12 (Anukul Mali) has testified that he found Ganesh Mali (appellant) to flee away and he chased him but failed.

52. From the evidence of DW-1 (Doctor Monotosh Sutradhar) who corroborated the burn injury sustained by the appellant. He being Medical Officer attached Correctional Home at Balurghat, examined the Ganesh Mali (appellant) as under trial prisoner in the Balurghat District Correctional Home and he referred him to Balurghat Sadar Hospital. According to patient he was

trying to save his wife from burning received that injury. But Ganesh Mali (appellant) never stated before the doctor (DW-1) that his wife committed suicide by setting herself on fire. Therefore, from the evidence of prosecution witnesses which we have discussed in earlier paragraphs together with the evidence of DW-1 we cannot come to a findings that injury sustained by the appellant due to his effort to douse the fire to save her burning wife who made dying declaration implicating the appellant. That apart, from the cross-examination of PW-17 (I.O of this case) it is found that I.O arrested accused/appellant on 07.04.2007 at 18.20 hours from Teor, he was trying to hide himself in a forest. This particular evidence regarding arrest of the accused from different village remained unchallenged throughout his rest cross-examination. Post occurrence conduct of the appellant is admissible within the meaning of Section 8 of the Evidence Act.

53. It is settled proposition of law that due to defective investigation, the rest of the evidence must be scrutinized independently of impact of it. In our case,

from the side of the appellant nothing material has been placed before us to show that any prejudice was caused to him for the reason of defective investigation.

54. Mere lapse on the part of prosecution should not lead unmerited acquittal, subject to rider that in such situation evidence on record should be clinching, so that lapses of prosecution can be condoned. In this case, evidence of witnesses is cogent and consistent further supported by dying declaration of the deceased.

55. From the entire evidence on record we find the following incriminating circumstances against the appellant to prove his guilt within the meaning of Section 498-A/302 IPC:

- a. Appellant was married with deceased.
- b. Appellant subjected deceased to physical and mental torture.
- c. Deceased made dying declarations before the witnesses as well as before the doctor implicating the appellant who set her on fire.

d. Appellant fled away after the incident and took shelter another village Teor and tried to hide himself in a forest wherefrom he was arrested.

56. The aforesaid chain of circumstances against the appellant is of conclusive nature. There is a complete chain of circumstances which shows that in all human probabilities, the offence has been committed by the appellant. Therefore having re-appreciated the entire evidence on record, we concur with Learned Trial Court. It is not a fit case where impugned judgment requires any interference.

57. For the reasons, this appeal stand dismissed.

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

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

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

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

[BIBHAS RANJAN DE, J.]

- 62.** I Agree.

[DEBANGSU BASAK, J.]