

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

Hon'ble Justice Chitta Ranjan Dash
AND
Hon'ble Justice Partha Sarathi Sen

C.R.A No. 644 of 2005
With
IA No. CRAN 4 of 2007 (Old No. CRAN 542 of 2007)

Kalabati Gupta & Ors.
Vs.
The State of West Bengal

For the Appellant : Mr. Himanshu De, Sr. Adv.,
: Mr. Navanil De, Adv.,
: Mr. Rajeshwar Chakraborty, Adv.,
: Mr. Srinjan Ghosh, Adv.,
: Mr. Subhrajit Dey, Adv.

For the State : Mr. Debabrata Chatterjee, Adv.,
: Md. Kutubuddin, Adv.,
: Mr. Santanu Deb Roy, Adv.

Heard on : 13.09.2022

Judgment on : 20.09.2022

PARTHA SARATHI SEN, J. : –

1. The present appeal arises out of a judgement and order dated 25.08.2005 and 26.08.2005, as passed by Learned Additional Sessions

Judge, 1st Fast Track Court, Hooghly, in Sessions Trial No. 30 of 2003 (arising out of GR Case No. 75 of 2003, P.S. Bhadreswar P.S. Case No. 29/2003 dated 11.02.2003, under Sections 498A/326 IPC). By the impugned judgement and order the Learned Trial Court found two accused persons namely; Onkar Nath Gupta (appellant no.2 herein) and Anil Gupta (appellant no.3 herein) guilty under Sections 498A/302/34 IPC and accused Kalabati Gupta (appellant no.1 herein) under Section 498 A IPC and thus, convicted them under Section 235(2) of the Cr.P.C.

2. The convicts felt aggrieved and thus preferred the instant appeal.

3. For effective disposal of the instant appeal, the facts leading to filing of Bhadreswar P.S Case No. 29 /2003 dated 11.02.2003, are required to be dealt with in nut shell.

4. On 11.02.2003, one Paresh Nath Bhagat, son of Late Gangaram Bhagat of Tarakeswar Mandir Para , P.S Tarakeswar , District Hooghly, lodged a written complaint with the Officer –in-Charge, Bhadreswar Police Station, District Hooghly, stating inter alia; that on 7th March, 2003, his sister Malati Gupta @ Malu Gupta was given marriage with one Onkar Nath Gupta, son of Kanta Prosad Gupta of Angus Majher Goalapara, P.S Bhadreswar, District Hooghly. It is the further version of the de-facto complainant that in such marriage which was solemnized as per Hindu Rights and Customs, he had given cash of Rs. 15,000/-, cot with bedding materials, gold and other nuptial gifts. It has been stated further by the de-facto complainant that thereafter his aforementioned sister went to her matrimonial home and started residing there with her husband as

married couple. It has been alleged further that sometimes after the marriage of his sister, her husband Onkar Nath Gupta, her mother-in-law Kalabati Gupta and her two brother-in-laws namely; Sunil and Anil Kumar Gupta started torturing her both physically and mentally. It has also been stated in the said written complaint that in the mean time his sister had given birth of a male child but in spite of that the torture at the instance of the aforementioned persons increased day by day and whenever his sister used to come to her paternal home she used to disclose the said incidents of torture at the behest of the aforementioned persons to him as well as to the other family members. However, with the hope that in future everything will be in order, the family members of the de-facto complainant tried to pacify her grievance and sent her back to her matrimonial home. In the said written complaint it has also been disclosed that on 11.02.2003, he came to learn from others that on the said day at about 2:30 p.m his brother-in-law Onkar Nath Gupta and mother-in-law Kalabati Gupta set fire on her person and as a result whereof she was seriously ablazed and she was thereafter taken to Chandernagore Sub-Divisional Hospital for her treatment.

5. As stated above on receipt of such written complaint, Bhadreswar P.S Case No.291/2003 dated 11.02.2003, under Sections 498A/326 IPC was started. Investigation was taken up and on completion of the same charge sheet was submitted against Onkar Nath Gupta, Kalabati Gupta , Anil Kumar Gupta, Sunil Kumar Gupta and Kanta Prosad Gupta under Sections 498A/326/302/34 IPC and also under Section 3 of the Dowry

Prohibition Act. After commitment learned Sessions Judge, Hooghly, transferred the aforementioned case to the learned trial court for trial and disposal. Lower Court Records reveals that the learned trial court on 10.11.2003, after considering the entire materials as placed before him and also on perusal of the CD, framed charges under Sections 498 A/304B/302/34 IPC against all the aforementioned charge sheeted accused persons. Since all the aforementioned charge sheeted five accused persons pleaded their innocence and claimed to be tried, the trial before the learned trial court proceeded.

6. Lower Court Record reveals that in order to bring home the charges as framed against the aforementioned five charge sheeted accused persons, the prosecution has examined 19 witnesses in all and exhibited 15 documents including two materials exhibits.

7. In order to prove their innocence on behalf of the defence seven witnesses have been examined and five documents have been exhibited.

8. In support of the instant appeal, learned advocate for the appellant at the very outset draws the attention of this Court to the impugned judgement as passed by the learned trial court. It is contended on behalf of the appellants that learned trial court while passing the impugned judgement has not considered the salutary principles as embodied in Section 32 (1) of the Indian Evidence Act, 1872, relating to acceptance of dying declaration and at the same time the learned trial judge misconstrued the principle of acceptance of dying declaration as time to time enunciated by the Hon'ble Supreme Court of India. It is contended

further on behalf of the appellant that if the evidence of PW2 (doctor of NRS Hospital, Kolkata), PW17 (Sub Inspector of Police, Entally Police Station), Exhibit 10 (alleged dying declaration) are considered conjointly in its proper perspective, it will reveal that the learned trial court while passing the impugned judgement committed gross error of fact as well as of law in holding that such oral and documentary evidence are not sufficient to prove the guilt of the accused. It is contended further that learned trial court while passing the impugned judgement ought to have come to a conclusion that Exhibit 10 cannot come under the purview of a dying declaration in view of the proposition of law as enunciated in the reported decision ***Laxman Vs. State of Maharashtra*** reported in **(2002) 6 SCC 710** and ***Koli Chunilal Savji and Anr. Vs. State of Gujarat*** reported in **(1999) 9 SCC 562**. It is further argued on behalf of the appellant that from the oral evidence of the prosecution witnesses it has not been proved beyond reasonable doubt that the alleged murder of the victim was committed by the present appellant nos.2 and 3 in furtherance of common intention of all within the meaning of Section 34 of the Indian Penal Code and thus, the finding of the learned trial court that the present appellant no. 2, Onkar Nath Gupta and appellant no.3, Anil Kumar Gupta are guilty under Sections 302/34 IPC is erroneous.

9. Learned advocate for the appellant while drawing attention of this Court to the oral evidence of the prosecution witnesses further contended that in absence of any cogent materials to attract the provisions of Section 498A IPC, learned trial court equally committed an error of fact as well as

of law in holding all the appellants herein guilty under Section 498A since the allegations of the relative prosecution witnesses are not specific and on the contrary those are merely omnibus allegations. Learned advocate for the appellant thus, submits that this is a fit case for allowing the instant appeal by setting aside the impugned judgement and order dated 25.08.2005 and 26.08.2005 as passed by the learned trial court.

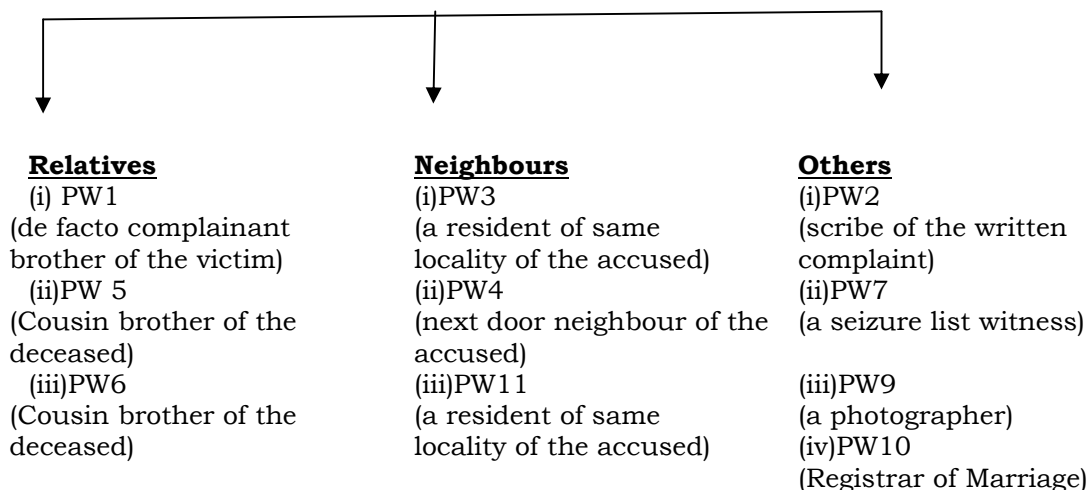
10. While opposing the contention of the learned advocate for the appellant, the learned advocate for the State also relied upon the reported decision of **Laxman (supra)**. It is contended by him that PW12 being a medical practitioner of NRS Medical College and Hospital, Kolkata and PW17 being a Sub-Inspector of Police of Entally Police Station are non-interested witnesses and thus, there is no reason to disbelieve their oral testimonies as well as the dying declaration (Exhibit 10) as recorded by PW17. It is strongly contended on behalf of the State that in the reported decision of **Laxman(supra)** it has been clarified by the Larger Bench of the Hon'ble Supreme Court of India that the mandatoriness of certification of a doctor about the fit and conscious state of mind of the victim patient is a hyper-technical view and, therefore, the dying declaration being Exhibit 10 as recorded by PW17 ought to have been given due importance and should be considered as a cogent evidence to bring home the charges as framed against the accused and as has been rightly done by the learned trial court.

11. It is further contended on behalf of the State that before the learned trial court not only the relative witnesses deposed against the present

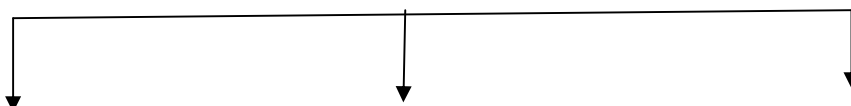
appellants about their torture upon the victim but also the neighbouring people of the accused persons deposed consistently that the victim/ house-wife was subjected to torture at her matrimonial home at the instance of the present appellants. It is thus, contended that before the learned trial court the prosecution is successful in bringing home the charges as against the accused persons and thus, learned trial court rightly passed the impugned judgement and the same need not be interfered in this appeal.

12. Since before the learned trial court 19 witnesses have been examined by the prosecution for the convenience of us, the said prosecution witnesses have been categorized and sub-categorized in the manner indicated hereunder:-

Private Witnesses



Government Officials



Medical Practitioner

- (i) PW12
(A doctor of NRS
Hospital, Kolkata)
(ii)PW15
(A doctor of NRS
Medical College and
Hospital in Forensic
Department)
(iii)PW18
(Autopsy Surgeon)

Others

- (i)PW14
(Executive Magistrate)

(ii)PW16
(Secretary of R.G.Kar
Medical College and
Hospital)

Police Officials

- (i)PW13
(Recording Officer)

(ii)PW17
(S.I. of Police Entally
P.S.)

(iii)PW19
(I.O.)

13. Since in the impugned judgement learned trial court while holding appellant nos. 2 and 3 herein guilty under Sections 498A/302/34 IPC put much reliance upon the alleged dying declaration of the deceased (Exhibit 10) vis-a-vis the oral testimony of PW17 and PW 12, we think it proper to look to the provisions of Section 32 of the Indian Evidence Act and the same is reproduced hereunder in verbatim:-

“Cases in which statement of relevant fact by person who is dead or cannot be found etc. is relevant .-

Statements, written or verbal , of relevant facts made by a person who is dead, or who cannot be found or who has become incapable of giving evidence, or whose attendance cannot be procured, without an amount of delay or expense , which under the circumstances of the case, appears to the court unreasonable, are themselves relevant facts in the following cases:

- (1) *When it relates to cause of death.- When the statement is made by a person as to the cause of his death, in cases in which the causes of that person’s death comes into question. Such statement are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the case of his death comes into question.*
- (2)
- (3)
- (4)
- (5)
- (6)

- (7)
 (8)”.

14. Since learned advocates of both the parties have placed the reliance upon the celebrated decision of the Hon’ble Supreme Court of India in the reported decision of **Laxman (supra)**, we have minutely gone through the same and for appreciation of the evidence as recorded by the learned trial court, the principle of law as discussed in the said reported decision is given herein below and the same is hereunder:-

“3. The juristic theory regarding acceptability of a dying declaration is that such declaration is made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the man is induced by the most powerful consideration to speak only the truth. Notwithstanding the same, great caution must be exercised in considering the weight to be given to this species of evidence on account of the existence of many circumstances which may affect their truth. The situation in which a man is on the deathbed is so solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason the requirements of oath and cross-examination are dispensed with. Since the accused has no power of cross-examination, the courts insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The court, however, has always to be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. The court also must further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Normally, therefore, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration looks up to the medical opinion. But where the eyewitnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and any adequate

method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a Magistrate or a doctor or a police officer. When it is recorded, no oath is necessary nor is the presence of a Magistrate absolutely necessary, although to assure authenticity it is usual to call a Magistrate, if available for recording the statement of a man about to die. There is no requirement of law that a dying declaration must necessarily be made to a Magistrate and when such statement is recorded by a Magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. 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.”

In this regard, we also consider it necessary to have a look to a latest reported decision of the Hon'ble Supreme Court of India in the case of **Purshottam Chopra vs. State (NCT of Delhi)** reported in **(2020) 11 SCC 489** where the principle regarding admissibility and acceptability of dying declaration have been elaborately discussed.

15. In the said judgement of **Purshottam Chopra(supra)** it has also been decided that a person who has suffered 92% burn injuries can give a dying declaration and the same can be accepted by a court if it inspires confidence of the court and if the same is free from tutoring and otherwise reliable. Accordingly, we consider it necessary to reproduce the relevant

portions of the judgement of **Purshottam Chopra** (*supra*) and the same is hereunder:-

“19. In Dal Singh case [State of M.P. v. Dal Singh, (2013) 14 SCC 159 : (2014) 4 SCC (Cri) 141] , this Court has pointed out that the law does not provide as to who could record dying declaration nor is there a prescribed format or procedure for the same. All that is required is the person recording dying declaration must be satisfied that the maker is in a fit state of mind and is capable of making such a statement. This Court also pointed out that as to whether in a given burn case, the skin of thumb had been completely burnt or if some part of it will remain intact, would also be a question of fact. This Court said: (SCC p. 167, paras 20-22)

“20. The law on the issue can be summarized to the effect that law does not provide who can record a dying declaration, nor is there any prescribed form, format, or procedure for the same. The person who records a dying declaration must be satisfied that the maker is in a fit state of mind and is capable of making such a statement. Moreover, the requirement of a certificate provided by a doctor in respect of such state of the deceased, is not essential in every case.”

.....

“(B) Can a person who has suffered 92% burn injuries be in a condition to give a dying declaration?”

24. This question is also no longer res integra. In Vijay Pal v. State (NCT of Delhi) [Vijay Pal v. State (NCT of Delhi), (2015) 4 SCC 749 : (2015) 2 SCC (Cri) 733] , we notice the following discussion: (SCC p. 759, paras 23-24)

‘23. It is contended by the learned counsel for the appellant that when the deceased sustained 100% burn injuries, she could not have made any statement to her brother. In this regard, we may profitably refer to the decision in Mafabhai Nagarbhai Raval v. State of Gujarat [Mafabhai Nagarbhai Raval v. State of Gujarat, (1992) 4 SCC 69 : 1992 SCC (Cri) 810] wherein it has been held that a person suffering 99% burn injuries could be deemed capable enough for the purpose of making a dying declaration. The Court in the said case opined that unless there existed some inherent and apparent defect, the trial court should not have substituted its opinion for that of the doctor. In the light of the facts of the case, the dying declaration was found to be worthy of reliance.

24. In State of M.P. v. Dal Singh (2013) 14 SCC 159 : (2014) 4 SCC (Cri) 141], a two-judge Bench placed reliance on dying declaration of the deceased who had suffered 100% burn injuries on the ground that the dying declaration was found to be credible.'

25. Therefore, the mere fact that the patient suffered 92% burn injuries as in this case would not stand in the way of patient giving a dying declaration which otherwise inspires the confidence of the Court and is free from tutoring, and can be found reliable."

As discussed above in course of his argument, learned Advocate for the appellant strongly contended that learned trial court for no reason whatsoever put much reliance upon the oral evidence of PW17 vis-à-vis Exhibit 10 since from the materials as available from the trial court's record it reveals that PW17 being a Sub-Inspector of Police, Entally PS has got no nexus with the present lis since from his Examination-in-Chief as well as from his cross examination, it is clear that neither he has any authority to record the alleged dying declaration (Exhibit 10) of the deceased nor any such requisition has been obtained by him either from the I.O of this case or from the attending doctor or from the NRS Hospital Authority. It was equally argued that from the evidence of PW12 it would reveal that he was neither the attending doctor of the said victim patient nor he was at all aware as to whether at that material time the victim was in a state of giving such dying declaration. It has further been argued that learned trial court though considered Exhibit 10 is a valid piece of evidence but at the same time he failed to visualize the injury report dated 11.02.2003, as prepared by DW 7 a doctor of Chandernagore Sub-Divisional Hospital, wherefrom it reveals that the victim in a conscious

state of mind stated to her that she suffered accidental burn injury on account of bursting of stove.

16. In our considered view, the argument as advanced by learned advocate for the appellant is not tenable since in the case of **Purshottam Chopra** (supra) it has been decided that law does not provide who can record a dying declaration nor is there any prescribed form, format or procedure for the same. It is not equally acceptable to us that the alleged dying declaration as recorded by PW 17 cannot be accepted as a valid piece of evidence since he has not been authorized to record such statement especially when it is within our knowledge that NRS Medical College And Hospital is situated within the Entally PS and there is no law that in an unnatural burn case no police officer can record statement of the victim. It is equally to be considered that both PW12 and PW17 are the government officials being the medical practitioner and Sub Inspector of Police respectively and there cannot be any cogent reason on the part of them to adduce false evidence against the accused. On carefully scrutiny of Exhibit 10 it appears to us that the victim at the time of making such statement was quite conscious and her answers are equally coherent even if, she suffered 80% burn injury.

17. Since the learned trial court convicted all the present three appellants under Section 498A IPC it becomes obligatory to us to look to the evidence of the relative witnesses i.e. PW 1,5 and 6 vis-à-vis the evidence of the neighbors i.e. PWS 3,4,8 and 11. Admittedly, in their

respective Examination-in-chiefs the aforesaid relative witnesses categorically stated that soon after the marriage of the victim she was subjected to torture at the instance of the present appellants on account of demand of dowry and other materials but none of the witnesses gave any vivid description of such torture or tenable /probable date/dates of commission of such torture upon her. Admittedly, the neighboring witnesses namely; PWs 3 and 4 in their Examination-in-Chiefs stated that they noticed unrest in the house of the accused persons but they never stated that the same occurred on account of demand of dowry at the behest of the accused persons. In view of such we are of considered view that the findings of the learned trial court that the present appellants are guilty under Section 498A IPC is not sustainable in the eye of law and the same is set aside.

18. In order to come to a logical conclusion as to whether the learned trial court is equally justified in convicting the appellant no.2 Onkar Nath Gupta and appellant no.3 Anil Kumar Gupta, under Sections 302/34 IPC we once again propose to look to Exhibit 10 being the dying declaration of the deceased.

19. On perusal of Exhibit 10 it appears to us that it is the last statement of the victim prior to her death that after the birth of her child her husband took her to her matrimonial home from her paternal home within 3-4 days and since then mental torture upon her started. It has been stated further by the victim that on 11.02.20003, when she was about to leave her matrimonial home for her paternal home and was

packing her wearing apparels, at that time her younger brother-in-law Anil Kumar Gupta (appellant no.3 herein) poured kerosene oil on her head and set fire on her person and at that time her husband and son was in the room of her father-in-law. She stated further that thereafter she could not find anything on account of such fire and afterwards her husband took her hospital by riding an auto.

20. From the aforesaid dying declaration it thus, reveals that the victim prior to her death in her dying declaration practically gave allegation as against the present appellant no.3 Anil Kumar Gupta only but not as against her husband Onkar Nath Gupta, who is the appellant no.2 herein. From the mouth of the prosecution witnesses it no where transpires that the alleged setting of fire took place in furtherance of common intention of the present appellant nos. 2 and 3 and therefore, we are constrained to hold that the finding of the learned trial court that the appellant no.2 Onkar Nath Gupta, is guilty under Sections 302/34 IPC is not equally tenable and the same is thus set aside.

21. In order to decide as to whether learned trial court is equally justified in holding the present appellant no. 3 Anil Kumar Gupta guilty under Sections 498A/302/34 IPC, we propose to look to the order dated 10.09.2013, as passed in this Criminal Appeal whereby leave was granted to the present appellant no. 3 Anil Kumar Gupta to file fresh application for bail and subsequently on 13.09.2013 bail was granted to him. It is pertinent to mention herein that previously by an order dated 07.03.2013, the plea of juvenility of the present appellant no.3 was taken up for the

first time and accordingly, a report was called for from the learned trial court for a limited purpose to ascertain the age of the appellant no.3 Anil Gupta on the date of the alleged occurrence of the alleged incident.

22. From the trial court's record it reveals that as per direction of this Court an enquiry was conducted by the learned trial court in view of provisions of Rule 12 (3)(a)(i)(ii) and (iii) of the Juvenile Justice (Care and Protection of Children) Rules 2007 and on completion of the same, the said enquiry report was sent to this court to the effect that present appellant no.3 Anil Kumar Gupta on the date of occurrence i.e. on 11.02.2003 was found to be 14 years 10 months and as such he was a juvenile in conflict with law at that time.

23. Since it is settled principle of law that trial of a juvenile in conflict with law (JCL) cannot be done by a Court of Sessions and/or Additional Sessions Judge, the finding of the Learned Trial Judge as against the present appellant no.3 Anil Kumar Gupta holding him guilty under Sections 498A/302/34 IPC vitiates and the same is thus, set aside.

24. In view of such the present appeal succeeds and as a result the judgment and order dated 25.08.2005 and 26.08.2005 as passed by Learned Additional Sessions Judge, 1st Fast Track Court, Hooghly, in Sessions Trial No. 30 of 2003 is thus, set aside.

25. Since it has been observed by us that the present appellant no.3 Anil Kumar Gupta, was a juvenile(14 years 10 months) at the time of alleged incident, it is obligatory on our part to direct the learned trial court to send the relevant case records with all materials to the

Jurisdictional Juvenile Justice Board for commencing fresh trial against JCL, Anil Kumar Gupta afresh without being influenced by any of the observation made by us in this judgement. However for ends of justice, we are not doing so since JCL Anil Kumar Gupta was brought under arrest on 14.02.2003 and he has been released on bail on 10.06.2003 by the learned trial court and he was again taken into custody on 25.08.2005, by the learned trial court while passing the impugned judgement and thereafter he was released on bail on 13.09.2013 by this Court; that is he was in custody for a period of 8 years 4 months and 14 days whereas under the provisions of the Juvenile Justice Care and Protection of Children) Act, 2000, the maximum period of keeping a JCL in a special home is for a period till he ceases to be a juvenile.

26. Accordingly, it is ordered that the appellants herein viz; Kalabati Gupta, Onkar alias Omkar Nath Gupta and Anil Kumar Gupta are thus dischargd from their respective bail bonds and be set at liberty at once, if not detained in connection with any other case.

27. Let a copy of this judgement along with LCR be sent down at once.

28. Urgent Photostat certified copy of this judgement, if applied for, be given to the parties on completion of usual formalities.

I agree.

(Chitta Ranjan Dash, J.)

(Partha Sarathi Sen, J.)