

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

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Md. Shabbar Rashidi

C.R.R. 188 of 2023

The Courts on its own Motion

Vs.

Sk. Chhoku Mia & Anr.

With

C.R.A. 221 of 2021

with

IA No. CRAN 1 of 2021

Sk. Chhoku Mia & Anr.

Vs.

**The State of West Bengal
with**

For the Appellants : Mr. Arunava Ganguly, Advocate

For the State : Mr. Nuguive Ahmed, Ld. APP
Ms. Trina Mitra, Advocate

Heard on : April 17, 2023

Judgment on : April 17, 2023

DEBANGSU BASAK, J.:-

1. The appeal is directed against the judgement of conviction and order of sentence dated December 22, 2016 passed by the learned Sessions Judge, Hooghly in Sessions

Trial No. 15 of 2016 arising out of Sessions Case No. 91 of 2016.

2. By the impugned judgement of conviction, learned Trial Judge convicted the appellants under Sections 448/323/304 of the Indian Penal Code, 1860. By the impugned order of sentence, the learned Trial Judge awarded rigorous imprisonment for a term of one year with a fine of Rs.1,000/- each and in default imprisonment for a term of one month each for the offence under Section 323 of the Indian Penal Code, 1860, rigorous imprisonment for a term of ten years with a fine of Rs.5000/- each and in default imprisonment for a term of three months for the offence under Section 304 of the Indian Penal Code, 1860 and rigorous imprisonment for a term of one year with a fine of Rs.1000/- each and in default further imprisonment for a term of one month for the offence under Section 448 of the Indian Penal Code, 1860. All the sentences were directed to run concurrently. Imprisonment for non-payment of fine was directed to run separately.

3. Police received a written complaint from prosecution witness (P.W.) 1 on February 19, 2016. On the basis of such written complaint, police registered a First Information Report being Pandua Police Station FIR No. 107 of 2016 dated February 19, 2016 under Sections 448/325/307/506/34 of the Indian Penal Code, 1860.

4. Police conducted an investigation with regard to such FIR. Police submitted charge-sheet against the appellants on May 20, 2016 under Sections 448/326/307/506/34/302 of the Indian Penal Code, 1860.

5. Court framed charges against the appellants under Sections 448/326/307/506/34/302 of the Indian Penal Code, 1860. The appellants pleaded not guilty and claimed to be tried.

6. The case of the prosecution at the trial was that, the appellants trespassed into the room of the victim on February 18, 2016 at about 10.30 a.m. with intent to assault and murder the victim. The appellants caused voluntary hurt to

the victim with a help of the broom. The appellants poured kerosene oil on the body of the victim and set her ablaze.

7. To bring home the charges as against the appellants, the prosecution examined 11 witnesses and relied upon various documentary and material evidences.

8. Learned advocate appearing for the appellants submits that the remaining portion of the sentences of the appellants were remitted by the order of the Judicial Department, Government of West Bengal, Vide No.849-JL/JD/L/16M-48/22 dated January 20, 2023 communicated through DCS Order No.024/1/IG-CSWB/23 dated January 25, 2023.

9. Learned advocate appearing for the appellants submits that consequent upon such remission, the appellants were released from the correctional home. In such circumstances, he submits that the Rule issued as against the appellants be discharged.

10. Learned advocate appearing for the appellants submits that, the victim attempted to commit suicide at least on three previous occasions. The present case is one of suicide. In

support of such contention, he draws the attention of the Court to the testimonies of the prosecution witnesses as also of defence witnesses. He submits that, prosecution witnesses also acknowledged that on three previous occasions, the victim attempted to commit suicide.

11. In furtherance of his contention that the victim committed suicide, learned advocate appearing for the appellants submits that, the Post Mortem doctor stated in cross-examination that it was not possible to classify any burn injury as self inflicted or otherwise. Therefore, according to him, in the facts and circumstances of the present case, the benefit of doubt should be given to the appellants.

12. Learned advocate appearing for the appellants submits that, the dying declaration being Exhibit-7 is of no consequence. According to him, the doctor before whom the dying declaration was allegedly recorded, did not certify that the victim possessed requisite mental capacity to record a dying declaration. In absence of such recording, the dying declaration stands vitiated.

13. Learned advocate appearing for the State submits that, P.W.3, 4 and 5 corroborated the written dying declaration being Exhibit-7. She refers to the oral testimonies of P.W.3, 4 and 5. She submits that, the victim narrated about the assault on her and the pouring of kerosene by the appellants on her and setting her on fire at least before P.W.3, 4 and 5 apart from Exhibit-7.

14. Learned advocate appearing for the State draws the attention of the Court to the deposition of the Doctor in whose presence the dying declaration was recorded. She submits that doctor in his oral testimony stated that victim possessed requisite mental capacity to record the dying declaration.

15. Learned advocate appearing for the State submits that P.W.3, 4 and 5 were interrogated immediately on the happening of the incident. Although, the victim survived till February 22, 2016. P.W.3, 4 and 5 were interrogated from February 19, 2016 onwards itself. There, such prosecution witnesses stated about the oral dying declaration of the victim.

16. According to learned advocate appearing for the State, the dying declaration being Exhibit-7 is corroborated by the oral testimony of the doctor in whose presence the dying declaration was recorded as well as by several prosecution witnesses. Apart from a written dying declaration, there are at least three oral dying declarations of the victim and that each of the dying declaration are consistent with each other.

17. P.W. 1 is the daughter of the victim. She lodged the written complaint, which was tendered in evidence and marked as exhibit 1. She stated that, on February 18, 2016, there was a quarrel between the victim and the appellants over falling of leaves of a tree belonging to the victim and P.W. 1 in the house of the appellants. During such quarrel, the appellants assaulted the victim with the help of broom. On being assaulted, the victim became almost senseless. Subsequently, the victim went to her kitchen and started cooking food. At that time the appellant came and poured kerosene oil on the body of the victim and set her ablaze.

18. P.W. 1 stated that, she was present at the time of occurrence of the incident in the house. She was engaged in some other work at the relevant point of time. She saw that the victim was burning and the accused persons were standing by her side. Seeing the incident, she raised a hue and cry. Hearing the hue and cry of the victim, many local people assembled there. They doused the fire from the body of the victim and took her to Pandua Hospital. From Pandua Hospital, she was referred to the Hooghly District Hospital. The victim succumbed to her injuries on February 22, 2016 at the Hooghly District Hospital.

19. P. W. 1 is the witness of the seizure list made by the police on February 19, 2016. Such seizure list was tendered in evidence and marked as Exhibit 2. P.W. 1 identified the material exhibits in Court.

20. P. W. 1 stated that three days after February 19, 2016, police came and took her to the house of the appellants. There, P.W. 1 brought out a plastic jar of kerosene oil and broom and identified the same to the police officer. Police

seized the broom under a seizure list in his presence. She identified her signature on the seizure list as also on the label. She identified the appellants in Court.

21. In cross-examination, P.W. 1 stated that, previously the victim tried to commit suicide thrice; once she consumed poison and two other occasions, she tried to commit suicide by jumping over on the railway track in front of running train.

22. P.W. 2 is the police personnel who recorded the dying declaration of the victim. He tendered the dying declaration of the victim in evidence which was marked as Exhibit-7. He stated that he took permission of the Superintendent, District Hospital, Hooghly to record the dying declaration in presence of a Doctor. He recorded the dying declaration of the victim in presence of P.W. 10, a Doctor of such hospital.

23. The elder sister of the victim deposed as P.W.3. She stated that on receiving the information of the burn injury, she rushed to the house of the victim. She saw that the victim was being taken to the Pandua Rural Hospital. At that time, the victim told her that the appellants poured kerosene oil on

her body and set her on fire. She was interrogated by the Investigating Officer on February 19, 2016.

24. Another elder sister of the victim deposed as P.W. 4. She stated that she went to the Chinsurah District Hospital and found the victim in burnt condition. On being asked, the victim told her that the appellants assaulted her with the help of broom and then poured keronene oil on her body by which she caught fire and received the burn injury. Police interrogated her on February 21, 2016. She identified the appellants in Court.

25. In cross-examination, P.W. 4 stated that when she spoke with the victim no other person was present by their side.

26. The younger sister of the victim deposed as P.W.5. She stated that, when she came to the house of the victim at the time of occurrence by foot. She saw the victim being lifted on a van rickshaw. She along with her mother and the eldest daughter of the victim went with the victim to the hospital. Some local people also followed them to the Pandua Rural Hospital. The victim narrated the incident that at the date

and time of occurrence, the appellants assaulted the victim with the help of broom and then poured keronene oil on her body while she was being taken to the Pandua Hospital and also in the ambulance from Pandua to Chinsurah District Hospital. P.W. 5 was interrogated by the police on February 19, 2016. She witnessed certain seizures. She identified her signature on the seizure list dated February 19, 2016. She stated that, police seized one plastic jar of kerosene oil and a broom from the house of the appellants. She identified her signature on such seizure list.

27. P.W. 6 is a hearsay witness who does not add any value to the case of the prosecution.

28. A person selling food at the side of railway station deposed as P.W. 7. He stated that, on February 18, 2016 after hearing about the incident, he went to the house of the victim. When the victim was being taken to the Pandua Rural Hospital, her brother Sayed asked her as to how she received the injury. At this, the victim told Sayed within his hearing that on the selfsame date at about 10/11 a.m., the appellants

assaulted her and after sometime they poured kerosene oil on her body and she caught fire and received burn injury. He was interrogated by the police after three days of the occurrence of the incident. He witnessed the inquest of the dead body of the victim. His signature on the inquest report was tendered in evidence and marked as Exhibit-8/1.

29. P.W. 8 is an Assistant Sub-Inspector of Police who held the inquest over the dead body of the victim on February 23, 2016. The inquest report was tendered in evidence and marked as Exhibit-8/2. He also tendered the dead body challan which was marked as Exhibit-9 and the seizure list which was marked as Exhibit-10.

30. The Doctor who held the postmortem on the dead body of the victim deposed as P.W. 9. He stated that, on February 23, 2016, he held the postmortem on the dead body of the victim. On examination, he found superficial and deep burn injury over various parts of the body. He tendered the postmortem in evidence which was marked as Exhibit-11. He opined that the

cause of death of the deceased was due to the effect of the burn injury, ante-mortem in nature.

31. P.W.10 is the Doctor before whom, a dying declaration was made by the victim. He stated that, the victim recorded a dying declaration in his presence. Such dying declaration was recorded by P.W.2. He stated that when the dying declaration was recorded, the victim was mentally fit, conscious and oriented to make such declaration. He made an endorsement on the dying declaration that it was written in his presence. He identified his endorsement on the dying declaration which was marked as Exhibit-7/1.

32. In cross-examination, P.W.10 stated that in case of burn injury, it is not possible to differentiate whether such injury was self-inflicted or caused by another person. Exhibit-7 did not specifically record as to whether the victim was mentally oriented, suitable to make the statement and capable of understanding. Moreover, the left thumb impression of the victim did not appear at Exhibit-7.

33. P.W. 11 is the Investigating Officer. He narrated about the conduct of the investigations. He tendered documentary and material exhibits. He tendered the rough sketch map with an index which was marked as Exhibit-13 and Exhibit-13/1. He tendered statement of P.W. 1 recorded under Section 161 of the Criminal Procedure Code leading to the recovery of the kerosene oil container. Such portion of the statement was marked as Exhibit-14. The General Diary of the entries was marked as Exhibit-15 and Exhibit-16. A seizure list dated February 23, 2016 was marked as Exhibit-17. He submitted the charge sheet against the appellants.

34. On conclusion of the evidence of the prosecution, the appellants were examined under Section 313 of the Criminal Procedure Code. P.W.2 stated that she quarreled with the victim on February 18, 2016. At that time appellant no. 1 was not there. The disputes cropped up because of cutting of tree branches. The dispute was quelled by the local residents. She claimed herself to be innocent and falsely implicated. She wanted to adduce evidence in support of her defence.

35. Similarly, appellant no. 1 in his examination under Section 313 of the Criminal Procedure Code, stated that he was not in the room when the incident took place. He claimed to be innocent and falsely implicated.

36. The defence examined two witnesses in support of their case. D.W 1 is a resident of the locality. He stated that at the time of the incident, his grand daughter rushed to him and told him that the victim was sprinkling kerosene oil from a stove and then she set herself on fire. He also said that previously the victim tried to commit suicide once by consuming poison, thereafter by setting herself ablaze and on the next occasion by jumping over running train. On all three occasions, local people saved her.

37. In cross-examination, D.W. 1 stated that he did not inform the incident to any body but raised hue and cry to save the victim.

38. D.W. 2 is the grand daughter which D.W 1 spoke of. She stated that she saw the victim pouring kerosene oil from a stove and set an end of her saree on fire with the help of

match stick and moved such end of the saree. She was frightened and rushed to D.W. 1 and told D.W. 1 about the incident.

39. Victim was admitted to the hospital on February 18, 2016 and she succumbed to her injuries on February 22, 2016.

40. P.W.1, daughter of the victim stated that, on February 18, 2016, there was a quarrel between the victim on one part and the appellants on the other part leading to the appellants assaulting the victim with the help of broom and thereafter pouring kerosene oil on her and setting her on fire. She was present during the incident and at the place of occurrence. These portions of the testimony of P.W.1 were not shaken despite detailed cross-examination of P.W.1 by the defence.

41. The victim, prior to her death, recorded her dying declaration being Exhibit-7. The dying declaration was recorded by the P.W.2 in presence of a doctor treating the victim at the District Hospital, being P.W.10.

42. Exhibit-7 speaks of an assault on the victim by the appellants and thereafter, the appellants pouring kerosene oil over her and setting her on fire.

43. P.W.10, corroborated the evidence of P.W.2 with regard to the recording of the dying declaration being Exhibit-7. He stated that the victim was of sound mind when the dying declaration was being recorded by P.W.2. He stated that he was present at the time when the dying declaration was being recorded.

44. The Post Mortem report of the victim being Exhibit-11 read with the oral testimony of the doctor, P.W.9 conducting the Post Mortem on the victim, establishes that the cause of death of the victim was due to the effects of the burn injury, ante mortem in nature. This opinion of P.W.9 was not dislodged by the defence despite cross-examination.

45. There are oral dying declarations made by the victim as also a written declaration being Exhibit-7. Oral dying declarations made by the victim were to P.W.3, 4 and 5. All the oral dying declarations are consistent with each other and

they narrate the same sequence of events. All the three oral dying declarations are also consistent with the written dying declaration being Exhibit-7.

46. Apart from the three oral dying declarations spoken of by the P.W.3, 4 and 5, P.W.7 stated in his evidence that he was present at the time when, the victim was telling her brother Sayed about how she received the injuries. Such statement of P.W.7 is also consistent both with the three oral dying declaration as also Exhibit-7.

47. All the dying declarations being uniform in nature and there being no material to disbelieve any of the prosecution witnesses regarding the dying declarations, we are unable to accept the contention of the appellants with regard to the validity of Exhibit-7. Significantly, the oral dying declarations made by the victim to the three prosecution witnesses noted above, was not questioned on behalf of the appellants during the hearing.

48. The victim may or may not be with the suicidal tendency as transpiring from the evidence of record. Suicidal tendencies

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apart there are overwhelming evidence of the appellants indulging in an assault and putting the victim on fire. Victim did not commit suicide as sought to be suggested on behalf of the appellants. Death of the victim was classified as homicidal and such opinion of P.W.9 was not dislodged.

49. State did not prefer an appeal from the impugned judgment of conviction and sentence. Moreover, State remitted the remaining portion of the sentence of the appellants. State did not seek enhancement of finding of guilt to one under Section 302 of the Indian Penal Code, 1860.

50. In such circumstances, we find no merit in the present appeal. CRA 221 of 2021 is dismissed. The application being IA No. CRAN 1 of 2021 is disposed of. Rule issued in CRR 188 of 2023 is also disposed of.

51. In view of the remission of the remaining portion of the sentence granted by the State, the appellants are not required to serve the remaining portion of the sentence awarded by the learned trial Judge despite affirmation of the judgment of conviction and the order of sentence in appeal.

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52. Urgent photostat certified copy of this judgment and order, if applied for, be given to the parties on priority basis on compliance of all formalities.

(Debangsu Basak, J.)

53. I agree.

(Md. Shabbar Rashidi, J.)