

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

Present:

The Hon'ble Justice Joymalya Bagchi
And
The Hon'ble Justice Rai Chattopadhyay

C.R.A. 79 of 2019

Sk. Allauddin @ Alauddin Sk @ Sk. Tara
-vs.-
The State of West Bengal

For the Appellant(s) : Mr. Tapas Ghosh, Adv.
Mr. Tanmoy Chowdhury, Adv.

For the State : Mr. Madhusudan Sur, Adv.
Mr. Dipankar Paramanick, Adv.

Heard on : 21.08.2023

Judgment on : 21.08.2023

Joymalya Bagchi, J.:

1. Appellant has assailed judgment and order dated 12.12.2018 and 13.12.2018 passed by the learned Additional Sessions Judge, Bolpur in Sessions Trial no. 4 (November) of 2017 arising out of Sessions Case no. 81 of 2017 convicting the appellant for commission of offence punishable under section 302 IPC and sentencing him to suffer rigorous imprisonment for life and to pay a fine of Rs.5,000/- in default to suffer further imprisonment of one year.

Genesis of the case:-

2. Profile of the prosecution case discloses the unfortunate death of the homemaker Hena Bibi at her matrimonial home. On 20.5.2017 appellant poured kerosene oil on Hena and set her on fire. She suffered severe burn injuries. Local people rushed her to Bolpur SD Hospital in the ambulance of PW14. A telephonic message was received at the local police station that one Hena Khatoon had been admitted with severe burn injuries and her dying declaration was to be recorded. PW10 ASI Anukul Mal who was on mobile duty, on instructions from I/C, Bolpur Police Station reached the hospital. Dalim Sarkar (PW2), another police officer also went to the hospital. Dr. Atreyi Chatterjee (PW8) recorded her dying declaration in presence of the staff nurse Monimala Das (PW9) and the aforesaid police personnel. Thereafter, the victim was shifted to Burdwan Medical College and Hospital where she breathed her last.

3. An unnatural death case being Burdwan PS UD case no. 681 of 2017 dated 21.5.2017 was registered.

4. On 23.5.2017 a written complaint was received from her father, Sk. Montu (PW1). It was alleged in the complaint that Hena Bibi had been married to the appellant. Marriage was registered by a 'Kazi'. At the time of marriage Rs. 1 lakh, gold ornaments and other articles were given to the appellant. Three months after marriage appellant and other in-laws subjected Hena to torture. They pressurised Hena to bring

a TVS Apache motor cycle. Sk. Montu gave Rs. 60,000/- in cash and promised to pay Rs. 34,000/- after two months. After lapse of two months torture increased. On 19.5.2017 about 5 a.m the accused persons had tied the hands and legs of Hena and set her on fire. Local people took her to Bolpur Hospital. Thereafter, she was shifted to Burdwan Medical College and Hospital where she expired on 21.5.2017. As he was busy for treatment of his daughter, there was delay in lodging FIR. Written complaint was treated as FIR and Bolpur P.S case no. 149 of 2017 dated 23.5.2017 under sections 498A/304B/34 IPC was registered for investigation against the appellant and the in-laws. During investigation the dying declaration was seized and charge sheet was filed. Charges were framed against the appellant and other accused namely Somir Sk., Tuslima Bibi, Sk Kalo @ Siraj and Fensi Bibi under sections 498A/304B/302/34 IPC. The accused persons pleaded not guilty and claimed to be tried.

5. In the course of trial, prosecution examined 17 witnesses to establish its case and exhibited a number of documents.

6. The defence of the appellant was one of innocence and false implication.

7. In conclusion of trial, the trial court by the impugned judgment and order convicted and sentenced the appellant as aforesaid. Co-accused were acquitted of the charges levelled against them.

Arguments at the Bar:-

8. Mr. Ghosh, learned counsel for the appellant argues witnesses have not supported the case. PW 1 claimed his daughter had suffered burn injuries while she was preparing tea. When he met her daughter at the hospital, she was not in a position to talk. PWs 4 and 6, neighbours of the appellant also claimed that the victim lady had suffered burn injuries while cooking. Medical officer PW8 who recorded the dying declaration did not certify that the victim was in a fit state to make statement. Bed head ticket had not been produced. Capacity of the victim to make dying declaration is doubtful. Hence, conviction ought not to be recorded on the strength of the dying declaration alone.

9. On the other hand, Mr. Sur, learned counsel for the State contends dying declaration was recorded by the medical officer PW 8 in presence of the staff nurse PW9. Police officers PW 2 and 10 were also present. PW8 unequivocally stated that the patient was not disoriented. She was able to understand and speak.

10. PW 8 is a disinterested medical witness and her evidence ought to carry more weight than the hostile witnesses namely PWs 5 and 6 who deviated from their earlier statements and tried to support the appellant in court. PW1 also resiled from the FIR and made an effort to give an impression that his daughter had suffered burn injuries during cooking. He was not present when the victim was admitted at Bolpur SD

Hospital and the dying declaration was recorded. Hence, he is not a competent witness with regard to capacity of the victim to make the dying declaration. Dying declaration recorded by PW8 is reliable and truthful one. Hence, appeal is liable to be dismissed. It has been duly proved and can be the sole basis of conviction.

Is the prevaricating stance of PWs. 1, 4 and 6 fatal?

10. Sk. Montu (PW1) is the father of the deceased, Hena Bibi. He deposed his daughter was married to the appellant. Gold ornaments were handed over at the time of marriage. Alauddin demanded a motorcycle. He was unable to do so but assured he would pay Rs.40,000/- for construction of building. Though in the FIR, he contended that his daughter had been set on fire by the appellant and her in-laws, in chief he claimed that his daughter told him that she sustained burn injuries while preparing tea by fire straw. During cross-examination he went a step further and claimed when he met his daughter she was not in a position to speak.

11. The witness appears to be highly inconsistent and has shifted his stance at every stage. In FIR he claimed his daughter had been set on fire while in-chief he deposed his daughter told him she had suffered burn injuries while cooking. During cross, he came out with a third version that when he met his daughter she did not have capacity to speak. This shows the witness for reasons best known to him was lying.

Little importance can be given to the version of such an unreliable witness.

12. Similarly, the neighbours of the appellant Koli Bibi (PW4) and Mujai Sk (PW 5) turned hostile and deposed victim sustained burn injuries while she was cooking by fire straw. They were cross examined with regard to their previous statement before police wherein they had not come out with a case of accidental burn. On the other hand, they had claimed appellant used to subject his wife Hena to torture on demands of money. This significant omission with regard to accidental burn before police renders their version with regard to accidental burn highly suspicious and a product of machination to save the offender.

13. It is not unknown a 'culture of compromise' prevails in our society. Owing to economic deprivations or social insecurities prompted through threat, coercion or other means witnesses including near and dear ones tend to hide the truth even at the cost of letting off an offender who is responsible for the death of one of their own. The 'culture of compromise' as a pernicious malady by the Apex Court in *Ramesh v. State of Haryana*¹ as follows:-

"48. ... another significant reason for witnesses turning hostile may be what is described as "culture of compromise".

49. In this regard, two articles by Daniela Berti delve into a sociological analysis of hostile witnesses, noting how village compromises (and possibly peer pressure) are a reason for witnesses turning hostile. In one

¹ (2017) 1 SCC 529

of his articles [Daniela Berti, "Courts of Law and Legal Practice", pp. 6-7.], he writes:

"For reasons that cannot be explained here, even the people who initiate a legal case may change their minds later on and pursue non-official forms of compromise or adjustment. Ethnographic observations of the cases that do make it to the criminal courtroom thus provide insight into the kinds of tensions that arise between local society and the State judicial administration. These tensions are particularly palpable when witnesses deny before the Judge what they allegedly said to the police during preliminary investigations. At this very moment they often become hostile. Here I must point out that the problem of what in common law terminology is called "hostile witnesses" is, in fact, general in India and has provoked many a reaction from Judges and politicians, as well as countless debates in newspaper editorials. Although this problem assumes particular relevance at high-profile, well-publicised trials, where witnesses may be politically pressured or bribed, it is a recurring everyday situation with which Judges and prosecutors of any small district town are routinely faced. In many such cases, the hostile behaviour results from various dynamics that interfere with the trial's outcome — village or family solidarity, the sharing of the same illegal activity for which the accused has been incriminated (as in case of cannabis cultivation), political interests, family pressures, various forms of economic compensation, and so forth. Sometimes the witness becomes "hostile" simply because police records of his or her earlier testimony are plainly wrong. Judges themselves are well aware that the police do write false statements for the purpose of strengthening their cases. Though well known in judicial milieus, the dynamics just described have not yet been studied as they unfold over the course of a trial. My research suggests, however, that the witness's withdrawal from his or her previous statement is a crucial moment in the trial, one that clearly encapsulates the tensions arising between those involved in a trial and the court machinery itself."

“In my fieldwork experiences, witnesses become “hostile” not only when they are directly implicated in a case filed by the police, but also when they are on the side of the plaintiff’s party. During the often rather long period that elapses between the police investigation and the trial itself, I often observed, the party who has lodged the complaint (and who becomes the main witness) can irreparably compromise the case with the other party by means of compensation, threat or blackmail.”

14. If the evidences of PWs 1, 5 and 6 are examined from this perspective, I have no doubt in my mind that the said witnesses had been won over and had come out with a version of accidental burn in an effort to screen the appellant.

Can the dying declaration save the prosecution case:-

15. Defence would have been successful in its venture by winning over these witnesses but for the prompt dying declaration recorded by the medical officer Dr. Atreyi Chatterjee (PW8).

16. PW8 deposed she was working at SD Hospital, Bolpur at the material point of time. On 20.05.2017 she recorded the dying declaration of Hena Bibi at 1.10 PM at the female surgery ward of Bolpur S. D. Hospital. Patient had sustained 85% burn injuries. PW8 deposed though physical condition of the patient was not good, patient was not disoriented. She could understand and was able to speak. Accordingly, dying declaration was recorded by her in intervals. Nursing staff viz., Monimala Das (PW9) and two police personnel, Constable Dalim Sarkar (PW2) and ASI, Anukul Mal (PW10) were

present at the time of recording the statement. Police personnel and the nursing staff put their respective signatures on the dying declaration. PW8 also put her signature on the dying declaration. Dying declaration recorded by her was marked as Ext.1/1. Signatures of the witnesses were also exhibited as Exts.1/2 and 1/3 respectively.

17. Monimala Das (PW9), nursing staff of S. D. Hospital proved her signature on the dying declaration as Ext.1/2.

18. ASI, Anukul Mal (PW10) deposed he is a witness to the dying declaration and he proved his signature on the document. He stated the patient made dying declaration in his presence and the doctor reduced it into writing. In cross-examination, he clarified on 20.05.2017 a telephonic information was received at the police station with regard to admission of the victim at S. D. Hospital, Bolpur with burn injuries and the fact that she wanted to make a dying declaration. He was on mobile duty and as per order, he went to the hospital.

19. Constable, Dalim Sarkar (PW2) is the other police officer who was present when the dying statement was recorded. He proved his signature on the declaration.

20. The contents of the dying declaration reads as follows:-

"As per stated by the pateient Hena Bibi, a case of 85% burn injury her husband Alauddin Sk. put her into fire by pouring Kerosene oil all over her body and ignited. According to her they were staying in the house of Kalo Sk. for around 2 months who was the relative of Alauddin Sk. Kalo Sk. and his wife also not rescued her from that situation according to the patient. As stated by the patient the incident occurred today morning."

21. Debashis Sarkar (PW16) is the Medical Officer who held post mortem over the body of the deceased. He found the following injuries:

“1st and 2nd degree of burn injuries over the whole body excepting, middle anterior chest wall and the fore arm”

He opined death was due to burn injuries, ante-mortem in nature. He proved the post mortem report (Exhibit 7).

22. Sk Kabul Ali (PW17) is the Investigating officer of the case. He deposed he perused the complaint and visited the place of occurrence. Thereafter, he came back to the police station and found dying declaration of the victim had been collected by ASI, Anukul Mal from Doctor Atreyi Chatterjee. He seized dying declaration from ASI, Anukul Mal under a seizure list, Ext.9. Subsequently, he arrested the appellant. He recorded the statement of Doctor Atreyi Chatterjee and staff nurse Monimala Das. He collected post mortem report. He submitted charge sheet.

23. Learned Advocate for the appellant has assailed the dying declaration on multiple grounds. He contends dying declaration has not been properly exhibited. No certificate of the doctor stating that the patient was conscious or in a fit state of mind to make the statement is endorsed in the dying declaration. Bed head ticket of the patient was not produced. Nature of her injury and her capacity to make the statement are unclear. Motive has not been proved as charge under section 498A IPC had failed. He also contended other circumstances of

the case particularly the depositions of PWs. 1, 5 and 6 improbabilises the contents of the dying declaration.

24. It is settled law a dying declaration can be the sole basis of conviction. Though a dying declaration being the statement of the victim ought to be given due weightage, it must not be forgotten as the maker is no longer in this world, its veracity cannot be tested through cross-examination. Accordingly, a heavy duty is cast on the Court to satisfy itself prior to relying on a dying declaration that:-

- a) The victim was conscious and in a fit state to make the statement;
- b) The statement is reliable and a truthful one and not a product of tutoring.

25. In *Paniben Vs. State of Gujrat*² the Hon'ble Apex Court summarised the evidentiary value of a dying declaration as follows:-

"18. ...

(i) *There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. (Munnu Raja v. State of M.P. [(1976) 3 SCC 104 : 1976 SCC (Cri) 376 : (1976) 2 SCR 764])*

(ii) *If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. (State of U.P. v. Ram Sagar Yadav [(1985) 1 SCC 552 : 1985 SCC (Cri) 127 : AIR 1985 SC 416] ; Ramawati Devi v. State of Bihar [(1983) 1 SCC 211 : 1983 SCC (Cri) 169 : AIR 1983 SC 164]).*

(iii) *This Court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had opportunity to observe and identify the assailants and was in a fit state to make the declaration. (K. Ramachandra Reddy v. Public Prosecutor [(1976) 3 SCC 618 : 1976 SCC (Cri) 473 : AIR 1976 SC 1994]).*

(iv) *Where dying declaration is suspicious it should not be acted upon without corroborative evidence. (Rasheed Beg v. State of M.P. [(1974) 4 SCC 264 : 1974 SCC (Cri) 426])*

² (1992) 2 SCC 474

(v) *Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. (Kake Singh v. State of M.P. [1981 Supp SCC 25 : 1981 SCC (Cri) 645 : AIR 1982 SC 1021])*

(vi) *A dying declaration which suffers from infirmity cannot form the basis of conviction. (Ram Manorath v. State of U.P. [(1981) 2 SCC 654 : 1981 SCC (Cri) 581])*

(vii) *Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected. (State of Maharashtra v. Krishnamurti Laxmipati Naidu [1980 Supp SCC 455 : 1981 SCC (Cri) 364 : AIR 1981 SC 617])*

(viii) *Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth. Surajdeo Oza v. State of Bihar [1980 Supp SCC 769 : 1979 SCC (Cri) 519 : AIR 1979 SC 1505])*

(ix) *Normally the court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eye witness has said that the deceased was in a fit and conscious state to make this dying declaration, the medical opinion cannot prevail. (Nanahau Ram v. State of M.P. [1988 Supp SCC 152 : 1988 SCC (Cri) 342 : AIR 1988 SC 912])*

(x) *Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. (State of U.P. v. Madan Mohan [(1989) 3 SCC 390 : 1989 SCC (Cri) 585 : AIR 1989 SC 1519])”*

26. In *Laxman Vs. State of Maharashtra*³ a Constitution Bench of the Hon'ble Apex Court, inter alia, held certificate by a medical officer that the victim was conscious and in a fit state to make dying declaration is not a *sine qua non* with regard to its admissibility. In the event, the capacity of the victim to make the statement is proved through attending circumstances, the Court may rely on such statement. Similar view was reiterated in *Surendra Bangali vs. State of Jharkhand*⁴.

27. I have examined the reliability and evidentiary value of the dying declaration in the light of the aforesaid settled propositions of law.

28. Firstly, I am unable to subscribe to the view of the learned Advocate that the dying declaration has not been exhibited. PW8 deposed the victim had made the statement and she recorded the said

³ (2002) 6 SCC 710

⁴ MANU/SC/0276/2021

statement. She affixed her signature on the statement. The entire statement has been exhibited as Ext.1/1.

29. Dying declaration was recorded in the presence of a nursing staff (PW9) who also affixed her signature on the statement. A telephonic communication had been received at the police station that the victim was admitted in the hospital and her dying declaration was to be recorded. Accordingly, PW10, a police officer who was on mobile duty was instructed by the Inspector-in-charge of the said police station to go to the hospital. He along with another police officer (PW2) was present at the hospital when the statement was recorded. They have proved their signatures on the statement.

30. PWs 2, 9 and 10 corroborate PW8 with regard to the recording of the dying declaration of the victim and have proved the said statement beyond doubt.

31. Secondly, I find the plea that the victim was not conscious and unfit to make the statement wholly unfounded. PW8 is a medical officer and the best witness with regard to the state of health of the patient. She is also an uninterested independent witness. She categorically stated that the victim was not disoriented. She was able to understand and speak. Her version is corroborated by other witnesses viz., PWs. 2, 9 and 10 who were present when the dying declaration was recorded and have supported the prosecution case.

32. Though PWs 2 and 10 are police officers, it may be worthwhile to note no case had been registered against the appellant at the time of recording the statement of the victim and the said officers had no reason to falsely implicate the appellant at that material point of time by manufacturing the dying declaration. Dying declaration was recorded by a medical officer in the presence of a staff nurse who certainly had no axe to grind against the appellant. On the other hand, version of PW1 (father of the victim) that his daughter was unable to speak in the hospital is wholly unreliable. As discussed earlier, the witness had resiled from his version in the FIR where he claimed his daughter had been murdered. In his over eagerness to protect the appellant this witness came out with contradictory versions in Court. In chief he claimed that his daughter told him that she had suffered burns during cooking but in cross he claimed his daughter was not in a capacity to speak. Would a reasonable man give any credence to such a lying witness? It is sad but true that even the father of the victim himself had been won over through scheming machination of the appellant.

33. While evaluating the evidence of PW1, it is also relevant to note that he was not present when his daughter had been admitted at the S. D. Hospital, Bolpur. Sayed Molla (PW14) is the ambulance driver who took the victim to S. D. Hospital, Bolpur from her matrimonial home and thereafter to Burdwan Hospital. He does not speak of the presence

of PW1 at the time when the victim was admitted at Bolpur S. D. Hospital. Hence, said PW1's version cannot be said to have any relevance with regard to the consciousness and the capacity of the victim to make the statement.

34. The other pieces of evidence with regard to accidental burning coming from PWs 5 and 6 i.e. neighbours of the appellant is of equal doubtful credibility. These witnesses came out with the version of accidental burning for the first time in Court. They had not disclosed this fact to the police and were declared hostile during trial. Evidence of the disinterested witnesses like medical officer, staff nurse and other witnesses with regard to the incriminating dying declaration cannot be put to question with reference to the unreliable and prevaricating version of the aforesaid witnesses who had been won over.

35. PW1 had alleged torture on her daughter over dowry demands in the FIR. Similarly, PWs. 4 and 6 had stated before the police the victim lady had been ill treated at the matrimonial home. But these witnesses resiled away from their earlier statements in Court. As a result, the trial Court was constrained to record an acquittal on the charge under section 498A IPC. The prevarication of these witnesses do not affect the crux of the dying declaration of the victim that the appellant had poured kerosene oil on her and set her on fire. As the acquittal on the charge of cruelty is due to inconsistent stance of lying witnesses, the

same ought not impact the unsullied dying declaration establishing the charge of murder.

36. Thirdly, non-production of the bed head ticket has not affected the unfolding of the prosecution case. PW.8 had clearly disclosed the extent of burns and the state of the patient at the time of recording the dying statement. The doctor deposed inspite of her serious condition the patient was well oriented and was able to speak. Nothing to discredit her version has been placed on record. A faint plea that the nature of injury could not be disclosed as bed head ticket was not produced in my estimation deserves to be rejected. Post mortem doctor (PW16) deposed with regard to the degree and extent of burn injuries he stated that the victim had suffered first and second degree burn injuries over the whole body excepting middle anterior chest wall and forearm. The aforesaid evidence leads to the inference that hand and fingers of the victim were damaged which may have prevented her from putting her signature/LTI on the dying statement.

37. Dying declaration was handed over by Dr. Atreyi Chatterjee to PW10, ASI, Anukul Mal. In the course of investigation, Investigating Officer (PW17) seized the said dying declaration under a seizure list. In the fitness of things, police ought to have started the case earlier on the basis of the dying declaration itself. Apathy of the police to do so, is a glaring example of indifferent attitude in law enforcement and cannot in

any way detract the court from relying on this vital and valuable piece of evidence.

Cited cases distinguished

38. In *Jayamma & Anr. Vs. State of Karnataka*⁵, there were serious contradictions between the statement of the doctor and police with regard to the nature of burn injuries suffered by the victim. In the present case, the version of the medical officer (PW 8) regarding the dying declaration is corroborated by staff nurse (PW 9) as well as the police officers PWs 2 and 10 present at the time of recording the said declaration. Evidence of post mortem doctor (PW16) also corroborates the nature of injuries suffered by the victim. Moreover, evidence had come on record that the victim in the cited case was administered sedatives/ pain killers and the possibility of her being delusional cannot be ruled out. No evidence not even a hint of suggestion was given to the medical officer that the victim had been administered sedatives prior to the recording of dying declaration.

39. On the contrary, the recording doctor unequivocally deposed that the victim was conscious, oriented and capable of making the statement which had been recorded by her.

40. In *Sampat Babso Kale & Anr. Vs. State of Maharashtra*⁶, there was a doubt that the victim who had suffered 98% burn injuries was in

⁵ AIR 2021 SC 2399

⁶ (2019) 4 SCC 739

a capacity to make statement. Extent of burns is not the sole criteria to infer the capacity of the victim to make a statement. Degree of burns and other attending circumstances are to be seen. In *Purshottam Chopra And Another vs. State (Government of NCT of Delhi)*⁷ the Apex Court held merely because a victim had suffered 100% burn injuries it cannot be said she was incapable of making a statement. Similar view was taken in respect of a victim who had suffered 92% burn injuries⁸. In the present case, though victim had suffered 85% burn injuries, the degree of burns were not of the 3rd degree. Hence, it was likely inspite of her serious condition she was conscious, oriented and able to make a cogent statement implicating the appellant. In fact, PW8 who is a medical officer had recorded the declaration. She is most suited to depose with regard to the victim's state of consciousness and her capacity to make the statement. No evidence of administration of pain killers is available on record unlike the cited case. Moreover, attending circumstances in the cited case, that is to say the conduct of the victim to remove her 'Mangal Sutra' and other valuables prior to the act of burning, giving an impression of suicide are significantly absent in the present case. Case of accidental burning propounded by witnesses who were won over by the defence in the course of trial cannot be a ground to disregard a credible and truthful dying declaration.

⁷ (2020) 11 SCC 489

⁸ Bhagwan vs. State of Maharashtra, (2019) 8 SCC 95

Conclusion:-

41. For the aforesaid reasons, I am of the opinion prosecution has been able to prove its case beyond reasonable doubt.

42. Conviction and sentence of the appellant are upheld and appeal is dismissed.

43. Period of detention suffered by the appellant during investigation, enquiry and trial shall be set off from the substantive sentence imposed upon him in terms of 428 of the Code of Criminal Procedure.

44. Let a copy of this judgment along with the lower court records be forthwith sent down to the trial Court at once.

45. Photostat certified copy of this judgment, if applied for, shall be made available to the appellants upon completion of all formalities.

I agree.

(Rai Chattopadhyay, J.)

(Joymalya Bagchi, J.)