

IN THE HIGH COURT AT CALCUTTA
Criminal Miscellaneous Jurisdiction
Appellate Side

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Md. Shabbar Rashidi

CRA 267 of 2021

Ram Mukherjee

Vs.

The State of West Bengal

For the Appellant : Mr. Soumya Banerjee, Adv.
Ms. Sucheta Banerjee, Adv.

For the State : Mr. Partha Pratim Das, Adv.
Mrs. Manasi Roy, Adv.

Hearing Concluded on : January 30, 2023
Judgement on : February 9, 2023

DEBANGSU BASAK, J.:-

1. Appellant has assailed the judgement of conviction and the order of sentence dated July 18, 2012 passed by the learned Additional Sessions Judge, 2nd Court, Arambagh, Hooghly in Sessions Trial No. 09/2015 arising out of Sessions Case No. 116/2014.

2. By the impugned judgement of conviction, the appellant has been convicted under Sections 498A/302 of the Indian Penal Code, 1860. By the impugned order of sentence, the appellant has been sentenced to simple imprisonment for 3 years and to pay a fine of Rs. 2,000 and in default to

undergo simple imprisonment for 4 months for committing the offence punishable under Section 498A of the Indian Penal Code, 1860 and sentenced to imprisonment for life and to pay a fine of Rs.10,000 and in default to suffer simple imprisonment for 2 years for committing the offence punishable under Section 302 of the Indian Penal Code, 1860.

3. The father of the victim had lodged a written complaint with the police on January 2, 2012 with regard to torture and dowry death of the victim on January 2, 2012. The father of the victim had implicated the appellant in such written complaint. He had stated that, the appellant joined the other family members in assaulting the victim.

4. The written complaint of the father of the victim had been registered as a First Information Report. The police on completion of the investigation had submitted a charge sheet against the appellant under Section 498A/302 of the Indian Penal Code, 1860. The Court had framed charges against the appellant under Section 498A/341/302/34 against the appellant on February 11, 2015. The appellant had pleaded not guilty and claimed to be tried.

5. At the trial, the prosecution had examined 13 witnesses and relied upon various documentary and material

Exhibits. On conclusion of the evidence of the prosecution, the appellant had been examined under Section 313 of the Criminal Procedure Code when, the appellant claimed himself to be innocent and falsely implicated.

6. At the trial, prosecution contended that, the victim had been married to the brother of the appellant. At the time of the marriage, a sum of Rs. 6,000 and some gold ornaments had been given by the father of the victim as demanded by the husband of the victim and his family members. After marriage, the victim used to reside in her matrimonial house. Soon after marriage, the victim had been subjected to torture both physically and mentally by her husband and the appellant. Almost every night, appellant and the husband of the victim used to return home in a drunken condition and assaulted the victim at her matrimonial home. About one and half month prior to the incident, the victim had gone to her paternal house when she was pregnant and she disclosed the sufferings at the hands of the husband and the appellant to her father and other relatives. However, such family members of the victim had convinced her that everything will be set right at her matrimonial home once she gives birth to the child. On January 2, 2012 at about 5:30 hours, the father of

the victim had received information that his daughter had been burnt alive. Then the father of the victim along with the relatives and neighbours went to the matrimonial home of the victim when they saw the victim to be lying at the footstep of the house with burn injuries all over her body. They brought the victim to the hospital. On the way to the hospital, the victim told her father that when she was asleep, her husband and the appellant poured kerosene oil upon her and that her husband lit her up with the matchstick. She had succumbed to the burn injuries subsequently.

7. Learned advocate appearing for the appellant has submitted that, the prosecution was unable to prove the charges against the appellant beyond reasonable doubt. He has submitted that, the case of the prosecution rested upon the alleged dying declaration allegedly made by the victim to the attending doctor being PW 12. He has submitted that, the case of the prosecution was that, the victim had been burnt alive. However, in cross examination, PW 12 had stated that, he did not find smell of kerosene oil either on the body of the victim or upon the wearing apparels of the victim. He did not record the essential parameters of the patient like her pulse rate, blood pressure et cetera. The attending nurse was absent

at the time of recording of the short history of the case by the doctor. The injury report also did not disclose in which language the patient had disclosed her allegations and the reasons behind the incident.

8. Learned advocate appearing for the appellant has drawn the attention of the Court to the various medical documents and submitted that, there is no endorsement to the effect that the victim was conscious and responding to the reasonable questions normally which a doctor puts at the point of time to judge the mental condition of the patient.

9. Learned advocate appearing for the appellant has submitted that the prosecution was unable to prove the motive of the appellant committing the alleged offences. Neither the victim nor the family members of the victim had lodged any complaint of torture or harassment of the victim by the appellant before any police station or before any local authority. None of the prosecution witnesses had stated that, there was any mediation for the so-called matrimonial disputes between the victim and her husband or the in-laws of the victim. The prosecution had been unable to establish any grudge behind the alleged incident of murder.

10. Learned advocate appearing for the appellant has contended that, the death occurred due to accident. None of the in-laws of the victim had fled the place of occurrence.

11. Learned advocate appearing for the appellant has submitted that, the victim had died at around 11 AM at the hospital. The victim had suffered burn injuries to the extent of 95% all over the body. Therefore, it was inconceivable that the victim had made the oral dying declarations as claimed on behalf of the prosecution.

12. In support of his contentions that the dying declarations which the prosecution had relied upon at the trial cannot be used for the purpose of convicting the appellant, learned advocate appearing for the appellant has relied upon ***2002 volume 6 Supreme Court Cases 710 (Laxman Vs. State of Mharashtra), 1999 volume 9 Supreme Court Cases 562 (Koli Chunilal Savji and Another Vs. State of Gujarat), 1983 volume 2 Supreme Court Cases 411 (Darshan Singh @ Bhasuri and Another Vs. State of Punjab) and 2007 volume 14 Supreme Court Cases 550 (State of Rajasthan Vs. Wakteng).***

13. Learned advocate appearing for the state has submitted that, the prosecution was able to establish the case

beyond all reasonable doubt. He has referred to the evidence of the prosecution witnesses. He has submitted that, PW 1, was the father of the victim had spoken about the torture and demand for dowry and the fact that dowry was given to the husband of the victim. PW 10 had corroborated the torture meted out to the victim by the matrimonial family of the victim.

14. Learned advocate appearing for the state has submitted that, PW 1 stated that, the victim told him that the husband and the appellant had poured kerosene upon her and set her on fire. PW 10 had corroborated PW 1 regarding the oral dying declaration made by the victim. PW 3 who is the brother of the victim had also corroborated the oral dying declaration made by the victim to PW 1.

15. Learned advocate appearing for the state has drawn the attention of the Court to Exhibit 5. He has submitted that, PW 12, who is a doctor by profession, and who treated the victim for the 1st time at the rural hospital, deposed that the victim was conscious and alert at the time of examination. He had recorded the dying declaration of the victim which was marked as Exhibit 5.

16. Therefore, learned advocate appearing for the state has contended that, the dying declaration of the victim had been proved beyond reasonable doubt. The dying declaration of the victim had implicated the appellant in the offences that he was charged with. The victim had sustained burn injuries. The defence of accidental burn was not proved by evidence as PW 1 had stated that the victim caught hold of the appellant when she was set on fire.

17. Learned advocate appearing for the state has submitted that, the impugned judgement of conviction and order of sentence be upheld.

18. The father of the victim had deposed as PW 1. He had deposed that, the victim was married to the brother of the appellant. At the time of the marriage, he had given Rs. 6,000 in cash, gold ornaments and other traditional gift items. He had identified the appellant in Court. He had stated that, the appellant used to behave in a cruel manner with the victim. The appellant and the husband of the victim used to come home in an intoxicated condition and used to physically assault the victim. The victim was not provided with proper food. The victim used to come to the paternal home and narrate the incidence of torture on her.

19. PW 1 had stated that, the appellant and the husband of the victim had poured kerosene oil on the body of the victim and set her on fire. He had received information from the local people of the matrimonial home of the victim. The distance between the matrimonial home of the victim and his house was about 4 miles. After receiving the news, he had rushed to the matrimonial home of the victim and found the body in a completely burnt condition. None of the in-laws of the victim were present in the house when he had reached there. His brother and some of his neighbours had accompanied him to the matrimonial home of the victim. They had shifted the body of the victim to the rural hospital. At that time, the victim was in her senses. He had asked her regarding the cause of injury. She had stated that while she was asleep her husband and the appellant had poured kerosene oil on her body and set her on fire. The fire had been started by the appellant and her husband with the help of a matchstick. The victim had died on the same date. He had tendered the written complaint in evidence which was marked as Exhibit 1.

20. He had been cross-examined at length on behalf of the prosecution. In cross examination, he had stated that, the husband of the victim expired in the hospital. He had denied

the suggestion that the appellant sustained burn injury from the fire on the body of the victim. He had stated that, he had visited the matrimonial house of the victim several times. He had admitted that, the victim, the husband of the victim and the appellant were burnt in the same incident. He had volunteered and said that, after the appellant set fire on the victim, she caught the appellant and her husband and as a result all of the 3 got burnt.

21. The scribe who had written the written complaint, had deposed as PW 2. He had stated that, he drafted the written complaint as for the version of PW 1. Thereafter, he had read over the written complaint to PW 1. He had identified his signature on the written complaint being Exhibit 1.

22. The paternal uncle of the victim had deposed as PW 3. He had corroborated the dowry given at the time of marriage of the victim. He had stated that, he rushed to the place of occurrence on receiving the news. He had found the victim to be conscious at that time. On enquiry, the victim had told that her husband and the appellant poured kerosene oil on her body and set her on fire. He had witnessed the seizure made on January 2, 2012. He had tendered the seizure list which was marked as Exhibit 2.

23. A neighbour of the appellant had deposed as PW 4. He had stated that after getting the news of the incident, he found the appellant, victim and her husband lying in a burnt condition. The victim was semiconscious. In cross examination, he had stated that, the 3 burnt persons were not in a position to speak. He was unable to say how they got burnt.

24. A local person had deposed as PW 5. He did not add any value to the case either of the prosecution or of the defence. Similarly, PW 6 did not add any value to the case of either the prosecution or the defence.

25. Another witness to the seizure list dated January 2, 2012 had deposed as PW 7. He had been cross-examined on behalf of the defence.

26. A neighbour of the appellant had deposed as PW 8. He had been declared hostile by the prosecution. He had denied in cross examination by the prosecution that he stated to the police that, the victim and her husband used to quarrel frequently.

27. A person known to PW 1 had deposed as PW 9. He had stated that the appellant and the husband of the victim had resided in the same mess. Appellant and the husband of the

victim used to assault the victim in an intoxicated condition. Appellant had wanted to cohabit with the victim and on her refusal, the appellant and the husband of the victim poured kerosene oil on the body of the victim and set her on fire. He had stated that, the victim said before them that both the husband and the appellant poured kerosene on her body and set her on fire. He had accompanied the victim to the hospital.

28. Another paternal uncle of the victim had deposed as PW 10. He had stated that, the appellant did not behave with the victim properly. The victim used to tell him that the appellant used to ask to stay with them. The victim was burnt by the appellant and his brother. After receiving the news, he had gone to the matrimonial home of the victim and saw the victim lying in a burnt condition. At that time, the victim was conscious. The victim had told him that, the appellant and her husband poured kerosene oil on her body and set her on fire. He was with the victim when she was taken to the rural hospital and thereafter to the subdivisional hospital where the victim had died. He had identified the appellant in Court.

29. The medical officer who had conducted the post-mortem on the dead body of the victim had deposed as PW 11. He had stated that, the deceased had more than 90% burn

injuries all over the body except the sole of the feet and part of anterior abdomen. He had tendered the post-mortem report which was marked as Exhibit 4. He had stated that, the probable cause of death of the victim was due to the effects of the burn injuries. In cross examination, he had stated that the patient who had extensive burn injury, could be capable of giving any statement. He had stated that, it was not possible to say how the victim had sustained the burn injuries.

30. The doctor at the rural hospital who treated the victim for the first time, had deposed as PW 12. He had stated that, on January 2, 2012 he examined the victim at the rural hospital. At that time, the victim had been conscious and alert. She had been brought to the hospital by her cousin and that the father of the victim was also present. He had recorded the statement of the victim. The victim had stated before him that she was set on fire after pouring kerosene on her body by her husband and the appellant. The victim had suffered 95% burn injury and was referred to the subdivisional hospital for treatment. He had tendered the injury report of the victim recorded by him in evidence which was marked as Exhibit 5. He had stated in cross examination that, the incident had taken place on January 2, 2012 at about 3 AM and that he

examined the victim at 8 AM on the same day. He had stated that there was no mention in his report as to whether there were smell of kerosene from the body/wearing apparel of the victim.

31. The investigating officer had deposed as PW 13. He had narrated about the steps he had taken in course of the investigations. He had been cross-examined on behalf of the defence.

32. On completion of the evidence of the prosecution, the appellant had been examined under Section 313 of the Criminal Procedure Code. He had stated that, he was innocent. He had claimed that, the victim accidentally caught fire while cooking. He and the husband of the victim had tried to save the victim and in the process they sustained burn injuries.

33. The cause of death of the victim has been specified as due to burn injuries in the post-mortem report being Exhibit 4. The post-mortem doctor had deposed as PW 11 and stated that, the probable cause of death was due to the effects of burn injuries. This opinion of the post-mortem doctor has not been assailed by the defence nor established to be incorrect.

In his cross examination, PW 11 had reiterated his opinion that the death took place due to the extensive burn injuries.

34. The victim had been taken to the rural hospital at first on January 2, 2012. The doctor who had treated the victim at the rural hospital had deposed as PW 12. He had stated that, he examined the victim at 8 AM in the morning of such date with the incident taking place at 3 AM on the same day. This statement he had made in cross examination.

35. The prosecution did not produce any witness at the trial who had seen the incident. The prosecution has relied upon the dying declarations of the victim to bring home the charges.

36. In the facts of ***Darshan Singh (supra)***, the Court had found that, the post-mortem doctor stated that there were remote chances of the victim remaining conscious after receipt of injury number 3 and therefore doubted the oral dying declaration made by such victim subsequently. In the facts of the present case, the post-mortem doctor had stated that, it was possible for a victim receiving the same type of burn injuries to be capable of giving any statement. Therefore, in the facts of the present case, there is no material on record to suggest that, the victim was incapable of making a statement

before her death subsequent to her suffering the burn injuries.

37. In ***Koli Chunilal Savji and another (supra)*** the Supreme Court had held that, the requirement of presence of doctor at the time of recording and certification that the declarant was conscious, in senses and in fit condition to make the statement are mere rules of prudence. The ultimate test is whether the dying declaration can be held to be a truthful one and voluntarily given.

38. On dying declarations and it forming basis of an order of conviction, the Supreme Court in ***Laxman (supra)*** had observed as follows: –

“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.”

39. In ***Wakteng (supra)*** the Supreme Court had held that, merely because a statement was recorded by police personnel and the thumb impression of the deceased was affixed on it, the same cannot straightaway be rejected. A statement of a deceased recorded by a police officer in a routine manner as a complaint and not as a dying declaration can be taken as a dying declaration after the death of the injured if he was found to be in a fit state of health to make the statement. If the dying declaration is recorded by an investigating officer, the same can be relied upon if the evidence of the prosecution witness clearly established beyond reasonable doubt that the deceased was conscious and he was removed to the hospital and he was in a fit state of health to make the statement.

40. The authorities cited above have highlighted various aspects of a dying declaration and its evidentiary value. A dying declaration can be oral or in writing or in any adequate

method of communication whether by words or by sign or otherwise, provided the indication is positive and definitive. If the oral statement is reduced to writing then, no oath is necessary nor is the presence of a magistrate absolutely necessary at the time of the recording of the statement. However, presence of the magistrate assures the authenticity of the recording although there is no requirement of law that the dying declaration must be recorded in the presence of a magistrate. There is no specified statutory form for recording a dying declaration.

41. Law recognises that the situation of a person on death bed is solemn and serene and therefore law accepts the veracity of the statement of such person. Law therefore dispenses with the requirement of administration of oath and cross examination of such person. However, acceptance of the veracity of the statement is not absolute and is subject to various criteria relating to its acceptability.

42. Since law dispenses with safeguards relating to the veracity of a statement when it comes to dying declaration, it is incumbent on the Court to exercise great caution while considering a dying declaration. It is imperative for the Court to 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 must guard against a statement which is the result of tutoring or prompting or a product of imagination. The court is required to decide as to whether the deceased was in a fit state of mind and bestowed with the opportunity to observe and identify the assailant.

43. While assessing the fitness of the state of mind of the deceased, the Court normally looks up to medical opinion. However where the eyewitnesses established that the deceased was in a fit and conscious state of mind to make the declaration then the medical opinion will not prevail. Absence of certification of the doctor as to the fitness of the mind of the deceased in such a situation will also not vitiate the dying declaration.

44. Law also does not specify the categories of persons who were capable of recording a dying declaration or the categories of persons who are incapable to do so. So long as the person hearing/perceiving the dying declaration or recording the dying declaration is in a position to fully comprehend the declaration of the deceased and communicate the same, the dying declaration may be treated as such.

45. PW 12 had stated that, when he examined the victim, she was conscious and alert. He had recorded a statement of the victim on the injury report of the victim being Exhibit 5. The victim had told him that she was set her on fire after pouring kerosene oil on her body by her husband and the appellant. Exhibit 5 is the injury report of the victim and has such noting on the body of the document as spoken of by the PW 12.

46. The victim had made dying declarations orally to PW 1, PW 3, PW 9 and PW 10. All the oral dying declarations are consistent and PW 1, 3, 9 and 10 had corroborated each other with regard to their arrival at the place of occurrence, the utterance of the dying declaration by the victim and the removal of the victim by them to the hospital.

47. The oral dying declarations of the victim as stated by PW 1, 3, 9 and 10 are consistent with the dying declaration that PW 12 as a doctor had noted on Exhibit 5.

48. The victim in her dying declarations had stated that, her husband and the appellant poured kerosene oil on her and set her on fire.

49. PW1, 3, 9 and 10 had stated that the victim was conscious when they had met her and when she made the oral

dying declaration to them. PW 12, the doctor who had treated the victim at the rural hospital had stated that the victim was conscious and she made the declaration as he noted in Exhibit 5. In the facts of the present case, therefore, the prosecution had placed adequate material on record to establish that, the victim was conscious and in a fit state of mind to make the dying declaration. She had done it truthfully, voluntarily, without any tutoring or prompting or that her statement was a product of imagination.

50. The appellant had claimed in his examination under Section 313 of the Criminal Procedure Code that, the victim suffered the burn injuries accidentally when she was cooking. Significantly, it has come in evidence that, the information as to the victim suffering burn injuries reached the father of the victim at around 5:30 AM in the morning. The doctor treating the victim at the rural hospital had stated that, the incident occurred at 3 AM in the morning. He had treated the victim at about 8 AM in the morning. No witness had stated at the trial that, there was an attempt at cooking at such early hours in the morning. The claim made by the appellant that, the victim had suffered the burn injuries accidentally is without any basis.

51. The prosecution therefore established that, the victim had been set on fire and that the appellant had taken an active part therein. The victim had died out of the burn injuries suffered from the fire put on in which the appellant was involved. The victim had been murdered with the appellant taking an active part in the murder of the victim.

52. At the trial, the prosecution had established that the victim had been subjected to torture and harassment by her in-laws and that the appellant was complicit therein. There had been demand for dowry.

53. In view of the discussions above, we have not found any ground to interfere with the impugned judgement of conviction and the order of sentence. We affirm the same.

54. CRA No. 267 of 2021 is dismissed.

55. Period of custody already undergone shall be set off against the sentences imposed. The sentences shall run concurrently.

56. The trial court records along with a copy of this judgement and order be sent to the appropriate court at once for necessary action.

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

[DEBANGSU BASAK, J.]

58. I agree.

[MD. SHABBAR RASHIDI, J]