

1. In this criminal appeal the judgement dated 23.09.2003 and the order of sentence dated 24.09.2003 as passed by learned Additional Sessions

Judge, 1st Court, Hooghly in Sessions Trial No.16 of 2003 has been assailed. By the impugned judgement learned trial court found the present appellant guilty of the offence under Section 498A IPC and thus, convicted and sentenced him to suffer RI for two years and to pay a fine of Rs.1000/- i.d to suffer RI for six months and at the same time the said Court also found the present appellant guilty of the offence under Section 302 IPC and thus, convicted and sentenced him to suffer RI for life and to pay a fine of Rs.5000/- id to suffer one year more with a further direction that both the sentences would run concurrently. The convict felt aggrieved and thus, preferred the instant appeal.

2. For effective disposal of the instant appeal the facts leading to initiation of the aforesaid sessions trial is required to be dealt with in a nutshell.

3. One Smt. Anima Sarkar, wife of Sri Nani Bhusan Sarkar of 1, Kapasdanga, P.O. and District Hooghly, lodged a written complaint with the O/C, Balagarh Police Station, District Hooghly stating inter alia, that on December 13, 1994 the marriage of her daughter Sumitra (Jhunu) was solemnized with the present appellant as per Hindu Rites and Customs and at the time of such marriage she had given various nuptial gifts, cash of Rs. 20,000/- and gold ornaments to the father of the present appellant but after such marriage, her son-in-law, who is the present appellant herein and his mother Smt. Hena Dutta further demanded Rs.30,000/- and various other articles from her and for fulfilling such demand they started inflicting torture upon her said daughter in which not only her said son-in-law and his mother but also his three brothers namely; Sibabrata Dutta, Nibabrata

Dutta and Ashim Dutta also participated. It has also been stated in the said written complaint that being unable to forbear such torture upon her, the said daughter of the de facto complainant viz; Sumitra returned to her paternal home but the de facto complainant as well as her other family members with an expectation of better future tried to persuade the present appellant and his family members but of no effect. It has been stated further that in order to pacify the dispute on account of the torture of the appellant and his family members, as per advice of the well wishers a room was taken on rent for the residence of the daughter of the de facto complainant and her husband under Jirat Panchayat in District Hooghly wherein the local Panchayat members and Jilla Parishad members also intervened. It has been stated also in the said complaint that on March 14, 1999 in the morning she came to learn from a local resident that her daughter Sumitra had been admitted along with her husband in burnt condition at Chinsurah Imambara Sadar Hospital and immediately thereafter she, her family members and her 'para' people reached to the said hospital and on reaching there she also noticed that her said daughter was admitted in female surgical ward in ablazed condition and at that time the victim disclosed to her that on the said day at about 9 A.M. her husband Subrata Dutta (the appellant herein) poured kerosene oil on her person and thereafter set fire on her person. It has been disclosed further that subsequently on March 14, 1999 her said daughter succumbed to her injuries at 17:10 hrs in PG Hospital, Kolkata where she was referred for better treatment.

4. On the basis of such written complaint Balagarh P.S Case no. 20/1999 dated 15.03.1999 under Sections 498A/302 IPC was started.

Investigation was taken up and on completion of the same charge sheet under Sections 498A/302/304B IPC was submitted.

5. After commitment and transfer the learned trial court on March 4, 2003 considered the charges as against the present appellant as well as against the other charge sheeted accused persons and on the basis of the materials placed before him framed charges under Sections 498A/302 IPC as against the appellant Subrata Dutta and at the same time framed charge under Sections 304 B as against the remaining charge sheeted accused persons. It is pertinent to mention herein that by the impugned judgment though the present appellant was found guilty under Sections 498A/302 IPC and thus was convicted under Section 235(2) of the Code of Criminal Procedure but by the self same impugned judgement, the learned trial court found the other accused persons facing the trial not guilty of the offence under Section 304B IPC and thus acquitted them under Section 235(1) of Cr.P.C.

6. Trial Court Record reveals that in order to bring home charges as against the present appellant as well as the other charge sheeted accused persons, the prosecution has examined 27 witnesses in all and several documents have been exhibited on their behalf. Before the learned trial court on behalf of the defence 7 witnesses have also been examined and the some documents have also been exhibited on behalf of the accused persons.

7. For effective disposal of the instant appeal this Court considers that a brief description of the prosecution witnesses is very much necessary. On perusal of the available materials of the trial court record it reveals that PW1 is the de facto complainant and the mother of the victim while PW2 is the

father of the deceased. PW3 is the neighbour of the rented accommodation of the deceased and the present appellant while PW4 is the landlord of the deceased and the present appellant. PW5 is the co-tenant where the present appellant and the deceased last resided together as tenant. PW6 is the sister of the deceased. PW7 and PW8 are the uncles of the deceased. PW9, PW10 and PW11 are the priests to the marriage, friend of the deceased and religious brother of the deceased respectively. PW12 is a resident of the Kapasdanga. PW13 is the autopsy surgeon. PW15 and PW16 are the seizure list witnesses. PW16 is the scientific officer of FSL. PW17 is another seizure witness. PW17 is the hospital staff and a seizure list witness. PW18, PW19, PW20 and PW21 are the police personnels and the seizure witnesses .PW22 is the Recording Officer. PW23 and PW25 are the doctors of SSKM Hospital , Kolkata . PW24 is the doctor of Chinsurah Sadar Hospital. PW27 is the 1st I.O and PW26 is the 2nd I.O of the said criminal case.

8. For arriving at a logical conclusion of the instant appeal we propose to deal with the evidence of those prosecution witnesses which in our considered view are material and vital in nature so as to avoid repetition and wastage of time. On perusal of the impugned judgement it reveals to us that the learned trial court has rightly come to the conclusion that the case as disposed of by him is based on circumstantial evidence. Learned trial court in his impugned judgement placed his reliance upon three dying declarations namely:-

- (i) The version of the victim to the de facto complainant;
- (ii) The version of the victim before Dr. Anjali Banerjee (PW25) at SSKM Hospital; and

- (iii) The version of the victim before the doctor of Chinsurah Hosptial (PW24).

It is pertinent to mention herein that all such statements of the victim have been exhibited vide; Exhibit 12, Exhibit 13 and Exhibit 18 (collectively).

9. Trial court record reveals further that on due consideration of the entire materials, learned trial court came to a finding that those three dying declarations were made by the deceased prior to her death in a conscious state of mind and those are trustworthy and thus came to a conclusion that those can be the basis of conviction of the present appellant and thus passed the impugned judgement.

10. Mr. Himanshu De, learned advocate for the appellant at the very outset draws attention of this Court to the evidence of PW1, PW2, PW6 PW10 and PW11 as well as to the evidence of PW24 and PW25 before whom according to the prosecution the victim stated to have made the alleged dying declarations. It is contended by Mr. De that admittedly it is settled law that a dying declaration can be the sole basis of conviction provided it inspires confidence of the court. It is further contended by Mr. De that learned trial court while passing the impugned judgement failed to visualize the contradictions and/or omissions in the deposition of the aforesaid witnesses and thus wrongly persuaded himself in passing the impugned judgement of conviction against the present appellant based on the oral dying declarations of the deceased. Drawing attention to the cross-examination of PW1 it is argued by Mr. De that on being asked PW1 categorically stated that she was not interrogated by the I.O and in course of investigation she never met any police officers. Such being the position there

cannot be any justification on the part of the learned trial court to believe the oral evidence of PW1 on account of such material omission which tantamounts to material contradiction in view of Section 145 of the Indian Evidence Act read with Section 162 of the Code of Criminal Procedure. Drawing attention to the evidence of PW2 it is argued by Mr. De that PW2 is also not a truthful witness since in his examination-in-chief he disclosed that his said deceased daughter stated to him that the present appellant set fire on her person on the relevant day and hour while PW27 being the first I.O in his cross-examination categorically stated that no such statement has been given by PW2 to him in his statement under Section 161 Cr.P.C which according to Mr. De tantamounts to a material contradiction. According to Mr. De similar type of contradiction arose in the case of PW6 as well as of PW10. It is further argued by Mr. De that the learned trial court while passing the impugned judgement though gave due importance to the Exhibit 12, Exhibit 13 and Exhibit 18 but at the same time failed to appreciate the evidence of PW3, PW4, PW5 , PW8 and PW15. It is argued further on behalf of the appellant that in the event the evidence of the aforesaid witnesses have been assessed in its due perspective, learned trial court might have come to a conclusion favourable to the appellant. Drawing attention to the evidence of the defence witnesses vis-à-vis Exhibit 'A' to Exhibit 'G' Mr. De, learned advocate for the appellant further argued that while passing the impugned judgement learned trial court failed to notice that the present appellant was also injured out of the self same incident and at the same time failed to appreciate the consequences of failure on the part of the prosecution to explain the injury suffered by the accused. It is submitted by

Mr. De that it is settled law that in the event it is found that the accused also suffered injury arising out of the self same incident where the victim had either suffered injury or had died, in absence of plausible explanation on the part of the prosecution the benefit of doubt must go in favour of the accused as per criminal jurisprudence. Mr. De, learned advocate for the appellant in course of his argument places his reliance upon the following reported decisions namely:-

- (i) ***Laxman vs. State of Maharashtra, reported in (2002) 6 SCC 710;***
- (ii) ***Atbir Vs. Govt. NCT of Delhi , reported in (2010) 9 SCC 1;***
- (iii) ***Purshottam Chopra & Anr. Vs. State (Govt. of NCT of Delhi), reported in (2020) 11 SCC 489;***
- (iv) ***Lakshmi Singh & Ors Vs. State of Bihar, reported in (1976) 4 SCC 394;***
- (v) ***Bhagwan Sahai & Anr. Vs. State of Rajasthan, reported in AIR 2016 SC 2714.***

11. Mr. De, learned advocate for the appellant thus submits before this Court that it is a fit case for allowing the instant appeal by setting aside the impugned judgement and order of sentence.

12. Per contra, Ms. Faria Hossain, learned advocate for the State submits before this Court that learned trial court committed no error of fact or of law in holding the dying declarations of the deceased as sacrosanct. It is further argued that from the evidence of the prosecution witnesses it would reveal that in absence of any chance of false implication or embellishment there cannot be any doubt to believe the dying declarations as given by the deceased prior to her death. Drawing attention to the evidence of the

deposition of PW24 and PW25 i.e. doctors of Immambara Sadar Hospital at Chinsurah and Doctor of SSKM Hospital, Kolkata it is argued that from the evidence of the said two medical practitioners it would reveal that the deceased at the time of making such dying declarations was in a fit state of mind . It is further argued by her that learned trial court rightly disposed of the said sessions trial on the basis of the dying declarations which have been exhibited before the learned trial court. In course of her argument Ms. Faria Hossain places her reliance upon the two reported decisions namely:-

(i) ***Takhaji Hiraji vs. Thakore Kubersing Chamansing and Others*** reported in ***(2001) 6 SCC 145: 2001 SCC Cri 1070; and ;***

(ii) ***Hare Krishna Singh and Others vs. State of Bihar*** reported in ***AIR 1988 SC 863: (1988) 2 SCC 95.***

13. Learned advocate for the State thus submits before this Court that it is a fit case for dismissing the instant appeal by upholding the impugned judgement.

14. We have considered the entire materials as placed before us. We have also gone through the charges as framed by the learned trial court, the deposition of the prosecution and the defence witnesses, the exhibited documents on the side of the prosecution and the defence as well as the impugned judgement. We have also given our due consideration over the submissions of the learned advocates of both the sides. Since the learned trial court while passing the impugned judgement placed his reliance upon the alleged dying declarations of the victim and held those are sacrosanct, we consider it necessary to look to some of the celebrated decisions of the Hon'ble Supreme Court on the subject of dying declaration. In the celebrated

decision of **Atbir (supra)** the Hon'ble Apex Court while dealing with the subject of dying declaration expressed the following view:-

“(i) Dying declaration can be the sole basis of conviction if it inspires the full confidence of the Court.

(ii) The Court should be satisfied that the deceased was in a fit state of mind at the time of making the statement and that it was not the result of tutoring, prompting or imagination.

(iii) Where the Court is satisfied that the declaration is true and voluntary, it can base its conviction without any further corroboration.

(iv) It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence.

(v) Where dying declaration is suspicious, it should not be acted upon without corroborative evidence.

(vi) A dying declaration which suffers from infirmity such as the deceased was unconscious and could never make any statement cannot form the basis of conviction.

(vii) Merely because a dying declaration does not contain all the details as to the occurrence, it is not to be rejected.

(viii) Even if it is a brief statement, it is not to be discarded.

(ix) When the eye-witness affirms that the deceased was not in a fit and conscious state to make the dying declaration, medical opinion cannot prevail.

(x) If after careful scrutiny, the Court is satisfied that it is true and free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal impediment to make it basis of conviction, even if there is no corroboration.”

The same view was taken in the reported decision of:-

i) Jagat Taran Chakraborty vs. The State (2011) 1 CCrLR (Cal) 410

ii) Bhajju @ Karan Singh Vs. The State of M.P reported in (2012) 2 CCrLR (SC)358:2012 Cri LJ 1926.

In the reported decision of **Laxman (supra)** the Hon'ble Supreme Court while dealing with the self same subject of dying declaration expressed the following view:-

“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 death bed 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 court 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 to always 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 look 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 in 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 is 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.”

15. At this juncture it is to be looked into as to whether the principles of law as enunciated in the aforesaid reported decisions can be applied or not in the instant lis. On perusal of the evidence of PW1 it reveals that in her examination-in-chief she testified that on the relevant day and hour when she got information about the burning of her daughter (deceased), she rushed to the Chinsurah Hospital where her daughter told her that the present appellant poured kerosene oil on her body and thereafter set fire on her person. However as rightly pointed out by Mr. De that PW1 was materially contradicted by the defence in her cross-examination wherein she specifically testified that she was not at all interrogated by the I.O of the said case and in course of investigation she did not meet any police officers. As also rightly pointed out by Mr. De such omission on the part of PW 1 really

tantamounts to material contradiction in view of Section 145 of the Indian Evidence Act and Section 162 of the Code of Criminal Procedure and the same definitely goes in favour of the accused. The testimony of PW2, who is the father of the victim to the effect that her deceased daughter prior to her death stated to him that the present appellant poured kerosene oil on her persons and set fire on her body has been materially contradicted in the cross-examination of the PW27 being the first I.O where the said I.O specifically stated that no such statement was given by PW2 in his statement under Section 161 Cr.P.C . As rightly pointed out by Mr. De, learned advocate for the appellant that similar material contradiction arose in case of PW6 as well as PW10 since their evidence that the victim made a dying declaration roping the present appellant was either contradicted in their own cross-examination or in the cross-examination of the PW 27 being the 1st I.O of the said criminal appeal.

In this regard we may look to the reported decision of ***Amar Ali Mondal vs. State of West Bengal*** reported in ***(2010)3 CCrLR Cal 737*** wherein the a Co-ordinate Bench of this Hon'ble High Court expressed the following view:-

“Statement by a prosecution witness before the police in terms of Section 161 Cr.P.C in course of investigation can only be used to contradict or discredit such witness as provided under section 145 of the Evidence Act. It is well settled position of law that the same cannot be used as substantive evidence in favour of against the accused. Such statement can, however,

be used for a limited purpose, i.e. for the purpose of contradicting or discrediting a witness in view of provisions of 162 Cr.P.C.”

The same view has been taken in the reported decision of :-

i) *Hazari Lal vs. The State of Delhi* reported in 1980 CrLJ 564: AIR 1980 SC873;

ii) *Sat Paul Vs. Delhi Administration* reported in 1976 CrLJ 295: AIR 1976 SC 294.

16. There is no doubt that we have not seen any such contradiction or omission in the evidence of PW24 (doctor of Chinsurah Hospital) and PW25 (doctor of SSKM Hospital). On perusal of the oral evidence of PW 24 vis-à-vis Exhibit 12 it reveals both in his examination-in-chief and in his cross examination as well as in Exhibit 12 it is specifically mentioned that the deceased prior to her death disclosed before the said doctor that her husband (the appellant herein) made an attempt to kill her by applying kerosene oil on her person and she thus sustained burn injuries. On close scrutiny of the testimony of PW25 vis-à-vis Exhibit 13 we find that the said witness has also testified in the same tune with regard to the alleged dying declaration by the deceased prior to her death. At this juncture a question arose as to whether the said doctors i.e. PW24 and PW25 being independent witnesses as well as medical practitioner of two separate hospitals can be believed or not. Before answering to the said question we also propose to look to the evidence of PW4, PW5, PW8 and PW15. From the trial court record it reveals that PW4 is the landlord of the deceased and the appellant

and in his house the unfortunate incident occurred. Before the learned trial court he testified that on the relevant day and hour he being a lawyer was in his chamber and was talking with his clients and after hearing the alarm raised by the deceased, he noticed from the chamber that the present appellant was coming out of his room with fire on his body and immediately thereafter he and other persons rushed to the P.O room and found the victim lady with burn injuries and she was then standing by the said wall and shouting for help and at that time she was crying for help. In his cross-examination it has been specifically stated by him that he noticed no untoward incident in between the present appellant and the deceased. PW5 is a co-tenant where the present appellant and his deceased wife used to reside also as a tenant and in his cross-examination it has been stated by him that he never noticed that the present appellant inflicted any torture upon his wife and that he had not seen any untoward incident between the present appellant and the deceased. From the examination-in-chief of PW8 nothing reveals as against the present appellant and on the contrary in his cross-examination PW8 categorically stated that the deceased Sumitra during her life time was very much arrogant. He further stated that no untoward incident occurred in their presence. PW15 is also a co-tenant of the appellant and the deceased who in her deposition stated nothing against the accused and in his cross-examination he stated that on the relevant day of the incident the deceased Sumitra kept her son at his home. It is to be kept in mind that PW4, PW5, PW8 and PW15 are all independent witnesses who have been tendered into the witness box on behalf of the prosecution and in their respective examination-in-chief nothing has/have been elicited

from their mouth which may affect the defence case and on the contrary in their cross-examination sufficient materials came out that they being either the landlord or the co-tenant of the said premises noticed no untoward incident in between the present appellant and the deceased and one of them also stated further that the deceased was very arrogant by nature. It has also been noticed by us that none of the said prosecution witness has been declared hostile by the prosecution and therefore their answers as given in their respective cross-examinations definitely weaken the case of the prosecution. As rightly pointed out by Mr. De that had there been any quarrel between the appellant and his deceased wife on the relevant day and hour or had there been any untoward incident between the appellant and the deceased Sumitra, PW 4 being the landlord of the said premises and PW5 being a co-tenant of the said premises must have adduced some positive evidence in favour of the prosecution and in absence of such evidence, the benefit of doubt ought to have been given to the present appellant.

17. The sessions trial which is the subject matter of the instant appeal has another facet which the learned trial court has probably overlooked. From the evidence of PW4, PW5, PW8 and PW15 vis-à-vis the evidence of DWs and Exhibit 'A' to 'G' it would reveal that the present appellant was also ablazed out of self same incident. In course of her argument before us Ms. Faria Hossain, learned advocate for the State did not dispute such position. Admittedly none of the prosecution witnesses in their deposition has explained as to how the accused, the appellant herein sustained burn injury

on his person and at this juncture the relevant portion of the cross examination of PW24 is thus:

“ The husband of the victim was also admitted in the hospital and he was also treated by me.

Page 2 was written by me.

It is written in the bed head ticket that the patient’s wife has been admitted in female ward with 70% burns. She has stated that husband has burnt her. This patient also tells the reverse.”

18. On comparative study of the aforesaid prosecution witnesses, the defence witnesses, documentary evidence on the part of the defence i.e. Exhibit ‘A’ to ‘G’ it is not at all clear that in between the appellant and the deceased who is aggressor. The effect of non-explanation of injuries sustained by the accused has been well explained in the reported decision of ***Mano Dutta and Another vs. State of U.P*** reported in **(2012) 4 SCC 79**.

“38.The question, raised before this Court for its consideration, is with respect to the effect of non-explanation of injuries sustained by the accused persons. In this regard, this Court has taken a consistent view that the normal rule is that whenever the accused sustains injury in the same occurrence in which the complainant suffered the injury, the prosecution should explain the injury upon the accused. But, it is not a rule without exception that if the prosecution fails to give explanation, the prosecution case must fail.

39.Before the non-explanation of the injuries on the person of the accused, by the prosecution witnesses, may be held to affect the prosecution case, the Court has to be satisfied of the existence of two conditions:

(i) that the injuries on the person of the accused were also of a serious nature; and

(ii) that such injuries must have been caused at the time of the occurrence in question.

40. Where the evidence is clear, cogent and creditworthy; and where the court can distinguish the truth from falsehood, the mere fact that the injuries on the person of the accused are not explained by the prosecution cannot, by itself, be a sole basis to reject the testimony of the prosecution witnesses and consequently, the whole case of the prosecution. Reference in this regard can be made to *Rajender Singh & Ors. v. State of Bihar*, [(2000) 4 SCC 298], *Ram Sunder Yadav & Ors. v. State of Bihar*, [(1998) 7 SCC 365, and *Vijayee Singh v. State of U.P.* [(1990) 3 SCC 190].”

Similar view was taken by the Hon'ble Supreme Court in the case of ***Lakshmi Singh and others vs. State of Bihar*** reported in **(1976) 4 SCC 394**, while dealing with the self same subject where the following view was taken:-

“.....1
2.P.W. 8 Dr. S. P. Jaiswal who had examined Brahmdeo deceased and had conducted the postmortem of the deceased had also examined the accused Dasrath Singh, whom he identified in the Court, on April 22. 1966 and found the following injuries on his person:

1. Bruise 3" x 1/2" on the dorsal part of the right forearm about in the middle and there was compound fracture of the fibula bone about in the middle.

2. Incised wound 1" x 2 m. m. x skin subcutaneous deep on the lateral part of the left upper arm, near the shoulder joint.

3. Punctured wound 1/2" x 2 m. m., x 4 m. m. on the lateral side of the left thigh about 5 inches below the hip joint.

According to the Doctor injury No. 1 was grievous in nature as it resulted in compound fracture of the fibula bone. The other two injuries were also serious injuries which had been inflicted by a sharp-cutting weapon. Having regard to the circumstances of the case there can be no doubt that Dasrath Singh must have received these injuries in the course of the assault, because it has not been

suggested or contended that the injuries could be self-inflicted nor it is believable. In these circumstances, therefore, it was the bounden duty of the prosecution to give a reasonable explanation for the injuries sustained by the accused Dasrath Singh in the course of the occurrence. Not only the prosecution has given no explanation, but some of the witnesses have made a clear statement that they did not see any injuries on the person of the accused. Indeed if the eye-witnesses could have given such graphic details regarding the assault on the two deceased and Dasain Singh and yet they deliberately suppressed the injuries on the person of the accused, this is a most important circumstance to discredit the entire prosecution case. It is well settled that fouler the crime, higher the proof, and hence in a murder case where one of the accused is proved to have sustained injuries in the course of the same occurrence, the non-explanation of such injuries by the prosecution is a manifest defect in the prosecution case and shows that the origin and genesis of the occurrence had been deliberately suppressed which leads to the irresistible conclusion that the prosecution has not come out with a true version of the occurrence.

.....
This Court clearly pointed out that where the prosecution fails to explain the injuries on the accused, two results follow: (1) that the evidence of the prosecution witnesses is untrue; and (2) that the injuries probalilise the plea taken by the appellants."

As discussed above it is undisputed that the burn injuries of the present appellant were also very serious for which he was transferred to Plastic Surgery Department as evident from Exhibit 'A' series and the evidence of DW1. In absence of clear, cogent and creditworthy evidence from the mouth of PW3, PW 4, PW 5 , PW 8 and PW 15 who could have led best possible evidence in support of the prosecution it has become very difficult for us to distinguish the truth from the falsehood as claimed by the present appellant and therefore in our considered view it would be very much risky to upheld the conviction of the present appellant as awarded by the learned trial court simply on the basis of her oral dying declarations as given to the two medical practitioners namely; PW24 and PW25. In a plethora of

judgement it has been well settled that in a criminal trial when two views are possible the view in favour of the accused must prevail.

19. In further considered view of this Court the reported decision of **Takhaji Hiraji (supra)** as cited from the side of the State practically helped the case of the appellant and the reported decision of **Hare Krishna Singh (supra)** is quite distinguishable from the facts and circumstances as involved in the present case.

20. In view of the discussion made hereinabove we thus found sufficient merit in the instant appeal and accordingly the instant appeal is allowed. Consequently the impugned judgement dated 23.09.2003 and the order of sentence dated 24.09.2003 as passed by learned Additional Sessions Judge, 1st Court, Hooghly in Sessions Trial No.16 of 2003 is hereby set aside.

21. Since the appellant has been enlarged on bail by this court vide order dated 16.06.2004 he be discharged from his bail bonds with immediate effect. In the event the present appellant remains in custody for any reason whatsoever in connection with Sessions Trial no. 16/03 as disposed of by Additional Sessions Judge , 1st Court Hooghly , vide its judgement and order of conviction dated 23.09.2003 and 24.09.2003, he be released at once, if not wanted in connection with any other case.

22. Department is directed to transmit the trial court record along with a copy of this judgement at the earliest for doing the needful by the trial court, if there be any.

23. Department is further directed to send a copy of this judgement to the Secretary , District Legal Services Authority, Hooghly for doing his needful at the earliest.

24. Urgent Photostat Certified copy of this judgment, if applied for, be supplied to the parties expeditiously after complying with all necessary legal formalities.

I agree.

(Chitta Ranjan Dash, J.)

(Partha Sarathi Sen, J.)