

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:-

HON'BLE JUSTICE CHITTA RANJAN DASH
AND
HON'BLE JUSTICE PARTHA SARATHI SEN

CRA 642 of 2004

Sk. Aftab Hossain & Ors.

Versus.

The State of West Bengal

For the Appellant : Mr. Debabrata Acharyya, Adv.
Mr. Sk. Samsul Arefin, Adv.
Mr. Sital Samanta, Adv.

For the State : Mr. Prasun Kumar Dutta, APP.
Md. Kutubuddin, Adv.
Mr. Santanu Deb Roy, Adv .

Last Heard on : **28.02 .2023**

Judgment on : **17.03.2023**

PARTHA SARATHI SEN, J. : –

1. The instant appeal arises out of the judgement dated 27.09.2004 and the order of sentence dated 28.09.2004 as passed by the learned Additional Sessions Judge, Fast Track, 2nd Court Midnapore, in Session Trial No. XXIII

of August 2001 whereby and whereunder the said trial court in the said case found the accused persons guilty for committing offence under Sections 498A/302/34 IPC and thus sentenced each of them to suffer RI for 3 years and to pay fine of Rs.1000/- i.d to suffer for six months for the offence committed by them under Section 498A IPC and also to suffer RI for life and to pay a fine of Rs.5000/- i.d to suffer RI of one year for the offence committed by them under Section 302 IPC with a further direction that all the substantive sentences of imprisonment would run concurrently . The convicts felt aggrieved and thus preferred the instant appeal. It is however pertinent to mention herein that during the pendency of the instant appeal, the present appellant no.3 Mst. Ashma Khatun @ Asheme Khatun has expired on 27.12.2019 and as such the instant appeal stood abetted as against her and such order of abetment was recorded by this Court vide order dated 28.02.2023. For effective disposal of the instant appeal, the facts leading to initiation of the aforesaid sessions trial is required to be discussed in a nutshell.

2. One Sk.Farhad Ali (PW1) of village Amrakuchi, PS Keshpur, Dist. Medinipur lodged a written complaint dated March 20,2001 with the I/C Kotwali P.S, Medinipur stating inter alia, that about four years back his daughter Sabina Khatun was given in marriage with Aftab Hossain (appellant no.1 herein) and thereafter for two years, both the bride and the groom led a happy conjugal life. It is the further version of the de-facto complainant that thereafter trouble started in the matrimonial home of his said daughter since the present three appellants being her husband, brother-in-law and mother-in- law started making quarrel and torture upon

her daughter on account of demand of dowry of Rs. 1 lakh which the de facto complainant could not fulfil on account of his financial stringency. It was the further version of the de facto complainant that for the non-fulfilment of such illegal demand his said daughter was frequently sent back to her paternal home however, with the expectation that everything would be in order in future the de facto complainant used to send her daughter to her matrimonial home with a request to the present three appellants not to make quarrel and torture on account of dowry. It has also been disclosed that 4-5 days prior to lodging of the FIR similar incident occurred and as usual the de facto complainant sent back his daughter to her paternal home. In the written complaint it has also been averred that on the last night at about 1:30 am one person being the head of the 'Moholla' (area) of Talpukur Colony intimated him over telephone that his said daughter Sabina Khatun was admitted at Medenipur Sadar Hospital with severe burn injury and after getting such information when he reached Midinipur Sadar Hospital he found his said daughter in totally ablazed condition and at that time his said daughter stated to him that it is none but her husband and her two in-laws i.e. the convicts of the aforementioned trial set fire on her person by pouring kerosene oil and thereafter his said injured daughter lost her sense. On the basis of such written complaint Kotwali P.S case no. 78/2001 dated March 20, 2001 under Sections 498A/326/34 IPC was started. However, since the victim died on March 21,2001 Section 302 was added in the FIR as per prayer of the I.O. Investigation was taken up and on completion of the same charge sheet under Sections 498A/ 302/34 IPC was filed as against the three appellants. Trial Court Record reveals that after

commitment and transfer of the trial court record, learned trial court on April 22, 2002 considered the charges against the present three appellants and on perusal of the entire materials as placed before him, framed charges under Sections 498A/302/34 IPC as against all the three accused persons. Trial court record reveals further that for bringing home the charges as against the three accused persons, the prosecution has examined 17 witnesses in all and several documents have been exhibited on their behalf. Though before the learned trial court the accused had adduced no evidence but from the trend of cross-examination of the prosecution witnesses and the answers as given by the accused persons in course of their respective examinations under Section 313 Cr.P.C, it would reveal that the defence case is based on false implication and clear denial.

3. For the sake of brevity we propose to categorize the prosecution witnesses in the following manner.

Private Witnesses	Government Witnesses	Police Witnesses
i. PW1 -Father of the deceased and the de facto complainant.	i. PW10 - Additional District Magistrate.	i. PW5 - A constable of police and a seizure list witness.
ii. PW4 - Mother of the deceased.	ii. PW13 - The Deputy Magistrate who recorded the alleged dying declaration of the deceased.	ii. PW17 - Investigating officer of this case.
iii. PW2 - Neighbour of the accused persons.	iii. PW 12 - The medical officer of the emergency department of Medinipur Sardar	

	Hospital.	
iv. PW3 - Neighbour of the accused persons.	iv. PW14 - The medical officer of Medinipur Sadar Hospital and a witness to the dying declaration as recorded by PW13.	
v. PW7 - Neighbour of the accused persons and brother of PW2.	v. PW16 - The medical officer of Medinipur Sadar Hospital and a witness to the dying declaration as recorded by PW13.	
vi. PW6 - Neighbour of the accused persons.	vi. PW15 - The Medical officer of Medinipur Sadar Hospital who performed autopsy over the dead body of the deceased.	
vii. PW5 - Kazi of the marriage between the deceased and appellant no.1		
viii. PW9 - Matrimonial uncle of the deceased and a seizure list witness.		
ix. PW11 - Scribe of the written complaint.		

4. As discussed above learned trial court after considering the oral evidence of the prosecution witnesses and after giving due thought over the

exhibited documents came to a conclusion that the charges as framed against all the three accused persons have been proved and thus passed the impugned judgement of conviction and order of sentence giving rise to the instant appeal.

5. Mr. Debabrata Acharya, learned advocate for the appellant in course of his argument at the very outset draws attention of this court to the certified copy of the impugned judgement. It is argued by Mr. Acharya that while passing the impugned judgement learned trial court placed much reliance upon the subsequent dying declaration of the deceased being Exhibit 4/1 without giving due importance to the first dying declaration being Exhibit 6/1 . It is argued on behalf of the appellants that the learned trial court while passing the impugned judgement ought to have held that the second dying declaration of the deceased is surrounded with suspicious circumstances and in not doing so, a serious miscarriage of justice has been caused while passing the impugned judgement . It is further argued that learned trial court ought to have visualize that all the witnesses to the exhibit 4/1 i.e. the alleged second dying declaration of the deceased had not been examined and such being the position there cannot be any justification on the part of the learned trial court to place much reliance upon the alleged second dying declaration being Exhibit 6/1 overlooking the first dying declaration of the victim being Exhibit 4/1. In support of his contention Mr. Acharya, learned advocate for the appellant placed his reliance upon the judgement as passed by the Hon'ble Supreme Court in **Criminal Appeal No.1290 of 2010 (Makhan Singh Vs. the State of Haryana)** reported in **(2022)SCC online SC 1019**. It is further argued on behalf of the present

appellants that under no stretch of imagination the appellant no.2 can be held guilty since from the rough sketch map as drawn by the I.O, it would reveal that the house of the present appellant no.2 is situated at a distance from the alleged P.O and that the presence of the appellant no.2 in the P.O at the fateful day and hour has not been proved beyond reasonable doubt.

6. Per contra, Mr. Prasun Kr. Dutta, learned Additional P.P duly assisted by Mr. Santanu Deb Roy and Md. Kutubuddin learned State counsels argued that the learned trial court made no mistake in holding that the second dying declaration of the deceased being Exhibit 6/1 is free from all vices and is genuine. It is further argued that in absence of any contrary evidence learned trial court rightly believed the testimonies of PW13 vis-à-vis PW12 , PW14 and PW16 since their evidence are neutral and consistent with each other. Drawing attention to the evidence of PW7 it is argued on behalf of the State/respondent that learned trial court is also justified in believing the oral testimony of PW7 and thus rightly passed the impugned judgement of conviction. Mr. Dutta, learned Additional P.P in course of his submission placed his reliance upon a judgement as passed by the Hon'ble Supreme Court of India in **Criminal Appeal No. 920/1997 (Nallam Veera Stayanandam & Ors vs. The Public Prosecutor, High Court of A.P reported in (2004)10 SCC 769).**

7. Since in this appeal learned advocates for the contending parties confine their arguments with regard to the acceptance and /or non-acceptance of the two dying declarations i.e. Exhibit 6/1 and Exhibit 4/1 we shall confine our discussion with regard to the evidence of those

prosecution witnesses which are related to such two dying declarations as mentioned above.

8. On perusal of the certified copy of the impugned judgement it appears to us that learned trial court while passing the impugned judgement admittedly placed his reliance upon the second dying declaration of the victim and not upon the first dying declaration which has been recorded almost 12 hours back prior to recording of the second dying declaration. In view of such, we feel it obligatory to look to the trial court record to assess under what circumstances the said dying declarations have been recorded and whether trial court is at all justified in passing his reliance upon the second dying declaration ignoring the first dying declaration of the deceased. However, prior to doing so, we also feel it obligatory to look to the statutory provision dealing with the subject of dying declaration i.e. Section 32 of the Evidence Act which is reproduced hereunder in verbatim:-

“Statements by persons who cannot be called as witnesses
32. Cases in which statement of relevant fact by person
who is dead or cannot be found ,etc., is relevant-*Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured, without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts in the following cases—*

1. When it relates to cause of death: When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person’s death comes into question. Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of

death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.

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9. At this juncture we also propose to look to some of the reported decisions of the Hon'ble Supreme Court of India dealing with the subject of dying declaration. In the case of **Amar Singh vs. State of Rajasthan** reported in **(2010) 3 CCrLR (SC) 446** the Hon'ble Apex Court expressed the following view:-

"Section 32(1) Evidence Act provides that the statements made by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question, are themselves relevant facts. In the present case, cause of death of deceased was a question to be decided and the statements made by the deceased before PW4 and PW5 that the appellant used to taunt the deceased in connection with a demand of scooter or Rs.25,000/- within a couple of months before the death of the deceased are statements as to "the circumstances of the transaction which resulted in her death "within the meaning of Section 32(1) of the Evidence Act".

10. With regard to the admissibility of the dying declaration we also propose to look to the celebrated decision of the Hon'ble Supreme Court in the Case of **Atbir vs. Govt. of NCT of Delhi**, reported in **(2010) 3SCC (cr) 1110: (2010) 9 SCC 1** where the Hon'ble Apex Court held the following:-

"(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.”

11. Keeping in mind the aforementioned legislative enactment and the judicial pronouncements we propose to look to the evidence of PW12 i.e the Medical Officer of Midnapur Sadar Hospital . In course of his examination-in-chief PW12 stated that on 19.3.2001 at about 11:55 p.m the victim was brought by her husband (appellant no.1 herein) in unconscious and approximately 100% burnt condition and at that time she was admitted under one Dr. Dilip Sen (PW14). He further stated that since the patient was under treatment of Dr. Dilip Sen he did not do any other treatment of the said patient. He was declared hostile by the prosecution and in his cross-examination by the prosecution he stated that he duly filled up the

emergency ticket in his own handwriting. He admitted that he had no right to examine the patient and to prescribe medicine. He further stated that being a doctor of emergency department it was his duty to take information of the condition of the patient though the patient was placed under the treatment of other doctor and on March 20, 2001 at about 6 am when he went to the victim and on query, the victim gave statement which he recorded (first dying declaration) (Exhibit 6/1). He further stated that prior to the writing of the dying declaration that is Exhibit 6/1 he did not make any contact with Dr. Dilip Sen(PW14) although the victim was under his treatment. At this juncture we feel it obligatory also to quote the dying declaration as recorded by PW12 and the same is reproduced hereinbelow in verbatim:-

“N.B. pt gained consciousness in F.S.S.W for a brief period and on asking said that she herself poured kerosin oil.

S.D of PW12

20/03-01 at 6 A.M”.

12. In course of his cross-examination by the defence he also stated that on regaining sense the victim herself told him that she poured kerosene oil on her body. At this juncture we also consider it necessary to look to the evidence of PW14 i.e. Dr. Dilip Sen under whom the victim was admitted at Mednipur Sadar Hospital on 19.03.2001. It is the version of PW14 in his examination-in-chief that on 20.03.2001 at about 1:15 hours he examined the patient who at that time was almost 100% burnt. It is his further version that the victim made a voluntary statement to the effect that the incident was suicidal in nature. However on the same day at about 1 pm the victim voluntarily gave statement that her burn injury is homicidal in nature and

that the present three appellants took part over the homicidal burn of her when she had quarrell with her husband. It has also been stated by PW14 that he gave a proposal to the Superintendent of Mednipur Sadar Hospital for recording the dying declaration of the victim in presence of a Magistrate and he further stated that before giving the statement she was in a position to give such statement. PW14 was extensively cross-examined on behalf of the defence. In course of his cross-examination by the defence PW14 stated that the victim disclosed to him that the incident was suicidal in nature and that the second statement of the victim was recorded after 12 hours after the first one.

If we scan the evidence of PW12 and PW14 by keeping those side by side, it appears to us that though it was the version of PW12 what while recording the first dying declaration (Exhibit 6/1) he made no contact with PW14 but PW14 in his cross-examination stated that such dying declaration was made by the victim either in his presence or to him. On conjoint perusal of the evidence of PW12 and PW14 it appears that on the relevant night and hour PW12 was posted in the emergency department and on the relevant time when the victim was brought to Midnpur Sadar Hospital he being in-charge of the emergency department simply filled up the '*proforma for police report*' and did nothing with regard to the treatment of the victim since the victim was admitted under PW 14. Such being the position, it is beyond our understanding as to what prompted PW12 (who was then in the emergency department) to suddenly record the dying declaration being Exhibit 6/1 of the patient without intimating the same either to PW14 or to the Superintendent of the said Hospital especially when it has not been stated

by PW12 in course of his deposition that he had to record the first dying declaration being Exhibit 6/1 since he noticed that at any moment the patient may succumb to her burn injury. In view of the discussion made hereinabove it appears to us that the action of PW12 while recording the first dying declaration of the deceased being Exhibit 6/1 is not only hyper-active but also suspicious in nature. At this juncture if we again look to the evidence of PW14 it would reveal that after considering the condition of the patient who was admitted under him in the aforesaid hospital, he took appropriate steps and followed protocols for recording of the dying declaration and that, only thereafter the second dying declaration i.e. Exhibit 4/1 has been recorded by PW13 who is none but an Executive Magistrate, a member of West Bengal Civil Service.

13. In considered view of us the evidence of PW13 is very much vital for arriving at a logical conclusion of this trial and accordingly we consider it prudent to discuss his testimony in a nutshell. PW13 in course of his examination-in-chief categorically stated that as per order of the District Magistrate he went to the hospital for recording the dying declaration of the victim. He further testified that the medical officer who remained present at the spot opined that the victim was in a fit state of mind to make such statement and he also testified that the victim expressed her willingness to give her voluntary statement and accordingly he recorded the statement being Exhibit 4/1 but he further testified that such recording of statement was done in presence of the doctors of the Hospital namely; Dr. Subhankar Sarkar, Dr. Susanta Sarkar, ward master N. Ganguly, sister and the parents and uncle of the victim. In course of his cross-examination PW13 stated that

such dying declaration was not recorded by him in question and answer form. He further stated that he summarized the statement of the victim. He further stated that prior to recording of such dying declaration being Exhibit 4/1 he did not ascertain from the patient as to whether she consulted with her parents and relatives. It is his further version that the patient was giving answer in a very soft and low voice and even all her statements were not so clear. At this juncture we also consider it expedient to look to the Exhibit 4/1 which has been recorded in Bengali and the English translation of which is as under:-

Smt. Sabina Khatun –“Yesterday (19.03.2001) at about 1 pm I had a quarrel with my husband since my husband asked me to transfer her father’s land in his favour. I did not agree to such proposal for which terrible quarrel occurred wherein my mother-in-law and father-in-law also participated. Later in the night my husband went to the house of my brother-in-law for watching TV and when I went to call him quarrel between us started again and thereafter, after returning to our own home such quarrel reached its peak and at that time my brother-in-law and mother-in-law caught hold of me and my husband snatched my earrings for which I suffered bleeding injury and at that time my husband poured kerosene oil on me and set me with fire.”

14. PW 16 being another medical officer of the said hospital in course of his examination-in-chief testified that the second dying declaration i.e. Exhibit 4/1 was recorded by PW13 in his presence as well as in the presence of ward master N. Ganguly and sister and some of the relatives and after recording of such statement of the victim he signed as a witness and other witnesses also put their signatures on such statement. In course of his cross-examination PW16 stated that the statement of the victim was not clearly audible however PW13 i.e. the Executive Magistrate was hearing such statement from a very close range.

15. On conjoint perusal of the evidence of PW13, PW14 and PW16 along with the contents of Exhibit 4/1 i.e. the second dying declaration, it appears to us that the second dying declaration Exhibit 4/1 was recorded after following due procedure and in presence of all the doctors under whom the patient was admitted at that material point of time and also in presence of other health officials of the said hospital.

Mr. Acharya, learned advocate for the appellants in course of his argument though challenged the veracity of the second dying declaration being Exhibit 4/1 on the ground that such dying declaration was recorded after 12 hours of the recording of the first dying declaration and thus chances of false implication of the present appellants at the instance of the relatives of the victim cannot be ruled out on account of their tutoring but the same does not appear to be much convincing to us in view of the facts that for the reason best known to them both the parents of the victim i.e. PW1 and PW4 became hostile and that there was no cross-examination of PW13, PW14 and PW16 to the effect or even no suggestions was given to the said prosecution witnesses.

16. On comparative study of the entire materials as discussed hereinabove it appears to us that the veracity of the second dying declaration being Exhibit 4/1 ought not to be doubted since the same is not surrounded with any suspicious circumstances and on the contrary the first dying declaration being Exhibit 6/1 as recorded by PW12 really creates doubt in our mind with regard to its genuineness. At this juncture, if we look to the evidence of PW7 it would reveal to us that he being a 'Muhalladar' of the locality of the accused persons testified that after

marriage the victim was well at her matrimonial home for two years and thereafter trouble ensued in her family on account of torturing by the present accused persons on demand of cash for the purpose of construction of house and purchase of landed property. In his examination-in-chief he further testified that after hearing the torture upon the victim he sometimes went to the house of the accused persons and tried to persuade them not to commit such thing but all his efforts went into vain. In his examination-in-chief he further testified that on 19.03.2001 at about 11pm he heard the cries of the victim and thus reached to her matrimonial home and found her in burning condition on the verandah and at that time all the accused persons were present there. He further testified that on being asked the victim Sabina declared to him in present of the accused persons that the accused persons poured kerosene oil on her person and set fire ablazed. He was extensively cross-examined by the defence and on being asked he testified that in his presence the accused persons returned all the nuptial gifts of the victim to her paternal home. It is pertinent to mention herein that with regard to his deposition that the victim Sabina disclosed to him as to how she suffered burn injury at the instance of the accused persons, there was no cross-examination on the part of the accused persons except a suggestion was given to him that the victim Sabina did not disclose the incident to him at that time. In view of such we consider that the deposition of PW7 remains uncontroverted on which reliance can be placed to reach at a logical conclusion of the instant appeal.

17. In the decision of **Nallam Veera Stayanandam (supra)** as cited from the Bar the Hon'ble Apex Court while dealing with the subject of multiple dying declaration expressed the following view:-

“in the case of multiple declarations each dying declaration will have to be considered patently on its own merit as to its evidentiary value and one cannot be rejected because of the contents of the other. In cases where there are more than one dying declaration, it is the duty of the Court to consider each of them in its correct perspective and satisfy itself which one of them reflects the true state of affairs.”

18. In considered view of us if the yardsticks of acceptances of dying declaration as decided by the Hon'ble Supreme Court in the reported decision of **Atbir (supra)** is applied in the case in hand it would appear to us that the learned trial court made no mistake while passing the impugned judgement in placing his reliance upon the second dying declaration i.e. Exhibit 4/1 since sufficient materials have been placed before the learned trial court that such declaration was made by the victim in a fit state of mind and the same is not the result of tutoring, prompting or imagination and the same is true and voluntary. In course of hearing of the instant appeal as discussed hereinabove nothing could be placed on behalf of the present appellants that the second dying declaration i.e. Exhibit 4/1 was either suffering from any infirmity or surrounded by any suspicious circumstances for which the same should not be acted upon. Though not necessary even if we exercise our prudence it would reveal that the contents of the dying declaration being Exhibit 4/1 not only gets due corroboration from the evidence of PW15 and PW16 but also from the evidence of PW7 who being the 'Muhalladar' of the area of the accused persons categorically

stated the same facts and circumstances as recorded by the PW13 especially when no case could be made out as against him (PW7) by the defence that he had an enimical relationship with the convicts. The argument of Mr. Acharya, learned advocate for the appellants that Exhibit 4/1 i.e. the second dying declaration also suffers from material illegality since the same was not recorded in verbatim but in a summarized form as stated by PW13 in his cross-examination is also not acceptable to us since it is the settled position of law that there is no requirement that a dying declaration must contain all the details of the occurrence or that it should be in question and answer form. On close scrutiny of Exhibit 4/1 i.e the second dying declaration it appears to us that the same has been written practically in verbatim and in clear and unequivocal manner for which we do not find any cogent and coherent reasons to disbelieve the same either with regard to its true contents or with regard to the manner of its recording.

19. In further considered view of us the decision of **Makhan Singh (supra)** as cited from the side of the appellants has been delivered in a different perspective which is quite distinguishable from the facts and circumstances of the case involved in the instant case.

20. In view of the discussion made hereinabove we thus find no merit in the instant appeal and accordingly the instant appeal is dismissed. As a result the impugned judgement dated 27.09.2004 and the order of conviction dated 28.09.2004 as passed by the learned Additional Sessions Judge, Fast Track, 2nd Court, Midnapore in Session Trial no. XXIII of August 2001 is hereby affirmed.

21. Department is hereby directed to transmit the trial court record along with a copy of this judgement at the earliest.

22. Department is further directed to forward a copy of this judgement to the Secretary, Legal Service Authority, Paschim Mednipur for dong his needful.

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

I agree.

(Chitta Ranjan Dash, J.)

(Partha Sarathi Sen, J.)