

**IN THE HIGH COURT AT CALCUTTA
IN THE CIRCUIT BENCH AT JALPAIGURI
APPELLATE SIDE**

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Md. Shabbar Rashidi

**C.R.A.(DB) 15 of 2022
IA NO: CRAN/1/2023**

**Prakash Ekka
VS.
The State of West Bengal**

For the Appellant : Mr. Jaydeep Kanto Bhowmik,
 Mr. Sayantan Bhowmik,
 Ms. Rikta Sarkar
 Advocates

For the State : Mr. Ujjwal Luksom,
 Mr. Sourav Ganguly
 Advocates

Heard on : 24.11.2023

Judgement on : 24.11.2023

DEBANGSU BASAK, J.:-

1. The appeal is directed against the judgment of conviction dated March 19, 2021/March 20, 2021 and order of sentence

dated March 20, 2021, passed by the learned Additional Sessions Judge, 1st Court at Siliguri in Sessions Case No.123(II)14/Sessions Trial No.17/2015.

2. By the impugned order of conviction, the learned trial Judge held the appellant to be guilty of offences under Sections 498A/302 of the Indian Penal Code, 1860. By the impugned order of sentence, the learned trial Judge sentenced the appellant to undergo rigorous imprisonment for life and to pay a fine of Rs.10,000/- and in default to suffer rigorous imprisonment for 2 ½ years for the offence punishable under Section 302 of the Indian Penal Code, 1860 and sentenced the appellant to undergo rigorous imprisonment for three years and to pay a fine of Rs.3,000/- only and in default to suffer rigorous imprisonment for one year for the offence punishable under Section 498A of the Indian Penal Code, 1860. The sentences awarded were directed to run concurrently.

3. Learned advocate appearing for the appellant submits that, the prosecution did not examine any eye witness to the incident. Circumstantial evidence adduced does not establish the guilt of the appellant.

4. He draws the attention of the Court to Exhibit 4 being the so-called dying declaration of the victim. He submits that, Exhibit 4 does not relate to the victim since, the victim is Reshma Ekka while left thumb impression on Exhibit 4 is of Reshma Khatoon. Moreover, no certificate of the Medical Officer certifying as to the mental and physical capacity of the victim to record the dying declaration was proved at the trial. He questions the veracity of the dying declaration. He submits that, since the so-called dying declaration being Exhibit 4 contains infirmities, no reliance should be placed thereon.

5. Learned Advocate appearing for the appellant draws the attention of the Court to the deposition of the prosecution witness (PW) no.1. There also, P.W. no.1 allegedly claimed that the victim disclosed that the appellant was involved in the murder. He submits that, such statement also should not be relied upon since, no corroborative evidence was established at the trial by the prosecution.

6. Learned advocate appearing for the appellant submits that, *mens rea* of the appellant committing the murder was not established at the trial by the prosecution. He draws the

attention of the Court to the evidence on record. He submits that, both the appellant and the victim allegedly were drunk at the time of the incident. Therefore, according to him, there was mitigating circumstances which the Court should take into account.

7. Learned advocate appearing for the appellant submits that, the involvement of the appellant was not proved by the prosecution at the trial. The bed head ticket of the victim was not marked as Exhibit at the trial. The chain of circumstances was not established by the prosecution. Presence of the appellant at the time of occurrence was not established by the prosecution.

8. Referring to the Post Mortem Report being Exhibit 6, learned advocate appearing for the appellant submits that, Post Mortem Report does not state that the death was homicidal in nature. He submits that, taking the medical documents as a whole, at best, charge under Section 304 Part I of the Indian Penal Code, 1860 can be made as against the appellant. However, the prosecution proceeded to charge the appellant under Section 302 of the Indian Penal Code, 1860.

9. Referring to the conviction under Section 498A of the Indian Penal Code, 1860 learned advocate appearing for the appellant submits that prosecution failed to establish such charge at the trial. Consequently, He submits that, the appellant should be discharged, particularly, taking into account the fact that the appellant was a tribal and that the appellant was of advanced age and is in custody since his arrest.

10. Learned advocate appearing for the State draws the attention of the Court to the evidence adduced by the prosecution. He submits that, the relationship between the appellant and the victim was that of husband and wife. The appellant was initially residing in the home of the victim subsequent to the marriage. During such period, the relationship between the appellant and the victim was cordial. Thereafter, the appellant and the victim moved out to live separately. At that point of time, the relationship became strained.

11. Learned advocate appearing for the State submits that, by virtue of the relationship of the appellant with the victim, it

was incumbent upon the appellant to establish how the death of the victim occurred. He points out that, the victim was found in a burnt condition in the matrimonial home of the victim. The appellant was missing from the date of the incident being March 19, 2013 till the date of death being March 25, 2013. Victim was removed to the medical facility. Victim confided with PW no.1 that, the appellant set her on fire by pouring kerosene.

12. Drawing attention of the Court to the dying declaration being Exhibit 4 learned advocate for the State submits that, the name of the victim is correctly recorded therein, initially, at the top. Thereafter, at the place where the name of the victim for left thumb impression was recorded, it was mistakenly stated a Reshma Khatoon. such mistake was explained both by Doctor in whose presence Exhibit 4 was recorded as well as by the nurse again in whose presence Exhibit 4 was recorded. He submits that, there is no discrepancy between the version of the involvement of the appellant in the death of the victim, given by the victim, to P.W.1 when the victim was being removed for the medical

facility and the statement of the victim recorded in Exhibit 4. Moreover, the appellant did not come forward at the trial to explain the death of the victim when he was examined under Section 313 of the Criminal Procedure Code. Appellant did not examine any defence witness to establish that the appellant was not present at the locale when the incident occurred.

13. Referring to the deposition of the Post Mortem Doctor, learned advocate appearing for the State submits that, Post Mortem Doctor stated that the death of the victim occurred due to the burn injuries. He submits that, the victim was set on fire by the appellant after pouring kerosene on her. Therefore, the appellant was guilty of murder of the victim.

14. A First Information Report bearing No.337/13 dated August 23, 2023 was registered under Section 498A/307 of the Indian Penal Code, 1860 by the police on the basis of the complaint registered by P.W.1.

15. On completion of investigation in respect of such police case, police submitted charge-sheet. Charges as against the appellant under Sections 498A/302 of the Indian Penal Code,

1860 were framed by the jurisdictional Court on May 19, 2015.

16. In support of the case of the prosecution, 16 witnesses were examined. On conclusion of the evidence of the prosecution, the appellant was examined under Section 313 of the Criminal Procedure Code where the appellant denied his involvement in the incident. He declined to adduce any defence witness.

17. Prosecution witness no. 1 is the younger sister of the victim. She stated that the victim was married to the appellant in 2004. After marriage, the appellant and the victim initially resided at Jayantika Tea Estate at the paternal home of the victim. In 2014, the victim and the appellant along with their daughter started living at a different place. However, the elder son of the victim continued to live at maternal home of the victim.

18. P.W. 1 stated that on August 19, 2013 at dead of night, she received information about the victim being set on fire. On hearing such news, she went to the matrimonial residence of the victim along with another person. They took the victim

to the North Bengal Medical College & Hospital. On the way to the hospital, the victim told them that, the appellant put kerosene oil over the victim and, thereafter, set the victim on fire. The victim was admitted at the North Bengal Medical & Hospital. On August 24, 2013, at about 1 P.M., the victim expired. The First Information Report was lodged two to three days thereafter as she was engaged in the matter of medical treatment of her elder sister. She identified the written complaint. The written complaint was tendered in exhibit and marked as Exhibit 1. She also identified the appellant in Court. She was cross-examined by the appellant at length. However, no material was extracted from P.W. 1 to assist the defence.

19. P.W. 2 is another sister of the victim. She stated that on August 19, 2013, she along with P.W. 1 and family member of P.W. 1 received information as to the condition of the victim. On hearing such news, her father and P.W. 1 went to the matrimonial home of the victim. On the following morning, she went to the North Bengal Medical College & Hospital and saw the victim. In the hospital, the victim told her that, the

appellant tried to feed liquor to the victim. When the victim refused, the appellant assaulted the victim and, thereafter, set the victim on fire after pouring kerosene oil over her. She stated that on August 24, 2013, the victim expired at the hospital due to her burn injuries. P.W. 2 is an inquest witness. She identified her signature on the inquest report, which was marked as Exhibit-2/1. She was cross-examined at length on behalf of the appellant. No material being extracted to assist the defence.

20. Uncle of the victim deposed as P.W. 3. He stated that he identified the appellant at the trial. He stated that after marriage, the victim and the appellant lived happily.

21. P.W. 4 is the Assistant Sub-Inspector of Police. He brought the dead body of the victim from hospital to the morgue. He identified the dead body challan which was marked as Exhibit-3 and the carbon copy of the command certified which was marked as Exhibit 3/1.

22. P.W. 5 is a neighbor of the appellant. He stated that, after marriage, the appellant and the victim lived together as husband and wife and that, the appellant used to consume

liquor frequently. He also stated that, the appellant used to quarrel with the victim. He stated that on the fateful night, on hearing hue and cry, he went to the house of the appellant at about 10/11 P.M. and found the victim was burning. He informed the matter to the elder brother of the father of the victim over mobile phone.

23. The Doctor posted at the North Bengal Medical College and Hospital before whom, the victim recorded a statement on March 23, 2013, was examined as P.W. 6. He tendered the dying declaration of the victim in evidence which was marked as Exhibit-4. He was cross-examined at length on behalf of the appellant. Court also put questions to P.W. 6 with regard to Exhibit-4. P.W. 6 stated, in reply to queries of the Court that, by mistake, it was mentioned in the dying declaration to the effect that the patient's LTI was that of Reshma Khatoon. In fact the LTI was that of the victim. He denied the suggestion that no dying declaration was recorded.

24. P.W. 7 failed to identify the appellant at the trial. He stated that he knew nothing about the incident.

25. Police personnel who held the inquest over the dead body of the victim was examined as P.W.8. He described the process of the inquest. He tendered the inquest report which was marked as Exhibit-2. He also identified the dead body challan being Exhibit-3. He identified the command certificate which was examined as Exhibit-3/1. He stated that he made a prayer to the Medical Superintendent of North Bengal Medical College for recording dying declaration of the victim. He tendered the letter dated August 23, 2013 in evidence which was marked as Exhibit-5. He was cross-examined at length by the defence.

26. The nurse before whom the dying declaration being Exhibit-4 was recorded, deposed as P.W. 9. She stated that, on August 23, 2013, the victim made the dying declaration. She identified the persons who were present at the time of recording of the dying declaration. She stated that Dr. Mahesh Borikar reduced the dying declaration of the victim. After recording the statement, such Doctor read over the statement and explained the same to the victim. Thereafter, the victim put her left thumb impression in presence of Dr. Mahesh

Borikar as well as herself. She also signed the dying declaration. She tendered her signature on the dying declaration which was marked as Exhibit 4/1. She stated that, both P.W. 6 as well as Dr. Mahesh Borikar put their respective signatures on the statement of the victim in her presence.

27. P.W. 9 was examined at great length by the appellant without any material being extracted in support of the defence.

28. P.Ws. 10 and 11 did not add any value to the case of the prosecution. They were declared hostile. On cross-examination by the prosecution, after they being declared hostile, they did not add any value to the case of either the prosecution or the defence.

29. P.W.s 12 and 13 did not add any value to the case of either of the prosecution or of the defence.

30. The doctor who conducted the post-mortem on the victim deposed as P.W.14. He stated that, he performed the post-mortem on the dead body of the victim. He opined that, the death of the victim was due to the secondary effects of the burn injuries sustained by the victim and ante-mortem in nature. He identified four burn injuries found on the body of

the victim. He tendered the post-mortem report dated August 25, 2013 which was marked as Exhibit-7. He was cross-examined at the behest of the defence. Opinion of the post-mortem doctor as to the cause of the death of the victim was not dislodged.

31. The police personnel who recorded the complaint received from P.W.1 as the First Information Report deposed as P.W.15. He tendered the police complaint which was marked as Exhibit-1.

32. Investigating Officer deposed as P.W.16. He narrated about the course of investigation. He tendered the rough sketch map along with the index which was marked as Exhibit-7 and Exhibit-7/1. He also tendered the letter dated August 31, 2013 relating to the dying declaration which was marked as Exhibit-8. He stated that he collected the dying declaration as also the post-mortem report. He was cross-examined at length by the defence.

33. The defence are unable to extract any material in support of their case. The appellant was examined under Section 313 of the Code of Criminal Procedure on conclusion of the

evidence of the prosecution. The material evidence of the prosecution was placed before him in his examination under Section 313. He responded to the queries put as either false or not known. As to the cause of death in reply to the query to question no.22, he stated that, his wife died as a result of fire. He stated that, there were two children and that he was required to pay for their expenses. He declined to adduce any defence witness.

34. Post-mortem report of the victim is Exhibit-6. Such report records four burn injuries on the body of the victim. It records the opinion of the post-mortem doctor as death was due to the secondary effects of the burn injuries mentioned in the post-mortem report, ante-mortem in nature. The doctor conducting the post-mortem being P.W.14 opined that the death was due to the secondary effects of the burn injuries mentioned in the post-mortem report and ante-mortem in nature.

35. Death of the victim due to the burn injuries suffered by her was established by the prosecution at the trial.

36. P.W. 1 stated that, she found the victim with burn injuries on August 19, 2013 and that, she took the victim and admitted her to the North Bengal Medical College and Hospital. P.W.2 stated in her deposition that, she met the victim on August 20, 2013 at the hospital where, she found the victim to be suffering burn injuries.

37. Victim recorded a dying declaration being Exhibit-4. Dying declaration was recorded in presence of two doctors and a nurse of the Hospital where the victim was admitted. One of the doctors and the nurse deposed at the trial. Both of them stated in unison that, the victim recorded the dying declaration being Exhibit-4. The doctor in whose presence, the dying declaration was recorded, being P.W.6 explained that the name of the victim was Reshma Ekka and that it was mistakenly written as the Left Thumb Impression of Reshma Khatoon on Exhibit-4. In fact, the LTI of Reshma Ekka was set and subscribed on the dying declaration of Reshma Ekka.

38. Much is sought to be made out of the mistake appearing in Exhibit-4 on behalf of the appellant. In the opening line of Exhibit-4, the name of the victim was correctly recorded as

Reshma Ekka and where the LTI was subscribed on Exhibit-4, the name was stated as Reshma Khatoon. The mistake was explained by P.W.6 in whose presence Exhibit-4 was prepared.

39. Moreover, the nurse who was present during the preparation of Exhibit-4 deposed as P.W.9 and she narrated as to how the Exhibit-4 came into being. She corroborated the statement of P.W.6 with regard to the dying declaration.

40. Apart from Exhibit-4, there is the oral evidence of P.W.1, where she stated that, the victim, confided in her, on the way to the hospital that, the appellant poured kerosene on the victim and set her on fire.

41. Victim suffered burn injuries. Death of the victim was the result of burn injuries as established by the post-mortem report of the doctor conducting the post-mortem on the victim. Death, therefore, was homicidal in nature.

42. The relationship between the appellant and the victim was that of husband and wife. Such relationship was not denied in the examination of the appellant under Section 313 of the Code of Criminal procedure.

43. The victim was found burning in her matrimonial house which she shared with the appellant. Neighbour of the victim being P.W.5 stated that, he went to the spot upon hearing the hue and cry and found the victim to be burning.

44. Appellant did not discharge his onus under Section 106 of the Evidence Act, 1872 with regard to the death of the victim. In any event, the circumstantial evidence established at the trial of the prosecution overwhelmingly leads to irretrievable conclusion of the appellant being involved in the murder of the victim.

45. Significantly, the appellant was absent from March 19, 2013 being the date of the incident till March 25, 2013 being the date of death of the victim. Appellant as the husband did not explain his absence during such period in his examination under Section 313 of the Code of Criminal Procedure.

46. Appellant was convicted not only under Section 302 of the Indian Penal Code, 1860 but also under Section 498A thereof. We find from the evidence-on-record that the charge under Section 498A of the Indian Penal Code, 1860 was not established at the trial. Apart from P.W.1 stating that, there

was a strained relationship between the appellant and the victim after a given period of time, there is no evidence of torture being meted out to the victim by the appellant. Moreover, one of the neighbours of the appellant being P.W.5 stated that, there was a cordial relationship between the appellant and the victim.

47. Benefit of doubt in respect of charge under Section 498A should, therefore, be extended to the appellant.

48. In view of the discussions above, we set aside the judgment of conviction and the order of sentence so far as charge under Section 498A of the Indian Penal Code, 1860 is concerned. However, we affirm the impugned judgment of conviction and the order of sentence under Section 302 of the Indian Penal Code, 1860.

49. The sentences in respect of Section 302 of the Indian Penal Code, 1860 will run concurrently.

50. **CRA (DB) 15 of 2022** along with all connected applications is **disposed of** accordingly.

51. A copy of this judgment and order along with the trial court records be transmitted to the appropriate Court forthwith.

52. Urgent 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.)

53. I Agree.

(Md. Shabbar Rashidi, J.)