

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

Present:

**The Hon'ble Justice Joymalya Bagchi**

And

**The Hon'ble Justice Gaurang Kanth**

***C.R.A. 55 of 2018***

***Sahajadi Bibi @ Bewa & Ors.***  
***Vs.***  
***State of West Bengal***

**Amicus Curiae** : Ms. Trina Mitra, Ld. Adv.

**For the State** : Ms. Amita Gaur

**Heard on** : 27<sup>th</sup> November, 2024

**Judgment on** : 27<sup>th</sup> November, 2024

**Joymalya Bagchi, J. :-**

1. Appellants have challenged the judgment and order dated 20<sup>th</sup> December, 2017 passed by the learned Additional Sessions Judge, Tufanganj, Cooch Behar in Sessions Case No. 16/TFG/2016 and Sessions Trial No. 01(08)/2016 convicting them for commission of offence punishable under Sections 302/34 of the Indian Penal Code and sentenced them to suffer Rigorous Imprisonment for life each and to pay a fine of Rs. 10,000/- in default to suffer imprisonment for one year more.

**Prosecution Case:-**

2. Prosecution case as alleged against the appellants is as follows :-

3. One Alima Bibi was married to Nabir Hossain ten months prior to the incident. At the time of marriage, cash to the tune of Rs.75,000/-, gold ornaments and other items were gifted to Nabir Hossain. After the marriage her husband and in-laws including the appellants tortured Alima for further money. On 26.02.2015 at 5 to 5.30 P.M her husband and in-laws assaulted her and set her on fire. She was admitted at Tufanganj S.D. Hospital. On the next day she was referred to M.J.N. Hospital, Cooch Behar for better treatment.

4. Her father P.W. 1 lodged written complaint against the husband and other in-laws including appellants resulting in Tufanganj Police Station Case No. 52 of 2015 dated 27.02.2015 under Sections 498A/304B/302/34 of Indian Penal Code read with Section 4 of the Dowry Prohibition Act against her husband Nabir Hossain and in-laws including the appellant. Charges were framed under Sections 498A/304B/302/34 of the Indian Penal Code and Section 4 of Dowry Prohibition Act. In course of trial, prosecution examined eighteen witnesses and exhibited a number of documents.

5. In conclusion of trial, learned Trial Judge by impugned judgment and order convicted and sentenced the appellant, as aforesaid. However, her husband Nabir Hossain and other in-laws i.e. Bachhiah Bewa, Rafiqul Miah, Azima Bibi, Tahamina Bibi and Ahamina Bibi were acquitted.

6. Nobody appears for the appellants.

7. Ms. Trina Mitra, learned Counsel empanelled with High Court Legal Services Committee is requested to appear for the appellants and assist the Court as *amicus curiae*.

**Arguments at Bar:-**

8. Ms. Mitra contends the prosecution case primarily hinges on the dying declaration recorded by the B.D.O. (P.W. 16) on 01.3.2015 at the residence of P.W. 1. In the dying declaration it is alleged the appellants poured kerosene oil on the deceased and set her on fire. P.W. 13 the doctor did not certify or state in Court the victim was conscious or in a fit state to make the statement. His signature does not find place on the written dying declaration. Signature of the deceased is also missing. B.D.O (PW16) recorded dying declaration in English and there is no endorsement that he had explained the written dying statement to the deceased.

9. The written dying declaration is in contradiction to other evidence on record including the oral dying declaration made to the parents and other relations of the deceased namely, PWs. 1, 4, 5 and 7. They stated the victim told them she had suffered accidental burns while cooking. Their version is corroborated by independent witnesses, namely PWs.3 and 6. Witnesses also stated there was good relation between the couple and other in-laws. There is no motive to commit the crime. Wearing apparels of the deceased were not produced in Court. On the other hand, burnt quilt was produced which corroborates PW 3 that the in-laws had tried to save the victim. Victim's father (PW1) also did not support the dying declaration purportedly written by B.D.O. Hence, she prays for acquittal.

10. Ms. Amita Gaur, for the State submits the incriminating dying declaration was recorded by the B.D.O. (P.W. 16) in presence of the Doctor (P.W. 18). They are disinterested witnesses and have no reason to falsely implicate the appellants. B.D.O. stated doctor told him the victim was in a fit state to make the statement. She had suffered 95 % burn injuries. Her hands were burnt hence her signature could not be obtained. In the F.I.R., P.W. 1 alleged that the husband and in-laws set his daughter on fire. But in Court he and other relations of the deceased came out with a different story. They stated that the victim made oral dying declaration to them that she had suffered burn injuries due to accidental fire. Exonerative dying declaration is an afterthought and has been conjured up to screen the offenders. It ought to be discarded in preference to the written dying declaration recorded by official witnesses. She prays for dismissal of the appeal.

**Evidence on Record:-**

11. PW 1 (Aftar Ali), PW 4 (Mamina Bewa), PW 5 (Jahinara Bibi), PW 7 (Aynul Haque) and PW 12 (Abeda Bewa) are the relations of the deceased. P.Ws. 1 and 5 are her parents. P.W. 4 is her aunt. PW 7 is her uncle and P.W. 12 is her grandmother. Though in the FIR it is alleged the victim had been subjected to torture over the demand of Rs.30,000/- by her husband and in-laws, in Court these witnesses did not whisper anything regarding torture on the victim over demand of money.

12. On the other hand, P.Ws. 5, 7 and 12 stated the relationship between Alima and her husband and the in-laws was good and they had visiting terms. After the incident P.Ws. 1, 4, 5 and 7 deposed they went to the hospital and Alima told them her *saree* had caught fire while cooking. It is true the exonerative dying declaration coming out from these witnesses does not find place in the FIR which was lodged by her father (P.W.1). On the contrary, it is alleged in the F.I.R. that her husband and in-laws had set her on fire.

13. Ms. Gaur strenuously argues these witnesses, for reasons best known to them, have come out with a new case of accidental death during trial which does not find place in the FIR.

14. On the contrary the written dying declaration which was recorded by B.D.O. (P.W.16) in presence of the medical officer (P.W. 18) is authentic and ought to be relied upon.

15. From the aforesaid discussion the pivotal issue which falls for consideration is as follows:-

Whether the Court would rely on the exonerative oral dying declaration narrated by the prosecution witnesses or the incriminating dying declaration recorded by BDO?

16. In a case involving multiple and contradictory dying declarations, it is the duty of the Court to sift the evidence on record to find which one is more reliable.

17. The incriminating dying declaration was recorded by BDO (P.W. 16). He deposed on the requisition of police he was directed by SDO, Tufanganj

to record the dying declaration. Dr. S. Sengupta (P.W.18) was requisitioned for examining the medical condition of the victim. He recorded the dying declaration at the parental house of the victim. He proved the statement (Ext. 8). The dying declaration is recorded in English in question-answer form.

18. To Query no.5, - *'how did you receive injury'*?

Victim stated her *sasuri* (mother-in-law), *bhasur* (brother-in-law) and *Ja* (brother-in-law's wife) had burnt her by pouring kerosene oil on her body. Her brother-in-law Saibuddin and his wife used to torture her.

19. To query no. 8, she added Tahamina and Rahamina also used to torture her.

20. During cross-examination the BDO admitted no signature of the victim was taken on the dying declaration. Signature of the doctor had also not been taken. BDO however clarified the doctor had confirmed that the victim was in a fit state to give her statement.

21. P.W. 18, Dr. S. Sengupta deposed on 01.03.2015 he had gone to the house of Alima Bibi where BDO recorded her dying declaration. General condition of the patient was poor and she was referred for medical treatment. During cross-examination, he admitted he had not given certificate that the victim was not in a position to record dying declaration. His signature was also not obtained on the dying declaration.

22. P.W. 15 is the investigating officer. He corroborated the dying declaration was recorded by P.W. 16. Victim finally expired on 05.03.2015.

Inquest on the victim was prepared by P.W. 10 who proved the inquest report.

23. P.W. 17 Post mortem doctor conducted post mortem and found the following injuries:-

*“(1) Superficial burn injuries with dressings with eight pieces of ‘sahree’ on the dead body i.e. – (a) Face and neck. (b) Chest wall (c) Abdomen (d) Both thighs, legs and feet (e) External genitalia (f) Both arms, forearms and hands (g) Whole back and buttock. Ninety five percent (95%) of the total surface of the body of the deceased was burnt.”*

He opined death was due to shock following burn injuries which were ante mortem in nature. In cross-examination he stated neck tissues, thyroid and other cartilage condition of trachea were marked healthy. He did not find any smell of kerosene oil from the body.

24. To improbabilise the aforesaid written dying declaration appellants have referred to the oral dying declaration made to the relations of the deceased and other witnesses, namely, PWs 3 and 6.

25. In view of the contradictory dying declarations coming on record it is necessary to examine the intrinsic value of the two dying declarations.

26. It is true the incriminating dying declaration was recorded by B.D.O. (P.W.16). However, it is argued no certificate with regard to the conscious and fit state of its maker was given by the medical officer (P.W. 18).

27. Absence of certification with regard to conscious and fit state of mind by itself is not a ground to reject the dying declaration. In absence of

certification, the Court has to look into attending circumstances to satisfy whether the victim was conscious and in a fit state to make the statement<sup>1</sup>.

28. We have scanned the evidence to satisfy ourselves on this score. Dr. Sengupta (PW 18) deposed the general condition of the patient was poor and he had advised shifting her to a higher medical centre. He is silent whether the patient was conscious and in a fit state to make the statement. Prosecution seeks to plug this hole by referring to P.W. 16 (B.D.O.) who claims the Medical Officer confirmed the fit state of mind of the patient. But Dr. Sengupta does not corroborate the BDO and stated he confirmed the fit state of the patient to BDO. In absence of corroboration from the medical officer, BDO's version that the doctor confirmed the patient's fit state of mind is hearsay and cannot be relied upon.

29. Another vital lacuna in the prosecution case is the absence of the signature of the Medical Officer on the dying declaration. The dying declaration has been proved by the B.D.O. (P.W. 16). However, the document does not bear signature either of the father of the victim (P.W. 1) or the Medical Officer (P.W. 18) both of whom were said to be present at the spot. Even if, one discounts the absence of signature of the deceased due to extensive burn injuries on her hand, omission of endorsement on the dying declaration by any other witnesses including the Medical Officer leaves a lurking suspicion with regard to the substitution of the dying declaration which admittedly had been recorded in English and had not been read over and explained to the victim?

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<sup>1</sup>*Laxman Vs. State of Maharashtra, (2002) 6 SCC 710*

30. It would be argued that B.D.O. is an official witness and there is no reason to doubt his impartiality. But for a dying declaration to be the sole basis of conviction it must not suffer from infirmities which casts doubt on the capacity of the victim to make the statement or renders its contents unreliable due to lack of corroboration from other sources.

31. As discussed earlier, the medical officer did not state on oath that the victim was conscious and in a fit state of mind to make the statement. The statement was neither signed by him nor the father (PW1). These suspicious circumstances surrounding the declaration casts doubt with regard to its reliability. We are fortified to come to such conclusion as no corroborative evidence led by prosecution to add credence to the contents of the dying declarations as would be evident from the following discussion.

32. Firstly, prosecution has failed to prove motive to commit the crime. Though in F.I.R it is alleged husband and in-laws tortured Alima for more money, during trial the (PWs. 5, 7 and 12) mother, uncle and grandmother of the deceased respectively as well as the independent witnesses i.e. (P.Ws. 3 and 6) stated relationship between the couple and in-laws was good.

33. Secondly, in the dying declaration victim stated the appellants poured kerosene on her and set her on fire. But P.M. doctor (P.W. 17) did not find smell of kerosene oil on her body. No burnt apparels of the deceased were produced in Court. Nor any report showing trace of kerosene on wearing apparels had also been produced. On the other hand, burnt quilt was seized from the residence of the appellants which probabalises the defence case

that the in-laws had tried to save the life of the victim and shifted her to hospital.

34. Thirdly, it is apposite to note the exonerative dying declaration made by the victim is supported by independent witnesses. P.W. 3 a neighbour of the appellants deposed she had come to the spot immediately after the incident. She had heard hue and cry and while going to the appellant's residence she found Alima had caught fire. The members of the house and neighbours doused the fire and Alima told them she caught fire while cooking. The husband and other family members took her to hospital and remained with her during treatment.

35. P.W. 6 is a neighbour of P.W. 1. He also supported the exonerative dying declaration and deposed when he went to the hospital Alima stated she had suffered accidental burn injuries. These independent witnesses have not only supported the exonerative dying declaration but have proved the efforts of the members of the family to save the victim by admitting her to hospital after she had caught fire.

36. These circumstances improbabilise the contents of the written dying declaration and renders it hazardous to base a conviction solely on its foundation.

37. Accordingly, we are inclined to extend the benefit of doubt and acquit the appellants.

38. Appeal is accordingly allowed. Connected application, if any, is also disposed of.

39. Appellant nos. 1, 2 and 3 viz. Sahajadi Bibi @ Bewa, Sabina Bibi @ Sirina Bibi and Saibuddin Sekh @ Miah shall be released from custody, if not wanted in any other case, upon execution of a bond to the satisfaction of the trial court which shall remain in force for a period of six months in terms of section 437A of the Code of Criminal Procedure.

40. I express my appreciation for the able assistance rendered by Ms. Trina Mitra, *Amicus Curiae* in disposing of the appeal.

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

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

I agree.

**(Gaurang Kanth, J.)**

**(Joymalya Bagchi, J.)**

SB/PA