

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

Appellate Side

Present:

The Hon'ble Justice Rajasekhar Mantha

And

The Hon'ble Justice Ajay Kumar Gupta

C.R.A. 404 of 2016

Anowar Hossain

Versus

The State of West Bengal

For the Appellant : Mr. Sabir Ahmed, Adv.
Mr. Tasnim Ahmed, Adv.
Mr. Dhiman Banerjee, Adv.
Mr. Quazi Ezaz Ahmed, Adv.

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

Heard on : 17.12.2024

Judgment on : 10.01.2025

Ajay Kumar Gupta, J:

1. The appellant has assailed the judgment and order dated 15.04.2016 and 18.04.2016 passed by the Learned Additional Sessions Judge at Dinhata, District – Cooch Behar in Sessions Trial No. 04(05)/2015 arising out of Sessions Case No. 6(D)/2015 thereby convicted the appellant for commission of the offence punishable under Section 302 of the Indian Penal Code, 1860 and sentencing him to suffer rigorous imprisonment for life and to pay a fine of Rs. 5,000/-, in default, to suffer simple imprisonment for two months.

2. The prosecution case against the appellant is that Rehena Parvin was married to Anowar Hossain, S/o Dablu Mia as per Shariat law on 3rd Aswin, 1419 B.S. As per demand of the groom's family, a sum of Rs. 50,000/- in cash, one Pulser motor cycle, gold ornaments, a cot, an almirah, a dressing table and a rack were given as the dowry. After marriage, she went to her in-law's house and led conjugal life.

3. Her husband allegedly being ill-advised by his parents started torturing her physically and mentally. He demanded that she brings a further sum of Rupees one lakh from her father. Rehena used to report the incident of torture to her father over telephone. In

the hope of leading peaceful conjugal life, she tolerated the torture. The appellant's parents started to live in Siliguri, away from the son and daughter-in-law.

4. It was alleged that on 04.09.2013 at about 7 o'clock in the morning, her husband being instigated by his parents over telephone assaulted Rehena physically and thereafter poured kerosene on her and set her on fire. A neighbour informed her father over telephone. Her father, with the help of the neighbours, admitted her in MJN hospital, Cooch Behar with serious burn injuries. She was later shifted to Jeeban Deep Nursing Home, Cooch Behar, where she died.

5. On 05.09.2013, Ruhul Amin lodged a written complaint regarding the incident which resulted in registration of an FIR being Dinhata P.S. Case No. 1102/2013 dated 05.09.2013 under Sections 498A/326/307 of the Indian Penal Code, 1860 initially against the husband and the parents-in-law.

6. Following the death of the victim, a charge under Section 302 of the IPC was added to the FIR. On completion of investigation, the Charge Sheet has been filed against all the three accused named in the FIR for the offence under Sections 498A of the IPC and

additionally, the offence u/s 302 of the IPC only against the accused Anowar Hossain.

7. In course of trial, charge for the offence u/s 498A of the IPC was framed against all the three accused person and additional charge was framed for the offence under Section 302 of the IPC only against the accused Anowar Hossain and contents of respective charges were read over and explained to the respective accused to which each of them pleaded not guilty and claimed to be tried and accordingly, they were put to trial.

8. To establish the case, the prosecution examined as many as 23 witnesses and the documents produced were marked exhibits 1 to 15 for the prosecution and the materials produced were marked Mat Exhibits I to II/8. During examination of the witnesses, the prosecution declared P.W.5, 6, 7, 8 and 10 as hostile witnesses.

9. Defence led no evidence. Based on the trend of cross-examination of the prosecution witnesses and examination of the accused under Section 313 of the Cr.PC, the defence appears to be that the victim, while cooking, accidentally caught fire from the gas oven. At the time of accident, her husband had been in his motor

vehicle repair shop at Petla Bazar away from the house and her parents-in-law had been at Siliguri. The defence claims that the accused has been falsely implicated into the case.

10. The Learned Trial Court, after considering the oral and documentary evidence presented by the prosecution, concluded that the appellant was the assailant and declared him as convict and sentenced him as aforesaid under Section 302 of the Indian Penal Code. However, no sufficient evidence found against any of the accused person for an offence punishable under Section 498A of the Indian Penal Code.

11. Heard the arguments and submissions of the rival parties and on perusal of the materials available on record, it appears the P.W. 1, the father of the victim is the complainant. He stated that his daughter, Rehena Parvin was married to Anowar Hossain as per Shariat law about three years ago. At the time of marriage, dowry consisting of a sum of Rs. 50,000/- in cash, one Pulser motor-cycle, furniture – cot, almirah, dressing table and golden ornaments were given. After the marriage, victim went to her in-law's house and about three months after marriage, her parents-in-law began to torture her. Her husband also started physically assaulting her. They started

torture upon her as they failed to give the balance dowry that is some ornaments. About four months after the marriage, they drove her out from the matrimonial home. His daughter waited outside the matrimonial home and lastly her mother-in-law let her enter the house. She informed such incident to her father over telephone and she also mentioned that her husband demanded an additional sum of Rs. 1 lakh instead of the remaining ornaments. He was unable to pay the sum of Rs. 1 Lakh as demanded by his son-in-law. About one year after her marriage, his daughter suffered burn injury at her in-law's house. In the morning, a woman made a telephonic call and informed him that his daughter had caught fire. They set out for the hospital. At Ghughumari, they came across the ambulance carrying his daughter. Two male and two female persons accompanied her. She was admitted in MJN hospital, Cooch Behar.

12. P.W. 1 further deposed his daughter told him on the way to MJN Hospital that in the morning, his daughter and his son-in-law had altercation and his son-in-law assaulted his daughter. His son-in-law asked his daughter to bring money. While his daughter was having meal in the morning, his son-in-law abused her with filthy languages. She could not finish her meal and went inside the room. His son-in-law followed her and poured kerosene on her and set her

on fire. As per his instruction, one Mojaffar Hossain (P.W. 21), a law clerk, scribed the written complaint. He proved the FIR marked as Exhibit 1. However, the P.W.1 admitted during cross examination that her parents-in-law were staying outside at Siliguri.

13. P.W. 2, Amina Bibi is the mother of the deceased. She corroborated the evidence of P.W. 1 and stated in the same fashion. She further stated in the morning while her daughter while having her meal her son-in-law dragged her inside the room and assaulted her with a 'Batam' (wooden log) and then poured kerosene on her and set her on fire. She further corroborated that they met her on the way to hospital and got her daughter admitted in Cooch Bihar hospital. The Doctor in the hospital advised them to shift the patient to Siliguri. Her daughter also asked them to get her admitted in the nursing home. Her daughter said that she was assaulted physically by son-in-law and set on fire.

14. P.W. 3, Sahera Bibi is a next-door neighbour of the P.W. 1 Rahul Amin. She deposed that her parents-in-law abetted her husband to harass and torture Rehena. She further deposed when Rehana came to her parents after her marriage, she visited her and stated that on the demand of balance amount of dowry her parents-

in-law tortured her. She also revealed that her parents-in-law asked her husband to pressurise her to bring a sum of Rs. One lakh from her parents. On the date of incident, one neighbour of the appellant informed the father of Rehena that his daughter had caught fire and asked to go there. She accompanied Ruhul Amin to hospital. At Ghughumari they came across the car carrying Rehena in the hospital. She boarded the car and consoled Rehena that she would recover. In the hospital She stated her that her husband poured kerosene oil on her and set her on fire. She further stated that as requested by Rehena, her father shifted her to Jeeban Deep Nursing Home, Cooch Behar, where she died in the next morning.

15. P.W. 4, another neighbour, deposed as similar as P.W. 3 and further stated that her husband assaulted her physically and poured kerosene on her and set her on fire. When she visited to her at Cooch Behar hospital, she stated that her husband assaulted her and poured kerosene on her and set her on fire.

16. P.W.14 conducted the inquest over the dead body of Rehene Parvin, aged about 18 years. He proved the inquest report as Exhibit no. 3.

17. P.W. 15 proved his signature appearing in the seizure list by which a saree was seized on 08.09.2013. He also identified the Saree as Mat Exhibit No. I.

18. P.W. 16, friend of victim Rehena Bibi, stated after marriage she had visited her parents' house. She met her. Victim had told her that her parents-in-law and husband used to torture her. Her husband was very greedy. He had asked her to bring a sum of Rs. 1,00,000/= from her parents. On getting the news, she went to Jeeban Deep Nursing Home at Cooch Behar to see her. Where she narrated her husband poured kerosene on her and set her on fire.

19. P.W. 18 conducted the ossification test of the dead body on 08.09.2013 and confirmed she died due to burn injury. The victim was brought and identified by the Constable No. 185, N.S. Bhutia of Kotwali P.S. On examination he found the following Injuries:

- 1) First and Second degree burn injury over the whole face and neck all around with burning of eye brows, eye lashes, and hair—anterior hair line of scalp,*
- 2) First and Second degree burn injury over both shoulder region, whole of anterior chest wall and*

abdominal wall up to the level of umbilicus and the left half of back,

3) Similar burn injury involved in both arms and forearms 2" above the wrist joint both sides, both palms, and dorsum of both hands, the other half of back and lower limbs are spared. No other external injury was seen.

20. P.W. 20, Constable No. 185 had carried the dead body of Reheena Parvin from Jeeban Deep Nursing Home to MJN Hospital, Cooch Behar for Post Mortem on the strength of dead-body challan. He proved his signature appearing on the dead body challan and seizure list prepared after completion of Post Mortem.

21. P.W. 21 is the scribe, who proved his hand writing and signature of the complainant appearing on the written complaint.

22. P.W. 17, Doctor who recorded dying declaration of the patient, Reheena Parvin aged about 18 years in presence of two staff Nurses of the hospital, Dipti Roy (P.W. 22) and Saroj Sukla (P.W. 12). He proved dying declaration marked as Exhibit 8 and his signature. He further clarified during the examination that due to burn injury

she could not sign or put her thumb impression on the statement recorded by him on 06.09.2013.

23. Both P.Ws. 12 and 22 were attending nurses have corroborated the statement of the Doctor, who recorded dying declaration. Both of them also narrated that on 06.09.2013, Dr. Saumyajit Sinha (P.W. 17) recorded dying declaration of the patient Rehena Parvin in their presence. The Doctor recorded the statement as per version of the patient. They put their signature as witnesses on the said dying declaration. They proved their signature as Exhibit 2/1 and 2/2. P.W.22 specifically narrated the version of patient that her husband poured kerosene on her and set her on fire.

24. Mr. Ahmed, learned counsel appearing on behalf of the appellant vehemently argued and submitted that from the cross-examination of PWs, it reveals at the time of incident or even prior to the incident, her parents-in-law were at Siliguri. Prosecution has miserably failed to establish the specific role of the parents-in-law as to how, when and by which means, the parents -in- law have abetted the Appellant to torture upon the victim from Siliguri. It is admitted fact that they were staying at Siliguri so, question of instigation or abetment to his son does not arise. They never demanded any dowry

or instigated or tortured the victim. Moreover, the convict, Anowar Hossain was also not present at the house at the time of incident occurred in the morning time at 7 o'clock. Actually, she caught fire from the gas oven while she was cooking food.

25. Prosecution witnesses i.e. P.W. 5, Sabjan Bibi and P.W. 6, Nasiran Bibi, both neighbours of the appellant narrated the actual incident. During their examination, both of them stated Rehena was cooking food and caught fire from the gas oven. When she caught fire from the Gas oven, she came out from the house and jumped into the adjacent watery paddy field to save herself. Mampi Bibi (PW.8) and Marjina Bibi (P.W.7) other witnesses rescued her from the watery paddy field.

26. It was further submitted that the P.W. 5 further stated during examination in chief that appellant, Anowar Hossain went to garage in the morning. Other witnesses, i.e. Marjina Bibi (P.W. 7) and Mampi Bibi (P.W. 8) also supported the evidence of P.W. 5 and P.W. 6 by saying that while cooking, victim caught fire at her in-laws house from the gas oven. P.W. 8 also stated during cross-examination by the defence that the appellant used to leave for his garage at 6'o clock in the morning and he returned home at 1 pm and again he leaves

home for the garage at about 2/2.30 hrs in the afternoon. While rescuing her, she did not get any smell of kerosene emanating from her body. Therefore, the entire case made out by the prosecution is false and fabricated only to implicate the appellant as well as his parents.

27. Learned counsel further submitted that the dying declaration recorded by the Doctor is incoherent. Such dying declaration is not reliable because it was simply recorded that:-

“As per the patient she was set on fire with kerosene by her husband Anowar Hossain at their residence. She was admitted in MJN Hospital on 4/9/13 at 9-45 AM.”

28. No specific role attributed by the patient against the husband while other witnesses deposed some other factual aspects prior to alleged burning. There was no certificate of the Doctor with regard to the condition of patient or whether she was in fit mental condition at the time of recording dying declaration. Furthermore, second dying declaration recorded by the Police officer after one day is full of contradictions and exaggeration. It was carefully drafted in details to cover up the lacunae of previous alleged dying declaration. In the second dying declaration it was stated that the victim was

unconscious after jumping into the paddy field and when she gained her consciousness, she found herself in hospital. Therefore, narration about the incident by her to the parents and neighbour on the way to hospital is false and fabricated. Inconsistency and contradictory or exaggeration are full of suspicious and it should not be acted upon without corroborative evidence. Learned counsel has placed reliance of three Judgments passed in the case of ***Rasheed Beg Vs. State Of M.P.***¹, ***Lakhan Vs. State of M.P.***² and ***Ram Manorath Vs. State of U.P.***³ to support his contention that a dying declaration which suffers from infirmity cannot be formed the basis of conviction and it should not be acted upon without corroboration.

29. It was further submitted that declarant was not conscious and state of fit mental condition. It can be ascertained from the treatment sheet being exhibit no.6 that various seductive injections were administered to her in the hospital. Prosecution has failed to establish any evidence that she was full of conscious and not under control of seductive medicines. Not bringing any Magistrate while alleged recording dying declaration is another doubtful circumstance

¹ (1974) 4 SCC 264;

² (2010) 8 SCC 514;

³ (1981) 2 SCC 654;

when there was sufficient opportunity as such only on such doubtful dying declaration is not safe for conviction.

30. Finally, the Learned counsel submitted that the Learned Session judge did not put any question regarding alleged vital incriminating alleged multiple dying declarations during examination of the accused under Section 313 of the CrPC thus accused is highly prejudice of getting no opportunity to explain his view. Therefore, only on such score conviction is liable to be set aside. The evidence of prosecution witnesses is full of inconsistency and not corroborative, so their evidences cannot be relied upon. Sufficient discrepancies are available on the face of record as such conviction is liable to be set aside.

He has placed reliance of a judgment passed in the case of ***Indrakunwar Vs. The State of Chhattisgarh***⁴ to bolster his aforesaid contention.

31. On the contrary, the learned counsel appearing on behalf of the State countered the argument of learned counsel appearing on behalf of the appellant and submitted that all the four witnesses i.e.

⁴ 2023 INSC 934: 2023 SCC Online SC 1364.

P.Ws. 5, 6, 7 and 8 were declared hostile by the prosecution. All the four witnesses turned hostile accordingly their evidence is unreliable. From the evidence of P.W. 10, Dipankar Roy, who was the ambulance driver, though he was declared hostile, during cross-examination by the prosecution admits he got smell of kerosene in the Ambulance.

32. Learned counsel appearing on behalf of the State further drew our attention to the dying declaration recorded by the Dr. Saumyajit Sinha (P.W. 17). He recorded the dying declaration on 06.09.2013. It reveals she was set on fire by pouring kerosene oil by her husband Anowar Hossain at their residence. Victim was admitted in MJN hospital on 04.09.2013. The victim herself stated that her husband set her on fire at her residence. She was conscious while recording her dying declaration. Victim had also stated the similar facts to her parents and P.W.3, who accompanied the victim on the way to hospital in the ambulance. The person who is about to die always speaks the truth. Not only that the independent witness i.e. Doctor but also two nursing staffs of the hospital corroborated about the contents of dying declaration of the deceased. There is no suspicious circumstance with regards to the dying declaration. In course of examination and cross-examination, Doctor has clarified about the health of patient. Prosecution has able to prove the case in

positive without any reasonable doubt. Therefore, the Learned Trial Judge rightly convicted the appellant under Section 302. He also needs to be punished under Section 498A of the Indian Penal Code, 1860. Since, the reason for her set on fire was in the event when she failed to fulfil demand as demanded by the appellant and in-laws of the victim.

33. Giving the anxious thought over the arguments made by the rival parties and upon perusal of the record, we find the appellant admitted during his examination under Section 313 of the CrPC that Rehena Parvin was married with him as per law of Shariat and after her marriage, Rehena went to matrimonial home and led conjugal life. However, he denied regarding payment of sum of Rs. 50,000/- in cash, one Pulsar motorcycle, golden ornaments, furniture – cot, almirah and dressing table. He further pleaded he had been in the market on the date of the incident in his shop at Petla Bazar. He admitted the victim died due to burn injuries.

34. Now, question arises here how she caught fire on the date of incident? It is admitted fact that the victim caught fire in her matrimonial home. She was in sari. On the date of incident, it reveals from the evidence of the P.W. 1 that the victim's parents-in-

law were staying in Siliguri. So, in the matrimonial home, only two persons were residing. The defence case is that the appellant was not present at the time of incident at his residence. He went to his garage at Petla Bazar. As per narration of P.Ws. 5, 6, 7 and 8, it reveals the entire incident is different. As per their version, Rehena was cooking. Suddenly, her silk sari, as she was wearing at the time of incident, caught fire from the gas oven and she shouted for help fire and fire and jumped into the adjacent watery paddy field. Mampi Bibi and Marjina Bibi took her out from the said watery paddy field. Jakir Hossain, the next-door neighbour, informed her father. P.Ws. 7 and 8 also supported the version of P.Ws. 5 and 6. During cross-examination by the defence, P.W. 8 admitted while rescuing her from watery paddy field, she did not get any smell of kerosene emanating from her body.

35. P.W. 11, Rohini Kanta Barman was a fireman. He deposed that in the morning after 8 AM, they got a fire call from a place to the west of Petla. They went there and found the patient had been carried away by an ambulance. They went inside the house and reported that fire broke out from cooking gas cylinder but they could not detect it and found the regulator of the gas cylinder was off. They did not find any trace of the fire elsewhere. During cross-examination, he admits

the persons gathered there stated that while cooking she caught fire from the gas oven. They did not find any kerosene container near the gas oven. He further admits he did not get any smell of kerosene near the gas oven.

36. P.W. 13, a fire operator deposed in his evidence that on 04.09.2013 at about 8.05 o'clock in the morning they received a fire call from Petla. When they reached the place of occurrence, the victim had been removed by an ambulance. They checked the LPG Cylinder and found it all right. They further found the regulator was turned off. They did not find smell of LPG. They found a plate with some boiled potatoes and a 'handi' (cooking rice pot) with boiled rice on the floor. Finally, they returned after inspection.

37. Even the P.W.23 investigation officer admits during cross examination that he inspected the entire house of Anowar Hossain. He further admits in the case diary there is no entry noting smell of kerosene in the house of accused during his visit. He also did not seize any container with smell of kerosene or with kerosene from the house of the accused. He did not contact any executive Magistrate or doctor for recording dying declaration of the victim.

38. From careful perusal of the evidence of witnesses, it appears there were no eye witnesses of the incident. Most of the witnesses are post occurrence witnesses i.e. family members, neighbours and friend. From their versions, two different histories found regarding the fire incident. **Firstly**, she caught fire while cooking from the gas oven and **Secondly**, her husband assaulted and poured kerosene oil on her and set her on fire. Upon meticulously perusal of entire evidence and documents produced by the prosecution, we find prosecution has failed to prove with reliable evidence that her husband assaulted and poured kerosene oil on her and set her on fire and creates doubt on the following reasons: -

1. No. container/drum of kerosene oil recovered from the place of occurrence.
2. No smell of kerosene oil found in the room or any place of matrimonial house by the vital independent witnesses i.e. fire service men, Investigating officer or neighbours, who rescued her from the adjacent paddy field.
3. No remanent of the Kerosene oil found in the place of occurrence.
4. No specific history of incident reported initially either at the time of admission in the emergency department

of the MJN Hospital, Cooch Behar though the claim of the family members are that she had stated about the incident to them while they were accompanied her to hospital in the Ambulance.

5. Admission sheet marked as exhibit 6 indicates flame burn 70%. No other history recorded at the time of admission or thereafter.
6. Bed head ticket marked as Exhibit 7 is also blank in the column 'How injury occurred'
7. It is further appearing from the clinical notes dated 4th September as 40% burn. Pt. does not give any specific history. She was disoriented and in pain.
8. Referral Card (Exbt.8) indicates the percentage of burn as 45%.
9. P.M report shows death was due to shock due to burn injury. However, there was no external injuries found on the body though mother of victim deposed she was assaulted with 'Batam' (wooden log) and dragged into the room and poured kerosene oil and set on her fire.
10. No Batam recovered or seized by the Investigation officer.

39. Now, this Court considers how far the evidence of P.Ws. 5, 6, 7, 8 and 10 can be relied upon. P.Ws. 5, 6, 7, 8 and 10 were declared hostile. Whereas P.W. 11 was not declared hostile even he partly demolished the case of the prosecution.

40. From the evidence of P.W. 23, the Investigating Officer, it appears the statements recorded under Section 161 of the CrPC of the witnesses nos. 5, 6, 7 and 8 were confronted and found the P.W. 5 did not state that in the morning, Anowar Hossain left the house for his garage. She did not state that when Rehena was cooking, she caught fire in her silken saree suddenly from the gas oven. However, she stated that in the morning, there was altercation between Anowar Hossain and Rehena and she heard it from her house.

41. In addition, P.W. 6 also stated in her statement under Section 161 of the CrPC that in the morning, she heard appellant was quarrelling with his wife Rehena from his house. She did not state that while cooking, Rehena caught fire from gas oven.

42. The P.W. 7 stated that while rescuing Rehena from watery paddy field, they got the smell of kerosene from the body of Rehena.

She did not state that while cooking, Rehena caught fire from the gas oven.

43. P.W. 8 also did not state while recording statement under Section 161 of CrPC by the Investigation officer that while cooking, Rehena caught fire from the gas oven. Therefore, the version of all the witnesses was different in the court dock from their statements before the police. P.Ws. 11, 13 and 23, the three, fire service men and Investigating Officer found the LPG cylinder was off and in order at the place where it was installed. Therefore, evidence of hostile witnesses cannot be wholly reliable from the trend of their versions though it is settled law that even evidence of hostile witness has evidentiary value on following situations: -

- i) It is difficult to overlook the evidence of a witness who has been declared hostile and when his testimony is not shaken on material points in the cross examination, there is no ground to reject his testimony in toto;
- ii) Hostile witness is not necessarily a false witness. Granting of permission to cross examination his own witness does not amount to adjudication by the court as to the veracity of a witness. It only means a declaration

that the witness is adverse or unfriendly to the party calling him and not that the witness is untruthful;

iii) If some portion of the statement of the hostile witness inspires confidence it can be relied upon and the witness cannot be termed as wholly unreliable;

iv) If some portion of the statement of the hostile witness inspires confidence, it can be relied upon. He cannot be thrown out as wholly unreliable.

v) In case of hostile witnesses, portion of the evidence of hostile witnesses, which is consistent with the prosecution or defence case can be accepted

44. In the present case in hand, the P.W. 17, Doctor Saumyajit Sinha recorded the dying declaration in presence of the witnesses, namely, Dipti Roy (P.W. 22) staff nurse and Saroj Sukla (P.W. 12), staff of the Hospital. They were posted at Female Surgical Ward (Burn Unit) at MJN Hospital on 06.09.2013. Both P.W. 12 and P.W. 22 corroborated that on that day, Dr. Saumyajit Sinha recorded dying declaration of patient Rehena Parvin in their presence (Exbt. 2). The Doctor recorded the statement as per version of patient and they put signatures on the said dying declaration as witnesses. They also

proved their signatures appearing in the dying declaration marked as Exhibits 2/1 and 2/2.

The statement of the patient recorded by P.W.17 is set out herein below:

"Dying Declaration

Pt : Reheena Parvin

18 yrs F/M.

W/O Anowar Hossain

Address Petla, P.S. Dinhata, Coochbehar

As per the pt she was set on fire with kerosene by her husband Anowar Hossain at their residence. She was admitted in MJN Hospital on 4/9/13 at 9-45 AM.

Dated 6/9/13.

Coochbehar

at 7-00 PM.

Signature

DR SAUMYAJIT SINHA

Reg 36398

S/N Dipti Roy

S/N Sanjay Sukla

Medical Officer (Surgeon)

M.J.N. Hospital, Cooch Behar"

45. The P.W. 22 also stated in her evidence that the patient stated that her husband poured kerosene and set on her fire and she further stated that Saroj Sukla, another staff, was also present at the time of recording of dying declaration of the victim. P.W. 22 stated in her cross-examination that in the Burn Unit, patient party do not allow to enter even at the time of visiting hour.

46. On the next date i.e. on 07.09.2013 the police officer also recorded statement/dying declaration of the patient as under: -

“On being interrogated by you I state that it is about one year since I have got married. In the marriage my father gave many things to me and my husband and thus my father gave in the marriage socially as per Muslim Sariat. The gold ornaments of my hand, ear, and neck were not given. Those things were due. Even today my father has not been able to provide those things. At present my husband needs money for business. So, very often my parents-in-law would tell my husband, "ask your wife to go to her father and bring Rs one lakh approximately from his father. and thus enlarge your business and run it well. They should not give gold. A sum of Rs one lakh is enough". My

husband too as per the version of his parents would ask me to bring money. Since after few days of my marriage we continued strained relation. Day by day it turned into a quarrel and and ultimately it turned into an assault. Very often my husband assaulted me. He did not take care of me. He did not ask me whether I took my meal or whether my health was good. By this time about one month has been elapsed since my parents -in-law left us for Siliguri. They told us that from now on they would live in Siliguri. There they would lead their life by running business. Myself and my husband were present at home. In that morning I was cooking by fuel. He finished his meal. I sat to take my meal. He started talking about money while I was eating. Out of grudge being half fed I left my meal and came to living room from the kitchen. We were quarrelling. From quarrel it turned into assault. At last catching hold of me he fastened my hands and then poured kerosene on my body out of a drum. None came at my cry. When I was set ablaze, he freed me. I came outside running. I do not know what happened later on. When I came to my sense, I found myself here. On the day of occurrence my parents -in -law were not present at home. But they talked to my husband over telephone to kill me. The wife is rude. My father-

in-law was Dalbu Mia and my mother-in-law was Anowara Bibi.”

47. Now, another question arises before this court whether multiple dying declarations of the victim would be sufficient for conviction. Before proceeding to the merits of this matter, it would be appropriate to appreciate the various principles as laid down by the Hon’ble Supreme Court with regard to cases involving multiple dying declarations.

48. In ***Kamla v. State of Punjab* [(1993) 1 SCC 1 (2-Judge Bench)]** has held:

“5. It is well settled that dying declaration can form the sole basis of conviction provided that it is free from infirmities and satisfies various tests (vide KhushalRao v. State of Bombay [AIR 1958 SC 22: 1958 SCR 552: 1958 Cri LJ 106]). The ratio laid down in this case has been referred to in a number of subsequent cases with approval. It is also settled in all those cases that the statement should be consistent throughout if the deceased had several opportunities of making such dying declarations, that is to say, if there are more than one dying declaration, they should be consistent. If a dying

declaration is found to be voluntary, reliable and made in fit mental condition, it can be relied upon without even any corroboration. In a case where there are more than one dying declaration if some inconsistencies are noticed between one and the other, the court has to examine the nature of the inconsistencies namely whether they are material or not. In scrutinising the contents of various dying declarations, in such a situation, the court has to examine the same in the light of the various surrounding facts and circumstances.”

49. In **State of Punjab v. Parveen Kumar** {(2005) 9 SCC 769 (2 JUDGE BENCH)} the Hon’ble court further observed:

“10. The court must be satisfied that the dying declaration is truthful. If there are two dying declarations giving two different versions, a serious doubt is created about the truthfulness of the dying declarations. It may be that if there was any other reliable evidence on record, this court could have considered such corroborative evidence to test the truthfulness of the dying declarations...”

50. In **Amol Singh v. State of M.P.** {(2008) 5 SCC 468 (2-JUDGE BENCH)} the Hon’ble court has held:

“13. ... However, if some inconsistencies are noticed between one dying declaration and the other, the court has to examine the nature of the inconsistencies, namely, whether they are material or not. While scrutinising the contents of various dying declarations, in such a situation, the court has to examine the same in the light of the various surrounding facts and circumstances.”

51. Faced with multiple dying declarations, the Hon’ble Court in ***Lakhan v. State of M.P.*** {(2010) 8 SCC 514 (2-JUDGE BENCH)} observed-

“21. ... In case there are multiple dying declarations and there are inconsistencies between them, generally, the dying declaration recorded by the higher officer like a Magistrate can be relied upon, provided that there is no circumstance giving rise to any suspicion about its truthfulness. In case there are circumstances wherein the declaration had been made, not voluntarily and even otherwise, it is not supported by the other evidence, the court has to scrutinise the facts of an individual case very carefully and take a decision as to which of the declarations is worth reliance.”

This judgment was also referred to by the Hon'ble Court in ***Makhan Singh v. State of Haryana* {(2022) SCC ONLINE SC 1019 (2-JUDGE BENCH)}**

52. In ***Ashabai v. State of Maharashtra*, {(2013) 2 SCC 224 2- JUDGE BENCH}** the Hon'ble court observed: —

“15. When there are multiple dying declarations, each dying declaration has to be separately assessed and evaluated and assessed independently on its own merit as to its evidentiary value and one cannot be rejected because of certain variations in the other.”

53. In ***Jagbir Singh v. State (NCT of Delhi)*, {(2019) 8 SCC 779 (2- JUDGE BENCH)}** the following principles were observed by the Hon'ble court:

31. A survey of the decisions would show that the principles of declarations can be culled out as follows:

....

31.6. However, there may be cases where there are more than one dying declaration. If there are more than one dying declaration, the dying declarations may entirely agree with one another. There may be dying declarations where inconsistencies between the

declarations emerge. The extent of the inconsistencies would then have to be considered by the court. The inconsistencies may turn out to be reconcilable.

31.7. In such cases, where the inconsistencies go to some matter of detail or description but is inculpatory in nature as far as the Accused is concerned, the court would look to the material on record to conclude as to which dying declaration is to be relied on unless it be shown that they are unreliable;

31.8. The third category of cases is that where there are more than one dying declaration and inconsistencies between the declarations are absolute and the dying declarations are irreconcilable being repugnant to one another. In a dying declaration, the Accused may not be blamed at all and the cause of death may be placed at the doorstep of an unfortunate accident. This may be followed up by another dying declaration which is diametrically opposed to the first dying declaration. In fact, in that scenario, it may not be a question of an inconsistent dying declaration but a dying declaration which is completely opposed to the dying declaration which is given earlier. There may be more than two.”

54. In ***Uttam v. State of Maharashtra, {(2022) 8 SCC 576 (2-JUDGE BENCH)}*** the Hon’ble court has observed:

“15. In cases involving multiple dying declarations made by the deceased, the question that arises for consideration is as to which of the said dying declarations ought to be believed by the court and what would be the guiding factors for arriving at a just and lawful conclusion. The problem becomes all the more knotty when the dying declarations made by the deceased are found to be contradictory. Faced with such a situation, the court would be expected to carefully scrutinise the evidence to find out as to which of the dying declarations can be corroborated by other material evidence produced by the prosecution. Of equal significance is the condition of the deceased at the relevant point in time, the medical evidence brought on record that would indicate the physical and mental fitness of the deceased, the scope of the close relatives/family members having influenced/tutored the deceased and all the other attendant circumstances that would help the court in exercise of its discretion.”

55. Having considered various pronouncements of the aforesaid judgments, the following principles have been laid down by the Hon’ble Supreme Court in the case of ***Abhishek Sharma vs. State***

(Govt. of NCT of Delhi)⁵ for a court to consider when dealing with a case involving multiple dying declarations:

- i. The primary requirement for all dying declarations is that they should be voluntary and reliable and that such statements should be in a fit state of mind;
- ii. All dying declarations should be consistent. In other words, inconsistencies between such statements should be 'material' for its credibility to be shaken;
- iii. When inconsistencies are found between various dying declarations, other evidence available on record may be considered for the purposes of corroboration of the contents of dying declarations.
- iv. The statement treated as a dying declaration must be interpreted in light of surrounding facts and circumstances.
- v. Each declaration must be scrutinized on its own merits. The court has to examine upon which of the statement's reliance can be placed in order for the case to proceed further.
- vi. When there are inconsistencies, the statement that has been recorded by a Magistrate or like higher officer can be relied on,

⁵ 2023 INSC 924

subject to the indispensable qualities of truthfulness and being free of suspicion.

vii. In the presence of inconsistencies, the medical fitness of the person making such declaration, at the relevant time, assumes importance along with other factors such as the possibility of tutoring by relatives, etc.

56. The Hon'ble Supreme Court also noticed certain judgments in the aforesaid case, where the extent of burn injuries sustained by the deceased was considered.

57. In the case of ***Chacko v. State of Kerala* {(2003) 1 SCC 112 (2- JUDGE BENCH)}** the Hon'ble Supreme court declined to accept a dying declaration made by a person, 70 years of age, having sustained 80% burns. Therein, the declaration was recorded 8-9 hours after burns, giving minute details as to motive and manner. It was opined that the condition of the patient described as "conscious, talking" in the wound certificate would in and of itself not testify to the condition of the patient making such declaration, nor would the oral evidence of the doctor or Investigating Officer.

58. In *P.V. Radhakrishna v. State of Karnataka* {(2003) 6 SCC 443 (2- JUDGE BENCH)} it was observed that there cannot be any hard and fast rule, lending itself to uniform application on the question whether the percentage of burns suffered is a determinative factor to affect the credibility of the dying declaration. The same would depend on the nature of the burns, the body parts affected, and the effect thereof on mental faculties, as well as other factors.

59. In *Surinder Kumar v. State of Haryana* {(2011) 10 SCC 173 (2- JUDGE BENCH)} the dying declaration made by a person having 95-97% burn injuries was not accepted given that at the time of making the declaration, the deceased was under the influence of Fortwin and Pethidine injections, because of which she could not have had normal alertness.

60. The Hon'ble Supreme Court in *Uttam (supra)* followed the principle as held in *KhushalRao v. State of Bombay* {AIR 1958 SC 22 (3- JUDGE BENCH)} that in order to test the reliability of a dying declaration, the court has to keep in view, the circumstances like the

opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the fact stated, had not been impaired at the time he was making the statement, by circumstances beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties.

61. Applying the aforesaid principles as laid down and observations as made by the Hon'ble Supreme Court, we now proceed to examine them in the instant facts and circumstances of the case.

62. First statement made by the victim before the family members and neighbour while she was accompanied to the hospital on 04.09.2013 as under:

“On that day in the morning, the victim and the appellant had altercation and the appellant assaulted the victim. The appellant asked the victim to bring money. While the victim was having meal in the morning, appellant abused her with filthy languages.

She could not finish her meal and went inside the room. The appellant followed her and poured kerosene on her and set her on fire”

63. The Dying declaration recorded by the Doctor (P.W.17) on 06.09.2012 is set out as follows:

“As per the patient she was set on fire with kerosene by her husband Anowar Hossain at their residence. She was admitted in MJN Hospital on 4/9/13 at 9-45 AM.”

64. On perusal of the dying declaration as above, it shows the same had been recorded by the Doctor in presence of two staffs of the Hospital. Patient had told him that ***“as per the patient she was set on fire with kerosene by her husband Anowar Hossain at their residence. She was admitted in MJN Hospital on 4/9/13 at 9-45 AM.”*** Undoubtedly, Section 32 Indian evidence Act corresponding to Section 26 of the BSA, 2023 is an exception to the rule of hearsay, however, the same would not be applicable in the present case.

65. Dying declaration is, in fact, recorded by the Doctor. However, no Doctor's certificate was found with regard to the condition of patient as to whether she was in fit mental condition at the time of recording dying declaration. Whether she was fully conscious or not at the time of recording is also missing. The vital certificate/endorsement of doctor is also missing in the body of dying declaration that whether the contents of the dying declaration was read over and explained to her prior to putting signature of the Doctor or witnesses to satisfy her whether the statements recorded by the doctor was correctly recorded or not?

66. The last statement/dying declaration recorded by the PW-23 On the next date i.e., on 07.09.2013, is extracted herein below:

“On being interrogated by you I state that it is about one year since I have got married. In the marriage my father gave many things to me and my husband and thus my father gave in the marriage socially as per Muslim Sariat. The gold ornaments of my hand, ear, and neck were not given. Those things were due. Even today my father has not been able to provide those things. At present my husband needs money for business. So, very often my

parents-in-law would tell my husband, "ask your wife to go to her father and bring Rs one lakh approximately from his father. and thus enlarge your business and run it well. They should not give gold. A sum of Rs one lakh is enough". My husband too as per the version of his parents would ask me to bring money. Since after few days of my marriage we continued strained relation. Day by day it turned into a quarrel and and ultimately it turned into an assault. Very often my husband assaulted me. He did not take care of me. He did not ask me whether I took my meal or whether my health was good. By this time about one month has been elapsed since my parents -in-law left us for Siliguri. They told us that from now on they would live in Siliguri. There they would lead their life by running business. Myself and my husband were present at home. In that morning I was cooking by fuel. He finished his meal. I sat to take my meal. He started talking about money while I was eating. Out of grudge being half fed I left my meal and came to living room from the kitchen. We were quarrelling. From quarrel it turned into assault. At last catching hold of me he fastened my hands and then poured kerosene on my body out of a drum. None came at my cry. When I was set ablaze, he freed me. I came outside running. I do not know what happened later on. When I came

to my sense, I found myself here. On the day of occurrence my parents -in -law were not present at home. But they talked to my husband over telephone to kill me. The wife is rude. My father-in-law was Dalbu Mia and my mother-in- law was Anowara Bibi”

67. Despite recording dying declarations one after another, no attempt was made to have the same made before magistrate, which, as a rule of prudence, would have supported to the prosecution. It is reflected from the record that at the time when the statement was recorded, the condition of the deceased was not good and had been administered treatment for her injuries. She was removed to another nursing home for her better treatment. It has not come forth as to the nature of treatment and what kind of medicines was given to her. In the absence of a positive statement by the medical team or Doctor responsible for her treatment, it cannot be stated, with certainty, that the medicines administered had no effect of impairing the mental fitness of the deceased. There is no medical opinion placed on record in this behalf. Therefore, with the cloud of doubt surrounding dying declaration, it is but natural that the court looks to other circumstances and evidence to satisfy the requirement of the statement made as being true and voluntary. The other

circumstances present in the case in hand are already discussed above.

68. It is true that a dying declaration is not to be discarded on account of brevity, but it is equally true that it must contain the proximate cause of the deceased's condition and the reason therefor. Here, the dying declarations recorded by the Doctor and police officer are insufficient to hold the dying declaration is the only basis of conviction without corroboration. At the cost of repetition, some vital inconsistencies, discrepancies and doubtful circumstances are given below as follows:

- a) There were no external injuries found while conducting post mortem examination of the dead body though it was claim of the prosecution witnesses that she was assaulted by 'Batam' and her hands were also tied.
- b) The victim herself stated that in the morning she was cooking by fuel. Her husband finished his meal. She sat to have her meal. Her husband started talking about money while she was eating. Out of grudge being half fed, she left her meal and came to living room from the kitchen. They were quarrelling. From quarrel it turned into assault. At last

catching hold of her, he fastened her hands and then poured kerosene on her body out of a drum. None came at her cry. When she was set ablaze, he freed her. She came outside running. She does not know what happened later on. When she came to her sense, she found herself at the hospital.

Even for the sake of arguments, if the statement is taken to be true then how the parents (PW 1 and 2) and next door neighbour (P.W. 3) deposed that victim stated about the incident in the ambulance to them while they were accompanying her to hospital. Such contradiction is very damaging to the prosecution case.

c) Neither the stove, in which she was cooking nor any drum of kerosene oil recovered or seized in the instant case rather only a Gas oven was available in the kitchen.

d) No smell of kerosene oil found in the room or any place of matrimonial house by the vital independent witnesses i.e. fire service men (PWs 11 and 13), Investigating Officer (PW 23) or neighbours (P.Ws. 7 and 8), who rescued her from the adjacent paddy field.

- e) No remanent of the Kerosene oil found in the place of occurrence.
- f) No specific history of incident reported either at the time of admission in the emergency department of the MJN Hospital, Cooch Behar though the claim of the family members was that she had stated about the incident to them while they were accompanied her to hospital. In addition, parents of the deceased claimed they have admitted her in the hospital but no history of burn injuries narrated by them to the attending doctor in the emergency while attending her.
- g) Admission sheet marked as exhibit 6 indicates flame burn 70%. No other history recorded at the time of admission or thereafter.
- h) Bed head ticket marked as Exhibit 7 is also blank in the column 'How injury occurred'
- i) It is further appearing from the clinical notes dated 4th September, 2013 that she was having 40% burn. Pt. did not give any specific history. She was disoriented and in pain.

j) Referral Card (Exbt.8) indicates the percentage of burn as 45%. So, no correct percentage of burn injuries of the victim reflected in the medical documents.

k) P.M. report shows death was due to shock due to burn injury. However, no external injuries found on the body though mother of victim deposed she was assaulted with 'Batam' (wooden log) and dragged into the room, poured kerosene oil and set on her fire.

l) No 'Batam' recovered or seized by the Investigation officer.

m) No roping material by which victim's hands were fastened was recovered or seized.

n) No medical opinion placed on record in respect of her mental fitness or alertness at the time of recording dying declaration.

o) It is trite law conviction may be recorded on the sole basis of a dying declaration. In such cases, the court must satisfy itself that the maker of the dying declaration was conscious and in a fit state of mind to make the statement and that the statement is voluntary and truthful. But in the present case prosecution failed to bring medical opinion on record

in connection with her fit mental condition or alertness at the time of recording dying declaration.

p) In absence of a positive statement by the medical team or Doctor responsible for her treatment and what kind of medicines was given to her, it cannot be stated, with certainty, that the medicines administered had no effect of impairing the mental fitness of the deceased.

q) Though the person who is about to die or in the verge of death or is in the deathbed speaks truth but now in the present day or in the current situation, this saying is not wholly reliable to form a conviction until and unless corroboration by any other reliable evidence.

r) There was no Doctor's certificate in the body of dying declaration with regards to the condition of patient as to whether she was in fit mental condition or conscious at the time of recording dying declaration. Certificate/endorsement of doctor is also missing whether the contents of the dying declaration was read over and explained to her prior to putting signature of the Doctor or witnesses to satisfy her whether declaration recorded correctly or not.

s) There are several contradictions, variations and inconsistency amongst the prosecution witnesses.

t) No sufficient incriminating materials or evidence transpires from the record that the prosecution has been able to prove the case of offence punishable under Section 498A of the Indian Penal Code.

69. It is duty of the prosecution to produce best evidence to prove the case without reasonable doubt. Failure, on the part of prosecution, ultimately favour the accused/convict.

70. In view of aforesaid discussion and findings, this court is the view that the prosecution failed to bring home the charges against the appellant in positive beyond the reasonable doubts either by direct or circumstantial evidence. Accordingly, the impugned judgment and order of conviction and sentence is, thus, set aside.

71. The Appellant is acquitted from the offence as alleged.

72. Appeal being **CRA 404 of 2016** is, thus, **allowed**. Connected applications, if any, are also disposed of.

73. Appellant shall be set at liberty forthwith if he is 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, 1973 corresponding to Section 481 of the BNSS, 2023.

74. Trial Court Records along with copies of this judgment are to be sent down at once to the learned Trial Court for information and necessary compliance.

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

I Agree.

(Rajasekhar Mantha, J)

(Ajay Kumar Gupta, J)