

IN THE HIGH COURT AT CALCUTTA
Criminal Appellate Jurisdiction
APPELLATE SIDE

Present:

The Hon'ble Justice Debangsu Basak
And
The Hon'ble Justice Prasenjit Biswas

C.R.A. 661 of 2019

Madan Mallick & Ors.
-Versus-
The State of West Bengal

For the Appellants : Mr. Moinak Bakshi,
Mr. Niketa Bhattacharjee.

For the State : Mr. Rana Mukherjee, Ld. APP
Mr. Pravas Bhattacharya.

Hearing concluded on : July 02, 2025

Judgment On : July 11, 2025

Prasenjit Biswas, J:-

1. The judgment and order of conviction dated 26th September, 2019 and 27th September, 2019 passed by the learned Additional Sessions Judge, Bishnupur, in connection with Sessions Case No. 5(11)2010, [Sessions Trial No. 1(11)2010] is assailed in this appeal.

2. By passing the impugned judgment, these appellants were found guilty for commission of offence punishable under Section 302 of the Indian Penal Code and they were sentenced to suffer life imprisonment along with a fine of Rs. 5000/- each, in default of payment of fine to further undergo rigorous imprisonment for six months each.

3. Being aggrieved and dissatisfied with the said impugned judgment and order of conviction the present appeal is filed at the behest of the appellants.

4. The instant case was started on the basis of a complaint lodged by the de-facto complainant stating, interalia, that the marriage of his daughter Tumpa Mallick with Ganesh Mallick was solemnized according to Hindu Rites and Customs on 02.03.2005. After marriage his daughter's father in law namely, Madan Mallick and brother-in-law namely, Tapan Mallick started torturing upon the victim and a 'salish' was held on 14.08.2013. The torture upon the victim was increased after the marriage of her brother-in-law. On 05.07.2009 the wife of Tapan Mallick namely, Ranu Mallick gave false blame upon the victim for theft and uttered abusive languages upon her and as per their instructions the father-in-law

of the victim stopped providing meal to her. On 06.07.2009 at about 6 A.M. in the absence of Ganesh Mallick (husband of the victim), the father-in-law and brother-in-law and his wife caught hold of the victim and assaulted her mercilessly. At around 8 A.M. the victim tried to commit suicide by pouring kerosene oil and set fire on her person. The de-facto complainant got information at about 10 A.M. over phone from the neighbour of parent-in-laws of her daughter and he reached at the spot at 11 A.M. The victim was shifted to Bankura Medical Hospital. Thereafter, this de-facto complainant lodged complaint before the police station and over the complaint of the de-facto complainant, a case being Patrasayer P.S. Case No. 09 dated 10.07.2009 was started under Section 498A of the Indian Penal Code. Thus, the criminal law was set in motion. Police investigated the case and submitted charge-sheet against the accused persons under Section 498A/302/34 of the Indian Penal Code.

5. Charge was framed by the Trial Court under Section 498A/302/34 of the Indian Penal Code. In this case, 17 (seventeen) witnesses were examined by the side of the

prosecution and documents and seized articles were marked as exhibits.

6. Mr. Moinak Bakshi, learned Advocate appearing on behalf of the appellants said that there are apparent contradictions and omissions in the statements of the witnesses and as such, the evidences brought on record by the side of the prosecution cannot be relied upon. It is said by the learned Advocate that the conviction was made by the learned Trial Court solely relying upon the dying declaration of the victim dated 10.07.2009. It is said by the learned Advocate that after making the dying declaration the victim was discharged from the hospital on 27.08.2009 and started to reside at her parental house. When the burnt injuries got infected due to lack proper care and post release treatment the victim was once again admitted in the hospital on 14.09.2009 and ultimately she died on 24.09.2009. It is said by the learned Advocate that due to unknown reason no statement was recorded by the investigating agency between 14.09.2009 and 24.09.2009 as to how the injuries got infected and whether the victim wanted to give any declaration. As per submission of the learned Advocate that in view of discharge of the victim from the hospital after

making dying declaration on 27.08.2009 the statement made by her cannot and could not be taken and/or treated as dying declaration in the facts and circumstances of the case.

7. The learned Advocate further assailed that the contentions of the FIR were completely different from the statement of the victim and only after being tutored by her mother (PW3) she made the statement. The attention of this Court is drawn by the learned Advocate to the post mortem report and it is said that the said report categorically mentioned that the death of the victim on 24.09.2009 was due to infection of burn injuries and the same was ante mortem in nature. It is further said by the learned Advocate that it was contended in the FIR lodged by the de-facto complainant (father of victim) that the victim put kerosene oil by herself on her body but at the time of giving deposition he stated that the appellants in collusion with each other put kerosene oil on the body of the victim. It is said that the de-facto complainant (PW1) admitted in his deposition that he along with Ganesh Mallick (husband of the victim) took the victim to the hospital for treatment but in the FIR it is said by the de-facto complainant that his son in law was not present at the time of incident and left

home for business. As per submission of the learned Advocate that the dying declaration made by the deceased was not made voluntarily as PW3 admitted in her cross-examination that after the doctors left from the place, she asked the victim whether she had stated all such facts before them and in reply the victim stated that she had stated in her dying declaration before the doctor about all such facts which are true. So, on the said admission made by PW3 the said dying declaration made by the victim is not reliable and on the basis of such dying declaration the finding of the Trial Court regarding conviction of the appellants may not be sustainable. In support of his contention, learned Advocate has placed reliance upon the decision rendered by the Hon'ble Apex Court in the case of **Atbir-vs- Government of NCT of Delhi**¹. So, it is said by the learned Advocate that the impugned judgment and order of conviction passed by the learned Trial Court is not sustainable under the provision of law and it may be set aside.

8. Mr. Rana Mukherjee, learned Advocate on behalf of the State said that there is nothing material in this appeal for which the

¹ (2010) 9 SCC 1

impugned judgment and order of conviction passed by the learned Trial Court may be interfered with. It is said by the learned Advocate that all the witnesses of the prosecution corroborated the story of the prosecution. It is said that the dying declaration made by the victim was exhibited in this case and as per legal position the dying declaration may be the sole basis of conviction. As per submission of the learned Advocate that there is nothing in the record for which the dying declaration made by the victim dated 10.07.2009 can be disbelieved. As per submission of the learned Advocate that on the relevant date and time the accused persons in connivance to each other poured kerosene oil on the person of the victim and set fire and as such, the victim sustained severe burn injuries and subsequently died. It is said by the learned Advocate that if the Court comes to the conclusion that the dying declaration was the truthful version as the circumstance of the death and the appellants are involved in murdering the victim, there is no question of further corroboration. It is said that in this case the de-facto complainant/ father and PW3, being the mother and other witnesses corroborated the contentions of the written complaint and there is nothing in their cross-examination

for which their testimonies and the dying declaration made by the victim can be disbelieved. So, it is said that the impugned judgment and order of conviction passed by the learned Trial Court may be upheld.

9. We have considered the rival submissions advanced by both the parties.

10. The de-facto complainant (PW1) lodged a complaint before the police station stating that on the relevant date and time of the alleged incident, being unable to bear the severe insult and torture upon his daughter and being provoked by the appellants, the victim tried to commit suicide by setting fire upon her after pouring kerosene oil. Whereas in his deposition PW1 stated that the appellants in collusion with each other put kerosene oil on the body of the victim. So, there is contradiction in between the contentions of the FIR made by the de-facto complainant and his statement before the learned Trial Court. The death of the victim is not denied by the defence. It is nobody's case that the death of victim was suicidal. Prosecution said that the death of the victim was homicidal; on the other hand, the appellants said that the death of the victim was accidental. The post-mortem report which

is marked as exhibit 9 in this case reflects that the death was due to the effects of burn injuries and infection of burn injuries and ante-mortem in nature. It is admitted position that the incident was happened on 06.07.2009 and immediately after the incident the victim was admitted to the hospital and she made dying declaration on 10.07.2009. The victim was discharged from the hospital on 27.08.2009 and thereafter, again admitted on 14.09.2009 and subsequently died on 24.09.2009.

11. The only contention made by the learned counsel for the appellants that the dying declaration made by the victim is doubtful and not corroborated by the witnesses of fact and hence it cannot be the sole basis of conviction. The dying declaration may be the sole basis of conviction and it can be done so if it is not tutored and made voluntarily. The doctrine of dying declaration is enshrined in Section 32 of the Evidence Act, 1872, as an exception to the general rule contained in Section 60 of the Act, which provides that oral evidence in all cases must be direct, i.e., it must be the evidence of a witness, who says he saw it. The dying declaration is, in fact, the statement of a person, who cannot be called as witness and, therefore, cannot be cross-

examined. Such statements themselves are relevant facts in certain cases. In case the court comes to the conclusion that the dying declaration is true and reliable, has been recorded by a person at a time when the deceased was fit physically and mentally to make the declaration and it has not been made under any tutoring/duress/prompting; it can be the sole basis for recording conviction.

12. In this case, learned Trial Court solely relied upon the declaration made by the victim dated 10.07.2009 as a dying declaration. It is fact that after the alleged incident the victim was admitted to the hospital and he made statement before the doctor on 10.07.2009 but she was discharged from the hospital on 27.08.2009 and she started to reside at her parental house and when the burn injuries got infected she was admitted again on 14.09.2009. It is quite astonishing that no statement was taken by the investigating agency as to whether the victim intended to give any declaration. Moreover, PW3 (mother of the victim) stated in her cross-examination that after the doctors left the place she asked the victim as to whether she had stated all such facts and in reply to that the victim stated that she had stated all such facts

which are true. So, it is evident from the testimony of PW3 that she wanted to be sure as to whether the victim narrated the entire facts to the doctor. At the time of dying declaration the victim was in no way in an apprehension of death. In order to pass the test reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view of the fact that the statement has been made in the absence of the accused, who had no opportunity of testing the veracity of the statement by cross-examination. But once, the court has come to the conclusion that the dying declaration was the truthful version as to the circumstance of the death and the assailants of the victim, there is no question of further corroboration.

13. There are two issues with respect to a dying declaration. The first one would be, whether the declaration was actually made. Naturally, this would be assessed on the basis of the evidence of the witnesses, who claimed that such declaration was made and witnessed by them. There would be a question of accuracy of the recording of such declaration, if made or maintained by such witnesses. If the evidence in that regard is satisfactory, the Court would come to a conclusion that a particular statement was, indeed,

made by the deceased. The Court thereafter would be required to decide whether such statement made by the deceased was true. In other words, the fact of having made the statement voluntarily and the truthfulness of the said statement are both required to be established before a declaration is termed as reliable. For ascertaining the truthfulness of the statement of a dying person, the parameters, which are applied to the witnesses while judging reliability of their evidence, must be applied. The reliability of a version of a witness would depend on several factors including opportunity available to witness to know, physical and mental capacity of the patient to convey, kind of treatment which the patient was undergoing, chances of tutoring, relation of witness with patient and so on.

14. It is no doubt that it is a settled principle of law that dying declaration is the substantive evidence and the order of conviction can be solely recorded on the basis of a dying declaration provided the Court is fully satisfied that the dying declaration made by the deceased was voluntarily. In this case, the evidence of the mother of the victim (PW3) shows that she made through her daughter

narrated the facts as told. Moreover, there is nothing in the evidence in record which shows that the victim was inapprehension of death at the time of making the statement. Admittedly, there is no eye witness to the incident and the entire case stands upon the declaration made by the victim dated 10.07.2009.

15. PW7, Rabi Halder, PW 13, Sukumar Lohar, PW14, Ganesh Mallick (husband of the victim), PW15, Gajan Lohar have stated in their evidences that the fire was caused by the lamp. Moreover, PW7 stated in cross-examination that the lamp from which the victim got contact with fire was a container of solution which was transformed into a lamp and in that incident the husband of the victim embraced her with lungi in order to put off the fire.

16. In this case, PW14 Ganesh Mallick who happens to be the husband of the victim was cited as a witness. He was declared hostile by the prosecution and cross-examined him. This witness has stated in the cross-examination by the defence that on the date of incident his wife (victim) lit the lamp when she was changing her cloths and she caught fire and then this witness rushed towards her and tried to put off the fire and informed the

incident immediately to his in laws. So, the PWs 7, 13, 14 and 15 ascribed the injuries to fire caught from oil lamp and not supported the prosecution case of hostile burning.

17. PW20, Dr. Biswanath Soren did not get definite information about the cause of death and as per his statement, death occurred due to burn injuries and infection of burn injuries which is ante-mortem in nature. In cross examination this PW20 said that he could not give any opinion as to whether the death was due to homicidal, accidental or suicidal.

18. In this case, prosecution has failed to establish the motive behind the alleged incident by the accused persons and the entire case is rested upon the hypothesis, surmises and conjectures. There is no eye witness to the incident. PW14, the husband of the victim rescued her wife by putting off the fire with his 'lungi' and the victim was taken to hospital by him. It is said by this witness that the victim was discharged on 28th August and she was fit at that time and thereafter, she was taken to his in law's house and left her there.

19. The answer to the question put to the accused persons clearly showed that the victim caught fire while changing her cloth

by the fire lamp. The specific explanation offered by the accused Madan Mallick finds support from the statements of PW(s) 7,13, 14, and 15. The learned Trial Court while convicting the appellants completely failed to take note of the explanation offered by the appellants in their statement under Section 313 Cr.P.C. which was probable in the facts of the present case.

20. It is trite law that Section 313, CrP.C. cannot be seen simply as a part of *audi alteram partem*. It confers a valuable right upon an accused to establish his innocence and can well be considered beyond a statutory right as a constitutional right to a fair trial under Article 21 of the Constitution, even if it is not to be considered as a piece of substantive evidence, not being on oath under Section 313(2), Cr.P.C. The mere use of the word 'may' cannot be held to confer a discretionary power on the court to consider or not to consider such defence, since it constitutes a valuable right of an accused for access to justice, and the likelihood of the prejudice that may be caused thereby. Whether the defence is acceptable or not and whether it is compatible or incompatible with the evidence available is an entirely different matter. If there has been no consideration at all of the defence

taken under Section 313 Cr.P.C., in the given facts of a case, the conviction may well stand vitiated. To our mind, a solemn duty is cast on the court in dispensation of justice to adequately consider the defence of the accused taken under Section 313 Cr.P.C. and to either accept or reject the same for reasons specified in writing.

21. We have already said that in this case the appellants came with a specific and plausible defence but the Trial Court did not consider the same and without considering it convicted the appellants. In our considered opinion, therefore, the conviction of the appellants from this angle too is unsustainable.

22. To summarise we hold that, the evidence on the point of dying declaration does not inspire confidence and it cannot be relied upon. There is no reliable evidence to satisfy the judicial mind that the deceased voluntarily made her statement. From the materials on record we are not satisfied about the truthfulness of the voluntarily nature of the dying declaration.

23. It is profitable to quote that the observation of the Hon'ble Apex Court in case of **Atbir (supra)** wherein the Supreme Court observed at paragraph 22, interalia, that:

“22. The analysis of the above decisions clearly shows that:

- 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 the 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 eyewitness 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 the basis of conviction, even if there is no corroboration.”

24. In the above report the Apex Court observed that the court has to satisfy that the deceased was in a fit state of mind to make the statement and was in clear capacity to observe and identify the assailant and the statement was made without any influence. Once the court is satisfied that the dying declaration is true and voluntary it is sufficient for the purpose of conviction. It is further held by the Apex Court that it cannot be a ground to reject the whole prosecution case merely because a dying declaration was not recorded by a Magistrate. However, if it appears from the record of the case that the dying declaration is not reliable, a question may arise as to why the Magistrate was not called for recording the dying declaration. In the case at hand the learned Trial Court has found the dying declaration creditworthy and has held that the same was made by the deceased voluntarily. It would appear from the evidence of PW3 that she was all along sitting by the side of the victim at the hospital and in her evidence during trial had said that she enquired if her daughter had said

everything. So, the possibility of tutoring in giving dying declaration cannot be ruled out. Moreover, although there was plenty of time but no requisition was sent to the Executive Magistrate for recording the statement of the victim. The prosecution is quite silent in this aspect and no explanation has been given by the prosecution.

25. In the aforesaid facts and circumstances, we find and hold that the prosecution has hopelessly failed to substantiate the charges levelled against the appellants beyond all reasonable shadow of doubt by adducing consistent, cogent and reliable evidence. If dying declaration is excluded nothing remains in the prosecution case. Therefore, the appellants are legitimately entitled to avail the benefit of doubt.

26. Hence, the judgment and order of conviction passed by the learned Trial Court could not sustain under the provision of law and requires to be reversed by acquitting them from the charges framed against them.

27. In view of the above, the appeal stands **allowed**.

28. The judgment and order of conviction dated 26.09.2025 passed by the learned Additional Sessions Judge, Bishnupur,

Bankura stands set aside. Consequently, the sentence awarded on 27.09.2019 is also set aside.

29. The accused appellants namely, Madan Mallick, Tapan Mallick and Ranu Mallick, are hereby acquitted from the offence punishable under Section 302/34 Indian Penal Code. The appellants are to be released from jail forthwith if not wanted in connection with other offence. The amount of fine if deposited is to be refunded to the appellants. In view of provision of Section 437A of Cr.P.C. the appellants shall have to execute bail bonds with sureties and such bail bonds shall be in force for six months.

30. Let a copy of this order along with the Trial Court Records be sent down to the Trial Court immediately.

31. Urgent Photostat certified copy of this order, if applied for, be given to the parties on payment of requisite fees.

[PRASENJIT BISWAS, J.]

32. I Agree

[DEBANGSU BASAK, J.]