

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

**CRA No. 787 of 2009
Nanu @ Narayan Adhikary
Vs.
State of West Bengal**

**Before: The Hon'ble Justice Rajarshi Bharadwaj
&
The Hon'ble Justice Apurba Sinha Ray**

For the Appellant	: Mr. Partha Sarathi Bhattacharyya, Adv. Ms. Sukla Das Chandra, Adv. Mr. B. Seth, Adv. Ms. S. Saha, Adv.
For the State	: Mr. Madhusudan Sur, Ld. APP Mr. Manoranjan Mahata, Adv.
CAV On	: 14.05.2025
Judgment On	: 04.07.2025

Apurba Sinha Ray, J. :-

1. The instant appeal was filed by the appellant against the judgement and order of conviction and sentence dated 20.06.2008/21.6.2008 passed by the Learned Additional Sessions Judge, Fast Track, 3rd Court, Siliguri in Sessions trial No. 04 of 2006 arising out of Sessions Case No. 50 (S) of 1998 whereby the appellant was convicted under Section 302 of the Indian Penal

Code and sentenced to suffer rigorous imprisonment for life with fine of Rs. 5000/-, in default, simple imprisonment for 5 months.

2. The Learned Counsel Mr. Bhattacharya has submitted on behalf of the Appellant that the Learned Trial Judge did not consider several factual aspects. According to him, the FIR was lodged by the father after two days of the incident without giving an explanation in the FIR. Secondly, the scribe, the elder brother of the appellant, and his wife, the person namely Naren @ Nagen Babu and other in-laws of the victim or the appellant were not examined. Thirdly, there was no investigation from the date of 11.01.1998 to 13.01.1998. No admission register, bedhead ticket have been seized by the I.O. Fourthly, dying declaration was recorded without certifying whether the victim was able to make such declaration or not. Fifthly, neither any nurse nor any doctor has been made a charge-sheet witness. Sixthly, there are serious discrepancies in the depositions of the witnesses. Seventhly, the Learned Trial Judge completely ruled out the probabilities of last seen together and circumstantial evidence. Eighthly, the Learned Trial Judge completely failed to consider that the place of occurrence has not been established beyond reasonable doubt. Ninthly, the Learned Trial Judge did not consider that the occurrence of suicide and/or murder by someone else cannot be ruled out in view of the deposition of the investigating officer, the PW1, PW2, PW3, and PW4 and others. Tenthly, the dying declaration allegedly made by the victim was taken in a printed form.

3. The Learned Counsel has relied upon several judicial decisions. According to him, in **AIR 1973 SC 501, Thulia Kali v. State of Tamil Nadu**, the Hon'ble Supreme Court has been pleased to observe the importance of First Information Report in a criminal case as a vital and valuable piece of evidence for the purpose of corroborating the oral evidence adduced at the trial. It is also held therein that the importance of the above report can hardly be overestimated from the standpoint of the accused.

4. The object of insisting upon a prompt lodging of the report to the police in respect of commission of an offence is to obtain an early information regarding the circumstances in which the crime was committed, the names of the actual culprits and the part played by him as well as the names of eye witnesses present at the time at the scene of occurrence. Delay in lodging the First Information Report quite often results in embellishment, which is a creature of after-thought.

5. The Learned Counsel of the Appellant has also relied upon the judicial decision **reported in 1992 SCC (Cri) 957, State of U.P. v. Shishupal Singh** in support of his contention that conviction can be based solely on the dying declaration, provided it is free from infirmities and capable of acceptance by the Court. If there are suspicious circumstances, conviction solely upon such dying declaration is deprecated by the Hon'ble Supreme Court. The Learned Counsel has also drawn our attention to another case law **reported in (2009) 12 SCC 498 Kantilal v. State of Rajasthan**. In the

said case law, the doctor of the hospital was present but did not give any certificate. There are sufficient materials showing that the dictum of the above case law of the Hon'ble Supreme Court have not been followed in proving the case against the appellant during trial since the Executive Magistrate did not ask preliminary questions to ascertain mental fitness of the victim. Further declaration was not read over and explained to the deceased.

6. The judicial decision **reported in (2011) 10 SCC 173 Surinder Kumar v. State of Haryana** was also placed before us for our consideration. According to the said decision, when dying declaration is in conflict with the prosecution version as to the time of burning, relation of the appellant with the deceased, such dying declaration cannot be relied upon since there is no material to show that deceased was in her normal alertness. It is also reiterated in the above case law that there is no legal impediment to make the dying declaration a basis of conviction, even without corroboration, if it is coherent, consistent, thorough and voluntary. If the court is satisfied that it is free from any effort to induce the deceased to make a false statement, it can safely rely upon such a dying declaration. According to the above case law, the Court must scrutinize the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination.

7. Mr. Bhattacharya has also submitted that the dying declaration of the deceased is the only piece of evidence in this case. There are several factors

which show that such a dying declaration cannot be relied upon. There was a two day delay in lodging the FIR and such a dying declaration came into being only after the arrival of the parents in the scene. The exhibit 3/1 is not a sacrosanct piece of evidence. Neither any doctor nor any nurse was examined. However, the dying declaration was not read over and explained to the victim. Such a dying declaration did not contain the signature or mark of the victim. There is no material in the said dying declaration showing that the doctor and nurse were present at that spot. Moreover, the attending doctor was not examined. Further, the mother was present at the time of alleged recording of dying declaration and it is the mother of the victim who put her LTI at the time of recording dying declaration. Mere recording of dying declaration by the Executive Magistrate cannot prove the case of the prosecution.

8. Mr. Bhattacharya again submitted that it is a pure case of suicide over an issue of money. At that relevant time, the victim committed suicide by pouring kerosene oil upon herself and further the accused was not present at the spot.

9. As there are several lacunae in the prosecution case and further as the dying declaration has not been proved beyond all sorts of reasonable doubt, the appellant should be acquitted. In order to show the bona fide of the appellant, the Learned Counsel has drawn our attention to the fact that the appellant was arrested from the precincts of North Bengal Medical College and Hospital which goes to show that the accused did not flee away

from the place of occurrence, on the other hand, he was taking steps for recovering his wife who was severely injured due to her suicide attempt.

10. The Learned Counsel, Mr. Madhusudan Sur, appearing on behalf of the State has opposed the prayer for acquittal. According to him, the prosecution has examined 13 witnesses to prove the guilt of the appellant and the defense has also examined one witness in support of the appellant. From the deposition of the witnesses it appears that all the witnesses have categorically supported the FIR as well as deposition of the PW1 to the effect that the victim told the PW1, PW2, PW3 and PW5 that the appellant set her on fire and PW6 has also corroborated the fact that the dying declaration was recorded in presence of the doctor and PW2.

11. Mr. Sur has further submitted that in her dying declaration *the victim stated that* "Kechal Hoyechilo bole agun lagia dai" and further stated that "takata ekbar deyechilo tarpar abar jor koray niye niyechilo ai Karoney jhogra". The incident of setting fire on the body of the victim took place on 11th January, 1998 and the de facto complainant was informed about the incident on the next day i.e. on 12th January, 1998 at about 2pm and the F.I.R. was lodged on 13th January, 1998 at about 3.15 P.M. after explaining the delay of 1 day as they were busy with the treatment of the victim. So, from the facts and circumstances stated above there is no doubt that it is the Appellant who has committed the offence and as such, the judgement and order of conviction and sentence passed by the Learned Trial Court is required to be affirmed.

12. We have considered the rival contentions of the parties and we have also considered the judicial decisions submitted by the Learned Counsel of the appellant. At the very outset, we would like to say that apart from the dying declaration, there is no direct evidence to show that the appellant poured kerosene oil on the body of the victim and thereafter set her on fire. There is no evidence, at the relevant point of time, of any witness who had seen the appellant with the victim. In other words, there was no last seen together theory in this case since nobody saw the victim with the appellant soon or immediately before the incident. At the same time there was also no witness who saw the victim pour kerosene oil on her body and thereafter to set herself on fire. Therefore, there is no witness excepting, the victim herself who can say how the body of the victim caught fire.

13. Needless to add, the only piece of evidence of vital importance is the dying declaration of the victim. If the dying declaration of the victim inspires confidence in the mind of the Court and further, if it is free from blemishes and suspicion, the same can be relied upon.

14. It is true that in order to record the dying declaration of a victim the recording officer, that is, the Executive Magistrate must have seen that the victim is in a position to talk and is conscious and alert to make any statement before him. In order to ascertain whether the victim is alert, mentally fit, and conscious; the magistrate, not being medical personnel, should have taken the assistance of the attending doctor or any doctor of the concerned hospital to ascertain whether the victim is in a state of

consciousness and whether she is mentally fit and alert to make such statement or not.

15. In this case, it is found that the concerned doctor of the hospital had given a certificate to the effect that the victim was mentally fit and alert at the relevant point of time to make such a statement. The said certificate was found in a printed form having several blank spaces therein showing that such blank spaces can be filled up on a case to case basis. The question was raised whether such a printed form containing blank spaces to be filled up for the ingredients of mental fitness or consciousness of the victim on the overleaf of the printed dying declaration form, is acceptable in the eyes of law or not. Such a printed certificate having blank spaces filled up by the concerned doctor was placed before the Learned Trial Court. It is found that such blank portions of the medical certificate in the printed form of dying declaration were duly filled up by the doctor and thereafter, he signed the same. Therefore, it is not correct to say that no doctor was present or no certificate from a doctor recording the alertness of the victim at that point of time was taken by the Executive Magistrate. Though such printed form may raise certain questions, but, needless to mention, the factors which are to be checked or considered before recording of dying declaration are of vital importance, and, therefore, in a concise form, if the dying declaration contains a printed certificate with blank spaces to be filled up on a case to case basis, the same should not be viewed with suspicion merely because it was printed beforehand. The Executive Magistrate, being PW6, has categorically mentioned that the doctor was present and he gave the

certificate of the mental alertness of the victim at the relevant point of time. The question of whether the victim was mentally fit or alert can also be ascertained by scrutinizing the alleged dying declaration given by the victim, Mina @ Nina Adhikary at the relevant point of time. If we peruse the question and answer of the said dying declaration, we shall find the same as hereunder:-

“What is your name?”

Ans: Nina Adhikary.

What is your address?

Ans: Lichupakri, Phansidewa.

How old are you?

Ans: 22 years.

Whether you are married/unmarried?

Ans: Yes. I am married.

What is your father/husband's name?

Ans: Narayan @ Nanu Adhikary.

How many days before you got married?

Ans: Approximately 6 (six) months before I got married.

How did this condition of your body happen?

Ans: AMAR BOR GAYE AGUN LAGIYE DIAHCHEY, MATHEY NIYE GIYE AMAR BOR ORTHAT SWAMI XXX SANDYA SARE CHHOYTAR SOMOY AGUN DIYE DAI. AGUN LAGAR AGEY GAYE KEROSIN TEL DIYE DAI, KECHAL HOYECHHILO BOLE GAYE AGUN LAGIYE DAI.

(My husband set my body on fire. After taking me to a field my husband set me on fire at 6:30 P.M. Before setting on fire, he poured kerosene oil on my body. Due to some dispute, he set me on fire.).

Do you like to say anything in this matter?

Ans. Takata ekar diyechhilo tarpor abar jor kore 100 taka jor kore nieye niyechhilo. Ai karoney jhagra.” (Once he gave the money but thereafter took away Rs. 100/- forcibly. That was the reason for quarreling).”

16. The above statement of the victim shows that she was mentally alert and was in a position to make her statement. She has correctly stated her address of her matrimonial home. She has also correctly stated her age. The third question further shows that she has correctly made a statement regarding her marital status. It is also found that she has clearly stated the name of her husband Narayan @ Nanu Adhikary. She did not only mention Narayan Adhikary but she has also stated ‘alias Nanu Adhikary.’ This goes to show that she was alert. But the most important statement showing that she was mentally alert and fit, was her answer to question number 6. The question was, when did you get married? She has clearly mentioned her marriage took place approximately six months ago. The date of recording such statement was 14.01.1998 and the Mat exhibit I i.e., the marriage invitation card shows that the marriage between the victim and the appellant took place on 01.07.1997 i.e., exactly approximately six months ago. Therefore, she was able to calculate her date of marriage correctly and this goes to show that she was mentally fit and alert to make her statement. Accordingly, so far as the mental alertness of the victim is concerned this court believes and finds that at the time of giving such statement the victim was mentally alert. Had she not been in a mental state of alertness she could not have calculated the exact period of her marriage. Further such statements were recorded by the Executive Magistrate after putting some

preliminary questions as well. In our view, the requirement of scrutinisation of mental alertness of the victim by the court itself, as discussed in Surinder Kumar's case (supra), has been done in the case in our hand. Needless to mention, the learned counsel of the appellant submits, on instruction, time and again, even in his written arguments, that the dispute arose over some money. The victim in her last answer to the declaration had also described the reasons for quarreling as hundred rupees. This also points towards her mental alertness.

17. The appellant has submitted that such statement was the result of tutoring of the victim at the instance of her mother. We do not find any material in support of such conjecture. On the other hand, it is transpired that the PW2, being the mother of the victim, has deposed that her daughter told her that the appellant set her ablaze after putting kerosene oil on her person. The defence case that the victim committed suicide has been brought on record by producing one witness being the DW1, Bhutan Jha. According to him, soon after the incident, he came to know that the victim tried to commit suicide by pouring kerosene oil on her body and thereafter set herself on fire. The said DW1 has further stated that at the relevant point of time the appellant was not there and 2/3 days prior to the incident the appellant told him that he was going to Ghoshpukur for a couple of days. He mentioned categorically in his statement that at the relevant time, the appellant was not in the village. Subsequently, that is, after 8/10 days of the incident he met again with the appellant. The defence has relied upon this witness. In our view, the deposition of DW1 cannot be relied upon since

within 2/3 days of the incident, the appellant was arrested and forwarded to the concerned court. Hence, there was no possibility for the DW1 to meet the appellant after 8/10 days of the incident in their village. Therefore, the deposition of DW1 is an attempt on the part of the defence to save the appellant from the rigors of law. However, as there is nothing on record to show that the victim was tutored at the instance of her mother, we cannot rely upon such submission on the part of the defence. No suggestion was given to PW2 being the mother of the victim that she tutored the victim to make such a statement implicating the appellant falsely. It is unusual for a mother to teach her dying daughter to implicate her son-in-law falsely and it is also difficult to believe that a dying lady will falsely implicate her husband, if her husband was not a wrongdoer. Moreover, the submission of the defence that there was a possibility of committing murder of the victim by any person other than the convict, is not believable also since a dying lady would not implicate her innocent husband if the wrongdoer is any person other than her husband. Therefore, we do not find any gross irregularities or infirmities in recording the dying declaration. It is true that no signature or thumb impression of the victim was taken on the dying declaration. The physical condition of the victim appeared to be not good to obtain a signature on a document. It requires certain physical activity. To put a thumb impression on the dying declaration document also requires some physical activity on the part of the victim. Merely because the signature or thumb impression of the victim was not taken on dying declaration, and therefore, such declaration cannot be relied upon, is not a

correct proposition of law since in this case the entire body of the victim excepting neck and head was burnt. Taking a thumb impression from such a victim or taking her signature on a document was quite impossible. The thumb impression of the mother was taken to identify the patient and also for the purpose of keeping a check and balance to show that the statement of the victim was correctly recorded by the concerned Magistrate. The PW2, in her deposition, has stated that the said statement of the victim was recorded by the Executive Magistrate.

18. It is alleged that there was an unexplained delay of two days in lodging the FIR and this is sufficient to show that the contents of the FIR were contaminated. The learned counsel for the appellant has time and again submitted that FIR was not done until the arrival of the parents and even after their arrival, the FIR was lodged at a very belated stage. By citing the judicial decision reported in Thulia Kali's case (supra), the learned counsel has categorically submitted that contents of such FIR cannot be relied upon.

19. It is true that there was a delay in lodging the FIR. But the factual matrix of the case is also required to be considered. The incident took place on 11.01.1998 at about 6:30 P.M. The parents of the victim got information on the next day i.e. on 12.01.1998 at about 12 noon. They came to the matrimonial house of the victim wherein the father in law of the victim intimidated the parents and other accompanying persons that the victim was taken to hospital. The parents went to the concerned hospital and after

reaching there they made an enquiry from the victim and the victim narrated the incident. It is true that even after getting such information the FIR was not lodged immediately. It took more than 24 hrs. to lodge the relevant FIR even after gathering such information. The prosecution claimed that the parents were busy with the treatment of the victim and further they being illiterate persons were unable to gather courage to lodge the FIR as soon as they came to know about the incident from the victim. Such submission of the prosecution cannot be brushed aside since we have to consider the mental condition of the parents who being persons of below poverty line and being unaware of the nitty gritty of procedural law may cause some delay in lodging the FIR but that does not mean that the contents of the FIR are false, fabricated or contaminated. The parents who suddenly saw their beloved daughter in such a terrible condition where her all body parts excepting head and neck were burnt with the use of kerosene oil might have taken sometime to realize the situation before taking a decision to lodge an FIR. Therefore, I do not find any reason to disbelieve the contents of the FIR even if it was lodged after 33 hours of the incident.

20. It is only when the FIR is lodged, generally the investigation is commenced. In this case, the FIR was lodged on 13.01.1998 and soon thereafter the investigation was started. Therefore, the plea of the appellant that there was no investigation from the date of 11.01.1998 to 13.01.1998 does not impress upon this court. It is not a case of the defence that the appellant took the victim to the hospital. The concerned I.O did not seize the

admission register, bedhead ticket etc. and it appears that such documents should have been seized by the concerned I.O. but if the I.O. has failed to do so, such failure cannot weaken the prosecution case in view of the materials on record including the dying declaration of the victim. Similarly, if the I.O. fails to examine some of the important witnesses and to show them as chargsheet witnesses, we cannot acquit the appellant on that score only.

21. It is also not correct that the I.O. did not fix the place of occurrence. The rough sketch map which has been marked as exhibit-7 shows that the place of occurrence was in a field near bamboo grove and the said place is away from several villages. The seizure list which has been marked as exhibit-2/1 shows that one jerrycane of kerosene oil and some burnt pieces of cloth were seized from a vacant place near a bamboo grove under P.S. Phansidewa in presence of the witnesses. Therefore, the place of occurrence was shown to be the vacant place in a field of Madhujyot village.

22. It is true that some witnesses saw the victim in the house of the appellant in a burnt condition but that does not mean the incident was taken place inside the house of the appellant. The evidence of Ajit Mishra being the PW – 4 has stated that on the relevant date he was at home and at about 7:00-7:30 P.M. after hearing a hue and cry he rushed to the spot to see that the appellant's elder brother and his wife were helping the victim to move. The sister-in-law of the appellant requested the PW – 4 to accompany them to the medical college and hospital and accordingly they got the victim admitted at the medical college and hospital and thereafter they came back.

This goes to show that after the incident the victim was taken to her matrimonial home by her in laws and wherefrom she was taken to the hospital as aforesaid. The PW – 4 in his cross-examination has stated that his house is contiguous to that of the house of the appellant. However, PW-4 and PW-8 have deposed that the marriage invitation card and the jerricane were seized in their presence. Though, the PW- 8 has categorically stated that the invitation card was seized from the house of the accused, he did not categorically state wherefrom pieces of burnt cloth and jerricane kerosene oil were seized. He simply stated the police also seized “some pieces of burnt cloth and one jerricane of kerosene oil at that time in my presence under a seizure list”. In his examination-in-chief the PW-4 has disclosed that police seized one drum and invitation card in his presence and he has also identified his signatures on two different seizure lists. However, the PW – 4 has deposed in his cross-examination that the drum was taken from the house of the accused but he cannot say who took out the said drum. This is truly a confusion but nobody can deny that the human memory sometimes become fade due to passage of time. As the two seizure lists were made distinctly, that is, one for seizure of invitation card from the house of the accused and another for seizure of drum/jerricane and burnt pieces of cloth from the concerned field as discussed above, we think that the confusion created by the deposition of PW-4 is negligible since in our view had all the seized articles were seized from the house of the appellant then in all probabilities there would have been only one seizure list of different seized items. Therefore, according to us, the confusion as pointed out by the

defence does not give a fatal blow to the prosecution case. Moreover, the presence of the appellant in the precincts of the hospital after two days of the incident does not prove his innocence, since neither he nor his other relatives informed the parents of the victim soon after the incident. Had it been a case of attempted suicide, he or his relatives would have intimated the parents of the victim immediately after the incident. Moreover, the absence of any independent eyewitness to see the incident of setting the victim on fire after pouring kerosene oil at the instance of the appellant is quite possible since in the winter season, the Sun usually sets on before 5 pm, and in the village side 6.30 pm in the month of January, it is usually remains dark and possibility of presence of independent witness remains bleak. Therefore, considering all aspects of the matter, we do not find any major infirmities in the judgment and order of the conviction of the appellant as pronounced by the Learned Trial Judge.

23. Hence, we hereby affirm the impugned judgment and order of conviction accordingly. The instant appeal is, thus, dismissed on contest but without any order as to costs.

24. It appears from the record that the appellant is already in custody for about 17 years. However, he has been sentenced to suffer rigorous imprisonment for life. He has no criminal antecedents as per materials on record. In view of the observation in case of **Matalu Oraon -vs- State of West Bengal, Criminal Appeal No. 167 of 2009, decided on 19.04.2022,**

we think that he should be given an opportunity to pray for remission to the concerned authority who may take appropriate decision over such petition for remission. The appellant be informed accordingly through the Superintendent of the concerned Correctional Home.

25. CRA 787 of 2009 is thus disposed of. The trial court record be sent to the concerned court along with a copy of this judgment at once.

26. Urgent photostat certified copies of this Judgment, if applied for, be supplied to the parties on compliance of all necessary formalities.

I Agree.

(RAJARSHI BHARADWAJ, J)

(APURBA SINHA RAY, J.)