

(2015) 08 CAL CK 0040
In the Calcutta High Court
Case No : C.R.A. No. 729 of 2008

Hasina Bewa and Others

APPELLANT

Vs

The State of West Bengal and Others

RESPONDENT

Date of Decision : 12-08-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161
Evidence Act, 1872 — Section 103, 104, 114(f), 31
Penal Code, 1860 (IPC) — Section 302, 32, 326, 34, 498A

Citation : (2015) 4 CALLT 357 : (2016) 1 DMC 535

Hon'ble Judges : Indira Banerjee, J; Sahidullah Munshi, J

Bench : Division Bench

Advocate : Biplab Mitra and Trina Mitra, for the Appellant; Sabir Ahmed, Advocates for the Respondent

Judgement

Sahidullah Munshi, J—This appeal is against the judgment dated 18th September, 2008 and order of sentence dated 19th September, 2008 convicting the appellants to undergo rigorous imprisonment for 3 years and to pay a fine of Rs. 5000/- (Five Thousand) only in default, to undergo further rigorous imprisonment for 1 year for commission of offence punishable under Section 498A, Indian Penal Code and further convicting both the appellants to undergo rigorous imprisonment for life and to pay fine of Rs. 10,000/- (Ten Thousand) only in default, to undergo further rigorous imprisonment for 3 years for the commission of offence punishable under Section 302, Indian Penal Code and further directing that both the sentences will run concurrently.

2. Bhaktinagar P.S. Case No. 418/05 dated 15th October, 2005 (G.R. 1609/05) was registered on the basis of a complaint lodged by one Asma Khatoon, wife of Late Enamul Haque of Kawakhali Police Station, Matigara, District - Jalpaiguri (hereinafter referred to as the complainant) alleging commission of offences under Section 498A/326/34 of the Indian Penal Code against the appellants and one Mohammad Hasibul alias Hasibul Islam, Mohammad Hasan alias Hassen Ali, Nuri Khatoon all being the children of one Late Sabjal alias Safjal Ali of Kalangini

Police Station, Bhaktinagar, District - Jalpaiguri. At a subsequent stage the Investigating Agency submitted charge-sheet against the appellants and the aforesaid 3 others under Section 498A/302 of the Indian Penal Code. The case of the appellants was committed before the learned Additional District and Sessions Judge, 2nd Fast Track Court, Jalpaiguri for trial of the charges under Section 498A/302 of the Indian Penal Code as was framed against both the appellants. It may be mentioned that the other three co-accused Hasibul, Md. Hassen and Nuri Khatoon who claimed they were juveniles was referred to the Juvenile Justice Board.

3. During trial the Prosecution relied upon as many as 23 witnesses in support of the complaint case. In short, the complaint case is that one Begum Khatun got married with Md. Hasibul and after marriage Begum Khatun was residing at her matrimonial home and she was subjected to torture during her stay at Kawakhali and later at Kalangini, by her husband, mother-in-law, namely, Hasina Bewa, brother-in-law, namely, Md. Hassen, sister-in-law, namely, Nuri Khatoon and one Md. Jahirul Islam said to be paramour of Hasina Bewa the mother-in-law of the deceased Begum Khatun.

4. It is the further case of the Prosecution that on 15th October, 2005 the de facto complainant, Asma Khatun came to know that her daughter Begum Khatun was lying admitted at North Bengal Medical College and Hospital (hereinafter to be called N.B.M.C. and Hospital) and after receiving the said information she had been there when Begum Khatun reported her mother that the above named accused persons poured kerosene oil on her body and set her on fire. Ultimately, Begum Khatun succumbed to her burn injuries and, accordingly, complaint was filed.

5. In support of their case the Prosecution has examined 23 witnesses but the Defence has not examined anyone. Of the said witnesses PW 1 - the de facto complainant has stated that she was informed by the village people of Kalangini that her daughter was set on fire by the accused persons and on receiving the said information she rushed to N.B.M.C. and Hospital and found Begum, her daughter, in almost totally burnt condition and Begum told this witness that the accused persons poured kerosene oil on her body and set her on fire and thereafter, she lodged complaint in Bhaktinagar Police Station. The complaint was written by one Parimal Hawladar under her instruction and Parimal took her LTI. This witness identified the accused appellants in Court. PW 1, in her cross-examination, has admitted that the marriage between Begum and Hasibul was a love marriage and she did not give consent to the marriage and she did not have any relation with them. Both the parties to this case did not have visiting terms.

6. PW 2, Md. Samisud, has been declared hostile by the Prosecution.

7. PW 3, Gafaruddin Ahmed, has also been declared hostile by the Prosecution.

8. PW 4, Samsul Haque, a resident of Kalangini, has stated that he knows Hasina Bewa and Jahirul and has stated that Begum Khatun died in 2005. As a

neighbour he was aware of the fact that Hasibul and Begum used to pick up quarrel with each other and both of them used to report it to him for Salish but he declined. He further stated that he heard crying and saw that Begum Khatun was burning when all the members of the matrimonial home of Begum fled away. He and some others took her to N.B.M.C. and Hospital and got there admitted.

9. PW 5, Amina Khatoon, is the elder sister of Begum Khatun. She has stated that after marriage Begum used to reside in her matrimonial home at Kawakhali and thereafter, they stayed at Kalangini. Matrimonial home of Begum consisted of Begum herself, her husband, mother-in-law, brother-in-law, Hassen and sister-in-law, Nuri. During Begum's stay at Kawakhali this witness along with others observed that Begum was subjected to torture and cruelty. Even she was not given adequate food for which Panchayat was informed and Salish was held but no fruitful result was brought forth. PW 5 further stated that even during stay of Begum at Kalangini she was subjected to torture and assault by the accused persons and that accused persons poured kerosene oil on her body and set her on fire. This witness stated that she and others were informed by the neighbours of Begum's in-laws' house and on receiving the said information they had been to N.B.M.C. and Hospital and on enquiry Begum informed her that Begum had not been given food for four days and the accused persons poured kerosene oil on her body and set her on fire. Begum died after 6 days and her mother lodged a written complaint.

10. PW 6, Safizul Ansari, the husband of PW 5, stated that Begum was subjected to torture and assault by the accused persons and others. He has stated that he visited the in-laws' house of Begum thrice and he was informed by PW 1 that Begum was lying admitted at N.B.M.C. and Hospital and he had been there. He deposed that Begum told him that the accused persons poured kerosene oil on her body and set her on fire.

11. PW 7, Faizul Rahaman, has stated that Begum Khatun is his niece and that she got married with Hasibul. After marriage Begum used to reside in her matrimonial home where she used to pick up quarrel with her in-laws and husband and after a lapse of 1 year they shifted their matrimonial home at Kalangini under Matigara Police Station. He, however, said that he cannot say how Begum spent her days there at Kalangini in her matrimonial home. He was informed by the residents of Kalangini that Begum was admitted in the hospital and there she was admitted for 3 days in burnt condition. He, however, stated that police recorded the statement of Begum in the form of a dying declaration when PW 7 was present and he signed over the dying declaration as a witness. He said that the dying declaration was recorded in the presence of Staff Nurse of the ward of the hospital where Begum was admitted. He further said that Executive Magistrate made inquest over the dead body of Begum in his presence and he stood as a witness. In cross-examination, however, this witness stated that he put his signature on a white blank paper being insisted by police on which dying declaration was recorded. He also said that he put his signature on

the inquest report held by the police which was filled up and not blank paper. He further said that he was not aware of the contents of the dying declaration.

12. PW 8, Ramjan Ali, stated that he put his signature after seizure of a photograph in his presence and the seizure list was prepared and that he was examined by police.

13. PW 9, Neza Md. is a signatory on the seizure list of one "Kupi" and one plastic bottle. This witness was declared hostile by the Prosecution.

14. PW 10, Papia Chanda, a Staff Nurse at N.B.M.C. and Hospital, stated that on 15.10.2005 she was posted at the said hospital in the same capacity in female surgical ward and on that date she had night shift duty commencing from 8:00 p.m. of 15.10.2005 till 7:30 a.m. of 16.10.2005. She said on 16.10.2005 at about 00:13 to 15 hours a police officer came to her ward and met Begum Khatun after obtaining her permission and also requesting her to accompany him to the said patient. Said Police Officers were two in number and security guard of the hospital accompanied them in her ward. Police Officer recorded statement from the patient in her presence and patient stated to Police Officers that her husband, mother-in-law, brother-in-law and others used to assault and torture upon her and set her on fire pouring kerosene oil over her entire body. She said that after the Police Officer recorded the statement of the patient she put her signature. The security guard of the hospital also put his signature. She stated that one Faizul Rahaman of the village of the in-laws of the patient also put his signature as witness. In cross-examination she stated that she was not examined by the police after death of Begum Khatun. She said she did not bring the duty roster to show the period she was in female surgical ward on the duties mentioned in examination-in-chief nor did she hand over the said roster to the Investigating Officer.

15. PW 11, Parimal Hawladar, the scribe, stated that the written complaint was reduced into writing by him as per instruction of Asma Khatun and after reducing it into writing he read over and explained the same to the maker and thereafter, she put her LTI in his presence.

16. PW 12, Nazrul Islam, was declared hostile by the Prosecution.

17. PW 13, Bulbul Munshi, stated that he worked as Munsif in the marriage of Hasibul and Begum Khatun. He could not say how Begum Khatun died.

18. PW 14, Sayeda Khatoon, identified the accused persons on the doc. This witness who is a resident of Kawakhali has stated that during stay of Begum at Kawakhali she was subjected to torture and she was not given even adequate food and for that Salish took place which also failed. Subsequently, matrimonial home of Begum was shifted to Kalangini and this witness came to know from the mother of Begum that Begum was set on fire by her in-laws by pouring kerosene oil on her, in her matrimonial home and Begum died in N.B.M.C. and Hospital.

19. PW 15, Tulsi Das, is the security guard of N.B.M.C. and Hospital. This witness

stated that while on duty on 15.10.2005 at night one Police Officer told him to accompany him to female surgical ward and, accordingly, he accompanied him and the said Officer recorded the statement of one female patient, namely, Begum Khatun in his presence and at that time one sister of the said ward was also present while recording the statement. He said that the victim stated to Police Officer that her mother-in-law, nonod, deyor and her husband, on pouring kerosene oil, set her on fire. The said statement was recorded on 16.10.2005 at night about 1:30 hours.

20. PW 16, Abdul Gaffar, is a resident of Kawakhali. He has stated that during Begum's stay in her matrimonial home at Kawakhali she was subjected to torture by her husband, mother-in-law, nonod, deyor and one Jahirul and that there was an attempt for settlement but without any result. Thereafter, matrimonial home of Begum Khatun was shifted to Kalangini wherein also she was subjected to torture. The accused persons assaulted her, poured kerosene on her body and set on fire. She was taken to N.B.M.C. and Hospital when this witness used to work as an employee in the said hospital. Begum succumbed to such injuries after 5-6 days. This witness further stated that during stay in hospital Begum stated to this witness personally what he has deposed in his affidavits in Court and identified the accused persons. This witness, however, stated that he did not witness the assault on Begum by the accused persons. He has no personal knowledge about the incident of assault at Kalangini.

21. PW 17, Dipankar Ghosh, worked as Record Supplier of N.B.M.C. and Hospital and on 23.11.2005 he was posted therein in some post and on that date Police seized bed head ticket of Begum Khatun containing 14 sheets including dying declaration. He is a witness to the seizure list prepared by the Police. This witness, on cross-examination, has deposed that he was not examined by the Investigating Officer.

22. PW 18, Jamil Akhtar,, a constable being No. 1056 posted at Matigara Police Station. He carried the dead body from N.B.M.C. and Hospital to the morgue of the said hospital with the help of dead body challan prepared by Assistant Sub-Inspector, B.N. Roy Sarkar, vide Matigara P.S. U.D. Case No. 579/05 dated 20.10.2005. This witness has deposed that he knows the signature and handwriting of the said Assistant Sub-Inspector. PW 18 had further stated that said Assistant Sub-Inspector, B.N. Roy Sarkar, made inquest over the body of Begum Khatun in his presence and prepared inquest report. This witness put his signature on the report.

23. PW 19, Dr. Amarendra Nath Sarkar, an Assistant Professor of Surgeon, then posted at N.B.M.C. and Hospital on 16.10.2005. he was posted in the said hospital in his said capacity. On the said date at night at about 1:30 hours he received a call book from Superintendent of the said hospital and, thereafter, rushed to the hospital, recorded dying declaration of Begum Khatun who was lying admitted in the female surgical ward under Registration No. 05023010 in presence of ward sister S. Bhattacharjee (Staff Nurse). This witness stated that

the dying declaration of Begum Khatun was written by him in his own handwriting and under his signature. He took the left thumb impression of Begum Khatun in presence of the said Staff Nurse. This witness deposed that Begum Khatun stated that she had quarrel with her family members and her husband, mother-in-law, sister-in-law and brother-in-law, all four of them tortured her and poured kerosene oil on her body and set her on fire. Begum also stated to him that Jahirul, who had illegal relationship with her mother-in-law, engineered the entire event from behind. This witness stated that after his signature the date was put by him as 16.10.2005 but afterwards it was made 15.10.2005 after his signature and there is no initial there by him. He, however, stated that he cannot explain how did it take place. In his cross-examination, this witness has deposed that there is no endorsement to the effect that after the dying declaration was reduced into writing in English the same was read over and explained to the maker, that is, Begum Khatun in Bengali. He said, after LTI of Begum Khatun there is no mention as to who took it, nor was it attested. He said that the writing "LTI of the patient Begum Khatun" is not in his own handwriting on Exhibit 9.

24. PW 20, Sumanta Sarkar, is a Group-D staff at N.B.M.C. and Hospital. He has stated that on 23.11.2005 he was posted at Record Section of the said hospital and Police seized certain documents such as, bed head ticket, dying declaration of Begum Khatun. Police also prepared seizure list in his presence and he admitted his signature which he put on seizure list earlier.

25. PW 21, Dr. Saibal Gupta, is a Professor and Head of the Department, Forensic and State medicine at N.B.M.C. and Hospital. He deposed that on 21.10.2005 he was in the same Institution and in the same capacity and on that date one Dr. Prabir Deb held post mortem over the body of Begum Khatun in connection with Matigara P.S. U.D. Case No. 579/05 dated 20.10.2005. body of the deceased was identified by Constable No. 1056, Jamil Akhtar of the said Police Station. He proved the post mortem report prepared and signed by Dr. Deb. This witness stated that he knows the signature and handwriting of Dr. Deb.

26. PW 22, Sri S.T. Bhutia, the learned Executive Magistrate, who held inquest over the body of Begum Khatun on 21.10.2005 vide Matigara P.S. U.D. Case No. 579/05 dated 20.10.2005 and the body was identified by one Faizul Rahaman and it was done in presence of witnesses and at the morgue of N.B.M.C. and Hospital.

27. PW 23, Sankar Sarkar, is the Investigating Officer in the case and he was posted on 15.10.2005 at N.J.P. outpost under P.S. Bhaktinagar, District - Jalpaiguri as Sub-Inspector and he was endorsed by the then Officer-in-charge to investigate Bhaktinagar P.S. Case No. 418/05 dated 15.10.2005 and thereafter, he had been to the place of occurrence and drew rough sketch map with index and examined some witnesses under Section 161, Cr.P.C. and made prayer to the on-duty Doctor for recording dying declaration of Begum Khatun of the said hospital as the learned Executive Magistrate was not available. Hasibul Islam,

Hasina Bewa, Md. Hassen Ali and rest of the accused persons surrendered before the learned Court. He made prayer before the learned Court for adding Section 302, IPC which was allowed by the learned Court. He seized one water bottle having smell of kerosene oil from the place of occurrence and one well used old "Kupi" containing a bit of kerosene oil from place of occurrence and prepared seizure list in presence of witnesses. This witness has also stated that he seized a colour photograph of Begum Khatun and her husband Hasibul Islam. He examined the victim girl Begum Khatun under Section 161, Cr.P.C. in presence of witness and Staff Nurse on duty and seized bed head ticket of Begum Khatun (since deceased) from the hospital authority on 23.11.2005. On completion of investigation he has submitted charge-sheet against the accused persons. This witness deposed that he has examined PW 2, PW 3, PW 9 and PW 12 under Section 161, Cr.P.C. and has further stated that PW 2 stated to him that Begum Khatun stated to them that she was kept on starvation and PW 3 stated to the witness that the mother of Hasibul used to inflict torture upon Begum Khatun both physically and mentally and also stated that on the date of incident in the morning quarrel cropped up in between victim girl and accused persons and accused persons rebuked Begum Khatun. PW 3 stated to this witness that Begum Khatun was in starvation for four days. Husband of Begum assaulted her on the night prior to the date of incident. PW 23 has further stated that PW 9 stated to him in his statement that Police seized one plastic bottle having kerosene oil smell and one kupi in his presence and PW 12 stated to PW 23 in his statement that every now and then the husband, in-laws of Begum Khatun and one Jahirul of Jhotiakhali used to inflict torture and assault upon Begum and on the date of incident the quarrel picked up in between Begum and her husband and in-laws.

28. In this appeal the appellants, Hasina Bewa and Jahirul Islam, have agitated that evidence of PW 1 and PW 5 goes a long way to create a serious doubt as to the trustworthiness and genuineness of the Prosecution case inasmuch as they contradict each other on vital points. It is stated that PW 1, during her cross-examination specifically stated that since the marriage of said Begum Khatun (since deceased) was solemnized with one Hasibul, the son of the appellant No. 1 out of love affair, she had no consent to the same. The complainant did not have any relation with the deceased as well as the members of the family of the appellants being the in-laws of the deceased and hence, the question of having knowledge about the alleged infliction of torture upon the deceased does not arise under any circumstances whatsoever. It is argued that learned trial Court has committed error in believing the Prosecution story although, the story based on the deposition of PW 1 that her daughter Begum Khatun was subjected to torture by the husband and her other in-laws but neither the complainant would show any contemporaneous document to justify her allegations nor could she explain the quantum or nature of torture as was claimed to be inflicted upon the deceased Begum Khatun and that apart, there was no evidence of reporting such alleged torture upon Begum Khatun to the local Panchayat or any other local authority, as the case may be. It is alleged that the case of the Prosecution is

totally false particularly that the deceased originally made a dying declaration before the attending Doctor of North Bengal Medical College and Hospital and the learned Court below has erroneously relied upon the same although, the said dying declaration does not reflect in any term that the victim was in a fit state of mind to make such dying declaration and, therefore, the order of conviction based on such dying declaration cannot be justified. It has been stated that the learned Court below has committed gross error in law in relying upon the dying declaration although, the same was not recorded as far as possible in the version of the person on death bed what has been so recorded in English and in the language of PW 19 and that there is no evidence that the deceased was literate and capable enough to understand English. Therefore, under such circumstances, the alleged dying declaration (Ext. 9) can never be the basis of conviction of the appellants. Mr. Mitra, learned Counsel appearing for the appellants, submits that since there is no eye-witness to the alleged incident, the Prosecution case is entirely based on circumstantial evidence then, under such circumstances the aforesaid lacunas in unfolding the Prosecution case cast a serious doubt as to the genuineness of the Prosecution's case and hence, deserves to be interfered with by this Hon'ble Court. According to the appellants, the order of conviction is liable to be set aside and the appellants are entitled to be set free.

29. Mr. Mitra, learned Counsel appearing for the appellants has referred to the following decisions in -

? Shaikh Bakshu and Others Vs. State of Maharashtra ,

? Nazma Bibi alias Nazma Bewa and Another Vs. The State of West Bengal, (2009) 3 CALLT 527 ,

? Smt. Laxmi Vs. Om Prakash and Others, AIR 2001 SC 2383 : (2001) CriLJ 3302 : (2001) 3 Crimes 140 : (2001) 2 DMC 139 : (2001) 5 JT 280 : (2001) 4 SCALE 241 : (2001) 6 SCC 118 : (2001) 3 SCR 777 : (2001) AIRSCW 2481 : (2001) 5 Supreme 26 ,

? Sujoy Sen @ Sujoy Kr. Sen Vs. The State of West Bengal, (2007) 104 CLT 806 : (2007) CriLJ 3727 : (2007) 6 JT 465 : (2007) 6 SCALE 560 : (2007) 6 SCC 32 : (2007) 7 SCR 112 "

30. Mr. Sabir Ahmed, learned advocate appearing for the State, submits that PW 1 has lodged the complaint to the Police Station on 15th October, 2005, that is, on the date of the alleged incident. The incident took place at 8:00 hours in the morning but the complaint was lodged at about 20:45 hours on the selfsame day. PW 1, in her written complaint, has categorically stated that on receipt of the information she rushed to the deceased and on enquiry, the deceased disclosed the names of five FIR named accused persons and also claimed for their punishment. He submits that deposition of PW 1 corroborates the fact of pouring kerosene oil and setting on fire by the accused persons including the present appellants inasmuch as she could not be shaken by the Defence Counsel during cross-examination. Learned Counsel submits that immediately after the

incident the deceased was taken to hospital by neighbouring people which could be apparent from the statements made by PW 4 in his cross-examination before the learned Court and after the deceased was taken to the hospital PW 1, could meet her daughter, who at the first instance, made a statement to PW 1 accusing the appellants and three others regarding the cause of her death. Learned Counsel submits that the post mortem report indicates that stomach and bladder were found empty which corroborates the fact narrated by the deceased in her dying declaration that she was not fed for 4 days before the incident took place. Learned Counsel submits that the FIR is based on information received from the deceased by PW 1 which is also to be considered as a dying declaration made by the deceased. In this connection, he submits that although, inquest is not substantive piece of evidence but the introduction of the reason of death has come from the mouth of the deceased at the first instance when PW 1 met her in the hospital and, thereafter, dying declaration was recorded by the Investigating Officer on the selfsame day at about 1:30 in the night in presence of PW 7, PW 13 and PW 15. It has come to the light that the Investigating Officer, in presence of PW 7, PW 13 and PW 15, recorded the dying declaration which has been exhibited and marked as Exhibit No. 4/3 and on perusal of the dying declaration it would be crystal clear that the deceased on her own stated that on 15th October, 2005 in the morning her husband, mother-in-law, brother-in-law and sister-in-law assaulted her even on the night of 14th October, 2005 and they did not give her food for last four days and PW 10, in her examination, has stated that in presence of the security guard of the hospital as also one Faizul Rahaman had put signature as a witness to the dying declaration. It has been sought to be demonstrated that in the examination-in-chief of PW 13 she has stated that the Police Officer took her permission and she accompanied the Investigating Officer and in her presence the dying declaration was recorded and PW 15 being the security guard of the said hospital has also categorically stated that he was present at the time of recording the dying declaration. He submits that although, PW 7, in his cross-examination, has stated that he has put his signature on a blank paper that does not vitiate the execution or recording of his dying declaration by the Investigating Officer when two of the witnesses being PW 13 and PW 15 have proved their presence at the time of such recording of dying declaration by the Investigating Officer. He submits that there was yet another dying declaration recorded by PW 19, who, in his evidence, has stated that in presence of a Staff Nurse, namely, S. Bhattacharjee, in his own handwriting he recorded the dying declaration and took the LTI of Begum Khatun (since deceased), and from her dying declaration it is apparent that she had quarrel with the family members and all four family members poured kerosene oil on her body and set her on fire. The dying declaration also reveals that Jahirul engineered the entire event from behind, who had illicit relationship with her mother-in-law. It is submitted that in cross-examination by the Defence the Doctor, PW 19, has categorically stated that the patient was responsive to stimulation. He submits that the Prosecution case has been established by constant corroboration of the fact as also from the dying declaration made by the

deceased before the Investigating Officer as well as before the Doctor and the learned trial Judge has correctly come to the conclusion regarding the guilt of the appellants. He, however, submits that the allegation and conviction under Section 498A, IPC against the appellant No. 2 cannot be said to have any bearing since the appellant No. 2 is not a relative of the husband and the relative of the husband can only be punished under Section 498A, IPC. Jahirul, appellant No. 2, being a paramour of the appellant No. 1, cannot claim under the purview of Section 498A, IPC. Learned Counsel submits that the allegation under Section 302 and participation in the commission of offence as also conspiracy has well been established from the statements of the deceased person. Learned Counsel has relied on a judgment reported in Laxman Vs. State of Maharashtra, AIR 2002 SC 2973 : (2002) CriLJ 4095 : (2002) 4 Crimes 42 : (2002) 6 JT 313 : (2002) 6 SCALE 135 : (2002) 5 SCALE 418 : (2002) 6 SCC 710 : (2002) 1 SCR 697 Supp : (2002) 2 UJ 1363 : (2002) AIRSCW 3479 : (2002) 5 Supreme 557 . Relying upon such judgment learned Counsel submits that it is well settled that there is no bar for basing conviction solely on the dying declaration but the same should be tested on its voluntariness and truthfulness and in the instant case, according to him, the dying declaration is voluntary in nature.

31. In the instant case, the Prosecution has introduced and relied upon two dying declarations recorded by PW 19 and PW 23 being Ext. 9 and Ext. 4 respectively. PW 19 was attached to N.B.M.C. and Hospital in his own capacity as Assistant Professor of Surgery. In his evidence PW 19 disclosed that on 16th October, 2005 at about 1.30 in the morning his service was requisitioned through a call book by the Superintendent of the said hospital. This witness had been to the said hospital and recorded the statement of Begum Khatun (the dying declaration) who was lying admitted in the female surgical ward of the said hospital. Evidence of PW 19 reveals that such recording was made in presence of S. Bhattacharjee, a Staff Nurse. In the statements so recorded it appears that since after marriage Begum Khatun was subjected to torture by the family members, namely, the husband, mother-in-law, sister-in-law and brother-in-law. All four persons poured kerosene oil on her body and set her on fire. Jahirul engineered the entire event from behind.

32. We have gone through the judgment and order of conviction under appeals, deposition of the witnesses and the materials disclosed before us.

33. The dying declaration, Ext. 9 and the evidence of PW 19 become suspect for many reasons, namely,

"i) The call book through which service of PW 19 was requisitioned was neither seized, nor produced in Court;

ii) The Superintendent of hospital who requisitioned the service of PW 19 was never examined to justify the claim of PW 19 that on the relevant date and time his service was requisitioned;

iii) The doubt becomes more prominent from the fact that S. Bhattacharjee, the

Staff Nurse in whose presence the statement and/or declaration was originally recorded by PW 19 was never examined.

iv) The duty on roster, attendance register of the relevant date was neither seized, nor produced to remove the doubt regarding the fact of recording the statement of Begum Khatun by PW 19 at 1:30 hours in the morning in presence of Staff Nurse, S. Bhattacharjee."

34. The Prosecution is under legal obligation to prove by production and exhibiting relevant records pertaining to the attendance and duty roster of the staff in the hospital and in absence of such records oral evidence is no substitute for proving the fact in issue.

35. It appears from the evidence of PW 19 that the statement made by Begum Khatun was recorded in English by PW 19 and the same was never read over and explained to her in Bengali conversely the recorded statement was not read over and explained to the declarant. Such departure makes the dying declaration unacceptable as held by the Hon"ble Apex Court in the case of Nazma Bibi @ Nazma Bewa & Anr. (supra) reported in 2009(2) CHN 901 as also Shaikh Bakshu & Ors. v. State of Maharashtra reported in 2008(1) SCC (Cri) 679. It is pertinent to mention the observation of the Hon"ble Apex Court in the case of Shaikh Bakshu In paragraph 13 which is as follows :

"13. The letter in question was not produced by him. The trial court came to the conclusion that PW 3, the Medical Officer and the constable reached the Burns Ward at about 7:10 p.m. As noted above, it was the evidence of PW 3 that he had accompanied the Naib Tahsildar, PW 1. Even if it is accepted as noted by the trial court that the Naib Tahsildar has not produced the letter because it may be misplaced but nothing prevented the prosecution to produce the copy of the letter which was purportedly written to the Naib Tahsildar. No effort in that regard has been made. The trial court and the High Court noted that the condition of the deceased was deteriorating since 6:10 p.m. The trial court, however, held the dying declaration to be credible because the Medical Officer was present when the declaration was recorded. There was no mention in the dying declaration that it was read over and explained to the deceased. The trial court and the High Court concluded that even though it is not so stated, it has to be presumed that it was read over and explained. The view is clearly unacceptable."

36. In the reported decision of Nazma Bibi @ Nazma Bewa & Anr. (supra) the Hon"ble Apex Court, relying on the judgment of Shaikh Bakshu & Ors. (supra) held and observed -

"11. We have very carefully perused the Exhibit 8, the alleged dying declaration recorded by a doctor and have found the same does not bear any signature of the declarant and there is no endorsement that after recording, the same was read over and explained to the declarant. Although, signature of the declarant is always essential in the dying declaration but its absence is not per se fatal unless

it is explained. However, in the case in hand we find that prosecution has not come out with any explanation whatsoever as to why the signature of the declarant was not obtained in the said dying declaration, Exhibit 8. It is never the case of the prosecution that no signature or thumb impression could have been obtained due to the nature of injuries sustained by the declarant on her palm or in the fingers.

In recent decision reported in 2008(1) SCC (Cri) 679 in the case of Shaikh Bakshu & Ors. v. State of Maharashtra, the Apex Court endorsed the necessity of mentioning in the dying declaration that the same was read over and explained to the declarant. In the said case, the Apex Court held in the dying declaration it must be clearly mentioned that same was read over and explained to the deceased and such facts cannot be presumed. In this connection it is also pertinent to note the doctor concerned in his substantive evidence before the Court never also claimed that after recording of the dying declaration he read over and explained the same to the declarant.

Moreover, there are other aspects of the case, which has a great impact as to the question of acceptability of the Exhibit 8. Although, according to the P.W. 12 the doctor who recorded the alleged dying declaration, Exhibit 8 at the time of recording the sister-in-charge was present but surprisingly enough her presence was not recorded in Exhibit 8 as a witness and there is no explanation for the same. It appears although all the medical papers including the bed head ticket of the victim Nagma Khatun was seized from the hospital by the police under a seizure list, Exhibit 3 but so far as the Exhibit 8, the alleged dying declaration is concerned, surprisingly there was no seizure list as regards to the same and that too without any explanation. In our opinion, the aforesaid omissions are quite fatal for the prosecution case."

37. The evidence of PW 19 after being subjected to cross-examination creates serious doubt with regard to the acceptability of the dying declaration (Ext. 9) recorded by PW 19. Following things emerge out from the cross-examination, namely,

- "i) Writing of FSW in Ext. 9 by somebody other than PW 19;
- ii) Writing of LTI of Begum Khatun by somebody other than PW 19 himself;
- iii) Changing the date from 16.10.2005 to 15.10.2005 by someone other than PW 19 himself;
- iv) Writing the names of the appellant No. 1, Hasina Bewa, Hassen Ali, Hasibul Islam and Sabina Begum, being the sons and daughters of appellant No. 1 by someone other than PW 19."

38. PW 19 has admitted that these interpolations were not made by him and those were made by someone else. The interpolations indicated above in Ext. 9 definitely indicate presence of interested person who might be interested to establish Ext. 9 as a true dying declaration recorded by PW 19 perhaps to

conspire against the appellants for obvious reasons. There is yet another declaration of Begum Khatun (Ext. 4) recorded by PW 23, Sub-Inspector of Police. This document also creates doubts in our mind. This declaration has been claimed to be recorded in the hospital in absence of ward Doctor on duty and without requisitioning his presence. Such type of recording of statement by Police has been disapproved by the Hon"ble Apex Court in Smt. Laxmi v. Om Prakash & Anr. (supra). Paragraph 28 and 29 of this report is important to take note of. In paragraph 28 it has been observed that -

"This Court excluded the same from consideration for failure of the Investigating Officer to get the dying declaration attested by the Doctor who was alleged to be present in the hospital or anyone else present."

39. In paragraph 29 it has been observed that -

"A dying declaration made to a police officer is admissible in evidence, however, the practice of dying declaration being recorded by Investigating Officer has been discouraged and this Court has urged the Investigating Officer availing the service of Magistrate for recording dying declaration if it was possible to do so and the only exception is that the deceased was in such a precarious condition that there was no other alternative left except the statement being recorded by the Investigating Officer or the police officer later on relied on a dying declaration..."

40. It is claimed to have been recorded in presence of the Staff Nurse of the ward but it is surprising to note that the statement of Begum Khatun was recorded by two different persons in the same hospital on the same date more or less at the same time. The Staff Nurse on duty in whose presence PW 23 recorded the statement is found to be different from the Staff Nurse in whose presence PW 19 recorded the statement of Begum Khatun both at the same time. PW 19 recorded the statement in presence of S. Bhattacharjee, the Staff Nurse whereas one Papia Chanda who figured as PW 10 in the trial, claimed to be Staff Nurse and PW 23 recorded the statement. Surprisingly enough the Prosecution chose not to produce the duty roster and the attendance register of the hospital to prove this fact. It is important to point out that if Section 103 and 104 of the Evidence Act is pressed into service, evidence of PW 10 and PW 15 renders to be totally unacceptable. The burden of proof that they were on duty on that particular day has to be proved by the persons who claimed they were on duty by producing the best evidence. In this case, best evidence is the document, that is, the attendance register of the relevant date and the duty roster of the relevant date. The attendance register and duty roster is a document within the meaning of Section 31 of the Evidence Act. For non-production of the document oral evidence cannot be a substitute for it.

41. So far the evidence of PW 1 and PW 5, that is, the mother and sister of the deceased Begum Khatun is concerned, those suffer from serious infirmities which also create a serious doubt about the trustworthiness and truthfulness of the

aforesaid two witnesses. Ext. 6 is the written complaint of Asma Khatoon, PW 1, the mother of the deceased which has been treated as First Information Report (hereinafter referred to as the FIR). The said FIR brings on record commission of a cognizable offence at the earliest moment. PW 1, in her earliest disclosure, has reported to the Police Station at about 21:15 hours on 15.10.2005 near about 11:00 hours after she received information that her daughter had set fire on herself. The complainant, PW 1 immediately went to her daughter Begum Khatun and asked the reasons for doing so. In reply, her daughter disclosed the names of the appellants and other accused persons about that incident. In the complaint, however, it has been stated that the complainant suspects about a conspiracy for cause of setting fire on her daughter. This part of the FIR is based on suspicion. The evidence of PW 1 was recorded nearly two years thereafter, that is, on 07.09.2007. In her evidence in Court PW 1 stated that on enquiry she was told by her daughter that kerosene was sprinkled on her by the appellants and she was set on fire. Setting the deceased on fire by pouring kerosene oil is a serious matter and not a trivial matter which could have, per chance, escaped the memory of the complainant while lodging FIR. The complainant had enough time to think over, and perhaps had talk with others. From the standpoint of mother it is improbable if not impossible to forget such an important fact if it was really disclosed to her by her daughter in the morning.

42. Omission to mention an important fact in the FIR which ought to have been mentioned is bound to create doubt about the truthfulness of the witness and also the Prosecution case. In this regard Mr. Mitra has relied on the Apex Court judgment in the case of Sujoy Sen alias Sujoy Kumar Sen (supra).

43. Now, with regard to PW 5, Amina Khatun, is concerned she, for the first time, deposed in Court having accompanied her mother to the hospital and heard the conversation between her mother and sister, it is quite surprising that such an important witness who claims to be present all along, escaped the notice of the Investigating Officer and she was never examined by the Police. Non-examination of this witness is bound to raise reasonable doubt about her presence on the relevant date and time. It is also noteworthy that this witness in her evidence admitted lodging of FIR by PW 1 in writing being written by PW 11. From her evidence it also appears that this witness was aware of the contents of the FIR wherein it was not disclosed that kerosene was poured on the deceased and she was set on fire. This being the position it is quite doubtful to rely upon the evidence of this witness. This will not be safe to draw a conclusion of guilt of the appellants based on the evidence of this witness.

44. It appears that Papia Chanda, PW 10, in her evidence claimed that she was posted as a Staff Nurse in the female surgical ward of the hospital in question on and from 15th October, 2005 at 8:00 p.m. till 16th October, 2005 up till 7:30 a.m. is, however, falsified from the evidence from PW 19 where the concerned Doctor, PW 19 stated that it is not PW 10, Papia Chanda but one S. Bhattacharjee was on duty as a Staff Nurse in the female surgical ward of the hospital. This

doubt could have been dispelled by the Prosecution by producing hospital records of the relevant date relating to the duty roster and attendance register of the hospital. It is most surprising that PW 23, the Investigating Officer, has not made any endeavour to seize and produce the hospital records to justify the presence of PW 10. The evidence of PW 10 (Papia Chanda) also suffers from serious doubt inasmuch PW 10, in her evidence, claimed one Faizul Rahaman (PW 7) having endorsed his signature in her presence. The aforesaid statement is falsified from the evidence of PW 7 wherein he stated that he was not examined by the Investigating Officer. He put his signature on the dying declaration in a white blank paper being insisted by the Police.

45. Evidence of PW 15, Tulsi Das (Security Guard), the other signatory on Ext. 4, reveals that presence of this witness in the hospital on the relevant date, that is, 16th October, 2005 is doubtful. This witness claims to be posted as Security Guard in the hospital at night and whose duty is outside the ward. Barring this uncorroborated statement made in Court for the first time it appears that this witness was not examined during investigation by the Police. No contemporaneous document for example, attendance register, duty roster was produced in Court to prove his presence in the hospital on the relevant date, that is, 16.10.2005 and time. It is also important to note that PW 23, the Investigating Officer, seized some hospital records, namely, bed head ticket of Begum Khatun from PW 17, Dipankar Ghosh, a Record Supplier of N.B.M.C. and Hospital but no reason is forthcoming why the Investigating Officer was prevented to seize the duty attendance register, duty roster, call book and produce those documents in Court in support of the Prosecution case. Non-production of these vital records without any reasonable explanation exposes the Prosecution to suffer a consequence of the presumption under Section 114(f) of the Evidence Act. Evidence of other witness produced in support of their case, namely, PW 16, Abdul Gaffar, do not deserve to consider seriously. An attempt has been made through this witness to support the Prosecution case but such an important witness was not available during investigation and was not examined by the Police. The tenor of evidence of this witness indicates that he is a chance witness and cannot be relied upon.

46. This being the position and this being the sum total of the Prosecution case it is difficult to rely upon the evidence adduced by the above-named Prosecution witnesses. On a careful scrutiny of the evidence indicated above we are of the view that sufficient evidence is lacking to come to a conclusion for holding that the appellants are guilty of the offence alleged. So far the allegations under Section 498A against the Appellant No. 1 is concerned she has already served out the sentence as she is in custody over 10 years.

47. In cases of homicide, a dying declaration made by the deceased is admissible to prove the cause of his/her death. The principle on which dying declarations are admitted in evidence, is based upon the legal maxim that a man will not meet his maker with a lie in his mouth. Under English law, a dying declaration

would only be admissible when the maker of the declaration was in expectation of imminent death. However, Section 32 does not require that the maker of a dying declaration should be in expectation of imminent death, nor is restricted to cases of homicide alone.

48. Though a dying declaration is entitled to great weight, yet it is always to be kept in mind that as the maker of the statement cannot be subjected to cross-examination. It is, therefore, essential for the Court to insist that the dying declaration should be of such a nature that it should inspire full confidence of the Court in its correctness.

49. The Court is obliged to ensure that the dying declaration was recorded properly without distortion and also to rule out the possibility of the statement being the result of either tutoring, prompting or vindictiveness or the figment of imagination. Before relying upon a dying declaration, the Court must be satisfied that the deceased was in a fit state of mind to make the statement. Once the Court is satisfied that the dying declaration was properly recorded, true, voluntary and not influenced by any extraneous considerations, the Court can base conviction on a dying declaration, without any further corroboration.

50. In *Smt. Laxmi Vs. Om Prakash and Others*, AIR 2001 SC 2383 : (2001) CriLJ 3302 : (2001) 3 Crimes 140 : (2001) 2 DMC 139 : (2001) 5 JT 280 : (2001) 4 SCALE 241 : (2001) 6 SCC 118 : (2001) 3 SCR 777 : (2001) AIRSCW 2481 : (2001) 5 Supreme 26, the Supreme Court held that a dying declaration, as a piece of evidence, stands on the same footing as any other piece of evidence. It is to be adjudged and appreciated in the light of the surrounding circumstances, and its strength is to be determined by reference to the principles governing the weighing of evidence.

51. The question before us is whether the deceased in this case actually made the dying declarations as recorded and if so whether the deceased was in a fit state of mind to voluntarily make a conscious and true dying declaration, free from vindictiveness or torturing and free from any motive to avenge ill-treatment meted out to her.

52. In this case, it is not in dispute that one of the dying declarations was recorded by the Investigating Officer at about 1:30 at night in the female ward in the presence of a male guard who was obviously not supposed to be in the female ward at that point of time. As discussed above, two different dying declarations, one allegedly made before the Doctor and the other allegedly made before the Investigating Officer which were almost simultaneous were witnessed by two different staff nurses. The Staff Nurse who witnessed the dying declaration recorded by the doctor, that is, S. Bhattacharjee, was not examined. No attempt was made by the prosecution to prove that the other nurse, Papia Chanda was on duty, by production of the duty register.

53. As per the statement of the deceased, the deceased had been kept without food for 3 or 4 days. This part of the statement is substantiated by the post

mortem report which clearly indicated that the stomach as also bladder were completely empty. The deceased also stated that there was a quarrel prior to the incident.

54. The deceased must have been in agony the doctor did not certify that the deceased was in a fit state to make a clear and coherent dying declaration.

55. As observed above, when the F.I.R. was lodged by the mother of the deceased, she did not state that the deceased had been set on fire by the accused appellants. In our considered view, it would not be appropriate in the facts and circumstances of the instant case to base conviction solely on the basis of the purported dying declarations unsupported by any kind of corroborative evidence. In our view, the accused appellants have to be given the benefit of the doubt.

56. In any case in the purported dying declaration, there is nothing against the accused appellant No. 2 who was allegedly the paramour of the mother-in-law of the deceased. Not being a relative, he could not possibly have been convicted under Section 498A of the Indian Penal Code. Even the dying declaration is not sufficient for conviction of the appellant No. 2 under Section 302 of the Indian Penal Code.

57. We, therefore, cannot sustain the conviction of the appellants and, accordingly, the same is set aside.

58. The appellants are, therefore, set free.

59. The Criminal Section is directed to send down the lower Court records together with a copy of the judgment forthwith to the concerned learned trial Court.

60. Urgent Photostat certified copy, if applied for, be delivered to the learned counsel for the parties, upon compliance of all usual formalities.

Indira Banerjee, J.

I agree.