
(2015) 02 TP CK 0034
In the Tripura High Court
Case No : Criminal Appeal (J) 09 of 2013

Santosh Deb and Others

APPELLANT

Vs

The State of Tripura

RESPONDENT

Date of Decision : 18-02-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 162, 313
Evidence Act, 1872 — Section 113A, 113-A, 27, 32, 32(1)
Penal Code, 1860 (IPC) — Section 107, 109, 302, 304, 304B

Citation : (2015) 02 TP CK 0034

Hon'ble Judges : Utpalendu Bikas Saha, J;S. Talapatra, J

Bench : Division Bench

Advocate : Ratan Dutta, for the Appellant; R.C. Debnath, Addl. PP, Advocates for the Respondent

Final Decision : Allowed

Judgement

Utpalendu Bikas Saha, J—This appeal is filed by four appellants, namely, Sri Santosh Deb, Sri Ajit Deb, Smt. Radha Rani Deb and Smt. Sati Rani Deb challenging the judgment dated 31.01.2013 passed by the learned Addl. Sessions Judge, Khowai, West Tripura, in ST 53(WT/K) of 2011 convicting the appellants under Section 306 IPC and sentencing the appellant Santosh Deb to suffer RI for 10 years and to pay a fine of Rs. 5,000/-, i.d. to suffer further SI for one month. The other appellants were sentenced to suffer RI for 7 years and to pay a fine of Rs. 5,000/-i.d. to suffer further SI for one month.

2. Heard Mr. Ratan Dutta, learned counsel appearing for the appellants as well as Mr. RC Debnath, learned Addl. PP for the State.

3. Prosecution case in brief is as follows:

"One Gobinda Chowdhury, PW 2, lodged a typed complaint to the Officer-in-Charge, Khowai Police Station on 10.02.2011 alleging that the marriage of his daughter Sohagan Chowdhury was solemnized with accused Santosh Deb about

one year six months back. Out of their wedlock, the victim deceased gave birth to a son and thereafter, her mother in law, Smt. Radha Rani Deb and her husband Santosh Deb started torture on her demanding Rs. 20,000/- and one Fridge. On 07.02.2011 at about 1.30 a.m. in the dead night the accused Ajit Deb went to the house of PW 9, Sri Ajit Deb, son in law of the informant and reported that the daughter of the informant Sohagan Chowdhury had sustained burn injuries due to burst of kerosene stove. Accordingly, PW 9 rushed to the house of the informant, PW 2 and reported the matter to his family members and the informant received the information over telephone at his place of work at Churaibari. Thereafter, the son of the informant, Ranjit Chowdhury, PW 1 and his son in law Ajit Deb, PW 9 visited the house of the accused persons at Mahadeb Tilla and came to know that Sohagan was shifted to Khowai Hospital and he realized that there was a conspiracy behind the incident and he also noticed that in the courtyard of the house there was some burnt bunch of hair and from their smell of kerosene was coming and then they asked Manoranjan Deb, father in law of the victim and came to know that on 06.02.2011 in the night at about 11.00 p.m. the incident took place. Subsequently, his son PW 1 and his son in law PW 9 along with their two companions, namely, Sri Sajit Das and Sri Kamini Debnath, (PW 8) went to Khowai Hospital and came to know that victim Sohagan was shifted to GB Hospital. Then they, along with their said companions went to GB Hospital and found that Sohagan was fighting with death. There the son of the informant Ranjit (PW 2) had a discussion with Sohagan at GB Hospital and came to know that her husband and matrimonial relatives collectively poured kerosene oil and set her on fire and thus attempted to kill her."

4. It was also mentioned in the FIR that about a week prior to the incident, Sohagan telephoned her brother Ranjit and requested him to arrange money immediately otherwise her husband would not let her to live in that house and would kill her. The delay in lodging the FIR has also been explained stating inter alia, that due to engagement in treatment of the victim he could not file the FIR in time.

5. On the basis of the said complaint/FIR a specific police case was started and on completion of the investigation submitted charge sheet under Sections 498A/306 IPC against the accused persons. As the alleged offence was triable by a Court of Sessions, the case was committed by the learned SDJM, Khowai.

6. The learned trial court after hearing the accused persons framed charges against them under Section 304B IPC and proceeded with the trial. In order to prove its case, the prosecution examined as many as 11 witnesses and also relied upon some documents which were marked as Exhibit 1 to 9. The accused appellants in their defence adduced no evidence as their case before the trial court was of total denial.

7. Learned trial court, on completion of recording of evidence of prosecution witnesses examined the accused persons under Section 313 Cr.P.C. and the accused appellants denied the allegation of the prosecution and the principal

accused Santosh Deb took the plea that the deceased committed suicide due to depression as her parents did not visit her after her marriage and the other accused persons pleaded their innocence.

8. On assessment of the evidence on record, learned trial court came to the conclusion that the prosecution failed to make out a case under Section 304B as the prosecution failed to prove that there was any demand of dowry but established a case under Section 306 IPC and consequent thereto passed the order of conviction and sentence as stated supra. Hence, the instant appeal.

9. Before dealing with the submission of the learned counsel for the parties, it would be proper to visit the deposition of the prosecution witnesses. From the evidence of PWs 1 to 3, it is undisputed that the marriage of the victim Sohagan was solemnized with the accused Santosh and she died on 17.02.2011 at GB Hospital due to burn injuries and the said incident took place after about 1 1/2 years of her marriage.

10. PW 1, Ranjit Chowdhury, brother of the victim-deceased in his deposition stated that before 10-15 days of her sustaining burn injuries the victim telephoned him at his place of work and informed him that her husband and mother in law has demanded Rs. 20,000/- for purchasing a vehicle, one gold chain, one fridge and to transfer a rubber plantation in the name of her husband and that during day time her mother in law tortures her mentally and in the night her husband used torture her physically and she also requested him not to disclose this fact to her parents considering their family condition.

11. He further stated that initial information was given to them that she sustained injury due to bursting of stove but when they visited her matrimonial home they found that she was shifted to Khowai Hospital and from there to GB Hospital. He has also deposed that in the courtyard of the matrimonial house of his sister, they had seen some black markings and there was no sign of marking of black marks or other burning clues in other parts of that house. So he suspected that either she was forcefully burnt to death at that place or after her death her body was burnt in that area. He has also stated that if on any occasion his friends visited the house of his sister then she was mentally tortured uttering that whether she has any love relation with the friends of him or not. This witness identified all the accused persons.

12. PW 2, Gobinda Chowdhury, the father of the victim has stated that he received information from PW 9, Ajit Deb, his son in law and came to GB Hospital on the following morning and met with Sohagan in senseless condition at the hospital and before lodging the FIR he did not discuss anything with his daughter as she was unconscious and at the time of incident he was at Churaibari with his wife, PW 3, Sabita Chowdhury and his son was at Khowai. Thus, he lodged the FIR basing on the facts supplied by his Son and Son in law, i.e. PWs 2 and 9. He has also stated that he came to know from his son Ranjit that 10-15 days prior to the date of incident his son PW 1 received information from his daughter that

she was subjected to torture by her husband accused Santosh on demand of Rs. 20,000/-, one gold chain and also put pressure on her to transfer a rubber garden in his name and that her mother in law and other accused also used to torture her mentally. This witness also said that his daughter regained sense at GB Hospital and he had talked with her and there she informed him that she put fire on her person due to demand of Rs. 20,000/-, one gold chain and for transferring a rubber garden in the name of her husband and the said demand was made by her husband and mother in law. He has also proved his signature in the FIR and enclosed report and also identified the accused persons.

13. PW 3, mother of the victim, Sabita Chowdhury in her deposition stated that she was first informed by PW 9, Ajit Deb her son in law, that her daughter Sohagan was at GB Hospital due to illness and after getting information they went to GB and found her daughter with burn injury in senseless condition. She has also stated that after 3/4 days of the incident her daughter regained her senses and when she tried to know from her daughter regarding the incident her daughter did not give any reply though she made a statement to the police in her presence and so far she could understand, her daughter stated to the police that after her marriage, for three months she lived peacefully and thereafter gradually she was subjected to mental torture mainly by her husband, accused Santosh and her mother in law, Radha Rani for want of gold chain, some amount for purchasing a vehicle and for transferring one rubber garden in the name of the accused Santosh. Her daughter was also threatened that if these demands were not fulfilled then they could arrange for the second marriage of the accused Santosh.

In her cross, she specifically stated that her daughter did not make any acquisition at any point of time to her against her matrimonial house before the said incident.

14. PW 4, Haradhan Das was tendered by the prosecution.

15. PW 5, Dr. Niladri Sengupta stated that on 14.02.2011 while he was posted in the Surgical Unit No. III in GB Hospital, in connection with Khowai PS Case No. 17/2011 Executive Magistrate, Subhasish Bandopadhhaya, DCM, Sadar had recorded dying declaration of one patient namely, Sohagan Chowdhury in his present and after examining the patient he has given certificate that she was in sound state of mind to give her dying declaration. He has also proved the certificate given by him including his signature, Exhibits 3 and 4 respectively. This witness did not say or disclose what was the statement of the deceased before the Executive Magistrate.

16. PW 6, Suman Rakshit, a Revenue Inspector deposed in his statement that he had accompanied the Executive Magistrate, Subhasish Bandopadhhaya, DCM, Sadar for recording the dying declaration of one patient namely, Sohagan Deb in connection with Khowai P.S. Case No. 17/2011 and the Executive Magistrate after obtaining the certificate from the Medical Officer, PW 5 recorded the dying

declaration of the said patient in presence of him as well as the Doctor (PW 5). He has put his signature at the bottom of that statement as Exhibit 3/1 but the witness could not recollect what the victim stated to the Executive Magistrate.

17. PW 7, Sri Dibyendu Roy, the Officer-in-Charge of the GB T.O.P. conducted the inquest over the body of the deceased on requisition.

18. PW 8, Sri Kamini Debnath does not throw any light as to the offence.

19. PW 9, Ajit Deb has deposed in his statement that the accused Ajit Deb informed him visiting his house that his sister in law Sohagan sustained burnt injury due to bursting of stove and requested him to go to their house and then he along with PW 1, PW 8 and another person, namely, Mana went to the matrimonial house of Sohagan but they did not see any stove in that house. They found some burnt hair and some kerosene in round shape in the courtyard of the house of the accused and then they learnt that Sohagan was shifted to GB Hospital. They also went to GB Hospital and after two days of the incident he returned from GB Hospital and during that time she did not regain her sense to talk. This witness also stated that subsequently Sohagan regained her senses and made statement to her parents where she also complained regarding the demand of dowry and causing torture. But from whom he knew the fact that Sohagan regained her sense, he did not disclose anything.

20. PW 10, Sri Sanjit Bhowmik, IO of the case, has deposed that during investigation he examined the victim on 14.02.2011 and before examining the victim he obtained permission from Dr. Pradip Sarkar about fitness of the victim to make statement. The victim stated to him that on 06.02.2011 in the night when the accused Santosh returned after driving vehicle and she called him for having dinner at about 10.30-11.00 p.m. but her husband said to her she should take her meal and he would not take dinner and also rebuked her in ugly language and then she was enraged. Thereafter, out of anger on her husband and due to mental torture of her husband, mother in law Smt. Radha Rani Deb, brother in law Sri Ajit Deb and Sister in law Sati Rani Deb, she put kerosene on her and set fire on herself to get rid of torture.

21. He has also stated that Sohagan told him that her husband, mother in law, brother in law and sister in law used to abuse her in slang language regarding day to day works and insulted her and also asked her to go to her parent's house or to commit suicide. She also specifically stated that her husband had never beaten her but teaming up with them he used to humiliate/insult her. This witness also proved this portion of the statement of the deceased as recorded by him under Section 161 Cr.P.C. as Exhibit 7.

22. PW 11, Dr. Pranab Chowdhury is the doctor who conducted the post mortem examination over the body of the deceased along with Dr. Partha Debbarma on 18.02.2011 and on examination found ante-mortem burn injury comprising 72% of the body surface area and that the cause of death in his opinion was "Septicaemia and shock" as a result of burn injuries. He further stated that there

was a history of burn injury by pouring K Oil by her husband on 06.02.2011 as per information of police. The said report was not brought into evidence by PW 11.

23. Mr. Dutta, learned counsel for the accused appellant, while urging for setting aside the order of conviction and sentence would contend that the word "instigate" appearing in Section 107 IPC means "active role played by a person with a view to stimulate another person to do the thing". According to him, it is the instigation to the commission of the offence itself which constitutes an offence of abetment. The instigation must amount to provoking, inciting, urging or encouraging a person to do a thing.

24. He further submits that the words uttered in a feat of anger or omission without any intention cannot be termed as instigation and to prove the element of instigation to substantiate the charge under Section 306 IPC onus always lies on the prosecution to establish that the appellant has assaulted or treated the deceased in any manner or with such intention that the deceased was rushed to commit suicide. In support of his aforesaid contention he has referred to the case of Sonti Rama Krishna Vs. Sonti Shanti Sree and Another, AIR 2009 SC 923 : (2008) 12 JT 449 : (2009) 1 SCC 554 wherein the Apex Court observed that the words uttered in a feat of anger or emotion without intention cannot be termed as instigation.

25. Mr. Dutta again contended that the statement of PWs 1, 2 and 3, inter alia that the victim used to tell them that her husband, mother in law, brother in law and sister in law used to torture her for bringing money, gold chain and to transfer a rubber garden in the name of her husband as dowry cannot be accepted being the said statement of the victim is not a statement relating to the cause of death and also does not fall within the purview of sub-section (1) of Section 32 of the Indian Evidence Act and thus the said such evidence cannot be used as a basis for conviction.

26. In support of his aforesaid contention he placed reliance on the decision of Inderpal v. State of M.P., 2002 (2) Cr LJ 926 wherein the Apex Court noted inter alia, unless the statement of a dead person would fall within the purview of Section 32(1) of the Indian Evidence Act there is no other provision under which the same can be admitted in evidence. In order to make the statement of a dead person admissible in law (written or verbal) the statement must be as to the cause of her death or as to any of the circumstance of the transactions which resulted in her death, in cases in which the cause of death comes into question.

27. He also referred to the case of Sangannagari Narasimulu Vs. State of Andhra Pradesh, (2005) 2 ALD(Cri) 387 : (2005) 3 ALT(Cri) 290 : (2005) CriLJ 4168 : (2006) 1 DMC 834 , wherein the learned Single Judge of the A.P. High Court took note of Inderpal (supra), and would contend that in the case of Sangannagari (supra) learned Single Judge of the A.P. High Court while discussing the evidence of the Mother and Sisters of the victim, who were the witnesses in that case,

held that being they are not the direct witnesses of the alleged cruelty and their evidence is based on communication with the deceased who complained of additional dowry demand by her husband-accused, statement of the deceased to her relatives, mother and sisters is a weak piece of evidence and is also a hear say evidence which is inadmissible. In the instant case also neither PW 1, nor PWs 2 and 3 are the direct witnesses of the alleged cruelty. Thus, their deposition is a weak piece of evidence.

28. He has also taken us to the dying declaration of the victim, as recorded by the Executive Magistrate, Subhasish Bandopadhhaya, DCM, Sadar and the statement of the deceased recorded under Section 161 Cr.P.C. which was treated as dying declaration and contended that there is inconsistency and contradiction in these two dying declarations. Thus, the learned trial court committed error while relying upon the dying declaration for convicting the accused persons. He further submits that the contend of the dying declaration allegedly made to the Executive Magistrate, Subhasish Bandopadhhaya cannot be looked into as those contentions were not proved by the prosecution by way of examining the recording officer, i.e. the Executive Magistrate.

29. In support of his aforesaid contention, he has placed reliance on the decision of the Apex Court in Samadhan Dhudaka Koli Vs. State of Maharashtra, AIR 2009 SC 1059 : (2009) CLT 433 : (2009) 1 JT 122 : (2008) 16 SCALE 66 : (2008) 16 SCC 705 : (2009) AIRSCW 212 : (2008) 8 Supreme 719 , particularly paragraphs 14 and 15 which are reproduced hereunder:

"14. Evidently, there are a few inconsistent and contradictory dying declarations. The court while appreciating evidence on the basis of such dying declarations is required to take into consideration inconsistencies between two statements. In this case, the learned Sessions Judge and the High Court proceeded on the basis that out of the three dying declarations, in two of them the deceased did not make any allegation against her husband.

15. A judgment of conviction can be recorded on the basis of a dying declaration alone, but the court must have been satisfied that the same was true and voluntary. Indisputably, for ascertaining the truth as regards the voluntariness of making such a dying declaration, the court is entitled to look into the other circumstances but the converse may not be true. It is not a case where the deceased and appellant were living separately. It is also in dispute, and as would appear from the statements made by the deceased in her first dying declaration that, even on the night in question appellant was not in the house; she was brought to the hospital by her husband and his family. If the intention of the appellant was to cause death to her, the fire would not have been extinguished by his family members."

30. He further submits that in order to bring an act or omission on the part of the accused within the scope of Section 306 IPC, an act of abetment as contemplated by Section 107 IPC must be established on the part of the accused

showing that he intended "to bring about the suicide of the person concerned" meaning thereby that there should be the intention of the accused to aid or instigate the deceased to commit suicide which is a condition precedent for an offence under Section 306 IPC.

31. In support of his aforesaid contention he has placed reliance on the judgment of the Apex Court in *Madan Mohan Singh Vs. State of Gujarat and Another*, (2010) 4 Crimes 34 : (2010) 10 JT 641 : (2010) 4 LLJ 849 : (2010) 8 SCC 628 : (2010) 10 SCR 351 and the judgment of the Gauhati High Court in *Shri Vishal Agarwal Vs. State of Assam and Another*, (2012) 3 GLD 430 particularly para 30 which is as follows:

"30. Abatement of suicide requires, as discussed above, instigation from the end of the accused to the person, who commits suicide. The action of the accused has to be, therefore, intentional in the sense that the person, who assaults, must intend that the person assaulted commits suicide. If one person assaults another person with no intention to make the later commit suicide, the mere assault would not amount to an offence under section 306, IPC if the person assaulted commits suicide. Even if a person is mentally and physically harassed and tortured, the person, who perpetrates harassment and torture, cannot be held liable under section 306, IPC unless there is some material indicating that the intention, behind the harassment and torture, was to see that the person, harassed and tortured, commits suicide."

32. According to him, in the instant case, prosecution failed to prove instigation from the end of accused persons. He also stated that there is no evidence except the statements of PWs 1, 2 and 3 and the alleged statement recorded under Section 161 Cr.P.C. of the victim that the accused persons either mentally or physically tortured the victim with an intention to make her to commit suicide. Even if for argument sake it is admitted that she was assaulted or tortured, mere assault or torture would not amount to an offence under Section 306 IPC even if the person assaulted commits suicide, unless there is some material evidence indicating that the intention behind the harassment and torture was to see that the person harassed and tortured commits suicide.

33. While refuting the submission of the learned counsel for the appellants, Mr. Debnath, learned Addl. PP submitted that there cannot be any reason to disbelieve the dying declaration of the victim recorded by the Executive Magistrate as well as the statement under Section 161 Cr.P.C. recorded by PW 10, IO of the case, after following the necessary procedure. In both the dying declarations, the victim stated that she poured kerosene oil on her body at around 10.30 p.m. on 06.02.2011 on her own and that she attempted to commit suicide due to continued mental torture and harassment by her husband, mother in law, younger brother in law and sister in law. Therefore, even if there is no other evidence, the dying declaration itself can be the basis for conviction.

34. In support of his aforesaid contention he has placed reliance on Mukeshbhai

Gopalbhai Barot Vs. State of Gujarat, AIR 2010 SC 3692 : (2010) CriLJ 4721 : (2010) 9 JT 322 : (2010) 12 SCC 224 : (2011) 1 SCC(Cri) 318 : (2010) 9 SCR 632 : (2010) AIRSCW 5614 , particularly para 5, 16 and 17 of the said judgment which are as follows:

"5. Kamlaben succumbed to her injuries on the 18th September 1993 and on 26th September 1993 the husband of the deceased, Ratilal Hemabhai Parmar PW7, gave a complaint in the police station alleging inter-alia that shortly before her death she had informed him that the appellant was responsible for her injuries and he had thrown kerosene on her and set on fire, on her refusal to accept his sexual advances. It is in this background that the appellant was arrested, and after investigation a charge-sheet was filed against him and he was ultimately brought to trial for offences punishable under Section-302 etc. of the IPC.

....

16. We have considered the arguments advanced by the learned counsel for the parties. At the very outset, we must deal with the observations of the High Court that the dying declarations Ex. 44 and 48 could not be taken as evidence in view of the provisions of Section 161 and 162 of the Cr.P.C. when read cumulatively. These findings are, however, erroneous. Sub-Section (1) of Section 32 of the Indian Evidence Act, 1872 deals with several situations including the relevance of a statement made by a person who is dead. The provision reads as under:

Sec. 32. Cases in which statements of relevant fact by person who is dead or cannot be found, etc., is relevant. -Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:--

(1) When it relates to cause of death. - When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question."

We see that the aforesaid dying declarations are relevant in view of the above provision. Even otherwise, Section 161 and 162 of the Cr.P.C. admittedly provide for a restrictive use of the statements recorded during the course of the investigation but sub-Section (2) of Section 162 deals with a situation where the maker of the statement dies and reads as under:

"(2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of clause (1) of Section 32 of the Indian Evidence Act, 1872 (1 of 1872), or to affect the provisions of section 27 of that Act."

17. A bare perusal of the aforesaid provision when read with Section 32 of the Indian Evidence Act would reveal that a statement of a person recorded under Section 161 would be treated as a dying declaration after his death. The observation of the High Court that the dying declarations Ex. 44 and 48 had no evidentiary value, therefore, is erroneous. In this view of the matter, the first dying declaration made to the Magistrate on 14th September 1993 would, in fact, be the First Information Report in this case."

35. He submits that the story relating to bursting of stove has not come from the prosecution. It is the accused Ajit Deb who informed regarding the bursting of stove to PW 9, Ajit Deb only to divert the relatives of the victim from the actual incident. Thus, these witnesses should not be disbelieved as they immediately rushed to the place of occurrence.

36. He further submits that the learned trial court has not found the appellants guilty of an offence under Section 304 IPC but has rightly convicted them under Section 306 of IPC taking aid of Section 113A of the Indian Evidence Act. He has referred to the decision of the Apex Court in *Rajeev Kumar Vs. State of Haryana*, (2013) 11 AD 453 : AIR 2014 SC 227 : (2013) 14 JT 357 : (2013) 4 RCR(Criminal) 964 : (2013) 13 SCALE 410 particularly para 15 of the said decision which is as follows:

"15. On the evidence on record, though the appellant is not guilty of the offence under Section 304B, IPC, he is certainly guilty of offences of abetment of suicide and cruelty. Section 113-A of the Indian Evidence Act states as follows:

"113A. Presumption as to abetment of suicide by a married woman.- When the question is whether the commission of suicide by a woman had been abetted by her husband or any relative of her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of her husband had subjected her to cruelty, the court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband.

Explanation.--For the purposes of this section, "cruelty" shall have the same meaning as in section 498A of the Indian Penal Code"

The language of Section 113-A of the Indian Evidence Act makes it clear that if a woman has committed suicide within a period of seven years from the date of her marriage and that her husband had subjected her to cruelty, the court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband. The Explanation to Section 113-A of the Indian Evidence Act states that for the purpose of Section 113-A "cruelty"

shall have the same meaning as in Section 498A, IPC. The Explanation to Section 498A, IPC, defines "cruelty" and Clause (a) of the Explanation states that cruelty means any willful conduct which is of such nature as likely to drive a woman to commit suicide. The dying declaration of the deceased (Ext. PN) as well as the evidence of PW-5 extracted above are sufficient to establish that the appellant used to fight on petty issues and give beatings to the deceased, which drove the deceased to commit suicide. This is, therefore, a clear case where the appellant had committed offences under Sections 498A and 306, IPC."

37. Before we proceed to consider the respective contentions of the learned counsel for the parties, we at stage may examine the alleged dying declaration of the deceased made before the Executive Magistrate, Subhasish Bandopadhhaya, DCM, Sadar, and the statement of the deceased under Section 161 Cr.P.C. treated as dying declaration (Exhibit 7) recorded by the IO, PW 10. Admittedly, the Executive Magistrate was not examined and the accused persons did not get any opportunity even to cross examine the said witness and the dying declaration was not brought on record. Right to cross examination of an witness is a legal right as the same is a part of fair trial.

38. It appears from the said dying declaration allegedly made to the Executive Magistrate that the deceased stated that she poured kerosene oil over her body at around 10.30 p.m. on 06.02.2011 on her own and she has also stated she attempted for suicide due to prolonged mental torture by her husband, mother in law, youngest brother in law, i.e. the husband's youngest brother and her elder sister in law, i.e. the husband's elder sister but in the said dying declaration she nowhere stated how and when they mentally tortured her. Even she did not say a single word regarding the demand of dowry.

39. It also appears from the statement of the deceased Sohagan Choudhury (Deb) recorded under Section 161 Cr.P.C. as discussed above, that she nowhere stated that the accused persons abused/rebuked her and there is nothing that at any point of time she was physically tortured. To establish a case that the deceased was mentally tortured before her committing suicide it has to be established how and in what manner she was insulted or humiliated. Mere using the word that the accused abused or rebuked her itself would not be enough for coming to a conclusion that she was tortured and for which ultimately she committed suicide. She has stated in her Statement under Section 161 Cr.P.C. that she did not inform anything to her father's house regarding all these matters. Therefore, the deposition of PWs 1 to 3 that they heard from the deceased Sohagan that the accused persons demanded money, gold chain etc. cannot be believed as the same is not reliable and trustworthy.

40. It is also the admitted position that Dr. Pradip Sarkar, who is alleged to have declared the victim as fit to make statement and permitted the IO to record the statement under Section 161 Cr.P.C. was also not examined and non-examination of the said doctor also creates a doubt regarding the fitness of the victim to make statement.

41. In *Sohan Raj Sharma Vs. State of Haryana*, AIR 2008 SC 2108 : (2008) CriLJ 2569 : (2008) 6 SCALE 192 : (2008) 11 SCC 215 : (2008) AIRSCW 3202 the Apex Court discussed about abetment and held as follows:

"12. "6. Section 107 IPC defines abetment of a thing. The offence of abetment is a separate and distinct offence provided in the Act as an offence. A person, abets the doing of a thing when (1) he instigates any person to do that thing; or (2) engages with one or more other persons in any conspiracy for the doing of that thing; or (3) intentionally aids, by act or illegal omission, the doing of that thing. These things are essential to complete abetment as a crime. The word "instigate" literally means to provoke, incite, urge on or bring about by persuasion to do any thing. The abetment, may be by instigation, conspiracy or intentional aid, as provided in the three clauses of section 107. Section 109 provides that if the act abetted is committed in consequence of abetment and there is no provision for the punishment of such abetment, then the offender is to be punished with the punishment provided for the original offence. "Abetted" in Section 109 means the specific offence abetted. Therefore, the offence for the abetment of which a person is charged with the abetment is normally linked with the proved offence.

7. In cases of alleged abetment of suicide there must be proof of direct or indirect acts of incitement to the commission of suicide. The mere fact that the husband treated the deceased-wife with cruelty is not enough - See *Mahinder Singh v. State of M.P.*, AIR 1995 SCW 4570" ".

42. In *Samadhan Dudhaka Koli* (supra), the Apex Court stated that consistency in the dying declaration is a very relevant factor and such a relevant factor cannot be ignored. When a contradictory and inconsistent stand is taken by the deceased herself in different dying declaration, they should not be accepted on their face value. In any event, as a rule of prudence, corroboration must be sought from other evidence brought on record. In the instant case, there are some inconsistencies between the dying declaration recorded by the Executive Magistrate and the statement recorded under Section 161 Cr.P.C. by the IO of the case, which was treated to be the dying declaration. Thus, it would not be proper for this Court to rely upon those dying declarations for convicting the accused appellants.

43. A person can be convicted even on the basis of a dying declaration when the same has been proved but if there are two dying declarations and one is inconsistent with the other, then a person cannot be convicted on the basis of a dying declaration which is otherwise not trustworthy. In the instant case, the recording officer of the dying declaration has not been examined and the contention of the dying declaration was also not proved and Section 161 statement treated as dying declaration is also a fractured one as in the said dying declaration no intention of instigation is available.

44. Taking note of *Sohan Raj Sharma* (supra) after considering the evidence on record it would also be clear that no element of instigation to constitute the

abetment of suicide beyond reasonable doubt is found in the evidence as led by the prosecution.

45. Thus, the impugned judgment and order is interfered with and the conviction, as returned by the learned Addl. Sessions Judge, Khowai is set aside on benefit of doubt. In the result, the appeal is allowed. The appellants are acquitted from the charges levelled against them.

46. The appellant No. 1, Santosh Deb be released forthwith if not wanted in connection with any other case. As the other appellants are on bail, their bail bond stands discharged.

Send back the LCR.