
(2013) 01 CAL CK 0044
In the Calcutta High Court
Case No : C.R.A. No. 446 of 2001

Sk. Ali Mohammad

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 10-01-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 464
Penal Code, 1860 (IPC) — Section 302, 326, 34, 498A

Citation : (2013) 1 CALLT 628 : (2013) 1 CHN 645 : (2013) 2 DMC 745

Hon'ble Judges : Murari Prasad Shrivastava, J; Joymalya Bagchi, J

Bench : Division Bench

Advocate : Saswata Gopal Mukherjee, for the Appellant; Debasis Roy, Ld. P.P.,
for the Respondent

Final Decision : Dismissed

Judgement

Joymalya Bagchi, J.—This appeal is directed against the judgement and order dated 28.08.2001 passed by the learned Judge, Special Court, E.C. Act-cum-Additional District and Sessions Judge, Asansol, Burdwan in S.C. Case No. 5/92 whereby the learned Sessions Judge convicted the appellants for commission of offence punishable under sections 498A /326 /302 /34 of the Indian Penal Code and sentenced them to suffer rigorous imprisonment for two years each and to pay a fine of Rs. 1,000/- each, in default to suffer rigorous imprisonment for six months more (for the offence punishable u/s 498A of the I.P.C.) to suffer rigorous imprisonment for life and to pay fine of Rs. 5,000/- each in default to suffer rigorous imprisonment for one year more (for the offence punishable u/s 302 of the Indian Penal Code), both the sentences to run concurrently. No separate sentence was awarded for the offence punishable u/s 326 of the Indian Penal Code. The prosecution case as alleged against the appellants is to the effect that the victim Mobia Bibi was married to appellant No. 2 (Sk. Siraj) in April-May, 1988; on 12.12.1989 the appellant No. 1 (Sk. Ali Mohammad) demanded a sum of Rs. 200/- from Mobia; she replied that she had no money, then Siraj asked her to bring the money from her parent's house situated in the

same locality; she went to her parent's house and requested her mother to pay Rs. 200/- and told her that if that amount was not paid, her husband would murder her; her mother was unable to pay the said amount and when she returned to her in-laws house, she was assaulted and kerosene oil was poured on her body and she was set on fire by the appellants; it was alleged that door of the room was locked from the outside with the cycle chain; local people hearing the hue and cry rescued her and shifted her to the Asansol S.D. Hospital; in the meantime, First Information Report was lodged at Barabani police station by her father, Abdul Hai (P.W. 1), resulting in the registration of Barabani P.S. Case No. 94 dated 89 dated 12.12.1989 under sections 498A /326 /34 of the Indian Penal Code against the appellants and one Hazera Bibi; at the hospital, it was alleged that the victim made dying declarations before the treating doctors and finally succumbed to her injuries; upon her death, section 302 was added to the case.

2. The charge-sheet was filed in the instant case under sections 498A /326 /302 /34 of the Indian Penal Code against the appellants and the said Hazera Bibi.

3. The case was committed to the Court of Sessions and thereafter was transferred to the Court of learned Judge, Special Court, E.C. Act-cum-Additional District and Sessions Judge, Asansol for trial and disposal.

4. The learned Judge framed charges against the accused persons and the said Hazera Bibi u/s 498A /326 /302 /34 of the Indian Penal Code. The appellants and co-accused Hazera Bibi pleaded not guilty and claimed to be tried. Prosecution examined as many as 12 witnesses and exhibited a number of documents including the dying declarations of the victim being exhibit 4, 5 and 6 herein.

5. The defence of the appellants was one of innocence and false implication. Specific suggestion was made that the victim committed suicide at her parental home and the appellants had been falsely implicated in the case.

6. In the course of trial, Hazera Bibi absconded and the case was filed against her.

7. In conclusion of trial, all the appellants were convicted of the offences punishable under sections 498A /326 /302 read with section 34 of the Indian Penal Code and were sentenced, as aforesaid.

8. The appellants have preferred the instant appeal against the said judgement and order of conviction and sentence.

9. P.W. No. 1 (Abdul Hai) is the de facto complainant and the father of Mobia Bibi. He has deposed that on 12.12.1989 his daughter had come to his house demanding Rs. 200/- as her husband Siraj (appellant No. 2) had directed her to do so and had threatened her that she would be killed if she did not bring the money. He further deposed that Siraj had borrowed a sum of Rs. 260/- from his employer and had lost such money in gambling. He further deposed that as they failed to give money to his daughter she was confined in a room which was locked from the outside by a cycle chain and all the appellants set her on fire by

pouring kerosene oil on her. He further stated that he and his wife rushed to the spot after hearing the information that his daughter was being killed. He deposed that his daughter was crying that as money was not paid she was being killed. She was taken to hospital and that P.W. 1 lodged complaint with the local police station. In cross-examination, he admitted that he was not inside the room when his daughter went to demand money from his wife. He denied the suggestion that the incident had occurred in his house.

10. P.W. 3 (Gulam Rasul) is the brother of the victim. He stated that on 12.12.1989 the victim came to their house and demanded Rs. 200/- from his mother but his mother was unable to pay and she returned to her in laws" house. He further stated that he was in a Saloon when he heard shouts from the para people that his sister had caught fire. He rushed to the matrimonial home and found that his sister was lying outside the room after breaking open the chain of the door. He claimed that his sister was crying that for want of Rs. 200/- her husband, father-in-law, mother-in-law and sister-in-law set her on fire. He further deposed that as their mental condition was not normal they were taken to their house. His father went to the police station to lodge FIR and he went to the hospital. He deposed that his sister made dying declaration before the doctor. Her L.T.I, was taken on the dying declaration. He further deposed that the police seized burnt portions of her saree, chain with lock, kerosene tin with some kerosene oil, tabiz, one match box with match sticks from the place of occurrence and he signed the seizure list. In cross-examination, ho was unshaken in his deposition relating to the dying declarations made by his sister.

11. P.W. 7 (Rahila Bibi) is the mother of the victim. She stated that on 12.12.1989 around 12.30 p.m. her daughter came to her house and demanded Rs. 200/- as her husband had lost Rs. 260/- in gambling which he had to return to his employer. She further stated that her daughter told her if that amount was not paid she would be killed by her husband. She was unable to pay the sum and Mobia went back to her matrimonial home. Fifteen to twenty minutes later, she had heard shouts that Mobia had been killed. She stated that she went to the matrimonial home of Mobia and found that her daughter had been brought out from the room after breaking open the chain and lock on the door. Her husband and so were also there. She claimed that her daughter stated to her that the appellants had caught hold off her by force and Sk. Siraj poured 5 litres of kerosene oil on her and set her on fire. In cross-examination, she claimed that her daughter had given statements to the doctors and police on two occasions in her presence.

12. These are the relations of the victim who deposed in this case.

13. P.W. 2 (Sk. Kuddus) is the driver of the trekker by which Mobia was taken to the hospital. The said witness was declared hostile. In the cross-examination on behalf of the defence, he admitted that he did not get inside the hospital and did not see any treatment on Mobia. He further claimed that Mobia did not give any reply before the doctors.

14. P.W. 4 (Sk. Jaimul) is the local villager who was also declared hostile. He stated in his deposition that he had heard shouts from the house of P.W. 1 Abdul and saw smoke coming out. The prosecution cross-examined the said witness as to elicit contradictions in his deposition from his previous statement to the police. During cross-examination by the defence, he stated that Mobia did not state anything upto the hospital and she was not in a condition to speak.

15. P.W. 5 (Sk. Aspak) is another villager who accompanied Mobia to the hospital. He stated in his deposition that he heard shouts and when he went to the house of Sk. Siraj he found a trekker there. Mobia was lying in the trekker and she did not say anything at that time. In cross-examination, he claimed that he heard from Jaimul (P.W. 4) Mannan Nazrul and Kuddus (P.W. 2) that Mobia committed suicide at the house of her father. He, however, was unable to explain why the trekker was standing in front of the house of the Siraj.

16. These are the evidences of the local witnesses.

17. P.W. 6 (Dr. Indrani Mazumdar) is the doctor who held the post mortem of the victim.

18. P.W. 8 (Dr. P. Mukherjee) is the doctor who prepared the injury report of the victim wherein he recorded the dying declaration of the victim that has been exhibited as exhibit 4. P.W. 8 again recorded the same in the bed head ticket of the victim which has been exhibited as exhibit 5. P.W. 8 was also present at the time of recording of the last dying declaration at 2.45 p.m. by Dr. B.S. Das (P.W. 11). He signed the said dying declaration at 3.30 p.m. He further states that such dying declaration was recorded both in indirect and direct speech.

19. P.W. 10 (Dr. Suproakash Mukherjee) is the doctor who was present when the last dying declaration was recorded and he also signed the same. P.W. 11 (Dr. B.S. Das) recorded the last dying declaration of the victim which was exhibited as exhibit 6. The same bears the L.T.I. of the victim. He stated that the patient was conscious and in full sense at the time of recording of the said dying declarations. In cross-examination, he admitted that Morphine injection was administered upon the victim at 2.45 p.m. and her statement was recorded at the same time. He further admitted that the statement was made in Bengali but the same was recorded by him in English.

20. These are the medical witnesses who recorded the dying declarations of the victim in the hospital.

21. P.W. 9 (Abdul Hay) is the O.C. of Baraboni police station who received the written complaint of P.W. 1 and registered First Information Report.

22. P.W. 12 (Pradip Kumar Biswas) is the S.I. attached to Baraboni police station who investigated the crime. He visited the place of occurrence and seized incriminating articles from the house of the appellants and prepared a seizure list. He further stated that he collected the injury report, dying declarations and the post-mortem report of the victim in the course of investigation. He deposed

that he submitted the charge-sheet in the instant case.

23. Mr. Mukherjee, appearing for the appellants has challenged the prosecution case on the ground that the incident did not occur at the matrimonial home but at the parental house of the victim that is house of P.W. 1 herein. In support of his contention, he relied on the evidence of P.W. 4, (Sk. Jaimul) who stated that he heard hue and cry at the residence of P.W. 1 and found smoke coming out from his house. He further submitted that the same contention was also deposed by P.W. 5 (Sk. Aspak), who had not been declared hostile.

24. There is little merit in such submission. It is true that P.W. 4 did not support the prosecution case and was declared hostile. The evidence of P.W. 5 with regard to such fact is based on hearsay, inasmuch as he claimed that he was informed by Jaimul (P.W. 4) and others that the victim committed suicide at the residence of her father. On the other hand, the evidence of other prosecution witnesses and attending circumstances clearly improbabilise such possibility. P.W. 2, the driver of the trekker who took the victim to the hospital stated in his evidence that the appellant No. 3, Sk. Kalu, the brother of appellant No. 2, Siraj had called him to bring the trekker at the place of occurrence. That apart, P.W. 5 in his deposition stated that he found the trekker in front of the house of Sk. Siraj with the victim Mobia lying therein. Furthermore, incriminating articles like burnt clothes of the victim, bottle containing some kerosene oil, cycle chain with lock, matchbox containing matchsticks, tabeez, broken bangles of Mobia were seized by the Investigating Officer, P.W. 12 from the residence of the appellants.

25. In view of the aforesaid facts, there is no escape from the conclusion that the incident took place at the residence of the appellants and the suggestion of the defence that the same occurred at the house of P.W. 1 is wholly unworthy of any credit.

26. The prosecution case principally hinges on the dying declarations made by the victim. An analysis of the evidence on record shows that the prosecution has relied on dying declarations of the victim.

27. First is the oral dying declaration made by the victim immediately after the occurrence which is sought to be proved by P.W.s 1, 3 and 7. The other dying declarations were written by the medical personnel in the course of treatment of the victim at Asansol S.D. Hospital. The second dying declaration was recorded by Dr. P. Mukherjee at around 1.50 p.m. in the injury report which was exhibited as exhibit 4, which reads as follows:

The patient said that after a quarrel with her husband and mother-in-law the husband poured a can of kerosene over her and lit with a match.

She identified the mother in law here as one of the culprits.

O/E 100% burn

smell of kerosene present from the patient.

G.C.V.V. Poor.

gasping.

Further details from bed head ticket.

Medical Superintendent S.D. Hospital informed for noting declaration.

This statement is also reflected in the bed head ticket (exhibit 5) which reads as follows:

C/o:- kerosene being poured all over body and lighted with a match by husband-following a quarrel.

O/- smell of kerosene

100% burn

G.C.V.V. poor.

Gasping.

Patient clearly said she was burnt by the husband.

28. The third and the last declaration is recorded in direct and indirect speech by P.W. 11 and was witnessed by P. W. 8 and 10 and the same reads as follows:

Statement made by Mobia Bibi, wife of Sk. Siraj of Domani Bazar Sultan Para on 12.12.89 at 2.45 p.m.

She states that her husband poured kerosene oil on her body at about 12.30 p.m. and burnt with a matchstick. Before it she was assaulted by her husband several times on several occasions.

I, Mobia Bibi wife of Sk Siraj of Domani Bazar Sultan Para made this statement in full sense on 12.12.1989 at 2.45 p.m. that my husband poured kerosene oil on my body at about 12.30 p.m. in my room and lighted a matchstick and burnt me. My mother in law, sister in law, etc were present at that time.

I was assaulted several times before on several occasions.

29. Mr. Mukherjee has criticized the dying declarations and submitted that the same are inconsistent to one another and suffer from various infirmities and therefore cannot form the sole basis of conviction. He impeached the said dying declarations on the following grounds:

a) There was no certificate of any doctor that the victim was in fit state of mind to give statement.

b) The physical condition of the victim presupposes that she was not in a position to give any statement far from any voluntary statement.

c) This statement recorded in direct speech clearly shows that the victim was not in a position to give any statement of her own.

d) No explanation is given as to why such statement was recorded in English though allegedly made in Bengali. By this, the cardinal principle of recording of a dying declaration has been violated and as such said dying declaration cannot be relied on.

e) Morphine injection was administered on the victim before recording of her statement. Therefore, the consciousness cannot be attributed to the said statement of the victim.

f) How can a victim of 100% burnt injury put her LTI on "Dying Declaration" when PW-8 much prior to time prescribed inter alia "dressing", is a definite circumstance which cast doubt on the prosecution story.

g) In comparison of the evidence of PW-8 and PW-11, it appears that there is a discrepancy in time of recording of the dying declaration. If not, then also there is no explanation to the fact as disclosed by PW-11 in his cross-examination that "the time when the witnesses signed the statement recorded by me shows that they did not sign immediately after recording of the statement.

h) From the evidence of PW-3 and PW-7 it appears that they were present at the time of recording of the statement. P. W. 7 also was present when P.W. 8 recorded the statement of the victim. Considering the following parts of this note, the probability that P.W. 7 and P.W. 3 had tutored the victim prior to making her statement cannot be ruled out and conclusion may be drawn that the dying declaration was the outcome of such tutoring of the victim by her mother and brother.

i) P.W. 8 has admitted that some words were inserted subsequently to the statement of its trustworthiness.

30. He relied on the following decisions in support of his contention:

i) SCC Cri. 230

ii) P. Mani Vs. State of Tamil Nadu,

iii) 2003(1) SCC 110

iv) Shakuntala Vs. State of Punjab,

31. It is settled law that a dying declaration if found to be voluntary and trustworthy the same can form the sole basis of conviction. To seek corroboration of a dying declaration is a rule of prudence and not a necessity of law. It is to be seen whether the aforesaid dying declarations in the factual matrix of the instant case are reliable and truthful and can affirm the basis of the conviction.

32. With regard to the first oral dying declaration which the prosecution claimed was made before P.W.s 1, 3 and 7 wherein the victim had implicated all the appellants, it appears the same was not corroborated by the local witnesses like P.W. 2, Sk. Kuddus and P.W. 4, Sk. Jaimul and P.W. 5 (Sk. Aspak). While P.Ws. 1, 3 and 7 stated that when they reached the place of occurrence the victim

narrated to them the incident P.W. 5 categorically stated that the victim did not state anything at that time. Moreover, in cross-examination P.W. 5, further, clarified that since he reached the house of Siraj upto the hospital Mobia Bibi did not state anything. P.W. 2 also does not speak of the victim making any statement at the place of occurrence or during her transportation to the hospital. Furthermore, the evidence of P.W. 1, 3 and 7 is also not consistent as to the exact words spoken by the victim.

33. In view of such contrary version appearing from the evidence of the relation witnesses on one hand and the local witnesses on the other, it is unsafe to rely on such oral dying declaration.

34. This brings us to the dying declarations of the victim recorded during her treatment at Asansol S.D. Hospital in the medical papers, namely exhibits 4, 5 and 6.

35. Dr. P. Mukherjee (P.W. 8) proved exhibits 4 (injury report) and 5 (bed head ticket). He recorded the said dying declaration in the said injury report (exhibit 4) as well as in the bed head ticket (exhibit 5). It appears from exhibit 4 (injury report) that the victim had been brought to the hospital by the appellant No. 3. Thereafter, he recommended for further recording of another dying declaration of the victim and the same was done as indoor patient in exhibit 6 by P.W. 11 and was countersigned by P.Ws. 8 and 10.

36. The doubt raised by Mr. Mukherjee as to the capacity of the victim to make the said dying declarations is clearly obviated by the evidence of the medical personnel namely, P.W.s 8 and 11. It is the evidence of P.W. 11 that the victim was conscious and in full senses. In the bed head ticket it is recorded that the victim is conscious. In *Laxman vs. State of Maharashtra* reported in 2002 (6) SCC 710, a Constitution Bench of the Apex Court held as follows:

What is essentially required is that the person who recorded a dying declaration must be satisfied that the deceased is in a fit state of mind.

37. In the instant case written dying declarations were recorded by doctors themselves. It is the clear unequivocal evidence of P.W. 11 that the lady was conscious and in her full senses at the time of recording of such dying declaration. That apart in the instant case the second dying declaration recorded at 1.50 p.m. in exhibit 4 (injury report) and exhibit 5 (bed head ticket) cannot be said to be impaired by the administration of morphine injection inasmuch as the same was recorded prior to the administration of such injunction at 2.45 p.m. The last dying declaration was recorded at 2.45 p.m. simultaneously to the administration of morphine injunction. One can take judicial notice of the fact that a morphine injection would not have an immediate impact on the senses of a patient and therefore the recording of the dying declaration simultaneously to the administration of morphine injection would clearly have no impact on the mental faculty of the patient in making such declaration.

38. With regard to fixation of L.T.I. of the victim on the dying declaration it appears that P.W. 8 has opined that in spite 100% burnt victim may put his L.T.I. on paper. Therefore, the contention as to the improbability of the dying declaration being recorded in such manner is wholly unfounded.

39. The other contention of Mr. Mukherjee with regard to discrepancy as to the time of recording of the dying declarations also appear to be explained away by P.W. 8. It is the consistent evidence on record that the dying declaration of the victim was written at 1.50 p.m. by P.W. 8 in the injury report (exhibit 4) and bed head ticket (exhibit 5). Thereafter, at 2.45 p.m. it was again recorded both in direct and indirect speech by P.W. 11 in presence of P.W.s 8 and 10. P.W. 8, however, signed such declaration later on at 3.30 p.m. We, therefore, are unable to accept the contention of Mr. Mukherjee that there is inconsistency as to the time of recording of such dying declarations.

40. Mr. Mukherjee has further sought to improbabilise the dying declarations on the ground that the same was tutored as the relations, namely P.W.s 3 and 7 were present at the time when they were recorded. The evidence on record however is to the contrary. It appears that the second dying declaration was recorded at 1.50 p.m. in the presence of the mother-in-law, one of the appellants in the instant case, and no relation of the victim was present. This clearly improbabilises the suggestion that the dying declarations were a product of tutoring at the behest of the relation.

41. Finally, Mr. Mukherjee has argued that the dying declarations were made in Bengali, however the same have been written in English and that there was an interpolation in the dying declaration recorded in exhibit 6. One must not lose sight of the fact that the dying declarations had been recorded by government doctors attached to a government hospital. They are responsible public servants and wholly disinterested witnesses. The interpolation in all likelihood is due to a slip of the pen and not a conscious effort on behalf of the author of such document to embitter the same. Furthermore, it is common knowledge that medical personnel recorded their findings in English and not in vernacular language. It is therefore neither unusual nor artificial that the dying declarations were recorded in English by the attending physicians and the same would not militate against their voluntariness or truthfulness on such score. It is disputed that P.W. 8 and 11 were conversant both in Bengali and English. In the case of *Bakhshish Singh Vs. The State of Punjab*, similar issue arose as to whether the dying declarations which was made in Punjabi but was recorded in Urdu is liable to be rejected on that score. The Apex Court held as follows:

As a matter of fact in Punjab the language used in the subordinate Courts and that employed by the Police for recording of statements has always been Urdu and the recording of the dying declaration in Urdu cannot be a ground for saying that the statement does not correctly reproduce what was stated by the declarant. This, in our opinion, was a wholly inadequate reason for rejecting the dying declaration.

42. Similarly, in Government hospitals, it is common practice that doctors record their findings in English and hence in the facts of the instant case the P.W. 8 and 11 recording the dying declarations (narrated in Bengali by the victim) in English cannot be a valid ground to reject them. We are therefore unable to accept the contention of Mr. Mukherjee that the written dying declarations recorded by the medical personnel in English in the instant case are not admissible in evidence.

43. Now let us examine the extent of involvement of the appellants. It appears from the aforesaid two dying declarations that no role has been ascribed to appellant Nos. 1 and 3 at all. With regard to appellant No. 4, in the second dying declaration as recorded in the injury report (exhibit 4), it appears that the victim had said that she had a quarrel with the appellant No. 4 and her husband (appellant No. 2) and thereafter her husband (appellant No. 2) set her on fire. She also identifies appellant No. 4 as one of the culprits. However, these facts do not appear from another contemporaneous recording of self-same dying declarations in the bed head ticket (exhibit 5). In that statement, there is no reference to the role of the said appellant No. 4. Moreover, in the subsequent dying declaration recorded in exhibit 6 the only role attributed to the mother-in-law (the appellant No. 4) is that she was present at the place of occurrence.

44. In view of such inconsistency in the narration as to the role of appellant No. 4 in the dying declarations, as aforesaid, it would be unsafe to hold that the fact that she quarrelled with the victim is proved beyond reasonable doubt.

45. Even if such version is believed, there is nothing on record to say that she instigated her son to set the fire on victim sharing a common intention with him in doing so. We are therefore unable to accept on the basis of the inconsistent version as emanating from the multiple dying declarations that appellant No. 4 shared common intention to commit the murder of the victim. As discussed earlier, even if she may have participated in a domestic quarrel with the victim (though not proved beyond doubt), there is nothing to show that she participated or goaded her son to commit murder. Her presence at the place of occurrence without anything more cannot give rise to an inference of sharing common intention with the husband of the victim. Undoubtedly, the victim in one of her narrations stated that the appellant No. 4 is one of the culprits. However, such fact is significantly absent in the other dying declarations. That apart, when we find from a forensic analysis of the role attributed to the said appellant No. 4 in the said dying declarations and when the evidence on record with regard to the same does not satisfy the legal requirement of proof beyond reasonable doubt we are unwilling to uphold her conviction on the opinion of the victim as to her moral assessment of guilt.

46. In view of such inconsistency as to the role of the appellant No. 4 in the transactions resulting in the death of the victim it appears to be prudent to give benefit of doubt to the appellant No. 4 on the charge of commission of offence punishable u/s 302 read with section 34 of the Indian Penal Code.

47. On the other hand, the consistent version of the dying declarations recorded in the medical papers, as aforesaid, clearly and unequivocally depict the role of appellant No. 2 in the commission of murder of the victim. It is appellant No. 2 who poured kerosene oil on her and set her on fire by lighting a match stick. There is no contradiction or inconsistency as to the version of the role of the said appellant No. 2 in the murder of the victim. It is therefore clear that the prosecution has established the charge of murder against the appellant No. 2 beyond reasonable doubt.

48. It is settled law that the concept of "falsus in uno falsus in omnibus" has no manner of application to proof and reliability of dying declarations. It has been held in *Godhu and Another Vs. State of Rajasthan*,) that, "If a part of the dying declaration has not been proved to be correct, it need not necessarily result in the rejection of the whole of the dying declaration."

49. Hence, even if we have not believed the dying declarations (in view of its patent inconsistencies) as to the role of appellant No. 4, we are persuaded to rely on the same as to the role of appellant No. 2 as the same are consistent, unvarnished and corroborative of one another in that regard.

50. The charge in the instant case was framed u/s 302 /34 of the Indian Penal Code. It appears on an analysis of evidence on record that the other appellants cannot be said to have shared any common intention with appellant No. 2 to commit murder of the victim. Appellant No. 2 in the instant case, therefore, is liable to be convicted of offence of section 302 IPC simpliciter.

51. To convict the said appellant No. 2 u/s 302 simpliciter at this appellate stage does not cause any prejudice to him inasmuch as he was fully aware of the circumstances of the prosecution case and as to the role played by him therein. Therefore, the conviction of the appellant No. 2 u/s 302 of the Indian Penal Code does not cause any prejudice or occasion any failure of justice and such conviction is wholly sustainable without reframing of charge in view of the provisions of section 464 of the Code of Criminal Procedure. (See *Sawal Das Vs. State of Bihar*,)

52. Now let us examine the evidence on record with regard to charges under sections 326 /34 I.P.C. and 498A/34 of the Indian Penal Code. The evidence with regard to torture of the victim is omnibus in nature. Furthermore, there is no evidence on record that the said torture arose for or in connection with any demand of dowry. Even on the fateful day the demand of Rs. 200/- was on account of the appellant No. 2 having lost sum of money due to gambling. This demand cannot be termed to be a demand of dowry as it did not arise for or in connection with marriage. It essentially partakes the nature of a domestic dispute wherein the husband singularly caused the death of his wife by setting her on fire. The participation of the other appellants in the matter of murder is therefore not proved beyond reasonable doubt. It is true that in some of the dying declarations recorded in the injury report the appellant No. 4 is attributed

to have quarrelled with the victim immediately prior to the incident. However, such role is significantly absent in the subsequent dying declaration recorded in exhibit 6. Hence, she is entitled to benefit of doubt. For such reason, we hold that the appellant No. 1, 3 and 4 are not guilty of the aforesaid offences punishable under sections 498A /326 /302 /34 of the Indian Penal Code. However, the act of the appellant No. 2 in assaulting the wife and setting her on fire which resulted in her death would certainly fall within the Clause (a) of the definition of "cruelty" in section 498A of the Indian Penal Code and hence, he is liable to be convicted both on the score of 326 IPC and section 498A IPC.

53. In the course of the argument and in the written submission it has been stated that the appellant No. 1 has died. However, no death certificate has been furnished in support thereof. We have therefore not accepted the factum of death of the appellant No. 1 but have dealt with his appeal on merits. For the aforesaid reasons, we allow the appeal so far as it relates to appellant Nos. 1, 3 and 4 herein. The conviction and sentence of the appellants are set aside. The appellant Nos. 1 and 3 shall stand discharged from their bail bonds and the appellant No. 4 shall be forthwith released from custody, if she is not wanted in any other case. The appeal so far as it relates to appellant No. 2, however, is dismissed.

Murari Prasad Shrivastava, J.

I agree.