GAHC010120202012

THE GAUHATI HIGH COURT AT GUWAHATI

(The High Court of Assam, Nagaland, Mizoram and Arunachal Pradesh)

PRINCIPAL SEAT AT GUWAHATI

Criminal Appeal No. 11/2012

Sri Dulen Hati Baruah,
Son of Sri Baneswar Hati Baruah,
Resident of Village-Gobori ali,
P.O.-Goborijan,
P.S.- North Lakhimpur,
District:- North Lakhimpur, Assam

.....Appellant.

-Versus-

State of Assam

.....Opposite party.

Advocates for the appellant : Ms P Bhattacharya,
Advocate for the respondents : Ms S H Bora, APP,

BEFORE

HON'BLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

Date of hearing : 10.01.2024

Date of Judgment : 24.01.2024

JUDGEMENT AND ORDER (CAV)

Heard Ms P Bhattacharya, learned counsel for the appellant, Sri Dulen Hati Baruah and Ms S H Bora, learned Additional Public Prosecutor for the State of Assam.

2. This appeal is directed against the Judgment and Order dated 21.12.2011, passed by the learned Additional Sessions Judge (FTC), Lakhimpur at North Lakhimpur, in connection with Sessions Case No. 80(NL)/2011, arising out of GR Case No. 572/2011, convicting the appellant under Section 498(A) of the Indian Penal Code, 1860 ('IPC', for short), to undergo Rigorous Imprisonment for one year and to pay a fine of Rs. 1,000/-, with default stipulation. The appellant will hereinafter be referred to as the accused.

3. The genesis of the case was that on 05.05.2011, at about 10:00 pm,

the accused set ablaze his wife Bornali Baruah by dousing her with kerosene. The victim Bornali Baruah (also referred to as the deceased or the victim) was immediately shifted to the North Lakhimpur Civil Hospital, but she succumbed to the burns sustained by her. While the victim was undergoing treatment, her mother Smt Munu Baruah lodged an FIR and GD Entry No. 167 dated 10.05.2011 was registered and the FIR was forwarded to North Lakhimpur Police Station and registered as NLPS Case No. 231/2011, under Section 498(A) IPC.

4. The Investigating Officer (IO, for short), Dinobandhu Bhuyan embarked upon the investigation. He recorded the statements of the victim and other witnesses. He went to the place of occurrence and recorded the statements of the other witnesses and prepared the sketch map. Meanwhile, the victim succumbed to her injuries. The body was forwarded for autopsy. After completion of investigation, charge sheet was laid against the accused under Section 498(A)/302 IPC. On appearance of the accused, copies were furnished and this case was committed for trial.

5. At the commencement of trial, charge was framed under Section 498(A)/302 IPC and the particulars of offence were read over and explained

to the accused. The accused abjured his guilt and claimed innocence.

6. To connect the accused to the crime, the prosecution adduced the evidence of five witnesses including the Medical Officer (MO, in short) and the accused adduced the evidence of one witness in defence. On the incriminating circumstances projected through the evidence, the statement of the accused was recorded under Section 313 of the Code of Criminal Procedure (CrPC, for short). The tenor of the answers of the accused depicts a plea of total denial. He denied the charges and the evidence against him. He stated that his family was ostracized with allegations of incest. After atonement, his family was accepted by the society. The deceased caught fire from the lantern. He tried to extinguish the fire and sustained burns in the process. His cousin Tutu (DW-1) shifted his wife to the hospital.

7. The learned trial Court delineated the following points while deciding the case-

> "*i) Whether the accused being husband of Smt. Bornali Baruah subjected her to cruelty by wilful conduct which is of such nature as it is likely to drive her to commit suicide or cause grave injury or danger of life, limb or health of Bornali, setting her on fire by pouring kerosene*

on her body or harassed her with a view to coerce her or any other person related to her to meet the demand of dowry ?

ii) Whether the accused did commit murder by intentionally (or knowingly) causing the death of his wife, Smti Bornali Baruah, by setting her on fire by pouring kerosene on her body, on demand of dowry on the relevant date, time and place?"

8. The learned trial Court held the accused guilty of offence under Section 498(A) IPC, but acquitted him from the charges under Section 302 IPC. The decision of this Court will be limited to the offence under Section 498(A) IPC, under which the accused was convicted. Here the scope of controversy appears to lie in a narrow campus i.e., within the point No. (i) taken up by the trial Court.

9. It is submitted by the learned counsel for the accused-appellant herein, that the learned trial Court ignored the fact that the FIR was lodged after 5 days without any explanation, justifying the inexplicable delay in lodging the FIR. The witnesses are all interested witnesses and evidence of one witness which was varying was not taken into consideration. It is also submitted that prior to the incident, there was no allegation of any cruelty, but immediately,

after the incident the witnesses have alleged that cruelty was extended to the victim. It is also submitted that the learned trial Court had ignored the fact that the FIR was an afterthought as the FIR was lodged after 5 days. It is also submitted that due to the myriad of contradictions in the evidence which could be elicited through the cross-examination of the IO, the accused was not held guilty of offence under Section 302 IPC and similarly the accused ought to have been acquitted from the charges under Section 498(A) IPC. The learned counsel for the accused-appellant has prayed to set aside the impugned judgment and order and set the accused at liberty.

10. The learned Additional Public Prosecutor has, however, submitted that evidence of related witnesses cannot be discarded as evidence of interested witnesses. The evidence of all the witnesses clearly depicts that cruelty was prevalent in the household which led to the unfortunate incident. It has been correctly held by the learned trial Court that as the family members were busy providing treatment to the victim, there was a delay in lodgement of the FIR. Considering the mental agony during the incident, the FIR could not be lodged immediately after the incident. The learned Additional Public Prosecutor has submitted that the accused deserves punishment for the offence of Dowry Death under Section 304 B IPC, but he was let off leniently.

11. Per contra, the learned counsel for the accused has submitted that there is no time frame to rope in the accused under Section 304 B IPC. It could not be deciphered through the evidence, if the victim died within seven years of her marriage.

12. The learned Additional Public Prosecutor has submitted to dismiss the appeal, as it is devoid of merits.

13. The relevant portion of the decision of the learned trial Court is reflected hereinbelow:-

> "*In this respect reliance can be placed in the case of S. Sudershan Reddy & Ors. -Vs- State of Andhra Pradesh, reported in (2006)10 SCC 163, wherein the Hon'ble Supreme Court has held:-*
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> *"Relationship is not a factor to affect the credibility of a witness. It is more often than not that a relation would not conceal the actual culprit and make allegation against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyze evidence to find out whether it is cogent and reliable."*
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> *35. It is further submitted by the learned defence counsel that no neighbours of the family of the accused has been examined by the prosecution to prove the alleged offence committed by the accused though two families were living by the side of the rented house of the accused.*
>
> *We know that neighbours whose evidence may be some assistance, are generally reluctant to depose in court as they want to keep aloof and do not want to*

antagonize a neighbourhood family.

36. From the discussion made herein above, the inevitable conclusion is that the prosecution has successfully proved the offence punishable under section 498(A) IPC but miserably failed to prove the offence punishable under section 302 IPC against the accused beyond all reasonable doubts."

14. Now, the question that falls for consideration is whether the learned the learned trial Court has erred in deciding the case against the accused.

15. To decide this appeal in its proper perspective, the evidence is reappraised.

16. PW-1, Smt Munu Baruah, is the informant and she deposed that the incident occurred about 4 (four) months ago (from the date of her deposition). After her daughter's marriage to the accused, the accused demanded dowry from her daughter which led to quarrels between her daughter and the accused. On the night of the incident, at about 10:00 pm, the accused doused the victim with kerosene and set her ablaze. When she received the information, she (PW-1) went to the place of occurrence (PO, for short) and found her daughter with burn injuries and her son-in-law (accused) escaping from the PO. Her daughter was able to speak and her daughter informed her that the accused poured kerosene over her and set her ablaze. They called the 108 Ambulance and sent her daughter to the

hospital. There was a delay in lodging the FIR as she was busy with her daughter's treatment. After 7 days, her daughter succumbed to her injuries.

17. In her cross-examination, PW-1 has stated that her daughter's rented house is near to her rented house and when she heard the commotion, she went to her daughter's house and saw her daughter in flames. The neighbours sent her daughter to the hospital. In her cross-examination, she also stated that she could not recall whether she stated before the Police that her daughter informed her that the accused demanded dowry from her.

18. The IO, Sri Dinobandhu Bhuyan deposed as PW-5 and he has affirmed through his cross-examination that PW-1 did not mention in her initial statement under Section 161 CrPC that the accused demanded dowry from her daughter, which resulted in the marital discord between her daughter and the accused. The IO has also affirmed that PW-1 did not mention before him that she saw her daughter in flames and the accused escaping from the PO. It has also been affirmed by the IO that PW-1 did not state under Section 161 CrPC that her daughter was able to speak and her daughter stated that the accused set her ablaze, on her failure to meet his illegal demand of dowry.

19. It is apparent that several contradictions could be elicited through the cross-examination of PW-1, vis-à-vis the cross-examination of the IO, PW-5 as per Section 145 of the Indian Evidence Act, 1872 (The Evidence Act, for short) qua Section 162 CrPC. Will these contradictions cause a dent in the evidence?

20. Sri Amal Baruah, who deposed as PW-2, is the informant's husband and father of the deceased, Bornali Baruah. At the time of the incident, while he was attending duty at DC office, one person informed him about the incident, but he did not proceed to the PO. He deposed that he learnt from his wife that his daughter was set on fire by the accused as she was unable to meet his illegal demand of dowry. He immediately went to the hospital and met his daughter, who told him that the accused set her ablaze as she was unable to meet the accused persons's demand of dowry. His son-in-law, i.e, the accused was not in the hospital with his daughter. His daughter also informed him that the accused assaulted her. Prior to the incident, his daughter earlier informed him that the accused used to assault her to meet his illegal demand of dowry.

21. In his cross-examination, PW-2 has also stated that he mentioned

about all these facts before the Police, which has however, been contradicted and controverted by the IO, PW-5. The IO has affirmed that PW-2 did not mention in his initial statement that one person informed him that his daughter has been set ablaze by the accused. The IO, PW-5 has also affirmed that PW-2 has not mentioned under Section 161 CrPC that he went to the hospital to meet his daughter, but the accused was not in the hospital with his daughter. PW-2 also did not mention in his initial statement that the accused assaulted his daughter and set her on fire as she failed to meet her husband's illegal demand of dowry. He has also not mentioned under Section 161 CrPC that prior to this incident, the accused assaulted his daughter earlier as she failed to meet his illegal demand of dowry.

22. Thus, it is apparent from the evidence of PW-1, PW-2 and PW-5 that several major contradictions could be elicited through the cross-examination of PW-1 and PW-2, vis-à-vis the cross-examination of PW-5. It has also surfaced from the evidence of PW-1 and PW-2 that the victim and the accused were staying in a rented house, which was near to the house of the informant.

23. The evidence of PW-3 and PW-4 also projects major contradictions.

Smt Anjumoni Baruah is the younger sister of the victim and she deposed as PW-3 that on the date of the incident, while she was in her parental home, she heard about the incident. She went to the PO and saw her elder sister adorned in a jacket, but the lower part of her body was naked. She met her brother-in-law, who dismissed the incident as an incident to be ignored, and sent her out of the room. Then they called the 108 ambulance and sent her sister to the hospital. When the Police came, the accused fled. Her sister died in the hospital after 7 days.

24. In her cross-examination, PW-3 has affirmed that she has mentioned whatever she stated in her examination-in-chief before the Police (IO). The evidence of PW-3 has also been contradicted by the evidence of the IO, PW-5. The IO has affirmed through his cross-examination that PW-3 did not mention in her earlier statement that when she went to the PO, her elder sister was sitting on the bed and she was adorned in a jacket, but she had nothing underneath. She has also failed to mention under Section 161 CrPC that her brother-in-law (accused) was in the house. She has also not mentioned before the IO that the accused demanded dowry and set her sister ablaze.

25. The evidence of PW-4 has also been contradicted and controverted by the evidence of the IO. Purna Kanta Baruah is the brother of the deceased, who deposed as PW-4 that when his sister sustained burn injuries, he asked his sister, who informed him that the accused set her ablaze as she failed to meet his illegal demand of dowry. His sister also informed him that the accused had assaulted her.

26. PW-4, however, admitted in his cross-examination that he did not mention before the Police that he noticed burn injuries on his sister from her head to her abdomen. He has also admitted that he did not mention before the Police that his brother-in-law set ablaze his sister as she has failed to meet his illegal demand of dowry. He has admitted that he did not mention before the Police that his brother-in-law used to assault his sister, which has been affirmed by the IO, PW-5, through his cross-examination.

27. The IO is the formal witness and he deposed as PW-5 that after receipt of the FIR, he went to the PO, prepared the sketch map and recorded the statement of the victim under Section 161 CrPC. He has identified the statement of the victim as Exhibit-4 and has proved Exhibit-4(1) as his signature. He further deposed that he made preparations for inquest and

forwarded the body for autopsy. On 06.07.2011, he submitted charge sheet against the accused.

28. Medical Officer (MO, for short), Munindra Narayan Bordoloi, deposed as PW-6 that he performed post-mortem on the body of the victim and his findings are as follows:-

> "*A healthy female dead body of average built. Rigor mortis present. The whole anterior thoraxic wall, whole anterior abdominal wall, the hands and the legs are burnt. The burn injuries are antemortem in nature.*"

29. According to the Doctor, the death of the deceased was due to shock, as a result, of 80 percent burn injuries. Ext-5 is the post mortem report. Ext-5(1) is his signature. In his cross examination, he stated that person with 80% burn injuries can give statement.

30. It has been submitted by the learned Additional Public Prosecutor that the cross-examination of the IO reveals that even a person with 80% burn injuries can give a statement and the statement of the victim has been recorded under Section 161 CrPC, which has been marked as Exhibit-4 and this statement is nothing but a dying declaration. To this, the learned counsel for the appellant has submitted that the dying declaration recorded by the Police cannot be based solely to sustain any conviction. It is also submitted

that the statement of the defence witness was not taken into consideration by the learned trial Court.

31. The learned counsel for the accused has relied on the decision of Hon'ble the Supreme Court in ***State of Haryana -Vs- Ram Singh ;*** reported in **(2002) 2 SCC 426,** wherein it has been held and observed that-

> ***11. Significantly, the prosecutor produced the bundle containing three pieces of bones, which are identified by PW 8 as the same pieces of bones, which were under seizure by the police authorities at the place of occurrence - these bones, however, were not produced and placed for examination before the postmortem doctor as to whether they can be co-related with that of the deceased person. The Serological Report of these bones did not see the light neither the Ballistic Experts Report as to the nature of the weapons used. It is a duty cast on the prosecution to prove the guilt of the accused persons beyond all reasonable doubts. High Court has dealt with the issue that the thumb marked disclosure statement of Ram Singh dated 29.1.1992 casts a lot of doubt as to the involvement of accused Ram Singh since Ram Singh was arrested only on 13.2.1992 as such disclosure statement of 29.1.1992 cannot be had - it is this inconsistency which was noticed by the High Court and Ram Singh, at whose instance the ring was supposed to have been recovered, stands acquitted on the ground of benefit of doubt. The High Court, however, has not considered the medical evidence vis-a-vis the eye-witnesses account - the conflict and inconsistency between the two also raises a very great suspicion in the mind of the Court : credibility of the prosecution case stands at zero level by reason of the conclusion of the High Court and accordingly benefit of doubt to Ram Singh. It is the same prosecutor, which has recovered the pieces of bones, had it exhibited but not produced before the postmortem doctor, who would otherwise be able to identify the bones as that of the deceased. This failure of the prosecution, in our view, cannot be taken as a mere omission but a failure, which would go a long way in the matter of reposing confidence thereon.***
>
> ***13. The judgment under appeal admittedly does not contain a whisper even pertaining to the contradictions between eye-witnesses account and the medical evidence. In the contextual***

facts and as noticed above, medical evidence runs positively counter to the eye-witnesses account rendering the ocular testimony not being dependable or trustworthy. There is no credible evidence on record. It is significant that all the so-called eye-witnesses were produced in Court by the police from its custody in handcuff condition and it is only on the witness box that the handcuffs were released and taken up from the body of the person. All of them are under-trial prisoners being involved in a murder trial. The Court thus has to scrutinise its evidence with a little bit of caution and scrutiny so as to judge their veracity. Admittedly all the supposed eye-witnesses are relations of the deceased. As such they fall within a category of interested witnesses. It is not that the evidence ought to be discredited by reason of the witness being simply an interested witness but in that event the Court will be rather strict in its scrutiny as to the acceptability of such an evidence. High Court has principally relied on the 161 statements and the contradictions available on the record have not been taken note of. In our view this is a clear error on the part of the High Court. Some weapons have been seized along with the cartridges and it has been stated that such recovery was effected in terms of the disclosure statement. Before this Court it has been strongly urged that the same is in contravention of Section 27 of the Evidence Act. Undoubtedly, Section 27, though provides an exception, but the Court should always be vigilant about the circumvention of its provision - "Sarkar on Evidence (15th Edition)" has the following to state on Section 27 :-

> *".....The protection afforded by the wholesome provisions of Sections 25 and 26 is sought to be whittled down by the police by their ingenuity in manipulating the record of the information given by the accused in the case-diary in such a manner as to make it appear that it led to the discovery of some facts although the police might have made such discovery from other sources. When a fact is once discovered from information received from another source, there can be no discovery again even if any information relating thereto is subsequently extracted from the accused. A devise sometimes adopted by the police is to stage a scene and take the accused to the place where the things discovered lay buried or hidden and require him to make a search for them at the spot indicated to the accused, or sometimes the articles are first produced before the accused and thereafter statements purporting to have been made by him about the so-called discovery are recorded. Court should be watchful that the protection afforded by Sections 25 and 26 should not be dependent on the ingenuity of*

the police officer in composing the narrative conveying the information relating to the alleged recovery of a fact."

19. Significantly all disclosures, discoveries and even arrests have been made in the presence of three specific persons, namely, Budh Ram, Dholu Ram and Atma Ram - no independent witness could be found in the aforesaid context - is it deliberate or is it sheer coincidence - this is where the relevance of the passage from Sarkar on Evidence comes on. The ingenuity devised by the prosecutor knew no bounds - Can it be attributed to be sheer coincidence? Without any further consideration of the matter, one thing can be more or less with certain amount of conclusiveness be stated that these at least create a doubt or suspicion as to whether the same has been tailor-made or not and in the event of there being such a doubt, the benefit must and ought to be transposed to the accused persons. The trial Court addressed itself on scrutiny of evidence and came to a conclusion that the evidence available on record is trustworthy but the High Court acquitted one of the accused persons on the basis of some discrepancy between the oral testimony and the documentary evidence as noticed fully herein before. The oral testimony thus stands tainted with suspicion. If that be the case, then there is no other evidence apart from the omni present Budh Ram and Dholu Ram, who however are totally interested witnesses. While it is true that legitimacy of interested witnesses cannot be discredited in any way nor termed to be a suspect witness but the evidence before being ascribed to be trustworthy or being capable of creating confidence, the Court has to consider the same upon proper scrutiny. In our view, the High Court was wholly in error in not considering the evidence available on record in its proper perspective. The other aspect of the matter is in regard to the defence contention that Manphool was missing from village for about 2/3 days and is murdered on 21.1.1992 itself. There is defence evidence on record by DW-3 Raja Ram that Manphool was murdered on 21.1.1992. The High Court rejected the defence contention by reason of the fact that it was not suggested to Budh Ram or Dholu Ram that the murder had taken place on 21.1.1992 itself and DW-3 Raja Ram had even come to attend the condolence and it is by reason therefor Raja Ram's evidence was not accepted. Incidentally be it noted that the evidence tendered by defence witnesses cannot always be termed to be a tainted one - the defence witnesses are entitled to equal treatment and equal respect as that of the prosecution. The issue of credibility and the trustworthiness ought also to be attributed to the defence witnesses at par with that of the prosecution. Rejection of the defence case on the basis of the evidence tendered by defence

witness has been effected rather casually by the High Court. Suggestion was there to the prosecution s witnesses in particular PW 10 Dholu Ram that his father Manphool was missing for about 2/3 days prior to the day of the occurrence itself - what more is expected of the defence case : a doubt or a certainty - jurisprudentially a doubt would be enough : when such a suggestion has been made prosecution has to bring on record the availability of the deceased during those 2/3 days with some independent evidence. Rejection of the defence case only by reason thereof is far too strict and rigid a requirement for the defence to meet - it is prosecutor's duty to prove beyond all reasonable doubts and not the defence to prove its innocence - this itself is a circumstance, which cannot but be termed to be suspicious in nature.

32. In this case on hand, the defence witness, DW-1, Tutu Baruah testified that the accused is his nephew, whereas, the deceased was his cousin. As the accused and the deceased were within prohibited degree, their marriage was not accepted by their family and the villagers and so they used to stay separately in a rented house near the rented house of the family members of the deceased. He has never witnessed any quarrel or marital discord between the accused and the victim. He used to visit them, but the victim never informed him that the accused used to assault him to meet his illegal demand of dowry. On the night of the incident, at about 12'o clock midnight, the accused came and informed him that his right hand was burnt because he tried to put off the fire caught by his wife. The accused also sought monetary help from him. Then, he, DW-1 took the accused to the Police Station and, thereafter to the hospital and he helped both the accused and the deceased

by providing financial aid. The accused was in the hospital for three days. On the night when the victim passed away, the accused was arrested by the Police from the hospital.

33. By relying on the decision of Hon'ble the Supreme Court in ***Ram Singh's case (supra),*** the learned counsel for the appellant laid stress in the argument that all the eyewitnesses are related to the deceased and as such, they fall within the category of interested witnesses. It is also submitted that the dying declaration appears to be tailor-made. The defence witnesses cannot always be termed to be tainted. The defence witnesses are also entitled to equal treatment and equal respect at par with the prosecution witnesses. The issue of credibility and trustworthiness ought to be attributed to the defence witnesses at par with that of the prosecution.

34. In the instant case, the DW-1 was related to both the parties. It has surfaced through his evidence that the deceased was the accused person's cousin and after they got married, they were ostracized by the society. As the DW-1 is related to the accused, so was he related to the deceased. It is further submitted by the learned counsel for the accused that the contradictions elicited through the cross examination of the interested

witnesses cannot be ignored. Rejection of the defence case will be far too strict and rigid a requirement for the defence to meet. The prosecution has failed to prove this case beyond all reasonable doubts. When the accused was acquitted from the charges under Section 302 IPC on benefit of doubt, the trial Court ought to have acquitted the accused from the charges under Section 498(A) IPC. The dying declaration cannot be relied upon as the dying declaration has not been certified by any doctor that the victim was in a fit state of mind to make such a statement. The statement made by the doctor in a nonchalant manner that, even a victim with 80% burn injuries can give a statement, cannot be accepted in this case. This dying declaration was not accepted by the trial Court and this cannot be accepted at the stage of appeal.

35. It is further submitted by the learned counsel for the accused that the dying declaration appears to be sketchy and cannot form the sole basis of conviction when the defence could elicit major contradictions through the cross examination of witnesses who can be branded as interested witnesses. Even the evidence of DW-1 reflects that prior to this incident he was not privy to any dispute between the accused and the deceased. I find substance in the submissions of the learned counsel for the accused.

36. The learned Additional Public Prosecutor has relied on the decision of Hon'ble the Supreme Court in the case of the *State of* ***Jharkhand Vs. Shailendra Kumar Rai @ Pandav Rai,*** reported in **(2022) 0 AIR (SC) 5393**. It is submitted that the appeal preferred by the State of Jharkhand was allowed despite the fact that dying declaration was recorded by the police in connection with Shailendra Kumar Rai's case (supra). This case is similar to the case at hand. The victim died due to burn injuries sustained by her. It was held by Hon'ble the Supreme Court in ***Shailendra Kumar Rai's case (supra)*** that:

> "***55. That certain witnesses including the family members of the deceased were declared hostile is insufficient to cast doubt upon the prosecution's case. It was not the prosecution's case that the hostile witnesses were eye witnesses to the crime. Rather, these witnesses' testimonies were relevant mainly to show that the deceased consistently stated that the respondent raped and murdered her, to different persons. The absence of evidence which establishes the consistency of the dying declaration over a period of time is not fatal to the prosecution's case. As noted previously, the dying declaration was recorded in the victim's words and read out to her, after which she affixed her signature on it."***

37. The case of Shailendra Kumar Rai (supra) is not similar to this instant case. The dying declaration in Shailendra Kumar Rai's case (supra) was recorded by the police on 07.11.2004. He recorded the statement of the victim under Section 161 CrPC and read out the contents to the victim. The

victim affixed her signature in the declaration in his presence, and he signed the declaration as well. The grandfather and the mother of victim and co-villagers affixed their signatures to the declaration and Dr. R.K. Pandey certified that the victim was fit to make a statement and affixed his signature to the statement. The IO Lallan Prasad (PW-11) has stated that R.K. Pandey was present when he recorded the statement of the victim.

38. *Per contra* in this case at hand, the dying declaration was not even discussed in the judgment by the learned trial Court. The dying declaration was not accepted as evidence by the learned trial Court. The IO recorded the statement of the victim under Section 161 CrPC. The victim's signature was not taken nor was there any certificate to the effect that the victim was in a fit state of mind to give her statement. This dying declaration requires corroboration. The evidence of witnesses are replete with contradictions. Major contradictions could be elicited through the cross examination of the witnesses. Unlike the case of ***Shailendra Kumar Rai (supra),*** the defence could elicit through the cross examination of the witnesses that they did not mention in their previous statements that the victim was subjected to cruelty by the accused to meet his illegal demand of dowry. It has to be borne in mind that all the witnesses being related failed to mention before the

Investigating Officer of any cruelty being meted out to the victim. DW-1 through his evidence did not incriminate that the accused and the victim had any dispute.

39. The learned counsel for the accused relied on the decision of Hon'ble the Supreme Court in Irfan *@ Naka Vs. The State of Uttar Pradesh reported in (2023) 0 AIR (SC) 4129* wherein it has been held and observed that:

> "*62. There is no hard and fast rule for determining when a dying declaration should be accepted; the duty of the Court is to decide this question in the facts and surrounding circumstances of the case and be fully convinced of the truthfulness of the same. Certain factors below reproduced can be considered to determine the same, however, they will only affect the weight of the dying declaration and not its admissibility: -*
>
> *(i) Whether the person making the statement was in expectation of death?*
>
> *(ii) Whether the dying declaration was made at the earliest opportunity? "Rule of First Opportunity"*
>
> *(iii) Whether there is any reasonable suspicion to believe the dying declaration was put in the mouth of the dying person?*
>
> *(iv) Whether the dying declaration was a product of prompting, tutoring or leading at the instance of police or any interested party?*
>
> *(v) Whether the statement was not recorded properly?*
>
> *(vi) Whether, the dying declarant had opportunity to clearly observe the incident?*
>
> *(vii) Whether, the dying declaration has been consistent throughout?*
>
> *(viii) Whether, the dying declaration in itself is a manifestation / fiction of the dying person's imagination of what he thinks transpired?*
>
> *(ix) Whether, the dying declaration was itself voluntary?*
>
> *(x) In case of multiple dying declarations, whether, the first one inspires truth and consistent with the other dying declaration?*
>
> *(xi) Whether, as per the injuries, it would have been impossible for the deceased to make a dying declaration?*
>
> *63. It is the duty of the prosecution to establish the charge against the accused beyond*

the reasonable doubt. The benefit of doubt must always go in favour of the accused. It is true that dying declaration is a substantive piece of evidence to be relied on provided it is proved that the same was voluntary and truthful and the victim was in a fit state of mind. It is just not enough for the court to say that the dying declaration is reliable as the accused is named in the dying declaration as the assailant."

40. In the case at hand, it is apparent that the dying declaration was recorded by the police. The statement of the victim under Section 161 CrPC can be considered as a dying declaration in this case. It is not discernible from the evidence of the MO, if the victim was in a fit state of mind to give a statement. In a matter-of-fact manner, the MO stated that a person with 80% injuries can give a statement. It cannot be ignored that the victim was suffering from burn injuries and she may not be able to affix her signature, but at the same time, the manner in which the dying declaration was recorded, leads us to believe that this dying declaration cannot be relied upon as the sole evidence to bring home the charges leveled against the accused. Moreover, the learned trial Court had already acquitted the accused from charges under Section 302 IPC.

41. The learned Additional Public Prosecutor has laid stress in her argument that the dying declaration reveals that the victim was subjected to cruelty and this dying declaration can be relied upon to uphold a conviction of the accused under Section 498(A) IPC. This argument of the learned Additional Public Prosecutor cannot be accepted in this case on hand. It is

also not discernible if the dying declaration was voluntarily made and whether the victim was in a fit state of mind when the dying declaration was made by the victim. Moreover the evidence is fraught with contradictions. Relating to the major contradictions elicited through the cross examination of all the witnesses, the decision of Hon'ble the Supreme Court in ***Darshan Singh Vs. State of Punjab,*** reported in **(2010) 2 SCC 333** is relevant, wherein it has been observed that:

> "*26. If the PWs had failed to mention in their statements u/s 161 CrPC about the involvement of an accused, their subsequent statement before court during trial regarding involvement of that particular accused cannot be relied upon. Prosecution cannot seek to prove a fact during trial through a witness which such witness had not stated to police during investigation. The evidence of that witness regarding the said improved fact is of no significance. [See : (i) Rohtash Vs. State of Haryana, (2012) 6 SCC 589 (ii) Sunil Kumar Shambhu Dayal Gupta Vs. State of Maharashtra, 2011 (72) ACC 699 (SC). (iii) Rudrappa Ramappa Jainpur Vs. State of Karnataka, (2004) 7 SCC 422 (iv) Vimal Suresh Kamble Vs. Chaluverapinake, (2003) 3 SCC 175]*"

42. In this case at hand, it has already been reflected in my foregoing discussions that the informant did not mention in her initial statement that her daughter was able to speak and her daughter stated that the accused set her ablaze on her failure to meet his illegal demand of dowry. The informant also did not mention in her initial statement that the accused demanded dowry from her daughter. This has been affirmed by the IO, PW-5. The PW-2 also did not mention before the IO in his initial statement that his daughter was set ablaze by the accused. When he got the news, he went to the

hospital to meet his daughter but the accused was not in the hospital with his daughter. He also did not mention before the IO that the accused assaulted his daughter and set her ablaze as she failed to meet his illegal demand of dowry. The victim's father PW-2 also did not mention under Section 161 CrPC that prior to the incident, the accused assaulted his daughter to meet his illegal demand of dowry. Similarly, PW-3 and PW-4, the younger sister and the brother of the victim also did not mention in their initial statement that the accused demanded dowry. They also did not mention that the accused assaulted the victim and set her ablaze.

43. In the wake of the foregoing discussions, it is thereby held that the conviction under Section 498(A) is not sustainable. It is true that the evidence of PW-1, PW-2, PW-3 and PW-4 are similar, but at the same time, it cannot be ignored that the witnesses never mentioned before the IO when their statements were recorded under Section 161 CrPC that the victim was subjected to cruelty. The IO has affirmed that PW-1, PW-2, PW-3 and PW-4 have not mentioned under Section 161 CrPC that the accused used to subject his wife to cruelty and demand dowry and he finally set her ablaze as she failed to meet his illegal demand of dowry. The dying declaration recorded by the police cannot be solely relied on to convict the accused under Section 302

IPC or Section 498(A) IPC. It is true that the evidence implies that the accused was staying with the victim alone and the accused had failed to discharge his burden by explaining why the victim sustained the fatal injuries, which led to her death. Moreover I disagree with the passing remark of the MO that a victim with 80% burn injuries can give her statement. The victim was in the hospital and no certificate was given by any doctor that the victim was in a fit state of mind. The statement of the victim was not recorded properly to be accepted as a dying declaration. Any prudent person may not find it plausible that a victim with 80% burn injuries will be able to make a dying declaration. It was thus the duty of the prosecution to establish the charges against the accused beyond all reasonable doubts, which the prosecution has failed.

44. The benefit of doubt must be extended to the accused. In this case at hand, it cannot be held that the dying declaration can be relied upon as a substantive piece of evidence and the same was voluntarily made and the victim was in a fit state of mind. Despite the fact that the accused was last seen with the victim, the accused was not held responsible for offence under Section 302 IPC or for offence under Section 304(B) IPC.

45. It is apt to reiterate that major contradictions could be elicited through the cross examination of the witnesses. The accused is thus not held guilty under Section 498 (A) IPC. The argument of the learned Additional Public Prosecutor has no leg to stand. This dying declaration which was not accepted by the learned trial Court cannot be relied on to uphold the conviction of the appellant/accused under Section 498(A) IPC.

46. When the prosecution has failed to prove the foundational facts, the accused cannot be held liable for the burn injuries sustained by the victim which led to her death. It would be apt to reiterate that the manner in which the dying declaration was recorded, it was correctly not accepted by the learned trial Court as the sole evidence to bring home the charges leveled against the accused. The major contradictions which could be elicited through the cross examination of the witnesses vis-a-vis the cross examination of the IO lends a benefit of doubt to the accused. The judgment and order of conviction does not stand the scrutiny of law. The judgment and order of conviction dated 21.12.2011 is hereby set aside and the accused is acquitted from the charges under Section 498(A) IPC on benefit of doubt.

47. However, keeping in view the provisions of Section 437-A CrPC, the

appellant, Sri Dulen Hati Baruah is directed to furnish a personal bond in the sum of Rs.30,000/- (Rupees Thirty Thousand) and a surety bond in the like amount before the learned trial Court, which shall be effective for a period of 6 (six) months.

48. Appeal is hereby allowed.

49. Send back the LCR.

JUDGE

Comparing Assistant