IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Bivas Pattanayak

C.R.A. 610 of 2016

Piyarul Sk
-Vs-
The State of West Bengal

For the Appellant : Mr. Arnab Saha, Adv.

Mr. Bibaswan Bhattacharyya appears as *Amicus Curiae.*

For the State : Ms. Zareen N. Khan, Adv.
Ms. Amita Gaur, Adv.

Heard on : 16.03.2022, 29.04.2022 and 17.05.2022

Judgment on : 20.05.2022

Joymalya Bagchi, J. :-

In the night of 17.09.2010, Hasina Khatun suffered burn injuries at her matrimonial home. Five years prior to the incident, she was married to the appellant Piyarul. They had fallen in love and married. Initially, Nurjaman Ali (P.W. 1), father of Hasina did not approve the match. Subsequently, he accepted Piyarul as his son-in-law. A son,

namely, Hasan was born to the couple. He was around 3½ years at the time of incident. Aruna Bibi (P.W. 10), sister of Hasina informed her parents about the incident. They came to the matrimonial home of Hasina and heard she had been shifted to Berhampore General Hospital. On the next day, i.e. 18.09.2010 they went to Berhampore General Hospital where it is claimed Hasina told them an altercation had cropped up between Piyarul and herself as she had received a phone call in the mobile phone of Piyarul from a lady. Piyarul became angry and set her on fire. In the morning of 20.09.2010, Hasina expired. On 21.09.2010, Nurjaman Ali (P.W. 1) lodged written complaint resulting in Daulatabad P.S. Case No. 149/10 dated 21.09.2010 under sections 498A and 302 of the Indian Penal Code. In the course of investigation, appellant was arrested and charge-sheet was filed against him. Charges were framed under sections 498A and 302 of I.P.C. against the appellant. Appellant pleaded not guilty and claimed to be tried. In the course of trial, prosecution examined 16 witnesses and exhibited a number of documents. It was the specific defence of the appellant that the incident occurred around 10:00 p.m. and he was not present at his residence. Hasina's saree accidentally caught fire from a lamp and she suffered burn injuries. Appellant and others removed her to hospital. After the death of Hasina, appellant was falsely implicated in the case.

After considering the evidence, the learned trial Judge by the impugned judgment and order dated 26.04.2016 and 28.04.2016

convicted the appellant for commission of offence punishable under section 302 of I.P.C. and sentenced him to suffer imprisonment for life and to pay a fine of Rs. 5,000/-, in default, to undergo simple imprisonment for six months more with a further direction that a sum of Rs. 3,000/- out of the fine, if deposited, be awarded to Hasan Ali, son of the deceased and the remainder be paid to the State to defray the expenses incurred in the prosecution.

Mr. Bibaswan Bhattacharyya as *Amicus Curiae* submits there are two sets of dying declarations made by the deceased. While P.Ws. 4 and 5 stated the victim told them she had suffered accidental burns, P.Ws. 1, 7 to 10 (relations of the deceased) stated the victim told them appellant had set her on fire. Trial Judge disbelieved both sets of dying declarations but relied on Hasan Ali, son of the deceased, to record a finding of guilt against the appellant. Hasan was six years of age at the time of his deposition in 2014 and would have been barely above two years at the time of the incident in 2010. Trial Judge erred in law in relying on a child witness who was barely three years of age at the time of occurrence and unable to appreciate the manner in which the incident occurred. He also disbelieved the alibi of the appellant as transpiring from P.W. 3, a tea stall owner, who stated that the appellant was present in his tea stall at the time of occurrence. There is no legally admissible evidence connecting the appellant with the murder. Hence, the appeal is liable to be allowed.

Learned Counsel for the appellant adopts the submission of Mr. Bibaswan Bhattacharyya.

Learned Counsel for the State argues Aruna Bibi, sister of the deceased arrived at the spot on the fateful night and the victim made a dying declaration incriminating her husband. Aruna informed her parents and on the next day when they went to the hospital, the victim told them her husband had set her on fire. Trial Judge erroneously disbelieved their versions. No reliance ought to be placed on P.Ws. 4 and 5 as their statements are contrary to the defence case that the victim accidentally caught fire from a kerosene lamp. Victim suffered 98% burns and died at the hospital. Her minor son, P.W. 17, vividly described the manner in which the appellant had set her on fire. Hence, prosecution case has been proved beyond doubt.

P.Ws. 1, 7 to 10 are the relations of the deceased. P.W. 1 is her father and first informant. He deposed Hasina was married to the appellant five years prior to the incident. She was tortured by the appellant. At the day of the incident, a phone call had come in the mobile phone of the appellant. His daughter had received the phone call. Appellant got angry and assaulted her daughter. Thereafter, the appellant put kerosene oil on his daughter and set her on fire. He came to the place of occurrence. His daughter stated that the appellant had set fire on her. She expired three days later in the hospital. After the death of his daughter, he filed written complaint which was scribed by P.W. 15,

Montu Mohuri (Mondal). He put his LTI on the inquest report prepared by police (P.W. 14) as well as Magistrate. During cross-examination, P.W. 1 stated there was a love affair between the appellant and his daughter. Initially, he did not support the marriage. His daughter went to the house of the appellant and married. Subsequently, he accepted the appellant as his son-in-law. He denied the suggestion that his daughter had suffered accidental burns around 10:00 p.m. at night.

Salema Bibi (P.W. 7) is the mother of the deceased. She deposed appellant had illicit relationship with a lady. As Hasina protested, the appellant assaulted her. Torture began after the birth of a son to the couple. Her elder daughter Aruna Bibi (P.W. 10) informed them that appellant had set Hasina on fire. They went to the matrimonial home of Hasina but could not find her. On the next day, i.e., 18.09.2010, they went to Berhampore New General Hospital. Hasina told them she had received phone call on the mobile of Piyarul. Piyarul became angry and threatened her. Thereafter, he set her on fire. Her version is corroborated by her sons Abu Taher (P.W. 8) and Abu Sayed Sk (P.W. 9). Aruna Bibi (P.W. 10) deposed she is a resident of Nowdapara where the appellant also resided. On the day of the incident, hearing hue and cry, she rushed to the matrimonial home of Hasina and found her in burnt condition. Hasina told her father of Hasan had set fire on her. Appellant and his mother took Hasina to hospital. She reported the incident to her parents. Hasina died after three days in hospital. In cross-examination, after three

days she informed the incident to police. Three days thereafter police interrogated her.

These witnesses have spoken of incriminating oral dying declaration made by the victim firstly, on the night of the incident to Aruna Bibi (P.W. 10) and, thereafter, on the next day in the morning to her parents (P.Ws. 1 and 7) and her brothers (P.W. 8 and 9).

Trial Judge has rightly disbelieved this aspect of the prosecution case.

P.W. 1, father of the victim has not corroborated Aruna. P.W. 1 is completely silent both in F.I.R. as well as in Court that Aruna had come to their house and informed them that the victim had stated that the appellant had set fire on her. Though P.Ws. 7 to 9 claimed Aruna heard the incident from the victim and reported the matter to them, this vital witness as per investigating officer (P.W. 16) was not ever at her residence and was belatedly examined on 29.09.2010, that is, about eight days after the registration of F.I.R.

In view of the aforesaid circumstances, trial Judge was unwilling to rely on Aruna Bibi, P.W. 10, and give credence to her version that the victim had made an oral dying declaration to her on the very night of the incident. Even the oral dying declaration claimed to be made by the victim in the morning of the next day, i.e., 18.09.2010 to her relations appears to be doubtful when one juxtaposes such evidence against the notings of the medical officer (P.W. 13) in the treatment sheet marked as

Exhibit-8. P.W. 1, 7 to 10 stated they visited the victim at Berhampore New General Hospial in the morning of 18.09.2010. P.W. 9 stated they had been to the hospital around 7:00 a.m. At that time, the victim made dying declaration to them. However, P.W. 13 examined the victim around 8:50 a.m. on that day and found her unconscious. He also noted no relations of the victim were present at that hour. These notings of the medical officer with regard to state of consciousness of the victim in the morning of 18.09.2010 and the absence of her relations in the hospital casts serious doubt whether the victim was at all conscious and in a fit state to make statement to her relations at that hour.

In this backdrop, trial Judge rightly discounted the evidence of the relations of the victim with regard to dying declaration made to them in the morning of 18.09.2010.

Another set of exonerative dying declarations is transpiring from the evidence on record.

P.W. 4, Jyotsna Bibi, is a neighbour of the appellant. She deposed hearing hue and cry, she came to the residence of the appellant and found Hasina had caught fire. Victim was removed in a rickshaw van. In cross-examination, she stated she saw mother-in-law was pouring water on Hasina's body. Hasina told her she had caught fire from the oven. Piyarul took her to hospital.

P.W. 5 (Anowar Hossain), rickshaw van owner is a hostile witness. He altered his version in Court and stated victim told him at the time of cooking she had caught fire.

Trial Court rightly disbelieved the so-called exonerative dying declarations made to the aforesaid witnesses. P.W. 5 spoke about the exonerative dying declaration for the first time in Court. His deposition in Court is at variance to his earlier statement to police wherein he had stated he heard appellant and his mother suggesting Hasina to state that she had accidentally caught fire as the mosquito net in the room got burnt from a kerosene lamp. Hence, this witness is wholly unreliable.

Moreover, these exonerative dying declarations are even inconsistent with the defence of the appellant. During his examination under section 313 Cr.P.C. appellant claimed victim's saree had accidentally caught fire from a lamp but P.Ws. 4 and 5 stated victim claimed to have caught fire while cooking. No oven or cooking utensils were recovered from the room where the victim had caught fire.

These circumstances weighed heavily with the trial Judge who rightly discarded the evidence of these witnesses with regard to the so-called exonerative dying declaration.

Trial Court also did not believe the abili of the appellant that he was not present at his residence when the incident occurred. With regard to his alibi, appellant has relied on P.W. 3, a tea stall owner. He claimed on the fateful night, appellant had come from Islampur by bus and was

in his shop around 9:00 p.m. Suddenly, they heard hue and cry from the house of the appellant and rushed to the spot. P.W. 3 found Hasina lying in a ditch and her mother-in-law was pouring water on her body. Thereafter, she was removed in a rickshaw van to hospital. P.W. 3 was rightly disbelieved by the trial Judge. He claimed appellant had come from Islampur by bus and was in his tea stall around 9:00 p.m. when the incident occurred. Defence of the appellant as transpiring from the trend of cross-examination as well as his statement during his examination under section 313 Cr.P.C. show he claimed the incident occurred at 10.00 p.m. and not 9:00 p.m. as contended by P.W. 3. Appellant has also not uttered a single word with regard to his returning from Islampur by bus as stated by the said witness. Thus, version of P.W. 3 is untrustworthy and not even congruous with the defence taken by the appellant. There are other circumstances which improbabilises P.W. 3. Sketch map prepared by the investigation officer. P.W. 16 and marked as Exhibit-11 does not show the presence a tea stall in the vicinity of the house of the appellant. P.W. 3 was unable to produce documents to show that he was carrying on such business near the place of occurrence. P.W. 3 claimed he saw the body of the victim lying in a ditch near the house of the appellant. There is no ditch near the house of the appellant as per the sketch map prepared by the investigation officer. None of the witnesses stated the body of the victim was lying in a ditch near the house of the appellant. Trial Court rightly observed the facts and circumstances of the

case improbabilises P.W. 3 with regard to the time of occurrence. Evidence on record shows victim was promptly brought to Islampur Hospital in a van rickshaw. It took 20 minutes to arrive at Islampur Hospital. Referral card (Exhibit-7) of Islampur Hospital shows the victim was referred to a higher medical centre for better treatment around 1:40 a.m. As the victim had been promptly brought to Islampur Hospital after the occurrence and immediately thereafter referred to a higher medical centre around 1:40 a.m., it is unlikely that the incident occurred around 9:00 p.m. On the contrary, the circumstances are consistent with the prosecution case that the incident occurred around midnight and, immediately thereafter, the victim had been shifted in a van rickshaw to Islampur Hospital from where she was referred to Berhampore New General Hospital. For these reasons, I am in agreement with the trial Judge that the alibi of the appellant is not believable.

The Trial Court strongly relied on the evidence of the child witness Hasan Ali who was summoned by the Court under section 311 Cr.P.C. and examined to arrive at a just decision of the case as P.W. 17.

Hasan stated he was six years old at the time of his examination on 28.11.2014. The Court put various questions to the child witness to test his understanding and capacity to depose. Upon being satisfied with the competence of the witness to depose, trial Judge recorded his evidence. Hasan deposed his mother sustained burns and passed away. He was in the house when the incident occurred. His father lit fire with a stick and

burnt her. He closed the door from outside. He had gone outside to urinate and saw his father set his mother on fire inside the house. A person tried to open the door but his father kicked him. His mother was removed by his father and two persons to Islampur Hospital. She did not state anything at that time. His mother passed away in hospital. He stated the incident happened in midnight. He was unable to state the time from the clock in Court. After the death of his mother, he started living in his maternal uncles' house. In cross-examination, he stated he learnt about his mother having sustained burn injuries and passing away at his maternal uncles' house.

Trial Court relied on the aforesaid witness and came to a finding of guilt against the appellant. When the prosecution primarily rests on the evidence of a child witness, it is the duty of the Court to examine the evidence of the said witness with utmost care and circumspection. A child of tender years is prone to prompting and tutoring. Hence, an onerous duty is cast on the Court to examine the deposition of a child witness not only on his capacity and ability to understand circumstances but also on the possibility of the witness being tutored by persons who have control and custody over him. In the F.I.R. P.W. 1 claimed Hasan was 3½ years at the time of the incident. But during his examination in Court on 28.11.2014 he claimed he was six years old. By such estimation he would be barely two years when the incident occurred. No clear proof

with regard to the actual age of the child at the time of incident is forthcoming.

On an approximation from the evidence on record, it appears the child was between 2-3½ years at the time of the incident. While admissibility of the evidence of a child witness is dependent on his ability to understand questions put to him and give rational answers thereto as per section 118 of the Evidence Act, probative value of his deposition would dependent on an additional factor, that is, his capacity to comprehend and understand the events at the time of occurrence.

In the present case, though the child witness was six years old at the time of his examination and was capable of answering questions, rationally, it must be borne in mind he was deposing with regard to events which occurred in 2010 when he was barely 3½ years old (as per F.I.R.) and not even two years old (as per his own deposition in Court). The extremely tender age of the child witness, that is, between 2-3 years at the time when the incident occurred gives rise to serious doubt whether the said witness was able to comprehend the circumstances in which her mother had suffered burn injuries and died. I am further prompted to come to such a conclusion as the child witness stated these facts for the first time in Court after four years of the incident. During this time he was in the control and custody of her maternal grandparents and uncles. Had the child understood the circumstances in which her mother had suffered burn injuries, he would have certainly divulged

them to his maternal grandparents and uncles. None of these relations have deposed that Hasan told them that the appellant had set his mother on fire. In the absence of corroboration from the relations of the deceased who had custody of the child I find it difficult to rely on his evidence narrated for the first time in Court after four years. It is also relevant to note that he had neither been interrogated by police nor cited as a witness for the prosecution. On the other hand, it is possible upon being summoned by the Court he had been tutored by his maternal grandparents/uncles to depose against the appellant. An in-depth scrutiny of his deposition also reveals various inconsistencies or exaggerations. In one of the part of his deposition, he stated he was in the room when his mother was set on fire, while in another part he stated he went out of the room to urinate and saw his father set his mother on fire. Incident occurred in the dead of the night and it is highly improbable a child barely three years old would go out on his own to urinate outside the house. He stated his father had locked the door of the room where his mother was burning from outside and had kicked a man who had tried to open the door. These events as narrated by the witness is wholly inconsistent with his deposition that the appellant had immediately after the incident brought a rickshaw van and removed his mother to hospital. Deposition of the child witness is, therefore, fraught with inconsistencies and exaggerations. Extreme tender age of the witness at the time of occurrence and the fact he had not narrated such facts to his

grandparents or uncles with whom he had been residing for the last four years give rise to serious doubt as to his maturity to understand circumstances leading to the death of his mother. Hence, it would be unsafe to rely on this witness to come to a finding of guilt against the appellant.

However, the evidence on record unequivocally established that at night of 17.09.2010 the victim housewife had suffered extensive burn injuries at her matrimonial home resulting in her death.

P.W. 13, Dr. Md. N. Rahaman, medical officer who treated the victim at Berhampore General Hospital noted she had suffered 80% burn injury. P.W. 11, Dr. Swapan Kr. Mondal, post mortem doctor deposed he found burn injuries all over her body except scalp, i.e., 98% burn. He opined death was due to cardio respiratory failure owing to shock resulting from burn injury, ante mortem in nature. However, post mortem doctor did not opine whether the death was homicidal or not.

If the child witness is not believed, there is no direct evidence how the victim housewife suffered burnt injuries. While prosecution insists appellant had set her on fire, it is the defence version she suffered accidental burns when her saree caught fire in a kerosene lamp. Attending facts and circumstances of the case do not wholly rule out the possibility of accidental burns. Immediately after the incident, appellant brought a rickshaw van and took the housewife to Islampur Hospital and, thereafter to Berhampore General Hospital. Had he intended to

murder his wife, would he be so prompt to take her to hospital to save her life? Prosecution case that such effort was a mere ruse as mother-in-law of the victim was heard prompting to the latter that she should state that she suffered accidental burns is not supported by the rickshaw van puller, (P.W. 5) who is alleged to have heard such statement. P.W. 5 did not support the prosecution case in Court and was declared hostile. Under such circumstances, trial Court erred in law in relying on his previous statement to the investigating officer which was denied by him in Court. Appellant had stated that the victim had suffered accidental burn from the kerosene lamp. Kerosene lamps are ordinarily available in every village home. Recovery of half full bottle of kerosene and a burnt mat from the place of occurrence does not rule out the possibility of accidental burn as much as it does not lead to the inevitable conclusion of homicidal death. No investigation with regard to other compelling circumstances, namely, presence of smell of kerosene oil on the body or in the wearing apparels of the victim were undertaken to rule out the possibility of accidental burn. These loopholes in the prosecution case leave a lingering doubt that the victim may have suffered accidental burn injuries which prompted her husband that is the appellant and her mother-in-law to take all measures to save her life.

In this backdrop, I am inclined to extend the benefit of the doubt to the appellant and acquit him of the charge levelled against him.

Conviction and sentence of the appellant is set aside.

The appellant shall be released from custody, if not wanted in any other case, upon execution of a bond to the satisfaction of the trial court which shall remain in force for a period of six months in terms of section 437A of the Code of Criminal Procedure.

The appeal is, accordingly, allowed.

In view of disposal of the appeal, connected application, if any, is also disposed of.

I record my appreciation for the able assistance rendered by Mr. Bibaswan Bhattacharya, learned advocate as *Amicus Curiae* in disposing of the appeal.

Let a copy of this judgment along with the lower court records be forthwith sent down to the trial Court at once.

Photostat certified copy of this judgment, if applied for, shall be made available to the appellants upon completion of all formalities.

I agree.

(Bivas Pattanayak, J.) **(Joymalya Bagchi, J.)**

PA (Sohel)