
Paresh Basak and Another Vs State of West Bengal

C.R.A. No. 280 of 1998

Court: Calcutta High Court

Date of Decision: Nov. 25, 2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) " Section 161, 313#Penal Code, 1860 (IPC) " Section 300, 302, 307, 34, 498A

Citation: (2012) 3 CHN 200 : (2012) 2 DMC 149

Hon'ble Judges: J.N. Patel, C.J; Ashim Kumar Roy, J

Bench: Division Bench

Advocate: Tapas Kumar Ghosh and Ms. Archita Sen, for the Appellant; Prabir Mitra, Advocate and Ms. Anita Gaur, for the Respondent

Final Decision: Dismissed

Judgement

J.N. Patel, C.J.

In Session Trial No. 1 of 1997 (Session Case No.51 of 1992) the appellants Paresh Basak and Pratima Basak were tried

on the charge of having committed offences punishable under Sections 498A/302/34 of the Indian Penal Code for having committed murder of

Smt. Pratima Basak and having treated her with cruelty. The learned Additional Sessions Judge, 2nd Court, Suri, Birbhum by judgment and order

6.8.1998 found the appellants guilty of having committed offences punishable u/s 302/34 of the Indian Penal Code and sentenced them to suffer

imprisonment for life and to pay a fine of Rs. 2000/- each, in default to suffer further imprisonment for three months. The Court also found them

guilty of having committed offences u/s 498A of the Indian Penal Code and sentenced them to suffer rigorous imprisonment for 2 years and to pay

a fine of Rs. 1,000/- each, in default to suffer further rigorous imprisonment for two months and, therefore, this appeal.

2. It is prosecution case that Pratima Basak alias Chanu was given in marriage to the appellant No.1 namely Paresh Basak on 7th Jaistha, 1398

B.S. i.e. on 22.5.1991. Immediately after marriage, the deceased Pratima Basak went to reside with her husband. According to the prosecution,

Pratima was treated with cruelty and tortured by her husband and his family members and particularly by her Mejo Ja, second brother's wife

(sister-in-law) i.e. wife of Pawan Basak, viz., Pratima Basak, appellant/accused no.2 and they made her life miserable. The fact of such cruel

treatment and mental and physical torture was made known to Bablu Basak, the brother of the deceased and her relatives by Pratima from time to

time and also by writing letters. The reason given for such ill-treatment was that her husband Paresh Basak had illicit relation with Pratima her mejo

ja, wife of Pawan Basak. Therefore, he did not take care of her and her husband and sister-in-law wanted to get rid of her and often coaxed her to

end her life.

3. On 9.8.1991, at about 8 a.m. when Pratima @ Chanu was preparing tea, her husband, Paresh Basak and Pratima Basak (mejo ja) accosted

her and Pratima (mejo ja) poured kerosene on her person and her husband set her ablaze with matchstick.

4. Bablu Basak, P.W.1 came to know that his sister Pratima alias Chanu had been admitted to a nursing home of Dr. Sushil Babu at Sainthia

having sustained burn injury. Therefore, he along with his mother visited the nursing home of Sushil Babu and saw his sister in an unconscious

condition, but they were prevented from meeting Pratima (deceased). Bablu, P.W.1 went to Sainthia Police Station and lodged a written complaint

(Exbt. 1) and returned to the nursing home. The complainant, Bablu Basak having found that his sister was not given proper treatment, got her

removed to Sainthia Hospital. From Sainthia Hospital the patient was sent to Suri Sadar Hospital in an ambulance in the evening.

5. In the meantime, S.I. Tapan Kumar Sinha, P.W.11 after registering police case being No.71 dated 9.9.1991 u/s 498A/307 visited Sushil

Babu's nursing home and recorded the statement of Pratima (victim) and learnt that her husband Paresh Basak and Pratima Basak (mejo ja) were

responsible for setting her ablaze. He collected the wearing apparels (material Exbt. No.1) from the nursing home i.e. one print saree (burnt), petty

coat (burnt) and read blouse (burnt). He, thereafter, visited the place of occurrence and prepared a sketch map (Exbt. 14) and recorded statement

of witnesses. On his transfer he handed over the investigation to S.I. Md. Ali Khan. At Suri Sadar Hospital Pratima (deceased) came to be

admitted on 9.8.1991 at 11.25 p.m. She was examined by Dr. Ajay Sen and he found that she had more than 65 % burn injuries on her body but

was fully conscious. Therefore, he requested District Medical Officer for requisitioning of an Executive Magistrate for recording her statement.

6. On the next day i.e. 10.8.1991 at 12.00 noon S.K. Mallick, P.W.10, Executive Magistrate visited Suri Hospital. The Medical Officer identified

the patient Pratima, whose statement was to be recorded. In his presence Medical Officer certified that the patient was capable to give a dying

declaration. Therefore, he recorded the dying declaration (Exbt. 5) of the patient. As the patient was not in a position to put her signature on the

dying declaration he took the R.T.I. of the patient on the dying declaration as the left thumb of the patient was damaged by burns.

7. On 30.8.1991 at 6.00 a.m. Pratima died in the hospital. The police were informed. S.I. Samar Bhattacharya visited female surgical ward of Suri

Sadar Hospital at 8.30 a.m. After necessary identification of the deadbody he prepared a inquest report (Exbt.2). To find out the real cause of

death the deadbody was shifted to the morgue at Suri by Apu De, P.W.8 Police Constable No.211. The post-mortem examination was

conducted by Dr. Ashok Kumar Ray, P.W.9. Thereafter, the deadbody was handed over to relatives of the deceased for cremation. S.I. M. Ali

Khan, P.W.7 seized Photostat copies of letters handed over by the complainant, Bablu Basak and after completing the investigation filed

chargesheet.

8. In answer to the charge, the appellants pleaded not guilty and claimed to be tried.

9. On conclusion of the trial learned Additional Sessions Judge found the appellants/accused guilty of having committed offences punishable under

Sections 498A/302 read with Section 34 of the Indian Penal Code. Primarily relying on the dying declaration made by the victim and convicted

and sentenced them accordingly.

10. Learned Counsel appearing for the appellants/accused submitted that the prosecution case rests on certain letters alleged to have been written

by the victim to her brother and family members and the three dying declarations and there is no direct evidence or eye witnesses to the incident.

11. It is submitted that the prosecution has failed to prove that the letters were written by the victim and, therefore, the learned Trial Court has

committed a grave error in placing reliance on the alleged letters in order to come to the conclusion that the appellants/accused have treated the

victim with cruelty.

12. It is submitted by the learned counsel appearing for the appellants/accused that the dying declaration recorded by the Magistrate i.e. P.W.10

cannot be the basis of conviction as before recording of dying declaration of the victim the learned Executive Magistrate ought to have obtained a

certificate of the doctor about physical and mental condition of the declarant that she was in a position or capacity to make the statement but there

is no positive evidence on record to show that the victim was in sound mental and physical condition before her statement came to be recorded.

Further the thumb impression of the victim which had been obtained is not attested by the Executive Magistrate. It appears to have been taken on

a blank paper which was subsequently filled in as can be inferred from the observation made by the learned Trial Court who found the gap

between the last portion of the statement and the thumb impression for which no explanation has been offered by the prosecution and therefore it

creates doubt on the veracity of the statement which is alleged to be recorded on 10.8.1991 by way of dying declaration.

13. It is submitted that no time has been mentioned on the dying declaration to show when it was recorded and there are discrepancies in the

evidence of the witnesses regarding time of recording of the alleged dying declaration and so also in respect of the presence of doctor at the time of

giving dying declaration by the victim. It is submitted that the learned Executive Magistrate, P.W.10 has admitted in his evidence that the doctor of

Suri Hospital was not present during recording of the dying declaration.

14. It is submitted that the learned Trial Court erred in overlooking the deficiencies in recording of the dying declaration by the learned Executive

Magistrate and ought to have discarded the same. It is submitted that in all the prosecution has placed reliance on the three statements of the

victim, viz., (a) in the statement recorded u/s 161 Code of Criminal Procedure the victim stated that both the appellants/accused are responsible

for the fire caught by her when she was preparing tea; (b) before the doctor victim stated on his enquiry that her husband is only responsible for the

fire caught by her and (c) before the Executive Magistrate the victim stated that both the appellants/accused are responsible for the fire caught by

her.

15. Therefore, considering the discrepancies in the three dying declarations the learned trial Court ought to have given benefit of doubt to the

appellants/accused. On the contrary learned judge has taken the aid of the statements recorded u/s 161 of the Code of Criminal Procedure by the

victim only to the extent which helps the prosecution and ignored the portion of the statement u/s 161 of the Code of Criminal Procedure which

demolishes the prosecution case.

16. It is submitted that the prosecution has failed to examine the material witnesses who would have given a clear and true picture of the actual

incident and cause of death of the victim lady and also failed to tender some chargesheeted witnesses for the reasons best known to them and as

such failed to prove the charges against the appellants/accused beyond reasonable doubt and, therefore, they deserve to be acquitted.

17. On the other hand, learned counsel appearing for the State submits that the prosecution has established the case against appellants/accused

beyond a shadow of doubt. It is submitted that the neighbours and persons who were examined by the prosecution have turned hostile and,

therefore, prosecution case rests on the evidence of the complainant, Bablu Basak, P.W.1, the letters written by the victim to her family members

and brother and the three dying declarations. It is submitted that in cross-examination it is not disputed that the letters are not in the hand-writing of

the victim and the contents of the letter clearly go to show the cruel treatment meted out to the victim at her in-laws' place for the reason that the

victim objected to illicit relation between her husband and mejo ja.

18. Learned counsel appearing for the State fairly conceded that this is not a case which can be called dowry death but the prosecution has

sufficiently established that the victim was treated with cruelty and done to death within three months of her marriage so as to get rid of her. It is

also submitted that the three dying declarations are consistent and reliable.

19. It is submitted that at the very first instance the statement of the victim that came to be recorded by the police officer clearly indicates that both

the appellants/accused are the persons responsible for setting the victim on fire and when the victim was shifted to government hospital, the

Medical Officer who attended the victim also recorded her statement as to cause of burn wherein she has stated that her husband is responsible for

the burn injury suffered by her. This does not necessarily mean that the victim exonerated the appellant/accused Pratima, her mejo ja which

according to the prosecution is clearly reflected in the dying declarations recorded by the Executive Magistrate, P.W.10 wherein the victim has in

clear terms stated as to how kerosene was poured upon her by the appellants/accused Pratima and she was set on fire by her husband, Paresh

Basak. It is submitted that not only the Executive Magistrate has given evidence to the effect but in his presence the doctor has examined the victim

and certified her to be fit to give statement and, therefore, the prosecution has brought on record that the victim was physically fit and fully

conscious at the time of giving statement and the doctor in his evidence has deposed that the statement was recorded in his presence. Therefore, it

cannot be said that the Executive Magistrate on his own has recorded the dying declarations.

20. It is submitted that nothing has been brought on record to show as to why these independent witnesses would falsely implicate the

appellants/accused. It is, therefore, submitted that the prosecution has sufficiently proved the case against the appellants/accused and the appeal

deserves to be dismissed.

21. We have heard learned counsel for the appellants/accused as well as learned counsel for the State and gone through the evidence on record.

Only point which arises for determination is whether the appellants/accused have committed murder of Pratima alias Chanu by pouring kerosene

on her person by setting her ablaze.

22. It is not disputed that Pratima Basak alias Chanu suffered death due to burn injuries which she suffered at her father-in-law's house at Sainthia

Murerdihi Colony. It is true that the prosecution did not examine Dr. Sushil Banerjee or any of his staff in whose nursing home she was admitted at

the first instance nor the appellants/accused felt it necessary to call Dr. Sushil Banerjee or any staff member of his nursing home or medical papers

by way of defence. It has come in the evidence of Bablu Basak, P.W.1, complainant brother of Pratima Basak alias Chanu, that he went along

with his mother to the nursing home of Dr. Sushil Banerjee and saw from a distance his sister in a senseless condition. He was prevented by nursing

staff to see her. First thing he did was he went to Sainthia P.S. to lodge a written complaint and on his return he found that the treatment given to

his sister was not proper. He took her to Suri Sadar Hospital. From Sainthia Hospital the patient was shifted at Suri Sadar Hospital in an

ambulance. At Suri Sadar Hospital Pratima Basak (victim) was examined by Dr. Ajay Sen, P.W.5.

23. In the Court Dr. Ajay Sen had deposed that on 9.8.1991 Pratima (victim) was brought and admitted in their hospital at 11.25 p.m. being

referred from Sainthia PHC he examined and found more than 60% burn injury on her person including face, chest, back, arm and legs but patient

was fully conscious and therefore, on the very day he requested District Medical Officer for recording her statement. On 30.8.1991 at 6 a.m. the

patient died. After Pratima succumbed to her injuries, the police were informed and they visited the Hospital and prepared the inquest report

(Exbt.2). Thereafter, the deadbody was sent for post-mortem examination. The post-mortem was conducted by Dr. Ashok Kumar Ray, P.W.9.

24. In his evidence, Dr. Ashok Kumar Ray stated that he examined one Pratima Basak, Hindu female aged about 22 years in connection with Suri

P.S. Case No.204 dated 30.8.1991. The deadbody was identified by Con. No.211 Apu Dey of Suri P.S. On examination he found a female

body of average build and height, rigormortis present in the both upper and lower limbs, infected burn wound involving both lower limbs upto mid

thigh, abdomen, both upper limbs, whole of back and gluteal and some parts of forehead. He found no other injury on the dead body. In his

opinion death was due to septicaemia following above stated burn which was ante mortem in nature.

25. In cross-examination of Dr. Ray, P.W.9 there is no suggestion made to show that the victim did not die due to burn injury suffered by her on

the other hand the opinion of the doctor that death was due to septicaemia which was ante mortem in nature goes unchallenged.

26. Therefore, there can be no doubt that the victim Pratima Basak died due to burn injuries.

27. The question which remains to be examined whether the burn injuries suffered by the victim was accidental or homicidal as it is nobody's case

that the victim tried to commit suicide. In order to establish that the victim suffered homicidal death the prosecution relies upon the three dying

declarations.

28. The first dying declaration came to be recorded by S.I. Tapan Kumar Sinha, P.W.11. In his evidence this witness has stated that after

receiving the written complaint (Exbt.1/2) from Bablu Basak he registered Suri Police Station Case No.71 dated 9.9.1991 under Sections

498A/307 of the Indian Penal Code and filled up formal F.I.R. form (Exbt.1/3) and in the course of his investigation he had been to Sushil Babu's

nursing home and seized wearing apparels of the victim and also examined Pratima Banerjee (Basak) at the nursing home. He recorded her

statement u/s 161 of the Code of Criminal Procedure. According to him, "" the victim stated to me at nursing home that her husband accused

Paresh and Pratima Basak (mejo ja) are guilty for setting fire on her body"". This is the verbatim statement of the deceased Pratima Basak.

29. This was strongly objected to by the learned counsel appearing for the defence on the ground that it is not admissible in evidence. It appears

from the evidence that the trial Court overruled the objection and marked the portion in red ink and gave it Exbt.13. The portion marked Exbt.13

reads ...for setting me on fire my husband Paresh and my second sister-in-law (mejo ja) are solely responsible....they always tortured

me....Occasionally the second sister-in-law used to tell him to kill me....that I would never get back my husband.

30. This part of the evidence of S.I. Tapan Kumar Sinha, p.w.11 has gone unchallenged. On going through the overall evidence of this witness we

find that there is nothing to suggest that the victim or the police officer was tutored or influenced at the time the victim's statement came to be

recorded.

31. The second dying declaration is recorded by Dr. Ajay Sen, P.W.5 which is marked Exbt.7. According to Dr. Ajay Sen, P.W.5 on 9.8.1991

one Pratima Basak alias Chanu was brought and admitted in their hospital at 11.25 p.m. being referred by Sainthia PHC. The patient was admitted

in the hospital and was under his treatment. He has stated that when the patient was first produced before him she was not in good condition. He

made certain enquiry from her for the cause of such burning. She replied that the burn injury was caused by her husband, Paresh Basak when she

was preparing tea at 8.00 a.m. in the morning. Therefore, he wrote the reply in his own hand-writing in English which is marked Exbt. 7. (the

endorsement made by the doctor in the case paper). The patient stated that the burn injuries were caused by her husband Paresh Basak that she

was forcibly injured when she was making tea at about 8.00 a.m. There is further endorsement by the doctor that the patient has given her

statement in front of the staff nurse, viz., Archana Das and Asima Mandal.

32. The third dying declaration is recorded by S.K. Mallick, Executive Magistrate, P.W.10.

33. In his evidence before the Court this witness has stated that he deputed Sri A.K. Patra, WBCS for recording the dying declaration of the

patient, who reported his illness as such. On considering the urgency he had been to Suri Sadar Hospital. He found the patient who was identified

by the Medical Officer-in-Charge of Suri Hospital. On examination, Doctorbabu told that the patient is capable to give dying declaration. MO

certified the capability of dying declaration of the patient. Thereafter, he recorded the dying declaration of the patient which is signed by him. The

patient was not in a position to put her signature on the dying declaration as the left thumb of the patient was damaged by burning. He took RTI of

the patient. The dying declaration is marked Exbt. 5/2. English translation of Exbt. 5/2, the dying declaration of the victim is as under :

34. Being ordered by the Sub-Divisional Magistrate, Suri Sadar, I Sri Samarendra Kumar Mallick, WBCS, Executive Magistrate, deployed Sri

A.K. Patra, WBCS, Executive Magistrate to record the dying declaration of Smt. Pratima Basak, wife of Sri Paresh Basak, of Murerdihi Colony,

Sainthia, Birbhum. It was reported by Sri Patra that he was ill. In view of the said fact, I took the declaration of Smt. Pratima Basak, wife of Sri

Paresh Basak. The declaration was recorded by my own hand in the following manner and was recorded in the Surgical Ward (Female) of Suri

Sadar Hospital today at 12.45 hours. It was recorded after obtaining fit certificate of the M.O.

1 What is your name ? What is your age ?/ Pratima Basak. 18 years.

2 What is the name of your husband?/Paresh Basak.

3 Where is your in-laws" house (matrimonial home)?/ Sainthia Murerdihi Colony.

4 Did you use to live in the matrimonial home?/Yes.

5 How did you catch fire?/ In the morning yesterday (9/9/91) when I was preparing Ginger Tea (in the heater inside the kitchen) my husband held

me fully with his both arms and my second sister-in-law poured kerosene oil on my body. Thereafter my husband set me on fire by lighting match

stick. When I started shouting, he pushed me down and I became unconscious. I do not know what happened thereafter.

6 How long have you been married?/ About three months.

7 Over which matters, did quarrel use to take place between you, I mean, yourself and your husband?/ He did not love me. He used to disturb

peace since the marriage.

8 Did he use to tell you to bring different articles and money from your father"s house?/ Yes. This time he had asked me to bring 5000 rupees and

a dressing mirror from the brother (Dada).

35. Recorded by me. Read out and explained.

36. Admitted to be correct.

Sd/-(Illegible)

10/8/91 (12.45 hrs)

RTI of Sm. Pratima Basak,

w/o Sri Paresh Basak

Sd/- (illegible)

Executive Magistrate, Birbhum, Suri

10/8/91 (12.45 hrs)

37. Exbt. 5 is the endorsement of Dr. Ajay Sen, Medical Officer wherein he has noted that Smt. Pratima Basak, wife of Paresh Basak is fit to give

her dying declaration which may be treated as dying declaration.

38. Therefore, it can be seen that this is a case having more than one dying declaration of the victim and the principle normally followed for

ascertaining the reliability of the dying declaration, in such case is, each dying declaration is to be considered independently on its own merit as to

its evidentiary value and one cannot be rejected because of the contents of the other. However, it is the duty of the Court to consider each of them

in its correct perspective and record its satisfaction as to which one of them reflects the true state of affairs. What is required to be seen is that the

dying declaration should represent a truthful version of the incident and that there is consistency, particularly in material particulars in all the dying

declarations.

39. We have no hesitation to hold that all the three dying declarations are consistent and there is no reason to doubt their authenticity. The first one

is recorded by the police officer by way of statement u/s 161 of the Code of Criminal Procedure, at the very initial stage i.e. when he had gone to

the Sushil Babu's nursing home for the purpose of investigation of the case and at that period of time it has come on record in the evidence of

Bablu Basak (P.W.1) that they were not allowed to meet the victim, Pratima. Therefore, question of tutoring or influencing her does not arise. The

second one came to be recorded by way of endorsement on the medical case paper by Dr. Ajay Sen (P.W.5) the Medical Officer in the

Government Hospital where the victim was admitted. The doctor specifically stated that he felt the necessity of requisitioning the Executive

Magistrate for recording the dying declaration and, accordingly, informed the Medical Officer on duty. This endorsement on the medical case

paper can safely be considered as dying declaration made to the Medical Officer by the patient. On his making enquiry from her about the burn

injuries on her person, the patient has clearly indicated that the burn injuries were caused by her husband Paresh Basak and that she was forcibly

injured when she was making tea at about 8 a.m. in the morning and the third dying declaration is recorded by the Executive Magistrate. We find

there is endorsement by the Medical Officer as to the capability of the victim to make her statement and she has clearly implicated both the

appellants/accused when she was questioned as to how did she catch fire.

40. Learned counsel appearing for the appellants/accused submitted that in the second dying declaration which is recorded by way of endorsement

by the Medical Officer there is no mention of the name of the appellants/accused No.2 Pratima Basak (mejo ja). But this does not mean that

Pratima Basak (mejo ja) has been falsely implicated in the subsequent dying declaration recorded by the Executive Magistrate. We could have

accepted this contention of the learned counsel appearing for the appellants/accused that the possibility of falsely implicating Pratima Basak (mejo

ja) cannot be ruled out due to hostility between the two, but only if there was no other evidence to show her involvement. On the other hand, we

find that in the very first statement recorded by the police officer in the nursing home of Sushil Babu, i.e., at the earliest opportunity, the victim

Pratima Basak has clearly implicated her mejo ja i.e. appellant/accused Pratima.

41. The learned Counsel for the appellants/accused has assailed the Dying Declaration recorded by the Executive Magistrate by citing the decision

in Kantilal vs. State of Rajasthan and Arvind Kumar vs. State of Rajasthan (2010) 1 SCC (Cri) 593 by placing reliance on para 32.

32. It is well settled that one of the important tests of the credibility of the dying declaration is that the person, who recorded it, must be satisfied

that the deceased was in a fit state of mind. For placing implicit reliance on dying declaration, the court must be satisfied that the deceased was in a

fit state of mind to narrate the correct facts of occurrence. If the capacity of the maker of the statement to narrate the facts is found to be impaired,

such dying declaration should be rejected, as it is highly unsafe to place reliance on it. The dying declaration should be voluntary and should not be

prompted and physical as well as mental fitness of the maker is to be proved by the prosecution.

42. We fail to understand how this decision come to the rescue of the appellant. In Laxman vs. State of Maharashtra, the five Judge Bench of

Supreme Court while answering the reference has held: para 3.

3. The juristic theory regarding acceptability of a dying declaration is that such declaration is made in extremity, when the party is at the point of

death and when every hope of this world is gone, when every motive to falsehood is silenced, and the man is induced by the most powerful

consideration to speak only the truth. Notwithstanding the same, great caution must be exercised in considering the weight to be given to this

species of evidence on account of the existence of many circumstances which may affect their truth. The situation in which a man is on the

deathbed is so solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason the requirements of oath and

cross-examination are dispensed with. Since the accused has no power of cross-examination, the courts insist that the dying declaration should be

of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The court, however, has always to be on guard to see

that the statement of the deceased was not as a result of either tutoring or prompting or a statement of the deceased was not as a result of either

tutoring or prompting or a product of imagination. The court also must further decide that the deceased was in a fit state of mind and had the

opportunity to observe and identify the assailant. Normally, therefore, the court in order to satisfy whether the deceased was in a fit mental

condition to make the dying declaration looks up to the medical opinion. But where the eyewitnesses state that the deceased was in a fit and

conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to

the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and any adequate

method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. In most cases,

however, such statements are made orally before death ensues and is reduced to writing by someone like a Magistrate or a doctor or a police

officer. When it is recorded, no oath is necessary nor is the presence of a Magistrate absolutely necessary, although to assure authenticity it is usual

to call a Magistrate, if available for recording the statement of a man about to die. There is no requirement of law that a dying declaration must

necessarily be made to a Magistrate and when such statement is recorded by a Magistrate there is no specified statutory form for such recording.

Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each

particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state

of mind. Where it is proved by the testimony of the Magistrate that the declarant was fit to make the statement even without examination by the

doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is

essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise.

43. The exceptions, taken as regards the admissibility of the dying declaration, such as, failure to record in the certificate by the Medical Officer as

to the physical and mental condition of the victim and the absence of the Medical Officer till the Executive Magistrate completed the recording of

the dying declaration, do not affect the credibility of the dying declaration recorded by the Executive Magistrate. The endorsement(Exbt.15) made

on the paper where dying declaration has been recorded by the Medical Officer, viz., ""Pratima Basak, wife of Paresh Basak is fit to give her dying

declaration which may be treated as dying declaration"" makes it quite clear and sufficient to indicate that the victim was capable of giving her dying

declaration and Dr. Ajay Sen in his evidence has deposed to the effect that the dying declaration was recorded in his presence and has identified

and proved the endorsement (Exbt.5) and his signature (Exbt. 5/1) and has specifically said that he was present all along. Dying declaration

(Exbt.5/2) recorded by the Executive Magistrate sufficiently corroborates his evidence before the Court of having recorded the dying declaration

and attested the RTI of Smt. Pratima Basak, wife of Sri Paresh Basak. There are two endorsements in the dying declaration made by the

Executive Magistrate, Birbhum which came to be made after the dying declaration came to be recorded which mentions the date (10.8.1991) and

time (12.45 hours). The possibility of the victim having accidentally caught fire also stands ruled out for two reasons. First, there is no evidence on

record to show that the victim was using kerosene stove. According to her, she was preparing tea on the heater (electric) inside the kitchen. On the

other hand, she specifically attributes to the roles of her husband in holding her with his arms and second sister-in-law poured kerosene oil on her

person and her husband set her ablaze with matchstick. Therefore, considering the nature of injuries, it can be safely concluded that the same is not

caused by accident, but by the appellants/accused who caused the burn injuries to the victim by pouring kerosene on her person and setting her

ablaze, as a result of which she succumbed to the injuries and, therefore, this is a case which is squarely covered by clause 2ndly u/s 300 IPC that

is the act of setting her ablaze is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the

person to whom the harm is caused.

44. The other charge of having subjected the victim with cruelty and harassment stands established by the evidence of Bablu Basak, P.W. who is

the elder brother of the victim who has given evidence before the Court that he came to learn from the letters written by his sister that the

appellant/accused Paresh Basak is having illicit relations with accused Pratima Basak (mejo ja) and that they tried to settle the matter with the help

of police but ultimately refrained from taking any step considering the future of his sister. He has identified the letters written by his sister before the

Court, photocopies of which were handed over by him to the police during the investigation and came to be seized, vide seizure list (Exbt.3/2). He

has tendered those eight original letters before the Court. Seven are written in inland letters and one is on plain paper and he specifically stated that

all the letters are written by his sister. He knows her hand-writing. Therefore, the letters came to be marked Exbt.4 series 1 to 8. He has also

stated that he received two letters by post and other letters were sent to them via messenger since his sister was not allowed to post the same.

45. It was submitted that the victim was illiterate and could not have written the letters but nothing was suggested to her brother to disprove her

hand-writing. If one examines the letters produced before the Court during trial i.e. Exbt. 4/1 to 4/8 the first two are Inland letters which bear

postal stamp and the date on which they were posted and delivered i.e. 2.8.1991 which is prior to the incident and if one goes through the contents

of the letters these clearly implicate the appellants/accused of having subjected the victim to cruelty and refers to incidents of mental and physical

torture. The letters also disclose the motive attributed to the appellants/accused that her husband Paresh had illicit relation with Pratima Basak, his

sister-in-law, wife of Pawan Basak being elder to Paresh by more than 20 years and was also instrumental in getting Paresh married to the victim.

46. In our opinion the letters Exbt. 4/1-4/8 written by the victim Pratima Basak relate to the circumstances resulting in her death, whereas the three

dying declarations by her explain the cause of her death. Bablu Basak, P.W.1, the elder brother of the victim and also the complainant in this case

is the key witness who has given evidence to the effect that her sister was subjected to cruelty and stands corroborated by the letters sent to him

by his sister. We find no reason to disbelieve him as he is a natural witness. Similarly the Police Officer, Medical Officer and the Executive

Magistrate who have recorded the three dying declarations are all independent witnesses. Moreover the appellants/accused have not denied their

presence at the place of occurrence when the victim suffered burn injuries and have said nothing about the incident in their statement recorded u/s

313 Cr.P.C. Therefore, considering the evidence on record we find the trial Court was justified in holding the appellants/accused guilty.

47. We do not find any merits in the appeal preferred by the appellants/accused and, accordingly dismiss the same.

Ashim Kumar Roy, J.

48. I agree.