Form No. J(1)

**IN THE HIGH COURT AT CALCUTTA**

**CRIMINAL APPELLATE JURISDICTION**

Present :

**The Hon'ble Justice Rajasekhar Mantha**
**And**
**The Hon'ble Justice Rai Chattopadhyay**

**CRA 723 of 2015**
**With**
**CRAN 3 of 2021**
**Kader Mia**
**Vs.**
**The State of West Bengal**

For the Appellant. Mr. Imtiaz Ahmed
Ms. Ghazala Firdaus
Mr. Sk. Saidullah
Mr. Mithun Mondal Mr. Md. Arsalan

For the State Mr. Debasish Roy, Ld. PP,
Mr. Saryati Datta

**Judgement reserved on- March 12, 2026**

**Judgement pronounced on- March 16, 2026**

**Rajasekhar Mantha, J.**:

1. The subject appeal is directed against the judgment of conviction dated October 8, 2015 and the order of sentence dated October 9, 2015 respectively, passed by the Additional Sessions Judge, Dinhata, in Sessions Trial No. 12(01)/2015 arising out of Sessions Case No. 30(D)/2014. The appellant was convicted for the offence under section

302 of Indian Penal Code and was sentenced to life imprisonment and to pay a fine of Rs 2,000. In default thereof, to suffer a simple imprisonment for 2 months.

**THE PROSECUTION CASE AND THE EVIDENCE ON RECORD**

1. **PW 1 was the father of the victim**. He lodged the complaint dated September 1, 2011, with Dinhata PS, Cooch Behar. The complaint was scribed by PW 8. PW 1 stated that in 2007 his daughter got married to the appellant. At the time of marriage, he paid Rs 18,000 and other gift items to the appellant and in-laws of the victim.
2. PW 1 stated in the said complaint that from inception of the marriage, the appellant and family tortured the victim upon failure of the latter to bring a further sum of Rs 10, 000 from her paternal home. In 2009, a girl child was born from the wedlock of the appellant and victim. PW 1 stated the torture of the appellant and his parents upon the victim increased after birth of the said girl child.
3. PW 1 mentioned in the said complaint that the victim was not provided food at her matrimonial home and she was starving thereat. The appellant and family used to provoke her to commit suicide. On August 30, 2011, at around 3 p.m. the appellant and family set the victim on fire after pouring kerosene oil on her. They locked the door from the outside.
4. Upon hearing hue and cry of the victim, the neighbors entered the house and unlocked the door of the room where the victim was locked. Thereafter, the victim is stated to have run and dived into a pond situated near the PO. The said neighbors took the victim to Dinhata Hospital on

August 31st, 2011. The victim therefore was taken to the said Hospital one day after the said incident. PW 1 reached the hospital and heard the entire incident from the victim, and lodged the said complaint after two days that is on August 1st September, 2011.

5. **PW 25, Dr.Subrata Haldar was the postmortem doctor.** He deposed that it cannot be stated that whether the burn injuries on the person of the victim were homicidal or suicidal.
6. Investigation was completed and charge sheet was filed against 4 accused persons. Charges were framed on January 29th, 2015 against them under Sections 498A , 304B and 302 of the IPC.
7. **PW 1 was Rafique Mia,** the defacto complainant father of the victim. He has deposed that the victim told him at the Dinhata SD hospital that she suffered burn injuries while cooking in the kitchen in her matrimonial house. He was declared hostile by the prosecution. He denied having stated in the complaint and statement before the IO that the victim was tortured by the appellant with dowry demands. He also denied the prosecution suggestion, that the appellant induced the victim to commit suicide. He also denied that the accused poured kerosene over the victim and set her on fire at 3 PM on 31st July 2011.
8. PW 1 further denied having stated in the complaint that when the victim was screaming in pain the neighbors opened the door and the victim ran out of the house and jumped into a pond when the fire on the victim was doused.

9. In cross-examination by the defense, PW 1 deposed that the relations between his daughter and the appellant was warm. The victim studied up to class VII -VIII. The appellant and his brother lived separately. To the Court, he answered that his daughter told him 7-8 days after the incident that she was burnt while cooking. He further stated to Court that he did not tell the same to the police.

10. **PW-2 was Nur Hussain** brother of the victim. He was declared hostile after he stated that the victim died out of burn injuries sustained while cooking. His sister had a happy conjugal life. He denied the entire prosecution case in cross-examination by them. In cross examination by the defense he stated that the victim and the appellant visited their house with their child. He also deposed that he went to the hospital every day after the incident.

11. **PW 3 Najrul Mia,** was the **uncle** of the **victim**. He deposed that he is not aware of the case against the appellant. He deposed that he was not examined by the police. He was also declared hostile by the prosecution. He denied his entire statement to the police.

12. **PW-4 was Smriti Parihar** a staff nurse at the Dinhata SD Hospital. She deposed that she witnessed and signed on the dying declaration of the victim at the Hospital at the request of the doctor. She stated that the doctor recorded the declaration without any relative of the family or police being present and without any request for the same from the superiors of the doctor. Her mother tongue was Nepali. She did not depose that she knew or understood Bengali. She admitted that she was not examined by the police.

13. **PW 5, Fazle Haque,** was the brother-in-law of the victim**.** He deposed that upon returning home from work, he came to learn from his wife that the victim died of burn injuries while cooking. He deposed that the victim had good relations with the appellant. PW 5, however, was not declared hostile by the prosecution.

14. **PW 6, Nur Banu Bibi,** was a neighbor of the victim. She deposed that she had come to learn that the victim caught fire while cooking in the kitchen. She was declared hostile by the prosecution. During her cross-examination, PW 6 deposed that she did not tell the police that there was a quarrel between the appellant and the victim in the morning of August 31st 2011, when the victim was admitted to the hospital. She deposed that she did not tell the police that she heard any hue and cry of the victim and then saw the victim diving into the pond near the PO. She deposed that the appellant had good relations with the victim. She denied the entire case of the prosecution.

15. **PW 7, Ali Hossain,** used to address the victim as sister-in-law by local courtesy**.** He deposed that he heard that the victim suffered burn injuries while cooking in the kitchen. He deposed that the police have not examined him. The prosecution declared him hostile. **PW 9, 10, 11, 12, 16, 17 were also the neighbors of the victim.** They deposed along the lines of PW 7. They were declared hostile by the prosecution.

16. **PW 13 was another neighbor of the victim**. He deposed that he is unaware of the case against the appellant.

17. **PW 14 was the neighbor of the victim**. He deposed that he heard that the victim has suffered burn injuries while cooking rice in the kitchen. He deposed that upon hearing a hue and cry, he rushed to the house of the victim and found her lying unconscious. The police did not examine him. The prosecution declared him hostile.

18. In cross-examination, PW 14 deposed that he has not told the police that the relationship between the victim and the appellant was sour. He deposed that he had not told the police that the appellant and his parents used to provoke the victim to commit suicide.

19. **PW 18 was the police constable** who transferred the body of the victim to the Maharaja Jitendra Narayan Medical College and Hospital, Coochbehar for postmortem.

20. **PW 19 was the imam** of the local mosque. He deposed that he solemnized the marriage of the victim with the appellant. He, however, deposed that he does not know the appellant. He deposed that he heard that the victim has died from burn injuries. He deposed that the father of the victim, PW1, has never confided in him about the condition of the marital life of the victim. He was declared hostile by the prosecution. He denied the prosecution's case.

21. PW 15 has deposed that he referred the victim to Maharaja Jitendra Narayan Medical College and Hospital, Coochbehar for advanced treatment. The victim, however, chose to stay at the Dinhata SD hospital. He confirmed that the victim was fully conscious on September 1st, 2011. The dying declaration of the victim was recorded on September 1st, 2011.

PW 15 however was not a witness to the said dying declaration of the victim. The victim died on August 11th, 2011 at 4:20 p.m.

22. During his cross-examination, PW 15 deposed that the admission sheet of the said Hospital has recorded the case history of the victim as one of burn injury caused by suicide. He, however, deposed that he is unable to recognize the signature of the doctor on the admission sheet. Thus, there is an irreconcilable inconsistency between the case history recorded in the bed head ticket and that recorded in the said admission sheet.

23. **PW 20, was Dr Mrinal Kanti Biswas**. He was another doctor at the said Dinahata SD hospital. He recorded the dying declaration of the victim. The same was witnessed by a nurse of the said Hospital**,** namely **Smriti Parihar PW 4.**

24. PW 20 has deposed that the victim was fully conscious at the time of making the said dying declaration. PW 4, the witness to the said dying declaration, has confirmed that the victim was conscious. PW 4 has deposed that she was on duty on September 1, 2011, at the female surgical ward of the said Dinhata Hospital. The dying declaration of the victim was recorded on September 1, 2011. The said dying declaration is set out below:-

DYING DECLARATION
Taken on 01.08.2011 at 2.30 p.m.
Name of the Patient: ROFIKA BIBI
Age: 26 years
Sex: F
W/O-Kader Mia
Ward – FSW
Date of Admission-31.07.2011
Admission R/N-15280

Sd/-illegible

01.08.11

My name is Rafika Bibi. The name of my husband is Kader Mia. My House is situated at Petla. My husband used to assault me almost everyday. The family members of my matrimonial house never obstructed my husband while he assaulted me. Yesterday afternoon at about 2.30-3.00 p.m. my husband assaulted me. Then he poured kerosene oil upon myself and set fire on me by using match sticks. After that he flew away. I was yelling with intolerable pain. Then the neighbors rushed to the spot and tried to save me.

(L.T.I of patient)

Witness:-
1 Mrinal kanti Biswas (On duty E.M.O)
2.Smriti Pariyar (Gr-II staff nurse)

Sd/-illegible

01.08.2011

Medical Officer

Dinhata S.D. Hospital

Dinhata, Cooch Behar

Exbt-2/1 in c/w Sess.-30(D)/14
Sd/-illegible
Additional Sessions Judge
Dinhata
27.04.15

Exbt-2

c/w Sess.-30(D)/14

Sd/-illegible

Additional Sessions Judge
Dinhata, 30/07/15

25. During his cross-examination, PW 20 deposed that the victim has put her thumb impression on the said dying declaration. Initially, PW 20 was unable to state as to why the victim did not put her signature on the said dying declaration. It, however, appears that on a question put by the trial court, PW 20 stated that though the victim was fully mentally conscious, she was not physically fit to use her hand and sign on the said dying

declaration. PW 20 has deposed that he is unable to recall whether he has read out and explained the contents of the said dying declaration to the victim.

26. PW 20 further deposed that he did not inform the police about the said dying declaration. He did not record the blood pressure of the victim or her heart and pulse rate. The treatment by the previous doctors is not recorded in the declaration. He admitted that no one was there to identify the victim. He admitted that he was not fully conversant with the dialect spoken by the victim. He further deposed that he did not obtain the prior permission of the police for recording the said dying declaration.

27. An inquest was conducted by the **PW 21, the ASI of Dinhata PS and the Executive Magistrate, Mr Sabyasachi Roy (WBCS)** on August 12, 2011. The inquest was scheduled to be conducted on August 11, 2011 when the victim died. However, due to bad light the inquest could not be conducted.

28. The inquest report stated that the victim had suffered burn injuries. PW 20, the ASI of police, and the Executive Magistrate both found that the back of the body of the victim had received the maximum injury. The body of the victim was thereafter sent for post mortem.

29. **PW 22 was the investigating officer of the case**. He has deposed that he sent a written request of EMO of the Dinhata SD hospital to record the dying declaration of the victim. There is no evidence on record to suggest that EMO of the said hospital directed PW 20 to record the dying declaration of the victim.

30. **PW 22 was the Investigating Officer of the case.** He deposed that he has written to the Emergency Medical Officer (EMO) of the said Dinhata SD hospital for recording a dying declaration of the victim. During the examination in chief of PW 22, the prosecution drew this attention to the statements made by several prosecution witness, who turned hostile, under section 161 of the CrPC.

31. **PW 23 was a seizure witness.** He deposed in the cross examination that he has lent his signature on the seizure list without being informed about the contents thereof by the police. **PW 24 was another seizure witness.** He deposed that he knew the victim.

32. **PW 25 was the post mortem doctor**. He found burn injuries on the person of the victim. He deposed that he found the following burn injuries on the body of the victim. He however could not state whether the said burn injuries were homicidal or suicidal. He found the following injuries on the person of the victim:_

> Partial and full thickness burn injuries were noted at following regions:-
>
> 1) both arms and forearms and hands.
>
> 2) whole anterior chest wall and both breasts,
>
> 3) upper half of anterior abdominal wall,
>
> 4) right thigh,
>
> 5) right leg.
>
> 6) left leg and
>
> 7) whole back.
>
> On careful examination a zone of redness was noted in between normal and burnt skin. Time since death is 20 to 22

> hours. In my opinion the cause of death was due to shock following above mentioned burn injuries and which was ante mortem in nature.

**ANALYSIS OF THIS COURT:-**

33. The prosecution witnesses have negated the entire case of the prosecution. Significantly, in addition to the relatives of the victim turning hostile, the neighbors of the victim have also turned hostile.

34. The prosecution witnesses during the trial have deposed that the victim died by accident. She succumbed to burn injuries caused to her while cooking. The said witnesses however have stated before the Police that the victim was set on fire by the appellant and family. They have stated to the police that they have unlocked the room of the victim where she was detained and set on fire. They have rescued her. They stated that thereafter the victim dived into the pond near the PO.

35. This Court is of the view that in the present facts of the case, it was incumbent upon the investigating officer, PW 22 to have the statement of the said prosecution witnesses recorded before a magistrate, under Section 164 of the CRPC. He ought to have confronted the said statements of the witnesses under Section 161 of the CrPC, to each of them, in terms of Section 162 of the CrPC. The reason is that it is extremely unnatural that during the trial, each of the prosecution witnesses both family and neighbors would resile from their statements made under section 161 of the CrPC unless they were compelled or made statement to the police under duress. Such is the only possible inference in the facts of the case. Admittedly none of the statements of

the family of the victim or the neighbors was recorded before a Magistrate under Section 164 of the CrPC.

36. It appears from the evidence of PW 22, the IO, that the prosecution had made a last ditch attempt to overcome the hostility of the prosecution witnesses by referring to the 161 statements of the said prosecution witnesses to the IO during the latter's examination-in-chief. The investigating officer however under the law cannot depose on behalf of the other prosecution witnesses, who have allegedly tendered the said 161 statements. In such a case, the evidence of IO would be rendered hearsay.

37. The evidence of the neighbors of the victim was direct evidence as regards events which took place after the victim was allegedly set on fire. The neighbors stated under Section 161, CrPC that upon hearing the hue and cry of the victim, they rushed to the house of the victim and unlocked the door where the victim was burning on fire. They further stated in their 161 statement that they have seen the victim to have dove in the pond to save her life. PW 22 therefore ought to have such statements recorded under Sec. 164, CrPC before a magistrate.

38. Thus in the present case, the non-recording of the statement of the prosecution witnesses, both family and neighbors, before the Magistrate is a vital lapse in the investigation. This is not a mere defect in the investigation. It has left a substantial doubt in the mind of this Court that the IO may have compelled the PWs to make statements under section 161 of the CRPC.

39. The case of the prosecution was that the victim was set on fire by pouring kerosene oil on her and she was locked in a room. The neighbors of the victim are stated to have unlocked the door. There is no evidence on record to suggest that the said door was broken open by the neighbors. As to how the neighbors had unlocked the said door without the keys thereof has remained unexplained.

40. The seizure witnesses, PW 23 and 24, have feigned ignorance of the seized materials. They have deposed that the police have not made them aware of what is actually seized. The case of the prosecution therefore cannot stand on the evidence of the aforesaid witnesses.

41. The prosecution case falls flat on its back in view of the clear and unequivocal evidence of PW-1, 2 and 3 that the victim led a happy conjugal life with the appellant. The prosecution on one hand led alleged the victim was murdered by her husband by pouring kerosene oil and setting her on fire. On the other hand in cross examination of the PW-1 tried to lead a case of suicide by the victim. This contradiction should have been noticed by the Trial Court.

42. The learned trial judge has convicted the appellant on the basis of the dying declaration. The dying declaration of the victim was recorded by PW 20. He was a doctor at Dinhata SD hospital. The victim was admitted thereat. PW 15, another doctor at the said Dinhata SD Hospital has deposed that he initially treated the victim and referred her to Maharaja Jitendra Narayan Medical College and Hospital, Coochbehar for better treatment. The victim however was not shifted to the said Hospital. As to why the victim was not shifted to the said Hospital

remains unexplained. It appears that the recording of the dying declaration of the victim at the Dinhata SD Hospital was more of a priority over the better treatment of the victim.

43. Significantly, the dying declaration of the victim does not allude to the participation of her in-laws in the torture committed upon her. It merely states that the in-laws of the victim did not stop the appellant when the latter used to torture her. The dying declaration of the victim has only accused the husband of the victim of setting her on fire. The surrounding circumstances involved in the recording of the said dying declaration are thus suspicious. In ***Paniben (Smt.) v. State of Gujarat Reported in (1992) 2 SCC 474,*** it was held as follows:-

> 18. (iv) Where dying declaration is suspicious it should not be acted upon without corroborative evidence.

44. PW 22, the IO, has deposed that he has sent a written request to the emergency medical officer of the Dinhata SD hospital to record the dying declaration of the victim. The victim died 9 days after the purported dying declaration was recorded by PW-20. As to why PW 22 did not get the dying declaration of the victim recorded before a magistrate remains unexplained.

45. PW 20, who recorded the dying declaration of the victim, has deposed that he recorded the same on his own volition. Surprisingly, PW 20 has deposed that he did not inform the police authority about the dying declaration of the victim. The police also did not record the statement of PW-4 the nurse who witnessed the purported dying declaration. The conduct of the PW 20 in recording the dying declaration of the victim without informing the police is suspicious. It is also against common

sense, since the IO PW 22, had sent a written request to the Emergency Medical Officer of the Dinhata SD hospital to record the dying declaration of the victim.

46. The dying declaration was given out by the victim on September 1, 2011. The victim survived for 10 days thereafter. She died on September 11, 2011. PW 20 and PW 4, a nurse at the said Dinhata SD Hospital who was attending the victim, have deposed that the victim was fully conscious at the time of making the said dying declaration. Therefore it may be inferred that the victim was conscious even after making of the said dying declaration. Ordinary prudence required the investigating officer to get the dying declaration of the victim recorded before a magistrate.

47. It is now, however, well settled that a dying declaration can form the sole basis of conviction. A truthful and voluntary dying declaration need not be corroborated. Such situation obtains when a dying declaration is beyond doubt, not surrounded by suspicious circumstances. In this regard, it may be noted that PW 20 who recorded the dying declaration has deposed that he has not recorded the procedure of treatment given to the victim during her admission at the said Dinhata Hospital. It therefore appears that PW 20 was over enthusiastic in recording the dying declaration of the victim than her treatment. There therefore appears an unwanted activism on the part of the PW 20 to record the dying declaration of the victim.

48. The victim survived for another 10 days from the date of making the said dying declaration. Thus there was no tearing hurry to record the dying declaration following the due process of recording the same in a question and answer form.

49. PW 22, the investigating officer has deposed that he made a written request to the Emergency Medical Officer of the said Dinhata SD hospital to record the dying declaration of the victim. Therefore, it can be reasonably inferred that PW 20, who recorded the dying declaration of the victim, was informed by someone to record the dying declaration of the victim. PW-20 therefore knew that he needs to submit the said dying declaration to the police. It is therefore surprising that PW 20 did not inform the police about the recording of the said dying declaration. There is no evidence on record to suggest that the PW 20 was acting as per the instruction of the said EMO.

50. It is equally surprising and unexplained that PW 20 did not wait for the police to be present while recording the said purported dying declaration. The victim survived for 10 days from the date of the recording of the said dying declaration. The said dying declaration was recorded in haste without any rhyme or reason.

51. A dying declaration can be recorded by any respectable officer of the state. A doctor of a government hospital is indeed respectable officer of the state. PW 20, however, does not appear to be a responsible officer in view of that he has deposed during the trial that he has not read over and explained the contents of the said dying declaration to the victim. In

***Khushal Rao v. State of Bombay reported in AIR 1958 SC 22*** , it was held as follows:-

> "16.....(1) that it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated;
> (2) that each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made;
> (3) that it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other pieces of evidence;
> (4) that a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence;
> (5) **that a dying declaration which has been recorded by a competent Magistrate in the proper manner, that is to say, in the form of questions and answers, and, as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration *which depends upon oral testimony which may suffer from all the infirmities of human memory and human character***, and
> (6) that in order to test the reliability of a dying declaration, the Court has to keep in view, the circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the facts stated, had not been impaired at the time he was making the statement, by circumstances beyond his control; ***that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it;*** and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties."
>
> Emphasis applied

52. A dying declaration recorded by a magistrate therefore stands on a higher pedestal. Therefore, when a dying declaration is recorded by an officer of the state, other than the Magistrate, it should be carefully scrutinized and examined by a Court. The said dying declaration, recorded by PW 20, does not sustain this scrutiny.

53. PW 20 did not read over and explain the contents of the said dying declaration to the victim. He did not inform the police about the said dying declaration. He was not aware that a written request was made by the IO to the EMO, Dinhata SD hospital to record the dying declaration of the victim. He was unable to state as to why the victim put her thumb impression. PW 20 has deposed that the victim was mentally conscious but was not physically fit. As to how therefore the victim put her thumb impression on the said declaration which requires some strength and pressure of the hand is suspect.

54. The contents of the purported dying declaration are all the more suspect as the PW-2 deposed in cross-examination that he and his father, PW-1, visited his sister, the victim, in the hospital every day. It is therefore surprising if not suspicious as to why the dying declaration was not recorded in the presence of PW-1 and PW-2, and the latter did not know about it at all.

55. Further, the IO of the case had ample time to record the dying declaration before a magistrate. In fact, the inquest was conducted by an executive magistrate in view of Section 174(3) read with Sec. 176, CrPC, which mandates that an inquest must be conducted by an executive magistrate when the woman dies within 7 years in her matrimonial home. The investigation in the matter was rather callous and perfunctory.

56. The dying declaration is further rendered suspicious when the evidence of PW 4 and PW 15 is compared. PW 4 has deposed that she has seen the victim conscious at the time of making the said dying declaration.

She has signed on the said dying declaration as a witness. PW 15, who initially treated the victim at the said hospital upon her admission threat, has equally deposed that the victim was conscious on September 1, 2011, when the victim made the said dying declaration. PW 15 however did not sign on it. The signature of PW-15 was equally important on the said declaration, which is not there. There is therefore some doubt as to whether the victim was a proper state of mind when the purported dying declaration was recorded.

57. The said declaration has not been recorded by a magistrate and hence not in a question and answer form and therefore ought to have been read out to the victim and confirmed before obtaining her LTI thereon. This omission by PW-20 is yet another ground to discredit the same.

58. Admittedly the charge under Section 498A was not established by the prosecution. The charge of murder of the victim for dowry, consequently also gets diluted

**CONCLUSION:-**

59. Having regard to the aforesaid discussions, the finding of guilt by the trial court solely based on the dying declaration is not sustainable and is liable to be set aside and is hereby set aside.

60. The instant appeal CRA 723 of 2015 is allowed. Consequently, all connected applications shall stand disposed off in terms of this judgement

61. The appellant shall be set at liberty subject to his not being wanted in connection with any other case and subject to execution of a bond under Section 437 of the CRPC corresponding to Section 480 of the BNSS.

62. There shall be no order as to costs.

**(Rajasekhar Mantha J)**

**I agree,**

**( Rai Chattopadyay J)**