GAHC010223922018

2026:GAU-AS:8546

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Death Sentence Ref./2/2018

THE STATE OF ASSAM
REPRESENTED BY PP, ASSAM.

VERSUS

ZAKIR HUSSAIN
NAGAON

Advocate for the Petitioner : PP, ASSAM,

Advocate for the Respondent : MR. A K BHUYAN, MR. Z KAMAR (Amicus Curiae),MS. N CHOUDHURY,MR. M BORAH,MR. A KHOUND,MR T TASHI,MS. Y S PHOM,MS S SARMA HAZARIKA

Linked Case : Crl.A./336/2018

ZAKIR HUSSAIN
S/O MD. ABDUL REZZAK
RESIDENT OF LALUNG GAON
PS BATADRABA
DIST NAGAON
ASSAM

VERSUS

THE STATE OF ASSAM AND ANR
REPRESENTED BY PP ASSAM

2:SARAFAT ALI
S/O LATE NUR BAKAS

RESIDENT OF LALUNG GAON
PS BATADRABA
DIST NAGAON
ASSAM

Advocate for : MR. A K BHUYAN
Advocate for : PP
ASSAM appearing for THE STATE OF ASSAM AND ANR

BEFORE

HON'BLE THE CHIEF JUSTICE ASHUTOSH KUMAR

HON'BLE MR JUSTICE ARUN DEV CHOUDHURY

For the Appellants : Mr. A. K. Bhuyan, Senior Advocate, assisted by Ms. N. Choudhury, learned Advocate in Crl. A. No. 336/2018.

For the Respondents : Mr. R. R. Kaushik, Additional Public Prosecutor, Assam.

Amicus Curiae : Mr. Z. Kamar, learned Senior Advocate/Amicus Curiae, assisted by Mr. S. J. Choudhury, learned Advocate in Death Sentence Ref. No. 02/2018.

Date on which the Judgment is Reserved : 19.05.2026.

Date of the pronouncement of Judgment : **16.06.2026.**

Whether the pronouncement is of the operative part of the

Judgement : NA.

Whether the full Judgment has been pronounced: Yes.

JUDGMENT & ORDER (CAV)

(A.D.Choudhury, J)

1. The Death Sentence Ref. No. 02/2018 and Crl. A. No. 336/2018, have been heard together and are being disposed of by this common Judgment and Order.

2. We have heard Mr. A. K. Bhuyan, learned Senior Advocate, assisted by Ms. N. Choudhury, learned Advocate for the appellant in Crl. A. No. 336/2018. and Mr. R. R. Kaushik, learned Additional Public Prosecutor, Assam, for the State. We have also heard Mr. Z. Kamar, Learned Senior Advocate/Amicus Curiae.

3. By the impugned Judgment dated 04.09.2018 and Order of sentence dated 07.09.2018 passed by the learned Special Judge, Nagaon in Special (POCSO) Case No. 23(N)/2018, the accused/appellant was convicted under sections 448, 201, 302 IPC and sentenced RI one year, RI for three years and Death sentence respectively and and sentenced under section 6 of the POCSO ACT and sentenced to RI for Life.

4. The prosecution case, in a nutshell, is that on 23.03.2018, the informant, Md. Sharfat Ali (PW-1) lodged an FIR with the Officer-in-Charge of Batadraba Police Station, alleging that on 23.03.2018 at 1:30 P.M., taking the advantage of absence of their family members in the house, accused/appellant Zakir Hussain and his two associates, who are child in conflict-with-law, (hereinafter will be referred as CCL or CCLs), trespassed into their house and at first committed rape on his 12 years minor daughter, by gagging her mouth with cloth and handkerchief and then set fire on her body by pouring kerosene oil which was brought by him to pump out water from the pond. Subsequently, they rushed to their house and found their daughter in grave condition and, as such, shifted her to

Nagaon Civil Hospital for treatment, and on asking their daughter, she stated that the above-named three accused persons forcefully committed rape and then set fire to her body. Although his daughter was shifted to Nagaon Civil Hospital for her better treatment, the doctor referred her to G.M.C.H. Subsequently, she died at G.M.C.H., which was informed to him by his son.

5. After receiving the F.I.R., the Officer-in-Charge of Batadraba Police Station accordingly entered the GDE No. 447 dated 23.03.2018 and registered the Batadraba P.S. Case No. 64/2018 under Sections 448/376(D)/201/302 IPC read with Section 4 of the POCSO Act against the accused/appellant Zakir Hussain and two CCLs, and started the usual investigation thereon.

6. Upon completion of the investigation, police laid a charge sheet in the case under Sections 448/376(D)/201/302 IPC read with Section 6 of POCSO Act against the accused Zakir Hussain and two CCLs, while charge under Section 120(B)/212/201 IPC was framed against the accused Abdul Razzek, Jubeda Khatun, Abdul Rashid, Muklesur Rahman and Fakaruddin.

7. The learned Special Judge framed charges under Sections 448/302/201 IPC read with Section 6 of the POCSO Act against the accused/appellant Zakir Hussain; charge under Section 120(B)/212 IPC was slapped against the accused Jubeda Khatun, Muklesur Rahman, Abdul Rashid, Abdul Rezzak; charge against accused Fakaruddin was framed under Section 202 IPC, and read over to all the accused, to which they pleaded not guilty, and accordingly, the trial proceeded.

8. During the Trial, to bring home the charges, the prosecution examined as many as 46 witnesses and exhibited 130 documents and material exhibits. The accused were examined under Section 313 Cr.P.C. The defence side examined 3 (three) witnesses in their support.

9. Thereafter, the impugned judgment and sentence were passed by the learned Special Judge, Assam, convicting and sentencing the accused/appellant, Zakir Hussain, as detailed hereinabove; however, acquitting the other accused persons.

10. Mr. A. K. Bhuyan, learned Senior counsel appearing for the appellant, submits that the entire prosecution case rests substantially upon alleged oral and written dying declarations, and there is no eyewitness to the actual occurrence. According to the learned Senior Counsel, the prosecution has failed to establish the cognitive and mental fitness of the deceased inasmuch as PW-28 found approximately 96% ante-mortem 4th degree burns, and PW-27 admitted that no test regarding the orientation or coherence of the deceased was conducted before recording Exhibit-16. It is further argued that PW-33 admitted that the victim was not in a condition to speak.

11. The learned Senior Counsel, referring to Exhibit-16, argues that the said exhibit suffers from procedural infirmities inasmuch as no Magistrate was called despite availability, the declaration was not recorded in question-and-answer form, despite the seriousness of the allegation and availability of procedural safeguards, and no Bed Head Ticket (BHT) or contemporaneous medical record regarding mental fitness was exhibited.

12. Referring to the evidence of PW-25 and PW-24, the learned Senior Counsel argues that the deceased and her family members primarily spoke in the Mymensingh dialect. However, the prosecution failed to establish whether PW-27 understood the dialect or whether any interpreter was present during the recording of the declaration.

13. It is further argued that at the time the several witnesses allegedly heard the declaration, the names of the accused persons had already begun to circulate within the village and hospital environment.

14. According to the learned Senior Counsel, PW-45, the I.O, admitted substantial improvements made by several witnesses during trial regarding genital slashing, exhortation to kill the victim and detailed overt acts attributed to the individual accused person.

15. Referring to the medical evidence, learned senior counsel submits that despite allegations of violent gang rape and genital assault by knife, the post-mortem report did not reveal any corresponding genital injuries, and no spermatozoa were detected in the vaginal slides.

16. Regarding the confessional narration, Mr Bhuyan, learned Senior Counsel, argues that the alleged confession attributed to the appellant is inadmissible under Sections 25 and 26 of the Evidence Act, since it was admittedly made while the accused was in police custody.

17. It is lastly contended that the cumulative infirmities affecting the reliability of the declarations, medical corroboration and procedural infirmities render the conviction unsafe and the appellant is, therefore, entitled to an acquittal.

18. Per contra, Mr R. R. Kaushik, learned Additional Public Prosecutor appearing for the State, submits that the learned trial Court rightly appreciated the evidence on record and correctly convicted the appellant.

19. The learned Additional Public Prosecutor argues that the prosecution case is supported by multiple oral and written dying declarations made consistently before PW-1, PW-14, PW-19, PW-25, PW-26, PW-27, PW-29, and PW-30. According to him, the deceased consistently named the accused Zakir and the other two CCLs and attributed rape and burning to them.

20. Mr Kaushik, learned Additional Public Prosecutor, further argues that the FIR was lodged promptly and that it itself records that the deceased disclosed the names of the accused persons while being taken to the hospital.

21. According to the learned Additional Public Prosecutor, the absence of a Magistrate or formal medical certification does not, by itself, invalidate the dying declaration if the court is otherwise satisfied as to the voluntariness and consciousness of the maker.

22. Referring to evidence of PW-27, PW-29 and PW-30, it is argued that the deceased was conscious and was capable of speaking at the relevant time. The learned Additional Public Prosecutor further submits that even extensive burn injuries do not by themselves negate the reliability of a dying declaration.

23. Mr Kaushik, learned Additional Public Prosecutor, also contends that the medical and forensic evidence materially corroborates the prosecution case. PW-28 proved homicidal anti-mortem burn injuries, and kerosene residue was detected on the seized materials.

Human semen was also detected on the half pant allegedly belonging to one of the CCLs, and therefore, the prosecution has been able to prove their case beyond a reasonable doubt.

24. It is lastly submitted that the contradictions highlighted by the prosecution are minor contradictions and the defects highlighted in the investigation do not affect the core prosecution case, and that the cumulative circumstances clearly establish the guilt of the appellant beyond a reasonable doubt.

25. We have given anxious consideration to the submissions advanced by the learned counsel for the parties. Also, perused the materials available on record.

26. The prosecution seeks conviction primarily upon (i) oral dying declarations allegedly made before relatives and villagers; (ii) written dying declaration Exhibit-16; (iii) medical evidence intended to corroborate the declaration; (iv) alleged recovery and confessional conduct of the accused;

27. The admissibility of such dying declarations is traceable to section 32 (1) of the Indian Evidence Act, 1872, which constitutes a carefully carved exception to the rules against hearsay evidence.

28. The provision renders relevant statements made by the deceased person as to the cause of death or circumstances of the transaction resulting in death whenever the cause of death comes into question.

29. The jurisprudential foundation underlying the doctrine of dying declaration is embodied in the maxim ***Nemo Moriturus, Praesumitur-Menteiri",*** namely, that a person at the verge of death is not presumed to lie. The law proceeds upon the assumption that when worldly motive stands extinguished by the consciousness of impeding death, the possibility of deliberate falsehood ordinarily diminishes.

30. Yet, the solemnity attached to a dying declaration does not place it beyond judicial scrutiny.

31. The law has consistently recognised admissibility of such evidence under Section 32(1) of the Evidence Act.

32. The Supreme Court in **Khushal Rao –vs- State of Bombay,** reported in **A.I.R. 1958, S.C. 2022**, first held authoritatively that a dying declaration is not a weaker species of evidence and may itself form the sole basis of conviction if found to be truthful and voluntary.

33. The principles were subsequently crystallised and elaborated. Some of the important decisions in this regard are: **Atbir –vs-. Government of NCT of Delhi**, reported in **2010-9-S.C.C.-1; Purushottam Sopra –vs-. State Government of NCT of Delhi**, reported in **A.I.R. 2020 S.C. 476**; **Irfan alias Naka –vs- State of Uttar Pradesh**, reported in **2023, S.C.C. Online, S.C. 1060**; **Rajendra S/o Ramdas Kolhe –vs- State of Maharashtra**, reported in **2024 I.N.S.C. 422**.

34. In **Irfan** (supra), the Supreme Court reiterated that the court must carefully scrutinise whether the declaration inspires confidence; appears natural and voluntary; is free from tutoring; and is supported by surrounding circumstances. The court emphasised that where suspicious features appear, the declaration cannot be mechanically accepted merely because it is admissible under Section 32(1) of the Evidence Act.

35. In **Rajendra** (supra), the Supreme Court reiterated that the court must carefully evaluate the declarant's physical condition, cognitive capacity, consistency, procedural safeguards, and overall reliability. The court emphasised that where the declarant suffered serious injuries, and the surrounding circumstances create doubt regarding orientation and coherence, the court must insist upon greater assurance before sustaining a conviction solely on a dying declaration.

36. The Supreme Court has consistently emphasised that before acting solely upon a dying declaration, the court must be fully satisfied that:

I. The declarant was in a fit physical and mental condition.

II. The declaration was voluntary.

III. The statement was free from tutoring, prompting or imagination.

IV. The declaration inspires full confidence.

V. Surrounding circumstances do not create suspicion.

37. The law is equally well settled that neither recording by a magistrate, nor medical certification, nor question-and-answer format constitutes an inflexible rule of law. Nevertheless, these safeguards are regarded as important rules of prudence evolved through judicial experience. Their absence does not automatically invalidate the declaration, but where suspicious circumstances co-exist, such absence assumes considerable significance.

38. Equally settled is the proposition that the percentage of burn injuries is not decisive. Even a person with 90%- 100% burns may make a reliable declaration if cognitive and mental fitness is affirmatively established.

39. However, where a victim suffered near total fourth-degree burns accompanied by severe shock, pain and nervous collapse, the court must insist upon greater assurance regarding orientation, coherence and reliability.

40. Having regard to the aforesaid principles of law, let us now consider the prosecution evidence regarding the oral and written dying declarations.

41. In the present case, the oral dying declarations allegedly made before PW-1, PW-2, PW-25, PW-26, PW-35, and other villagers constitute the earlier layers of the prosecution evidence.

42. PW-1, the father of the deceased/informant, constitutes the earliest alleged recipient of an oral dying declaration. According to him, the deceased disclosed that appellant Zakir and the two CCLs committed rape upon her, slashed her private parts and thereafter poured kerosene and set her ablaze. At first blush, the evidence appears significant because it purports to contain the earliest version.

43. However, deeper scrutiny reveals several infirmities.

44. Firstly, PW1's testimony is not consistent regarding the stage at which the disclosure

was made. At one stage, he stated that the deceased narrated the occurrence at home; elsewhere, he suggested that the narration occurred while she was being taken to the hospital.

It is on record that the PW-25, the mother of the victim and PW-26, the sister of the deceased, along with another villager, were present in the ambulance while such a dying declaration was made. However, PW-25 and PW-26 never supported such a projection of any dying declaration inside the ambulance; rather, it has come through prosecution evidence that the deceased was administered oxygen from the place of occurrence to Nagaon Civil Hospital.

As regards the dying declaration at the place of occurrence, the PW-15, the next-door neighbour of the deceased, was one of the persons at the first point of time dousing the fire of the injured person, even before PW-1 reached the place of occurrence, is significant inasmuch as he deposed during cross-examination that the victim was not in a position to talk. It assumes significance because the prosecution's case substantially rests on the spontaneity and reliability of the declarations.

45. Secondly, the prosecution's case reveals that by that time, several villagers had already arrived, and the accused's name had begun to circulate. Consequently, the possibility that PW-1's own understanding influenced the later witnesses also cannot be ruled out.

46. The PW-2, who is the sister-in-law of the deceased, is projected as a witness who claimed that she saw the accused exit through the rear door after the occurrence.

However, her testimony suffers from substantial weakness. Her version appears deeply intertwined with the collective village narrative that emerges after the event. Several witnesses later repeated what PW-2 allegedly narrated to them. Thus, her evidence became the source of a chain of hearsay propagation.

The prosecution has not clearly established the precise circumstances under which PW-2 identified the accused as they were allegedly exiting through the rear of the house.

Another important aspect is that the PW-2 herself disclosed that when she entered the house where the incident took place, she witnessed PW-15 and PW-16 were already dousing the fire; however, PW-15 and PW-16 did not support the last-scene theory as projected by PW-2. Her testimony, therefore, cannot safely be treated as wholly independent corroboration.

47. The PW-25, the mother of the victim who is projected to be another witness to an oral dying declaration, admitted that the deceased had severe burns on her whole body;the face to lips; the deceased was not identifiable; she and the deceased spoke only the Mymensingh dialect; she was not present when the father (PW-1) questioned the deceased.

The linguistic aspect also assumes enormous significance, which shall be dealt at appropriate place. The significance is for the reason of the doubt raised by the defence, whether PW-27, the Doctor who recorded the written dying declaration, understood the Mymensingh dialect, who translated the declaration, and how translation was ensured, was never clarified by the prosecution.

48. The PW-26, the sister of the victim another witness to a dying declaration, ultimately admitted that before the Magistrate that she merely narrated what the deceased had allegedly told the PW-1, the father of the victim. Thus, her testimony appears to be derivative and not wholly independent.

49. The evidence of the PW-35, a co-villager and projected witness to the oral dying declaration, further deepens this concern.

He admitted that before he questioned the deceased, PW-1 had already informed him about the names of the accused. Thus, by the time PW-35 allegedly heard the declaration, the narrative had already crystallised externally.

Moreover, PW-35 admitted that the deceased did not specify who poured kerosene, who ignited the fire, or who committed which specific act. Yet later witnesses attributed

highly detailed, individual roles to each accused. Such progressive elaboration materially affects reliability.

50. This court further notes that statements of material witnesses, including PW-14, PW-25, PW-26 and PW-36, were recorded after an unexplained delay of approximately 14 to 15 days. Delay in recording the statements of crucial dying-declaration witnesses assumes particular significance because it increases the possibility of embellishment and reconstruction.

51. In a prosecution based upon oral dying declaration, spontaneity and insulation are critical safeguards against reconstruction and embellishment. Once names are publicly circulating, the possibility of collective narrative formation, unconscious prompting and post-occurrence contamination cannot be safely excluded and therefore requires cautious judicial evaluation.

The delay in recording the statement may not affect admissibility. Nevertheless, where the prosecution substantially relied upon an oral dying declaration allegedly heard by such witnesses, an unexplained delay assumes significance when evaluating the weight, credibility, and possibility of embellishment.

52. The evidence of PW-27, PW-29 and PW-30 constitutes the core evidentiary framework regarding the written dying declaration. Exhibit-16 is the written dying declaration and constitutes the cornerstone of the prosecution's case.

53. PW-27, the Doctor at the Nagaon Hospital who recorded the dying declaration, stated that the victim was in shock and pain but conscious and capable of speaking.

At the same time, PW-27 admitted that the victim suffered severe pain and shock and was wirthing; she did not test the victim's orientation or recollective capacity; the declaration was not recorded in question and answer form; no Magistrate was informed despite availability; no contemporaneous endorsement regarding mental fitness was made.

54. PW-29 and PW-30 broadly supported the recording process. Yet the cumulative evidence reveals serious infirmities.

55. The PW-29, the on duty staff nurse at the Nagaon Hospital admitted that around 50 persons, including media personnel, were present around the burn unit. Such surrounding circumstances materially weaken the prosecution's assertion that the declaration emerged in wholly insulated and uninfluenced circumstances.

56. The PW-30, a trainee nurse admitted that no dates were written beneath the signatures, and the burn register was seized after a substantial delay; no bed head ticket was exhibited.

57. These omissions materially affect the contemporaneity and procedural integrity

58. PW 42 was the In-charge at BP Civil Hospital and is the foundational witness regarding requisition, recording and seizure of Exhibit 16. His evidence materially weakens the prosecution's case.

He admitted that the names of the accused had already been disclosed by the deceased's parents before the recording of Ext 16. Such admission indicates that the prosecution narrative had already started circulating before the formal recording of the dying declaration.

He further admitted that, although a Magistrate was available nearby, he chose not to requisition one and instead requested that a doctor to record the declaration. No explanation was given for bypassing the Magistrate. He further admitted that the Burn Register was not seized immediately.

Another important aspect in the evidence of PW-42 is that he went to the ward, along with PW-33, a police constable, after receiving a request from the police for the recording of a dying declaration and witnessed the victim suffering from severe burn injuries and screaming.

59. PW-33 stated during cross-examination that the victim girl was at a critical stage and was not in a position to speak.

60. Thus, these two witnesses did not entirely support the projection of PW-27 as to the cognitive condition of the victim.

61. While the aforesaid circumstances undoubtedly create doubt regarding the reliability of the declaration, this Court cannot overlook that PW-27, PW-29 and PW-30 consistently stated that the victim spoke.

62. Ordinarily, such evidence may furnish assurance regarding the ability of the declarant to communicate. However, the issue in the present case is not merely the ability to utter words but whether the prosecution has ***affirmatively established*** the cognitive fitness necessary for making a coherent and reliable declaration. It is this aspect that remains insufficiently established.

63. Beyond that, no contemporaneous endorsement regarding mental fitness was made or exhibited through any medical documents, though the seriousness of the case warranted greater procedural assurance.

64. The distinction between the ability to utter words and the cognitive capacity to make a coherent and reliable declaration is crucial. The prosecution was required to establish not merely speech but cognitive fitness to state the facts in detail as projected in the written dying declaration.

65. The court cannot overlook that the victim had sustained 96% to 100% fourth-degree burns. Medical witnesses themselves admitted severe pain, nervousness, and shock. Yet, no effort was made to objectively assess memory, orientation, comprehensiveness, or coherence. Even the Bed Head Ticked was not seized, which could have thrown light on this aspect.

66. The proposition that even a victim suffering from extensive Burn injuries may remain conscious and capable of making a statement is too well settled to admit of any dispute.

Equally well settled, however, is the principle that the court must be satisfied on the evidence that the declarant was in fact in a physical and mental condition to make the statement attributed to her.

67. The cumulative effect of evidence of PW-27, PW-29, PW-30, PW-33 and PW-42 leaves us with substantial doubt regarding the cognitive fitness of the deceased at the time Exhibit-16 was allegedly recorded.

68. The prosecution has undoubtedly established that deceased was capable of uttering words. The real issue, is however, is whether she possessed the degree of orientation, coherent and recollective capacity necessary for making reliable and detailed declaration.

69. In the absence of any contemporaneous medical record, Bedhead Ticket, nursing note, fitness assessment or objective evaluation of mental status and having regard to the evidence regarding severe pain, sock, and extensive burn injuries, we are unable to record the degree of assurance required for treating Exhibit-16 as wholly reliable.

70. Another circumstance that assumes significance while evaluating the reliability of Exhibit-16 is the unresolved question regarding language and translation.

71. The court is conscious that the absence of translation evidence may not always be fatal. However, where the entire prosecution case rests substantially upon the precise words allegedly spoken by the deceased, the prosecution was under an obligation to remove reasonable uncertainty regarding comprehension and translation.

72. The PW-25, the mother of the deceased, admitted that neither she nor the deceased understood Assamese, and they spoke in the Mymensingh dialect. PW-24, a villager, also confirmed that the deceased was speaking in the Mymensingh dialect. Yet, the prosecution has entirely failed to establish/explain whether PW-27 understood the Mymensingh language; whether any interpreter was present; who translated the alleged declaration and how the accuracy of translation was ensured.

73. This omission is not merely technical.

74. In a dying declaration, the precise words attributed to the declarant constitute substantive evidence. Any uncertainty regarding translation directly affects authenticity and reliability.

75. The court cannot presume accurate comprehension and translation in the absence of evidence. The prosecution was under an obligation to affirmatively establish the linguistic bridge through which the declaration was allegedly understood and recorded inasmuch as the defence had raised a specific defence in this regard. The prosecution's failure to do so creates a substantial evidentiary gap.

76. As for the medical evidence, it fails to furnish substantial corroboration of several crucial aspects of the prosecution's narrative.

77. PW-28, who conducted the post-mortem at Gauhati Medical College & Hospital, found approximately 96% ante-mortem 4th degree burns involving almost the entire body. He admitted that the victim would have suffered excessive pain, shock and nervousness. More importantly, despite repeated allegations regarding gang rape, violent genital assault, and the slashing of vagina and rectum by a knife, the post-mortem report did not reveal corresponding genital injuries. External genital organs and uterus were described as healthy. No internal genital injury was recorded. No spermatozoa were found in vaginal slides.

78. We are conscious that absence of genital injury or spermatozoa is not invariably fatal to a prosecution of rape. Nevertheless, in the present case, the dying declarations attribute an exceptionally violent genital assault involving slashing of the vagina and rectum by knife. Yet the post mortem report disclosed no corresponding genital injury and described the external genitalia and uterus as healthy. While this circumstances does not by itself negate the allegation, it considerably weakness degree of medical corroboration available to support the narration appearing in the declarations.

79. The prosecution sought corroboration in this regard through alleged crime scene narration and recovery evidence involving the accused Zakir and his extrajudicial confession.

80. The prosecution has placed heavy reliance on a confessional statement and the subsequent recovery of the apparel at the instances of the two accused.

81. Before proceeding further, we take note of the propositions of law laid down by the Constitution Bench of the Hon'ble Apex Court while dealing with the provisions of Sections 24 to 27 of the Indian Evidence Act and Section 162 CrPC in ***State of U.P. Vs. Deoman Upadhyaya*** reported in (***1960) SCC online SC 8***. The propositions can be culled out in the following manner:

I. A confessional statement made by an accused to a police officer or procured by inducement, threat or promise having reference to the charge against him cannot be proved against him in a proceeding in which he is charged with the commission of an offence, whether such statement is made by such person in custody or not.

II. A confession made to a person other than a police officer, while in custody of police, cannot be used as evidence against such person in a proceeding in which the said person is charged with the commission of an offence, subject to the condition that such confession is made in the immediate presence of a Magistrate.

III. A statement made, whether it is a confession or not, to another person, when the maker of the confession is not in custody, the person before whom such statement is made may be proved if it is otherwise relevant; however, the person before whom such confession is made shall not be a police officer.

82. In the present case, however, the evidence of PW-6, the scribe of the FIR, PW-11 & PW-17, two Assistant Commissioners, and PW-18, another independent witness, establishes that the alleged confession was made while the accused was in police custody.

83. PW-6 occupies a dual position in the prosecution case. He is the scribe of the FIR and is also presented as a witness to the alleged crime-scene narration/confessional conduct of the accused, Zakir.

84. PW-6 deposed that during the crime scene recreation, the accused Zakir narrated before police personnel, Magistrate, and others how he and two CCLs committed rape and thereafter, set the victim on fire. However, such a statement was admittedly made while the accused was in police custody and surrounded by the police officers.

85. Similar is the version of PW-11, PW-17 and PW-18.

86. These prosecution witnesses, before whom such confessions were made, unequivocally testified that the confessional statements were made before them while the accused persons were in police custody and police officers were present.

87. Therefore, Sections 25 and 26 of the Evidence Act render the confessional portion inadmissible except to the limited extent permitted under section 27 of the Evidence Act. i.e.confined to discovery.

88. Now, coming to the discovery of the lungi used in the commission of the crime, the law as regards the admissibility of the statements of the accused recorded under Section 27 of the Evidence Act is well settled since the decision of the Privy Council in ***Pulukuri Kotayya Vs. King-Emperor*** reported in ***(1947) 0 Supreme (SC) 4,*** wherein it was held that as per Section 27 of the Evidence Act, only the information leading to the actual discovery of facts in consequence of such information would be admissible in evidence, but the extent of information admissible must depend upon the exact nature of facts discovered, to which such information is required to be related. In ***Deoman Upadhyaya*** (supra), it was held that the part of the information given by a person, while in police custody, (whether the information is a confession or otherwise), which distinctly relates to a fact thereby discovered, is only provable in a proceeding in which the person is charged with the commission of an offence.

89. In the present case, even the recovery aspect does not materially advance the prosecution case. Even assuming that recovery is acceptable at its highest, the same remains essentially neutral in evidentiary value for the reason that the allegedly recovered 'lungi' yielded negative forensic results for kerosene and semen; No scientific evidence linked the recovered articles with the offence was established; No incriminating material beyond an ordinary wearable article was discovered. The recovered article was not scientifically connected with the commission of the offence and therefore fails to furnish any meaningful corroboration to the prosecution's narrative.

90. Therefore, the alleged confession and recovery failed to provide meaningful corroboration.

91. The Court finds considerable force in the criticism directed against the manner of investigation. In this regard, particular emphasis is required on the evidence of PW-45 and PW-46.

92. PW 45, the Investigating Officer, is a highly significant witness for the prosecution due to admissions made during cross-examination.

This witness admitted that he investigated the case from 23.03.2018 to 03.04.2018, but did not seize the dying declaration. According to this witness, PW-42 handed over the dying declaration on 03.04.2018; however, the same was shown to have been seized on 23.03.2018. He also admitted that nothing was recorded in the case diary as to how it was handed over. He also admitted that the Burn Register was also seized on 23.03.2018.

93. Thus, what emerges from the evidence is a serious uncertainty regarding the procedural chronology surrounding Exhibit-16. There is no clear contemporaneous record regarding its seizure, preservation, forwarding or institutional documents. No contemporaneous entry in the case diary reflected instructions for recording a dying declaration. The procedural sanctity regarding seizure, preservation and forwarding of **Exhibit 16** remained doubtful from the evidence of PW-42 and PW-45.

94. The PW-45 further admitted during cross-examination that several prosecution witnesses made substantial improvements before the Court and before the Magistrate.

He specifically admitted that the witnesses, namely, PW-14, PW-25, PW-26, and PW-35, had not earlier stated several crucial details, such as genital slashing by knife, exhortation to kill the victim, fetching of kerosene by the specific accused, and individualised role attributed to the accused, and they later narrated it during their depositions before the Court.

95. These omissions are not minor discrepancies. They go to the root of the prosecution narrative because the later-added details constitute some of the most emotionally incriminating aspects of the case.

96. The progressive elaboration of the narrative materially strengthens the defence contention regarding embellishment, reconstruction, and narrative contamination.

97. This witness also admitted that no Magistrate was involved, despite the availability; no audio-video recording of the declaration was undertaken, though videography was used during the crime scene recreation at the time of investigation.

This selective omission is significant because the prosecution's case rests substantially on the authenticity of the dying declaration.

98. Thus, the evidence of PW-45 substantially weakens the procedural integrity, contemporaneity, reliability of the witness's testimony, the evolution of the witness's testimony, and the authenticity of the dying declaration process.

99. The subsequent Investigating Officer, PW-46, further aggravated the doubt surrounding the prosecution case rather than curing it.

100. Firstly, PW-46 admitted that although the dying declaration was allegedly seized on 23-03-2018, it was not forwarded to the Court until months later. He could not satisfactorily explain why there was a delay in forwarding, and the burn entry was not seized

promptly.

He further admitted that there was no note in the case diary as regards the dying declaration and that only on 03.04.2018, he received the burn register, seizure list, dying declaration, seizure list of dying declaration and zimma nama from the Officer-in-Charge and is unaware why the dying declaration, which was recorded to be seized on 23.03.2018, was not sent to the Court till 04.04.2018.

He further admitted that the seized kerosene container contained no oil when seized, but when it was produced in Court, it contained oil.

101. Such a delay and irregularity in investigation materially affect the chain of custody, procedural sanctity, and evidentiary reliability.

102. Non-recording of the factum of the dying declaration immediately in the case diary is one of the most serious infallibilities emerging in the entire prosecution case.

103. If Exhibit-16 was genuinely and contemporaneously recorded in the Burn Unit, some institutional or medical notation regarding such a crucial procedure would ordinarily have existed. The absence thereof materially weakens the prosecution's assertion regarding contemporaneous recording.

Secondly, PW46 admitted that an entry was subsequently inserted in GDE. No. 438 regarding a telephonic instruction to record the victim's statement. This admission is highly significant because it reinforces the defence's contention that there may have been subsequent interpolation or reconstruction of official records.

This Court cannot ignore that the prosecution's case rests substantially upon documentary chronology. Any uncertainty regarding later insertion into GD entries directly affects the reliability of the investigative narrative.

Thirdly, PW-46 denied the suggestion that, after taking over the investigation, the dying declaration was shown to have been made under official influence.

Though denial was expected, the surrounding admissions regarding a delayed seizure, absence of the burnt register notation, absence of a Bedhead Ticket, and later GDE insertion materially weaken the prosecution's procedural credibility.

Fourthly, PW-46 himself admitted that no explanation existed regarding the absence of contemporaneous burnt register notation, and there was no clear institutional record regarding the declaration process.

104. Thus, rather than reinforcing authenticity, the testimony of PW-46 introduces serious uncertainties regarding whether Exhibit 16 was contemporaneously recorded, whether the procedural chronology presented by the prosecution is reliable, and whether institutional records genuinely support the prosecution's version.

105. In our estimation, what emerges from the evidence of PW-42, PW-45, and PW-46 is not merely an imperfect investigation but a series of unexplained irregularities that directly affect the authenticity and contemporaneity of Exhibit-16.

The uncertainty regarding the date of seizure, delayed forwarding, absence of corresponding Case Diary entries, delays receipt of hospital records, absence of contemporaneous institutional documentation and subsequent insertion in the general diary collectively create doubt regarding the procedural integrity surrounding the most crucial document relied upon by the prosecution.

106. Accordingly, the cumulative irregularities noticed above materially diminish the evidentiary value of the prosecution's case.

107. The defence evidence assumes significance in the present case, as it remains substantially unchallenged and supported by PW-9, a classmate of the deceased victim.

108. DW-1 and DW-2 who are also two classmates of the deceased stated that the deceased had a love relationship with Zakir; the other CCL frequently quarrelled with her and assaulted the deceased. The prosecution declined to cross-examine these witnesses.

109. Significantly, PW-9, a prosecution witness, materially corroborated this version by admitting that the deceased had a love relationship with the accused and one of the CCLs, frequently quarrelled with her in school for this reason.

110. This Court does not treat the defence evidence as establishing an alternative version of the occurrence. The relevance of such evidence lies only in demonstrating that certain surrounding circumstances and interpersonal dynamics were not investigated with the degree of thoroughness expected in a case of this nature.

111. In our opinion, the prosecution has unquestionably established that the deceased died from a homicidal burn death involving catastrophic ante-mortem injuries.

112. The court must record that the prosecution case is not wholly devoid of incriminating circumstances. The prompt FIR, repeated naming of the accused persons in multiple declarations, homicidal burn injuries and forensic detection of semen on the half pant allegedly belonging to one CCL undoubtedly creates grave suspicion against the accused persons. But suspicion, however grave, cannot substitute proof beyond a reasonable doubt, particularly in a case resting substantially upon dying declaration evidence affected by serious procedural and evidentiary infirmities. The Criminal Court is concerned not with what may happen but what the prosecution has proved beyond reasonable doubt. equally settled is that criminal jurisprudence requires the Court to guard against a conviction founded upon emotionally compelling but legally uncertain evidence.

113. The cumulative effect of the evidence reveals:

I. The absence of objective assessment regarding cognitive fitness where the victim sufferred 96% to 100% 4th degree burns accompanied by severe pain and shock;

II. Unresolved linguistic uncertainty regarding the translation and communication of the dying declaration;

III. Non-association of a Magistrate despite availability;

IV. Possibility of narrative contamination arising from prior public circulation of names;

V. Material omission and improvements by crucial witnesses;

VI. Lack of substantial medical corroboration regarding violent genital assault;

VII. Weak forensic linkage;

VIII. Inadmissible custodial confession;

IX. Serious procedural irregularities affecting the authenticity and contemporaneity of Exhibit-16.

114. It is true that no single/independent infirmity discussed hereinabove would, by itself, necessarily justify rejection of the prosecution's case. The absence of a Magistrate, delay in recording statements, linguistic uncertainty, lack of medical corroboration, procedural irregularities, or improvement in the witness testimony may individually admit of explanation. However, when these circumstances are viewed cumulatively and in conjunction with one another, they create a reasonable doubt regarding the overall reliability and truthfulness of the prosecution version. Such doubt must necessarily be in favour of the accused.

115. The Court is conscious that the allegation concerns a grave offence involving the death of a minor victim. The tragedy of the occurrence is undeniable. Yet the gravity of the acquisition, however serious, cannot dilute the standard of proof required in criminal law. The court must remain guided not by the gravity of the allegation but by the quality and reliability of the evidence adduced.

116. The dying declaration in the present case, for the reasons recorded herein before, therefore, does not attain the character of wholly unimpeachable evidence of sterling quality upon which conviction may safely rest without independent assurance.

117. Applying the settled principles governing dying declarations to the facts proved herein, we are unable to record the degree of judicial satisfaction necessary for sustaining a conviction based upon the alleged declarations.

118. Even if oral dying declarations are considered independent of Exhibit-16, we are unable to treat them as safe foundation for conviction. The alleged declarations made before multiple witnesses at different points of time, after the names of the accused had began circulating and several of the witnesses introduced material improvements regarding the manner of assault and individual role attributed to the accused. The declarations therefore, do not possess the spontaneity and insulations from external influence ordinarily expected of evidence intended to form the sole basis of conviction.

119. The appellant is, therefore, entitled to the benefit of doubt.

120. Accordingly, the conviction and sentence imposed upon the appellant, Zakir Hussain, by the learned Special Judge, Nagaon, in Special (POCSO) case No. 23(N)/2018, stand set aside.

121. The appellant is acquitted of the charges by extending the benefit of doubt.

122. The accused, Zakir Hussain, shall be released forthwith, if not required in connection with any other case.

123. Consequently, the Death Sentence Reference No. 02/2018 stands rejected, and Criminal Appeal Number 336/ 2018 stands allowed.

124. TCR should be returned.

125. While parting with the records, it is observed that the learned Trial court had already invoked the provisions relating to victim compensation and directed the District Legal Services Authority, Nagaon, to consider and process the claim of the victim’s family in accordance with the law applicable to the victim compensation scheme as envisaged under section 357-A Cr.P.C.

126. The direction issued by the trial court shall accordingly remain undisturbed. It is, however, expected that the concerned authority shall ensure expeditious compliance so that the intended rehabilitative support reaches the beneficiaries without undue delay, if such compensation has not already been paid.

JUDGE **CHIEF JUSTICE**

Comparing Assistant