

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.T.SANKARAN

&

THE HONOURABLE MR. JUSTICE B.SUDHEENDRA KUMAR

FRIDAY, THE 3RD DAY OF JULY 2015/12TH ASHADHA, 1937

CRL.A.No. 255 of 2010 (G)

AGAINST THE JUDGMENT IN SC.NO.1358/2008 ON THE FILES
OF THE ADDITIONAL SESSIONS COURT II, THIRUVANANTHAPURAM
DATED 30-11-2009

CP 45/2006 OF THE JUDICIAL FIRST CLASS MAGISTRATE COURT, KATTAKADA

APPELLANT:ACCUSED:

AMBILI, S/O. VELAYUDHAN, AGED 40 YEARS,
LAKSHAM VEEDU COLONY, VALIYAVILA,
PARATHIPALLY, MANOORKKARA VILLAGE,
THIRUVANANTHAPURAM DISTRICT.

THE NAME OF THE FATHER OF THE APPELLANT IS CORRECTED
AS VIDYADHARAN AS PER THE ORDER DATED 2.7.2015 IN
CRL.M.A.NO.3652 OF 2015.

BY ADVS.SRI.TONY PETTAH
SRI.THAMBI JACOB
SRI.BIJU.N.T.

RESPONDENT:COMPLAINANT:

STATE OF KERALA,
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SRI.K.K.RAJEEV

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
03.7.2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

**K.T.SANKARAN &
B.SUDHEENDRA KUMAR, JJ.**

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Dated this the 3rd day of July, 2015

JUDGMENT

Sudheendra Kumar, J.

The appellant is the accused in S.C.No.1358 of 2008 on the files of the Additional Sessions Court II, Thiruvananthapuram, who in this appeal challenges the judgment of conviction and sentence passed by the trial court under Section 302 of the Indian Penal Code. The trial court sentenced the appellant to imprisonment for life under Section 302 IPC.

2. The deceased Sindhu and the appellant were living together as husband and wife for about six months prior to the incident, even though they were not legally married. The deceased was unmarried. However, she had two children, namely, Vishnu and Chinchu. The first child was born in the relationship with PW8. The paternity of the second child is not known. On 26.6.2005 at about

2.30 p.m., the appellant poured kerosene on the body of the deceased Sindhu. The deceased Sindhu escaped to the bedroom of the house, where the deceased and the appellant were residing and closed the said room from inside. However, the appellant threw a lighted matchstick through the window and set the deceased fire. On hearing the screaming sound of the deceased, PW1 to PW4 reached there. They poured water through the window and put out the fire. Then the deceased came out of the bedroom, opening the door. She was immediately taken to the Medical College Hospital where she succumbed to the injuries on 29.6.2005 at 6.30 p.m. while undergoing treatment.

3. PW15 recorded Ext.P11 statement of the deceased on 26.6.2005 at 6 p.m.. Thereafter, on the request of PW15, PW14 recorded Ext.P10 dying declaration of the deceased. On the basis of Exts.P10 and P11, PW15 registered Ext.P12 FIR under Section 307 IPC. The investigation was taken over by PW17 on 27.6.2005. He visited the place of occurrence and prepared Ext.P1 scene mahazar. MO1 plastic bottle containing kerosene and MO5 match box were inter alia seized by PW17 as per Ext.P1 scene

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mahazar. MO1 and MO5 were found on the courtyard on the northern side of the house of the deceased. The appellant was arrested on 13.7.2005 at 6.30 p.m. by PW17. Since the deceased died on 29.6.2005, Ext.P17 report was submitted by PW17 before the Court incorporating Section 302 IPC to the section of offence, deleting Section 307 IPC. After completing the investigation, PW17 laid the charge before the Court.

4. We have heard the learned counsel for the appellant Sri.Tony Pettah and the learned Public Prosecutor Sri.K.K.Rajeev.

5. PW9 Doctor examined the deceased at 5.10 p.m. on 26.6.2005 and issued Ext.P4 wound certificate. Ext.P4 wound certificate would show that the deceased sustained about 90% burns involving almost the entire body. PW10 was the doctor who conducted the postmortem examination on the body of the deceased and issued Ext.P5 postmortem certificate. PW10 noted the following ante-mortem injuries as per Ext.P5 postmortem certificate:-

"INJURIES (ANTEMORTEM):

1. Superficial deep burns involving the whole body

sparing the soles. Burns smeared with white ointment. Scalp oedematous.

2. Surgical sutured venous cut down wounds (a) 3 cm long on the inner aspect of right leg 4 cm above ankle (b) 6 cm long on the inner aspect of left leg 2 cm above ankle- dressed with cotton and gauze bandage.”

PW10 opined that the death of the deceased was due to the burns involving about 97% of body surface. There is absolutely no material before the Court inconsistent with the finding of PW10 that the deceased died due to burns. In the said circumstances, we are inclined to hold that the deceased died due to burns.

6. Now the question to be considered is as to whether the death of the deceased was a suicide or a homicide. PW1 is the brother of the deceased. PW1 was aged only fourteen years during the relevant period. PW1 stated that in the morning of 26.6.2005, while he was going to play cricket, he saw the appellant in the house of the deceased and, at that time, the deceased was not there in the house. When PW1 came back to his house at about 2.15 p.m. after playing cricket, he noticed that the deceased Sindhu was there in the

house. He heard the cry of Sindhu when he reached near to the house of Sindhu. He rushed to the place. Then he saw the appellant standing in front of the house near to the window, putting his hands through the window holding the blouse of the deceased. PW1 could feel the smell of kerosene at that time. PW1 asked the appellant as to why he was creating nuisance to his sister. Then the appellant told him that the deceased went to sleep with others during the previous night. The appellant terrorised PW1 to leave that place. Therefore, PW1 left for his house. While PW1 was taking meals at about 2.30 p.m. on that day, he heard a screaming sound from the house of the deceased. PW1 to PW3 were together residing in a house which was situated nearly ten feet away from the house of the deceased. On hearing the screaming sound from the house of the deceased, PW1 to PW3 rushed to that house. When PW1 to PW3 reached the house of deceased Sindhu, they saw deceased Sindhu running inside her bedroom with fire on her body. The bedroom was found locked from inside. At that time, the appellant was found standing in front of the house. PW1 to PW3 attempted to put out the fire by splashing water through the window. PW4 also reached there and helped PW1 to PW3 to put out the fire. When the fire was put

out, the deceased came out of the room opening the door. She was immediately taken to the Medical College Hospital by PW3 and others. When the deceased came out of the room, she uttered that the appellant poured kerosene on her and threw a lighted matchstick at her and thereby the appellant set her fire.

7. PW2 saw the accused at about 10 a.m. on that day while she was on her way to the market. She came back at about 10.30 a.m.. At that time, deceased Sindhu was there in the house. She found the appellant quarrelling with Sindhu. At about 2.30 p.m., she heard the screaming sound of deceased Sindhu. PW1 to PW3 rushed to the place. Then PW2 saw the deceased running inside her bedroom with fire. PW1 to PW3 put out the fire. PW4 also reached there and helped PW1 to PW3 to put out the fire. Then the deceased came out opening the door. PW2 also stated that when the deceased came out of the bedroom, she uttered that she was set fire by the appellant after pouring kerosene on her body. PW3 had also given evidence in support of the evidence of PW2. PW4 reached the place on hearing the screaming sound of the deceased. He also found the deceased engulfed with fire and running inside the

bedroom. PW1 to PW4 put out the fire. Then, the deceased came out of the bedroom opening the door. The evidence of PW1 to PW4 would show that immediately when the deceased came out of the bedroom, she uttered that the appellant poured kerosene on her body and threw a lighted matchstick at her and thereby, set her fire.

8. The learned counsel for the appellant has argued that since PW1 did not incline to splash water to put out the fire, which is not the normal conduct of a brother facing a situation like this, it has to be held that PW1 did not witness the incident. It has been further argued by the learned counsel for the appellant that PW1 did not accompany the deceased to the hospital even though PW1 is the brother of the deceased and on that reason also, it has to be held that PW1 was not present at the place of occurrence at the relevant time. It has been further argued by the learned counsel for the appellant that even though PW1 had seen the deceased with kerosene on her body at about 2.15 p.m. on the fateful day, he did not make any attempt to rescue the deceased from the attack of the appellant, which is not the conduct of a person placed under the same situation, and in the said circumstances alone, the evidence of

PW1 cannot be relied upon.

9. It is borne out from the records that PW1 was aged only fourteen years at the relevant time. It is true that PW1 did not specifically state that PW1 splashed water to put out fire. However, the evidence of PW2 to PW4 would make it clear that PW1 to PW4 splashed water to put out the fire. Therefore, merely because PW1 did not specifically state in his evidence that he attempted to put out the fire, it cannot be said that PW1 was simply watching the incident as a silent spectator without attempting to extinguish the fire. The evidence of PW1 would show that when PW1 saw the deceased crying at about 2.15 p.m., he asked the appellant as to why he was creating problems to the deceased. Then the appellant terrorised PW1 to go away from there. Since PW1 was a boy of aged only 14 years at that time, it was only natural that he left the place when the appellant terrorised him. That apart, PW1 would not have normally expected that the appellant would set the deceased fire. It is evident from the records that PW1 to PW3 were residing in the same house. PW3 is the elder sister of the mother of the deceased. It is clear from the evidence that PW3 and others accompanied the

deceased to the hospital. However, PW2 did not accompany the deceased to the hospital. PW2 was an unmarried woman. The evidence would show that there was no male member in the house other than PW1. In the said circumstances, it was only natural that PW1 remained there in the house as the unmarried sister of PW1 alone was there in the house. That apart, PW1 was only a boy of 14 years at that time. For the said reasons, the above arguments advanced by the learned counsel for the appellant, cannot be accepted.

10. It has been argued by the learned counsel for the appellant that PW1 to PW3 are close relatives of the deceased and PW4 is a neighbour of the deceased and hence their evidence cannot be accepted to bring home the guilt of the appellant. The evidence of PW1 to PW4 would clearly show that the deceased was burnt to death by the appellant after pouring kerosene upon her. It is true that PW1 to PW3 are close relatives of the deceased. However, there is absolutely no material before the Court to indicate that PW1 to PW3 had any enmity or ill-motive against the appellant to falsely implicate the appellant in a case like this. The evidence of

PW1 to PW3 is not having any material discrepancy, contradiction or inconsistency to render their evidence incredible. Having gone through the evidence of PW1 to PW3, we are satisfied that their evidence is natural, creditworthy and hence acceptable. In the said circumstances, in the absence of any enmity or ill-motive to falsely implicate the appellant in a case like this, the evidence of PW1 to PW3 can be safely accepted. The evidence of PW1 to PW3 is corroborated by the evidence of PW4, who is not a relative of the deceased. The evidence of PW4 would show that PW1 to PW3 were present when PW4 reached the place. There is no material to indicate that PW4 had nurtured any enmity against the appellant to implicate the appellant in a case like this. The evidence on record does not show that PW4 had any ill-motive to falsely implicate the appellant in a case like this. That apart, PW4 was a neighbour of the appellant as well. In the said circumstances, we find no merit in the argument advanced by the learned counsel for the appellant in this regard. The evidence of PW1 to PW4 would prove that the appellant poured kerosene on the deceased and set her fire. The evidence of PW1 to PW4 is corroborated by the medical evidence of PW9 and PW10 coupled with Exts.P4 and P5.

11. The evidence of PW1 would show that PW1 had seen the deceased crying at about 2.15 p.m.. He saw the accused catching the blouse of the deceased through the window at that time. The evidence of PW1 would further show that when he asked the appellant as to why he was creating nuisance to his sister Sindhu, the appellant terrorised him. Had there been any attempt on the part of the deceased to commit suicide as contended by the appellant, the appellant would have naturally requested PW1 to render assistance to divert the deceased from her attempt to commit suicide. However, no such request was made by the appellant. Instead of making any such request, the appellant terrorised PW1. The above conduct of the appellant, as revealed from the evidence of PW1, is a strong circumstance to indicate that the death of the deceased was not a suicide.

12. PW9 examined the deceased at 5.10 p.m. on 26.6.2005 and issued Ext.P4 wound certificate. In Ext.P4 wound certificate, PW9 clearly noted the version given by the deceased that the husband of the deceased poured kerosene on her and lit her and

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thereby she sustained burn injuries. It is stated by PW9 that the deceased was conscious and well oriented at the time when he examined the deceased. In Ext.P4 also, PW9 clearly stated that the deceased was conscious and oriented.

13. PW14 recorded Ext.P10 dying declaration of the deceased on 26.6.2005 at 6.30 p.m.. In Ext.P10, PW14 recorded thus: "Today (26.06.2005) morning onwards, my husband Ambily was assaulting me. At about noon, he poured kerosene on my body to kill me. I cried aloud due to fear, entered into the room and closed the door. Ambily threw a lighted matchstick through the window. Thus my body was set fire and I sustained burn injuries."

14. Ext.P11 statement of the deceased was recorded by PW15, the Sub Inspector of Police, at 6 p.m. on the fateful day. In Ext.P11 also, the deceased had given almost the same version as she had given to PW14.

15. The learned counsel for the appellant has argued that Ext.P10 cannot be acted upon due to various reasons. The first

reason is that Ext.P10 was not recorded in the handwriting of PW14. The second reason is that PW14 stated before the Court that at the time of recording Ext.P10 declaration, PW15 and some other Police Constables were present there. However, PW15 stated that PW15 or any other Police Officer was not present when PW14 recorded Ext.P10 declaration. The third reason is that PW14 could not state as to who scribed Ext.P10.

16. It is true that PW14 stated before the Court that at the time of recording Ext.P10 declaration, PW15 and some other Police Constables were present there. However, PW15 stated that neither PW15 nor any other Police Constable was present at the time when PW14 recorded Ext.P10 declaration. Thus, there is inconsistency in the evidence of PW14 and PW15 with regard to the presence of police personnel at the time of recording of Ext.P10 statement by PW14. It is to be noted that PW14 and PW15 had given evidence before the court after a period of more than four years and three months from the date of incident. Considering the nature of their job, both PW14 and PW15 had to naturally come across with various cases of different nature during this period as a

part of their job. For said reason, the above said inconsistency in the evidence of PW14 and PW15 cannot be given much significance. It is true that Ext.P10 was not scribed by PW14. There is no rule of law or precedent which mandates that the dying declaration must be scribed by the person to whom it is given. Therefore, the mere fact that Ext.P10 was not scribed by PW14 is not a reason to discard Ext.P10. The evidence of PW14 would show that PW14 could not state the name or other details of the person who scribed Ext.P10. The Apex Court in Govind Narain and another v. Ram Narain (1993 CRI.L.J. 2598) declined to accept the dying declaration on the reason that the person who scribed the declaration was not examined before the court without assigning any convincing reason. In the case on hand, PW14 stated that Ext.P10 was scribed by a person as dictated by him. However, PW14 could not state the name or other details of the person who scribed Ext.P10. In the said circumstances, the scribe of Ext.P10 could not be examined before the court at the trial and hence, the defence did not get opportunity to cross-examine the scribe. Consequently, there is sufficient justification in discarding Ext.P10 declaration as argued by the learned counsel for the appellant. However, even if Ext.P10 dying

declaration is discarded, there are other materials to connect the appellant with the commission of the offence. Ext.P11 is the First Information Statement of the deceased recorded by PW15 on 26.6.2005 at 6 p.m. Ext.P11 statement was recorded by PW15 immediately when the deceased was brought to the Medical College Hospital. Ext.P11 is the statement of the deceased relating to the cause of death of the deceased. Therefore, there can be no dispute that Ext.P11 is the dying declaration of the deceased. Ext.P4 also contains the statement of the deceased relating to the cause of death of the deceased. Therefore, the statement in Ext.P4 also falls within the ambit of Section 32(1) of the Evidence Act. In Ext.P4 and Ext.P11, it was recorded that the husband of the deceased poured kerosene on her and lit her and thereby she sustained burn injuries. The evidence on record would show that the deceased was in a fit state of mind and was capable of giving such a statement. In the said circumstances, Ext.P4 and Ext.P11 can be safely accepted to bring home the guilt of the appellant. It is trite law that it is not necessary that the Magistrate should record the dying declaration. There is also cogent and reliable evidence of PW1 to PW4 to prove the incident. In the said circumstances, the argument advanced by

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the learned counsel for the appellant that the entire prosecution case has to be thrown out as no dying declaration was recorded by a Magistrate, even though the deceased was alive for three days after the incident, cannot be accepted.

17. It has been argued by the learned counsel for the appellant that the deceased died long after making the dying declarations and hence, the said declarations have no value. In this case, the incident was on 26.6.2005 at about 2.30 p.m. and the deceased succumbed to the injuries on 29.6.2005 at 6.30 p.m. while undergoing treatment in the hospital. The Apex Court in **Najam Faraghi alias Najam Faruqui v. State of West Bengal(AIR 1998 SC 682)** held as follows:-

“The second paragraph of subsection (1) reads as follows:- “Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question”. No doubt it has been pointed out

that when a person is expecting his death to take place shortly, he would not be indulging in falsehood. But that does not mean that such a statement loses its value if the person lives for a longer time than expected. The question has to be considered in each case on the facts and circumstances established therein. If there is nothing on record to show that the statement could not have been true or if the other evidence on record corroborates the contents of the statements, the court can certainly accept the same and act upon it”.

It is clear from the above decision that when a person is expecting his death to take place shortly, he would not be indulging in falsehood. But that does not mean that such a statement loses its value if the person lives for a longer time than expected. The question has to be considered in each case, on the facts and circumstances established therein. If there is nothing on record to show that the statement could not be true or if the other evidence on record corroborates the contents of the statements, then the court can certainly accept the same and act upon it. In the present case, there is nothing on record to indicate that the statements given by

the deceased could not be true. On the other hand, the evidence of PW1 to PW4 corroborates the contents in Exts.P4 and P11 statements. In the said circumstances, Exts.P4 and P11 dying declarations can be safely accepted. For the above reasons, the argument in this regard advanced by the learned counsel for the appellant fails.

18. The evidence of PW1 to PW4 would show that the deceased uttered immediately when she came out from the bedroom that the appellant poured kerosene on her and set her fire. The said utterance was made by the deceased immediately after the incident. There was no room for the deceased at that time for deliberation. The said utterance was spontaneous and clear. The said utterance made by the deceased was part of the same transaction which led to her death. Therefore, the said utterance is admissible under Section 6 of the Evidence Act as *res gestae* on account of its proximity of time to the act of murder. Since the said utterance relates to the cause of death of the deceased, it is also admissible under Section 32(1) of the Indian Evidence Act. Whether the said utterance/statement is admissible under Section 6 or under Section

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32(1) of the Indian Evidence Act, it is substantive evidence. [See Rattan Singh v. State of H.P.((1997) 4 SCC 161)].

19. DW1 was examined by the appellant to prove that the death of the deceased was a suicide. DW1 was rightly disbelieved by the court below. DW1 claimed to have witnessed the incident. DW1 stated that he had no acquaintance with the appellant. At the same time, DW1 admitted during his cross-examination that DW1 was also a party to take the first wife of the appellant to the hospital when the first wife of the appellant consumed acid in her attempt to commit suicide. DW1 stated that he also attempted to put out fire in this case. Therefore, the evidence of DW1 that he was not having any acquaintance with the appellant cannot be accepted. The further evidence of DW1 is that DW1 found the deceased engulfed in fire and at that time, one child of the deceased was also with her. But the evidence on record would show that no child of the deceased sustained any burn injury. Therefore, the said part of the evidence of DW1 cannot be believed at all. Even though DW1 claimed to have close association with PW8 and deceased Sindhu, DW1 could not even state correctly about the gender status of the

children of the deceased. DW1 stated that the deceased had two male children. However, the evidence on record would show that the deceased was having one male child and one female child. Having meticulously gone through the evidence of DW1, we are satisfied that the evidence of DW1 does not inspire confidence. The evidence of PW1 to PW4 would prove the relationship between the deceased and the appellant. The evidence of PW1 to PW4 would further show that the appellant did not even attend the funeral of the deceased. The evidence of PW1 to PW4 would also show that the appellant did not incline to put out the fire. Instead of putting out the fire, the appellant ran away from the scene when the deceased uttered that the appellant poured kerosene on her body and set her fire. The above evidence of PW1 to PW4 regarding the conduct of the appellant is also a strong circumstance corroborating the evidence that the death of the deceased was homicidal.

20. The evidence of PW1 to PW3 would show that the deceased had taken one of her children to the hospital and hence she was not in the house during the night of previous day, namely, 25.6.2005. However, the appellant believed that the deceased had

spent that night with somebody with whom the deceased had illicit relationship. This is stated to be the motive for the incident as per the evidence of PW1 to PW3. However, the deceased stated in Ext.P11 statement that the appellant had the business of selling illicit arrack. The deceased warned him not to sell illicit arrack. This is the motive for the incident as per the version of the deceased. Thus the evidence on record would show that the above said aspects contributed to the motive for the incident. Since there is direct evidence to prove the occurrence, the motive is irrelevant. Even then, the prosecution could establish the motive as well.

21. We have meticulously gone through the evidence on record and we are satisfied that the death of the deceased was homicidal. Having bestowed our anxious consideration on the evidence on record as discussed above, we are fully satisfied that the prosecution succeeded in establishing beyond reasonable doubt that the appellant committed the murder of Sindhu as alleged by the prosecution. In the said circumstances, we find no reason to interfere with the verdict of guilty, conviction and sentence passed by the trial court under Section 302 IPC.

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In the result, this appeal stands dismissed.

K.T.SANKARAN
Judge

B.SUDHEENDRA KUMAR
Judge

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