

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 29.02.2016

CONCLUDED on : 07.03.2016

CORAM:

THE HONOURABLE MR.JUSTICE S.NAGAMUTHU
AND
THE HONOURABLE MR. JUSTICE M.SATHYANARAYANAN

Criminal Appeal No.708 of 2010

State rep by
The Inspector of Police
Vanur Police Station
Villupuram District
(Crime No.129/2008) ... Appellant/Complainant.

-Vs-

Selvam @ Selvaganapathy ... Respondent/Accused

This Criminal Appeal has been preferred to allow the appeal and set aside the acquittal judgment dated 26.08.2009 in S.C.No.4/2009 on the file of the learned Additional District and Sessions Judge, Fast Track Court No.II, Tindivanam and convict the respondent/accused.

For Appellant : Mr.M.Maharaja
Additional Public Prosecutor

For Respondent : Mr.John Sathyan
for Mr.M.Govindaraju

J U D G M E N T

(Judgment of the Court was delivered by S.NAGAMUTHU, J.)

The respondent is the sole accused in S.C.No.4 of 2009 on the file of the Additional District and Sessions Judge, Fast Track Court No.II, Tindivanam. He stood charged for offences under Sections 354, 366, 397, 302 IPC and Section 4(A) of the Tamil Nadu Prohibition of Woman Harassment Act, 2002. By judgment dated 26.08.2009, the trial Court acquitted the accused from all the charges. Challenging the said acquittal, the State has come up with this appeal.

2. The case of the prosecution, in brief, is as follows:

[a] The deceased in this case was one Mohanasundari. She was working as a Field Officer in an Insurance Company known as 'Pearless India Limited'. P.W.6 - Panneerselvam is her husband. She was residing with her husband-P.W.6 at Thenper village. One week prior to the occurrence, the deceased had gone to Radhapuram village to the house of her relative. There, the accused was introduced to her. The accused told her to come on some other day to take Insurance Policy. The deceased had therefore, returned to her village.

[b] After one week, as earlier stated, the accused called her over phone and informed her that a friend of him was ready to take Insurance Policy. He wanted her immediately to proceed to the said place. In pursuance of the same, the deceased informed the Organiser of her Company on 02.07.2008 at about 12.45 p.m. and proceeded to Radhapuram village to meet the accused. P.W.10 told her to go to Radhapuram village and return on time safely. When she was going in the bus towards Radhapuram, the accused again contacted her over cellphone and wanted her not to go upto Radhapuram village and instead, he wanted her to get down at a place known as Siruvallakuppam. He assured to wait their for her. Accordingly, the deceased got down from the bus at the place mentioned by the accused. The accused was waiting for her in his motorcycle. He took the deceased in his motorcycle. On his way, he took her to a brick kiln. It took about an hour for them to reach the said place. A few people were working in the brick kiln. The accused wanted her to wait. Accordingly, she was waiting.

[c] At 5.45 p.m., when she asked the accused as to what had happened to his friend, who was ready to take policy, the accused told her to wait for some more time, as his friend was coming with money. Till 6.15 p.m., nobody turned up, as told by the accused. Then, the deceased wanted the accused to take her and to leave her at her house or at least to leave her at the bus stand, so that she can go by bus to her house. The accused immediately called somebody over phone and pretended as if he were speaking to his friend. Then he informed the deceased, that they could go to the house of his friend as his friend had informed him that he was waiting at his house. Under the said promise, he again took her in the motorcycle. Around 6.30 p.m., in a secluded place, the accused stopped the motorcycle. After parking the same, he went to the nearby place and started passing urine. The deceased was standing by the side of the motorcycle, turning towards the opposite direction. The accused returned near the motorcycle and touched her hands extending sexual overture. The deceased told him that she was not such a type of woman to have free sex with him. The accused got enraged over the same. He pulled the saree of the deceased, put

the same around her neck and strangulated her. He removed some of the jewels belonging to the deceased. Then, he pushed her down, took petrol from the motorcycle, sprinkled the same on her and set fire. The deceased sustained more than 50% of injuries. Abandoning her at the place of occurrence, the deceased left the place in his motorcycle.

[d] The deceased, having sustained extensive burn injuries, extinguished the fire by rolling on the floor. Then, she managed to walk along the road to the nearby village, namely Poonthurai. On seeing her coming with such extensive burn injuries on her body, the villagers enquired her. According to her, she told the entire happening to them. Then, P.W.13 one of the said villagers, took her to the JIPMER hospital at Puducherry. P.W.11 - Dr.Subashini examined her on 03.07.2008 at 12.20 a.m. The deceased told her that a known person poured kerosene on her and set fire on 02.07.2008 around 7.30 p.m. She was admitted there as inpatient. Ex.P3 is the Accident Register. The doctor informed the police as well as the Judicial Magistrate about the same.

[e] P.W.20, the Sub Inspector of Police, Vanur Police Station on receiving the said intimation from the hospital, proceeded to the hospital. He found the injured in a fit state of mind to make a statement. Then, he recorded the statement from the deceased vide [Ex.P12]. On returning to the police station at 8.30 a.m., on 03.07.2008, he registered a case in Cr.No.129 of 2008 under Sections 354, 376, 511 and 307 IPC and handed over the case diary to the Inspector of Police for investigation. Similarly, on getting intimation from the hospital, P.W.19, the then Judicial Magistrate-2 (Puducherry) went to the JIPMER Hospital at 7.55 a.m. on 04.07.2008. P.W.18 - Dr.Karthigeyan was attending on the deceased. The Judicial Magistrate requested the doctor to assess the mental fitness of the deceased to make dying declaration. The doctor gave opinion that the deceased was in a fit state of mind to make a dying declaration. In order to satisfy his judicial conscience, the learned Magistrate elicited certain answers from the deceased and based on the same and the Doctor's opinion besides the other circumstances, the learned Magistrate got satisfied that the deceased was in a fit state of mind to make a dying declaration. Then, he recorded the said dying declaration under Ex.P.9.

[f] On receiving intimation, P.Ws.6 (her husband), 7 (father), 9 (Relative) and 10 (Organiser of 'Pearless India Limited') also went to the hospital. When they independently enquired the deceased as to how she suffered these burn injuries, the deceased narrated to them also that the accused only poured kerosene and set fire. Despite treatment, the deceased died on 05.07.2008 in the hospital.

[g] P.W.21, took up the case for investigation, proceeded to the place of occurrence and prepared an Observation Mahazar and a Rough Sketch. He had requested P.W.17- the Fingerprint Expert to visit the place of occurrence. The Fingerprint Expert lifted chance fingerprints in a plastic bottle found at the place of occurrence. P.W.17 developed the said chance fingerprints. It is the further case of the prosecution that subsequently, the fingerprints taken from the accused were forwarded to P.W.17 and P.W.17, on comparing the same, found that the fingerprints tallied with that of the accused.

[h] The Investigating Officer (P.W.21) arrested the accused on 05.07.2008 at Tiruvakkarai, in the presence of P.W.14 and another witness. On such arrest, he made a voluntary confession, in which he disclosed the place where he had hidden the gold Murukku chain, Poosai thali, Thali balls, Gnanakkuzhal- 2 nos., Vaazhai seepu-1 No., Gold Coin- 1 No. and the Motorcycle bearing Registration No.PY-01-AE-0173. In pursuance of the said disclosure statement, he took P.W.21 and P.W.14 to the said place and produced M.Os.10 to 16. P.W.21 arrested him and recovered the material objects under a mahazar. On returning to the police station, he forwarded the accused to Court and handed over the material objects also to the Court. Following him, P.W.22 took up the case for investigation. On completing the investigation, he filed the Final Report against the accused.

3. Based on the above materials, the trial Court framed appropriate charges. The accused denied the same. In order to prove the case of the prosecution, on the side of the prosecution, as many as 22 witnesses were examined and 21 documents were exhibited, besides 16 material objects.

4. Out of the said witnesses, P.Ws.1 to 5, who are the villagers of Poonthurai have turned hostile and they have not supported the case of prosecution in any manner. P.W.6 - the husband of the deceased and P.W.7 - the father of the deceased has spoken about the oral dying declaration made by the deceased to them in the hospital. P.W.8 has spoken about the Observation Mahazar and the Rough Sketch prepared at the place of occurrence and also recovery of the material objects. P.Ws.9 and 10 have also stated that when they visited the hospital, the deceased made oral dying declaration implicating the accused. P.W.9 has spoken about the admission of the deceased at JIPMER Hospital at Puducherry and the treatment given to her. P.W.12 has spoken about the post-mortem conducted on the body of the deceased. P.W.13 - the villager, has turned hostile and he has not supported the case of the prosecution in any manner. P.W.14 - the Village Administrative Officer, has spoken about the arrest of the accused, the disclosure statement made by him and the consequential recovery of M.Os.10 to 16. P.W.15, an official from the Regional Transport Office has stated that the vehicle

in question was owned by the accused. P.W.16 has spoken about the fact that he took the dead body to the hospital for post-mortem. P.W.17 - the Fingerprint Expert has stated that he lifted three chance prints from a plastic bottle at the place of occurrence, which subsequently, found to tally with the fingerprints of the accused. P.W.18 - the Doctor has spoken about the fact that at the time when the dying declaration was recorded, the deceased was in a fit state of mind. P.W.19 has spoken about the judicial dying declaration recorded from the deceased. P.W.20 has spoken about the statement recorded from the deceased and the case registered by him. P.Ws.21 and 22 have spoken about the investigation done.

5. When the above incriminating materials were put to the accused under Section 313 Cr.P.C., he denied the same as false. On his side, as many as five documents were marked and one witness by name Suguna, was examined as D.W.1. D.W.1 is none else than sister-in-law of the accused. D.W.1 has stated that the deceased had developed intimacy with her husband. Since the accused took exception to the same, the deceased has made such false allegations against the accused as though the accused set fire to her.

6. Having considered all the above, the trial Court acquitted the accused. Aggrieved over the same, the State is before this Court with this appeal.

7. Today, the respondent/accused was present in Court. We have heard the learned Additional Public Prosecutor appearing for the State/appellant and Mr. John Sathyan, the learned counsel appearing for the respondent/accused and we have also perused the records carefully.

8. The learned Additional Public Prosecutor would submit that the trial Court was wrong in acquitting the accused and the judgment is perverse. He would point out that the deceased had made multiple dying declarations consistently stating that it was this accused who outraged her modesty and set fire to her. He would further submit that the recovery of the material objects belonging to the deceased from the possession of the accused, would further strengthen the case of the prosecution. The learned Additional Public Prosecutor would further submit that the chance fingerprints lifted from the bottle found at the place of occurrences tallied with that of the accused, but the lower court has failed to appreciate the same properly. The trial Court has given untenable reasons for acquitting the accused, he contended.

9. The learned counsel for the accused would vehemently oppose this appeal. According to him, the motive for the occurrence has not been either proved or the same is so flimsy.

He would further submit that though it is stated that the accused spoke to the deceased over cellphone and wanted her to come to Radhapuram village and then again spoke to her over cellphone and wanted her to get down from the bus at a different place, the call details of the cellphone of the accused as well as that of the deceased have not been collected and proved in evidence.

10. He would further submit that the villagers to whom the deceased made the earliest statement amounting to dying declaration have turned hostile and thus the earliest statement of the deceased is not available. He would further submit that the judicial dying declaration cannot be given any weightage of because the assessment of the learned Magistrate that the deceased was in a fit state of mind to make the dying declaration cannot be correct. He would further submit that the statement made to the Sub-Inspector of police also cannot be relied on as there are sufficient evidence on record to prove that it is a concocted document.

11. So far as the fingerprints found at the place of occurrence are concerned, the learned counsel would submit that though it is stated that the fingerprints were lifted on 03.07.2008 itself, strangely, the letter of the Deputy Superintendent of Police to the police photographer to take the photographs of the developed fingerprints is dated 04.07.2008 (vide Ex.D.1). Thus, according to him, the theory that the chance fingerprints were found at the place of occurrence in a bottle cannot be believed.

12. So far as the alleged recovery of the jewels is concerned, the learned counsel pointed out that absolutely there is no evidence that these jewels were lastly worn by the deceased at the time when she was lastly seen alive. He would further submit that there was no allegation at all that the jewels were virtually stolen. Thus, according to the learned counsel, this circumstance was also not been proved by the prosecution.

13. He would further submit that from the evidence of D.W.1, it has been established that the deceased had a motive against the accused and driven by the said motive, and on being tutored, she has made the dying declaration falsely against the accused and he would submit that this has been duly considered by the Trial Court.

14. He would further submit that there are so many missing links in the chain of circumstances and the prosecution has failed to prove by means of circumstances unerringly that the accused was the perpetrator of the crime. Therefore, according to him, the lower Court was right in acquitting the accused,

which does not require any interference at the hands of this Court.

15. We have considered the above submissions.

16. The deceased Mohanasundari was hardly aged 29 years. Admittedly, she was residing with her husband (P.W.6) at Thenper village. It is also in evidence and the same is not in dispute that she was working as a Field Officer in an Insurance Company known as 'Pearless India Limited', where P.W.10 was the organiser.

17. P.W.10, Mr.Mohan, in his evidence has stated that at 12.45 p.m. on 02.07.2008, the deceased spoke to him over phone that she was proceeding to Radhapuram village to meet one Selvaganapathy for the purpose of canvassing insurance policy. It needs to be emphasised that P.W.10 had not seen the accused Selvaganapathy before the occurrence. He had no motives against him and he is an independent witness. He has further stated that at 02.15 p.m. again, she spoke over phone and informed him that already she had left Villupuram and was proceeding to Radhapuram. P.W.10 advised her to finish the work quickly and return back safely. From this evidence, it is crystal clear that the deceased was proceeding to Radhapuram. This statement of the deceased made to P.W.10 relating to one of the circumstances which resulted in her death, is therefore, a dying declaration falling within the ambit of Section 32 of the Evidence Act.

18. But, this part of the evidence of P.W.10 is assailed by the learned counsel for the accused on the ground that the cellphone call details of the cellphone numbers stated to have been used by the deceased and P.W.10 have not been collected. It is of course true. But, had the call details been collected and admitted in evidence by following the procedure contemplated in Section 65B of the Evidence Act, the same would have further corroborated the evidence of P.W.10. Now the question is whether P.W.10 could be believed and whether his evidence could be acted upon in the absence of any corroboration from any other source such as the cellphone call details from the service provider. Looking for corroboration from independent sources is only a rule of caution and not a rule of evidence. It all depends upon the quality of the substantive evidence upon which reliance is made by the prosecution. It is settled law that if the evidence inspires confidence of the Court, then, the Court need not look for corroboration and the Court could act upon the said evidence.

19. In the instant case, as we have already pointed out, P.W.10 is an independent witness, who had no axe to grind against the accused at all. He had neither motive nor

acquittance with the accused. He is absolutely an independent witness. In our considered view, going by these facts and circumstances, this part of evidence of P.W.10 inspires confidence of this Court and therefore, we are inclined to act upon the same. It is not as though there were no corroboration from any other source. This statement of the deceased made to P.W.10 is duly corroborated by two dying declarations, one recorded by the learned Magistrate and the other recorded by the Sub Inspector of Police, wherein also, she had stated that she left for Radhapuram from Villupuram by bus. From these evidences, we hold that the prosecution has proved that around 2.15 p.m. the deceased had left for Radhapuram from Villupuram in a bus to meet the accused.

20. The next circumstance is that, according to the case of prosecution, when the deceased was travelling in the bus to go over to Radhapuram, the accused spoke to her over phone with guilty intention asking her to get down at a place known as Siruvallakuppam. Accordingly, she got down at that place from where she was taken in a motorcycle by the accused under the guise of going to a different place to canvas and collect insurance policy from one of his friends. These facts have been stated by the deceased in the dying declarations, including the judicial dying declaration.

21. Here again, the learned counsel would submit that the call details of the cellphone of the accused as well as that of the deceased have not been collected in order to scientifically prove that the accused spoke to the deceased while she was travelling in the bus to go over to Radhapuram. Of course, it is true that the collection of such cellphone call details from the service provider would have proved that the accused spoken to the deceased at the crucial time. In the absence of the same, the question is whether the case of the prosecution that the accused had spoke to the deceased could be believed or not. This fact has been spoken by the deceased in both the dying declarations viz., the judicial dying declaration as well as the dying declaration made to the Sub Inspector of Police. In these two dying declarations, the deceased had categorically stated that the accused called her over cellphone and wanted her to get down at Siruvallakuppam, instead of going to Radhapuram. Similarly, when P.Ws.6, 7 and 10 had gone to the hospital and met the deceased she told the same fact to them also. These are also dying declarations made by the deceased orally to these three witnesses. There is consistency in respect of this fact spoken in all the dying declarations.

22. But the learned counsel for the accused would submit that these dying declarations cannot be believed and therefore no reliance can be made on the same. But, we find no force in the said contention of the learned counsel. We hold that these

dying declarations are reliable and we are inclined to act upon the same (We will discuss a little later about the contentions of the learned counsel assailing these dying declarations and the reasons for our conclusion that they are all reliable).

23. From these dying declarations, in our considered view, the prosecution has clearly proved that the accused had spoken to her over cellphone and wanted her to get down at Siruvallakuppam and accordingly she got down and from where she was taken by the accused in his motorcycle.

24. The next circumstance is that the accused taken the deceased in his motorcycle under the guise that he was proceeding to meet his friend for the purpose of canvassing for insurance policy. He took her to a brickkiln where one Mani and others were working. According to these dying declarations, he made her to wait there informing her that his friend was mobilising money and coming to the said place. Believing these words, the deceased was waiting there. Since it became late, the deceased wanted to return back. But the accused immediately spoke to somebody and informed her that his friend had gathered money and he was waiting at his house and so they could go to the house of his friend and after collecting the money, she could go back to her office or her house by bus. When the deceased expressed difficulty, the accused persuaded her and took her in his motorcycle. This fact has been spoken to by the deceased in all the dying declarations. But the learned counsel for the accused would submit that none in the brickkiln had been examined by the prosecution to prove this fact.

25. It is true, that the prosecution has also not assigned any reason as to why none has been examined from the brickkiln to speak about this fact. This shows that the investigation was not up to the mark and moreover, the way in which the prosecution was conducted by the prosecutor also was not appreciable. But on that score, we cannot reject the dying declarations, wherein the deceased had stated about the above fact. Of course, it is true that if anyone from the brickkiln has been examined by the prosecution, it could have lend support or corroboration to these dying declarations in respect of this particular fact. The non examination of any witness from that brickkiln has only deprived the prosecution of having corroborative evidence to corroborate the dying declarations. For that reason, we are of the view that the dying declarations, wherein, this particular fact has been spoken cannot be rejected. We hold that this fact that the deceased was taken to brickkiln and was made to wait in the brickkiln for considerable time and thereafter the accused took her in the motorcycle stands proved.

26. The next circumstance is that the accused under the guise of taking her to the house of his friend had gone to a secluded place, where on both sides of the road, there were bushes looking like a small forest. The accused stopped the motorcycle, parked it on the side of the road and walked a few yards and started passing urine. Out of modesty, the deceased was standing by the side of the motorcycle turning towards the opposite direction. The accused after passing urine, returned near the motorcycle and touched her hands advancing sexual overtures. The deceased told him that she was not such a type of woman to have free sex with her and she wanted him not to harm her. When the accused continued to extend sexual overtures the deceased also continued to resist the same. In the said process, the accused took the saree end of the deceased, put it around her neck and pushed her near a bush. She fell down and fainted.

27. To prove this circumstance, of course, the prosecution has got no eyewitness account. The prosecution relies on these dying declarations. In all the dying declarations referred to above, the deceased had consistently stated about this fact. Since we have already concluded that these dying declarations are beyond any doubt, we have no reason to reject this part of the case of the prosecution, which has been spoken in an inspiring manner by the deceased in all the dying declarations.

28. When she was lying, the accused went to the road brought the motorcycle to that place, poured something on her, set fire and then fled away from the scene of occurrence in the motorcycle. The substance was poured from a plastic bottle and he threw the bottle by the side of her. Due to the heat produced by flames, the deceased regained orientation and by rolling on the ground, she got the fire extinguished and slowly she moved to the main road and walked a distance to a nearby village viz., Puthurai.

29. Whether this fact has been proved or not is the next question ? To prove this fact, apart from the above dying declarations, wherein, the deceased has stated consistently about the same, the prosecution also relies on the chance fingerprints lifted from the plastic bottle which was lying at the place of occurrence.

30. The learned counsel for the accused would submit that P.W.17, the fingerprint expert, has stated that he visited the place of occurrence on 03.07.2008, as requested by the Investigating Officer and at the place of occurrence, when he examined, he found the plastic bottle from which he was able to lift the chance fingerprints. Thus, according to him, the chance fingerprints were noticed on 03.07.2008 itself and with the help of the police photographer, the same was developed and photographed on the same day.

31. The learned counsel for the accused would bring to our notice that Ex.D1 is the memorandum dated 04.07.2008, issued by the Investigating Officer to the police photographer, Photo Section, Villupuram, requesting him to come and develop the photographs of the chance fingerprints concerned in the above case developed from the wine bottle. Referring to this document, the learned counsel would submit that when Ex.D1 was issued only on 04.07.2008, to the police photographer-P.W.17, he would not have developed the chance fingerprints on 03.07.2008 and taken photographs as stated by him on the same day. Though, there appears to be some force in the said argument of the learned counsel, if we go further deep into the materials, we would find that the said argument is liable to be rejected.

32. P.W.17, has stated that he examined the scene of occurrence and found the bottle viz., "Mansion House Brandy" bottle which is a plastic bottle from where he lifted the chance fingerprints. Ex.P2 Mahazar which is a spontaneous document prepared at the place of occurrence, immediately after the observation mahazar would show that the said bottle was recovered at 01.30 p.m. on 03.07.2008. This fact has been spoken by P.W.8 and the Investigating Officer. There is a mention in Ex.P2 that already the chance fingerprints have been developed by P.W.17. From these facts, it is crystal clear that the prosecution has proved that the bottle M.O.3 was lying at the place of occurrence and from the said bottle, the chance fingerprints were lifted by P.W.17 on 03.07.2008, itself. Thus, we have no difficulty in accepting the case of the prosecution in this regard.

33. The learned counsel for the accused would next contend that there is no proof that the finger impression of the accused was taken from him and the same was sent for comparison by P.W.17. It is unfortunate that P.W.21 has not at all stated that he collected the fingerprints of the accused by following the procedure established and forwarded the same to P.W.17 for comparison. The report of P.W.17 (Ex.P8) contains the alleged fingerprints of the accused which were used for comparison. A reading of the said document shows that the fingerprints of the accused were allegedly taken by one Head Constable No.399. Admittedly, it was not taken by the Investigating Officer. But unfortunately, the said Head Constable No.399 has not been examined by the prosecution to prove that these fingerprints, which were used for comparison, were taken only from the accused. The prosecution would have done well by examining the said witness to prove the fact that these fingerprints were taken as sample prints from the accused for the purpose of comparison.

34. There is yet another shocking circumstances, i.e., the photographs of the chance fingerprints lifted from the bottle have not been marked in evidence. Probably the police as well as the learned Public Prosecutor were under the mistaken impression that the accused doesn't have a right of fair trial and there is no right for him to compare the chance fingerprints with that of his own fingerprints and come out with his own stand. In this regard, we would like to state that the expert evidence is only an opinion and the same does not bind the Court. The final adjudication as to whether the chance fingerprints were that of the accused is to be made only by the Court. The opinion of the expert is only one of the inputs to the Court to resolve the said issue. When the correctness of the opinion of the expert is challenged by the accused, in the instant case, the Court is deprived of verifying the correctness of the opinion of the expert for want of the photographs of the chance fingerprints. Further as a part of fair procedure to be afforded to the accused, a copy of the developed chance fingerprints should have been furnished to the accused so that he can have an opportunity to compare his fingerprints with the same and to take an effective defence. Unfortunately, neither the accused has been furnished with a copy of the same, nor the same has been marked, so as to enable the Court to come to a conclusion on this issue. Therefore, we are forced to reject this part of the case of the prosecution that the chance fingerprints found on the bottle (M.O.3) tallied with that of the accused.

35. The learned counsel would next contend that at the earliest point of time, the deceased had told the Doctor that kerosene was sprinkled on her by a known person and set on fire. The learned counsel would next contend that in the judicial dying declaration, the deceased had not stated that kerosene was poured on her by the accused and then set her on fire. She has stated therein that something was poured on her. In respect of this argument, we would state that when some liquid was poured on the deceased, since she was under so much tension, it would not have been possible for her to perceive whether it was really kerosene or petrol or diesel or any other liquid. Out of assumption, being a village lady, she had told the Doctor that what was poured on her was kerosene, whereas, in the dying declarations, she has stated that some liquid was poured on her. This contradiction, in our considered view, is quite natural and for this contradiction, we cannot hold that her statement has lost its credibility.

36. The learned counsel would assail the judicial dying declaration recorded by P.W.18 on yet another ground viz., P.W.18 had failed to ascertain the mental fitness of the deceased before recording the dying declaration. He would submit that the assessment of the learned Magistrate that the

deceased was in a fit state of mind is contrary to the actual mental fitness of the deceased, which is evident from the answers of the deceased for the questions put by the learned Magistrate. We have carefully gone through Ex.P10 and the evidence of P.W.19 and the evidence of P.W.18. It is needless to point out that the opinion of the Doctor about the condition of the deceased is only an input to the learned Magistrate to enable him to arrive at the satisfaction that the deceased was in a fit state of mind to make a dying declaration.

37. As has been consistently held by the Hon'ble Supreme Court, it may be true that a man who is conscious in medical terms, may not be fit enough to make a dying declaration. For the purpose of making a dying declaration, what is the primary requisite is not a mere consciousness of the patient in terms of medical opinion, but the mental fitness of the deceased. The measure relates to the mental faculty of the deceased. The learned Magistrate, not only from the opinion of the Doctor, but by his own assessment from the answers elicited for the questions put by him and various other circumstances, should satisfy his judicial conscience that the deceased was in a fit state of mind to make a judicial dying declaration. In this respect, the learned Magistrate is not adjudicating on the issue, but he is satisfying his judicial conscience in respect of the mental fitness of the deceased so as to make a dying declaration. The satisfaction of the judicial conscience of the learned Magistrate should be reflected in the recoding made in the dying declaration itself by the learned Magistrate and even if there is any omission to record the same properly, by means of oral evidence, he can speak about the said fact. In this case, the learned Magistrate has rightly recorded his satisfaction of the judicial conscience from various circumstances that the deceased was in a fit state of mind to make a dying declaration.

38. After getting opinion from the Doctor, the learned Magistrate has proceeded to elicit certain answers by putting questions to the deceased so as to further assess the mental fitness of the deceased. For one such question, the deceased had given a wrong answer viz., when the learned Magistrate had asked her as to where she was at that time, she has said that she was at the house of her mother. Singling out this answer, the learned counsel submitted that this answer is wrong and therefore the learned Magistrate ought not have come to the satisfaction that she was in a fit state of mind to make a dying declaration. This approach, in our considered view is incorrect. Factually, before this question, the learned Magistrate had asked her as to which village she belonged to. She told that she was residing at her mother's house and she told the name of the village, the name of the taluk and also the name of the district. Immediately after the said answer, the

learned Magistrate had asked as to where she was. This question was not clear and the deceased would have heard the same as though the learned Magistrate was asking her as to where was she residing. Therefore, she has answered that she was residing at her mother's house. She has answered all the other questions correctly. The dying declaration of the deceased runs to almost three and half pages, which contains even the minute details. This itself would reflect that the deceased was conscious and mentally fit enough to make such a long statement.

39. The learned counsel would further submit that P.W.18 has stated that before the learned Magistrate had come to the hospital, morphine injection was given to her, which would have made her drowsy. The learned counsel took us through the cross examination of P.W.18, wherein, the Doctor has stated about the various other conditions like ear, throat etc., Referring to these facts spoken by the Doctor, the learned counsel submitted that the deceased would not have been in a fit state of mind to make a statement. But the fact remains that the very same Doctor, in the presence of the learned Magistrate, after having assessed her condition, had given certificate that she was conscious. Thus, in our considered view, the learned Magistrate had performed his judicial function properly and after having his judicial conscience satisfied, has recorded the dying declaration. Therefore, we hold that the judicial dying declaration (Ex.P11) is unassailable which itself can be the sole foundation for convicting the accused.

40. The learned counsel would further submit that the statement recorded by P.W.20 under Ex.P12 also cannot be stated to have been made when she was in a fit state of mind to make a dying declaration. Before recording the said statement under Ex.P12, P.W.20 had requested the Doctor to assess the deceased and to give his opinion regarding her mental fitness. The Doctor gave an opinion that she was conscious and oriented at the time of recording of the statement. Therefore, it is crystal clear that at the time when Ex.P12 was recorded also, she was mentally fit for making a dying declaration.

41. Between the above two dying declarations, we do not find any contradiction. In the judicial dying declaration, of course, there is omission of the fact that the accused set fire. When she was giving such a long statement, she would have omitted to mention about the same. This is only natural. But that is not a ground to doubt the said dying declaration.

42. Then comes the arrest of the accused. The accused was arrested on 05.07.2008 at 11.00 a.m. near Thiruvakarai Auto Stand in the presence of P.W.14 and another witness. On such arrest, the accused gave a voluntary confession in which he disclosed the place where he had hidden the gold jewels. In

pursuance of the said disclosure statement, he took P.W.21 and the witnesses to the place of hide out and produced M.Os.10 to 16. M.Os.10 to 15 are the gold jewels of the deceased and M.O.16 is the motorcycle. Since these jewels were in the possession of the accused, the presumption under Section 114 of the Evidence Act is that he was the one who killed the deceased and removed these gold jewels provided it has been proved that these are stolen properties.

43. The learned counsel would submit that P.W.11 Dr.Subashini during the cross examination has admitted that the jewels and other personal belongings of the deceased which were found on the body of the deceased were removed by her and were handed over to one Sundaramorthy. Referring to the same, the learned counsel would submit that since the properties had already been found on the deceased, the story of the prosecution that on the arrest of the accused, the jewels (M.Os.10 to 15) were recovered cannot be true. But this argument does not persuade us at all for many reasons. First of all, what P.W.11 has stated is that on the deceased, a nose screw, two bangles, two ear studs, one watch and one gold coin were found and they were removed by her and were handed over to one Sundaramorthy. But on the arrest of the accused and in pursuance of his disclosure statement, the articles recovered are, a gold Chain weighing 32 gms (M.O.10), gold Thali numbering one (M.O.11), gold Thali balls numbering two (M.O.12), gold Gnanakkuzhal numbering two (M.O.13), gold Vaazhai seepu numbering one (M.O.14) and gold Coin numbering one (M.O.15). It is common knowledge that Poosai thali, Thali balls, Gnanakkuzhal and Vaashai seepu are attached to the gold Thali chain and worn by a Hindu woman. If Thali chain is removed, these other jewels will go with the Chain and that is how, M.Os.10 to 15 had been removed by the accused and kept in his possession.

44. The learned counsel for the accused would contend that there is no evidence that these material objects (M.Os.10 to 15) were found missing from the body of the deceased. We find every force in this argument because neither P.W.6 nor P.W.7 or any other family member of the deceased had identified these jewels as that of the deceased. The learned public prosecutor who conducted the case before the trial Court had failed to invited them to identify these jewels, if possible. But the benefit arising out of the failure of the prosecutor cannot be given to the prosecution but to the accused. Therefore, the recovery of M.Os.10 to 15 would not, in any manner, go to help the case of the prosecution. Though the M.Os.10 to 15 were recovered on the arrest of the accused, the prosecution has failed to prove that they were the stolen articles. Thus, this Court is not in a position to presume under Section 114 of the Evidence Act that it was this accused who committed the murder and removed M.Os.10 to 15.

45. Lastly, the learned counsel for the accused would submit that the evidence of D.W.1 assumes importance. According to him, D.W.1 has stated that the deceased had developed illicit intimacy with her husband. The accused is her brother-in-law. Since the accused had reprimanded the deceased, out of vengeance, she had given this dying declaration falsely. We find it difficult to accept this defence, for, it is in evidence that the deceased had no prior acquaintance with the accused at all. He got introduced to the deceased only one week prior to the occurrence, when she visited a relative of the deceased at the village where the accused was also residing. Thus the deceased would not have had any motive against the accused as it is projected by the defence. Thus, there was necessity or occasion for the deceased to wreak vengeance on the accused by making such a false dying declaration.

46. The learned counsel for the accused would submit that when there are two views possible, one in favour of the accused and other in favour of the prosecution, the view taken by the trial Court in favour of the accused should not be reversed in an appeal against acquittal. For this proposition, the learned counsel for the accused relies on a judgment of the Hon'ble Supreme Court in Shyam Babu Vs. State of U.P. reported in (2012) 8 SCC 651 and another judgment of the Hon'ble Supreme Court in K.Venkateshwarlu Vs. State of A.P. reported in AIR 2012 SC 2955.

47. Regarding this legal proposition, we have no doubt in our mind. It has been repeatedly said by the Hon'ble Supreme Court that the presumption of innocence, which is inbuilt in the fair procedure guaranteed under Article 21 of the Constitution of India is doubled by the acquittal recorded by the trial Court. Unless, the said presumption of innocence, which has been doubled, is rebutted by means of strong circumstances, it is not permissible for the appellate Court to reverse the acquittal. Similarly, when there are two views possible, which are equally poised, the view taken in favour of the accused by the trial Court should not be disturbed by this Court. In the instant case, as we have elaborately discussed, there is no chance for two views as has been projected by the learned counsel for the accused. There is only one view which is reasonable, founded on proved chain of circumstances that it was this accused who caused the death of the deceased after outraging her modesty. The judgment of the trial Court is ***not correct** and the same is liable to be ***set aside**.

48. Having come to the said conclusion, that it was this accused who caused death of the deceased, we have to examine the question as to what is the offence that the accused has committed by his act. After considering various facts and

circumstances of the case, on 34.02.2015, we concluded that the act of the accused would amount to offences punishable under Sections 302 and 354 IPC. Then we directed the appeal to be listed on 29.02.2016, for further proceedings.

49. Accordingly, the matter came up for hearing on 29.02.2016. The learned counsel for the accused submitted that he should be permitted to make his further submissions in respect of the nature of the offence that the accused had committed. He submitted that the offence would fall only under Section 304(i) IPC and not under Section 302 IPC. He further submitted that Section 362 Cr.P.C. is not a bar for this Court to reconsider the finding that the act of the accused would amount to an offence under Section 302 IPC. We found force in the argument of the learned counsel. A perusal of Section 362 Cr.P.C. would go to show that no Court, when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error. As rightly submitted by the learned counsel for the accused, in this appeal, on 24.02.2016, we had not disposed of the appeal by any final order neither was there a final judgment. It was only a finding that the act of the accused would squarely fall within the ambit of Section 302 IPC. Since it was only a finding by means of an oral order dictated and since it was neither a judgment nor a final order and since we had not signed any judgment or order, we were satisfied that we could hear the learned counsel for the accused on this issue. The learned counsel for the accused, therefore made further arguments elaborately and we also heard the learned Additional Public Prosecutor on this issue.

50. A close reading of the dying declarations and various circumstances would go to show that the accused would have never intended to cause the death of the deceased as his attempt was only to have sex with her. Thus, his act would not fall within the first limb of Section 299 IPC. Secondly, he would not have intended to cause any injury which is either likely to cause death or sufficient to cause death in the ordinary course of nature. This conclusion emerges because, it is in evidence that the accused originally with the help of the saree constricted her neck, she fell down and fainted. Since there was no movement in her body, he would have been under the impression that she was dead. It was only thereafter, he had brought the motorcycle nearer to her and poured the combustible substance and set fire. Thus, the injuries caused by him were not the intended injuries. He caused these injuries under the belief that the deceased was already dead. But, without taking due care and caution to verify as to whether the deceased was alive or not, he had poured kerosene and set fire. This act of the accused would therefore, in our considered view, fall under

third limb of Section 299 IPC and consequentially under the fourth limb of Section 300 IPC. But at the same time, it is in evidence that the deceased threatened the accused that she would inform others about his conduct and put him to ridicule. This would have resulted in a quarrel. It was only in that quarrel, he used the saree around her neck and pushed her down. Subsequent setting fire to her was under the belief that she was already dead. This act of the accused, in our considered view, would fall under the fourth exception to Section 300 IPC. Thus, the act of the accused would squarely fall within the ambit of Section 304(i) IPC and accordingly he is liable to be punished besides for the offence under Section 354 IPC.

51. In respect of the quantum of punishment, the accused had filed an affidavit, wherein, he has narrated the mitigating circumstances in paragraphs 4 and 5 of the affidavit, which is as follows:

"4. I beg to submit that I am innocent and I haven't committed any offence. I am having three children's and they are all girl children still did not attained majority. The first one is Divya Bharathi aged about 16 years, studying 11th Standard, second one is Mohana Priya aged about 15 years, studying 10th Std, and the third one is Rudhra Sri aged about 14 years and studying 9th Std. I am the sole bread winner of family and now working as a mason at Kerala earning Rs.10,000/- per month, I used to visit my house once in a month. My entire family depends on my income and they don't have any source of income.

5. I further states that my father Shanmugam aged about 76 years and mother Thaiyal Nayagi aged about 74 years and she is under the treatment of cardiology for the past 10 years. I am taking care of them and borne entire medical and other expenses."

Having regard to the aggravating as well as the mitigating circumstances, we are of the view that sentencing the accused to undergo rigorous imprisonment for 10 years and to pay a fine of Rs.5,000/- in default to undergo rigorous imprisonment for three months for offence under Section 304(i) IPC and to undergo rigorous imprisonment for one year and to pay a fine of Rs.1,000/- in default to under go rigorous imprisonment for two weeks for the offence under Section 354 IPC would meet the ends of justice.

52. In the result,

(i) The State appeal is partly allowed, the judgment of acquittal rendered by the learned Additional District and Sessions Judge, Fast Track Court No.II, Tindivanam in S.C.No.4/2009 dated 26.08.2009, is set aside and the accused is convicted under Section 304(i) IPC and is sentenced to undergo rigorous imprisonment for 10 years and to pay a fine of Rs.5,000/- in default to undergo rigorous imprisonment for three months and for offence under Section 354 IPC to undergo rigorous imprisonment for one year and to pay a fine of Rs.1,000/- in default to undergo rigorous imprisonment for two weeks.

(ii) The sentences are directed to run concurrently. The period of detention already undergone shall be set off under Section 428 Cr.P.C.

(iii) The Registry is directed to commit the accused with a warrant to the Central Prison, Cuddalore, to undergo the sentence.

gms/kk

Sd/-

Assistant Registrar (CS-IV)

Dated: 7.3.2016

*Corrected order
as per order dated 8.3.2016

Sd/

Assistant Registrar (CS IV)

Dated: 9.3.2016

True copy

Sub Assistant Registrar.

To

1. The Judicial Magistrate, Vanur.
2. -do- thro the Chief Judicial Magistrate, Villupuram.
3. Additional District and Sessions Judge, Fast Track Court No.II, Tindivanam.
4. -do- thro the Principal Sessions Judge, Villupuram.
5. The Inspector of Police, Vanur Police Station, Villupuram District.
6. The Superintendent Central Prison, Cuddalore
7. The District Collector, Villupuram.
8. The Director General of Police, Mylapore, Chennai -4.
9. The Public Prosecutor High Court, Chennai.

To be substituted to the order already despatched on 07.03.2016

copy to:

Selvam @ Selvaganapathy (Accused) (Free of Costs)

1 cc to Mr.M. Govindaraju, Advocate, Sr. 14373

tej(co)
prk7/3

Crl.A.No.708 of 2010