

**BAIL SLIP**

Petitioner/Appellant/Accused namely Shakul Hameed was released on bail as per order of this court dated 02.08.2018 made in crl.mp (MD).No. 5323 of 2018 in CRL.A.(MD).No. 304 of 2018

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Judgment Reserved on : 15.09.2021

Judgment Delivered on : 07.10.2021

CORAM :

THE HONOURABLE MR.JUSTICE V. BHARATHIDASAN

and

THE HONOURABLE MRS.JUSTICE J.NISHA BANU

Criminal Appeal(MD)No.304 of 2018

Shakul Hameed

... Appellant/Sole Accused

vs.

The State rep by
The Inspector of Police,
Thuckalay Police Station,
Kanyakumari District.
(Crime No.724/2011)

... Respondent/Complainant

Appeal filed under Section 374 of the Code of Criminal Procedure, 1973, to call for the records pertaining to the impugned order made in S.C.No.66/2012 dated 18.6.2018 on the file of the learned Fast Track Mahila Court, Kanyakumari at Nagercoil, hear the counsel for the appellant/accused, set aside the order passed by the lower court and allow this criminal appeal.

For Appellant : Mr.R.Manickaraj for Mr.T.Nelson
For Respondent: Mr.A.Thiruvadi Kumar, Counsel for
Government of Tamil Nadu(Criminal side)

JUDGMENT

(Judgment of the Court was made by V. BHARATHIDASAN, J.)

The appellant is the sole accused in S.C.No.66/2012, on the file of the learned Fast Track Mahila Court, Kanyakumari at Nagercoil. He stood charged for the offences, under Sections 498 (A), 323, 406, 302 and 201 IPC. The trial Court, found the appellant guilty, for the offences under Sections 302 and 406 IPC, convicted and sentenced him to undergo life imprisonment and to pay a fine of Rs.10,000/-, in default, to undergo rigorous imprisonment for six months, for the offence under Section 302 IPC and sentenced him to undergo rigorous imprisonment for one year, for the offences



under Section 406 IPC. Trial Court acquitted the accused in respect of the charges under Sections 498(A), 323 and 201 IPC. Challenging the abovesaid conviction and sentence, the appellant is before this Court, with this appeal.

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

The deceased Fathima, is the wife of the appellant. Their marriage took place in the year 2003, during the marriage, the deceased's family has given 40 sovereigns of gold and Rs.2,00,000/- as dowry, apart from other household articles, worth about Rs.2,00,000/-. Out of the wedlock, they got three children. After 5 years of the marriage, quarrel started between the spouses and the appellant suspecting the fidelity of the deceased, used to beat the deceased. On 25.07.2011, at about 08.45 a.m., there was a quarrel, in which, the appellant attacked the deceased, poured kerosene and set fire on her. After hearing noise, neighbours rushed to the deceased's house and took her to one Joseph Hospital, Azhakiyamandapam, where PW14, Doctor, has given first aid, then, he referred the deceased to the Government Hospital, Asaripallam, for further treatment. At that time, the deceased has stated to PW14, Doctor, that the appellant/accused attacked her, poured kerosene and set fire on her. PW16 Doctor, admitted the deceased in the Government Medical College Hospital, Asaripallam, Kanyakumari, and issued the accident register(Ex.P4), and the deceased has stated to PW16, that she suffered fire injuries, while preparing hot water in her house. On the very same day, she was taken to one Ananthapuri Hospital at Trivandrum, against the medical advice, where she was admitted and given treatment on 27.07.2011, at about 12.25 p.m., PW20, Judicial Magistrate, Vanjiyoor, Trivandrum, recorded the dying declaration of the deceased(Ex.P7), after following all the legal requirements, after being satisfied that the deceased is conscious and fit state of mind, capable of giving statement. Wherein, the deceased has stated that, on 23.07.2011, there was a quarrel between the husband and wife, in which, the appellant beaten her, she fell down unconscious, later she regained conscious and found fire over her body. Immediately, the appellant poured water, doused the fire, took her to Joseph Hospital, Azhakiyamandapam, thereafter, to Government Hospital, Asaripallam, and she does not know who poured kerosene and set fire on her. However, she has stated that her husband alone was available in the house. PW19, Sub Inspector of Police, working in the respondent police station, on receipt of the intimation, from the Ananthapuri Hospital, Trivandrum, went there and recorded the statement of the deceased and based on that, he registered the FIR in Crime No.724/2011, for the offences under Sections 307 IPC(Ex.P8), on 28.07.2011 at about 08.00 a.m. On receipt of the FIR, PW21, Inspector of Police, commenced the investigation, and went to the scene of occurrence, wherein, he prepared the observation mahazar(Ex.P1), rough sketch(Ex.P13) and recorded the statement of witnesses, then, he proceeded to Ananthapuri Hospital, where, he recorded the statement of the deceased and handed over the investigation to PW22.



3. Subsequently, on 13.11.2011, at about 07.30 a.m., the deceased succumb to injuries, hence, PW22 altered the FIR, for the offences, under Section 302 IPC and submitted the altered FIR to the concerned Judicial Magistrate Court. On 14.11.2011, at about 08.00 a.m., he conducted inquest over the dead body in Ananthapuri Hospital, in the presence of witnesses, then, he recorded the statement of witnesses. PW17, Doctor, working in the Government Medical College Hospital, Trivandrum, conducted postmortem autopsy of the deceased and issued the postmortem certificate (Ex.P5) and found the following injuries:-

''INJURIES (ANTE-MORTEM

1. Hypopigmented area with patchy areas on spotty pigmentation on right cheek (5x1.5 cm) left cheek, adjacent chin across midline and front of neck (20x12-15cm) whole of right forearm, hand and adjacent part of fingers, inner aspect of right arm (12x6.5 cm) front of chest and abdomen across midline (29x6 to 21.5 cm). Whole of left forearm, hand, wrist and adjacent fingers, left arm (8cm x whole circumference) front of left thigh, outer aspect and adjacent part of back of right buttock and thigh (35x7 to 12 cm).

Infected wound inner aspect of right thigh, whole of right knee, leg and foot, inner aspect of left elbow (7.5x7cm) lower outer quadrant of left buttock (6x1.5cm) whole of back of left thigh, knee, leg and heel its upper extent 8 cm below genital fold, back of right thigh, knee, leg and heel and front of left knee, leg and foot.

Healing wound on the (1) upper inner quadrant of left buttock (2x1cm) with hypopigmented periphery and granulation tissue in the centre (2) upper inner quadrant of right buttock (1x1cm) with hyperpigmented periphery and granulation tissue in centre.

2. Two linear abrasions, 4cm long and 6.5cm long side by side and 1.5cm, apart on the right side of back of trunk in midline 14.5cm above natal cleft covered with adherent brown scab.

Infected wounds showed yellowish pus and granulation tissues at places.

Brain was congested and oedematous. Air passages contained blood stained fluid. Whole of left lung and lower and middle lobes of right lung consolidated and flakes of pus seen on the surface. Lungs also showed haemorrhagic areas on the surface. Chest cavities contained 120ml of blood stained fluid in each. Stomach contained 100ml of light brown fluid having no unusual smell and its mucosa was normal. Liver showed fatty changes. Spleen was friable. Kidneys were pale and flabby with distinct corticomedullary demarcation and cortical haemorrhages. Adrenals were haemorrhagic. Uterus measured 6.5x3.5x2cm and its cavity was empty. Distal ends of tubes showed scarring. Urinary bladder was empty. All



normal.

Photostat copy of the clinical case record of Ananthapuri Hospital, Trivandrum was perused after autopsy.

OPINION AS TO CAUSE OF DEATH:-

Death was due to infection following burns.''
and she was of the opinion that the death was due to infection due to burns. PW22, investigating officer, continued the investigation and recorded the statement of other witnesses and filed the final report on 16.01.2012.

4.Considering the above materials, the trial Court framed the charges as mentioned above and the accused denied the same as false. In order to prove its case, the prosecution has examined as many as 22 witnesses and marked 15 exhibits, apart from 4 material objects.

5.Out of the witnesses examined, PW1 is the brother of the deceased, he was residing at Vizhingam, Kerala State, he spoke about the earlier quarrel between the appellant and the deceased and also the harassment meted out by the deceased, at the hands of the appellant. PW2 is the mother of the deceased, she also spoke about the harassment meted out by the deceased. PW3 is the minor daughter of the appellant and the deceased, aged about 10 years, she is an eye-witness to the occurrence. According to her, on the date of occurrence, at about 07.30 a.m., there was a quarrel between the appellant and the deceased, in which, the appellant beaten the deceased, she fell down, she tried to prevent the accused from attacking her, however, the accused dashed the deceased against the wall, then poured kerosene, set fire on her, when the deceased shouted, neighbours rushed there and took her to the hospital. PW4 is the neighbour of the deceased, he heard the hue and cry from the deceased's house, when he went inside, he saw the deceased with fire in the nighty, immediately, he poured water, doused the fire and took her to Joseph Hospital, then to the Government Hospital, Asaripallam. PW5, another neighbour of the deceased, took the deceased to the hospital after the occurrence. PW6 is the friend of PW1, after hearing the news, he went along with PW1 and took the deceased to Ananthapuri Hospital. PW7 is the landlord of the deceased's house, he turned hostile. PW8 is the witness to the observation mahazar(Ex.P1) and recovery of MO1-burned blue coloured inskirt, MO2-half burned nighty, MO3-kerosene cane and MO4-matchbox. PW9, neighbour, along with others, took the deceased to the Government Hospital. PW10, Special Sub Inspector of Police, Kulithurai All Women Police Station, has stated that, earlier, on 26.12.2008, the deceased given a complaint against the accused and she received the complaint in CSR.No.262/2008. PW11, closely related to the deceased, his evidence is not having any substance. PW12, Bench Clerk, working in the Judicial Magistrate Court, Thuckalay, received the material objects in this case. PW13, Sub Inspector of Police, she also spoke about the earlier complaint against the deceased, against the accused, at Kulithurai All Women

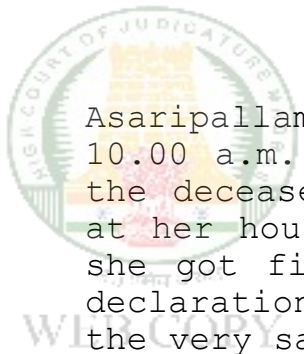


Police Station. PW14 is the Doctor at Joseph Hospital, Azhakiyamandapam, where the deceased was admitted, immediately after the occurrence, at about 08.15 a.m. with burn injuries, according to him, when he enquired the deceased, she has stated that the appellant attacked her, poured kerosene and set fire on her, on examination, he found that she suffered 70% burn injuries and he referred the deceased to Asaraipallam Government Hospital. PW15, Sub Inspector of Police, in the respondent police station, identified the body, for postmortem, after postmortem, thereafter, handed over the body to the relatives. PW16 is a Doctor, working in the Government Hospital, Asaripallam, Kanyakumari, according to him, on 25.07.2011, at about 10.00 a.m., the deceased was brought to the hospital, the deceased stated to him that at about 09.00 a.m., while she was preparing hot water, she suffered burn injuries and she was conscious at that time. PW17, Doctor, working in the Government Medical College Hospital, Trivandrum, conducted postmortem autopsy and given postmortem certificate as referred to above. PW18, Doctor, working in Ananthapuri Hospital, Trivandrum, he spoke about the treatment given to the deceased and also given certificate to the Judicial Magistrate, recording consciousness and fit state of mind of the deceased, for giving dying declaration. PW19, Sub Inspector of Police, recorded the statement of the deceased at Ananthapuri Hospital, Trivandrum, and registered the FIR on 28.07.2011, after the death of the deceased, he altered the FIR. PW20, Judicial Magistrate, Vanjiyoor, Trivandrum, spoke about the recording of dying declaration of the deceased. PW21, Inspector of Police, conducted initial investigation. PW22, continued the investigation and recorded the statement of other witnesses and filed final report.

6.Considering the above materials, the trial Court framed the charges as mentioned above and the accused denied the same. However, he did not examine any witness, nor marked any documents. Considering the materials available on record, the trial Court convicted the accused and sentenced, as stated in paragraph 1 of the judgment. Now, challenging the same, the present appeal has been filed by the appellant.

7.We have heard the learned counsel for the appellant and also the learned Additional Public Prosecutor and perused the records carefully.

8.The entire case of the prosecution rests on the judicial dying declarations of the deceased and the evidence of PW3, minor daughter of the appellant and the deceased. There are 5 dying declarations in this case. The first of the dying declaration was given by the deceased at one Joseph Hospital, Azhakiyamandapam, immediately after the occurrence, at about 08.15 a.m. where, PW14, Doctor, examined her, give some first aid, issued O.P Chit(Ex.P12), wherein, she has stated that her husband poured kerosene and set

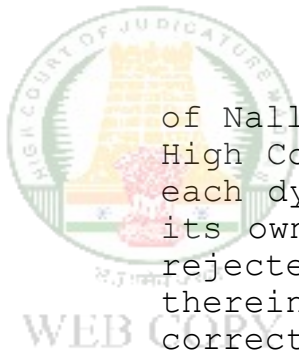


Asaripallam, where, PW16, Doctor, admitted the deceased, at about 10.00 a.m. and issued the accident register(Ex.P4). At that time, the deceased told to PW16, that while she was preparing hot water, at her house, at about 09.00 a.m., the kerosene cane fell down and she got fire and suffered burn injuries. It is the second dying declaration. Thereafter, she was taken to Ananthapuri Hospital, on the very same day and admitted therein, on 27.07.2011, she has given a judicial dying declaration before PW20-Judicial Magistrate, Vanjiyoor, Trivandrum, at about 12.25 p.m., wherein, she has stated that on 23.07.2011, at about 07.30 a.m., the occurrence has taken place, at that time, there was a quarrel, and the appellant was very angry with her and attacked her, she lost conscious, while she recovered conscious, she found that she was burning, immediately, the appellant poured water on her, in the meantime, neighbours also came and they took her to Joseph Hospital, and she does not know who poured kerosene on her. She had further stated that at that time, her husband was alone in the house. This is the third dying declaration. Subsequently, on the very same date, on receipt of the intimation from the hospital, PW19, Sub Inspector of Police, reached the hospital and recorded the statement of the deceased and based on the statement, he registered the FIR on 28.07.2011, at about 08.00 a.m, wherein, she has stated that on the date of occurrence, there was a quarrel, in which, the appellant beaten the deceased, poured kerosene and set fire on her, when she shouted, neighbours came, at that time, the appellant was standing with water, however, only neighbours poured water, on her and doused the fire, the deceased was also criminally intimidated by the appellant, that if she disclosed anything, he will harm the children and he will also burn the children. This is the fourth dying declaration. Apart from that, from the evidence of PW22, the investigating officer, it could be seen that on 25.07.2011, at about 04.00 p.m., one Thangasamy, Sub Inspector of Police, in the respondent police station, recorded the statement of the deceased at Asaripallam Government Hospital and registered the same in CSR.No.462/2011 and as per the statement of the deceased, at about 09.00 a.m., while she was preparing hot water, kerosene cane fell down, and she caught fire in the nighty, neighbours rushed there and doused the fire. That statement was not marked before the Court and Thangasamy, who is said to have recorded the statement, also not examined, by the prosecution.

9.From the careful perusal of all the dying declarations, there are material inconsistencies in each one of the dying declaration. Considering the fact that there are multiple dying declarations in this case, each dying declaration has to be considered independently, to find out which one reflects true state of affairs. The Hon'ble Supreme Court in **Kashmira Devi vs. State of Uttarakhand and others, reported in (2020) 11 SCC 343**, has held as follows:-

'22. While arriving at such conclusion the High Court has kept in view a decision of this Court in the case

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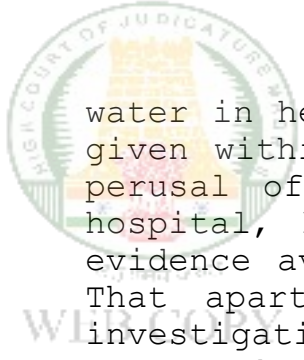


of Nallam Veera Stayanandam & Ors. Vs. The Public Prosecutor, High Court of A.P. (2004) 10 SCC 769 wherein it is held that each dying declaration has to be considered independently on its own merit as to its evidentiary value and one cannot be rejected because of the contents of the other. It is held therein that the Court has to consider each of them in its correct perspective and satisfy itself which one of them reflects the true state of affairs. The consideration made herein above would also indicate that on an independent consideration, the dying declaration dated 13.02.2008 is reliable for the reasons stated above. To the same effect the High Court has also relied on another decision of this Court in the case of Ashabai & Anr. Vs. State of Maharashtra (2013) 2 SCC 224 wherein it is held that when there are multiple dying declarations, each dying declaration has to be separately assessed and evaluated on its own merits.'

10.The said judgment has been followed in **Nagabhushan vs. State of Karnataka reported in (2021) 5 SCC 222**, as follows:-

'10.At this stage, the decisions of this Court in the cases of Nallam Veera Stayanandam v. Public Prosecutor (2004) 10 SCC 769; Kashmira Devi v. State of Uttarakhand (2020) 11 SCC 343; and Ashabai v. State of Maharashtra (2013) 2 SCC 224 are required to be referred to. In the aforesaid decisions, this Court had an occasion to consider the cases where there are multiple dying declarations. In the aforesaid decisions, it is held that each dying declaration has to be considered independently on its own merit as to its evidentiary value and one cannot be rejected because of the contents of the other. It is also held that the Court has to consider each of them in its correct perspective and satisfy itself which one of them reflects the true state of affairs. When there are multiple dying declarations, each dying declaration has to be separately assessed and evaluated on its own merits.'

11.Now, keeping the above legal position in mind, let us now consider each dying declaration. The first dying declaration is said to have given by the deceased, before the Joseph Hospital, Azhakiamandapam at about 08.15 a.m. before PW14. According to her, the deceased has stated that the appellant poured kerosene and set fire on her and she has also issued O.P Chit(Ex.P12), this statement was given in a private hospital and admittedly, PW14, did not produce Ex.P12 during investigation, but the above O.P Chit has been marked, only during trial, and there is no explanation, for not producing the same, during the investigation, which creates some doubt about Ex.P12. The next dying declaration was given at the Government Medical College Hospital, Asaripallam, at about 10.00 a.m. PW16 is the Doctor working in the Government Hospital, he admitted the deceased and issued the accident register(Ex.P4) wherein, the deceased has told that while she was preparing hot

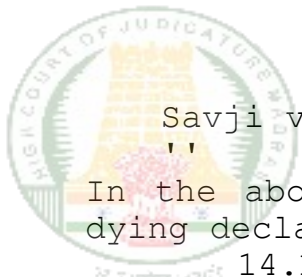


water in her house, she suffered burn injuries. That statement was given within two hours of the earlier dying declaration. From the perusal of Ex.P4, it could be seen that she was brought to the hospital, by one Nizar, brother of the deceased and there is no evidence available on record, to show that there was any tutoring. That apart, as stated earlier, as per the evidence of PW22, investigating officer, at about 04.00 p.m., on the very same day, yet another statement was recorded by the Sub Inspector of Police, in the Government Hospital, Asaripallam, wherein, the deceased said to have given a statement that while preparing hot water in her house, the kerosene cane fell down, in which, she got fire in the night and suffered burn injuries. The statement was taken on file as CSR.No.462/2011, however, that statement was not produced, before the Court. But, PW22, based on the records, admitted that CSR is available in the records. These two dying declarations have been given, immediately after the occurrence, PW16, was examined, about the second dying declaration, which was recorded in a Government Hospital, Asaripallam, hence, some importance could be given to that dying declaration. The third dying declaration is the judicial dying declaration, given before PW20, Judicial Magistrate, Vanjiyoor, on 27.07.2011, at about 12.25 p.m., wherein, the deceased is said to have given a statement that there was a quarrel between the husband and wife, at that time, the appellant attacked her, she fell unconscious and while she recovered, she found fire on her body. Immediately, the appellant poured water and doused the fire, further, she had stated that she does not know who poured kerosene on her. It is the judicial dying declaration before the Judicial Magistrate and the Judicial Magistrate was also examined to prove the same.

12.It is the settled law that a dying declaration recorded by a competent Judicial Magistrate would stand on much higher footing, than a declaration recorded by any other officers. The reason being, the Magistrate has no axe to grind against the person, named in the dying declaration. From the perusal of record, it could be seen that, PW20, Judicial Magistrate, recorded the dying declaration, after getting a medical opinion and after satisfying himself that the deceased is conscious and in the fit state of mind, to give a declaration, he recorded the statement.

13.The Hon'ble Supreme Court in **Lakhan vs. State of M.P reported in (2010) 8 SCC 514**, has held as follows:-

'12. A dying declaration recorded by a competent Magistrate would stand on a much higher footing than the declaration recorded by officer of lower rank, for the reason that the competent Magistrate has no axe to grind against the person named in the dying declaration of the victim, however, circumstances showing anything to the contrary should not be there in the facts of the case. (Vide Ravi Chander v. State of Punjab, Harjit Kaur v. State of Punjab, Koli Chunilal



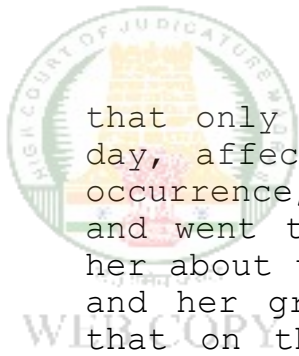
Savji v. State of Gujarat and Vikas v. State of Maharashtra).

In the above circumstances, we can safely rely upon the abovesaid dying declaration.

14.Regarding the last dying declaration(Ex.P9), said to have given by the deceased before PW19, Sub Inspector of Police. Perusal of that statement shows that very same day, on which, the judicial dying declaration has been recorded, PW19, Sub Inspector of Police, recorded her statement, it is the long statement running more than 2 pages, wherein, the deceased has stated that the accused poured kerosene and set fire. It is quite contrary to the earlier judicial dying declaration given by the deceased. Further perusal of the same, it could be seen, the signature of the deceased is found after a long gap and in the cross examination also, PW19, admitted the same. Considering the fact that the statement has been given before the police officer, subsequent to the judicial dying declaration, it is doubtful whether such long statement could be given by the deceased on her own.

15.The inconsistency found in all the dying declaration is material in nature, considering the surrounding circumstances, wherein, the occurrence has taken place inside the house and as per the judicial dying declaration given, the deceased has clearly stated that she was not aware who poured kerosene, and clearly stated that only this appellant poured water and doused the fire. That apart, in all the dying declarations, the deceased has consistently stated that there is a frequent quarrel, between the husband and wife and the appellant used to beat her quite often and harassed her and that could also be a reason to implicate the appellant in this case. In the statements given before PW16 Doctor and PW20-Judicial Magistrate, the deceased has not implicated the appellant. Only in the first dying declaration given to PW14 private hospital Doctor, and the statement given before PW19, Sub Inspector of Police, she has implicated him. Considering all those circumstances, the inconsistency in all those dying declarations, is material and we are of the view that it is unsafe to convict the appellant, based on the abovesaid dying declarations.

16.The next important circumstances is, the evidence of PW3, minor daughter of the deceased. She is said to be the eye-witness to the occurrence. Learned counsel for the appellant would submit that the presence of PW3, at the time of occurrence, is doubtful. She was a school going student. From her evidence, it could be seen that, at the time of occurrence, she had gone to the school and she returned back only about 04.00 p.m, hence, she could not have seen the occurrence. We have carefully considered the evidence of PW3, according to her, at about 07.30 a.m., there was a quarrel between the appellant and the deceased, at that time, the accused attacked the deceased, she fell down, thereafter, the appellant poured kerosene and set fire on the deceased, the neighbours came and took



that only the appellant used to send the children to school every day, affectionately. She has further deposed that on the date of occurrence, at about 04.00 p.m., she returned back from the school and went to the tuition centre, the tuition master did not inform her about the fire accident, thereafter, she did not go to her house and her grandfather took her to Trivandrum. She has also stated that on the date of occurrence, she had gone to the school she returned from the school along with his brother and she had not seen her mother. From her evidence, it could be seen that, on the date of occurrence, PW3 had gone to school and she returned back only about 04.00 p.m. Seeing from the natural conduct, had the child is available in the house, at the time of occurrence, there is no chance for her, to go to the school, after the occurrence, in the abovesaid circumstances, we find some force in the argument of the learned counsel for the appellant and we are of the view that the presence of PW3, at the time of occurrence, is doubtful and it is unsafe, to rely upon minor evidence to convict the accused. Considering those circumstances, we are of the considered view, it is highly unsafe, to convict the accused, based on the inconsistent dying declaration and doubtful minor testimony, hence, the appellant is entitled for acquittal. So far as the conviction under Section 406 IPC, it is only a testimony of PW1 and PW2, brother and mother of the deceased, that at the time of marriage, they have given money and jewels to the accused as dowry. Except that oral testimony of the interested witnesses, nothing available on record to bring out the offence under Section 406 IPC. In that circumstances, the accused is entitled for acquittal from that charge.

17. In the result, this Criminal Appeal is allowed and the conviction and sentence passed in S.C.No.66/2012, dated 18.6.2018, on the file of the learned Fast Track Mahila Court, Kanyakumari at Nagercoil, is set aside and the appellant is acquitted of all the charges. Fine amount, if any, shall be refunded to the appellant and bail bond shall stand cancelled.

Sd/-

Assistant Registrar (W)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

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Note : In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate / litigant concerned.

