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Crl.A.(MD) No.718 of 2022

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on	17.10.2023
Pronounced on	21.11.2023

CORAM

THE HONOURABLE MR.JUSTICE M.SUNDAR
and
THE HONOURABLE MR.JUSTICE R.SAKTHIVEL

Crl.A.(MD) No.718 of 2022

Mariya Leela
W/o.Packiyaraj

... Appellant

Vs.

State Represented by
The Inspector of Police,
Valliyoore Police Station,
Tirunelveli District. (Crime No.287/2019)

... Respondent

Criminal Appeal filed under Section 374(2) of the Code of Criminal Procedure, 1973 [Act 2 of 1974] praying to call for the records and set aside the Judgment and Conviction dated 27.10.2022 passed by the Principal Sessions Court, Tirunelveli in S.C.No.385 of 2021 and acquit the appellant.

For Appellant : Mr.P.T.Ramesh Raja
assisted by Mr.P.Suresh

For Respondent : Mr.R.Meenakshi Sundaram
Additional Government Pleader
assisted by Mr.A.Chinna Karuppaiya



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J U D G M E N T

WEB CODE: **R.SAKTHIVEL, J.**

This Criminal Appeal is preferred by the appellant assailing the 'Judgment dated 27.10.2022' [for the sake of convenience and clarity, hereinafter referred to as 'impugned Judgment'] passed by the 'Principal Sessions Court, Tirunelveli' [for the sake of convenience and clarity, hereinafter referred to as 'Trial Court'] in Sessions Case No. 385 of 2021 in which the appellant [for the sake of convenience and clarity, the appellant is called Accused as described before the Trial Court] was convicted for the offence punishable under Section 302 of 'The Indian Penal Code' [for the sake of convenience and clarity, hereinafter referred to as 'IPC'] and sentenced to undergo Rigorous Imprisonment for Life and also ordered to pay a fine of Rs.5,000/-, in default thereof, to undergo Rigorous Imprisonment for a further period of 4 years.

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

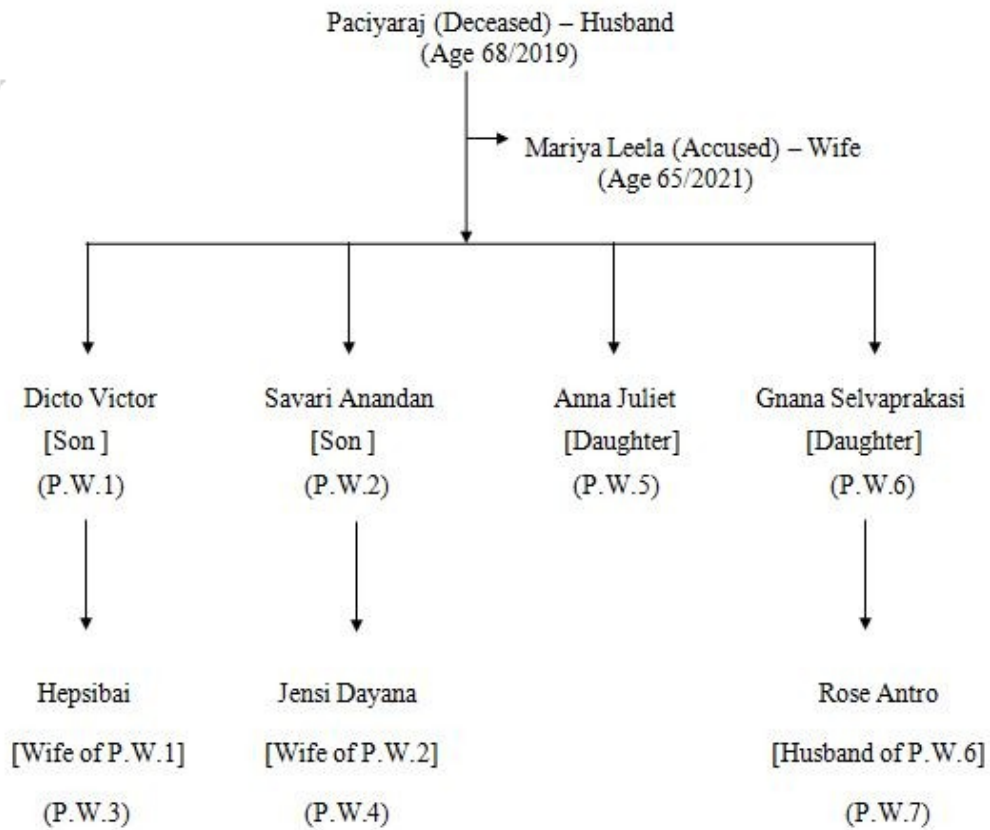
For ease of understanding, the relationship between the deceased, accused and witnesses (P.W.1 to P.W.7) is depicted below in the form of a genealogical chart.



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2.1. Deceased-Packiyaraj was the owner of a two-storey house (Door No.143/6), as well as two small tiled houses (Door Nos.144/6 and 145/6), both accompanied by vacant land surrounding them, collectively spanning 7 ³/₄ cents in Pallivasal Street, T Kallikulam. Decto Victor (P.W. 1) and Sabarai Anandhan (P.W.2) were residing in the two-storey house. The deceased was living in the tiled house (Door No.145/6) situated to the west of the two-storey building. Deceased and Accused, who are husband and wife, had a strained relationship for the past 15 years from the date of



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occurrence. They generally have food from P.W.1's house. The deceased had intended to give the tiled houses along with the vacant land surrounding it to P.W.2 and the two-storey building along with the surrounding vacant land to P.W.1. The deceased denied the accused (wife) any property. Hence, the accused quarrelled with the deceased on 09.09.2019 when they were inside the tiled house (Door No.145/6). Mr.Rose Andro (P.W.7) – Son-in-law of them pacified the quarrel and then left the spot. Thereafter, when the deceased was lying down on bed, at about 10.00 a.m., the accused quarrelled again with the deceased, abused him using filthy language, poured kerosene over him and set him ablaze using a fire torch. The deceased ran out of the house raising alarm. P.W.1 to P.W.4 rushed there, put off the fire and took the deceased to a private hospital for first-aid and thereafter admitted him to Government Medical College Hospital, Tirunelveli at 12.05 p.m.

2.2. The duty doctor at the burn ward there, sent a requisition letter to the Judicial Magistrate for recording dying declaration. The Judicial Magistrate (P.W.20) received the said requisition letter at 1.45 p.m. while he was in Court and rushed to the burn ward and recorded the statement of the deceased at 2.00 p.m.



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2.3 Special Sub-Inspector of Police (P.W.19) received intimation from the Government Hospital, Tirunelveli regarding the admission of the deceased upon which he went to the hospital and recorded the complaint statement at 5.00 p.m. from the deceased in the presence of P.W.1 obtaining P.W.1's signature as a witness. Thereafter, he registered an FIR in Crime No.287 of 2019 under Sections 294(b) and 307 of IPC. The Inspector of Police (P.W.21) after receiving a copy of the FIR and the complaint, rushed to the place of occurrence and prepared Observation Mahazar (Ex.P.13) and Rough Sketch (Ex.P.14) in the presence of witnesses Mr.Anthoni Dinesh Raja (L.W.16) and Mr.Gnana Chandran (L.W.17) and recovered the P.M.O.1 [Fire Torch - wooden stick with soot deposit wound by a partly burnt cotton cloth at one side] and P.M.O.2 [a partly burnt cotton towel] under the Seizure Mahazar.

2.4. On the same day at 10.30 p.m., despite medical intervention, the deceased passed away. The Duty Doctor (P.W.13) intimated the said fact to the police and then the police altered the Sections from 294(b) and 307 of IPC to Sections 294(b) and 302 of IPC and sent the alteration report (Ex.P.16) to the concerned Judicial Magistrate Court.



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2.5. Thereafter, P.W.21 conducted inquest upon the dead body of the deceased and the inquest report is marked as Ex.P.17. Thereafter, he sent the dead body for postmortem examination. Then, he recorded the witness statements.

2.6. On 10.09.2019, at 3.30 p.m., P.W.21 arrested the accused in the presence of witnesses Mr.Savarimani (P.W.11) and Mr.Jagan Kumar (P.W.12). Then, the Accused voluntarily gave a confession and P.W.21 recorded the same. The admissible portion of the confession is marked as Ex.P.18. Then, at 05.45 p.m., the Accused produced a matchbox (P.M.O. 3), two burnt matchsticks (P.M.O.4) and one plastic bottle (P.M.O.5) hidden in her cowshed. P.W.21 seized the said articles under Ex.P.19 Seizure Mahazar.

2.7. At 6.30 p.m., the Accused led P.W.21 to Kallikullam Ground situated in front of a mosque and produced a hidden 'bathing mug' (P.M.O.6). P.W.21 seized the said articles under Ex.P.20 Seizure Mahazar. Thereafter, he was transferred, so he handed over the case file to his successor P.W.22.



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2.8. P.W.22 took the case file on 20.09.2019 and examined Doctor Prasanna (P.W.15) who conducted the post-mortem, received the post-mortem report and recorded his statement. He examined other witnesses including forensic science officer and concluded his investigation and filed final report dated 16.03.2020 against the Accused under Section 294(b) and 302 of IPC before the Judicial Magistrate on 03.08.2020.

2.9 The learned Judicial Magistrate registered the case in P.R.C.No. 14/2020. Since the offence under Section 302 is exclusively triable by Sessions Court, he committed the case file and the Accused to the Trial Court. After hearing both sides, the Trial Court framed Charges under Sections 294(b) and 302 of IPC on 10.11.2021. To prove its case, the prosecution examined P.W.1 to P.W.22 (Witnesses) and marked Ex.P.1 to Ex.P.24 (Documents) and P.M.O.1 to P.M.O.6 (Material Objects).

2.10. On the defence side, Mr.Thiru.Antony Savarimuthu was examined as D.W.1 who is none other than the own brother of the Accused. No Exhibits or Materials Objects were marked on the defence side. When the Accused was examined under Section 313(1)(b) of Criminal Procedure Code, 1973 [Act No.2 of 1974] (for the sake of



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convenience and clarity, hereinafter referred to as 'Cr.P.C'), she denied the prosecution evidence and stated that from 08.09.2019 to 10.09.2019 at 05.15 a.m., she stayed in her brother's house (D.W.1's house). In short, she took a defence of '*alibi*'.

3. The Trial Court after hearing both sides, concluded that the prosecution has proved the offence under Section 302 of IPC but failed to prove the offence under Section 294(b) of IPC. Accordingly, the Trial Court convicted and sentenced the Accused as stated *supra* in paragraph No.1.

4. Feeling aggrieved with the conviction recorded and sentence imposed by the trial court, the Accused has preferred this Criminal Appeal under Section 374(2) of Cr.P.C.

5. This Court has perused the case files and the Memorandum of grounds of appeal. The following points arose for consideration:-

- i. Whether the conviction and sentence rendered by the Trial Court solely based on the dying declaration is to be sustained in this appeal?
- ii. Whether there exist any reason to interfere with the Impugned Judgement?



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Discussion and Decision for point Nos.(i) & (ii)

6. The Accused and the deceased are wife and husband respectively. P.W.1 to P.W.4 are their family members. P.W.5 and P.W.6 are their daughters. P.W.7 is the husband of P.W. 6. The deceased was the owner of a two-storey house (Door No.143/6), as well as two small tiled houses (Door Nos.144/6 and 145/6), both accompanied by vacant land surrounding them, collectively spanning 7 ³/₄ cents in Pallivasal Street, T Kallikulam. Decto Victor (P.W.1) and Savari Anandhan (P.W.2) were residing in the two-storey house. The deceased was living in the tiled house (Door No.145/6) situated to the west of the two-storey building. There is no dispute with the abovementioned facts.

7. The learned counsel for the Accused argued as follows.

- i. The Trial Court failed to consider the evidence of P.W.2 that the accused owns other properties.
- ii. The Trial Court failed to consider the evidence of P.W.5 and P.W.6 that the deceased was mentally ill.
- iii. The Trial Court failed to properly appreciate the evidence of P.W.19 and Ex.P.8 (Statement of the deceased).



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- iv. The Trial Court failed to consider the strained relationship between the accused and the deceased and the possibility of the deceased falsely implicating the accused.
- v. The Trial Court failed to consider the fact that the prosecution had failed to prove the presence of the accused in the place of occurrence at the time of the incident.
- vi. The Trial Court failed to consider the fact that, except the official witnesses, all other witnesses have not supported the prosecution case.
- vii. The Trial Court failed to appreciate the evidence of D.W.1.

In support of his arguments, the learned counsel relied on *Irfan*'s case [*Irfan @ Naka Vs. The State of Uttar Pradesh, Neutral Citation : 2023 INSC 758*]. Accordingly, he prayed to allow the appeal and set aside the conviction and sentence rendered by the trial court.

8. Per contra, the learned Additional Public Prosecutor appearing for the State argued as follows:



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- i. P.W.1 to P.W.7 are close relatives. Naturally, they may not support the case of the prosecution. However, evidence of P.W.1 to P.W.7 reveals the fact that the Accused and the deceased had a strained relationship and the deceased died due to burn injuries. Though P.W.1 to P.W.7 have not fully supported the prosecution's case and merely because the prosecution chose to treat them as hostile witnesses and cross-examined them, their evidence cannot be rejected *in toto*. In this regard, he relied on decision of the Hon'ble Supreme Court in ***Ramesh Harijan's*** case [***Ramesh Harijan Vs. State of U.P., reported in AIR 2012 Supreme Court 1979***]
- ii. The occurrence took place at 10.00 a.m. on 09.09.2019. Immediately, P.W.1 and P.W.2 took the deceased to a private hospital for first aid and thereafter, took him to Government Hospital at 12.05 p.m.. The duty doctor there requested the Judicial Magistrate to record statement of the deceased. The Judicial Magistrate rushed to the Government Hospital and recorded the victim's statement (Ex.P.11) after obtaining a fitness certificate from doctor. Further, he certified that throughout his examination, the deceased was in a fit state of mind.
- iii. On receipt of the intimation from the Government Hospital, P.W.19 came to the hospital and recorded the complaint statement (Ex.P.8) from the deceased in the presence of P.W.1. The signature of P.W.1 as a witness



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was obtained in the said complaint statement. P.W.1 has not denied the said fact in his chief examination.

- iv. The prosecution has proved the fact that the deceased died due to complications of antemortem burns by examining P.W.15 Doctor and Ex.P5 - Post-mortem Certificate.
- v. P.W.21 collected P.M.O.1 and P.M.O.2 and sent the same for forensic science examination. FSL report (Ex.P.22) proves that P.M.O.1 and P.M.O.2 have kerosene in them.
- vi. The prosecution has proved Ex.P.8 - Complaint Statement given by the deceased.

Accordingly, he prayed to sustain the conviction and sentence rendered by the Trial Court and to dismiss this appeal. In support of his argument, he relied on the decision of the Hon'ble Supreme Court in *Veerpal's* case [*State of U.P. Vs. Veerpal and another, reported in (2022) 4 SCC 741*].

9. This court has considered submissions made on either side and perused the case file in its entirety.

10. The prosecution examined P.W.1 to P.W.4 as eye witnesses. Their depositions are as follows:



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10.1. P.W.1 in his evidence has admitted that the relationship between the deceased and the accused was strained. He deposed that he took the deceased to the hospital and when the police came to obtain complaint statement, the deceased was conscious and talking. He further admitted that he signed in Complaint Statement (Ex.P.8) and that 'Signature (Ex.P1)' found in 'Complaint Statement (Ex.P.8)' is his. His deposition favours the prosecution only to this extent.

10.2. P.W.2 deposed that the deceased died due to burn injuries; that he along with P.W.1, P.W.3 and P.W.4 extinguished the fire over the deceased's body and that they rushed the deceased to the hospital. He further deposed that the accused and the deceased would often be quarrelling in the house.

10.3. P.W.3 and P.W.4 deposed that the deceased died due to burn injuries. P.W.4 further deposed that the accused and the deceased had a strained relationship.

11. P.W.5 to P.W.7 are not eyewitnesses. Their depositions are as follows:



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WEB COPY 11.1. P.W.5 deposed that the deceased died due to burn injuries and the accused lived in the house of the deceased. Further, she admitted that the relationship between the deceased and the accused was strained. She further deposed that, on 08.09.2019, the deceased came to her house and told her about the issues that were going on with the accused and that both had been to police station once concerning the issues going on between them.

11.2. P.W.6 deposed in her chief examination that there were disputes between the accused and the deceased owing to which the deceased committed suicide by burning himself with kerosene on 09.09.2019. She further deposed that P.W.1 to P.W.4 are residing in the same compound and there were some disputes between the deceased and the accused concerning the house properties. In her cross-examination by the defence side, she deposed that the accused has more properties in her name than the deceased and hence, there is no necessity to ask for more property from the deceased. She further deposed that, out of frustration, the deceased burnt himself with kerosene.



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WEB COPY 11.3. P.W.7 in his chief examination has deposed that the deceased died due to burn injuries; that, at that time he was at Valliyoor; that he and one Justin went to the Government Hospital and saw the deceased with burn injuries on his body and that, at that time, the Judicial Magistrate came to the Hospital to record statement from the deceased. Despite being cross-examined under Section 154 of Cr.PC, he did not support the case of the prosecution fully.

12. P.W. 8 and P.W.9 are neighbours. Though the prosecution examined them as eye witnesses, they did not support the case of the prosecution.

13. P.W.14 – Doctor who gave first aid to the deceased in the private hospital, deposed that the deceased was brought to the Hospital by P.W.1 and P.W.2; that he gave first-aid only and that he did not record the particulars of the deceased.

14. P.W.20 was the Judicial Magistrate No.I of Tirunelveli. He deposed that on 09.09.2019 at 01.45 p.m., he received requisition from



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Government Hospital, Tirunelveli for recording the statement of the deceased. He went to the Hospital at 02.00 p.m. and the duty doctor identified the deceased for him. After certification by the doctor that the deceased was fit to provide a statement and after himself ascertaining that the deceased was conscious and in a fit state of mind, he recorded the deceased's statement. Further, he deposed that, throughout his examination, the deceased was conscious and in a fit state of mind. To that effect, he obtained a certificate from the doctor.

15. P.W.19 was the Special Sub-Inspector of Police of Valliyur Police Station. On receipt of the intimation concerning the admission of the deceased from the Government Hospital, he rushed there and recorded Complaint Statement (Ex.P8) from the deceased in the presence of P.W.1 and also obtained the signature of P.W.1 as a witness. He clearly deposed the above said fact. Despite cross-examination, his evidence has not been shaken by the prosecution.

16. P.W.13 - Doctor who was on duty on 09.09.2019 in the burn ward, deposed that the deceased was admitted to the hospital at 12.05 p.m. and despite medical intervention, the deceased passed away at 10.30 p.m.



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on the same day. He further deposed that he sent the intimation of death

(Ex.P.2) to the police.

17. P.W.15 - Doctor who conducted post-mortem deposed that the deceased died due to burn injuries. Relevant portion from Ex.P.5 Post-mortem report reads as follows:-

“ ... APPEARANCE FOUND AT THE POST MORTEM:

*Moderately built and nourished body of a male.
Fingr and toe nails pale.*

THE FOLLOWING ANTEMORTEM INJURIES WERE NOTED:

Burns seen over face, front and back of chest, front and back of left side of abdomen, left thigh and leg, inner aspect of right thigh and leg and over left hand. Base of burnt area is red in colour.

OTHER FINDINGS:

Peritoneal Cavity: No free fluid.

Pleural cavity: No free fluid.

Heart: Normal, coronaries shows atheromatous plaques.

Hyoid bone: Intact.

Larynx and Trachea: No soot particles.

Stomach: Contains about 10 ml of colourless fluid, nil specific smell and mucosa congested.

Lungs, Liver, Spleen & Kidneys: Normal, c/s congested.

Small Intestine: Contains about 10 ml of colourless fluid, nil specific smell and mucosa congested.

Bladder: Contains 20 ml of urine.



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*Brain: Oedematous, c/s congested.
Viscera preserved and sent for Chemical Analysis.*

....

*FSD Ref:T.No.7398/2019/TIN/Tox.H/2282/2019,
dated 03/10/19.
Report received on 31.10.19.
Viscera negative for poison.*

FINAL OPINION:

*THE DECEASED WOULD APPEAR TO HAVE
DIED DUE TO COMPLICATIONS OF
ANTEMORTEM BURNS. ...”*

He further deposed that, such injuries on a person's back, sustained while lying down, may result from the individual lying down on one side. From the above evidence of the doctor, it is clear that the deceased died due to complications of antemortem burns.

18. P.W.21- Inspector of Police deposed that he went to the place of occurrence on 09.09.2019, prepared Observation Mahazar (Ex.P.13) and Rough Sketch (Ex.P.14) and recovered P.M.O.1 - Fire Torch (wooden stick with soot deposit wound by a partly burnt cotton cloth at one side) and P.M.O.2 -a partly burnt cotton towel under the Seizure Mahazar (Ex.P.15). Though P.W.21 deposed that he visited the place of occurrence in the presence of two witnesses namely Mr.Anthoni Dinesh Raja (L.W.



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16) and Mr.Gnana Chandran (L.W.17) the prosecution did not examine the said witnesses in Court. It is to be noted that, Ex.P.15 - Seizure Mahazar and Section 161 (3) Statement were received by the Judicial Magistrate on 10.09.2019 itself. Further, P.MO 1 and PMO2 were sent to Forensic Science Examination and the consequent FSL report revealed the presence of kerosene in them and hence there is no reason to disbelieve the evidence of P.W.21. Needless to mention that, Law does not mandate obtaining witness signature in Observation Mahazar and Seizure Mahazar.

19. P.W.21 further deposed that after conducting inquest on the dead body and examination of the witnesses, he arrested the accused on 10.09.2019 at 3.30 p.m. in the presence of Mr.Savarimani (P.W.11) and Mr.Jegankumar (P.W.12). Further, he deposed that the accused gave a voluntary confession in the presence of the above said witnesses and seized P.M.O.3 to P.M.O.6. P.W.11 and P.W.12 did not support the case of the prosecution. Moreover, FSL Report does not reveal any presence of kerosene in P.M.O.3 to P.M.O.6. Hence, confession and recovery of P.M.O.3 to P.M.O.6 are doubtful. The prosecution has not proved the said facts beyond reasonable doubt.



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20. From the above evidence and discussion, it is clear that, the deceased died due to burn injuries caused while lying down on one side.

The defence theory is that the deceased committed suicide. To be noted, after the death of the deceased, Ex.P.11 - Statement given by the deceased to the Judicial Magistrate which describes the cause of his death and the circumstances of the transaction leading to his death, is elevated to the position of dying declaration which is admissible under Section 32 of the Indian Evidence Act, 1872 (for the sake of convenience and clarity, hereinafter referred to as Evidence Act).

21. In Ex.P.11 - Statement, the deceased has clearly stated that the accused who wanted property, quarrelled with the deceased and poured kerosene over him and set him ablaze and that P.W.1 rescued him to the hospital. To be noted, Ex.P.11 - Statement is the earliest statement on record, given by the deceased to the Judicial Magistrate. The Judicial Magistrate recorded the same as per the procedure without any deviation. Hence, Ex.P.11 - Statement inspires confidence of the court.

22. Ex.P.8 - Complaint Statement was recorded subsequent to Ex.P.11 - Statement. In Ex.P.8, P.W.1 has signed as a witness. P.W.1 in his



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chief examination has admitted the said fact and his signature. In his cross-examination, he deposed that he was not aware of the contents of Ex.P8. It is to be noted, that P.W.1 is none other than the son of the accused. Hence, naturally, as an afterthought, he might now want to save his mother ie., the accused. It is apposite to mention here that, though P.W.1 to P.W.7 did not support the case of the prosecution fully, their evidence cannot be rejected in *toto*. In this regard, the prosecution relied on **Ramesh Harijan**'s case referred to *supra*. The relevant portion of the Judgement reads thus:

“ 18. It is a settled legal proposition that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examine him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent that their version is found to be dependable on a careful scrutiny thereof. (Vide: Bhagwan Singh v. State of Haryana, AIR 1976 SC 202; Rabindra Kumar Dey v. State of Orissa, AIR 1977 SC 170; Syad Akbar v. State of Karnataka, AIR 1979 SC 1848 and Khujji v. State of M.P., AIR 1991 SC 1853)

19. In State of U.P. v. Ramesh Prasad Misra & Anr., AIR 1996 SC 2766, this Court held that evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close



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scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. A similar view has been reiterated by this Court in Balu Sonba Shinde v. State of Maharashtra, (2002) 7 SCC 543, Gagan Kanojia & Anr. v. State of Punjab, (2006) 13 SCC 516; Radha Mohan Singh @ Lal Sageb & Ors. v. State of U.P., AIR 2006 SC 951, Sarvesh Narain Shukla v. Daroga Singh & Ors., AIR 2008 SC 320 and Subbu Singh v. State by Public Prosecutor, (2009) 6 SCC 462 : (2009 AIR SCW 3937).

Thus, the law can be summarised to the effect that the evidence of a hostile witness cannot be discarded as a whole, and relevant parts thereof which are admissible in law, can be used by the prosecution or the defence. (See also: C. Muniappan v. State of Tamil Nadu, AIR 2010 SC 3718]; and Himanshu @ Chintu v. State (NCT of Delhi), (2011) 2 SCC 36 : AIR (2011) 1 SC (Cri) 426)."

23. Learned counsel for the accused relied on **Irfan**'s case referred to *supra*. The facts of this case captured in Paragraph Nos.5 to 15 of the Judgement read thus.

"5. The appellant-convict was married twice. The first marriage was with a lady by name Ishrat, who was the daughter of his uncle Mohammad Yunus (PW-1). His second marriage was solemnised with a lady named Afsana. One son by name Islamuddin (deceased) was born in wedlock with Ishrat. The convict had two brothers, namely, Irshad (deceased) and Naushad (deceased), who lived along with him and his sister Soni (PW-4). Another brother by name



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Shanu alias Shahnawaz (PW-2) of the convict lived in the neighbourhood.

6. It is the case of the prosecution that the three deceased persons more particularly Islamuddin (convict's son) was highly opposed to the second marriage of his father, i.e., the appellant-convict. Islamuddin (deceased) was even once beaten by the appellantconvict as he had offered lot of opposition to the second marriage of his father. Islamuddin was also threatened by the appellant-convict that he would be thrown out of the house. Deceased Naushad (appellant-convict's brother) was in Saudi Arabia. He had just returned to Bijnore from Saudi Arabia on 04.08.2014.

7. Few days before the date of the incident, the appellant-convict had beaten his son (deceased Islamuddin) and at that point of time, Naushad and Irshad (deceased persons) had intervened to save Islamuddin. On 05.08.2014, at around 05.30 pm, PW-2 Shanu (convict's brother) went to see deceased Naushad and had dinner with PW-4 (convict's sister), Islamuddin and Irshad. The PW-2 also invited the appellant-convict for dinner. The appellant-convict lived in the same house as PW-4 and Naushad, but on a different floor.

8. On 05.08.2014, at around 10.00 pm, after the dinner was over, PW4 asked the PW2 to stay overnight as it was too late. Naushad and Islamuddin slept in one room. As Irshad wanted to sleep on the roof, the appellant-convict advised him to sleep inside the room, as the weather was bad. Thus, all the three deceased persons ended up sleeping in one room.

9. PW-2 claims that the door of the room in which, the three deceased were sleeping, was open.



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However, according to the PW-4, it was locked from inside. The PW-2 lived at a distance of 200 metres from the place of the incident. It is pertinent to note that the High Court disbelieved the presence of the PW-2 at the place of occurrence, i.e., the house.

10. On 06.08.2014, at around 12.30 am, the PW-2 is said to have woken up to see flames and smoke coming from the room, where the deceased persons were sleeping. The PW-2 and his sister Soni (PW-4) claim to have seen the appellant-convict setting the room on fire and thereafter, fastening the door latch from outside and running away.

11. It is the case of the prosecution that the PW-2 and PW-4 opened the door and at that point of time, saw the appellant-convict running from the roof towards the stairs. According to the case of the prosecution, Amzad and one another person by name Shafiq (both not examined) also saw the appellant-convict running away.

12. The PW-1 (Original first informant- uncle of the appellant-convict) was sleeping in his room in his own house at the time of the incident. The uncle's house is at the distance of about 200 metres from the place of the occurrence.

13. The relatives first took Islamuddin, Irshad and Naushad to one Pooja Hospital situated at Najibabad in a vehicle. The Hospital declined to admit them. All the three injured were thereafter, taken to the hospitals at Bijnore and Meerut and finally were admitted to the Dr. Ram Manohar Lohiya Hospital, Delhi (RML Hospital).

14. On 06.08.2014, early in the morning at around 6.10 am all the three injured were brought to the casualty ward of the RML Hospital by Shafiq



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Ahmad (not examined). At 9.00 am, PW-1 (first informant) lodged a First Information Report with the Najibabad Police Station. In the FIR, the first informant alleged that it was the appellant-convict, who set his own son and two real brothers on fire, while they were sleeping on account of personal animosity.

15. The dying declaration of deceased Irshad was recorded on 07.08.2014 by the A.S.I. at the RML Hospital. Irshad passed away on 09.08.2014. In the same way, the dying declaration of Islamuddin was recorded on 07.08.2014. Islamuddin passed away on 18.08.2014. It appears that the dying declaration of Naushad could not be recorded. Naushad also passed away on 18.08.2014. The two dying declarations were videographed in the mobile of the A.S.I.”

24. Contrary to the case in hand, in **Irfan’s** case, the following deviations can be observed.

- i. The investigating officer did not call magistrate to record the dying declaration.
- ii. Whether the injured persons were conscious and in a fit state of mind to give a dying declaration was not ascertained and no certificate was issued by the concerned doctor in this regard.

Further, the dying declaration therein did not inspire confidence of the court *inter-alia* because of the following reasons.



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- i. There were contradictory statements concerning whether the room was bolted from outside or inside.
- ii. A combined reading of both the dying declarations would show that the deceased were rescued with the help of neighbours. However, no such neighbour was examined as witness.
- iii. Both the dying declarations are silent about the presence of P.W.2 and P.W.4 in the scene of occurrence.

Further, in the case on hand, it can be easily gathered from the facts and circumstances that the deceased was in expectation of death; the deceased was conscious, fit and in a stable mind-set to make the dying declaration; the deceased had a good opportunity to observe the incident as it happened during the daytime when he was awake; the dying declaration recorded soon after he was admitted in the hospital duly by the Judicial Magistrate is consistent throughout and the Judicial Magistrate was satisfied that there was no tutoring of any sort. Hence, ***Irfan***'s case can be distinguished from the case on hand.

25. The defence of the accused is that the deceased committed suicide by burning himself with kerosene owing to his mental illness.



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D.W.1 who is the brother of the accused was examined in order to prove the alleged defence. However, the defence side did not produce any medical evidence or independent evidence to suggest that the deceased was mentally ill. P.W.1 to P.W.4 have not mentioned anything about the alleged mental illness in their evidence. Further, no suggestion was put to them in this regard in their cross-examination. Further, the accused took a plea of alibi that from 08.09.2019 to 10.09.2019 at 5.30 am, she was at D.W.1's house. The plea of alibi has been introduced only at a later point of time ie., during the cross-examination of the investigation officer and Section 313(1)(b) Examination. Plea of alibi is relevant and admissible under Section 11 of the Evidence Act. As per Section 103 of the Evidence Act, the burden lies upon the accused to establish the said plea. D.W.1 deposed that he is residing at *Duraikudiyiruppu Village* which is 3 k.m. away from the place of occurrence. It is to be noted that the date of occurrence was 09.09.2019 at 10. a.m. Immediately, after the occurrence, the deceased was admitted in the Hospital. If really, the accused was at his brother's house at the time of occurrence, naturally, she would have come to know the incident as she is not far away and rushed to the Hospital. Hence, the evidence of D.W.1 that they knew about the occurrence only on 10.09.2019 at 05.15 a.m. is not believable. Further, the



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arguments that accused owns property more than the deceased has not been established. Even if established, it would not have an impact on the case. Except D.W.1, no independent witness was examined to establish the alleged plea of alibi. Further, D.W.1 is an interested witness, hence, his evidence needs corroboration. Hence, this court is of the opinion that the defence taken up by the accused side has not been proved as per law.

26. It is a settled position of law that conviction can be recorded solely based on dying declaration if it inspires confidence of the court. Recently, the Hon'ble Supreme Court in ***Veerpal's*** case [***State of U.P. Vs. Veerapal and another, reported in (2022) 4 SCC 741***] held as follows:

“16. Now, on the aspect, whether in the absence of any corroborative evidence, there can be a conviction relying upon the dying declaration only is concerned, the decision of this Court in Munnu Raja [Munnu Raja v. State of M.P., (1976) 3 SCC 104 : 1976 SCC (Cri) 376] and the subsequent decision in Paniben v. State of Gujarat [Paniben v. State of Gujarat, (1992) 2 SCC 474 : 1992 SCC (Cri) 403] are required to be referred to. In the aforesaid decisions, it is specifically observed and held that there is neither a rule of law nor of prudence to the effect that a dying declaration cannot be acted upon without a corroboration. It is observed and held that if the Court is satisfied that the dying declaration is true and voluntary it can base its conviction on it, without corroboration. Similar view has also been expressed in State of U.P. v.



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Ram Sagar Yadav [State of U.P. v. Ram Sagar Yadav, (1985) 1 SCC 552 : 1985 SCC (Cri) 127] and Ramawati Devi v. State of Bihar [Ramawati Devi v. State of Bihar, (1983) 1 SCC 211 : 1983 SCC (Cri) 169] . Therefore, there can be a conviction solely based upon the dying declaration without corroboration.

17.Khushal Rao v. State of Bombay [Khushal Rao v. State of Bombay, 1958 SCR 552 : AIR 1958 SC 22] is a watershed judgment on the law on the evidentiary value of dying declarations. This Court laid down the following principles as to the circumstances under which a dying declaration may be accepted, without corroboration : (AIR pp. 28-29, para 16)

“16. On a review of the relevant provisions of the Evidence Act and of the decided cases in the different High Courts in India and in this Court, we have come to the conclusion, in agreement with the opinion [Guruswami Tevar, In re, 1939 SCC OnLine Mad 384] of the Full Bench of the Madras High Court, aforesaid, (1) that it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated; (2) that each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made; (3) that it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other pieces of evidence; (4) that a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence; (5) that a dying declaration which has been recorded by a competent Magistrate in the proper manner, that is to say, in the form of questions and answers,



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and, as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character, and (6) that in order to test the reliability of a dying declaration, the Court has to keep in view, the circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the facts stated, had not been impaired at the time he was making the statement, by circumstances beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties.”

27. In this case, Ex.P.11 - Statement was duly recorded and there is no reason to disbelieve the same. Hence, this Court is of the opinion that the Trial Court has rightly concluded that the accused is guilty of the offence under Section 302 of IPC. Further, there is no evidence available on record to attract offence under Section 294(b) of IPC. Therefore, this Court finds no reason to interfere with the impugned Judgement of the Trial Court. Point Nos.(i) and (ii) are answered accordingly.



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28. Resultantly, the Criminal Appeal is dismissed. The conviction and sentence rendered by the Trial Court in Sessions Case No. 385 of 2021 is sustained.

(M.S., J.)

(R.S.V., J.)

21.11.2023

Index: Yes

Neutral Citation: Yes

Internet: Yes

Speaking order

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To

- 1.The Inspector of Police,
Valliyoor Police Station,
Tirunelveli District.
- 2.The Principal Sessions Court,
Tirunelveli.
- 3.The Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.



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M.SUNDAR, J.,
and
R.SAKTHIVEL, J.,
jen

Pre-Delivery Judgment made
in
Crl.A.(MD) No.718 of 2022

21.11.2023