

G.Murugan Vs. State

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Court : Chennai

Decided On : Nov-19-2013

Judge : The Hon'Ble Mrjustice S.Rajeswaran

Appellant : G.Murugan

Respondent : State

Judgement :

IN THE HIGH COURT OF JUDICATURE AT MADRAS DATE:

19. 11.2013 CORAM: THE HON'BLE MRJUSTICE S.RAJESWARAN AND THE HON'BLE MR.JUSTICE P.N.PRAKASH CRIMINAL APPEAL NO.209 OF2012G.Murugan .. Appellant Versus State by Inspector of Police, F5, Choolaimedu Police Station, Chennai-94. .. Respondent Prayer: This Criminal Appeal has been preferred against the judgment of conviction, passed by the learned Sessions Judge, Mahalir Neethimandram, Chennai dated 02.03.2012 in S.C.No.534 of 2006. For Appellant :: Mr.R.Shanmugasundaram, SC for Mr.S.Siva Subramani For Respondent :: Mr.V.M.R.Rajendran, APP

JUDGMENT

P.N.PRAKASH, J.

This is a case of Uxoricide. Murugan, the sole accused before the trial Court, is the appellant before us. He was charged for the offence punishable under Section 302

IPC, for setting his wife, Mangayarkarasi on fire by dousing kerosine on her in the afternoon of 28.10.2006 at their residence. He was convicted and sentenced to life imprisonment and pay a fine of Rs.50,000/- in default to undergo six months simple imprisonment by judgment dated 02.03.2012 in S.C.No.534 of 2006 passed by the learned Sessions Judge, Mahalir Neethimandram, Chennai.

2. It is the case of the prosecution that the appellant Murugan and Mangayarkarasi were married 8 years before the incident. They have one son, Mugilan and a 3 year old daughter, Sanmathi. The appellant was working as a Security Guard and used to work on shifts. The couple were living in the second floor at D.No.53/27, Bhajanaikoil Street, Choolaimedu, Chennai, owned by one Kasthuri Kalidoss (PW.4). Their son Mugilan was left in the care and custody of the parents of Mangayarkarasi in her native village and the daughter Sanmathi alone was with them. The appellant used to suspect the fidelity of his wife, Mangayarkarasi and believed that she was having illicit intimacy with one Sekar. Earlier, the appellant has lodged a police complaint on 25.07.2006 about his wife's extra-marital affair with one Sekar and one Mrs.Selvi, Sub Inspector of Police (PW.21), F5, Choolaimedu Police Station, appears to have mediated between the couple in the police station where they agreed to bury their differences and live in peace.

3. On the fateful day, i.e. 28.10.2006, it is alleged by the prosecution that the couple quarrelled and the appellant poured kerosine on Mangayarkarasi and set her on fire, resulting in her fleeing from the second floor naked as her clothes were completely burnt, to the landlady's portion in the ground floor. She was wrapped with a blanket and was taken to K.M.C.Hospital, Chennai by Annammal (PW.1), her son Ravi (PW.2) and the appellant. Mangayarkarasi was first examined by the duty doctor, Dr.Jason Philip (PW.18) to whom she stated that she was set on fire by her husband. This has been recorded by him in the Accident Register (Ex.P9). PW.18 admitted her into the Burns Ward when her statement (Ex.P11) was recorded by one Thiru Ramachandran, Sub Inspector of Police, F5 Choolaimedu Police Station, Choolaimedu (PW.20). Her statement was treated as a complaint and an FIR in F5 Choolaimedu Police Station in Crime No.1778 of 2006 for an offence under Section 307 IPC was initially registered by PW.20. The original complaint and FIR were received by the jurisdictional Magistrate at 7.30 p.m. on

28.10.2006 as could be seen from the endorsement made by the learned Magistrate on the printed FIR (Ex.P12). The case was taken up for investigation by Mr.Elangovan, Inspector of Police (PW.24). He proceeded to the K.M.C.Hospital and after recording the statement of Mangayarkarasi, he visited the place of occurrence around 19.20 hours and prepared an observation Mahazar (Ex.P2) and rough sketch (Ex.P17). He seized the following articles from the place of occurrence, viz., i) burnt match sticks (MO.2), ii) partly burnt plastic bucket (MO.3), iii) Chittafight match box (MO.4), iv) partly burnt mat (MO.5) and v) white colour plastic can (MO.6) in the presence of witnesses, Kumar (not examined) and Subramani (PW.15) under the cover of Mahazar (Ex.P3). Attempts were made by the Investigating Officer to have the dying declaration recorded by the Judicial Magistrate, which did not materialize since the victim was not in fit condition to give any statement when the learned Magistrate came, as could be seen from the following endorsement made by the XVI Metropolitan Magistrate, Georgetown, Chennai. ".Since the patient was under sedation and not in a fit state of mind to give statement as certified by the duty Doctor, I could not record the statement of Mangayarkarasi.". It appears that the learned Magistrate went to the K.M.C.Hospital on 28.10.2006 at 8.45 p.m. and found that the patient Mangayarkarasi was not in a position to give any statement. On 29.10.2006 at around 8.00 a.m., PW.24 received information from Dr.Nirmala Ponnambalanm (PW.19) that Mangayarkarasi succumbed to the injuries and therefore, he sent a report (Ex.P22) to the jurisdictional Magistrate for altering the offence from Section 307 IPC to Section 302 IPC. PW.24 conducted the inquest over the body of Mangayarkarasi at the K.M.C.Hospital in the presence of witnesses around 9.00 a.m. on 29.10.2006 and the Inquest Report is Ex.P23. Thereafter, the body was sent for postmortem. Autopsy was conducted by Dr.Priyadharshini (PW.23) who in her report (Ex.P16) has opined thus: ".Injury: Superficial burns with the skin peeling all over the body except the breast and pubic area (95% burns). No other external or internal injury made out. Heart: Normal in size, C/s all chambers with fluid blood. Volves normal. Coronaries patent. Hyoidbone tracka intact, Stomach: food partial was present Lungs liver spleen, kidney normal. C/s congested. Intestine distend; Bladder empty. Uterus ovary Normal. Pelvis intact. Spinal Intact. Scalp bones, membrane, brain intact. Opinion: The deceased would appear to

have died of due to Hyporohenic shock due to burns."

4. PW.24 arrested the appellant at 10.00 a.m. on 30.10.2006 and recorded his statement of confession, pursuant to which, he effected recovery of Gold Thali (MO.9) and accompanying gold ornaments (MOs.10 to 14) from the possession of the appellant under the cover of Mahzar (Ex.P19) in the presence of the witnesses, Balachandran (PW.16) and Ramasubramanian (not examined). PW.24 also recovered a half shirt (MO.14) and a pant (MO.16) that were worn by the appellant at the time of the incident. All the material objects were sent under the cover of letter dated 31.10.2006 (Ex.P14) through the learned XVI Metropolitan Magistrate, Georgetown, Chennai to the Director, Forensic Science Department, Chennai for chemical examination. The Chemical Examiner, in his report (Ex.P15), dated 3.11.2006 detected kerosine on the Nighty (MO.1) that was worn by the deceased Mangayarkarasi, MOs.3 to 7 (detailed above) and half shirt (MO.15) and pant (MO.16) that were worn by the appellant at the time of incident. PW.24 examined Mrs.Selvi, Sub Inspector of Police (PW.21) and collected from her the complaint (Ex.P13) given by the appellant on 25.07.2006 against his wife and the connected records available in the police station. After examining various witnesses, PW.24 filed a final report on 8.11.2006 against the appellant Murugan for an offence punishable under Section 302 IPC.

5. The case was taken on file as PRC No.127 of 2006 by the learned XVII Metropolitan Magistrate and on appearance of the appellant/accused, copies under Section 207 Cr.P.C. were furnished to him and the case was committed to the Court of Sessions, Chennai and the same was made over to the Mahalir Neethimandram, Chennai as S.C.No.534 of 2006, where the appellant was charged for the murder of his wife Mangayarkarasi on 28.10.2006 by setting her on fire, punishable under Section 302 IPC, to which, the appellant/accused pleaded not guilty.

6. The prosecution examined 24 witnesses, marked 23 exhibits and 16 material objects. After completion of the evidence, the appellant/accused was examined under Section 313 Cr.P.C. as regards the incriminating material against him, to which, he sought to exaplain the same by filing a written statement. No witnesses

were examined on behalf of the appellant. Having considered the entire evidence both oral and documentary, the trial Court, found the accused guilty of the charges and accordingly, convicted and sentenced him to undergo life imprisonment and to pay a fine of Rs.50,000/-, in default, to undergo simple imprisonment for a period of three months.

7. Mr.R.Shanmugasundaram, learned Senior Counsel appearing for the appellant took us through the evidence of important witnesses, viz., PWs.1 to 5 and pointed out contradictions in their testimonies and contended that the prosecution has failed to prove its case beyond all reasonable doubts, but whereas, the defence has satisfactorily established alibi for the appellant. It was his contention that the deceased Mangayarkarasi committed suicide by self immolation and this is not a case of homicide.

8. Per contra, the learned Addl.Public Prosecutor took us through the incriminating materials in support of the prosecution case and contended that the prosecution has proved the case beyond reasonable doubt.

9. In this case, there are no eye witnesses. The case hinges upon circumstantial evidence and we are conscious that the proved circumstances cumulatively should lead to the one and only inference that the appellant committed the offence and no one else. With this principle in mind, we appreciated the evidence on record in this case. The following are a few undisputed facts, viz., i) that at the time of the incident, the couple were living in the second floor at D.No.53/27, Bhajanaikoil Street, Choolaimedu, Chennai owned by Kasturi Kalidoss (PW.4) who lived in the ground floor along with her son Santhosh Prabhu (PW.3); ii) that the deceased Mangayarkarasi died on account of burn injuries sustained by her on 28.10.2006; iii) that the couple were friendly with the family of Annammal (PW.1) whose husband is Bhaskar (PW.11) and their son is Ravi (PW.2); iv) that the daughter of the couple, namely, Sanmathi was left in the house of PW.1 at the time of the incident; and vi) that after the incident, the deceased was taken to the hospital by PW.1, PW.2 and the appellant by an auto-rickshaw where she was admitted into the 'Burns Ward' and she died on 29.10.2006; 10. Mr.R.Shanmugasundaram, learned Senior Counsel contended the defence has clearly established from the

evidence of PWs.1, 2 and 11 that the appellant was not in the house at the time of the incident, but was in the house of PW.1 with his daughter Sanmathi. He also pointed out various remiss in the investigation done by the police, especially the alleged recovery of the Nighty (MO.1) from the hospital by PW.24. He also contended that the plastic bucket (MO.3) found in the seizure mahazar (Ex.P3) does not find place in the observation mahazar (Ex.P2). The learned Senior Counsel took us through the entire evidence of Ilavarasi (PW.5) who is the sister of the deceased Mangayarkarasi, to drive home the point that the deceased had an illicit affair with one Sekar, but on coming to know that Sekar was already a married man, she committed suicide out of frustration.

11. He also contended that the deceased did not make any dying declaration to any of the witnesses, namely, PWs.1 to 4 who were available in and around the place of occurrence and the dying declaration (Ex.P11) recorded by the Sub Inspector of Police (PW.20) is bristled with suspicion and should not be acted upon in the light of the judgment of the Hon'ble Supreme Court in ".State (Delhi Administration, Delhi) Versus Lakshmanakumar and others". reported in 1995 (4) SCC476 12. We gave our anxious thought to all these aspects canvassed by the learned Senior Counsel appearing for the appellant. The prosecution has satisfactorily proved the fact from the evidence of Santhosh Prabhu (PW.3) and his mother Mrs.Kasturi Kalidoss (PW.4) that the deceased came down running from her portion with burns all over her body at around 1.00 p.m. on 28.10.2006 and as she was naked, PW.4 being a lady, quickly wrapped the deceased with a bedsheet. It is in the evidence of both Pws.3 and 4 that at that time, they saw the appellant in the second floor at the place of occurrence.

13. This evidence of PWs.3 and 4 who admittedly belong to one family is pitted against the evidence of Pws.1,2 and 11 of another family who say that the appellant was in their house at the time of the incident. It is for this Court to carefully examine and weigh these two sets of evidence and decide as to which set should be believed.

14. From the record, it appears that PWs.1 and 2 were examined in chief on 7.8.2007 and they were not cross-examined on the same day. In the chief

examination, PWs.1 and 2 did not state that the appellant was there in their house at the time of incident. PW.1 in her chief-examination on 7.8.2007, stated that- ".vd; fzth; tPl;oy; ,Uf;Fk;ngHJ nkW;go rd;kjpia k';ifah;furpapd; fztuhd M\$H;vjphp bfHz;Lte;J tPl;lhh;".. Similarly, PW.2 in his chief examination on 7.8.2007 stated that- ".k';ifah;furp te;J vd; mk;khit fl;og;gpof;Fk;ngHJ k';ifah;furpapd; FHe;ij rd;kjp vd; tPl;oy; ,Ue;;jhs;/ me;j Fhe;ijia M\$H; vjphp bfHz;Lte;J v';fs; tPl;oy; tPl;ljhF vd; mg;gh brhd;dhh;".. These two witnesses were cross-examined only on 10.9.2007. In their cross-examination, they stated that the appellant was in their house at the time of the incident which begs the question as to why the prosecution did not declare these two witnesses ".hostile".?. Perhaps, the prosecution was under the belief that a witness can be turned hostile only when he does not support the prosecution in Examination in chief, or is it on account of abject callousness on the part of the prosecution in not closely following the evidence of these witnesses in cross-examination?. The Hon'ble Supreme Court has settled the legal position way back in 1964 in ".Dahyabai Chhanganbhai Thakkar -vs- State of Gujarat". reported in AIR 1964 SC1563 as under: ".A clever witness in his examination in-chief faithfully conforms to what he stated earlier to the police or in the committing court, but in the cross-examination introduces statements in a subtle way contradicting in effect what he stated in the examination-in-chief. If his design is obvious, we do not see why the court cannot, during the course of his cross- examination, permit the person calling him as a witness to put questions to him which might be put in cross-examination by the adverse party.".

15. Coming to the evidence of Baskar Babu (PW.11), who is the husband of PW.1 and father of PW.2 and who was examined on 17.6.2008, he says that around 12.30 p.m., on 26.10.2006 while the appellant came to his house to leave his daughter Sanmathi with him, PW.2 came running and broke the news that the deceased had sustained burn injuries. We are not able to accept this part of his testimony because the prosecution has established through credible evidence that the incident had taken place around 1.00 p.m. on 28.10.2006 and not at 12.30 p.m. on 26.10.2006 as deposed in the Chief examination by PW.11. In his cross-examination, PW.11 corrects the date from 26.10.2006 to 28.10.2006. Surprisingly PW.11 was also not declared hostile by the prosecution for giving evidence that cuts the substratum of the prosecution case. All this apart, had his son Ravi

(PW.2) seen the appellant in his house when Mangayarkarasi was burning, he would have deposed so in his examination in chief itself. Whereas, that part of his evidence in chief which has been extracted above belies the evidence of his father PW.11. Therefore, we are unable to persuade ourselves to rely upon the testimonies of PWs.1, 2 and 11 that the appellant was in their house when his wife was suffering from burns.

16. At this juncture, it will be appropriate for us to deal with yet another point raised by the learned Senior Counsel appearing for the appellant that, had the appellant set his wife on fire, she would have certainly disclosed the same to PWs.1 to 4. According to the prosecution, the deceased came running down crying- ".save me, save me, my husband set me on fire".. The prosecution wanted to prove this aspect through the evidence of the landlady Kasturi Kalidoss (PW.4). Since PW.4 did not say in her examination in chief that she heard the deceased saying, ".my husband has set me on fire"., it was the appellant who set his wife on fire, she was declared hostile by the prosecution. Nevertheless she categorically stated that she saw the appellant in the second floor and gave him Rs.100/- as auto fare to take Mangayarkarasi to the hospital. It is settled law that the testimony of a witness who was declared hostile should not be thrown out lock, stock and barrel. In fact, an amendment to Section 154 of the Evidence Act has been introduced by the Criminal Law Amendment Act (Act 2 of 2006) with effect from 16.4.2006 in which Sub Section 2 has been added to Section 154 thereby giving statutory sanctity to judicial precedent on the evidentiary value of a hostile witness. Section 154(2) of the Evidence Act reads as under: ".154(2). Nothing in this section shall disentitle the person so permitted under sub-section (1) to rely on any part of the evidence of such witness.".

17. Admittedly, the appellant was with PW.1 and PW.2 when they took the deceased to the hospital by auto. Naturally, she would have been scared to accuse the appellant while she herself is in a precarious condition. At the K.M.C.Hospital, when the deceased Mangayarkarasi was questioned by Dr.Jason Philip (PW.18), she stated that it was her husband (appellant) who set her on fire. Dr.Jason Philip has recorded thus in the Accident Register (Ex.P9) as under: ".Allegedly this patient says that she was set on fire by her husband at 1.00 p.m.

on 28.10.2006 at above address. O/E conscious, Pulse -80/minute, B.P.-120/80 MM HG, 90% Burns. Admit in Burns Ward.". This can be treated as the earliest dying declaration of the deceased Mangayarkarasi.

18. As regards the presence of the appellant in the place of occurrence at the time of the incident, Santhosh Prabhu (PW.3), the landlady's son saw smoke emanating from the second floor at around 1.00 p.m. on 28.10.2006. He had the quick presence of mind to switch off the main electricity supply and in his testimony, he has stated that at that time, Mangayarkarasi was running down from the second floor, the appellant was there near to her. In his cross-examination, he specifically denied the suggestion put to him that the appellant was present in the house of Annammal (PW.1) and that he came from there only after hearing about the incident. Therefore, PW.3 and PW.4 corroborated each other and on a careful scrutiny of their evidence, we are convinced that the prosecution has proved beyond all reasonable doubt that the appellant was there with the deceased in the second floor when the incident took place. This oral testimony is corroborated by the evidence of Scientific Expert, Mrs.Kasthuri Bai, Scientific Officer (PW.22) who in her evidence as well in her report Ex.P15, has detected kerosine in the clothes, MOs.15 and 16, worn by the appellant at the time of the incident. No serious challenge was made by the defence on this aspect in the cross-examination of PW.22, except suggesting that the scientific report (Ex.P15) was given to suit the case of the prosecution. This ofcourse was denied by the witness. In fine, we place reliance on the testimonies of PWs.3 and 4 with regard to the presence of the appellant at the time and place of occurrence as against the testimonies of PWs.1, 2 and 11.

19. Adverting to the seizure of clothes, Mos.15 and 16, under the cover of Mahazar (Ex.P20) by the Inspector of Police (PW.24), we wish to note that the independent witness Balachandran (PW.16) supported the case of the prosecution in chief, but in his cross-examination he turned turtle and for reasons best known to the Public Prosecutor, he was not declared hostile and cross-examined. Nevertheless, it is settled legal proposition that even if the independent witness to a recovery turns hostile, the Court can accept the seizure if the evidence of the Investigating Officer is credible. (See: Mohamed Aslam -vs- State of Maharashtra

(2000(7) Supreme 687). In this regard, we are accepting the evidence of the Investigating Officer PW.24 and we hold that Mos.15 and 16 were recovered from the residence of the appellant based on the admissible portion of his confession statement (Ex.P18).

20. The learned Senior Counsel drew our attention to certain aspects of investigation concerning the seizure of the Nighty (MO.1) and the seizure of bucket (MO.3) from the scene of occurrence. There is some force in the contention of the learned Senior Counsel. From the evidence of PW.4, it was established that the deceased came running down naked and PW.4 wrapped her with a bed sheet and sent her to the hospital by an auto rickshaw accompanied by PWs.1, 2 and the appellant. According to the Investigating Officer (PW.24), he recovered the Nighty (MO.1) at the hospital under the cover of Mahazar (Ex.P1) in the presence of witnesses Ravi (PW.12) and Senthil Kumar (PW.13) at 8.40 a.m. on 28.10.2006. Ravi (PW.12) did not support the prosecution case, but whereas Senthil Kumar (PW.13), supported the prosecution case. The evidence on record shows that the deceased was not wearing any clothes and she was wrapped with a blanket provided by PW.4 and sent to the hospital. It is strange as to how the half-burnt Nighty (MO.1) suddenly made its appearance beneath the cot of the deceased in the hospital. Similarly, the observation Mahazar (Ex.P2) prepared by the Investigating Officer (PW.24) does not refer to the presence of the partly burnt plastic bucket (MO.3). Whereas, the partly burnt plastic bucket (MO.3) is alleged to have been recovered at the place of occurrence under the cover of Mahazar (Ex.P3) by the Investigating Officer. Building upon his case further, the learned Senior Counsel submitted that the plastic bucket was planted in order to give credibility to the dying declaration (Ex.P11) wherein, the deceased refers to the use of a plastic bucket by her husband to throw kerosine on her before setting her on fire. We find from the Observation Mahazar (Ex.P2) that water has been poured all over the house to extinguish the fire which must have been done by the landlady and others after sending the deceased to the hospital. Therefore, the place of occurrence must have been disturbed. The plastic bucket (MO.3) itself was half burnt. In such circumstances, we feel that these are two trivial infractions in the investigation and even if the Nighty (MO.1) and plastic bucket (MO.3) are taken out of consideration, there are enough materials incriminating the appellant.

Time and again, the Honble Apex Court has held that the benefits of remises in investigation can never go to the accused unless it cuts the root of the prosecution case (See: Amarsingh -vs- Balbinder Singh reported in 2003 AIR SCW717).

21. Now we propose to deal with the dying declarations given by the deceased Mangayarkarasi. The deceased was first examined by Mr. Jason Philips, Duty Doctor (PW.18) at the K.M.C.Hospital, Chennai at 1.40 p.m. on 28.10.2006. On questioning the deceased, she appears to have told the doctor that she was set on fire by her husband. This was recorded by PW.18 in the accident register (Ex.P9) which has already been extracted above. PW.18 has observed that the deceased was suffering 90% burns. There was no substantial cross-examination of PW.18 on this aspect and not even a suggestion was made to him to the effect that the deceased had not made such statement to him. PW.18 admitted the deceased into the Burns Ward in the hospital, where, further treatment was taken over by Dr.Bhoopathi (PW.17). Ramachandran, Sub-Inspector of Police, Choolaimedu Police Station (PW.20) received the information at 2.45 p.m. from the Outpost Police Unit attached to the K.M.C.Hospital that one Mangayarkarasi was admitted in the Burns Ward. PW.20 proceeded to the Burns Ward and after ascertaining her fitness from Dr.Bhoopathi (PW.17), he recorded the statement from the deceased which has been marked as Ex.P11. In Ex.P11, Dr.Bhoopathi has endorsed as under: ".Patient is fully conscious and she is in fit state of mind to give statement.". This certification has been proved and marked as Ex.P7 through PW.17. It is in the evidence of PW.17 that at around 8.50 p.m. on the same day, the learned XVI Metropolitan Magistrate, Chennai came to the Burns Ward for recording the statement of the deceased. Since the deceased was not in a fit condition and was in sedation, PW.17 certified that she is not not in a fit state of mind to give declaration. The learned Magistrate has recorded this in his proceedings (Ex.P8). The learned Magistrate in order to satisfy himself, appears to have put some questions to the deceased which evoked no response from her. This also finds place in Ex.P8. Ultimately, the learned Magistrate has endorsed in Ex.P8 that - ".Since the patient was under sedation and not in a fit state of mind to give statement as certified by the duty Doctor, I could not record the statement of Mangayarkarasi.".

22. Coming to the analysis of the dying declarations in the Accident Register (Ex.P9) recorded by Dr.Jason Philips (PW.18) and the statement Ex.P11 recorded by Ramachandran, Sub Inspector of Police (PW.20), we find that the first one is a cryptic statement and the second one is a little elaborate, wherein the deceased has stated about the quarrel she had with her husband on the fateful day and in a jiffy, it appears that the appellant threw kerosine from a bucket and threw a lighted match stick on her. The learned Senior Counsel relied upon the judgment of the Hon'ble Supreme Court in ".State (Delhi Administration) -vs- Laxman Kumar and Others (1985) 4 SCC476". and contended that the dying declaration given to the Sub Inspector of Police should be completely disregarded. We are unable to agree with this contention. It is trite law that a dying declaration can be recorded by any person and in view of Section 162(2) Cr.P.C. as there is no legal bar in admitting a dying declaration given to a Police man. In the Judgment relied upon by the learned Senior Counsel, we find that the Supreme Court has not laid down any proposition to the effect that the Court should disregard a dying declaration recorded by a Police Officer. In the facts and circumstances obtaining in that case, the Supreme Court did not accept the dying declaration recorded by the Police Officer. The Hon'ble Supreme Court in para 27 of the judgment, has given reasons for not accepting the dying declaration in that case. The Supreme Court, in the same judgment, has cited its another judgment in ".Dalip Singh -vs- State of Punjab (AIR 1979 SC1173, wherein, it has been held as under: ".We may also add that although a dying declaration recorded by a police officer during the course of investigation is admissible under Section 32 of the Indian Evidence Act in view of the exception provided in sub-section (2) of Section 162 of the Code of Criminal Procedure, 1973, it is better to leave such dying declaration out of consideration until and unless the prosecution satisfies the court as to why it was not recorded by a magistrate or by a doctor.". In this case, the first statement of the deceased Mangayarkarasi was recorded by Dr.Jason Philip (PW.18) in the Accident Register (Ex.P9). Thereafter, when the Sub Inspector of Police came to the Burns Ward, he has recorded the dying declaration (Ex.P11) in the presence of Dr.Bhoopathy (PW.17) who has also given certificate that the patient is in a fit condition to give dying declaration. The Investigating Officer did not remain content with it. He made arrangements to have a dying declaration recorded by a Magistrate which did not

fructify since the patient was not conscious at the time when the learned Magistrate visited the hospital. Therefore, we hold that the dying declaration recorded by PW.20 is relevant, admissible and inspires our confidence.

23. According to the prosecution, the motive for the murder was that the appellant suspected that his wife was having illicit affair with one Sekar and in order to establish the same, the prosecution examined one Mrs.Selvi, Sub Inspector of Police (PW.21) who brought about truce between the spouses on 25.07.2006 in the Police Station and marked the complaints lodged against each other (Ex.P13). It appears from the evidence of PW.21 and Ex.P13 that the warring couple agreed to bury the hatchet and after giving assurance to the police that hereinafter they would live in peace, they left the police station on 25.07.2006. The incident in question took place only on 28.10.2006, 3 months thereafter. The prosecution examined one Ilavarasi (PW.5), the sister of the deceased in order to prove that the appellant was continuously suspecting his wife's character which led to the appellant setting his wife on fire.

24. The learned Senior Counsel painstakingly took us through the entire evidence of Ilavarasi (PW.5) to show that her evidence is not trustworthy. We are also constrained to concur with this submission. According to PW.6, on 25.7.2006, the appellant locked the house from outside and confined the deceased and PW.6 inside the house until they were rescued by the police. This story does not appeal to us because there is absolutely no reference to this either in the evidence of Mrs.Selvi, Sub-Inspector of Police (PW.21) or in the compromise proceedings (Ex.P13). Therefore, we find that the prosecution has failed to prove either the motive or the intention of the appellant. From the dying declaration Ex.P11, there is no reference by the deceased that the appellant suspected her fidelity. On the contrary, the deceased in her dying declaration has stated that her husband was working as a Security Guard and he frequently abstained from going for job and whenever she questioned him about this, he quarrelled with her; that the portion of her house was leaking during rainy season and so she was asking him to lookout for a new house. She further questioned him as to why he was strewing his unwashed pants and shirts all over the house and not keeping them properly. While this quarrel was ensuing, her husband suddenly threw a bucket of kerosine

on her and set her on fire at around 1 O'clock in the afternoon on 28.10.2006. She further stated that her clothes started burning and she ran down the staircase. Thereafter she was taken to the hospital by Annammal (PW.1), Ravi (PW.2) and her husband (appellant). Thus we find that there was no pre-meditation and in the thick of the quarrel on account of his wife's provocation, he acted in the said manner. Thereafter, he remained there and even took his wife to the hospital with others.

25. From an analysis of these facts, we are of the view that the appellant cannot be convicted for an offence under Section 302 IPC. The proved facts show that the act of the appellant falls in the second part of Section 299 IPC coupled with Exception-I of Section 300 IPC, thereby punishable under Section 304 Part-I IPC. Accordingly, the Criminal Appeal is partly allowed. The conviction and sentence for the offence under Section 302 IPC imposed by the judgment, dated 02.03.2012 by the learned Sessions Judge, Mahalir Neethimandram, Chennai in S.C.No.534 of 2006, is set aside and instead, the appellant is convicted under Sec.304-Part I IPC and sentenced to undergo ten years rigorous imprisonment and also pay a fine of Rs.50,000/-(Rupees Fifty thousand) in default to undergo six months simple imprisonment. The sentences of imprisonment already undergone by the appellant (if any) shall be given set off. (S.R.,J.) (P.N.P.,J.) suk 19.11.2013 Index: Yes/ Internet: Yes/ To 1. Sessions Judge, Mahalir Neethimandram, Chennai.

2. The Inspector of Police, F5 Choolaimedu Police Station, Chennai. 3.The Public Prosecutor, High Court, Chennai. S.RAJESWARAN, J., AND P.N.PRAKASH, J., suk Judgment in CrI.A.No.209/2012 19.11.2013 Pre delivery Judgment in CrI.Appeal No.209 of 2012 TO THE HON'BLE MR.JUSTICE S.RAJESWARAN FROM JUSTICE P.N.PRAKASH

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