In Re: Basith and Others

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Court : Chennai

Decided On : Dec-11-1996

Reported in : 1997CriLJ3232

Judge : M. Karpagavinayagam and ;Rengasamy, JJ.

Acts : Indian Penal Code (IPC), 1860 - Sections 109, 114, 302, 307, 323, 342, 364 and 498A; Code of Criminal Procedure (CrPC) , 1973 - Sections 313, 342, 364 and 366; Evidence Act - Sections 32 and 32(1)

Appeal No. : Referred Trial No. 7 of 1996

Appellant : In Re: Basith and Others

Advocate for Def. : R. Shanmugha Sundaram, Public Prosecutor

Advocate for Pet/Ap. : A. Padmanabhan, Adv.

Judgement :

M. Karpagavinayagam, J.

1. In S.C. No. 3/96 on the file of First Additional Sessions Judge, 'Trichy, the appellants were convicted for the offence under Section 302 and 302 read with 109 Indian Penal Code and were sentenced to death. The present appeal has been resorted to by the appellants. Besides this reference also has been made under Section 366 Code of Criminal Procedure before this Court for confirmation

of death sentence imposed by the Trial Court.

2. The indictment against the appellants is that on 21-9-1995 at about 1.30 p.m., in the house door No. 52, Kaja Thoppu Tennur, Trichy, the first appellant at the instigation of the appellants 2 and 3 poured Kerosene over the body of the victim and set fire, with the result the victim died at 12.00 p.m., on 26-9-1995.

3. The short facts leading to the conviction were as follows :-

(a) The unfortunate victim in this case Sherfunnisa alias Rajathi was the wife of the first appellant Dasth. The appellants 2 and 3 are the parents of the first appellant. P.W. 4 Hussain and P.W. 5 Aiyasha Beevi are the parents of the victim deceased P.W. 6 Jaffer Sathick is her brother.

(b) About two years before the incident, the victim Sherfunnisa was married to first appellant. The parents of the victim belonged to Pudupet, Madras. The appellants are the residents of Trichy, Kosa Thoppu residing in door No. 52, Tennur, Trichy. Their house is situated in a closely and thickly populated area. There are several houses situated surrounding the house of the appellants. P.W. 1 Sherfunnisa, P.W. 2 Alima Beevi P.W. 3 Jarina are the residents of nearby houses.

(c) One year prior to the occurrence a female child was born to those spouses. The appellants were living in the said rented house along with the deceased as a joint family. Since the appellants wanted to purchase a new house, they asked the victim deceased to give her jewels to raise funds for the purpose of purchasing a house. The victim agreed to part with her jewel on the condition that the house must be purchased in her name. But this plea had been turned down by the appellants. From then onwards, they became hostile in their attitude towards the victim and day in and day out they use to beat her. Appellants 2 and 3 used to instigate first appellant to beat and drive her out. So the torture and ill treatment at the hands of the first appellant/husband continued every day.

(d) About two days prior to the occurrence P.W. 6 Jaffer Sathick the brother of the victim came to Trichy in order to meet some persons for his business purpose. Whenever he came to Trichy he used to stay in the house of P.W. 12 Aiya Begam.

She is the sister's daughter of P.W. 4. Her house also situated in Tonnur at Quaid-e-Millath Nagar at Trichy. This area is very near to the house of the deceased. While he came to Trichy, the victim complained to him about the ill-treatment meted out to her by the appellants since she was not amenable for the demand of parting with her jewels. P.W. 6 pacified her by saying that he would make immediate arrangements to see that their parents come from Madras on that day itself, to settle this problem. Accordingly he sent message to P.W. 4 and P.W. 5 the parents of the deceased.

(e) On 20-9-1995 P.W. 4 father and P.W. 5 mother of the deceased both came stayed in the house of P.W. 12. On 21-9-1995 morning, the victim deceased went to the house of P.W. 12 and met her parents. She also narrated the entire events that took place in her marital home. Thereupon the parents of the victim told her that they would report to Jamath next day and settle the dispute. At that point of time at about 1.00 p.m., the first appellant husband came there and forcibly pulled the deceased out from the house of P.W. 12 by catching hold of tuft and dragged her to his house through the streets. On the way he discriminately beat her with his hands. On seeing this P.W. 5, the mother also closely followed them objecting to the beating. When the victim and the first appellant came to the house, the second appellant and third appellant who were there inside the house shouted saying.'

Then the first appellant the husband took a kerosene bottle found in the kitchen and poured the kerosene over the body of the victim deceased. Then he lighted a match and threw it on her body. It was about 1.30 p.m. then. As seen as she caught fire all the three appellants immediately came out of the house looking the door from outside and putting a lock and went away.

(f) Unable to bear the pain due to burning fire the victim screamed as '[Vernacular matter omitted]'. On hearing the hue and cry, the neighbours rushed to the house. P.W. 11 who is the resident of the local area and auto driver also came and attempted to open the door. Since it could not be opened, he scaled over the roof, removed the tiles and jumped inside the house. There at the kitchen, he saw the victim deceased in flames. In order to save her, he took the mat and blankets

gunny bag found available in the house covered her body, and put out the fire. Thereupon he found that the door of the house was bolted from inside. So he unbolted the door and came out of the house along with the victim with full of burn injuries. In the mean time. P.W. 4 and P.W. 5 along with P.W. 12 came there. On seeing the serious injuries on the body of the victim deceased, P.W. 4 and P.W. 5 took the victim in an auto and rushed to the General Hospital, at Trichy.

(g) P.W. 7 Dr. Mumtas attached to the Trichy Government Hospital admitted the victim deceased who was brought by P.W. 4 at 2.00 p.m., in the hospital. After giving first aid treatment, when she enquired about the injuries, the victim told P.W. 7 Doctor that on that day at 1.30 p.m., five persons including her husband, mother-in-law and father-in-law, poured kerosene and set fire on her body after locking the door of the house and due to that she sustained these injuries. She found on the body of the deceased 36% of burns over the front chest, abdomen, face neek and inner side of two limbs. Thereafter the victim was admitted in the special ward namely F.S.II Ward. She issued Ex. P. 1 wound certificate. Thereupon she sent intimation - Ex. P. 4 to the Magistrate P.W. 10 requesting him to come and record the dying declaration from the victim, admitted for burn injuries. Intimation Ex. P. 10 was also sent by her to the out post police station at Trichy Hospital. P.W. 14 Police Constable received this message at 2.50 p.m. In turn he gave this message (sic) the jurisdiction police at Thillai Nagar Police Station at about 3.00 p.m.

(h) P.W. 10 Judicial Magistrate No. 1 Trichy, on receipt of requisition Ex. P. 4, reached the hospital at about 3.50 p.m., He met P.W. 8 Doctor Rajagopal and verified as to whether the victim deceased was in a fit condition to give dying declaration. Since P.W. 8 told him that she was conscious enough to give declaration, P.W. 10 the learned Magistrate recorded the dying declaration Ex. P. 5 from the victim deceased. Regarding her consciousness, fitness certificate Ex. P. 2 was given by P.W. 8 Doctor Rajagopal, while giving dying declaration, the victim after answering all the questions put by the Magistrate, told him that her husband the first appellant came to the house of P.W. 12 and forcibly dragged her to his house wherein he poured kerosene over her and set fire to her while her father-in-law and her mother-in-law were present and that thereafter all the three

persons went away after locking the door from outside. The recording was commenced on 3.15 p.m., and ended at 3.45 p.m.

(i) P.W. 15 Head constable attached to the Thillai Nagar Police Station, on receipt of the telephone message from outpost police Station, made an entry in the General Diary and immediately left for hospital. Since the Magistrate was recording dying declaration from the victim he waited outside till the recording was over. Thereafter he went into the ward and obtained a statement Ex. P. 8 from the victim. The case was registered in Crime No. 492/1995 under Section 323, 342, 498A, 307 read with 114 Indian Penal Code. The printed F.I.R. is Ex. P.9. The documents were despatched to the Court as well as to the senior officials.

(j) At about 5.00 p.m., on 21-9-1995 P.W. 16 Inspector of Police Thillai Ngar took up investigation on receipt of the copy of F.I.R. at 5.45 p.m., he went to the spot and prepared observation Mahazaar Ex. P.6 and drew rough sketch Ex. P. 11. He recovered from the spot M.O. 1 used match stick, M.O. 2 saree, M.O. 3 Jacket, M.O. 4 Bra, M.O. 5 Kerosene bottle under Mahazaar Ex. P. 6.

(k) At about 7.00 p.m., P.W. 16 went to the hospital and recorded a statement of the victim. This is Ex. P. 12. Again who went to the spot and examined P.W. 1 to P.W. 6. He made arrangements to apprehend the accused but they were not available. On 22-9-1995 at about 12 Noon he went to Alwarkurichi on information, and arrested all the three appellants near the bridge. Then after interrogation they were sent for remand.

(l) On 26-9-1995 at about 2.00 p.m. P.W. 16 received a message that the victim deceased died. So he altered the F.I.R. under Section 302 Indian Penal Code. He prepared a express report Ex. P. 13 and sent the same to the Court. Thereupon he went to the hospital and hold inquest (body) over the dead of the deceased between 3.00 p.m. to 6.00 p.m.

(m) On 27-9-1995 P.W. 9 Doctor Kalayana-sundari, attached to the Trichy Government Hospital, on receipt of the requisition sent by the Inspector requesting her to conduct the postmortem on the body of the deceased commenced post mortem at about 12.30 p.m., She found the following injuries :-

'On external examination :

Of the body 50% burn injuries were found on the face involving both the check all over the chest upto the level of spigastrium. Burn injuries in both the upper limbs mere on the middle side extending to the fingers. In the back burn injuries present.

On Internal Examination :

Of the Thorax the heart lungs were normal. On opening the abdomen the stomach empty. Liver spleen, kidneys and intestines normal. The uterus was normal in size and found empty. On opening the skull no fracture of skull bones and brain appears normal.'

She gave the opinion in Ex. P. 3 post mortem certificate that the deceased would appear to have died of burn injuries. P.W. 16 after finishing the investigation and examination of the witnesses, filed charge sheet on 17-10-1995 against the appellants for the offence under Section 364, 302 read with 109 Indian Penal Code before the Committal Court.

4. On committal, the learned Sessions Judge framed charges under Section 364, and 302 against the first appellant and 302 read with 109 against the 2nd and 3rd appellants. When questioned, the appellants pleaded not guilty and claimed to be tried.

5. To substantiate the charges framed against the appellants, the prosecution examined P.W. 1 to P.W. 16 filed Ex. P. 1 to Ex. P. 14 and marked M.O. 1 to M.O. 5.

6. After the evidence was over, the appellants were questioned under Section 313 Code of Criminal Procedure with regard to the incriminating circumstances found against them brought on record. All the appellants unanimously stated to the Court that they were innocent and false case was foisted against them.

7. On consideration of the evidence, oral and documentary adduced by the prosecution, trial Court though acquitted the first appellant in respect of charge under Section 364, came to the conclusion that the prosecution has established

the case against the appellants beyond doubt in respect of the offences under Section 302, 302 read with 109 Indian Penal Code and dealt with THEM as referred above.

8. Mr. Padmanabhan, counsel for the appellants took us through the entire evidence and contended that the prosecution case bristles with lot of infirmities, that most of the witnesses became hostile, that the only piece of evidence available is four dying declarations with full of inconsistencies and that since there is no acceptable evidence to fasten the criminal liability on the appellants they are entitled to be acquitted.

9. Per contra, Mr. R. Shanmughasundaram, Public Prosecutor countered his submissions contending that though the important witnesses turned hostile, the dying declaration given by the deceased on four occasions on the same date of occurrence would be sufficient to base the convictions for the above referred offences.

10. We have carefully scrutinised the divergent contentions urged by the counsel on both sides.

The case of the prosecution is that since the deceased declined to part with her jewels to the appellants on their demands in order to raise funds for purchasing a house, they began ill treating the deceased and on the date of occurrence when she went to the house of P.W. 12, her relative, in order to meet her parents P.W. 4 and P.W. 5 for informing about the attitude of the appellants the first appellant came to the house of P.W. 12 and forcibly took her by beating and dragging her through the streets, and then, after reaching the house, on the instigation of second and third appellants, the first appellant poured kerosene over her body and set her ablaze and thereafter they came out of the house, put a lock in order to prevent her from escaping from the house and then left the place hurriedly. P.W. 1 to P.W. 3 are the neighbours in the same area in which the first appellant and the deceased were living. They were examined to speak about the ill treatment meted out by the appellants 1 to 3 to the deceased, since she refused to part with her jewels. P.W. 4 and P.W. 5 the parents of the deceased were examined to speak that on the date of occurrence at about 1.00 p.m., the deceased came and

complained about the appellants. P.W. 6 her brother, also was examined to speak that the deceased reported to him about the torture by the appellants. But unfortunately all these witnesses turned hostile. Yet another important witness in this case is P.W. 11 who was examined to speak about the res gestae evidence. According to the prosecution, P.W. 11, the autorickshaw driver, who belonged to the same area, on hearing the scream rushed to the house of the deceased and that he saw the first accused coming from the house in an agitated mood and when P.W. 11 asked him as to what happened, he did not reply and hurriedly went away. This witness also turned hostile, so, virtually there is no evidence regarding the motive aspect. Since P.W. 11 turned hostile there is also no evidence relating to res gastae evidence. So ultimately we are left with only four dying declarations made by the deceased on four occasions on the same day of occurrence.

11. Though P.W. 12 the sister's daughter of P.W. 4 turned hostile, she gave evidence before the Court that the first appellant came to her house at about 1.00 p.m., and asked the deceased, who was talking with her parents P.W. 4 and P.W. 5, to come with him and so, the deceased went and joined her husband. P.W. 4 also, though treated as a hostile witness, deposed before the Court that when the victim deceased was removed from the house of the appellants for taking to the hospital he saw that the accused appellants were standing in front of the house. This aspect of the evidence as spoken by P.W. 4 and P.W. 12 before the Court, though available, it could be considered later as to how far it could be acted upon. Now let us see the dying declarations :

(1) Ex. P. 1, the wound certificate prepared by P.W. 7 Doctor on the basis of the statement given by the deceased at about 2.10 p.m.,

(2) Ex. P. 5 the dying declaration recorded by the Magistrate P.W. 10 in the presence of Doctor P.W. 8 who issued Certificate Ex. P. 2 at about 3.15 to 3.45 p.m.,

(3) Ex. P. 8 the complaint recorded by the Head Constable P.W. 15 attached to the Jurisdiction police station, between 3.50 p.m., and 4.00 p.m.,

(4) Ex. P. 12 the statement recorded by the Inspector of Police during the course of investigation on the same day at 7.00 p.m.,

12. The principle on which dying declarations can be admitted in evidence is indicated in legal maxim as follows :

'A man will not meet his maker with a lie in his mouth. The situation in which a man is on death bed is so solemn and screne.'

13. Though the dying declaration is to be given more weight, it is worthwhile to note that the accused has no scope for cross-examination. That is the reason, why Court insists that the dying declaration should be of such a nature as to inspire full confidence of the Court. The Court has to be on guard that the statement of the deceased was not as a result of either tutoring, prompting or a product of imagination. Once the Court is satisfied with the dying declaration, as true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law; that dying declaration cannot form the sole basis for conviction, unless it is corroborated.

14. The law relating to dying declaration is well settled now. Under Clause (1) of Section 32 of the Indian Evidence Act, 1872, statement made by a person, who is dead, as to cause of his death or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of his death comes into question, is a relevant fact and is admissible in evidence. Thus, Section 32(1) of the Evidence Act is an exception to the general rule that hear-say evidence is tested by cross-examination, it is not creditworthy.

15. However, the reliability of such statement/declaration should be subjected to close scrutiny, considering that it was made in the absence of the accused/appellant who has no opportunity to test its veracity by cross-examination. If there are more dying declarations than one, then the Court has also to scrutinise all the dying declarations to find out if each one of them passes the test of being trustworthy. The Court must further find out whether different dying declarations are consistent with each other in material particulars before accepting and relying upon the same. Once the statement of the dying person and

the evidence of the witness or witnesses testifying to the same are found reliable on a careful scrutiny, it becomes a very important and reliable piece of evidence and if the Court is satisfied that the dying declaration is true and free from any inducement, such a dying declaration, by itself, can be sufficient for recording a conviction even without looking for any corroboration.

16. Now the various authorities with reference to this aspect have been cited before this Court by both the counsel. Let us see one by one. The earliest case on this aspect is Khushal Rao v. State of Bombay, : 1958 CriLJ106 in this case, the full bench of Apex Court has considered and affirmed the decision of our High Court. The relevant observations are as follows :-

'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 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 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, 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 fact stated, had not been impaired and 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.'

17. In the next decision is Tapinder Singh v. State of Punjab, : 1970 CriLJ1415 wherein the Supreme Court following the proposition laid down in the above case has observed as follows (at page 1420 (of Cri LJ)) :-

'It is true that a dying declaration is not a deposition in the Court and it is neither made on oath nor in the presence of accused. It is, therefore, not tested by cross-examination on behalf of the accused. But a dying declaration is admitted in evidence by way of an exception to general rule against the admissibility of hearsay evidence, on the principle of neccesity. The week points of the dying declaration just mentioned merely serve to put the Court on its guard while testing its reliability, by imposing on it an obligation to closely scrutinise all the relevant attendant circumstancumstances'.

18. The next decision is K. Ramachandra Reddi v. The Public Prosecutor : 1976 CriLJ1548 . The relevant observations are as follows (at page 1551 (of Cri LJ)) :-

'The dying declaration is undoubtedly admissible under section 32 of the Evidence Act and not being the statement on oath so that its truth could be tested by cross-examination, the Courts have to apply the strictest scrutiny and the closest circumspections to the statement before acting upon it. While great solemnity and sanctity is attached to the words of a dying man because the person on the verge of death is not likely to tell lies or to concoct a case so as to implicate an innocent person yet the Court has to be on guard against the statement of the deceased being a result of either tutoring, prompting or a product of his imagination. Once a court is satisfied that the dying declaration is true and voluntary it can be sufficient

to found the conviction even without any further corroboration.'

19. The next decision in Paniban v. State of Gujarat, : 1992 CriLJ2919 wherein the supreme Court has observed at page 2923 (of Cri LJ) :

'Where there are more then one statement in the nature of dying declaration one first in point of time must be preferred. Of course, if the plurality of dying declarations could be held to be trustworthy and reliable, they have to be accepted.'

20. In Kamala v. state of Punjab : 1993 CriLJ68 the Apex court has held as follows (at page 80 (of Cri LJ)) :-

'It is well settled that dying declaration can form the sole basis of conviction provided that it is free from infirmities and satisfies various tests ..... in a case where there are more than one dying declaration if some inconsistencies are noticed between one and the other, the court has to examine the nature of inconsistencies namely whether they are material or not. In scrutinising the contents of various dying declarations, in such a situation, the Court has to examine the same in the light of the various surrounding facts and circumstances.'

21. In Kundula Bala Subramanyam v. State of Andhra Pradesh, : 1993 CriLJ1635 the Apex Court has observed as follows (at page 1642 (of Cri LJ)) :

'A dying declaration made by person on the verge of his death has a special sanctity as at that solemn moment, a person is most unlikely to made any untrue statement. The shadow of impending death is by itself the guarantee of the truth of the statement made by the deceased regarding the causes or circumstances leading to his death. A dying declaration, therefore, enjoys almost a sacrosanct status, as a piece of evidence coming as it does from the mouth of the deceased victim. Once the statement of the dying person and the evidence of the witnesses testifying to the same passes the test of careful scrutiny of the Courts, it becomes a very important and a reliable piece of evidence and if the Court is satisfied that the dying declaration is true and free from any embellishment, such a dying declaration, by itself, can be sufficient for recording conviction even without looking

for any corroboration. If there are more than one dying declarations then the Court has also to scrutinise all the dying declarations to find out if each one of these passes the test of being trustworthy. The Court must further find out whether the different dying declarations are consistent with each other in material particulars before accepting and relying upon the same.'

22. In State of Gujarat v. Khumansingh Karsan Singh, : AIR 1994 SC1641 , while dealing with the similar facts of the case and while acquitting the accused the Apex Court observed as follows (at page 1641 (of AIR)) :-

'The first dying declaration was recorded by a Head Constable P.W. 16 wherein she implicated her mother-in-law alone. She did not implicate her husband at all. The second dying declaration was made to her father. P.W. 8 wherein she implicated both her husband and her mother-in-law. The third dying declaration was recorded by the Executive Magistrate P.W. 14 at about 9.00 p.m., wherein she implicated both her husband and mother-in-law. It is, therefore clear that the second and the third dying declarations implicated both her husband and mother-in-law while the first dying declaration made to the Head Constable involved her mother-in-law only ..... there is no doubt that there is inconsistency between the first dying declaration and the subsequent two dying declarations while portrays the possibility of her being amenable to tutoring.

23. The last decision is Betal Singh v. State of Madhya Pradesh, : (1996)4SCC203 which is the recent decision given by the Apex Court reported in : (1996)4SCC203 which observes as follows :-

'Legal position remains unaltered that dying declaration should be scrutinised very carefully and if the Court is satisfied after such scrutiny that the dying declaration was true and was free from any effort to prompt the deceased to make such a statement and is coherent and consistent, there is no legal impediment in founding the conviction on it. The position does not change even if such a dying declaration is put forward in a bride burning case whether or not has been recorded by the police officer during investigation.'

24. In the light of the legal position as enunciated above, let us examine each and every dying declaration in order to see whether these dying declarations are free from infirmities and pass the test of being trustworthy.

25. The first dying declarations is Ex. P1. This document is prepared by P.W. 7 Doctor. As per her evidence, the victim was brought by her father P.W. 4 at about 2.10 p.m., Before giving any treatment, P.W. 7 questioned the victim as to how she sustained burn injury. According to P.W. 4, father of the deceased, who brought the victim, and P.W. 7, the Doctor who examined her, the victim was conscious and was able to speak. As per the evidence of P.W 7, Ex. P1 is the earliest document prepared at 2.10 p.m. The victim told P.W. 7 that at about 1.30 p.m., on that day five persons, including her husband, father-in-law and mother-in-law, the appellants, poured kerosene over her and set her ablaze. The statement recorded by P.W. 7 under Ex. P1 is as follows :-

'[Vernacular matter omitted] - said to have sustained burns [Vernacular matter omitted] (5 persons) [Vernacular matter omitted] (Homicidal) at 1.30 p.m., on 21-9-1995.'

As the Apex Court has observed, more importance has to be attached to the first dying declaration. According to this document, totally five persons set fire to her. After recording Ex. P1, P.W 7 sent requisition Ex. P4 to the Magistrate requesting him to record dying declaration from the victim at the Hospital and sent intimation Ex. P10 to the outpost Police Station situated at the General Hospital, Trichy. Curiously the document Ex. P10 which was prepared on the basis of Ex. P1 has not been referred in the evidence of P.W. 7. P.W. 14 the Head Constable attached to the out-post police station would say that he received the intimation from P.W. 7 Dr. Mumtaz regarding admission of the victim with burn injuries in the hospital. On receipt of this message, P.W. 14, in turn informed the jurisdiction police station through telephone. It was at about 3.00 p.m. then P.W. 15 Head Constable attached to the Jurisdiction Police Station Thillai Nagar received a telephonic message and went to the out post police station immediately and received Ex. P10 the hospital intimation. Strangely this Ex. P10 was not marked either through P.W 7 or P.W. 14. This has been marked through P.W. 15 Head Constable that too in

his re-examination. His evidence is that Ex. P10, prepared at the hospital, was received by him at the out post police station at Trichy hospital. So the evidence of P.W. 14 and P.W. 15 would make it clear that Ex. P10 was prepared at the hospital after the admission of the victim and was sent to the police. So obviously Ex. P10, sent by the hospital authorities, must have been prepared by P.W. 7 only on the basis of the first dying declaration as referred to in Ex. P1. Their perusal of Ex. P1 and Ex. P10 also would show that P.W. 7 Dr. Mumtaz has signed in these documents. But the funny part is that Ex. P10 which has been prepared on the basis of Ex. P1, mentions that the husband alone set fire to her after pouring kerosene. The relevant column in Ex. P10 is 4 and 5. The answer for those columns is mentioned as follows :-

In this document, which has been simultaneously prepared along with Ex. P1, only the husband is implicated and no others. So a doubt arises, whether this would have been prepared on the basis of Ex. P1 or some other dying declaration recorded by the Doctor from the deceased victim implicating her husband alone. If it is so, the another dying declaration on the basis of which Ex. P10 has been prepared, has not been placed before the Court. So apart from the inconsistencies between Ex. P1 and Ex. P10, we also feel that Ex. P10 was not prepared on the basis of Ex. P1 but on that day some other statements must have been prepared which have not been brought to light. So we think, this is a very serious infirmity.

26. The next dying declaration is Ex. P5. This Court as well as the Apex Court would observe as referred earlier that the dying declaration recorded by the Magistrate, attested by the Doctor certifying the conscious of the deceased, would have more significance. On perusal of Ex. P5 and on reading of the evidence of P.W. 10 the Magistrate and P.W. 8, Doctor, we could see that the Magistrate had correctly recorded the dying declaration from the deceased after observing the required formalities P.W. 10 enquired P.W. 8 Doctor as to her capacity to give dying declaration and after such a verification, the Magistrate put various questions to the deceased in order to know whether she was conscious and whether she was able to understand the question correctly. He recorded all these questions and answers in document Ex. P5. It is also to be noted that the entire statement was recorded by P.W. 10 in the presence of P.W. 8 Doctor who has

also attested the said document by giving the certificate Ex. P2. P.W. 3 - Doctor has mentioned in the certificate that patient was conscious and fit enough to give the statement and patient was conscious throughout while giving dying declaration and it was taken in his presence. So, we do not see any infirmity in the dying declaration, Ex. P5, recorded by P.W. 10. However, we are not able to place any reliance on this dying declaration Ex. P5 for the following reasons :

Ex. P1 was recorded at 2.10 p.m., before sedation was given by P.W. 7 Doctor. In her statement, made to the Doctor, the deceased had implicated 5 persons who set fire to her body. As per the evidence of P.W. 7 she was admitted in the special ward after administering sedation. In her evidence, P.W. 7 would make it clear that she was in orientation. But however P.W. 8 another Doctor would say that she was able to talk and she gave the dying declaration to the Magistrate, when she was fully conscious. The Ex. P5 would show that dying declaration given by deceased at about 3.15 p.m., was so brief and cryptic. It is only five lines. The statement is as follows :- Though the statement given by the deceased when she was in sedation, looks, so natural, this is not consistent with the earlier dying declaration - Ex. P1. According to the Ex. P1, five persons set her ablaze while in Ex. P5, recorded after one hour, she would say that only one person, namely, her husband, alone set fire on her body while the other two persons namely her father-in-law and mother-in-law were simply present in the house, Even though this statement was duly recorded by the Magistrate, we are not able to accept the Ex. P 5, due to the vital contradictions between this document and Ex. P1 as referred to above. So we have no hesitation to reject this document also.

27. The next dying declaration is Ex. P8 P.W. 15 the head constable attached to the jurisdiction police came to the hospital at 3.05 p.m., on receipt of Ex. P10 intimation from the hospital. When he came there P.W. 10 Magistrate was recording the dying declaration. So he waited till the recording was over and thereafter he went inside and obtained her oral statement and got her right thumb impression in Ex. P8. At 3.30 p.m., when P.W. 10 the Magistrate recorded the dying declaration Ex. P5 from the deceased, since the deceased was in a sedation, she was able to give her statement only in five lines as referred above. But when P.W. 15 recorded her statement, the complaint Ex. P8, at 3.45 p.m. she

had given nitty-grity details which run about two pages. It has to be considered whether she would have given those details at 3.50 p.m. while she was in sedation. Moreover, this statement Ex. P8 was not attested by the Doctor who was available there. Since P.W. 15 admitted that he was waiting till the Magistrate recorded her dying declaration, he knew that she was in a serious condition. So, when he obtained the statement in the presence of the Doctor, the same should have been attested by him. This was not done. But strangely the P.W. 15 head Constable was able to get explanation in Ex. P8 from the deceased to the effect that she wrongly mentioned to the Doctor as five persons, as referred to in Ex. P1. It is relevant to note that this is the third dying declaration. Suppose if any mistake is committed in the first dying declaration, the deceased must have mentioned about that mistake in the second dying declaration Ex. P5 itself. But there is no such explanation in Ex. P5 recorded by P.W. 10-Magistrate. Curiously P.W. 15 alone gets her explanation, while recording Ex. P8. At this stage, we cannot forget the fact that the victim was brought to the hospital by her father P.W. 4. Suggestion was put to P.W. 15, that Ex. P8 was given only at the instigation of P.W. 4, which was, of course denied. The relevant deposition is as follows :-

At this juncture, it is to be pointed out that the complaint was preferred at about 4.30 p.m., on 21-9-1995, which was registered for the offences under Sections 307 and 498-A, I.P.C., but the same has reached the Court, as admitted by P.W. 15, only on the next day, i.e. on 22-9-1995 at about 3.00 p.m. The delay of about 24 hours has not been explained by the prosecution. Further more, a reading of Ex. P8 would reveal that the deceased had given the entire story of the prosecution. As per Ex. P8, P.Ws. 1 to 3 knew about the ill-treatment meted out to her by the appellants. She also stated in Ex. P8, that she reported about this to P.W. 6, her brother, at whose instance P.Ws. 4 and 5, the parents of the deceased came and stayed in the house of P.W. 12. But, this part of the statement has not been supported by P.Ws. 1 to 6 and P.W. 12. Thus, we are able to see so many infirmities in Ex. P8. Moreover, there is no corroboration for Ex. P8-statement. That apart, as per Ex. P8, only at the instigation of 2nd and 3rd appellants, the parents of the 1st appellant, he poured kerosene on her and set ablaze. But this is not the case as projected in Ex. P1 and Ex. P5. So this Ex. P 8 also deserves total rejection.

28. The last dying declaration Ex. P12 is recorded by the Inspector of Police, at 7.00 p.m., on 21-9-1995. It was also not attested by the Doctor. A reading of Ex. P12 and Ex. P8 would make it clear, that the wordings contained in both the documents are verbatim same. Though Ex. P 12 was prepared at 7.00 p.m., on 21-9-1995, it reached the Court only on 27-9-1995 at about 7.00 p.m., i.e. after six days, and after the death of the deceased, along with inquest report. Whereas the case was altered into Section 302, I.P.C., immediately after the death of the deceased on 26-9-1995 itself.

29. Yet another infirmity in Ex. P12 is that the deceased gave the statement to P.W. 16, that on instigation of 2nd and 3rd appellants, the 1st appellant poured kerosene over her body and set fire to her and that all the appellants went out bolting from outside and putting up a lock over it. While the deceased was in flames inside the house, how could she know that all the appellants put up the lock after bolting the door from outside So, this is quite artificial. Further more, there is no corroboration for this aspect, because admittedly the lock allegedly put on the bolt outside was not recovered. As per the evidence of P.W. 11, on hearing the screms of the deceased from inside the house, he tried to open the door by pushing the same, but he was not able to open the same and so he scaled over the proof and got into the house, after removing the tiles. He would also state that after putting out the fire, he found that the door was bolted from inside, and so, he unbolted the door and came out along with the deceased. This would make it clear that the various materials given in Ex. P12 as well as in Ex. P8 are not supported by any corroboration. It is also mentioned in Ex. P6 - observation mahazar, that the tiles of the roof were found broken. In this fact situation, we are not able to pursuade ourselves to hold that the suicide theory has been completely ruled out. In these circumstances, we are not able to conclude that these dying declarations are voluntary or true disclosures of the deceased. Therefore, it is not safe to convict the appellants on the basis of these dying declarations alone, which are full of infirmities.

30. But there is one circumstance, which is against the appellants. P.W. 4, the father of the deceased would say that all the appellants were found standing in front of the house of the deceased, when the deceased was taken to the hospital.

However, learned counsel for the appellants would submit, that though P.W. 4, the father of the deceased would say in Court, that appellants 1 to 3 were found available in front of the house at the time of incident, while this aspect was put to them, when they were questioned under Section 313, Cr.P.C., this part of the evidence cannot be acted upon.

31. Learned counsel for the appellants, read out the following portions from the decision of the Apex Court in Sharad Birdhichand Sarda v. State of Maharashtra, : 1984 CriLJ1738 :

'It has been consistently held by this Court as far back as 1953 in the case of Hate Singh Bhagat Singh v. State of Madhya Bharat, : AIR 1953 SC468 that any circumstances in respect of which an accused was not examined under Section 342 of the Criminal Procedure Code cannot be used against him. Eversince this decision, there is a catena of authorities of this Court uniformly taking the view that unless the circumstance appearing against an accused to put to him in his examination under Section 342 or Section 313 of the Code of Criminal Procedure, the same cannot be used against him. 'In Shamu Balu Chaugule v. State of Maharashtra, : 1976 CriLJ492 . This Court held thus :

'The fact that the appellant was said to be absconding not having been put to him under Section 342, Criminal Procedure Code could not be used against him'.

He also cited another decision in Datar Singh v. The State of Punjab, : 1974 CriLJ908 :

'Mere suspicion or suspicious circumstances cannot relieve the prosecution of its primary duty of proving its case against an accused person beyond reasonable doubt. Courts of justice cannot be swayed by sentiment or prejudice against a person accused of the very reprehensible crime of patricide. They cannot even act on some conviction that an accused person has committed a crime unless his offence is proved by satisfactory evidence of it on record. If the pieces of evidence on which the prosecution chooses to rest its case are so brittle that they crumble when subjected to close and critical examination so that the whole superstructure built on such insecure foundations collapses, proof of some incriminating

circumstances, which might have given support to merely defective evidence cannot avert a failure of the prosecution case .....

We also do not think that the prosecution can benefit from the mere suspicious circumstance that the appellant did not surrender or was not traceable for nearly a year. Reliance was placed by learned counsel for the Appellants in the case of Prakash Mahadeo Godse v. State of Maharashtra, : (1969)3SCC741 , to contend that the conduct of the accused such as hiding after the occurrence by itself, does not conclude the matter. On the basis of this decision, learned counsel vehemently contended that this aspect of the evidence relating to the conduct of the appellant cannot be acted upon to base conviction.

32. In view of the foregoing discussion, we find that there is no material available on record to come to the conclusion that the appellants have participated in the occurrence and perpetrated the crime. Therefore, we are not able to agree with the reasonings given, and conclusions arrived at by the trial Court, to record the conviction upon the appellants.

33. Before parting with this appeal and Referred Trial, we may painfully point out some of the observations made by the Sessions Judge, in the concluding paragraph, in order to impose the death sentence, which are quite uncalled for and unwarranted. The said observations are as follows :-

34. The Apex Court has very often held that while imposing the capital sentence for the offence under Section 302, I.P.C., the Court is expected to consider both aggravating and mitigating circumstances. But, in this case, the Sessions Judge has focussed his attention to extraneous materials, not available on record, in order to award the maximum punishment, viz. death sentence. It only reflects the anxiety of the Sessions Judge to exhibit this vocabulary in Tamil, and nothing more. The learned Sessions Judge is expected to render his judgment only on the basis of the available evidence, in coherence with the judicial principles. It is ununderstandable, on what basis, the Sessions Judge has made these observations, which are not quite germane to the point at issue. Except expressing our deep displeasure over the way in which the said observations have been made in the judgment, we refrain ourselves from going further on account of

judicial restraint.

35. In the result, the criminal appeal is allowed, the conviction and sentence imposed on the appellants herein are set aside, and the appellants are acquitted of the charges framed against them, and they are directed to be set at liberty forthwith. The reference is answered accordingly.

36. Appeal allowed.