

**Azhagesan Vs. the State**

**Azhagesan Vs. the State**

**SooperKanoon Citation :** [sooperkanoon.com/833289](http://sooperkanoon.com/833289)

**Court :** Chennai

**Decided On :** Jun-17-2003

**Reported in :** 2005CriLJ294

**Judge :** M. Karpagavinayagam and ;S. Ashok Kumar, JJ.

**Acts :** [Indian Penal Code \(IPC\), 1860](#) - Sections 300 and 498A; [Evidence Act, 1872](#) - Sections 32

**Appeal No. :** Cri. Appeal No. 1076 of 2000

**Appellant :** Azhagesan

**Respondent :** The State

**Advocate for Def. :** E. Raja, Addl. Public Prosecutor

**Advocate for Pet/Ap. :** A.K. Kumaraswamy, Adv.

**Disposition :** Appeal dismissed

**Judgement :**

**S. Ashok Kumar, J.**

1.The appellant, who was the sole accused in S.C. No. 53 of 2000 on the file of the Tribunal Sessions Judge, Tiruvannamalai, was tried for the offences under Sections 498(A) and 302, I.P.C., but was convicted only under Section 302, I.P.C.

and sentenced to undergo R.I. for life and imposing a fine of Rs. 1000/in default to undergo R.I. for one month. Challenging the above conviction and sentence, the appellant has filed this appeal.

2. The facts in brief are as follows :

'(a) The accused is the husband of the deceased Uma Maheshwari. P.W. 1 is the father of the deceased. P.W.2 is the wife of the younger brother of P.W. 1, who hailed from Kamampattu village. The deceased and the accused got married on 3-10-1996 and they were living in the house of P.W. 1 for some time. The accused wanted to live separately, for which, P.W. 1 was not willing and objected to it, over which, dispute arose between the husband and wife, which resulted in filing a complaint at All Women Police Station, Tiruvannamalai.

(b) P.W. 10, Sub-Inspector of Police, All Women Police Station, Tiruvannamalai, who received the complaint from the deceased, registered the same in Petition Register No. 106 of 1997, Ex.P.6, and after enquiry, on an assurance by the accused that he will neither scold nor beat the deceased, she sent them after advising them with warning. Thereafter the deceased and the accused were living together at the residence of the accused.

(c) The motive of the occurrence is said to be that the accused urged his wife very often for getting money to meet his expenses and also wanted to sell the land of 50 cents gifted by the father of the deceased and bring the money of Rs. 60,000/- after selling the property. It is alleged that the father of the deceased P.W.1 has gifted the land to the deceased with a condition, that after the life of the deceased, the children of the deceased will have the absolute right over such property. Since the deceased had no issues, the accused wanted the deceased to sell the property and bring the money.

(d) On 3-10-1999 the accused wanted to pledge the vessels for which the deceased was not willing. When the deceased has returned from her work the accused wanted some money to purchase egg. When such demand was denied, the accused has set fire on the deceased after pouring the kerosene at 7.30 p.m. on the same day.

(e) Immediately the deceased was taken to the Government Hospital, Tiruvannamalai, by the sisters of the accused and she was admitted in the Government Hospital at 8.45 p.m. by D.W. 1 to whom, at the time of admission the deceased has stated that she sustained injuries at 8.00 p.m. in her residence due to stove burst and an intimation was sent to the Vettavalam Police Station.

(f) P.W. 12, Inspector of Police, Vettavalam Police Station received the intimation at 11.45 a.m. on 4-10-99 and immediately went to the Government Hospital, Tiruvannamalai and recorded the statement of the deceased, Ex.P.9, and registered a case in Cr. No. 254 of 1999 under Sections 498(A) and 307, I.P.C. and prepared F.I.R., Ex.P.10. He took up the investigation and reached the scene of occurrence at 3 p.m. and in the presence of P.W. 5 and one Rajendran he prepared Ex.P. 1, Observation Mahazar and rough sketch Ex. P. 11. He went to the Government Hospital, Tiruvannamalai and examined the deceased and the witnesses P.W. 1, P.W. 2 and one Ramalingam, and Elavarasi and recorded their statements. On the same day at 7.30 p.m., he arrested the accused and a confession given by the accused was recorded in the presence of P.W. 6 and one Maria Joseph. On that basis, he has recovered M.O.I to 3 under Mahazar Ex.P.3. When the accused was arrested, he found some injuries on his right hand and therefore, he sent him to the Government Hospital for treatment.

(g) In the meanwhile, on receiving the intimation from the hospital, the Judicial Magistrate No. II, Tiruvannamalai, went to the Government Hospital, at 5.55 p.m. and after ascertaining through the Doctor P.W. 8 whether deceased was in a fit state of mind to give a statement, he recorded the declaration, Ex.P.5 given by the deceased. Ex.P.5 was attested by P.W.8 Dr. Usha Kalyani.

(h) In spite of the treatment the deceased died on 7-10-1999 at 6.30 a.m. and on receipt of information P.W. 12 altered the F.I.R. under Section 302, I.P.C. and sent an express report, Ex.P. 12 to the Judicial Magistrate and higher officials. Continuing his investigation at 11.40 a.m. he went to the Government Hospital and in the presence of panchayatdars conducted an inquest on the dead body of Uma Maheswari and prepared Ex.P. 13, inquest report. At 2.00 p.m. on the same day he entrusted the body to a constable, P.W.9 with Ex.P.7 requisition for conducting

autopsy.

(i) P.W. 11, Dr. Somasundaram, Assistant Surgeon of Tiruvannamalai Government Hospital, received Ex.P7 requisition given by P.W. 12 to conduct autopsy on the dead body of the deceased and on the same day at 3.00 p.m. he conducted autopsy and found the following injuries.

'Burns all over the body front side and part of the back (L) Burns over the face, both upper and lower limbs partially healed burn wounds all over the body.

Hyoid bone intact. All ribs intact, both lungs congested and Right lung 750 gms and Left lung weight 1000 gms; Heart intact; Chambers empty, skull intact, Brain intact. Abdomen Stomach empty. Liver spleen intact. Both kidney intact congested. Intestine intact. Uterus intact; uterus intact empty, Extremities intact.

P.W. 11, has also given an opinion that the cause of death is due to burns and its complications.

(j) Continuing the investigation on 8-10-1999, P.W.12 examined P.W.10 and P.W.8 and recorded their statements. On 9-11-1999, he examined P.W. 11 and recorded his statement. After the completion of the investigation, on 9-11-1999, filed a chargesheet against the accused under Sections 498(A) and 302, I.P.C.

3. Before the trial Court, P.W. 1 to 12 were examined and Ex.P.I to 13 and M.O.I to 3 marked on behalf of the prosecution. On behalf of the accused D.W. 1 was examined and Ex.D. 1 was marked.

4. The accused was questioned with regard to the incriminating circumstances against him available in the evidence of the prosecution witnesses and the accused denied the same and also stated that the deceased sustained injuries due to stove burst, himself and his sisters took the deceased to the hospital. The learned sessions Judge, acquitted the accused from the charge under Section 498(A), I.P.C. but convicted the accused and sentenced him imprisonment for life for the offence under Section 302, I.P.C. Hence, the present appeal.

5. The learned counsel for the appellant took us through the entire evidence and contended that there are three dying declarations, Ex.DI one before the doctor at the time of admission into the hospital on 3-10-1999 at 8.45 p.m. another declaration before the Inspector of Police, P.W. 12 at about 1.00 p.m. on 4-10-1999 and the third one before the Judicial Magistrate at 5.50 p.m. on the same day and there are contradictions in all the three statement and a dying declaration which was made at the time of admission in the hospital, being the earliest statement should be believed. In Ex.D.I, statement before the doctor D.W.I, the deceased has stated that she sustained burn injuries due to accidental fire caused by stove burst, whereas in Ex.P.9 and Ex.P.5 she has stated that she sustained injuries at the hands of her husband, who set fire on her after pouring kerosene.

6. In reply to the above submissions, the learned Additional Public Prosecutor would contend that there is no contradiction between Ex.P.5 and Ex.9 and since the circumstantial evidence supports those documents which are marked as exhibits that should be relied upon and not the Ex.DI which was given at the time when she was under the influence of her husband and her in-laws and therefore, the judgment of the trial Court may be confirmed.

7. We have carefully considered the submission made by either side and also gone through the entire records.

8. As far as the earlier statement of the deceased in Ex.D.I, copy of the accident register recorded at 8.45 p.m. the same day, she has stated that she sustained injuries due to above burst and thereafter she was brought to the hospital, by her husband, which was recorded by D.W.I, Civil Assistant Surgeon, at the time of admission of the deceased into the hospital. As seen from the Ex.D. 1, a Copy of the Ex.D. 1 has been actually received by P.W. 12, but it was denied by P.W. 12 and he pleaded ignorance and stated that he did not receive the copy of the Ex.D.1. According to Ex.D.1 the deceased has sustained injuries only due to stove burst in her house. Since Ex.D.1 is against the prosecution case that the accused caused the burn injuries by setting fire on the deceased after putting kerosene, P.W. 12 has wantonly suppressed Ex.D.1, copy of the accident register, and D.W. 1 was not examined as a prosecution witness though he was cited as one of the

prosecution witnesses in the charge-sheet.

9. The validity and contents of Ex.D.1 can be discussed at a later stage and let us consider Ex.P.9 and Ex.P.5 now. On 4-10-1999, P.W. 12 went to the hospital and recorded Ex.P.9, the statement of the deceased at 1.00 p.m. She has given a lengthy complaint, wherein she has referred to the earlier quarrels between her and her husband and stated the reasons why her husband set fire on her after pouring kerosene. On the same day at 5.55 p.m. when P.W.7, Judicial Magistrate recorded, Ex.P.5 dying declaration of the deceased, she has given a short statement wherein also she has mentioned about the quarrel that ensued before the occurrence and also about the fact that her husband set fire on her after pouring kerosene. In both the statements she has also stated that immediately after setting fire, her husband ran out. The only difference between Ex.P.5 and Ex.P.9 is that in Ex.P.5 the statement of the deceased is brief whereas in Ex.P.9 the deceased has given a detailed statement, but the material and vital particulars as to the date and time of the occurrence and the reason for the occurrence and who caused the injuries by setting fire are found in both the statements. As such we do not find any material contradictions in both the statements, namely, Ex.P.5 and Ex.P.9. The particulars given in Ex.P.5 and Ex.P.9 have been corroborated by the evidence of P.W.1, P.W.2, P.W.4 and P.W. 10. P.Ws. 1 and 2 have spoken about the quarrel between the accused and the deceased and also the Thali of the deceased being cut by the accused. P.W.4, an independent witness has also spoken about the quarrel between the accused and the deceased and the demand of the deceased to sell 50 cents of land gifted by the father of the deceased. P.W. 10, Sub-Inspector of Police of All Women Police Station has stated about the complaint made by the deceased, her calling the accused and deceased and advising both of them and the accused taking the deceased to his house for living separately.

10. As regards the facts of the case that there were frequent quarrels between the deceased and the accused, who used to beat the deceased on and off and also demanded money from her by selling the 50 cents of the land gifted by her father, which has been spoken by P.W.1, father of the deceased. P.W.2 is wife of brother of P.W.1 and P.W.4, who owns a land nearby P.W. 1, spoke about the panchayat

to resolve the dispute between the deceased and the accused and also P.W. 10, Inspector of All Women Police Station, Tiruvannamalai, who advised the deceased and the accused to have a separate living, which is evident from Ex. P. 6. Therefore, as to on and off quarrel between the deceased and the accused and the advise and warning of P.W. 10 to the deceased and the accused, who was nagging the deceased to bring money by selling the land gifted by her father are all confirmed by the evidence of the above prosecution witnesses. The injuries sustained by the deceased has also been confirmed by the doctor, P.W. 11 who conducted autopsy on the body of the deceased and he has given an opinion in Ex. P. 8 that the deceased died only due to the burn injuries and the injuries also could have been caused in the manner as alleged by the prosecution. There is also no dispute on behalf of the accused that the deceased died due to the burn injuries. Apart from these materials there is also oral dying declaration made by the deceased before P.W. 1 and P.W.2.

11. Now let us consider the contention of the learned counsel that Ex.D. 1 statement of the deceased before the doctor, D.W. 1 which was the earliest statement and therefore reliance should be placed only on Ex.D. 1 and Ex.P.5 and Ex.P.9 should not be relied upon which are subsequent statements made after the arrival of the father of the deceased. He also cited a decision in : AIR 1994 SC1641 .

12. The learned counsel for the accused cited a decision of the Supreme Court in State of Gujarat v. Khumansingh Karsan Singh, : AIR 1994 SC1641 wherein it has been held that the conviction cannot, be based on inconsistent dying declarations. In the said case, in the first dying declaration before the Head Constable, the injured would implicate her mother-in-law only, whereas in the second and third dying declarations before her father and the executive Magistrate respectively, she has implicated both her mother-in-law and her husband and therefore, there is inconsistency in the dying declarations, which cannot be a base for conviction. But in the case on hand, there is no inconsistency in the dying declarations. In the first dying declaration, the deceased has not mentioned anybody for causing burn injuries because as we discussed supra she was under the influence of her husband and her in-laws, on the other hand, she has implicated, in Exs.P.5 and

P.9, her husband, who caused burn injuries by setting fire on her after pouring kerosene and therefore, the facts of the said judgment are not applicable to the case on hand.

13. In Re : Basith , after taking into consideration of the principles laid down in catena of decisions of the Supreme Court and other High Courts, the Division Bench of this Court has held that conviction of accused solely on the basis of contradictory dying declarations suffering infirmities and not supported by any corroboration is not proper. The principle laid down in the above case is not applicable to the case on hand since the facts of the case on hand are different.

14. In Ex.D.1, it is stated that the deceased told the D.W.I that she sustained injuries due to stove burst and the injuries was brought to the hospital by her husband. The theory that the deceased sustained injuries due to stove burst, cannot be accepted for the simple reason that in Ex. P. 1, Observation Mahazar and also in Ex. P. 11 rough sketch, the presence of any burst stove does not find a place. In case of stove burst normally there will be symptom of spilling of kerosene all over the room, in which accident took place, and there could be smoke and soot particles inside the room. There was no stove in the house of the accused whereas an oven was found inside the house which is a normal practice in the villages.

15. Further when P.W. 11 Doctor was cross-examined no such suggestion that the injuries sustained by the deceased are possible due to stove burst was made to him. Even D.W. 1 examined on behalf of the accused would not say that these injuries could have been caused due to stove burst. D.W. 1 has seen burn injuries spread all over the body except head and back of trunk of the deceased. Normally, in case of suicide injuries could be seen on the head and therefore, the absence of burn injuries on the head only negative the suicidal attempt and it is not the case of the accused that the deceased committed suicide.

16. Another reason for not relying upon Ex.D. 1 is that at the time of admission in the hospital the injured was taken by her husband and also her in-laws, the sisters of the accused. No relatives of the deceased were present at the time of admission in the hospital. Therefore, at the time of admission, the deceased was

not a free person and she was under the influence of her husband and her in-laws and naturally she has to expect the help of her husband and in-laws for better treatment in the hospital. In this context it is useful to cite a judgment of the Hon'ble Supreme Court in Harjit Kaur v. State of Punjab, : 1999 CriLJ4055 of the said judgment reads as follows :

'It was then contended by the learned counsel that this Dying Declaration should not be accepted as true because in her first Dying Declaration made to the Police Officer on 30-4-1992, Parinder Kaur had stated that she had received burns as a result of an accident and that no one else was responsible for the same. Both the Courts below after considering this inconsistency have thought it fit to rely upon the second Dying Declaration. It has been rightly held as an attempt on her part to save her husband and the in-laws. The circumstance clearly indicate that she was not a free person then. The reasons given by the trial Court and the High Court for not considering the first Dying Declaration as voluntary and true are quite convincing and we see no reason to differ from them. Therefore, the second Dying Declaration cannot be regarded as untrue merely because it is contrary to her statement made earlier. What she has stated in the second Dying Declaration; appears to be more probable and natural. If she had really received injuries at 2.00 a.m., because of bursting of stove then her in-laws would have taken her to the hospital immediately and would not have waited till 7.30 a.m. They would have informed the parents of Parminder Kaur as early as possible. They were not informed for two days in which hospital their daughter was admitted. All the circumstances indicate that the first Dying Declaration made before the Police Officer was not a correct one. As we find that the appellants have been rightly convicted, both these appeals are dismissed.' The facts of the above case are almost similar to the facts of the case on hand.

17. Accepting the above principle laid down by the Apex Court, we cannot rely upon Ex.D. 1 and would prefer to accept the Exs. P.5 and P.9 which have been corroborated by other materials as discussed supra.

18. Before parting with this case, we are constrained to observe on the defective investigation conducted by P.W. 12. A perusal of Ex.D. 1 marked through the

D.W. 1 clearly show that P.W. 12 Inspector of Police, received Ex.D. 1 copy of the accident register, with regard to the admission of the deceased but P.W. 12 would dare to say that he had not received any such accident register from D.W. 1, Doctor. It is nothing but a naked false statement made before the Court.

19. On going through the records, it is noticed that the D.W.I, who admitted the deceased in the hospital and issued Ex.D. 1, was cited as one of the prosecution witnesses. Though the D.W. 1 was cited as one of the prosecution witness, there is no reason on the part of the prosecution, why D.W. 1, on whose evidence the fate of the case is hanging, was not examined as prosecution witness. A perusal of Ex.D. 1 clearly show that a different story has been projected by the deceased to the doctor D.W.I. Having examined D.W.I doctor by P.W. 12, during the course of investigation, there is no reason as to why he was not examined as prosecution witness, probably, for the reason to suppress the earlier statement of the deceased to the doctor, which would give a fresh lease of life to the accused. The act of suppression of important prosecution witness has been done by P.W. 12 so as to get fruits for his misdeed. The duty of the Investigating Officer is only to collect the materials and place the same before the Court for the proper consideration of the Court. The investigating officer, in this case, has chosen to suppress the witness of the doctor, D.W.I, who admitted the deceased and registered Ex.D. 1. It is the duty of the Public Prosecutor of the trial Court to examine the witness who were cited as witness so that the prosecution can establish its case. Admittedly, this has not been done. In our view, both the Public Prosecutor of the trial Court as well as the investigating officer P.W. 12 have miserably failed to perform their respective duties. So this conduct of P.W. 12, who has given a false statement before the Court with reference to the receipt of Ex.D. 1, and the failure on the part of the Public Prosecutor to examine D.W. 1 as prosecution witness, though he was cited as one of the prosecution witnesses in the charge-sheet, in our view, is highly deplorable and reprehensible. Therefore, a copy of the judgment shall be marketed to the Director General of Police to take departmental action against the said persons.

20. In fine, we do not find any reasons to interfere with the judgment of the trial Court hence, the appeal deserves to be dismissed. Accordingly, the same is

dismissed confirming the judgment of the trial Court.

**SooperKanoon - India's Premier Online Legal Search - [sooperkanoon.com](http://sooperkanoon.com)**