IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

&

THE HONOURABLE MR.JUSTICE ZIYAD RAHMAN A.A.

WEDNESDAY, THE 1ST DAY OF SEPTEMBER 2021 / 10TH BHADRA, 1943

CRL.A NO. 480 OF 2017

[CRIME NO.1153/2014 OF Neyyattinkara Police Station, Thiruvananthapuram]

[AGAINST THE JUDGMENT DATED 6.5.2017 IN S.C. NO. 550/2016 ON THE FILE OF THE ADDITIONAL SESSIONS COURT, NEYYATTINKARA, THIRUVANANTHAPURAM]

APPELLANT/ACCUSED:

THANKAPPAN ACHARY
AGED 63 YEARS
S/O. KUMARASWAMY ACHARY, THUNDUVILAKATHU PUTHEN VEEDU,BACKSIDE OF ROLLAND HOSPITAL, PATHAMKALLU, THALAYAL DESOM,ATHIYANNOOR VILLAGE

BY ADVS.
SRI.A.RAJASIMHAN
SRI.K.NIRMALAN

RESPONDENT/STATE:

STATE OF KERALA
REPRESENTED BY THE CIRCLE INSPECTOR OF POLICE NEYYATTINKARA THROUGH THE PUBLIC PROSECUTOR,HIGH COURT OF KERALA

BY ADV.
SMT.S.AMBIKA DEVI, SPL.GP FOR ATROCITIES AGAINST WOMEN & CHILDREN.

THIS CRIMINAL APPEAL HAVING COME UP FOR HEARING ON 10.08.2021, THE COURT ON 01.09.2021 DELIVERED THE FOLLOWING:

J U D G M E N T

Ziyad Rahman A.A., J.

"*Nemo moriturus praesumitur mentire",* ; *"A man will not meet his maker with a lie in his mouth"*; the principle behind the admissibility of the dying declaration is the core issue in this appeal. The reason which lends credibility to the dying declaration is that, *'a sense of impending death produces in a man's mind the same feeling as that of a conscientious and virtuous man under oath'* ***(2001 (5) SCC 259 ; Uka Ram Vs State of Rajasthan)*** and in this case we are called upon to decide the applicability of the above principle; which all the same has to be applied depending upon the overall circumstances.

2. The appellant is the sole accused in S.C. No.550 of 2016 on the file of the Court of Additional Sessions Judge, Neyyattinkara. The appeal is filed being aggrieved by the conviction and sentence imposed upon him by the Sessions Court for the offences punishable under Section 302 IPC. The sentence imposed upon him is imprisonment for life and a fine of Rs.50,000/- with a default sentence of rigorous imprisonment for one year.

3. The prosecution case is as follows: The appellant/accused is the elder brother of the husband of the deceased. He is residing at a portion of the residential building in which his brother also resides with family consisting of his wife and two children. The property as well as the house situated therein

were in the name of the mother of the brothers. The relationship between the appellant and the deceased was not at all cordial and there used to be frequent squabbles between them. Because of such quarrels, the appellant used to cook his food separately. Even though both the parties were residing in two portions of the very same house, there was only one electricity connection and the charges were being shared by both. In the bill issued by the Kerala State Electricity Board (KSEB) for the month of June 2014, there was steep increase in the electricity charges, which prompted the deceased to submit a complaint before KSEB. Pursuant to the complaint, the officers of KSEB came to the premises and tested the meter. But they could not find any defect in the meter and according to them the increase in the bill was due to high consumption. The deceased maintained that the increase in consumption was due to the higher consumption of electricity by the appellant and she questioned the appellant about the same, which resulted in a verbal altercation between the parties, on 15.06.2014. The appellant countered her allegations by stating that it was due to the consumption of electricity by the deceased and her family. He also accused the deceased of selling LPG cylinder to other persons. On the very same day evening, when the son of the deceased came to the house from his office, the deceased told him about the above incident. Immediately, her son went to the appellant and questioned him about this incident and it resulted in a scuffle between the parties during which, the son of the deceased (PW1) also inflicted two blows upon the appellant. On the next morning i.e. on 16.07.2014, the husband of the deceased returned from

duty as a Security staff in a private establishment and the deceased served break fast to him. Even at that time there were some verbal exchanges between the appellant and the deceased. While the husband of the deceased was sitting inside the house, he heard the cry of the deceased from the veranda of the house. He ran out and found the deceased engulfed in flames, on the steps of the house, at around 9.45 A.M. Immediately he covered her with a sack to douse the fire. The appellant was also present at the scene of occurrence at the relevant time. Even though she was immediately taken to the Taluk General Hospital initially and later to the Medical College Hospital, Thiruvananthapuram, she succumbed to the injuries at 5.45 AM on 17.07.2014. According to the prosecution, it was the appellant who committed the homicide of the deceased by setting her ablaze after pouring kerosene over her body. The motive projected is the animosity of the appellant against the deceased which emanated from their domestic rivalry; intensified by the events that occurred on 15.07.2014.

4. In support of the prosecution case, PW1 to PW25 were examined, Exts.P1 to P32 and Ext.D1 were marked and Material Objects MO1 to MO6 were identified. After trial, the incriminating evidence were put to the appellant while his statements were recorded under section 313 of the Cr.P.C, which were denied by him. According to him, he is innocent and he further stated that on the date of occurrence, at the relevant time he was in the kitchen of his house and when he went outside, he found the deceased in flames. Immediately he attempted to extinguish the fire by pouring water over

her. After evaluating the entire materials, the Sessions Court found the appellant guilty and sentenced him with the punishment as mentioned above. This appeal is filed challenging the above conviction and sentence.

5. Heard the learned counsel for the appellant Sri.K.Rajasimhan and Smt.S.Ambikadevi, Special Government Pleader (Atrocities against Women & Children).

6. The learned counsel for the appellant submits that the conviction and sentence imposed upon him is without any basis as the prosecution failed to establish his guilt. He points out that, the case of the prosecution is full of contradictions. The charge itself is defective, since it is not in the form as prescribed in Section 211 Cr.P.C; it does not mention the name of the offence charged against him, which is a mandatory requirement, contends the learned counsel. The appellant was found guilty by mainly relying upon the dying declarations, which were not reliable. Even though there were four dying declarations as evidenced by the depositions of PW1, PW2, PW13 and PW14, none of the same could be relied on as the said witnesses were either tutored or highly interested. He points out certain infirmities in the manner of recording of the dying declaration by the Judicial First Class Magistrate (PW13) as well. The deceased was not in a proper physical or mental state to give dying declaration. According to him, it was a clear case of suicide by self-immolation after pouring kerosene over her body, since at the relevant time the deceased was depressed for various reasons. Her daughter eloped with a person, whom she married without their consent and her son was a drunkard

who used to create problems frequently. The learned counsel for the appellant strongly relies on the evidence of PW6, who is none other than the husband of the deceased and the younger brother of the appellant, who was declared hostile by the prosecution as he exculpated the appellant by stating that, it was a case of suicide. Based on the above contentions, he seeks to set aside the conviction and sentence imposed by the Sessions Court.

7. The learned counsel for the appellant relies on the judgments reported in **Dandu Lakshmi Reddy v. State of A.P [(1999) 7 SCC 69], Jayabalan v. Union Territory of Pondicherry [(2010) 1 SCC 199], Uka Ram v. State of Rajasthan [(2001) 5 SCC 254], State of Gujarat v. Jayrajbhai Punjabhai Varu [2016 KHC 6463], Narendra Singh Bisth v. State of Kerala [2017 (3) KHC 204] and Ashokan v. State of Kerala [2016 (4) KHC 687].**

8. Per contra, the learned Special Government Pleader contends that the prosecution successfully established the guilt of the accused and the contentions raised by the appellant are only to be rejected. According to the learned Special Government Pleader, the dying declarations relied on by the prosecution are genuine and reliable as the same were made by the deceased when she was in a proper and fit state of mind. The dying declaration recorded by the learned Magistrate was after following the procedure contemplated in this regard i.e after the doctor (PW22) certified that, she was fit for giving such a statement and the same was recorded in the presence of the said doctor. She also relies upon the evidence of PW14, the doctor who examined the

deceased immediately after the incident and informed the matter to the police. The dying declarations made to PWs 1 and 2, who are the children of the deceased were consistent with the dying declarations given to PW13 and PW14. With regard to the contentions of the learned counsel for the appellant as to the defective charge, the learned Special Government Pleader points out that the said contention is not legally sustainable as the brief summary of the prosecution case, and the offence constituted by such acts, along with the provision of the offence charged with, are clearly described in the charge framed by the Sessions Court and merely because of the reason that the charge did not name the offence, it cannot be treated as vitiated. It is also pointed out that the appellant does not have a case that, he suffered any prejudice on account of non-mentioning of the name of the offence in the charge. She seeks dismissal of the appeal in the above circumstances.

9. Before going to the merits of the case, we shall first deal with the contention of the learned counsel for the appellant as to the error in framing the charge. The charge framed by the Sessions Court is extracted hereunder;

> *"Thankappan Achari, S/o Kumaraswami Achari, the accused in the above case, as under:*
>
> *that on the 16th day of July, 2014, at about 9.45 a.m., you, due to your previous enmity with deceased Thilaka, doused kerosene over the body of deceased Thilaka, the wife of your brother Subrahmonian, at the steps leading to the verandah of the house 'Thunduvilakathu Puthen Veedu' with number NMC III/210 in Athiyannoor Village, where you and the family of deceased Thilaka were residing, and lit a match box and set her ablaze with the intention of causing the death of that victim, causing serious burn injuries through*

> *out her body, resulting in her death at about 5.45 a.m. on 17.07.2014 at Medical College Hospital, Thiruvananthapuram, and thereby committed the offence punishable under Section 302 IPC within the cognizance of this Court and that I hereby direct that you be charged with the above said offence and tried before this Court."*

According to the learned counsel for the appellant, Section 211 (2) of Cr.PC contains a clear mandate that, if the law which creates the offence gives it any specific name to the offence, it may be described in the charge by the name only.

10. It is true that on going through the charge framed by the Sessions Court, the offence is not described as 'murder' as defined in Section 300. The question that emerges is as to whether such omission would vitiate the charge and the conviction based on the same. While considering this question Section 464(1) of Cr.PC is very much relevant which reads as follows:

> *"464.* ***Effect of omission to frame, or absence of, or error in, charge.-*** *(1) No finding sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby."*

From the reading of the above provision, it is evident that no finding or sentence shall be invalid merely because of any error or omission which does not result in failure of justice. In this case, going by the contents of the charge, it is evident that a specific description of the offence committed by the

appellant has been clearly mentioned. The offence is not mentioned as ‘murder’ but 'causing death with intention to do so, is the charge', which is the offence of murder as defined under Section 300 and punishable under Section 302 IPC. Section 302 IPC is also specifically mentioned in the charge. The contention of the learned counsel for the appellant that the charge is defective hence, cannot be accepted. Further, as per section 464 of Cr.P.C, unless the omission resulted in failure of justice, such defect would not have any impact on the conviction, since here there cannot be alleged any ambiguity in the charge or the accused not being made aware of the exact offence he is charged with. The charge is very specific and contains a precise description of the acts/offences for which he is being prosecuted. It is also a crucial matter to be noted in this regard that, the appellant does not have a case that, non mentioning of the name of the offence resulted in any miscarriage of justice or prejudice to him. It is discernible from the records that, he defended the prosecution case after understanding the allegations raised against him clearly and also as to the offences constituted by such acts. He seems to have taken all possible defenses and none of the contentions raised by him would indicate that those were taken without knowing the details of the offences or acts charged against him.

11. In **Darbara Singh v. State of Punjab [(2012) 10 SCC 476]**, the Hon’ble Supreme Court considered the question of impact of defective charge on the trial conducted. In paragraph Nos.14 and 15 of the said judgment, it was observed as follows:

"14. The defect in framing of the charges must be so serious that it cannot be covered under Sections 464/465Cr.P.C., which provide that, an order of sentence or conviction shall not be deemed to be invalid only on the ground that no charge was framed, or that there was some irregularity or omission or misjoinder of charges, unless the court comes to the conclusion that there was also, as a consequence, a failure of justice. In determining whether any error, omission or irregularity in framing the relevant charges, has led to a failure of justice, the court must have regard to whether an objection could have been raised at an earlier stage, during the proceedings or not. While judging the question of prejudice or guilt, the court must bear in mind that every accused has a right to a fair trial, where he is aware of what he is being tried for and where the facts sought to be established against him, are explained to him fairly and clearly, and further, where he is given a full and fair chance to defend himself against the said charge(s).

15. The 'failure of justice' is an extremely pliable or facile expression, which can be made to fit into any situation in any case. The court must endeavour to find the truth. There would be 'failure of justice'; not only by unjust conviction, but also by acquittal of the guilty, as a result of unjust failure to produce requisite evidence. Of course, the rights of the accused have to be kept in mind and also safeguarded, but they should not be over emphasised to the extent of forgetting that the victims also have rights. It has to be shown that the accused has suffered some disability or detriment in respect of the protections available to him under Indian Criminal Jurisprudence. 'Prejudice', is incapable of being interpreted in its generic sense and applied to criminal jurisprudence. The plea of prejudice has to be in relation to investigation or trial, and not with respect to matters falling outside their scope. Once the accused is able to show that there has been serious prejudice caused to him, with respect to either of these aspects, and that the same has defeated the rights available to him under jurisprudence, then

> *the accused can seek benefit under the orders of the Court. (Vide: Rafiq Ahmed @ Rafi v. State of U.P., AIR 2011 SC 3114; Rattiram & Ors. v. State of M.P. through Inspector of Police, AIR 2012 SC 1485; and Criminal Appeal No.46 of 2005 (Bhimanna v. State of Karnataka) decided on 4th September, 2012).”*

As mentioned above, from the nature of the contest made by the appellant before the Sessions Court and also before this court, we are unable to find any instance of failure of justice as far as the appellant is concerned, due to the non-mentioning of the name of the offence in the charge. The said objection is only to be disregarded, as it is only a hyper technical objection without any prejudice being discernible or even argued and hence we have no hesitation in rejecting the contentions of the appellant in this regard.

12. Having found the above contention against the appellant, we shall move on to the merits of the case. As mentioned above, this is a case where the appellant had poured kerosene over the body of the deceased and set her ablaze. Ext.P16 postmortem certificate proved by PW17 doctor, who conducted the post mortem, contains the following observations:

> *“Body was that of an adult female of height 160cm and weight 60Kg. Scalp hair burnt off except for a few on sides of head, which showed singeing. Eyebrows and eyelashes burnt off. Eyelids were swollen; eyes closed; conjunctive congested. Soot stains seen on front teeth. Eyes, ears, nostrils and lips were affected by burns. Hymen absent, vaginal orifice admitted two fingers loosely. Other external body orifices were normal; finger nails were bluish. An old hyperpigmented raised scar 6x0.5 to 1x0.2cm horizontal on front of lower abdomen across midline, just below public symphysis. White ointment seen applied over burned areas.*

Corneae hazy. Rigor mortis was fully established and retained all over the body. Postmortem staining could not be made out due to burns. No sign of decomposition (Body was kept in cold chamber).

INJURIES (ANTE-MORTEM):-

1. Demo epidermal burns affecting (i) head and neck (ii) back of trunk (iii) front of trunk, upto a level, 5cm above umbilicus (iv) left upper limb (v) right upper limb sparing an area 30x5 to 10cm on back of forearm and lower part of arm (vi) patchy area on front of lower abdomen (22x4cm) and (vii) patchy area on right side of hip (12x5cm).

2. Sutured surgical venous cut down wound 3.5cm long on inner aspect of left leg, just above ankle.

Air passages contained purulent mucus; glottis was oedematous. Lungs were congested and oedematous. Stomach contained 100ml of dark brown coloured fluid having no unusual smell; mucosa pale. Urinary bladder was empty. Uterus measured 8.5x5x3cm; cavity empty; endometrium congested. Fallopian tubes showed scarring and ovaries were atrophied. All other internal organs were congested; otherwise appeared normal."

The opinion as to the cause of death was stated as "death was due to burn effected approximately 60% on the body surface area"

13. From the contents of Ext.P16 postmortem certificate, it is evident that the death of the deceased was due to burn injuries. However, the contents of Ext P16 would not indicate as to whether it was a case of homicide or suicide. The specific case of the appellant is that it was a suicide but on the other hand, the case advanced by the prosecution is that it was a homicide at the hands of the appellant. So we should move on to the other materials to decide the said question.

14. The investigation in the matter was commenced on the basis of FIR in Crime No.1153 of 2014 by Neyyattinkara Police. The FIR was registered based on the intimation submitted by PW14 doctor before whom the victim was brought for treatment immediately after the incident. Ext.P14 is the "Police Intimation" given by PW14, which formed the basis of Ext.P19 FIR. In Ext.P14, the reason for injury was mentioned as 'alleged attempt of setting fire by the elder brother of the husband (at home on 16.07.2014 at 9.45 am)'. Information was received by the police at 11 am on 16.07.2014, based on which crime was registered, investigation conducted and upon completion thereof, charge sheet filed against the appellant for the offences mentioned above.

15. The most important material relied on by the prosecution is the dying declaration of the deceased. Such declaration in this case was made to four persons including PW1 and PW2 who are respectively, the son and daughter of the deceased. The other persons to whom the aforesaid declaration was made are PW14 doctor who attended the deceased immediately after the incident and PW13, the Judicial First Class Magistrate, Thiruvananthapuram who recorded the statement of the victim as ordered by the Chief Judicial Magistrate, Thiruvananthapuram, which order was passed on the basis of application submitted by PW24; the Circle Inspector of Police. The dying declaration recorded by PW13 was marked as Ext.P11, which was recorded by PW13 after the mental status of the victim was certified as fit by

PW22 who was the duty doctor, when the dying declaration was recorded. The aforesaid certificate was produced as Ext.P11(a).

16. The first dying declaration was made to PW14 and his evidence contains a vivid description of the sequence of events, resulting in such declaration. According to the prosecution, incident occurred on 16.07.2014 at about 9.45 am and immediately after the incident the victim was taken to General Hospital, Neyyattinkara, where PW14 was the doctor. At the time when the deceased was brought to the hospital and while complying with the formalities for commencing the treatment, PW14 asked the bystander, PW6, the husband of the deceased as to the cause of the incident. PW6 stated that it was a case of suicide by self-immolation after pouring kerosene by the deceased and accordingly PW14 recorded the cause of injury as an attempt of suicide by fire in the "Accident and Wound certificate" (Ext.P13). However, at this juncture, the deceased raised her hands and sought the attention of PW14 as if she wanted to say something. Immediately, PW14 enquired with the victim as to the cause of injury and she stated that the act of setting ablaze was committed by the brother of her husband. Immediately what was earlier recorded in Ext.P13 was struck off and the alleged cause was written down by PW14 as 'alleged firing by kerosene by husband's elder brother as stated by the patient' at home on 16.07.2014 at 9.45 AM.

17. The learned counsel for the appellant strongly contends that the aforesaid correction made by PW14 in Ext P13 wound certificate was an after thought and it was done at the instance of the police. However, on examining

the entire sequence of events and also the other materials available on record, we have no reason to accept the said contention. The doctor is an independent witness and we have no material before us to find the doctor having any interest in the seeing the accused punished. On the contrary the husband has turned hostile and he has deposed in favour of his brother. The evidence of PW14 is very clear and reliable and it is stated that the husband first narrated the cause which was protested and corrected by the victim. The time gap between the occurrence and the recording of the said declaration is also very crucial, as it was recorded within minutes of the incident i.e at 10 AM, whereas the time of occurrence of crime was at 9.45 AM.

18. The contents of dying declaration as spoken by PW14 is also supported by the evidence of PW1, PW2 and PW13. PW1 is the son of the deceased. It is true that he was not present at the scene of occurrence. According to him, he was in his office at the time of the incident and immediately after the incident, he received a phone call from an authorikshaw driver named Ambili informing him that his mother sustained serious burn injuries and she is being taken to the hospital by Councilor Rajesh and he was asked to contact the said Rajesh. Immediately, he contacted the said Rajesh and it was informed that since the burn injuries are serious in nature, she was being taken to Medical College Hospital, Thiruvananthapuram and he was asked to come to Medical College Hospital. Accordingly, he reached there and by 11.30 am, the victim was brought to the Medical College Hospital. Immediately, on seeing the victim, he called her 'Amma'. Recognizing the

voice of PW1, the victim held his hands and when he enquired about the cause of incident, she stated that she was set ablaze by 'Valiyachan'(elder brother of the husband of the deceased) after pouring kerosene. PW1 also deposed about the dispute between the appellant and his mother and about the scuffle occurred between him and the appellant on the previous night. According to him, the dispute was on account of the higher electricity charges due to the high consumption of electricity by the appellant, which resulted due to usage of induction cooker by the appellant for cooking. He points out that the appellant even attempted to prevent the Electricity Board Officers from carrying out inspection of the meter, which is situated in the portion, where the appellant was residing. He would assert that, it was the appellant who committed the offence on account of the previous animosity with his mother.

19. PW2 is the daughter of the deceased. She admitted that she eloped without the consent of her family members. However, she pointed out that subsequently their marriage was conducted with the consent of all parties and she maintained cordial relationship with her family. Her mother too had accepted her relationship. At the relevant time she was a student at Heera Engineering College and on 16.07.2014 at the time of lunch break she noticed several missed calls on her phone and one of the said missed calls was from the sister of her mother; Maheswari. PW2 called back when she was informed that her mother sustained serious burn injuries and was admitted to Medical College Hospital, Thiruvananthapuram. Immediately her husband was informed and she along with her husband reached the Medical College Hospital by 3.30

pm on the very same day. The deceased identified PW2 by her voice and when she cried and enquired about the incident, the victim stated that it was the act of 'Valiyachan', who set her ablaze. PW2 also mentioned about the dispute between her mother and Valiyachan on account of the electricity bill as well. PWs 1 and 2, have clearly spoken about the involvement of the appellant as informed by the victim, which can only be treated as natural and spontaneous reaction from the part of the victim, when seeing her children. It is also established from their evidence that the relationship between the deceased and the appellant was not cordial. The wound certificate and the other medical records clearly reveal that the deceased had sustained very serious burn injuries (60%) all over her body and the victim was under imminent threat of death and hence the statements made by the victim to the said witness as to the cause of death and also as to the culprit has to be accepted, since it fulfills all the conditions of a valid dying declaration. The learned counsel for the appellant would seriously contend that the evidence of PW1 and PW2 cannot be relied upon, as both of them are highly interested witnesses being children of the deceased. He further points out that, they were also not in good terms with the appellant and they also had some vested interest in seeing the accused punished. In support of the said contention, he submits that the property wherein the parties are residing was in the name of the mother of the appellant as well as the father of PW1 and PW2 and in order to get full share of the property they wanted to get the rights of appellant extinguished, for which he was falsely implicated. However, on examination of

PW1 and PW2, we are unable to find any reason to disbelieve them. Merely because of the reason that the parties are related to each other, the evidence as a whole cannot be discarded, if their evidence is found convincing and reliable. This is particularly so, when the circumstances as revealed from their evidence reveals a natural reaction from a mother in her death bed owing to burn injuries. It is also to be noted in this regard that, despite being subjected to lengthy cross examination PW1 and PW2 could not be discredited.

20. Another instance of dying declaration is Ext.P11 which was recorded by PW13, the Judicial First Class Magistrate, Thiruvananthapuram. Immediately after commencement of the investigation, on the application submitted by the Investigating Officer, the Chief Judicial Magistrate, Thiruvananthapuram vide Ext P2 proceedings, authorized PW13 to record the dying declaration of the deceased while she was undergoing treatment at Medical College Hospital, Thiruvananthapuram. Accordingly on 16.7.2014 at 1.08 p.m. PW13 recorded Ext.P11 statement after it was certified by the doctor, PW22, the duty doctor in-charge at the relevant time, that the victim was mentally and physically fit for giving the dying declaration. The said certificate is Ext.P11(a). It is also discernible from Ext.P11 that, PW13 also started recording the dying declaration after satisfying herself that the deceased was capable of making a statement and in order to ascertain the same, she asked certain questions to the victim and all those questions were clearly recorded along with the statement of satisfaction of PW13 as to the state of mind of the victim at the relevant time. The entire declaration as

evidenced by Ext.P11 was recorded in the form of questions and answers, by adopting the exact words as stated by the victim. Even though, the contents of the same indicate certain difficulties for the victim in mentioning certain details, it contain sufficient materials indicating clearly the involvement of the appellant. The appellant was specifically named in the said statement. The learned counsel for the appellant submits that the said statements of the victim as contained in Ext P11 are not reliable as according to him some of the statements made by the victim are relating to the nature and extent of rights of the parties in the residential building and the atrocities the appellant used to commit on her, which were completely inconsistent with the prosecution case. To be precise, in Ext P11 statement, the victim had stated that the appellant used to assault her after consuming alcohol and according to the learned counsel for the appellant, this was the first time such a statement was made by the victim. The prosecution does not have a case that the accused used to physically assault the deceased after consuming alcohol. Similarly, the learned counsel for the appellant strongly contended about the poor mental state of the deceased at the relevant time by highlighting some statements made by the deceased such as "കുട്ടികൾ പാവം. ഭർത്താവ് പാവം . വീട് മൊത്തം അയാൾക്ക് തങ്കപ്പന്. എനിക്ക് ഒരു മുറി. ഇന്നലെ വീട്ടിൽ കറണ്ട് ബില്ല് വന്നു. അയാളത് അടച്ചില്ല". What is discernible from the said statement, is that, the entire house is for the accused whereas she is having only one room. The learned counsel for the appellant states that at no point of time, there was any such case against the appellant. According to the prosecution, both the parties i.e. the appellant on

one hand and the deceased and her family on the other hand, were living in separate portions of the very same house and it is nobodies case that, the right of the appellant extended all over the house except one room as stated by the victim in Ext P11. By relying upon this, the learned counsel for the appellant contends that, the mentioning of the nature and extent of right over the residential building by the victim in Ext.P11 statement, which were contrary to the facts, reveals the sedation and illusions caused by reason of the injuries and medication. It is contended that the deceased was not having proper mental orientation at the relevant time and the dying declaration made by her under such a state of mind cannot be relied upon. The learned counsel for the appellant also pointed out that the deceased was having some serious grudge against the accused and it could also be a case where she made false statements as contained in Ext.P11 purposefully to implicate the appellant in the case.

21. The learned counsel for the appellant brings to our attention the caution to be exercised by the courts while considering the dying declarations, as observed by the Honourable Supreme Court in the judgment in **Uka Ram v. State of Rajastan (2001)5 SCC 254)**. In the said decision, it was held that it has always to be kept in mind that though a dying declaration is entitled great weight, yet it is worthwhile to note that as the maker of the statement is not subjected to cross-examination, it is essential for the court to insist that the dying declaration should be of such nature as to inspire full confidence of the court in its correctness. The court is obliged to rule out the possibility of

the statement being the result of either tutoring, prompting or vindictive or a product of imagination. Before relying upon a dying declaration, the court should be satisfied that the deceased was in a fit state of mind to make the statement. Once the court is satisfied that the dying declaration was true, voluntary and not influenced by any extraneous consideration, it can base its conviction without any further corroboration; as a rule requiring corroboration is not a rule of law but only a rule of prudence. According to the learned counsel for the appellant, if the dying declarations in this case are considered in the light of the above principles, conviction cannot be based on the same, as none of them are inspiring or credit worthy. He also relies on the judgments in **Dandu Lakshmi Reddy v. State of A.P. (1999)7 SCC 69, State of Gujarat v. Jayrajbai Punjabhai Varu (2016(14)SCC 151) and Narendra Singh Bisth V. State of Kerala (2017 (3) KHC 2014)** for substantiating his contentions in this regard. In **Dandu Lakshmi Reddy**'s case (supra), the Hon'ble Supreme Court was dealing with a case where two dying declarations were made and both were inconsistent in material particulars. By taking note of those material discrepancies between the two versions, the Hon'ble Supreme Court came to the conclusion that dying declarations therein cannot form the basis of conviction in that case. However, in this case, there are four dying declarations. All of them are consistent in nature and specifically point out the involvement of the appellant in committing the crime. There is no inconsistency between the said statements, as in the case of **Dandu Lakshmi** (supra). Therefore, the reliance placed on **Dandu Lakshmi Reddy**'s case

(supra) is not acceptable in the facts of this case. As regards the judgment in **State of Gujarat v. Jayrajbai Punjabhai Varu** (supra), the Hon'ble Supreme Court observed that while dealing with the dying declaration, courts have to be extremely careful as the maker thereof is not available for cross examination which poses a great difficulty to the accused person. Therefore, a mechanical approach in relying upon a dying declaration just because it is there, is extremely dangerous. The court has to weigh all the attendant circumstances and come to the independent finding whether the dying declaration was properly recorded and whether it was voluntary and truthful. Similarly in **Narendra Singh Bisth** (Supra), a Division Bench of this Court observed that a conviction solely depending upon dying declaration can be sustained only if the declaration inspires full confidence of the Court with respect to its correctness. In **Purshottam Chopra and Another v. State (Govt. of NCT Delhi) [AIR 2020 SC 476]**, the principles relating to recording of dying declaration and its reliability were laid down by the Hon'ble Supreme Court. In paragraph 21 of the said judgment, it is observed as follows:

> *"(i) A dying declaration could be the sole basis of conviction even without corroboration, if it inspires confidence of the Court.*
>
> *ii) The Court should be satisfied that the declarant was in a fit state of mind at the time of making the statement; and that it was a voluntary statement, which was not the result of tutoring, prompting or imagination.*
>
> *iii) Where a dying declaration is suspicious or is suffering from any infirmity such as want of fit state of mind of the declarant or*

of like nature, it should not be acted upon without corroborative evidence.

iv) When the eye-witnesses affirm that the deceased was not in a fit and conscious state to make the statement, the medical opinion cannot prevail.

v) The law does not provide as to who could record dying declaration nor there is any prescribed format or procedure for the same but the person recording dying declaration must be satisfied that the maker is in a fit state of mind and is capable of making the statement

vi) Although presence of a Magistrate is not absolutely necessary for recording of a dying declaration but to ensure authenticity and credibility, it is expected that a Magistrate be requested to record such dying declaration and / or attestation be obtained from other persons present at the time of recording the dying declaration.

vii) As regards a burns case, the percentage and degree of burns would not,by itself, be decisive of the credibility of dying declaration; and the decisive factor would be the quality of evidence about the fit and conscious state of the declarant to make the statement.

viii) If after careful scrutiny, the Court finds the statement placed as dying declaration to be voluntary and also finds it coherent and consistent, there is no legal impediment in recording conviction on its basis even without corroboration."

We are duty bound to apply the tests as stipulated by the Honourable Supreme in the above judgments, while considering the question of admissibility of the dying declarations in this case. As we mentioned above, Ext.P11 dying declaration was recorded by PW13 after following all the procedures contemplated in this regard. The same was recorded in the form of questions and answers. From the reading of the same, it can be clearly gathered that all

the questions and answers were specifically recorded in its original form as spoken by the victim. The contents of Ext.P11 and also the manner of recording the said statement were clearly mentioned by PW22 as well, who was the duty doctor in charge at the relevant time. PW22, specifically mentioned the entire episode of recording the statement by the victim by PW13 and he also asserted about fitness of the mental status of the victim as existed at the relevant time. According to him, the victim was perfectly oriented and was fit for giving statement in this regard. So the evidence of PW13 was clearly corroborated by the evidence of PW22. The statement made by the victim while recording Ext.P11 dying declaration was also consistent with what she stated to PW1,PW2 and PW14 as well. All these witnesses have corroborated the contents of Ext.P11 dying declaration and their evidence corroborate each other. The statement made by the victim to the various witnesses; her son, daughter, the doctor who first examined her and the Magistrate who recorded the statement in the presence of another doctor, were consistent as regard to the role played by the appellant. The son and daughter of the victim though closely related cannot be termed to be interested witnesses, especially since their interest would be only in bringing to book the assailant of their mother. There is no material available to find them to be so hostile to their uncle as to falsely implicate him in the crime. The doctors in an event are totally independent and have nothing to do with the family affairs of the accused and the deceased. The medical records reveal that, at the time of giving the said statements, the victim was having 60% burns on her body and

was under the threat of imminent death. Another crucial aspect to be noticed is that the dying declaration made before PW14 was immediately after the incident i.e within just 15 minutes. The aforesaid statement gives more strength to the prosecution case particularly because of the reason that it was in close proximity of the commission of offence and, therefore, the chances of after thought, manipulation, tutoring etc. can be safely ruled out. Since the victim maintained the very same version in all the subsequent three dying declarations, we have no grounds to disbelieve the same and we accept the prosecution version as to the cause of death and the manner in which the incident occurred.

22. The learned counsel for the appellant made an attempt to discredit the sustainability of dying declarations by stating that, owing to 60% burn injuries, she was not in a position to make any statements. However, the evidence is otherwise. In the cross examination of PW17, a specific question was put to him to the effect as to whether it is possible for a person whose glottis and lungs are oedematous, to speak with clarity. PW17 answered that it could be possible. In **Vijay Pal v. State (GNCT) of Delhi (2015 (4) SCC 749)**, it was observed by the Honourable Supreme Court, after referring to the judgment in **1992 (4) SCC 69 (Mafabhai Nagarbhai Raval v.State of Gujarat)** that, unless there existed some inherent and apparent defect, the trial court should not substitute its opinion for that of the doctor. **Vijay Pal's** case dealt with a dying declaration of a person who suffered 100% burn injuries. Similarly, in **Bhagwan v. State of Maharashtra (2019 (8) SCC**

95) it was observed that, the mere fact that the patient suffered 92% burn injuries would not stand in the way of patient giving dying declaration which otherwise inspires the confidence of the Court and is free from tutoring, and can be found reliable. The challenge thrown by the learned counsel for the appellant in respect of the physical incapacity of the victim to make the dying declarations, is only to be rejected. We have already found that, the dying declarations in this case are inspiring and trustworthy. Thus, on examination of the materials before us by applying the level of caution as observed by the Honourable Supreme Court in **Uka Ram** (supra) and other judgments relied on by the appellant, we are convinced that, all the conditions as stipulated by the Honourable Supreme Court in **Purushottam Chopra** (Supra) are satisfied.

23. There is yet another aspect which prompts us to discard the contention of the appellant in this regard. As against the evidence of PW1, PW2, PW13, PW14 and PW22, which includes three independent witness; two doctors and one Judicial First Class Magistrate, the learned counsel for the appellant is requiring us to rely upon the evidence of PW6 to discard the dying declarations. The evidentiary value of the above witnesses, particularly that of PWs 13, 14 and 22, as against PW6, is very high and incomparable. PW6 is the husband of the deceased and also the brother of the accused. Right from the inception, he was taking a stand to protect the appellant from the prosecution. The above fact can be gathered from the evidence of PW14, the doctor who examined the deceased immediately after the incident and before whom the first dying declaration was made by the deceased. He categorically stated that

when the victim was brought before him, the cause of injury reported to him by PW6 was that it was a case of suicide, which was immediately objected to by the victim herself and corrected, as a case of attempted homicide by setting her ablaze after pouring kerosene, by the appellant. Further, the evidence of PW1 and PW2 also reveal the close relationship between the appellant and PW6. It is also discernible from the evidence of PW6 itself that after the death of the deceased, he was residing along with the appellant in the portion of the house occupied by the appellant. The evidence also reveals that the appellant as well as PW6 used to consume alcohol together and this was one of the reasons which contributed to the enmity between the deceased and the appellant. The close relationship between the appellant and PW6 is also revealed from the evidence of neighbours particularly PW5. When all the above facts and circumstances are taken into consideration, the contention of the learned counsel for the appellant to give predominance to the version of PW6, cannot be accepted. PW6, according to us, had an interest in shielding his brother and saving him from the crime committed. Though he puts forth a case of self-immolation he does not speak of any cause.

24. Further contention of the learned counsel for the appellant is that the deceased had committed suicide as she was unhappy with certain incidents in her life. One of the reason for the same was that, PW2 the daughter of the deceased eloped with a person and got married without the consent of the deceased and her family. Apart from the above, it was also contended by the learned counsel for the appellant that the son of the

deceased was a drunkard and this also caused much pain to her and ultimately the above aspects led to the suicide of the deceased. Even though such contentions were put forward, on scanning through the materials available we could not find anything to support the same. PWs 1 and 2 were cross-examined on behalf of the accused, by making the above suggestions, but no material which would give any indication as to the victim being depressed for any of the above reasons could be elicited. On the other hand, PWs 1, 2 and 5 have categorically stated that she was very happy and there existed no circumstances which would compel her to commit suicide. Out of the entire evidence, the most crucial evidence in this regard is that of PW5 who is the neighbour of the deceased and who used to have regular interactions with the deceased. It is discernible from her evidence that the deceased used to share her domestic affairs quite often. She would state that the deceased was very cordial with her daughter and her husband, even though she initially objected to their relationship. Similarly, she also denied the suggestion that the son of the deceased used to create problems after consuming alcohol. The learned counsel for the appellant would rely upon a statement made by PW6 to the effect that, just before the incident when he reached home, the deceased served him tea and thereafter she handed over the identity card of PW6 by stating that he should look after the children and left the room. The incident of fire occurred immediately after the said incident. According to the learned counsel for the appellant, the fact of handing over the identity card and the statements made by her, indicates her intention and

preparedness to commit suicide. In support of the said contention, the learned counsel for the appellant would highlight the statement made by PW6 to the effect that her father had committed suicide and one of her brothers also attempted to commit suicide. However, we are not prepared to accept the above contention as we do not think that the said unsubstantiated statements would give rise to any assumption as to the possibility of a suicide. This is particularly because, PW6 was hostile to the prosecution and had given a completely different statement before the police. Apart from the above, PW6 was taking a stand in favour of the accused right from the inception presumably due to the intimacy he maintained with the accused, who was his elder brother. We have already found that he is not all a reliable witness.

25. The learned counsel for the appellant would further submit that the possibility of suicide is evident from the nature of injuries particularly injury No.1 mentioned in Ext.P6 post mortem certificate. He submits that, on going through the description of injury No.1, it can be seen that, there were dermo epidermal burns on the right upper limb sparing an area 30x5 to 10cm on back of forearm and lower part of arm. According to him, the lack of burn injury on the back of forearm and lower part of arm indicates that it is a case of suicide. He submits that, if a person is pouring kerosene over his own body the hand used for pouring kerosene would be spared. According to him this is the reason why that portion of the body did not suffer any burn injury. To strengthen the said contention, he relies on the judgment in **Jayabalan v.**

Union Territory of Pondicherry (2010)1 SCC 199, wherein in paragraph 27 and 28, it was observed as follows:

> *"27. It is also significant to refer to the opinion of Dr. R. Balaram, Junior Specialist of Forensic Medicines (PW 12), who in his deposition stated that if a person pours kerosene on himself or herself over his or her head, it would spread over the back also. The presence of kerosene on the body of the deceased is established from the deposition of PW 12 who, in the post mortem report of the deceased, recorded an observation that the scalp hair of the deceased smelt of kerosene."*
>
> *"28. Thus, we are of the considered opinion that if it were a case of suicide by the deceased by pouring kerosene over her head, the kerosene oil would have certainly run down on the chest as well as on the back side of the body and the fire would have spread all over the body causing burn injuries both on the front as well as on the back side of the body. But that is not the case here. The post - mortem report revealed that there were no burn injuries on the back side of the chest, abdomen and right foot of the deceased. The body of the deceased was found to be in a lying position with a fresh injury mark on the left side of her forehead. A possible inference which can be drawn is that after hitting the deceased on her forehead, the appellant made her lie down on the floor inside the bathroom and thereafter poured kerosene oil on the body of the deceased, which on account of lying position of the body could be poured only on the front part of her body. As such, when the deceased was burnt, there were no burn injuries found on the back side of the body of the deceased".*

However, on going through the factual scenario of the above case, it can be seen that therein prosecution case was that the victim was inflicted with some injuries and she was lying on the floor after sustaining the said injuries.

Thereafter, the accused poured kerosene over her body and set her ablaze and hence, the burn injuries were only on one side of the body. In the said case, the doctor who had conducted postmortem was explaining the nature of injuries therein which occurred in the circumstances mentioned therein and the statement as to the distribution of burn injuries in a case of suicide was made in the above circumstances. In this case, the factual situation is completely different. The crucial aspect to be noticed in this regard is that while PW17, the doctor who conducted the postmortem of the deceased was cross-examined, a specific question was put to him as to whether the nature of injuries would indicate a suicide attempt or not. The response of PW17 is that the manner of death cannot be stated from the distribution of burns. He also opined that, it cannot be said that the burn injuries could be seen only on those portions kerosene was poured. He also denied the suggestion put to him to the effect that if a person himself is pouring kerosene over his head, the upper part of his hand would not suffer any burn injury. Thus when we examine all the above aspects and also taking into consideration the expert opinion given by the doctor who conducted the postmortem, we have no material before us to accept the contentions put forward by the learned counsel for the appellant on this aspect and to disregard the valuable evidence of the Doctor.

26. It was also contended on behalf of the appellant that, going by the nature of injuries as revealed from Ext.P16 postmortem certificate, the eyes of the deceased were completely burned. It was not possible for her to identify any person by sight. He contends that, in such circumstances, the evidence of

PWs.1,2 and 13 are to be disbelieved as they have stated that the deceased recognized them. However, the said contention is far from truth as revealed from the materials before us. First of all, it is evident from the description of injuries that only eyebrows and eyelashes were burned, and it does not indicate damage to the eyes as a whole. PW17, doctor has stated that there were no burn injuries to the eyes and he also opined that it could have been possible for the deceased to open her eyes after the burn injury suffered by her. Apart from the above, even if it is assumed for argument that she was not able to identify the witnesses or any person by sight, that will not affect the case of the prosecution in any manner. PWs.1 and 2 have specifically stated that when they had seen their mother while she was being treated in the hospital and when they enquired with her as to the cause of death, she identified them by their voice. Therefore the nature of injuries sustained to the eyes of the deceased and the impact of such injuries are not at all material. Regarding the identification of PW13 Magistrate also, the question of identifying the said witness by sight does not arise. This is particularly because of the reason that PW13 was not a person known to her. Further PW13 has clearly stated that she introduced herself as a Magistrate and the purpose of her visit was also informed to the deceased. In such circumstances, the nature of injuries as pointed out by the learned counsel for the appellant even if it is assumed as true will not affect the prosecution case.

27. The learned counsel for the appellant also relied on the recovery of MO4 bottle with kerosene. He contends that, as per seizure mahazar, a bottle

of kerosene filled to half, was recovered from the scene and the bottle was closed when it was recovered. According to the learned counsel, the bottle being in a closed state is highly improbable as no one would care to close the bottle and keep it there, after pouring kerosene over the body of a person and setting her ablaze. We do not find any substance in the argument since there can be no presumption that after setting a person ablaze the perpetrator would not close the bottle. Human behavior is complex and we cannot oversee with precision, as to the actions of a person in such a situation and no definite conclusion can be arrived at. Responses would vary from person to person and no assumption in respect of the same is possible. One person may go about a crime in a haphazard manner while another may act with definite deliberation and execution.

28. Apart from the above, the learned counsel for the appellant tried to attack the prosecution by stating that, no attempt has been made to ascertain the source of kerosene and to ascertain whether it was procured by the appellant. However, kerosene being a house hold article, we do not think that, the same is an omission at all. It is evident from the records that, the appellant was cooking his food separately for which he was maintaining a kitchen. Of course, if the source of the same was traced out, certainly it would have been a crucial piece of evidence, but in our view, absence of investigation on this aspect is not sufficient to exculpate the appellant, particularly when there is overwhelming evidence for his inculpation. The learned counsel further submits that, even though PW9 and PW13 have stated that, it was the police

who had taken the victim to the hospital, in the FIR it is recorded that the information was received only at 11 AM. But we do not think that it is a serious inconsistency to discredit the prosecution case particularly in the light of the discussions we have already made.

29. Thus on examining the entire materials available, there are several aspects which point to homicide at the hands of the appellant herein. The strained relationship between the appellant and the deceased, is evident from the depositions of PW1, PW2 and PW5. PW5 neighbour clearly stated that PW6 had close relationship with the accused. Evidence of PW5 also supports the case of prosecution that, the appellant made counter allegation against the deceased for selling a gas cylinder. PW5 has stated that, she collected one gas cylinder from the deceased some days before the incident. Further, all the said witness have clearly stated that, PW6 used to drink alcohol along with appellant, which indicates the closeness of their relationship. The dispute, stemming from the sudden increase in electricity bill stands proved by PW12 who is the Assistant Engineer of KSEB. He categorically stated about the complaints submitted by the deceased and also about the inspection conducted by them pursuant to Exts.P8,P9 and P10. The dispute in respect of excess electricity bill and the verbal exchange between the deceased and the accused got escalated into a scuffle between PW1 and the appellant. The immediate provocation to commit the crime is revealed from the evidence of PW1 as well as PW6. When all these aspects are taken together, it leads to an irresistible conclusion that the enmity between the parties which ultimately resulted in an

incident of scuffle between the appellant and PW1 on the previous day of the crime, incited the accused to commit the murder of the deceased. Even though, those aspects alone are not sufficient to conclude on the question of the guilt of the accused, the dying declarations clearly fill up the said vacuum. Consistent dying declarations (four in number) through the evidence of Pws.1,2,13,14 & 22, found to be very reliable, provides credence to each other and proves the guilt of the accused. As mentioned above, the alternative theory of suicide, is not substantiated as there are no materials even to instill a doubt in our mind in this regard.

In such circumstances, the only conclusion possible is that the death of the deceased was a homicide and it was the appellant who committed the said brutal act as put forward by the prosecution. We find no reason to interfere with the findings of the Sessions Court. Accordingly, this appeal is dismissed and the conviction as well as sentence imposed by the Sessions Court is confirmed.

Sd/-

K. VINOD CHANDRAN, JUDGE

Sd/-

ZIYAD RAHMAN A.A., JUDGE

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