

(2011) 05 DEL CK 0053

In the Delhi High Court

Case No : Criminal Appeal 270 of 2004 and Criminal M.A. 441 of 2011

Devender @ Kallu

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 10-05-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 157, 159, 161, 313
Penal Code, 1860 (IPC) — Section 302, 307, 324

Citation : (2011) 2 JCC 1453

Hon'ble Judges : S. Ravindra Bhat, J;G.P. Mittal, J

Bench : Division Bench

Advocate : Sumeet Verma, for the Appellant; Lovkesh Sawhney, APP, for the Respondent

Final Decision : Allowed

Judgement

S. Ravindra Bhat, J.—The Appellant (hereafter called "Kallu") impugns a judgment and order dated 08.08.2003 in S.C. No. 125/1999 by which he was convicted for the offences punishable u/s 302/324 IPC. For the offence u/s 302 IPC, the Appellant was sentenced to undergo life imprisonment and pay a fine of Rs. 1,500/- in default of payment of fine the convict was sentenced to further undergo rigorous imprisonment for one month. For the offence u/s 324 IPC, the Appellant was sentenced to undergo Rigorous Imprisonment for one year.

2. The case of the prosecution is that, PW-18 Durgesh and deceased Guddu @ Vinod used to sell fruits in Azadpur on a cart; both used to sleep on the cart itself at night. The Appellant Kallu also used to sell fruits in Azadpur and his cart used to be near the cart of the deceased and PW-18. The Appellant owed Rs. 7,000/- to the deceased. On 08.08.1999, he (the deceased) detained the Appellant's cart and told him that he would not release it till the Appellant returned the Rs. 7,000/- borrowed by him. The Appellant threatened the deceased and said that he would "see" him later. On 08/09.08.1999 PW-18 and the deceased were sleeping on one cart. At about 4:30 AM PW-18 felt that someone had put some

liquid substance on him due to which he woke up, even the deceased woke up and they saw that the Appellant had poured some petrol like substance on them. The Appellant set the deceased on fire with a match stick. The deceased sustained burn injuries on his entire body; PW-18 also sustained some burn injuries. PW-18 and the deceased raised an alarm and the Appellant ran away. PW-2 Har Gobind @ Dabbu, who was sleeping on another cart tried to save PW-18 and the deceased and in the process he too sustained burn injuries on his arm. The deceased and PW-18 were removed to J.P.N. Hospital. From the hospital, Duty Constable Babu informed police station Adarsh Nagar, recording D.D. No. 28A, stating that the deceased Guddu, PW-18 Durgesh and PW-2 Har Gobind were admitted in the hospital with burn injuries. SI Mukesh Kumar reached the hospital and collected the MLC's of all the three injured persons and he recorded the statement of PW-18 Durgesh and got the case registered u/s 307/324 IPC bearing FIR No. 415/99. He along with PW-18 and PW-2 reached the spot and seized burnt articles like cart, bed sheet, shirt, bunch of keys, blanket, shoes, tarpaulin etc and also prepared the site plan. At about 11:10 AM Constable Anil informed PS Adarsh Nagar that Guddu @ Vinod had died, recording D.D. No. 21B. Section 302 IPC was added in the FIR. On 10.08.1999 inquest proceedings were conducted by Inspector Jagdish Pershad and the dead body was sent for post mortem examination. On 17.08.1999, the Appellant was arrested from the Court and he made a disclosure statement. On 18.08.1999 on the basis of his disclosure statement a plastic can which was thrown by him behind the fruit shops at Parmeshwari Bagh was recovered and seized. Charge was framed against the Appellant u/s 302/307/324 IPC. The Appellant pleaded not guilty and claimed trial.

3. To prove its case, the prosecution examined 19 witnesses. PW-2, PW-3 and PW 18 are eye witnesses; PW-18 (the informant) turned hostile. PW-2 Har Gobind deposed that he sells fruits on a rehri near Ayodhya Mills and that the deceased, brother of Santosh also used to sell fruits on a rehri next to his; about 50 people sell fruits on a rehri there. The Appellant Kallu also used to sell fruits on a rehri there. He further deposed that PW-18 and the deceased used to use their rehri to sleep at night; he too used to sleep on his rehri. The Appellant used to purchase fruits from Santosh (brother of deceased) and the Appellant owed him about Rs. 7/8,000. The Appellant was unable to pay back the money due to which Santosh confiscated the Appellants' rehri about 2 or 3 days prior to the incident. He further deposed that about 8/9 months ago (his statement was recorded on 24.05.2000) the deceased met the Appellant at 12 in the noon near Ayodhya Mill and took him (Appellant) to a go-down and abused him; even Santosh came to the go-down. On the same day at about 3:30/4:00 AM in the night, when everyone was sleeping of their rehri, PW-2 saw the Appellant pouring kerosene oil and petrol. The Appellant then lit a paper and left it on the deceased. The deceased, in a burning condition ran towards the nala. PW-2 with the help of others extinguished the fire and in the process he too received injuries on his forehead, hand and right arm. PW-18 Durgesh who was sleeping

next to the deceased was also burnt. PW-2 further deposed that the deceased told him that the Appellant had set him (the deceased) on fire. They all were taken to the hospital; PW-2 and PW-18 were discharged from the hospital after being given treatment. PW-2 further deposed that they were questioned by the police and various burnt articles such as shoes, shirt, rehri were seized.

4. In the cross examination, PW-2 admitted that the incident took place on the night of 08/09.08.1999 at about 4:30 AM but denied that it was the deceased who was to take money from the Appellant and not Santosh. He later admitted that the deceased had demanded money from the Appellant and the Appellant had told the deceased that he would "see" him later. He deposed that the IO prepared the site plan of the place of incident at his (PW-2) instance. He further deposed that one bed-sheet, one pair of sandals in burnt condition and a bunch of keys were taken by the police. PW-2 stated that the police recorded his statement in the hospital on the same day when he was taken there by Santosh, Ashok and others. The statements of Ashok and Santosh were not recorded by the police in his presence. PW-2 admitted that about 15/20 rehri were parked at the spot, in the night and about 8/10 people used to sleep on those rehri. About four rehri were parked between his rehri and that of the deceased. PW-2 stated that when he woke up about 2/4 people were present at the spot and the deceased was moved to the hospital before he was. However he was not sleeping when the incident took place as he himself had sustained burn injuries. He further stated that the Appellant used to buy fruits from Santosh but he had not seen any money transaction taking place between the two of them; Santosh had not demanded money from the Appellant in his (PW-2's) presence. He admitted that at night all the rehri are parked adjacent to each other and at the time of occurrence one Anna was sleeping with him (PW-2) on his rehri and PW-18 and the deceased were sleeping on another rehri nearby. He further deposed that he had stated to the police that the deceased had taken the Appellant to a go down and abused him (the Appellant) and that he had seen the Appellant pour kerosene oil and petrol on the deceased and left a burnt paper on him which burnt the deceased. He further deposed that he was taken to the police station after about one hour of his returning from the hospital and remained there for about 30 minutes. In the police station, were made enquiries from one boy Pinki. He further deposed that the Appellant used to sleep on his rehri even though he had a rented room in his possession. He admitted that the Appellant owned four rehri but, that he did not use any of his rehri to sell fruits. The Appellant's room was at a distance of about 5/10 minutes walk from the spot where the incident took place. He stated that it is incorrect that the Appellant used to stay in the night at his rented room and not on his rehri. He admitted that Santosh, the deceased, PW-18 Durgesh and the Appellant were all from his village. He further stated that the packing waste used to remain scattered at the spot and all the rehriwalas used to smoke at the spot. He denied that the Appellant had not burnt the deceased. He further stated that he was not aware if the Appellant had stayed in the mental asylum, Agra for about six months.

5. PW-3 Munshi Ram, is also a fruit vendor in Azadpur Market. He deposed that he used to park his rehri in front of Ayodhya Mill in Azadpur Market and used to sleep on his rehri at night; several persons including the deceased, PW-18 and PW-2 also used to park their rehri there and sleep on them at night. In the month of Asadh, on the 5th day of the month in 1999, at about 4/4:30 AM the Appellant came where all of them were sleeping on their rehri and lighted a match-stick. He stated that when he (PW-3) asked the Appellant what he was doing, the Appellant told him that he was searching for some money. PW-3 saw the Appellant having spirit in a panni (can of plastic) and thought that the Appellant was going to relieve himself. The Appellant burnt a fire underneath the rehri of the deceased and on PW-3's asking as to what he was doing, the Appellant told him to be quiet and let him (Appellant) do what he was doing. PW-3 further deposed that the Appellant set the deceased on fire and poured the material which was in the panni on the deceased and ran away. He stated that he asked the deceased to get up as he had been set on fire by the Appellant and since the deceased suddenly woke up, the flames on the deceased rose high. Even PW-18 was sleeping on the same rehri. PW-3 deposed that he along with the help of others put out the fire and threw a quilt on the deceased. He stated that he had known the Appellant for a long time.

6. In his cross-examination, PW-3 admitted that he had forgotten the date due to age and lapse of time and that the incident did take place on 08/09.08.1999. He states that PW-2, Hargobind helped in extinguishing the fire. During the cross-examination it was observed that the witness was suffering from an advanced stage of Tuberculosis (T.B.) and was very weak and infirm, even unable to stand and speak. He deposed that his statement was recorded by the police at the spot a few days after the incident but did not remember the exact date. No statement of any other witness was recorded by the police in his presence. He admitted that there used to be 10-12 parked rehri at the spot and in all 10/15 persons used to sleep on or near them. He knew the deceased and Santosh (brother of deceased) since childhood; he also knew the Appellant since childhood. The distance between his rehri and that of the deceased was about one yard only and no one was sleeping between his rehri and that of the deceased. PW-3 further stated that the Appellant used to go to his room to sleep and did not sleep on the rehri at night; he used to come to the market to attend to his work as he had four rehri there. He further admitted that there was no dealing or transaction between the deceased and the Appellant and that the Appellant used to have dealings with Santosh. He states that he had seen the Appellant with a panni in his hand; he had seen the Appellant from a distance of not more than one yard. PW-18 was also sleeping near the deceased. He denied that there was waste lying nearby. He admitted that he used to smoke quiet often but only during day time. He further deposed that he raised an alarm when the Appellant ran away but he could not apprehend him as he was weak. About 4-5 persons tried to chase the Appellant but he managed to escape. According to PW-3, the Appellant had gone mad; he could make this out by his actions and

gestures. However he could not say if the Appellant had been admitted to a mental hospital in Agra. He admitted that about 6 months prior to the incident, the Appellant used to behave like "mentals" and used to murmur. PW-3 denied that he had not seen the Appellant on the day of the incident and that the Appellant had not set the deceased on fire in manner deposed by him.

7. PW-15 SI Mukesh, first IO of the case deposed that on 09.08.1999, after receiving D.D. No. 28A, he along with Constable Rajbir went to JPN Hospital and obtained the MLC of injured Guddu (deceased), Har Gobind (PW-2) and Durgesh (PW-18). Guddu was declared unfit to make a statement due to the burn injuries in his mouth. He recorded the statement of PW-18 and prepared a rukka and sent through Constable Rajbir to the PS for registration of the case. Later, he recorded the statement of Guddu u/s 161 Code of Criminal Procedure Both PW-2 and PW-18 were discharged from the hospital and he with the two injured persons went to the spot and prepared a site plan at the instance of PW-18. In the mean time Constable Rajbir came to the spot and handed over the rukka and copy of the FIR to him (PW-15). A photographer was called and the scene of occurrence was photographed. He further deposed that from the spot one rehri, one bed sheet in a burnt condition, one blanket, three shirts, one pair of shoes, one plastic tarpaulin and a bunch of keys were seized and all the articles were sealed. Munshi Ram (PW-3) who claimed to be an eye witness reached the spot and got his statement recorded. PW-15 further deposed that he went to the Appellant's house but the Appellant was nowhere to be found. On returning to the spot, a copy of D.D. No. 21B, regarding the death of the deceased was handed over to him.

8. On 17.08.1999, PW-15 along with Inspector Jagdish Persad SHO (PW-14) reached Tis Hazari Court, where the Appellant had surrendered and arrested him. He further stated that while in custody, the Appellant made a disclosure statement in pursuance of which on 18.08.1999 the Appellant got recovered a black plastic can from the bushes near fruit shops, Azadpur. The can was seized and sealed. In his cross examination, PW-15 deposed that he reached the hospital at about 06:45 AM and remained there till 08:45/9:00 AM. He recorded the statement of injured PW18 in the hospital itself and sent the rukka at about 08:15 AM from the hospital itself; Constable Rajbir returned to the spot with a copy of the FIR and rukka at about 09:30 AM. He further deposed that he recorded the statement of Guddu (deceased) at about 08:25AM, when the doctor declared him fit for statement. He admitted that the word "un" had been struck off in the MLC of the deceased (from the word "fit") but denied that deceased was not fit for making a statement. He further denied that the statement of the deceased was recorded by him of his own and that PW-18 had not made any statement. PW-15 further stated that the statement of PW-3 was recorded at about 10:00/10:15 AM and that the house of the Appellant was at a distance of 1 1/2 K Ms from the spot. He admitted that he had not moved any application before SDM to record the statement of the deceased. PW-15 was unable to tell if the second IO of this case (Inspector Jagdish Persad SHO) had asked any public

person to join when the disclosure statement of the Appellant was recorded. He denied that no disclosure statement was made by the Appellant. He further admitted that the place of recovery was an open place and that IO had not prepared any site plan of the place of recovery. He further denied that the investigation was not fair and that nothing was recovered at the instance of the Appellant.

9. PW-5 Dr. Akash Jhanjhee conducted the postmortem examination on the dead body of the deceased on 10.08.1999 at about 12 in the noon. He deposed that soot deposits were present in both the nostrils of the dead body and no smell of petrol or kerosene was found on the scalp hair. He further deposed that, in his opinion the deceased had suffered burns upto 100% and that all the injuries were ante mortem and were caused by flames of the fire.

10. The Appellant in his statement u/s 313 Code of Criminal Procedure denied all the allegations and gave his version of the case. He stated that he used to buy fruits from Santosh and due to competition he (the Appellant) had suffered a loss; he had taken 125 boxes of pomegranate from Santosh and was not able to pay the cost (Rs. 6,000). When Santosh demanded the money, the Appellant arranged for Rs. 5,000 from his younger brother on Sunday and went to his friend's house from where he returned at about 11:00/11:30 PM. The deceased took the Appellant to meet Santosh and he (Santosh) told the Appellant that he should have the money arranged by Monday. He stated that he returned to his room after meeting Santosh and the next morning he was informed that the deceased was burnt to death and everyone was suspecting him of having burnt the deceased. He therefore went to his village and informed his parents about the incident; the police took away his father and therefore under pressure from his family he surrendered in Court.

11. The counsel for the Appellants submitted that the testimony of PW-2 cannot be relied upon as PW-2 had made material improvements in his deposition. In his previous statement i.e. u/s 161 Code of Criminal Procedure there was no mention of the incident wherein the deceased is said to have abused the Appellant. Moreover in his previous statement PW-2 had only stated that he woke up on hearing some noise and saw that the deceased was burning; nowhere in his previous statement has he mentioned that he saw the Appellant pouring petrol and kerosene oil. It was further submitted that as per PW-2's deposition, one Pinki was being questioned by the police when he reached the police station but there is no mention of any Pinki by the prosecution. According to PW-2's testimony one Anna was also present at the time of incident but he was not made a witness in the case by the prosecution. It was urged that there was a possibility that the waste material lying scattered at the spot caught fire accidentally as many people used to smoke at the place of incident. The counsel for Appellant urged that the MLC's of PW-18 Durgesh and PW-2 Hargobind Ex.PW8/A and ExPW8/B say that the fire was lit by someone with a bidi. It was argued that the Appellant had no motive to commit the crime as PW-2 has stated

that it was Santosh and not the deceased who was to take money from the Appellant.

12. It was further submitted by the counsel for Appellant that the testimony of PW-2 and PW-3 contradict each other. According to PW-2 the Appellant had thrown petrol and kerosene on the deceased whereas PW-3 stated that he had used spirit. PW-2 further stated that the Appellant left a burnt piece of paper on the deceased whereas PW-3 states that the Appellant burnt fire underneath the rehri of the deceased and set the deceased on fire. PW-3 also deposed that the Appellant used to go to his room to sleep and did not sleep on his rehri at night whereas PW-2 stated that the Appellant used to sleep on the rehri all the time and used to sleep in his rented room occasionally. It was urged by the counsel that this made the entire case of the prosecution doubtful.

13. Learned Counsel for the Appellant submitted that the in the MLC of the deceased the word "unfit" was made fit by striking off "un" from the word. This, urged the counsel, was done to justify the statement of the deceased u/s 161 Code of Criminal Procedure The deceased had suffered almost 100% burns on his body, as revealed by Ex.PW-5/A and in these circumstances it would have been impossible for him to make a statement to the police. It was urged that the MLC report of the deceased had been tampered with and the endorsement "patient is unfit for statement" was changed to "patient is fit for statement" by striking off the "un".

14. It was further argued that the Appellant was arrested from Tis Hazari Court on 17.08.1999 and he made his disclosure statement on that day itself, however the recovery of the plastic can was made on 18.08.1999. The delay of one day makes the recovery of the plastic can very doubtful and the prosecution was not able to furnish any explanation for the delay. It was urged that as per the post mortem report, no smell of kerosene oil or petrol was found in the scalp hair and furthermore the scalp hair was not even sent to CFSL for chemical analysis. Therefore, according to the Appellants, the prosecution was not able to prove that the deceased was burnt by pouring petrol on him. It is argued that even as per the prosecution version, PW-2 is not an eyewitness, and that his testimony varies with that of PW-3. Mr Verma, the learned amicus argued that PW-2 acknowledges that his statement was recorded later, even though the police claims that the statement u/s 161 was recorded earlier.

15. It was submitted that the special report, mandated by Section 157 of the Code of Criminal Procedure, was not sent to the concerned magistrate, which constitutes a fatal infirmity to the prosecution story. Further, submitted the amicus, the non examination of others, who, the witnesses produced in court said were present, including one Pinky, cast suspicion and doubt on the prosecution story about the Appellant's guilt. Mr. Verma relied on the decision in The State of Rajasthan Vs. Shri Teja Singh and Others, where the prosecution duty was underlined in the following terms:

...it is clear that apart from the said eyewitnesses produced by the prosecution many other villagers would have at least seen the last part of the occurrence including the escape of the accused and the accused not being strangers to the villagers could have been easily identified by them. By not examining those independent witnesses, the prosecution has failed to produce the available independent corroborative evidence to support the evidence of interested witnesses, namely, P Ws 6, 7 and 9 because of which the High Court was justified in drawing adverse inference against the prosecution.

16. Learned Counsel submitted that the MLC of Durgesh, PW-18, showed that he had sustained burn injuries when aiding someone who had been injured on account of a fire that was started by a lit bidi. The MLC (Ex. PW-8/A) did not record the Appellant's name. It was urged that the prosecution story about recovery of a can (from which an inflammable substance was allegedly poured, leading to fire) was disbelieved by the Trial Court, knocking out the entire prosecution story.

17. It was lastly urged that the only eyewitness, PW-3, who supported the prosecution story, about the manner how the fire was lit by the Appellant, clearly admitted that his statement was recorded by the police later. He also admitted that the Appellant used to sleep in his room. The prosecution did not prove that any inflammable substance (kerosene or petrol) had been poured by the Appellant, which was set afire; there was in fact no control earth recovery. Unlike PW-18, this witness (PW-3) had not been injured, and his version conflicted in material particulars with that of the prosecution. Therefore, submitted the learned amicus, the prosecution could not be said to have established its case beyond reasonable doubt.

18. Mr. Luvkesh Sawhney, the learned APP, argued that the appeal is unmerited and deserves to be dismissed. It is submitted that though PW-18 did not support the prosecution during the trial, he admitted having been examined, and his statement being recorded by the police; he was also an injured witness, as testified by his MLC. Emphasizing that PW-15 had deposed having recorded the rukka. It was submitted that the prosecution version about due investigation, and recording of statements of witnesses at the earliest, finds support in the version of PW-18, who deposed that his statement was recorded in the hospital. It was submitted that there was no delay in recording the rukka, which was done at 08:15 AM; the FIR was recorded at 09:05 AM, as the prosecution had established. If these facts were noticed, there was no question of any occasion for the prosecution to build a false story and wrongly implicate the Appellant, as is sought to be urged by him.

19. Replying to the argument about non-compliance with Section 157, it was urged that in every case, the delay in sending the special report to the magistrate would not result in the prosecution story being disbelieved. If other facts, about the recording of FIR were established, and the court is satisfied that the incident was reported and recorded at the earliest possible time, the delay, if

any, incompliance with Section 157, would not be fatal. In support of the argument, learned APP relied on Pandurang Chandrakant Mhatre and Others Vs. State of Maharashtra, where it was held that:

As regards delayed receipt of the copy of FIR by the Court of Magistrate on 12-4-1988, in the first place Ext. 84, FIR register indicates that copy of FIR was sent to the Magistrate concerned on 3-4-1988 itself. Secondly, and more importantly, if the evidence of eyewitnesses is found cogent, convincing and credible, the delay in receipt of the copy of FIR by the court concerned would not be of much significance.

Similarly, reliance was placed on Pala Singh and Another Vs. State of Punjab, where it was observed that:

No doubt, the report reached the Magistrate at about 6 p.m. Section 157 Code of Criminal Procedure requires such report to be sent forthwith by the police officer concerned to a Magistrate empowered to take cognizance of such offence. This is really designed to keep the Magistrate informed of the investigation of such cognizable offence so as to be able to control the investigation and if necessary to give appropriate direction u/s 159. But when we find in this case that the FIR was actually recorded without delay and the investigation started on the basis of that FIR and there is no other infirmity brought to our notice, then, however improper or objectionable the delayed receipt of the report by the Magistrate concerned it cannot by itself justify the conclusion that the investigation was tainted and the prosecution insupportable. It is not the Appellant's case that they have been prejudiced by this delay.

20. It was urged that PW-2 is no doubt not an eyewitness. However he saw the accused running away after the event, when he saw deceased burning. He was also injured trying to save deceased. It was submitted therefore, that this witnesses' version to that extent, was relevant, and could not be discarded. Furthermore, it was submitted that the statement of PW-3 was recorded on 9th morning, at the earliest. He is consistent in deposing, what he stated, in the Section 161 Cr. PC. His (PW-3's) evidence is cogent, about his getting up early, seeing the accused pouring substance, and lighting up the deceased. This witness, as well as PW2 did not mention about beedi being thrown at deceased. It was further submitted that all the ML Cs in the case have the same language - word by word. Names of assailants were given. The ML Cs were mechanical, and no objection to the omission to mention the accused could therefore, be taken. It was submitted that the defence version about beedi being lit, and cause of death, is unacceptable. In this case, the prosecution witnesses being cogent about the role of the Appellant, and there being evidence about existence of motive, this Court, urged the learned APP, ought to desist from disturbing the findings of the Trial Court, as minor discrepancies and inconsistencies are found in every case.

21. The above discussion shows that according to the prosecution allegations, on

08/09.08.1999 PW-18 and the deceased were sleeping on a cart. At around 04:30 AM PW-18 felt that someone had put some liquid substance on him due to which he woke up, even the deceased woke up and they saw that the Appellant had poured some petrol like substance on them. The Appellant set the deceased on fire with a match stick. The deceased sustained burn injuries on his entire body; PW-18 also sustained some burn injuries. PW-18 and the deceased raised an alarm and the Appellant ran away. The prosecution mainly relied on the testimonies of PW-2, PW-3 and PW-18. The learned APP during the hearing had fairly submitted that PW-2 was not an eyewitness; however, he urged that the said witness had seen the Appellant fleeing from the spot. PW-2's evidence, in the opinion of this Court, is unreliable. In his previous statement, u/s 161 Code of Criminal Procedure he did not mention of the incident in which the deceased allegedly abused the Appellant. Importantly, in his previous statement PW-2 had stated about waking up on hearing some noise and seeing that the deceased was burning; His previous statement does not mention that he saw the Appellant pouring petrol and kerosene oil- something he sought to introduce in his deposition, in court. Therefore, the prosecution cannot rely on the testimony of this eyewitness; his allegations, not having been made about the aspect of motive, are also unworthy of credence on that score.

22. PW-3 states that his police statement was recorded at the spot; his testimony shows that he was nearest to the deceased's rehri. His version varies with that of PW-2, in that, according to him, the fire was lit by the Appellant, beneath the deceased's rehri. He also admitted that the Appellant owned four rehri, used to sleep in his room, and had no dealings with the deceased, but with his brother (Santosh). He was not clear about the date when the incident occurred, when he deposed in court. Now, this version (pouring kerosene and lighting a fire beneath the rehri) is contrary to the prosecution story, recorded in the FIR, about the Appellant having lighted the fire with a bidi. PW-3 mentions about a can (panni). Now, interestingly, there is no recovery of any control earth. If indeed, the prosecution had been informed about the facts, deposed to by PW-3, there ought to have been some recovery of earth sample, near the place of incident, and its forensic analysis.

23. In this case, the prosecution version was that PW-18 had informed the police, and narrated the facts, which were recorded in the FIR. In other words, he was the informant about the offence. He is also an injured eyewitness. His statement Ex. PW-8/A was recorded by the police. However, he resiled from that; even though he admitted that a statement was recorded by the police, he explained that it was only regarding the fire incident and that he did not see the Appellant. If this testimony is taken in face value, then what the court has to consider is that the prosecution version about the nature and origin of the fire, is as spoken by PW-3, which is at variance with that of the other two eyewitnesses.

24. The next aspect is that the Trial court, in the impugned judgment, noticed that though the Appellant had been arrested about 10 days after the incident, no

attempt was made to recover the incriminating article (panni). This aspect was dealt with in Paras 41 to 43 of the impugned judgment, where the court concluded that the recovery was suspect, and discarded that circumstance from consideration.

25. This Court is of opinion that the Trial court fell into error in not noticing that there were two versions as to the incident, and how it occurred. The first information given to the police was that of an attacker having lit the fire with a bidi; however, the other version, spoken to by PW-3, was about sprinkling of kerosene or petrol and lighting the deceased's rehri from underneath. These two versions are not compatible; besides the alleged eyewitness/ informant, PW-18 did not support the prosecution at all during the trial. In these circumstances, the Trial Court's conclusion that the lack of any material, as regards whether any inflammable substance had been poured on the deceased, or his immediate vicinity, being not material, is a clear error. The assumption - particularly after disbelieving the recovery of the pannu - that petrol could have been used, and that it would not leave traces, as it tends to evaporate, is speculative. If there is any constant factor in every criminal trial, it is the obligation of the prosecution to establish its allegations beyond reasonable doubt, and the corresponding duty of the court to vigilantly oversee the process, and not fall prey to a conjecture being elevated to a finding, which in this case, unfortunately appears to have happened. The Trial court's failure to see that two versions of the incident - lighting of bidi on the one hand and lighting of fire by kerosene/ petrol - were sufficiently contradictory; in any case, the prosecution theory was not supported by its star witness PW-18 (regarding the origin of the fire being by a lit bidi). PW-2's testimony on the Appellant's role was not material, because he sought to improve his version, introducing the theory of pouring of kerosene. The absence of any forensic report, to support the theory of an inflammable liquid being poured and set alight, further weakens the prosecution story.

26. This Court is also of the opinion that the prosecution had an obligation to explain if, and when the report u/s 157 Cr. PC had been sent to the magistrate. This obligation is a positive one, in order to eliminate any suspicion of false implication of an accused in a criminal case, and the authorities have underscored the mandatory character to prove this as a fact. The prosecution's lapse is telling on its case. Equally, this Court notices that the Death report (Ex. PW-19/A); the brief facts and the request for post mortem of the dead body (Ex. PW-19/B and Ex. PW-19/C) are all dated 10-9-1999. The death occurred in the early hours of 09-09-1999, in this case. Yet the prosecution has not furnished any explanation why the post-mortem of the body was sought late.

27. Having regard to the entire conspectus of facts, and the circumstances as they emerge from the above discussion, this Court is of the opinion that the prosecution failed to prove its allegations about the Appellant having committed the offence he was charged with, beyond reasonable doubt. The appeal therefore, has to succeed. The bail and the surety bond are hereby discharged.

The Appeal is allowed in the above terms.