

THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: 11.08.2011

+ **CRL. A.1310/2010**

WAHID AHMEDPetitioner
Through: Mr Siddharth Luthra, Sr. Adv. with Mr Vipin
Bhardwaj, Advocate.

versus

STATERespondent
Through: Ms Richa Kapoor, Addl. Standing Counsel for the
State.

+ **CRL. A.1311/2010**

ZAFAR-UL-ISLAMPetitioner
Through: Mr Sumeet Kaul, Adv.

versus

STATERespondent
Through: Ms Richa Kapoor, Addl. Standing Counsel for the
State.

+ **CRL. A.1245/2010**

MAZAHAR-UL-ISLAMPetitioner
Through: Mr Siddharth Luthra, Sr. Adv. with Mr Riaz Mohd.
Adv.

versus

STATERespondent
Through: Ms Richa Kapoor, Addl. Standing Counsel for the
State.

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE MANMOHAN SINGH

1. Whether Reporters of local papers may be allowed to see the judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in Digest? Yes

MANMOHAN SINGH, J.

1. The present appeals are directed against the judgment dated 09.09.2010 and subsequent order on sentence date 21.09.2010 in Sessions Case No. 38/09 passed by Additional Sessions Judge, North East, Karkardooma Courts, Delhi, whereby the appellants were convicted under section 302/34 IPC and sentenced to rigorous imprisonment for life and to pay a fine of Rs. 2000/- and in default, to undergo simple imprisonment for two months.

2. The factual matrix of the of the prosecution case is that on 11.10.2005, a PCR call vide DD No. 14-A, was received in Police Station Seelampur regarding burning of woman in House No. 1312, Gali No. 42, Jafrabad, Delhi. On the receipt on the said DD, PW-11 S.I. Har Prasad along with PW-8 Constable Surender Kumar, reached at the spot, where they came to know that the injured had been taken to GTB Hospital by a PCR van.

3. PW-11, S.I. Har Prasad left PW-8 Constable Surender Kumar at the spot and he himself went to GTB Hospital and obtained

the MLC of injured Shabana Anjum who had sustained 60-65 % burn injuries. She was declared fit for statement and PW-11 S.I. Har Prasad recorded her statement Ex. PW-11/A, wherein she made the following statement:

“Statement of Smt. Shabana Anjum W/o. Mazhar-ul-Islam Aged about 29 years R/o. House No. 1312, Street No. 42, Jaffrabad, Delhi.

I reside at the aforesaid address. I am a house wife. My marriage was solemnized about eleven years ago. I have two daughters namely Amreen and Baby Riza Anjum @ Honey aged about 9 and 5 years respectively. My husband was harassing me for the last several months and he used to leave the house leaving me alone in the house. On 11.10.2005 at about 3.20 p.m. I was present at my house and my both daughters were playing outside the room in the veranda. My husband and brother-in-law (Jeth) came down from the terrace. Without giving me a chance to take care of myself, my brother-in-law Jafar-ul-Islam poured the kerosene oil on me and my husband lit the match stick and threw the same on me as a result whereof my clothes caught fire. My father-in-law Waheed Ahmad was exhorting to finish me today itself, actual words being “*Aaj Ise Khatam Kar do, Baad me main sab dekh loonga ye aurat aise manne wali nahin hai*”. Both my daughters were also witnessing this incident. These people have set me ablaze with the intention of killing me. Necessary legal action be taken against them. I have heard the statement and the same is correct.

RTI of Shabana Anjum”

4. PW-11, S.I. Har Prasad made an endorsement, Ex.PW-

11/B, on the complaint of Shabana Anjum and got the case registered vide FIR No.615/2005 Ex. PW-9/A, in Police Station Seelampur under section 307 read with 34 IPC. During the investigation S.I. Har Prasad prepared the site plan, Ex. PW-11/C, recorded the statements of witnesses, collected one plastic bottle from the spot and some burnt clothes from the scene of crime and put the same in a parcel of cloth and sealed with the seal of 'GRS' and seized them vide memo Ex.PW-8/A. He arrested the accused Wahid Ahmed and Mazhar-ul-Islam on the same day, that is, 11.10.2005. Thereafter the investigation was handed over to PW-14, S.I. Nitin Kumar.

5. Smt. Shabana Anjum remained admitted in the Hospital for 31 days and was discharged on request on 11.11.2005. The discharge slip is Ex. PW-7/DA, 7/DB and 7/DC. Thereafter, on 05.12.2005 her condition deteriorated and she was again admitted in the hospital, but she succumbed to her burn injuries on the same day. The post-mortem of the dead body was conducted on 06.12.2005 by PW-1, Dr. S. Lal in GTB Hospital and the case was converted into section 302 read with section 34 IPC. As per the post mortem report Ex.PW-1/A, the cause of death was septicemic shock due to superficial to deep ante mortem flame burns. Total area involved 60% of total body surface.

6. After the completion of the investigation, chargesheet was filed against the accused Mazhar-ul-Islam, Wahid Ahmed and Zafar-ul-Islam. Accused Zafar-ul-Islam, who was on interim bail under section 438 Cr. P.C., his anticipatory bail application was rejected by the High Court of Delhi on 13.07.2006 and a supplementary chargesheet was filed against him. Thereafter, on 02.06.2006 charges were framed against all the three accused persons under section 302 read with section 34 of IPC to which all the accused persons pleaded not guilty and claimed trial.

7. The prosecution, in support of its case examined as many as 17 witnesses. The learned ASJ, after examining the testimonies of all the witnesses passed the impugned judgement dated 09.09.2010, wherein it was held that from the statements made by PW-2 Amreen and PW-3 Baby Riza Anjum @ Honey coupled with the statement Ex.PW-11/A made by the deceased Shabana Anjum and the post mortem report Ex.PW-1/A, it is proved that three accused persons namely Mazhar-ul-Islam, Wahid Ahmed and Zafar-ul-Islam, in furtherance of their common intention committed the murder of Shabana Anjum. Thus the three accused persons were convicted under Section 302 read with section 34 IPC. Subsequently, the impugned order on sentence dated 21.09.2010 was passed.

8. The appellants, being aggrieved by the said judgment and order on sentence, have filed the present appeals.

9. The conviction of the appellants, has been challenged, inter alia, mainly on following grounds:

(i) That there are no independent witnesses from nearby houses who had seen the appellants coming from the place of occurrence or who had put out the fire of the deceased or made the PCR call. It has also been pointed out that PW-2 Amreen in her cross-examination stated that her father was in the business of making buttons and the workers assisting her father used to come to the house every day for work except on Eid, but, none of such workers were interrogated or made to join the investigation. This shows that the police had not carried out a fair investigation.

(ii) That the thumb impression present on Ex.PW-11/A is not of the deceased Shabana Anjum, because, as per the MLC Ex. PW-6/A, there were 60-65% burns injuries on the upper part of the body. Further, PW-1, Dr. S. Lal in his cross-examination stated that superficial burns involved the epidermis of skin. When a person tries to

extinguish a fire, his palms and hands are bound to be burnt. Even PW-2 Amreen admitted in her cross-examination that her mother was not able to take food herself as her hands including her palms and fingers were bandaged.

(iii) That the two eyewitnesses, namely, PW-2 Amreen and PW-3 Baby Riza, were tutored by their grandparents (maternal)in as much as since the date of the incident, that is, 11.10.2005, they are in their custody.

(iv) That PW-3 Baby Riza stated that the three accused '*Upar Se Aaye*' that is they came from upstairs, but, according to the site plan there is no room, no stairs but only terrace. But PW-3 Riza did not see any of the accused persons going upstairs, though, as stated by her, she was playing in the veranda.

10. The accused persons in their defense examined three witnesses namely, DW-1 Abdul Rehman, DW-2 accused Waheed Ahmed and DW-3 Mohd. Haroon. DW-1 Abdul Rehman stated that in October 2005 he had gone to the house of his sister where he came to know that the uncle of accused Waheed was admitted in the hospital. At that time Waheed used to reside in Dehradun and on

10.10.2005, he informed Waheed about the illness of his uncle. He further stated that on 11.10.2005 Waheed came to his house at 12:00 noon and thereafter went to the hospital with him. He left Waheed at the hospital and went to his sister's house. On reaching Jafarabad he came to know about the untoward incident at the old residence of Waheed and he telephoned him at 4:00 p.m. Next day he came to know that Waheed had been taken by the police.

11. DW-2 accused Waheed stated that he was a teacher in a Government School and retired from service on 30.06.2003. After the retirement he has moved to his house in Dehradun and on 11.10.2005 he had gone to GTB Hospital to see his uncle, he received a phone call from DW-1 Abdul Rehman that there had been a fire incident in the house of his son Mazhar-ul-Islam. After that he came to his house. After that police took him for interrogation and thereafter, detained him and after producing him before the Duty Magistrate, sent him to judicial custody.

12. DW-3 Mohd. Haroon stated that he works at the medical store of accuse Zafar-ul-Islam and on 11.10.2010 he was present at the said medical store. At about 2:00 p.m. on that day, when he was returning from his house after taking lunch, he saw that the father-in-law of accused Mazhar-ul-Islam along with one lady in burqa and

one person with beard, entered the house of Mazhar-ul-Islam. At that time accused Zafar-ul-Islam was present at his medical store. He further stated that after 15-20 minutes the said persons left the house of Mazhar-ul-Islam and at about 3:00 p.m. the neighbors told that smoke was coming out of the house of Mazhar-ul-Islam. They closed the shop and went to the roof and saw that there was heavy fire in the house.

13. The statements U/s 313 Cr.P.C of all the three accused persons were recorded in which they denied the allegations against them. They have also stated that they are innocent and have been falsely implicated in this case. Accused Mazhar-ul-Islam has stated that it is a false case registered at the instance of his in laws and his wife as he had divorced his wife prior to the incident. He has further stated that his daughters were constantly under the influence of their mother and after her demise, they came under the influence of their maternal grand parents (nana and nani) in general and grand mother (nani) in particular. His eldest daughter Amreen ran away from the custody of her nana and nani on 25th January, 2010 and she took shelter at a place where his father was staying. His father informed the police in this regard and gave custody of Amreen to police. Accused Wahid Ahmed has stated that he did not give any

exhortation (lalkara). At the time of the alleged incident, he was in Dehradun along with his ailing wife. Zafar-ul-Islam was at his shop at the time of alleged incident. He is not on visiting terms with his younger son Mazhar-ul-Islam and vice versa. He had already disowned him. Accused Zafar-ul-Islam has stated that he was not present at the spot. He was at his shop. He, being the *jeth* of the deceased, was entitled to claim the dead body of Shabana Anjum. He further stated that he was not on visiting terms with his brother, Mazhar-ul-Islam.

14. We have heard the learned counsel for the parties and have also gone through the evidence and other material placed on record by the prosecution.

15. The following are the main submissions made by the learned counsel appearing on behalf of the appellants:

1. That the alleged dying declaration, Ex.PW-11/A, cannot be believed as it does not bear thumb impression of deceased Shabana Anjum. The MLC of the deceased, Ex.PW-6/A, also does not bear the thumb impression of the deceased.
2. That PW-2 Amreen and PW-3 Baby Riza Anjum, who are the daughters of deceased and Mazhar-ul-Islam,

appellant in Crl A.1245/2010, are the child witnesses and were tutored by their Nana and Nani. Thus, the statements made by them cannot be believed.

3. That Wahid Ahmed, appellant in Crl A.1310/2010, was not residing in Delhi and was not present at the spot when the alleged incident took place.
4. That Zafar-ul-Islam, the appellant in Crl A.1311/2010 was also not present at the spot as he was in his shop at the relevant time.
5. That IO has not investigated the case properly. He did not record the statements of public witnesses who were present there at the spot and had extinguished the fire on the body of the deceased Shabana Anjum.

16. Let us now discuss the submissions made by the learned counsel for the appellants. As already mentioned, the first submission of the appellants is that the dying declaration cannot be believed as the same does not bear the thumb impression of the deceased Shabana Anjum and the MLC of the deceased also does not bear the thumb impression of the deceased. In support of his submission, the learned counsel for the appellants submitted that PW-6 Dr Rajni Sachan admitted that the palm of the deceased was in

burnt condition. As per record, the investigating officer obtained the thumb impression of deceased Shabana Anjum on the statement, Ex.PW-11/A, which was not possible as her palm was burnt. It is also argued that no certificate was given by the doctor who was present at the time of recording of the statement of the deceased Shabana Anjum about her mental state and fitness and further the said statement was not recorded by any Magistrate. Thus, under these circumstances, the same cannot be believed.

17. The statement, Ex.PW-11/A, was recorded by SI Har Prasad on 11.10.2005 and it bears right thumb impression of deceased Shabana Anjum. At the time of cross-examination of PW-11, no suggestion was given to him that the said statement does not bear the thumb impression of deceased Shabana Anjum. As far as obtaining of certificate from the doctor pertaining to mental state and fitness of the deceased is concerned, the admitted position is that she was brought to the GTB Hospital on the date of incident and she was examined in the hospital at 4:00 p.m. vide MLC Ex. PW-6/A which revealed that she was conscious oriented. The said evidence further shows that the patient was fit for statement. The said MLC was proved by PW-6 Dr. Rajni Sachan, who had stated in the cross-examination that the patient was able to speak well and was fit for

making the statement. No suggestion whatsoever was made by the defence counsel in the cross-examination that the deceased was not fit for statement and was not conscious oriented. It was mentioned in the MLC that “Burnt area chest, abdomen, lower chin, neck, both upper limb, back throat, back abdomen approximately 60% to 65%.” Since it was not specifically mentioned in the MLC that the palm and fingers were burnt, the presumption is that the investigating officer might have taken the thumb impression of the deceased. As there was no suggestion in the cross-examination of PW-6 Dr. Rajni Sachan as well as PW-11 SI Har Prasad that the same does not bear the thumb impression of the deceased Shabana Anjum, therefore, the evidence recorded in the trial court of PW-6 and PW-11 on this aspect cannot be ignored. It is settled law that if there is no cross-examination of a prosecution witness in respect of a statement of fact, it will only show the admission of that fact. Further, MLC indicates that the patient was conscious oriented and was fit for statement when her statement, Ex.PW-11/A, was recorded by PW-11 SI Har Prasad. The testimony of PW-6 remains unchallenged in cross examination, the same has to be believed as it is settled law that whenever a statement of fact made by a witness is not challenged in cross examination, it has to be taken that the fact in question is not

disputed. The other contention of the appellant is also without any force that the statement was not recorded by the Magistrate and therefore the dying declaration must be disbelieved. While it is true that a dying declaration ought to be recorded before a Magistrate, it does not mean that just because it has not so been recorded, the dying declaration, which is otherwise credible, should be discarded.

18. The other argument of the learned counsel for the appellant is that the statement was recorded on 11.10.2005 whereas she died on 5.12.2005 and the said statement cannot be treated as a dying declaration of Shabana Anjum. There is no force in the submission that the statement recorded on 11.10.2005 has no value as we feel that if the victim lives for a longer time than expected at the time of recording of statement, the dying declaration does not lose its value. Even for the sake of argument, if we ignore the dying declaration as referred above, there is direct evidence, i.e., the statements of eye-witnesses PW-2 and PW-3.

19. PW-2 Amreen made her statement on the date of incident as well as before the Court. The substance of her statement before the Court reads as under:

“On 11.10.2005 I and my sister Honey were playing in the verandah of the house. My mother was lying in the house. Then my father, my grandfather and my *Tau ji* came down. My

father and my *Tau ji* entered the room where my mother was lying and my grandfather remained outside the room. On seeing them, my mother got up. My grandfather uttered about my mother, “*Aaj isse khatam kar do. Main baad mein sab dekh loonga.*” Thereafter my Tau Jaffar-ul-Islam threw kerosene oil on my mother. Thereafter my father threw lighted match stick on the body of my mother and as a result whereof the clothes of my mother caught fire. My mother, myself and my younger sister ran out of the house crying. Some people from the street put off the fire of my mother. One of them informed the police telephonically and police came there. My mother, myself and my younger sister were taken to the hospital by the police in a police van. My mother was taken to emergency room of the hospital and myself and my younger sister were made to sit outside.”

20. PW-3 Baby Riza Anjum @ Honey, who is the daughter of the deceased and younger sister of PW-2 Amreen, who was also an eye-witness of the incident, has corroborated the testimony of PW-2 on all the material points and has supported the case of the prosecution.

21. The argument of the learned counsel for the appellants is that PW-2 Amreen and PW-3 Baby Riza Anjum @ Honey are child witnesses who have been tutored and their statements cannot be believed. It has been argued by the learned counsel for the appellants that both the said witnesses PW-2 and PW-3 were tutored by their nana and nani and their statements were recorded in the hospital by

the Investigating Officer. It is submitted by the learned counsel for the appellants that both have deposed falsely at the instance of their nana and nani and PW-3 has even admitted in her cross-examination that earlier she used to obey her mother and now she is obeying her nana and nani.

22. It is pertinent to mention that statements of both the witnesses PW-2 and PW-3 were recorded in the hospital by the Investigating Officer SI Har Prasad before the arrival of nana and nani. We feel that both the witnesses are natural witnesses and nothing has come out in the cross-examination of both the witnesses in order to show that they deposed at the instance of their nana and nani because after the incident, statements of both were recorded in the hospital by the Investigating Officer before the arrival of their nana and nani. Therefore, the question of tutoring at the time of recording the statements does not arise. It is settled law that some discrepancies do creep in when witnesses depose in natural manner and if these discrepancies do not go to the root of the prosecution story, then the same may not be given undue importance. Further, the evidence of a witness has to be considered as a whole and its cumulative effect is to be considered by the Court. Insofar as a child witness is concerned, this Court in a case of **Bindu v. State (NCT) of**

Delhi: 2009 VIII AD (Delhi) 190 held as under:

“As per the provisions of Section 118 of the Evidence Act all persons are competent to testify, unless the court consider that by reason of tender years they are incapable of understanding the questions put to them and of giving rational answers but then it is for the Judge to satisfy himself as regards fulfillment of the requirement of the said provision. A child of tender age can be allowed to testify if he has intellectual capacity to understand questions and give rational answers thereto. The evidence of a child witness cannot be rejected, per se, but the court as a rule of prudence is required to consider such evidence with close scrutiny and if it is convinced about the quality thereto and the reliability of the child witness can record conviction based on his testimony. If after careful scrutiny of child witness’s statement the court comes to the conclusion that there is impressed of truth in it. There is no reason as to why the court should not accept the evidence of child witness.”

23. Thus, we feel that PW-2 Amreen and PW-3 Baby Riza Anjum @ Honey are natural witnesses and are daughters of the deceased and were present in the house at the time of incident as it has come on record. It is also important to understand as to why they would falsely implicate their father, grandfather and their Tau ? The statements of PW-2 and PW-3 further fortify the fact that one day before her death, i.e., 10.10.2005, the deceased wrote a letter Ex.PW-16/A to the Incharge, Police Station Seelam Pur, Delhi-190 053. The extract of the said letter written in Hindi and transliterated in English

reads as under:

“Vinti hai ki main makan no. 1312, Gali No. 42 Jaffrabad Thana, Seelampur Delhi main apne do bacho umar 10 varsh aur 5 varsh sahit rahtin hoon. Uprokt Shri Mazhar Ul Islam se karib 11 varsh poorv muslim riti rivaz ke anusar shaadi hui thi. Jisme mere maa baap ne inki kaafi achi aavbhagat kit hi tatha inko khush rakhne ki ichha se istridhan mein jarurat ki sabhi aadhunik cheezein dahez mein di thin taaki ye loog mujhe khush rakh sakein. Uprokt mere pati ne ghar ke neeche kaaj button ityadi ki machine laga rakhin hain tatha anye kaam bhi karte hain tatha samajik burai bhi karte hain. Shaadi ke kcuh samay baad say hi mere pati ne mujhe sharirik va mansik pida pahuchani shuru kar di thi main tabhi se inke atyachar sahan karti aa rahi hoon. Uprokt mere pati ko meri saas, sasur, jeth, jethani tatha nand tatha jeth ki ladki bhadrakati hai tatha mere sath atyachar karne mein mere pati ki madad karte hain. Inke dabav se tang aakar main apne maa baap se do – teen baar nakad paisa bhi lakar de chuki hoon parantu inki havas badh hi gai hai. Meri do ladkiya hain. Ab uprokt ka kahana hai ki isse ladka paida nahin hoga so mujhe bijlee ke chalet pankhe bina bolt ke neeche bitha lita dete hain taki pankha gire to main mar jaaon. Kabhi mere kapde faad dete hain, mitti ka tel chidakkarak jalane ki koshish karte rahte hain. Sote hue mujhe va mere baccho ko kai kai din bhookha bhi rakhte hai, khane pine ko kuch nahin dete hai, marte peette hain tatha ladka paida na hone ke karan doosri shaadi karna chahte hain. Kehte hain ki isko aisi maut do taki yeh mar bhi jaye aur hum par aanch bhi na aaye. Mera saara zavar va anye kimti saaman bench chuke hain jeth fad dete hain tatha ghar se zabardasti nikal dete hain. Aapse haath jod kar vinti hai ki meri va meri santaa ki jaan va maal ki raksha

*karke uprokt logon ke khilaaf kanooni karavai
karke meri madad ki jaaye taaki mera va mere
bachchon ka bhavishye surakshit rahe. Aapki
mahaan kripa hogi.”*

24. The said letter had been proved by PW-16 ASI Prem Chand who brought the complaint register of Police Station Seelam Pur, in respect of the complaint dated 10.10.2005 made by the deceased with the allegation of physical harassment and criminal intimidation which was received vide DD No.34-B and registered diary No.1192 by the Reader-Office. PW-16 deposed that the said complaint was received by the Record Moharir and relevant entry made at serial No.3 and the same was marked to ASI Giri Raj. The original complaint was also produced before the Court. In the cross-examination, it is stated by PW-16 that he did not know what steps were taken on receiving the complaint Ex.PW-16/A. Although the said complaint Ex.PW-16/A was also against the mother-in-law and Jethani, however, it appears from the complaint that one day before the incident, she had some apprehension about the incident. It is very unfortunate that no steps were taken by the Police on the complaint made by her one day in advance of the date of incident, otherwise, the life of the deceased could have been saved. But one thing is very clear from the said complaint that the same corroborates the statement of the deceased recorded as PW-11/A. Further, the

statements of PW-2 and 3 recorded by the Investigating Officer in the hospital cannot said to be recorded at the instance of nana and nani as their nana and nani were not present at that time and they were not tutored. It is also matter of record that the statements recorded in the hospital about the incident before the Investigating Officer on 11.10.2005 and before the Court in the year 2007 are substantially the same. It is pertinent to mention that in the cross-examination of PW-2, she has made the statement that she remembers that her mother had come to home from the hospital once and she was again admitted in the hospital. She has not denied the fact that her nana and nani had taken her mother to the hospital 2-3 times for dressing. She has admitted that the whole body of her mother was bandaged except her face. She was not able to take her food herself and she also admitted that her palm and fingers were bandaged.

25. PW-2, in her cross-examination, denied the suggestion that when she and her sister had reached the hospital at 5:00 or 5:30 p.m., her nana and nani had come prior to them. Rather she has made the statement that when her mother had reached the hospital, she was in senses and able to talk inspite of her having sustained burn injuries. She has also denied the suggestion that her statement was recorded by the Police after she had been well tutored by nana and

nani in the hospital.

26. The next submission of the learned counsel appearing on behalf of Wahid Ahmed (the appellant in Crl A. No.1310/2010) is that he was not residing in Delhi on the date of occurrence and in fact he had shifted to Dehradun in 2003 after his retirement from his service. He was not present at the spot at the time of alleged incident. Actually he came to Delhi from Dehradun to see his ailing uncle, who was admitted in GTB Hospital and he came to know about the incident at 4 pm. In support of defence, Wahid Ahmed examined himself as DW-2 and Abdul Rehman as DW-1. Both have deposed that at the time of incident Wahid Ahmed, who is the father-in-law of the deceased, was not present at the spot and at the relevant time he was present in GTB Hospital where his uncle was admitted. In fact, he took the plea of alibi.

27. In his statement recorded under Section 313 Cr.P.C. he had stated that at the time of alleged incident, he was present in Dehradun along with his ailing wife. However, in his defence evidence, he has taken different stand that at the time of incident, he was present in GTB Hospital where he had gone to see his ailing uncle. It is the admitted position that he did not examine his wife in support of his plea that he was present in Dehradun along with his

wife nor he examined his uncle, who was admitted in the hospital, to prove that he was with him at the time of incident. He also did not produce any record from the hospital to show that his uncle was admitted in the hospital. The testimony of DW-1 Abdul Rehman, who was supporting his case, had made a statement that he left Waid Ahmed in GTB Hospital at 12:00 noon on the date of incident i.e. 11.10.2005 and went to his sister's house. The incident in the present case took place at about 3:20 p.m. on the said date, so it appeared that DW-1 Abdul Rehman was not with Wahid Ahmed at the relevant time of incident. Therefore, Wahid Ahmed was unable to prove his plea of alibi. It is settled law that the burden of proving a plea of alibi is entirely on accused and strict proof is required for establishing the same. An accused can only succeed if he shows that he was so far away at the relevant time and he could not be present at the place where the crime was committed. Wahid Ahmed has totally failed to discharge the burden of proving the same. Therefore, the submission made on his behalf cannot be accepted.

28. The similar submission made by the Zafar-ul-Islam is that he was not present at the spot at the time of incident. His plea was that he was in his shop at the relevant time. In support of his plea, he has examined DW-3 Mohd. Haroon, who has stated that at the

relevant time, he was with him in medical store situated at 1312/42, Main Road, Jafrabad. Admittedly, DW-3 Mohd. Haroon did not make any statement before the Police in this regard in order to show that Zafar-ul-Islam was at his medical store along with him at the time of incident. We are of the considered view that the testimony of DW-3 Mohd. Haroon is also not reliable and is of no help to the case of Zafar-ul-Islam. Therefore, the contention of the Zafar-ul-Islam in this regard is also rejected.

29. The next submission of the learned counsel for the appellants is that the Investigating Officer had not investigated the case properly and he had not seized the bed, mattress and earth control from the spot and there are various contradictions in the statement of Investigating Officer. He has also not shown in the site plan the place where the alleged empty bottle of kerosene and burnt clothes were lying. It could have been a case of self-immolation. It is also contended that the Investigating Officer did not record the statements of public witnesses who were present at the spot. It is settled law that conviction of the accused can be based even on the testimony of a solitary witness and when the evidence is found to be wholly reliable, the discrepancies, which are not material, can be ignored. In the case of *M.A. Abdulla Kunhi v. State of Kerala: 1991*

SC 452, it has been held that it is not necessary that all the persons, who were witnessing the occurrence, should be examined. The present case is a case where only the eye-witnesses PW-2 and PW-3, who are the daughters of the deceased, were present. Their statements have been found to be creditworthy and reliable and therefore, even the contention raised by the learned counsel for the appellants has no force and it has to be ignored under the said circumstances.

30. Lastly, it has been argued by the learned Senior counsel Mr Siddharth Luthra, appearing on behalf of Zafar-ul-Islam, that the incident took place on 11.10.2005. The deceased Shabana Anjum was in hospital for 31 days and she was discharged from the hospital against the advice of the Doctor on 11.11.2005 and did not take proper medical treatment and she died of cardiac arrest and septicemia and, therefore, Section 302 of IPC is not attracted in the present matter. At the most, the appellants ought to have been convicted under Section 307. Further, if she would have been given a proper medical treatment, she could have survived. Thus, the appellants are entitled for the benefit by converting the conviction from Section 302 to Section 304 IPC. Learned counsel has referred to few decisions in support of his submission:

31. In order to consider the contention of learned counsel for the appellant, it would be fruitful to have a look at the law relating to culpable homicide. The distinction between two types of culpable homicide that is, murder and culpable homicide not amounting to murder has been analysed by the Supreme Court in leading case titled as *State of A.P. v. Rayavarappu Punnayya*: AIR 1977 SC 45. The relevant portion of the judgment is reproduced as under:

“12. In the scheme of the Penal Code, “culpable homicide” is genus and “murder” its specie. All “murder” is “culpable homicide” but not vice-versa. Speaking generally, “culpable homicide” *sans* “special characteristics of murder”, is “culpable homicide not amounting to murder”. For the purpose of fixing punishment, proportionate to the gravity of this generic offence, the Code practically recognises three degrees of culpable homicide. The *first* is, what may be called, “culpable homicide of the first degree”. This is the greatest form of culpable homicide, which is defined in Section 300 as “murder”. The *second* may be termed as “culpable homicide of the second degree”. This is punishable under the first part of Section 304. Then, there is “culpable homicide of the third degree”. This is the lowest type of culpable homicide and the punishment provided for it is, also, the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of Section 304.

13. The academic distinction between

“murder” and “culpable homicide not amounting to murder” has vexed the courts for more than a century. The confusion is caused, if courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minutae abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Sections 299 and 300. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

14. Clause (b) of Section 299 corresponds with clauses (2) and (3) of Section 300. The distinguishing feature of the mens rea requisite under clause (2) is the knowledge possessed by the offender regarding the particular victim being in such a peculiar condition or state of health that the internal harm caused to him is likely to be fatal, notwithstanding the fact that such harm would not in the ordinary way of nature be sufficient to cause death of a person in normal health or condition. It is noteworthy that the “intention to cause death” is not an essential requirement of clause (2). Only the intention of *causing* the *bodily injury* coupled with the offender's *knowledge* of the likelihood of such injury causing the death of the particular victim, is sufficient to bring the killing within the ambit of this clause. This aspect of clause (2) is borne out by Illustration (b) appended to Section 300.

Section 299

Section 300

A person commits *Subject to certain*

culpable homicide if the act by which the death is caused is done —	<i>exceptions</i>	culpable homicide is murder if the act by which the death is caused is done
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INTENTION

(a) With the intention of causing death; or	(1) With the intention of causing death; or
(b) With the intention of causing such bodily injury as is <i>likely</i> to cause death; or	(2) With the intention of causing such bodily injury as the <i>offender knows to be likely</i> to cause the death of the person to whom the harm is caused; or
	(3) With the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is <i>sufficient in the ordinary course of nature</i> to cause death; or

KNOWLEDGE

(c) With the knowledge that the act is <i>likely</i> to cause death	(4) With the knowledge that the act is so <i>imminently dangerous that it must in all probability cause death</i> or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing
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death or such injury as
is mentioned above.

15. Clause (b) of Section 299 does not postulate any such knowledge on the part of the offender. Instances of cases falling under clause (2) of Section 300 can be where the assailant causes death by a fist blow intentionally given *knowing* that the victim is suffering from an enlarged liver, or enlarged spleen or diseased heart and such blow is likely to cause death of that *particular* person as a result of the rupture of the liver, or spleen or the failure of the heart, as the case may be. If the assailant had no such knowledge about the disease or special frailty of the victim, nor an intention to cause death or bodily injury sufficient in the ordinary course of nature to cause death, the offence will not be murder, even if the injury which caused the death, was intentionally given.

16. In clause (3) of Section 300, instead of the words “likely to cause death” occurring in the corresponding clause (b) of Section 299, the words “sufficient in the ordinary course of nature” have been used. Obviously, the distinction lies between a bodily injury *likely* to cause death and a bodily injury *sufficient in the ordinary course* of nature to cause death. The distinction is fine but real, and, if overlooked, may result in miscarriage of justice. The difference between clause (b) of Section 299 and clause (3) of Section 300 is one of the degree of probability of death resulting from the intended bodily injury. To put it more broadly, it is the degree of probability of death which determines whether a culpable homicide is

of the gravest, medium or the lowest degree. The word “likely” in clause (b) of Section 299 conveys the sense of “probable” as distinguished from a mere possibility. The words “bodily injury ... sufficient in the ordinary course of nature to cause death” mean that death will be the “most probable” result of the injury, having regard to the ordinary course of nature.

17. For cases to fall within clause (3), it is not necessary that the offender intended to cause death, so long as the death ensues from the intentional bodily injury or injuries sufficient to cause death in the ordinary course of nature. *Rajwant v. State of Kerala* is an apt illustration of this point.

18. In *Virsa Singh v. State of Punjab* Vivian Bose, J. speaking for this Court, explained the meaning and scope of clause (3), thus (at p. 1500):

The prosecution must prove the following facts before it can bring a case under Section 300, ‘thirdly’. First, it must establish quite objectively, that a bodily injury is present; secondly the nature of the injury must be proved. These are purely objective investigations. It must be proved that there was an intention to inflict that particular injury, that is to say, that it was not accidental or unintentional or that some other kind of injury was intended. Once these three elements are proved to be present, the enquiry proceeds further, and fourthly it must be proved that the injury of the type just described made up of the three elements set out above was sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with

the intention of the offender.

19. Thus according to the rule laid down in *Virsa Singh case* of even if the intention of accused was limited to the infliction of a bodily injury sufficient to cause death in the ordinary course of nature, and did not extend to the intention of causing death, the offence would be “murder”. Illustration (c) appended to Section 300 clearly brings out this point.

20. Clause (c) of Section 299 and clause (4) of Section 300 both require knowledge of the probability of the act causing death. It is not necessary for the purpose of this case to dilate much on the distinction between these corresponding clauses. It will be sufficient to say that clause (4) of Section 300 would be applicable where the knowledge of the offender as to the probability of death of a person or persons in general — as distinguished from a particular person or persons — being caused from his imminently dangerous act, approximates to a practical certainty. Such knowledge on the part of the offender must be of the highest degree of probability, the act having been committed by the offender without any excuse for incurring the risk of causing death or such injury as aforesaid.

21. From the above conspectus, it emerges that whenever a court is confronted with the question whether the offence is “murder” or “culpable homicide not amounting to murder”, on the facts of a case, it will be convenient for it to approach the problem in three stages. The question to be considered at the first stage would be, whether the accused has done an act by doing which he

has caused the death of another. Proof of such causal connection between the act of the accused and the death, leads to the second stage for considering whether that act of the accused amounts to “culpable homicide” as defined in Section 299. If the answer to this question is prima facie found in the affirmative, the stage for considering the operation of Section 300 of the Penal Code, is reached. This is the stage at which the court should determine whether the facts proved by the prosecution bring the case within the ambit of any of the four clauses of the definition of “murder” contained in Section 300. If the answer to this question is in the negative the offence would be “culpable homicide not amounting to murder”, punishable under the *first* or the *second* part of Section 304, depending, respectively, on whether the second or the third clause of Section 299 is applicable. If this question is found in the positive, but the case comes within any of the exceptions enumerated in Section 300, the offence would still be “culpable homicide not amounting to murder”, punishable under the first part of Section 304, of the Penal Code.”

Thus according to the law laid down in *Virsa Singh’s* case (supra) even if the intention of accused was limited to the infliction of a bodily injury sufficient to cause death in the ordinary course of nature and did not extend to the intention of causing death, the offence would be murder. Illustration (c) appended to Section 300 clearly brings out this point.

32. We have considered the decisions referred to by the appellants carefully and we are of the considered view that the material facts in each of the cases are different than the present case. In the present case, PW-2 in her cross-examination has clearly deposed that she remembered that her mother had come to home from the hospital once and thereafter she had been admitted in the hospital. Her nana and nani had taken her to the hospital 2-3 times. The whole body of her mother was bandaged except her face when she had seen her mother when she came home at her nana's house. Her mother was not able to take her food herself in her nana's house as her hand including palm and fingers were bandaged and also she was not in a position to move her hands.

We have also examined the statement of PW-6 Dr Rajni Sachan. From the said statement, there is a conclusion without any doubt that the doctor, who had conducted the post-mortem examination, clearly came to the conclusion that the injury was a superficial to deep partially healed flame infected burn present over neck, front of chest, abdomen over upper aspect, both upper limbs completely, front of right thigh and back of chest and abdomen completely. Total area involved approximate 60% of total surface area. Yellowish, green slough present over burns at places and the

cause of death was opined to be septicemic shock due to superficial to deep ante-mortem flame burns.

33. Admittedly at the time of admission, burnt area chest, abdomen, lower chin, neck, both upper limb, back throat, back abdomen was approximately 60% to 65%.

34. It appears from the record that the deceased was discharged on 11.11.2005 at the request of mother of the deceased. The discharge slip is Ex.PW-7/DA. At the time of discharge, the statement Ex.PW-7/DB of the mother of the deceased was recorded which is signed by her and she has stated that she has been informed that the patient was in critical condition and there was likelihood of risk to her life. The thumb impression of her mother was also taken on Ex.PW-7/B.

35. Even otherwise, we are of the considered view that the injuries, as referred above, were sufficient in the ordinary course of nature to cause death. From the medical record available on record, it appears to us that she survived for a longer time than expected and she otherwise could not have survived even if she would have remained in hospital.

36. In similar circumstances, a Division Bench of Karnataka High Court has given its finding in the case of Noorsab alias Noor

Ahmed v. State of Karnataka: 2001 Cri.L.J. 425 (Kant) (DB)

wherein the victim wife was set on fire by the husband, sustained 80% burn injuries and she got discharged from hospital against medical advice and on her re-admission in the hospital she succumbed to her injuries, the doctor who besides conducting post-mortem examination had also treated the deceased at first instance and after re-admission, opined that deceased died on account of burn injuries sustained by her, the accused was found guilty under Section 302, not under Section 304 IPC.

37. Considering the overall circumstances of the matter, we are unable to accept the submissions of the learned counsel for all the appellants. We are of the view that the statements of PW-2 Amreen & PW-3 Baby Riza Anjum @ Honey are consistent and corroborative and nothing has come out in their cross-examinations which could help the case of the accused/appellants. Therefore, they have to be considered as trustworthy and reliable witnesses and question of disbelieving them does not arise. From the statement, Ex.PW-11/A, of the deceased and the post-mortem report Ex.PW-1/A, it is proved that the incident took place on 11.10.2005 as alleged by the prosecution and jeth (brother-in-law) of the deceased threw kerosene oil on the deceased and husband of the deceased threw lighted match

stick on her body and at the door, Wahid Ahmed, father-in-law of the deceased, exhorted “Aaj Ise Khatam Kar Do, Baad Mein Main Sab Dekh Loonga”. The said utterance was confirmed by eye-witness PW-2. Therefore, it is established, without any doubt, that all the three accused, in furtherance of their common intention, committed the murder of Shabana Anjum. There is hardly any ground to interfere with the judgment dated 09.09.2010 and the order on sentence dated 21.09.2010. The appellants are, therefore, not entitled for the benefit of conversion of conviction from Section 302 to Section 304 IPC.

38. The appeals are, therefore, dismissed.

MANMOHAN SINGH, J

BADAR DURREZ AHMED, J

AUGUST 11, 2011

dp/jk