

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11.01.2016

CORAM:

THE HONOURABLE MR.JUSTICE A.SELVAM

Criminal Appeal No.486 of 2015

Moorthy

... Appellant/Accused

vs.

State Rep. By

The Inspector of Police,
Perambur Police Station
Nagapattinam District
(Crime 461/2011)

... Respondent/Complainant

Criminal Appeal filed under Section 374(2) of Cr.P.C., against the judgment made in S.C.No.69 of 2013 dated 12.6.2015 on the file of the Sessions Judge, Fast Track Mahila Court, Nagapattinam.

For appellant : Mr.K.V.Sridharan

For Respondent : Mr.P.Govindarajan,
Additional Public Prosecutor.

JUDGMENT

The conviction and sentence dated 12th day of June, 2015 passed in Sessions Case No.69 of 2013 by the District and Sessions Court, (Fast Track Magalir Court), Nagapattinam are being challenged in the present Criminal Appeal.

2. The case of the prosecution is that the accused is the husband of the deceased by name Sudha and their marriage has been performed prior to four years. After some time from the date of marriage, the accused has started to attack the deceased frequently by way of demanding money. On 22.7.2011, at about 10 p.m., while the deceased has been sleeping, the accused has asked her to go to her parents' house and get money for presenting a Gold ring to the son of his sister on the eve of his marriage. Since the deceased has refused to concede the demand of the accused, he doused Kerosene on her person and set fire and subsequently admitted in Government Hospital, Mayiladuthurai. The deceased has given a statement and the same has been registered in Crime No.461 of 2011.

3. On receipt of the statement alleged to have been given by the deceased, the Investigating Officer, viz., P.W.15, has taken up investigation, examined connected witnesses. On 12.10.2011, at about 4.30 p.m., the deceased has passed away and subsequently, sections of law have been altered and P.W.15 has taken up further investigation and made arrangements for conducting autopsy on the body of the deceased and accordingly Dr.Vennila (P.W.11) has conducted Post Mortem and she found the following external and internal injuries:-

"Ext. Appearances:

Old burs with yellowish slough seen in the neck, upper limbs both front & back, chest front and back, upper abdomen front and back with partially healed lesions in lower abdomen and both upper limbs. External genitalia normal. Foley catheter with urobag seen at the urethra.

Int.Appearances:

Head-skull bones intact, Brain -appears pale. No intracranial hge. Neck-Hyoid bone and thyroid cartilage intact. No carbon particles seen in larynx and trachea. Chest Ribs and pleura intact. Both lungs pale. Heart-pale, chambers empty. Great vessels empty. Abdomen - all organs in site. Peritoneal cavity and its coverings intact. Stomach pale, contains 100 ml of green coloured fluid. Small intestine pale and distended with gas. Liver, spleen, kidney pale. Uterus pale, normal in size and cavity empty. Both spine and long bones intact.

The Post Mortem Certificate has been marked as Ex.P.14. After completing investigation, the Investigating Officer (P.W.16) has laid a final report on the file of Judicial Magistrate Court NO.2, Mayiladuthurai and the same has been taken on file in P.R.C.No.2 of 2012.

4. The Judicial Magistrate No.2, Mayiladuthurai after considering the facts that the offence alleged to have been committed by the accused is triable by Sessions Court, has committed the case to the court of Sessions, Nagapattinam Division and the same has been taken on file in Sessions Case No.69 of 2013 and subsequently made over to the trial court.

5. The trial court, after hearing arguments of both sides and upon perusing relevant records has framed first charge against the accused under Section 302 of the IPC and second charge against him under section 4-A(1) of Tamil Nadu Prohibition of Harassment of Women Act, 1998 and the same have

been read over and explained to him. The accused has denied the charges and claimed to be tried.

6. On the side of the prosecution, P.Ws.1 to 16 have been examined and Exhibits P.1 to 18 and Material Objects 1 to 4 have been marked.

7. When the accused has been questioned under Section 313 of the Criminal Procedure Code, as respects the incriminating materials available in evidence against him, he denied his complicity in the crime. On the side of the accused, D.W.1 has been examined and Ex.D.1 has been marked.

8. The trial court, after hearing arguments of both sides and upon perusing relevant evidence available on record, has found the accused guilty under Section 304 Part 1 of Indian Penal Code and sentenced him to undergo 5 years Rigorous Imprisonment and also imposed a fine of Rs.5,000/- with usual default clause. Against the conviction and sentence passed by the trial court, the present Criminal Appeal has been filed at the instance of the accused as appellant.

9. The consistent case put forth on the side of the prosecution is that prior to four years from the date of occurrence, the accused has married the deceased Sudha and both of them for a short span have lived happily and subsequently the accused has started to attack her by way of demanding money. On 22.7.2011, at about 10 p.m., the accused has directed the deceased to get money from her parents' house for the purpose of purchasing a Gold ring so as to present the same to the son of his sister on the eve of his marriage and since the deceased has refused to concede the demand made by him, he doused Kerosene on her person and subsequently set fire on her and thereafter she has been admitted in Government Hospital, Mayiladuthurai and on 12.10.2011, she passed away.

10. The prosecution has set the law in motion only on the basis of statement alleged to have been given by the deceased to P.W.9. The said statement has been registered in Crime No.461 of 2011 and the same has been marked as Ex.P.7, wherein it has been clearly stated about the overtacts alleged to have been committed by the accused. Apart from Ex.P.7, on the same day, the concerned Magistrate after asserting the mental condition of the deceased, has recorded a Dying Declaration and the same has been marked as Ex.P.5. On the basis of Exs.P.7 and P.5, the trial court has invited conviction and sentence against the appellant/accused under section 304 Part-1 of IPC.

11. The learned counsel appearing for the appellant/accused has contended that in the instant case, the specific evidence given by the mother of P.W.1 is that the deceased has made oral

Dying Declaration to her by way of saying that she attempted to commit suicide. The specific evidence of P.W.2, elder brother of the deceased is that only due to accidental fire, the deceased has sustained injuries. The specific evidence given by P.W.10, the Doctor, who admitted her in Government Hospital is to the effect that it is reported that only due to accidental fire, the deceased has sustained injuries and since on the side of the prosecution, three different versions are available with regard to cause of injuries sustained by the deceased, the prosecution is not certain enough as to how the occurrence has taken place and the trial court, without considering the nature of evidence given by the witnesses mentioned supra and also without considering the fact that only after tutoring, the deceased has given Exs.P.5 and P.7, has invited conviction and sentence and therefore, the conviction and sentence passed by the trial court are liable to be set aside.

12. The learned Additional Public Prosecutor has sparingly contended that P.W.2 has clearly stated in his chief-examination to the effect that after occurrence, he met the deceased and she told that the occurrence has taken place only due to the accused and after some time, he has been recalled and cross-examined and given evidence, which has not been stated in his statement recorded under section 161 Clause 3 of Code of Criminal Procedure, 1973 and in fact, only on the basis of statement given by the deceased, a case has been registered against the accused under section 307 of IPC and on the same day, the deceased has given a Dying Declaration and the trial court, after considering the evidentiary value of Ex.P.5 and Ex.P.7 has rightly invited conviction and sentence against the appellant/accused under section 304 Part I of IPC and therefore, the conviction and sentence passed by the trial court are not liable to be set aside.

13. As stated earlier, the prosecution has set the law in motion only on the basis of Ex.P.7, statement alleged to have been given by the deceased. In Ex.P.7, it has been clinchingly stated to the effect that in the place of occurrence, the accused has poured Kerosene on the person of the deceased and set fire on her. On the same day, Ex.P.5, Dying Declaration has come into existence, wherein also it has been clearly stated about the specific overtacts alleged to have been committed by the accused. Since Ex.P.7 is a statement alleged to have been given by the deceased, wherein it has been clearly stated about the cause of injuries and subsequently, the deponent of Ex.P.7 has passed away, as per section 32(1) of the Indian Evidence Act, 1872, Ex.P.7 itself can be treated as a Dying Declaration and no corroborative evidence is required. Even though Ex.P.7 can be treated as Dying Declaration as per section mentioned supra, on the side of the prosecution, Ex.P.5 Dying Declaration is also available, wherein it has been clearly stated that in

the place of occurrence, the accused has poured Kerosene on the person of the deceased and set fire on her. Considering the fact that Ex.P.5 and Ex.P.7 are having more evidentiary value as per the section mentioned supra, the same can be a sole basis for inviting conviction and sentence against the appellant/accused.

14. The entire argument put forth on the side of the appellant/accused is based upon the evidence given by P.Ws.1 and 2 and 10. As rightly pointed out on the side of the prosecution, P.W.2 has been initially examined on 25.1.2014, wherein he has clearly stated to the effect that the deceased has reported him that her husband has poured Kerosene and set fire on her. After lapse of 6 days, he has been recalled and cross-examined, wherein he has stated that he and one advocate and others have gone to Hospital, where the deceased has stated that only due to accidental fire, she sustained injuries and only for the purpose of getting compensation from the Government as per advice given by the said advocate, she stated to the effect that the accused has poured Kerosene and set fire on her.

15. Considering the fact that during the course of chief-examination, he has not stated anything about the facts found in his evidence recorded on 26.5.2014, the Court can very well eschew the evidence given by him in cross-examination, which has been done on 26.5.2014.

16. It is true that in the Accident Register, it has been simply stated that only due to accidental fire, the accused has sustained injuries. In fact, this Court has closely perused Ex.P.13, Accident Register, wherein it has not been specifically stated that the said statement has been recorded from the deceased (then injured). Therefore, the court cannot come to a conclusion that different type of versions are available in the case of the prosecution.

17. The learned counsel appearing for the appellant/accused has drawn the attention of the Court to the decision reported in (2014) 3 SCC (Cri) 216 (Umakant and another vs. State of Chhattisgarh), wherein at paragraph No.22, the Hon'ble Supreme Court has deduced the following circumstances under which a Dying Declaration can be relied upon or rejected:

"(i) Dying declaration can be the sole basis of conviction if it inspires the full confidence of the court.

(ii) The court should be satisfied that the deceased was in a fit state of mind at the time of making the statement and that it was not the result of tutoring, prompting or imagination.

(iii) Where the court is satisfied that the declaration is true and voluntarily, it can base its conviction without any further corroboration.

(iv) It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence.

(v) Where the dying declaration is suspicious, it should not be acted upon without corroborative evidence.

(vi) A dying declaration which suffers from infirmity, such as the deceased was unconscious and could never make any statement cannot form the basis of conviction.

(vii) Merely because a dying declaration does not contain all the details as to the occurrence, it is not to be rejected.

(viii) Even if it is a brief statement, it is not to be discarded.

(ix) When the eyewitness affirms that the deceased was not in a fit and conscious state to make the dying declaration, medical opinion cannot prevail.

(x) If after careful scrutiny, the court is satisfied that it is true and free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal impediment to make it the basis of conviction, even if there is no corroboration."

18. Further, in paragraph No.24, it is observed that sufficient materials are available for the purpose of showing that the deceased (then injured) has been tutored for the purpose of giving a Dying Declaration and therefore, the same cannot be relied upon.

19. In the instant case, as pointed out earlier, Ex.P.7 statement has been given only by the deceased (then injured), wherein it has been clearly stated about the specific overtacts alleged to have been committed by the accused on the person of the deceased. On the same day, Ex.P.5 Dying Declaration has come into existence, wherein identical version has been made against the accused. In fact, absolutely there is no evidence for the purpose of showing that the then injured (deceased) has been tutored to give Dying Declaration as against the deceased. It has already been pointed out that evidence given by P.W.2 during the course of cross-examination is liable to be eschewed and the same cannot be a basis for coming to a conclusion that the then injured (deceased) has been tutored to give Dying Declaration. Therefore, the factual aspects of the present case are alien of the facts found in the decision referred to

earlier. Under the said circumstances, the observation made by the Hon'ble Apex Court for disbelieving the Dying Declaration mentioned therein, cannot be applied in the present case. It has already been pointed out that Ex.P.7 itself can very well be treated as Dying Declaration as per section 32(1) of the Indian Evidence Act, 1872. Apart from Ex.P.7, Ex.P.5 Dying Declaration is also available. In both Exhibits, the specific overtacts of the appellant/accused have been clinchingly mentioned. Since Ex.P.5 and Ex.P.7 are nothing but genuine Dying Declarations, the same can be a sole basis for inviting conviction and sentence against the appellant/accused. Therefore, in the light of the discussions made earlier, this Court has not found any acceptable force in the contentions put forth on the side of the appellant/accused.

20. The trial court, after considering the available evidence on record has rightly invited conviction and sentence against the appellant/accused and altogether the present Criminal Appeal deserves to be dismissed.

In fine, this Criminal Appeal is dismissed. The conviction and sentence passed against the appellant/accused in S.C.No.69 of 2013 by the trial court are confirmed.

Sd/-

Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

ajr

To :

1. The Sessions Judge, Fast Track Mahila Court, Nagapattinam.
2. The Inspector of Police, Perambur Police Station
Nagapattinam District
3. The Superintendent Central Prison, Cuddalore.
4. The District Collector/District Magistrate Cuddalore.
5. The Public Prosecutor, High Court, Chennai

+ 1 cc to Mr.K.V. Sridharan, Advocate Sr.2012

Cr1.A.No.486 of 2015

EV(CO)

EU 27.1.16