

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18.02.2016

CORAM

THE HON'BLE MR.JUSTICE S.NAGAMUTHU
AND
THE HON'BLE MR.JUSTICE M.SATHYANARAYANAN

CRIMINAL APPEAL No. 237 of 2013

T.Jayapal

.. Appellant

Vs.

The State represented by
The Inspector of Police
Kelamangalam Police Station
Krishnagiri District.
Crime No.179 of 2009

.. Respondent

This Criminal Appeal is preferred under Section 374(2) of Cr.P.C against the judgment of conviction and sentence imposed on the appellant by the learned Additional Sessions Judge, Krishnagiri District, in S.C.No. 44 of 2010, dated 16.04.2012.

For Appellant : Mr.R.Sankarasubbu

For Respondent : Mr.M.Maharaja
Additional Public Prosecutor

J U D G M E N T

(The judgment of the Court was delivered by S.NAGAMUTHU, J.)

The appellant is the sole accused in S.C.No.44 of 2010 on the file of the learned Additional Sessions Judge, Krishnagiri. The accused stood charged for offence under Section 302 IPC. By judgment, dated 16.04.2012, the Trial Court convicted the appellant under Section 302 IPC and sentenced him to undergo imprisonment for life and to pay a fine of Rs.10,000/-, in default, to undergo rigorous imprisonment for five months. Challenging the said judgment of conviction and sentence, dated 16.04.2012, the appellant/accused is before this Court with this appeal.

2. The case of the prosecution in brief is as follows :- (i) P.W.4-Thimmarayappa is the father of the accused. The deceased in this case was one Rajammal. The deceased was the sister of P.W.4. The deceased owned some properties. The accused had grudge over the deceased, because, she was not willing to give the said properties to him. This is stated to be the motive for the occurrence.

(ii) It is alleged that on 11.10.2009, at about 12.30 p.m., when the deceased was passing through the back side of the house of one Sakamma (P.W.2), near Konekhanpalli lake bund, the accused suddenly emerged at the said place. He intercepted the deceased and attempted to strangle her with a ligature. Thereafter, the accused poured petrol on her body and set fire. The deceased was immediately taken to the Government Hospital at Hosur, at 3.50 p.m. P.W.12-Dr.Mahesh examined the deceased and he found extensive burn injuries on the body of the deceased. Ex.P.17 is the Case Sheet showing the treatment given to the deceased. P.W.12-Dr.Mahesh gave intimation to the learned Magistrate, for recording dying declaration. P.W.11-Mrs.Meenachandra, the then Judicial Magistrate No.II, Hosur, rushed to the hospital at 6.15 p.m. P.W.12-Dr.Mahesh gave opinion that the deceased was conscious. Then, the learned Judicial Magistrate No.II, Hosur, recorded the dying declaration of the deceased, in which, the deceased told that the accused initially strangled her by means of a ligature and then, sprinkled diesel on her and set fire.

(iii) On receiving intimation from the hospital, P.W.14-Mr.K.Radhakrishnan, the then Inspector of Police, Kelamangalam Police Station, received a complaint from P.W.1-Krishnappa on 11.10.2009 at 4.00 p.m. and registered a case in Crime No.179 of 2009 for the offence under Section 307 IPC against the accused. Ex.P.21 is the First Information Report. He proceeded to the place of occurrence and prepared an Observation Mahazar (Ex.P.22) and he also prepared a Rough Sketch (Ex.P.23) showing the place of occurrence in the presence of P.W.6-Mallesh and another witness. On the same day, P.W.14 arrested the accused near the bus stop Baleganapalli in the presence of P.W.7-Ramasamy, the then Village Administrative Officer, and another witness. On such arrest, the accused gave a voluntary confession, in which, he disclosed the place, where he had hidden the ligature and a pepsi bottle. In pursuance of the same, the accused took the police and witnesses to the said place and produced M.O.1 and M.O.2. P.W.14 recovered M.O.1-a pepsi bottle and M.O.2-ligature under Ex.P.4 mahazar in the presence of the witnesses. On returning to the Police Station, he forwarded the accused to the Court and handed over the Material Objects also to the Court.

(iv) For further treatment, the deceased was taken to Bangalore and admitted in the Victoria Hospital at Bangalore. P.W.13-Mr.Vajjiram, the then Inspector of Police of Denkanikottai Police Station, was incharge of Kelamangalam Police Station on 13.10.2009. He received Ex.P.18-death intimation from the Victoria Hospital, Bangalore, to the effect that on 13.10.2009, at about 6.00 a.m., the victim Rajammal, who was taking treatment in the hospital died. Therefore, he altered the offence into one under Section 302 IPC and forwarded the Alteration Report under Ex.P.19 to the Magistrate Court.

(v) The dead body of the deceased was brought back to the Government Hospital at Hosur. Thereafter, P.W.14-Radhakrishnan, the then Inspector of Police, conducted inquest on the body of the deceased and forwarded the dead body for postmortem. P.W.8-Dr.Senthil conducted autopsy on the body of the deceased on 14.10.2009, at 12.00 noon, and he found the following injuries on the body of the deceased :-

"External Injuries:- 2nd degree burns with scar over the face, neck, front of chest and abdomen, both upperlimbs, back of trunk and both thighs.

Internal Examination:-

- (1) Hyoid preserved.
- (2) Ribs intact.
- (3) Heart 200 grams of clotted blood in chambers.
- (4) Lungs (L) 350 grams (R) 375 grams c/s.congested.
- (5) Liver 1100 grams c/s.congested.
- (6) Stomach empty.
- (7) Kidneys 80 gms back c/s.congested.
- (8) Spleen 90 grams c/s.congested.
- (9) Bladder empty.
- (10) Uterus & Ovaries Normal.
- (11) Skull Intact.
- (12) Membranes Intact.
- (13) Brain 1100 grams petechial haemorrhage present.
- (14) Base of skull intact."

Ex.P.6 is the Postmortem Certificate. The doctor gave opinion that the deceased would appear to have died due to the burn injuries. The extent of the burn injuries was assessed at 80%.

(vi) On completing the investigation, P.W.14, the then Inspector of Police, laid the chargesheet against the accused.

(vii) Based on the above materials, the Trial Court framed charges as detailed in the paragraph No.1 of this judgment. All the accused denied the same as false. During the trial, in order to prove the case of the prosecution, on the side of the prosecution as many as 14 witnesses were examined and 24 documents and 3 material objects were marked. Out of the said witnesses, P.Ws. 1 to 6 turned hostile and they have not stated anything incriminating the accused. P.W.7, the then Village Administrative Officer, has spoken about the arrest of the accused and the consequential recovery of the ligature and the pepsi bottle. P.W.8-Dr.Senthil has spoken about the postmortem conducted by him and his final opinion regarding the cause of death. P.W.11, the then Judicial Magistrate No.II, Hosur, has spoken about the judicial dying declaration recorded by her at the hospital, wherein, the deceased had told that it was this deceased, who attempted to strangle her and then poured diesel on her and set fire. P.W.12-Dr.Mahesh has spoken about the admission of the deceased at the hospital (he has not stated anything about the condition of the patient at the time when the dying declaration was recorded). P.W.13-Mr.Vajjiram, the then

Inspector of Police, has spoken about the alteration of the case into one under Section 302 IPC. P.W.14-Mr.Radhakrishnan, the then Inspector of Police, has spoken about the investigation done and final report filed.

(viii) When the accused was questioned under Section 313 Cr.P.C. as to the incriminating circumstances found in the evidence of prosecution witnesses, he denied the same as false. But, he has not chosen to examine any witness nor to mark any document. His defence was a total denial. Having considered all the above, the Trial Court found the appellant/accused guilty and convicted them accordingly. That is how, the appellant/accused is now before this Court with this appeal.

3. We have heard Mr.R.Sankarasubbu, the learned counsel appearing for the appellant and Mr.M.Maharaja, the learned Additional Public Prosecutor appearing for the State and also we have perused the records carefully.

4. As we have already pointed out, almost all the vital witnesses, who were expected to support the case of the prosecution, have turned hostile. Thus, the prosecution has been left only with the judicial dying declaration recorded by P.W.11, the then Judicial Magistrate No.II, Hosur, under Ex.P.16.

5. The learned counsel for the appellant would submit that Ex.16-dying declaration needs to be rejected, because, the learned Magistrate has failed to ascertain the mental fitness of the deceased before recording the said dying declaration (Ex.P.16).

6. The learned Additional Public Prosecutor would submit that the dying declaration (Ex.P.16) carries the certificate of the doctor to the effect that the deceased was conscious and thus, there is no reason to reject the said dying declaration (Ex.P.16).

7. We have considered the above submissions. It is settled law that a dying declaration, more particularly, a judicial dying declaration can be the sole foundation for conviction provided it carries no doubt. A Constitution Bench of the Hon'ble Apex Court in the judgment reported in (2002) 6 Supreme Court Cases 710, Laxman vs. State of Maharashtra, has held that the Magistrate, being a disinterested witness, and a responsible officer and there being no circumstances or material to suspect that the Magistrate had any animus against the accused or in any way interested in fabricating a dying declaration, the question of doubt on the dying declaration recorded by the Magistrate does not arise. But, at the same time, it is essentially required that the learned Magistrate, who records a dying declaration, must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the learned Magistrate that the declarant was fit to make the statement, even without examination by the Doctor, the declaration can be acted upon, provided the Court ultimately holds the same to be voluntary and truthful. A certification by the doctor is

essentially a rule of caution and therefore, the voluntary and truthful nature of the declaration can be established otherwise.

8. Keeping in mind the above settled position of law, if we look into Ex.P.16-dying declaration, and the evidence of P.W.11, the then Judicial Magistrate No.II, Hosur, it is crystal clear that the learned Magistrate had not recorded that the deceased was in a fit state of mind to make such a dying declaration. Of course, it is true that Ex.P.16-dying declaration carries the certificate of the doctor to the effect that the deceased was conscious, but, the said doctor, who has been examined as P.W.12, in his oral evidence has not stated anything about the same. Therefore, the opinion of the doctor, which is found in Ex.P.16-dying declaration, stands not proved. Assuming that the certificate of the doctor to the effect that the deceased was conscious carries weightage that would not automatically go to prove the mental fitness of the deceased to make a dying declaration. As has been held by the Hon'ble Apex Court in the decision cited supra, it is the paramount duty of the learned Magistrate to assess to his subjective satisfaction that the deceased was in a fit state of mind to make a dying declaration. As has been further held by the Hon'ble Apex Court, a certificate by the doctor is essentially a rule of caution and therefore, the voluntary and truthful nature of the declaration can be established even in the absence of such a certificate from a doctor. In otherwords, the certificate given by the doctor is only, one of the inputs to the learned Magistrate to make an assessment of the mental fitness of the deceased. In the instant case, the learned Magistrate had asked only three questions to the deceased. The questions asked by the Magistrate and the answers elicited from the deceased are also as follows:-

i. Q: Do you know that I am the Judicial Magistrate No.II, Hosur ?

Ans: Yes, I know.

ii.Q: What is your name ?

Ans: Rajammal.

iii. How did you sustain the injury and at whose hands ?

9. Obviously, questions 1 and 2 were for the purpose of ascertaining the mental fitness of the deceased. In our considered view, the learned Magistrate had not bestowed his best efforts, which are required in law, in discharge of his judicial function, to ascertain the mental fitness of the deceased. These two questions asked in a mechanical fashion would not be sufficient to assess the mental fitness of the deceased. Having elicited answers from the deceased, the learned Magistrate has not even made any assessment of the mental fitness of the deceased.

10.A close reading of Ex.P.16-dying declaration would go to show that the learned Magistrate, no where has stated that the deceased was in a fit state of mind to make a dying declaration. In her oral evidence also, the learned Magistrate has not stated that in her assessment, the deceased was in a fit state of mind to make a dying declaration. As we have already pointed out, except the

endorsement of the doctor in Ex.P.16, which stands not proved, there is nothing in Ex.P.16-dying declaration or in the oral evidence of the learned Magistrate that the deceased was in a fit state of mind to make a dying declaration. Thus, Ex.P.16-dying declaration cannot be held to be a voluntary and truthful dying declaration of the deceased. There is also no other corroboration to the said dying declaration from any other independent source.

11. In view of the said position, it is not safe to sustain the conviction based on the above dying declaration alone. We hold that the prosecution has failed to prove the case beyond reasonable doubts.

12. In the result,

- i.the appeal is allowed, the conviction and sentence imposed on the appellant by the Trial Court is set aside and the appellant is acquitted;
- ii.The appellant is directed to be set at liberty unless his detention is required in connection with any other case.
- iii.Fine amount, if any, paid by the appellant shall be refunded to him.
- iv.The bail bond, if any executed by the appellant/accused, shall stand discharged.

Sd/-

Asst.Registrar (CS II)

/true copy/

Sub Asst. Registrar

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To

- 1.The Inspector of Police,
Kelamangalam Police Station,
Krishnagiri District.
- 2.The Additional Sessions Judge,
Krishnagiri.
- 3.The Additional Public Prosecutor,
High Court,
Chennai.

4. The Superintendent of Prison
Central prison,
Vellore

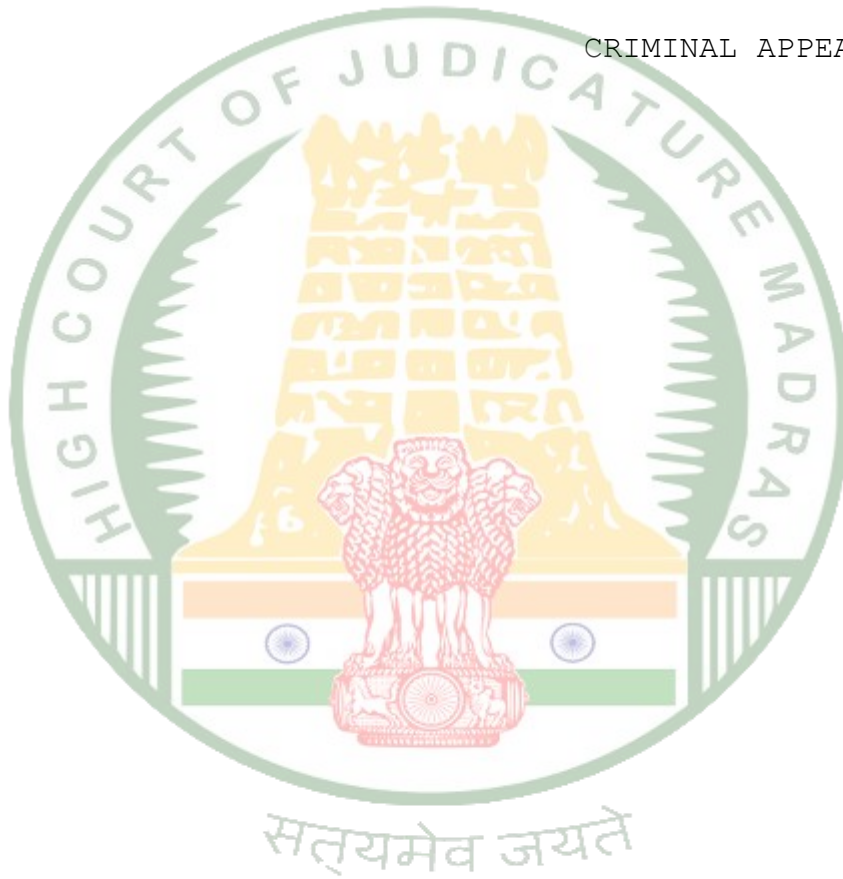
5. The District Munsif cum Judicial Magistrate
Denkanikottai

6. The Section Officer
Criminal Section,
High Court, Madras

1 cc to M/s.R. Sankarasubbu, Advocate, Sr. 10402

CRIMINAL APPEAL No.237 of 2013

MP (CO)
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