

BAIL SLIP

The accused Viz; Lingesan @ Lingeswaran (Accused-1) and R.Kaliappa Giramani (Accused-2) were released on bail as per order of this Court 30.10.2012 and made in MP.No.1 & 2 in CrI.A.No.733/2012

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02.03.2016

CORAM

THE HONOURABLE MR. JUSTICE M. JAICHANDREN

AND

THE HONOURABLE MR. JUSTICE S. NAGAMUTHU

CRIMINAL APPEAL No. 733 of 2012

1. Lingesan @ Lingeswaran
2. R. Kalappa Giramani ..Appellants/Accused 1&2

Vs.

State rep. by
Inspector of Police,
Soonampaedu Police Station
Kancheepuram ..Respondent/Complainant

Prayer: Criminal Appeal as against the order dated 23.08.2012 passed in S.C. No. 181 of 2009 by the learned Sessions Judge, Mahila Court, Chengalpet.

For Appellants :: Mr.M. Rajasekar

For Respondent :: Mr.M. Maharaja
Addl. Public Prosecutor

J U D G M E N T

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

The appellants are accused 1 and 2 in S.C. No. 181 of 2009 on the file of learned Sessions Judge, Mahila Court, Chengalpet. They stood charged for the offences under Sections 498A and 302 r/w 34 I.P.C. By judgment dated 23.08.2012, the Trial Court convicted both the accused under Sections 498A and 302 r/w 34 I.P.C. and sentenced each one of them to undergo imprisonment for life and to pay a fine of Rs.5000, in default

to undergo rigorous imprisonment for one year, for the offence under Section 302 r/w 34 I.P.C. No separate sentence was imposed on the appellants for the offence under Section 498A I.P.C. Challenging the said conviction and sentence, the appellants are before this Court with this appeal.

2. The case of the prosecution, in brief, is as follows:

(i) The deceased, in this case, is one Gangeswari. The 1st appellant/1st accused is her husband and the 2nd appellant/2nd accused is her father-in-law. The marriage between the 1st accused and the deceased was celebrated four years prior to the date of occurrence, i.e, on 26.02.2008. After marriage, these two accused and the deceased were living at Vennangupattu Village. In course of time, both the accused started demanding dowry of Rs.1 lakh from the parents of the deceased. They harassed the deceased repeatedly demanding the said amount. Sometime before 26.02.2008, the 1st accused, stating that only if the deceased brings the demanded amount, she can stay in her matrimonial home, left the deceased in her parental home. On 25.02.2008, though the deceased was not willing, the mother of the deceased convinced her and sent her along with her child, to the house of the accused.

(ii) On 26.02.2008, at 11a.m., when the deceased was alone in her house, these accused, demanded dowry and quarrelled with her. At the end of the quarrel, it is alleged that the 1st accused poured kerosene on the body of the deceased and tried to set fire by lighting a matchstick. As the matchstick did not light up, the 2nd accused, snatched the matchbox and lighted a match stick again and set fire to the deceased, resulting in the deceased sustaining severe burn injuries. The deceased was immediately rushed to local Government Hospital, where the deceased told the Doctor that while she was cooking, the kerosene stove burst and consequently, she caught fire. After treatment for sometime in the said hospital, she was then shifted to JIPMER Hospital, Puducherry.

(iii) On receipt of intimation, Ex-P7, from the Hospital Authorities, P.W.13, the then Sub Inspector of Police, Soonampaedu Police Station, rushed to the JIPMER Hospital. She went to Ward No.34, where the deceased was undergoing treatment as an in-patient and found that she was in a conscious state. One Doctor, by name, Senthil, who was attending on the deceased, also certified that the deceased was in a fit and conscious state of mind to give a statement. Having ascertained the condition of the deceased, P.W.13 recorded her statement at 11.40a.m. on 28.02.2008. On returning to the Police Station, she registered a case in Crime No. 96 of 2008 for the offences under Sections 498 A and 307 I.P.C and under Section 4 of the Dowry Prohibition Act. Ex-P8 is the statement of the deceased recorded by P.W.13 and Ex-P9 is the First Information Report.

Then, she forwarded both the documents, namely, Exs-P8 and P9 to the Court, which were received by the learned Judicial Magistrate, Madurantakam, at 8p.m. on 28.02.2008. P.W.13 also gave a request, Ex-P10 to the Court concerned to record the dying declaration of the deceased. Accordingly, P.W.14, learned Judicial Magistrate No.I, Puducherry, as directed by the Chief Judicial Magistrate, Puducherry, went to JIPMER Hospital at 11.30a.m. and recorded the dying declaration of the deceased in the presence of one Doctor Senthil. The said Doctor certified that the deceased was in a conscious state of mind to give the statement. P.W.14, on his part, made enquiries with the deceased and he got his judicial conscience satisfied that the deceased was in a fit and conscious state of mind to give the dying declaration and thereafter, he recorded the dying declaration of the deceased, which has been marked as Ex-P11.

(iv) Thereafter, the case was taken up for investigation by P.W.15, the Inspector of Police, Soonampaedu Police Station. P.W.15 proceeded to the place of occurrence and prepared an Observation Mahazar (Ex-P5) and a rough sketch(Ex-P12) in the presence of P.W.s 9 and 10. He also recorded the statements of P.W.s 9 and 10. Then, he went to JIPMER Hospital and recorded the statements of the victim Gangeswari and P.W.s 1 to 7. On 29.02.2008, at about 5.15p.m., he arrested the 1st accused in the presence of P.W.6 and another. At that time, the first accused gave a voluntary confession statement, the admissible portion of which has been marked as Ex-P13. Pursuant to the said statement, a 10 litre white plastic can (M.O.1) came to be recovered under a mahazar, Ex-P14. Thereafter, the accused was sent for judicial remand and the case property was sent to Court. On receipt of intimation about the death of the victim, in this case, P.W.15 altered the section of offence into Sections 498A and 302 I.P.C. and Section 4 of Dowry Prohibition Act. Ex-P16 is the section of offence alteration report. On 26.03.2008, between 10.30 a.m. and 11.30a.m., in the presence of Panchayatdhars and witnesses, he conducted inquest on the body of the deceased in the mortuary of JIPMER Hospital. Ex-P17 is the inquest report. Then, he sent the dead body for postmortem.

(v) P.W.11, Dr.M.J.E. Ambroise, Chief Medical Officer, Department of Forensic Medicine, JIPMER, Puducherry, conducted autopsy on the body of the deceased at 11.40a.m. on 26.03.2008. He opined that the deceased had sustained 43% burns on her body and that death was due to septicaemia due to burns.

(vi) Continuing the investigation, P.W.15 examined P.W.11, the Doctor, who conducted autopsy and P.W.14, Judicial Magistrate No.1, Puducherry, who recorded the dying declaration of the deceased and recorded their statements. On completing the investigation, he laid the charge sheet against the accused

for offences under Sections 498A and 302 r/w 34 I.P.C. on 09.05.2008.

(vi) Based on the above materials, the Trial Court framed appropriate charges as detailed in the first paragraph of the judgment. The accused denied the same as false.

(vii) In order to prove the case, on the side of the prosecution, as many as 15 witnesses were examined, 17 documents and one material object (a 10 litre white plastic can found at the place of occurrence) were marked. Out of the said witnesses, P.W.1 is the mother of the deceased. P.W.2 is the elder sister of the deceased. P.W.3 is the elder brother of the deceased. P.W.4 is another elder brother of the deceased. P.W.5 is yet another elder sister of the deceased. P.W.6 is the husband of P.W.5. P.W.7 is a friend of P.W.6. and P.W.8 is a neighbour of the deceased. All these witnesses, namely, P.W.s 1 to 8, have turned hostile and they did not support the case of the prosecution in any manner. P.W.s 9 and 10 have spoken about the preparation of Observation Mahazar and rough sketch at the place of occurrence and recovery of M.O.1. P.W.11 has spoken about the postmortem conducted on the body of the deceased and his final opinion about the cause of death. P.W.12 is the Head Constable, who carried the dead body to the Doctor for postmortem. P.W.13 has spoken about the statement recorded by her from the deceased under Ex-P8 and the registration of the case. P.W.14, learned Judicial Magistrate No.1, Puducherry, has spoken about the recording of judicial dying declaratioin by him and P.W.15 has spoken about the investigation done and the filing of final report.

(viii) When the above incriminating materials were put to the accused, they denied the same as false. On their side, they examined two witnesses as D.W.s 1 and 2. D.W.1 is a close relative of the deceased. She has stated that on 25.02.2008, when she came to the house of the mother of the deceased, for the purpose of extending an invitation in respect of marriage of her sister, she was asked to take the deceased along with her and also invite the husband of the deceased for her sister's marriage. Accordingly, she took the deceased along with her. On reaching the house of the deceased, when the deceased went to prepare tea, the kerosene stove burst and the deceased sustained burn injuries. D.W.2 is yet another close relative of the deceased and he is none else than the husband of D.W.1. He has stated that he accompanied D.W.1 for the purpose of extending marriage invitation and he has also stated that due to bursting of kerosene stove, while cooking, the deceased caught fire. On the side of the accused, the marriage invitation card of the sister of D.W.1 has been marked as Ex-D1. Having considered all the above, the Trial Court convicted these two appellants as stated in the first paragraph of the judgment. That is how,

these accused/appellants are before this Court with this appeal.

3. We have heard the learned counsel appearing for the appellants and the learned Additional Public Prosecutor appearing for the State and we have also perused the records carefully.

4. As we have already pointed out, all the relatives and neighbours of the deceased, who have been examined as P.W.s 1 to 8, have turned hostile and they have not supported the case of the prosecution, in any manner. The prosecution, therefore, relies only on the two dying declarations made by the deceased, one to P.W.13, the then Sub Inspector of Police, Soonampaedu Police Station and the other to P.W.14, learned Judicial Magistrate No.1, Puducherry.

5. Learned counsel for the appellants would submit that these two dying declarations cannot be believed for various reasons. According to him, initially, the deceased was taken to a local Government Hospital where the deceased told the Doctor that while she was cooking on a kerosene stove, it burst and consequently, she caught fire. As pointed out by the learned counsel, unfortunately, the medical records pertaining to the treatment given in the said hospital have not been produced. The Doctor, who treated the deceased, has also not been examined. However, in Ex-P7, the deceased has stated that she was taken to local Government Hospital where she told the Doctor that she sustained burn injuries due to bursting of kerosene stove when she was cooking. This, being the earliest dying declaration, deserves weightage. From the said hospital, she was taken to another hospital for which also, there is no evidence. There also, the deceased had repeated the same version. Finally, she was taken to JIPMER hospital at Puducherry. In the said hospital, according to P.W.13, the statement of the deceased, namely, EX-P8 was recorded at 11.40a.m. on 28.02.2008. If we have a look at the judicial dying declaration recorded by P.W.14, it also states that the dying declaration was recorded at 11.30a.m. on 28.02.2008. The learned Judicial Magistrate No.1, Puducherry, in his evidence, has stated that on 28.02.2008, the Sub Inspector of Police (obviously referring to P.W.13) had given a request to record the dying declaration from the deceased in connection with the case in Crime No. 96/2008 and as directed by the Chief Judicial Magistrate, he went to JIPMER Hospital and recorded the dying declaration of the deceased at 11.30a.m. This evidence of the learned Judicial Magistrate would clearly go to show that even before 11.30a.m. on 28.02.2008, the Sub Inspector of Police (P.W.13) had registered the case in Crime No. 96 of 2008 and made a request to record the judicial dying declaration. As spoken to by P.W.13, Ex-P8 was recorded at 11.40a.m. i.e, after the learned Judicial Magistrate had gone to the hospital.

Therefore, before Ex-P8, there would have been some other statement recorded from the deceased by P.W.13, upon which the case in Crime No. 96 of 2008 would have been registered before 11.30a.m. on 28.02.2008. That statement, as pointed out by the learned counsel for the appellants, has been suppressed. This creates some doubt as regards the genuineness of Ex-P8. Even assuming that Ex-P8 was recorded at 11.40a.m., as spoken to by P.W.13, the learned Magistrate had recorded Ex-P11 between 11.40a.m. and 12.10.p.m. The dying declaration shows that the learned Magistrate received intimation at 11.10a.m. itself, which means that based on some other statement, the Sub Inspector of Police would have registered a case before 11.10a.m. on 28.02.2008 and thus, between 11.40a.m. and 12.10p.m., the deceased was giving dying declaration to the learned Judicial Magistrate. When that be so, it is not understandable as to how P.W.13 could have recorded a statement from the deceased at 11.40a.m. on 28.02.2008. It is, as if, P.W.s 13 and 14 had recorded the dying declarations simulataneously, which is impossible. This anomaly has not been explained by the prosecution. This creates enormous doubt as regards the credibility of Exs-P8 and P11.

6. So far as Ex-P11 is concerned, the learned Magistrate has taken a printed form with certain blanks. The form contains a few questions printed already. The answers elicited from the deceased have been written in the handwriting of the learned Magistrate. The statement of the deceased has also been written in the handwriting of the learned Magistrate. But, in the dying declaration, the following printed words are found, "To satisfy myself, I put the following questions to ascertain whether the patient is conscious and capable of giving statement". In the next page of the Dying Declaration, the following words have also been already printed, "From the above said reply, I myself satisfied that the patient is conscious and capable of giving statement and recorded the following (sic)". After completing the recording of statement, the learned Magistrate did not record his satisfaction regarding the mental fitness of the deceased to make the dying declaration. From the above printed statements found in the dying declaration, it is crystal clear that the learned Magistrate, even before going to the hospital, had recorded as if he were satisfied that the deceased was conscious and capable of giving a dying declaration. The learned Magistrate has not explained as to how was he able to record the satisfaction regarding the mental fitness of the deceased, even before going to the hospital. It is the law that a learned Magistrate, before recording a dying declaration, should perform the solemn function of satisfying his judicial conscience as to whether the victim was in a fit state of mind to make a dying declaration or not. The satisfaction of the learned Magistrate regarding the mental fitness is, of course, subjective, but, based on certain fundamental facts. In order

to satisfy his judicial conscience about the mental fitness of the patient, he is required to take into account the opinion of the Doctor, if available and also make an assessment regarding mental fitness from the queries put to the victim. Since the Judicial Magistrate discharges a solemn judicial function in recording his satisfaction, the Courts have held that such judicial dying declaration can be the sole foundation for conviction, even in the absence of any corroboration from any other source. More solemnity is attached to judicial dying declaration for yet another reason, namely, that what is stated by the declarant is purely recorded by the Magistrate, without any embellishment. If a Judicial Magistrate fails to discharge the said solemn function, that is expected of him, then the solemnity attached to the judicial dying declaration is lost and consequently, the judicial dying declaration is liable to be doubted and rejected.

7. In the instant case, since the learned Judicial Magistrate did not arrive at the satisfaction regarding the mental fitness of the deceased, after making subjective assessment of the deceased, no weightage can be given to the said dying declaration. Then, as we have already stated, when Ex-P11 was recorded by the learned Judicial Magistrate, the relatives of the deceased had also arrived. Therefore, the possibility of tutoring cannot be totally ruled out. Apart from that, the Doctor, who certified that the deceased was conscious while the statement was recorded by P.W.13 as well as during the recording of dying declaration by P.W.14, has not been examined. Above all, it is seen from the evidence of D.W.s 1 and 2 that the deceased caught fire due to bursting of kerosene stove while cooking. This is in consonance with the earliest statements made by the deceased to the Doctors at two hospitals. Hence, for the above reasons, we find it difficult to sustain the conviction. We hold that the prosecution has failed to prove the case beyond all reasonable doubts.

8. In the result, the appeal is allowed. The conviction and sentence imposed on the appellants/accused by the Trial court are set aside and they are acquitted of all the charges. Fine amount, if any, paid, shall be refunded to the appellants/accused.

-s/d-

Assistant Registrar

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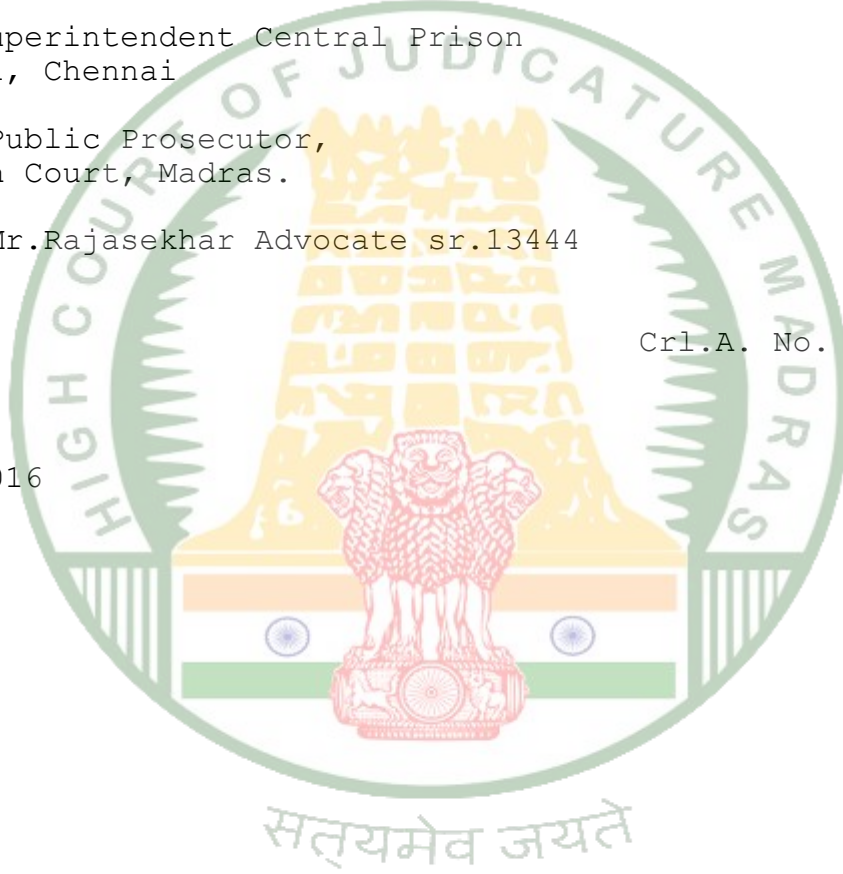
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To

1. The Mahila Court, Chengalpet.
 2. The Judicial Magistrate
Maduranthagam
 3. The Chief Judicial Magistrate
Chengalpet
 4. The Inspector of Police
Soonampadue Police Station
 5. The Superintendent Central Prison
Puzhal, Chennai
 6. The Public Prosecutor,
High Court, Madras.
- +1 cc to Mr.Rajasekhar Advocate sr.13444

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