

BAIL SLIP

Crl.a.No.223 of 2017

Raja Accused/Appellant Which was directed to be released on bail as per Order of this Court dated 27.04.2017 made in Crl.Mp.No.5413/17 in Crl.A.NO.223/17 on the file of this Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 24.10.2017

CORAM

THE HONOURABLE Mr.JUSTICE M.SATHYANARAYANAN
and
THE HONOURABLE Mr.JUSTICE N.SESHASAYEE

Crl.A.No.223 of 2017

Raja ... Appellant / Sole Accused

Vs.

State rep. By
The Inspector of Police,
Vennandur Police Station,
Namakkal District.

... Respondent

Prayer : Criminal Appeal filed under Section 374(2) of Cr.P.C., praying to set aside the judgment made in S.C.No.35 of 2015 on the file of the District Sessions Judge, Magalir Neethimandram [Fast Track Court], Namakkal, dated 21.03.2017 and acquit the accused.

For Petitioner : Mr.S.N.Arun Kumar

For Respondent : Mr.R.Ravichandran
Government Advocate [Crl. Side]

JUDGMENT

[Judgment of the Court was delivered by N.SESHASAYEE,J.]

This appeal is preferred by the sole accused in S.C.35 of 2015 on the file of Mahila Court (Fast Track Court), Namakkal. He challenges his conviction for an offence under Sec.302 IPC, as well as the sentence for imprisonment for life and a fine of Rs.2,000/- imposed on him Vide impugned judgment which is under challenge in this appeal.

2. The prosecution has come forward with the least complicated line of accusation:

- The appellant was married to one Kala. They have a daughter (P.W.3) aged 5 years at that relevant time when the occurrence took place. Kala believed that her husband/appellant had developed an illicit intimacy with a certain Illavarasi, that this had triggered differences between the spouses and that they quarrelled frequently on this issue. While so, on 05.2.2015, at about 6.00 hours in the evening, the spouses quarrelled yet another time, during the course of which, Kala chose to pour kerosene on her body and the appellant herein lit a match and set Kala on fire.
- She was first taken to Government Hospital, Vennandur and from there she was shifted to Government Hospital, Salem.

3.1 P.W.1 and P.W.2 were Kala's parents. P.W.7 was her paternal uncle (P.W.1's brother). The information about the occurrence was first received by P.W.7, who in turn intimated the occurrence to P.W.1 and P.W.2. Around 8.00 p.m., that day, they all reached the Government Hospital, Salem, where Kala was waging, what ultimately turned out to be her losing battle with life.

3.2 P.W.15 is the Judicial Magistrate. She was intimated by the hospital at 10.00 p.m. and at 10.15 pm she had arrived at the hospital, satisfied herself about Kala's fitness to tender dying declaration, and recorded it.

3.3 Kala died at 12.45 or to be precise 0.45 hrs on the following day (06-02-2015). Thereafter, at 9 a.m. on 06-02-2015, P.W.1, Kala's father, preferred Ext.P-1 complaint before respondent-police, based on which Ext.P-11, FIR was registered by P.W.16, Inspector of Police, Vennanthoor Police Station, Namakkal District, pursuant to which, P.W.16 took up the investigation. He visited the scene of occurrence, prepared the Observation Mahazar and Rough Sketch, collected and seized the material objects from the SOC, proceeded to the Salem Government Hospital mortuary and conducted inquest on the body of the deceased and forwarded the body for postmortem. P.W.12, Dr.Sangeetha, had conducted the postmortem and gave Ext.B-7, postmortem certificate. After forwarding the viscera for chemical analysis, she gave her final opinion that Kala's death was occasioned due to the consequential effects of the burn she suffered. P.W.16, Investigating Officer interrogated the various witnesses. On 28.03.2015, P.W.16, completed the investigation and filed his final report.

4. On committal to the sessions, charge was framed against the accused for commission of an offence under Sec. 302 IPC to which the appellant pleaded not guilty to the charge and hence the case went for trial. During trial, the prosecution examined sixteen witnesses and produced sixteen documents. The appellant/accused was questioned under Section 313(1)(b) of Cr.P.C. with regard to incriminating circumstances in the evidence tendered by the prosecution and he denied it as false and on the side of the appellant/accused no documents were filed and no witness are examined. Evaluating the evidence made available by the prosecution, the learned Sessions Judge, found the accused guilty of the offence he was charged with, convicted him for under Sec.302 IPC and sentenced him to undergo imprisonment for life and to pay a fine of Rs.2000/-

5.1 The prosecution line of the case has two parts: (a) a motive; and (b) the said motive leading to murder.

5.2 The motive that the prosecution attributes is that appellant was having an extra marital relationship with a certain Illavarasi that led to familial discordance and spousal differences. Kala and the appellant quarrelled frequently over the issue.

5.3 The murder part of the prosecution case is that on the date of occurrence, at about 5.30 p.m. there was yet another quarrel between the spouses, during which Kala poured kerosene on her and the appellant lit fire to her. P.W.3, their little daughter aged 5 years was the eye witness.

6.1 In its effort to prove the motive part, the investigating agency appeared to be rest contented with just making a statement and did not trouble itself to prove it. P.W.16 has testified during the course of his cross examination that he did not even attempt to identify the woman he has chosen to name and alleged as the one with who appellant was in relationship with, nor has he attempted to track her.

6.2 Turning to the murder part, its only eye-witness to the occurrence, P.W.3, the child born to Kala and the appellant, did not come to prosecution's rescue as it has testified that it did not see her father set her mother on fire. The only piece of evidence that it now relies on is the dying declaration of the victim of the crime.

7. Before this Court, the learned counsel for the appellant put forth the following points in defence of his case.

- Soon after the occurrence, it was the accused who took his wife Kala first to the Government Hospital, Vennanthoor,

and then to the Government Hospital and Medical College, Salem. If the accused was involved in the crime or carried a strong intention to murder his wife, it is least likely that he would have attempted to save his wife through medical treatment.

- P.W.12, Dr.Sangeetha in her postmortem report has recorded that Kala had suffered serious burn injuries above her neck. P.W.1, in his chief-examination had deposed that on he reaching Government Medical College and Hospital, Salem along with his wife P.W.2, they were not allowed to see their daughter and that they were told that their daughter Kala was unconscious. They had come at about 8.00 clock in the night. The Judicial Magistrate had gone to the hospital to record the dying declaration upon intimation received by her at 10.00 p.m. and had reached the hospital at 10.15 p.m. Kala had admittedly died in another two and half hours, which implies between 10.00 p.m and 12.45 p.m. till about midnight, Kala's condition must have been continuously deteriorating. Here the doctor, who certified to Kala's fitness to tender dying declaration in Ext.P-10 has recorded that Kala has suffered 100% burn injuries. This incidentally is the only piece of medical evidence that the prosecution has produced about Kala's condition before her death. Given the fact that her head/face was substantially burnt, it is highly doubtful if Kala was fit enough to communicate in any form.
- While in law, uncorroborated dying declaration can be a foundation for conviction if the same is otherwise reliable, yet where its reliability is suspect then it requires corroboration. Dying declaration though is a substantial piece of evidence, still it has to sync with other evidences available on record. This includes consequences of non production of such evidences that have the potential to tilt the balance of prosecution case. In the context of the case, the extent of burn injuries that Kala had suffered and her deteriorating condition would indicate that there could be a strong possibility that she might have not been conscious and fit enough to tender her statement as to the cause of her impending or imminent death. A set of independent evidence that could have corroborated the prosecution version about Kala's fitness to give her dying declaration was the Accident Register prepared at Government Hospital, Vennandur as well the one prepared at Government Medical College & Hospital, Salem. P.W.16, the Investigating Officer did not care to collect these Accident Registers nor has he felt the necessity to interrogate the doctors, who prepared them. The suppression of these documents and the non-examination of

the doctors who prepared these documents are critical, and adverse inference must be drawn against the prosecution and consequently the benefit that flows from the same shall be granted to the appellant.

- Prosecution relies on a solitary eyewitness in P.W.3, a child witness. She, a five year old daughter of Kala and the appellant had stated in her cross-examination that she had rushed to the house only after she heard her mother's scream. In other words, she has not seen the occurrence and cannot be considered as one. Barring her, no witness was even appeared to be in the vicinity of the SOC.

The prosecution has neither proved the motive, nor the murder, and that it latches on to a dying declaration whose reliability is not beyond doubt and hence the conviction handed down by the Sessions Court is not appropriate and benefit of doubt should be granted to the appellant, argued the counsel.

8. Countering the above argument, the learned Public Prosecutor argued that where a dying declaration is of unsuspecting quality and hence of unimpeachable variety, then that itself can form the foundation for conviction without any need for corroboration. In the instant case, after the admission of the victim in the Government Hospital, Salem, intimation was given to P.W.15, the Judicial Magistrate at 10.00 p.m. and in about 15 minutes, the Magistrate had reached the hospital to record the dying declaration. The Magistrate had obtained a certificate from a physician about Kala's fitness to tender her dying declaration. Independent of such certification, the learned Magistrate too has also satisfied herself about Kala's consciousness and orientation with her preliminary questioning of the person whose statement she was to record. The dying declaration [Ext.P-9], backed by the evidence of P.W.15, is cogent and unpenetrable that the defence could neither impeach reliability of the dying declaration with any other evidence available on record, nor could pick any material flaw in its recording, nor anything to doubt the evidence of P.W.15. To fortify his argument, the learned Prosecutor placed reliance on the authorities of the Hon'ble Supreme Court in *Atbir Vs. Government of NCT of Delhi* [(2010) 9 SCC]; *Salim Gulab Pathan Vs. State of Maharashtra through SHO* [(2012) 6 SCC 606]; *Ramesh and Others Vs. State of Haryana* [(2017) 1 SCC 529]. He added that the dying declaration was tendered and recorded even prior to the commencement of the investigation which rules out the possibility of tutoring the victim prior to she making her statement as to cause of her imminent death.

9. When the evidence is analysed, following factors get proved without any point of dispute. They can be categorized and sequentialised :

- The time of occurrence was not in doubt. It has taken place at about 5.30 p.m. on 05.2.2015. The accused obviously was present at the SOC. For, it was he who has taken his wife to the Hospitals. He first took her to Government Hospital, Vennanthoor and then to Government Mohan Kumaramangalam Hospital, Salem. P.W.3 speaks to this fact even though the prosecution, for inexplicable reasons, has chosen not to make available the Accident Registers of the two hospitals. It is also the case of the defence that it was the appellant who rushed his wife to the Hospitals. It proves one significant fact : That the accused was present at SOC.
- The prosecution attempted to portray that P.W.3, minor daughter/child witness as an eye witness. But she does not help the prosecution's cause. As rightly pointed out by the appellant's counsel, she has stated that she was playing outside the house, and entered the house only after she heard her mother screaming. It is very obvious that she could not have seen the appellant actually setting his wife on fire.

10. This now leaves only the dying declaration as the solitary piece of evidence on whose believability the decision on the involvement of the appellant in the crime is poised. It is an admitted fact that the victim was taken to two hospitals and the investigating agency did not do that which most investigating officers would not miss: To collect the Accident Registers and recording the statements of the doctors who attended on Kala, on the fateful day. Their evidence would have had the ability to provide some vital information, but the point is whether their absence has rendered Ext.P-9 dying declaration suspicious and unworthy of merit.

11.1 This now takes to examining the dying declaration per se. P.W.15, the Judicial Magistrate, in her cross examination has deposed that when she arrived at the hospital to record the dying declaration, few persons were surrounding Kala and that she had cleared the crowd before she proceeded to do her job. P.W.1 and P.W.2 were the victim's parents. Both of them have taken an unilateral stand that they were not allowed to meet the patient as she was unconscious. During their respective cross-examination it was not even suggested to them that they had met their daughter Kala and tutored her. Nor was the Magistrate cross examined as to the presence of Kala's parents in the small crowd that was around her when the former arrived at Kala's bedside.

11.2 The dying declaration is terse. The victim says that in the morning her father-in-law gave Rs.2,000/- to her husband,

that he in turn gave Rs.550/- to her, that she tried to contact him over phone but the appellant did not attend the call, that she poured kerosene on herself upon her belief that she living was the cause for all the problem, and her husband lit her. What is significant here is that she did not implicate her husband entirely for the occurrence of the crime perpetrated on her, but segregated the roles that she and the appellant played. Why should a woman, having suffered cent percentage burn injuries, should do it, if she had a motive to implicate her husband falsely? It needs to be stressed that she died in about two and half hours since the time of recording of dying declaration. A soul on a torturous wait for death can hardly lie.

12. The defence requires this Court to visualise the improbability of believing the statement of the Judicial Magistrate on Kala's fitness to make a statement. On a plain reading of P.W.15's testimony, there appears no material to disbelieve the evidence of the learned Magistrate. And, defence was not able to collect any facts from P.W.1, P.W.2 or P.W.7, all of who are close relatives of the victim that may discredit the evidence of P.W.15. The only other evidence that might have provided some material to test the believability of P.W.15 was the evidence of the doctor (P.W.12) who performed postmortem on the body of the victim, but she was not cross examined at all.

13. In Laxman Vs. State of Maharashtra [(2002) 6 SCC 720], the Supreme Court has held:

"3. The juristic theory regarding acceptability of a dying declaration is that such declaration is made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the man is induced by the most powerful consideration to speak only the truth. Notwithstanding the same, great caution must be exercised in considering the weight to be given to this species of evidence on account of the existence of many circumstances which may affect their truth. The situation in which a man is on death bed is so solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason the requirements of oath and cross-examination are dispensed with. Since the accused has no power of cross-examination, the court insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The court, however has to always be on guard to see that the statement of the deceased was not as a result of either tutoring

or prompting or a product of imagination. The court also must further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant."

In Krishnan Vs. State of Haryana [(2013) 1 MLJ (Cr1) 694 (SC)], it is held:

"18.
.....

it is not an absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused when such dying declaration is true, reliable and has been recorded in accordance with the established practice and principles."

In Ramesh Vs. State of Haryana [(2017) 1 SCC 529], it is held:

"31. Law on the admissibility of the dying declarations is well settled. In Jai Karan V. State (NCT of Delhi) ⁵, this Court explained that a dying declaration is admissible in evidence on the principle of necessity and can form the basis of conviction if it is found to be reliable. In order that a dying declaration may form the sole basis for conviction without the need for independent corroboration it must be shown that the person making it had the opportunity of identifying the person implicated and is thoroughly reliable and free from blemish. If, in the facts and circumstances of the case, it is found that the maker of the statement was in a fit state of mind and had voluntarily made the statement on the basis of personal knowledge without being influenced by others and the court on strict scrutiny finds it to be reliable, there is no rule of law or even of prudence that such a reliable piece of evidence cannot be acted upon unless it is corroborated. A dying declaration is an independent piece of evidence like any other piece of evidence, neither extra strong or weak, and can be acted upon without corroboration if it is found to be otherwise true and reliable. There is no hard-and-fast rule of universal application as to whether percentage of burns suffered is determinative factor to effect credibility of dying declaration and improbability of its recording.

32.

.....

33. No doubt, the victim has been brought with 100% burn injuries. Notwithstanding, the doctor found that she was in a conscious state of mind and was competent to give her statement. Thus, the Magistrate had taken due precautions and, in fact, the medical officer remained present when the dying declaration was being recorded. Therefore, this dying declaration cannot be discarded merely going by the extent of burns with which she was suffering, particularly, when the defence has not been able to elicit anything from the cross-examination of the doctor that her mental faculties had totally impaired rendering her incapable of giving a statement."

An assessment of Ext.P-9 dying declaration recorded by P.W.15 coupled with her evidence proves that it is trustworthy and believable and in the face of the law declared by the Supreme Court, the same can be acted upon without any need for corroboration. If the fact that the presence of the appellant at SOC stands proved, then he has to explain what has happened to negate the believability of Ext.P-9.

14. But has the appellant committed murder? Is he liable for conviction under Sec.302 IPC? Here the facts, as have been proved do not indicate it. First, the prosecution has not been able to establish the motive. Second, the appellant was busy running around with his badly burnt wife to hospitals, and if ordinary course of human conduct is the measure of such conduct of the appellant, then it eliminates the possibility that he intended his wife's death. Thirdly, there is no pre-mediation or preparation. Even the kerosene was poured by the victim on herself and the role of the appellant was limited to lighting a match and put her on fire. It cannot be stated that the appellant carried a deliberate intention to cause such injury as is capable of causing the death of his wife. And, if it were only an accident, then the burden was on the defence to explain and prove it, but, as indicated earlier, it has not attempted one. On a careful appreciation of evidence this Court comes to the conclusion that the appellant has done an act with the knowledge that his act would cause death of his wife. In plain terms he can be held guilty for an offence under Sec.304 Part II IPC and not one punishable under Sec.302 IPC.

15. In the end, this appeal is partly allowed and the conviction of the appellant under Sec.302 IPC is modified to one under Sec.304(II) IPC and impose on him a sentence to under go five years RI and to pay a fine of Rs.2,000/-, in default of which to under go a sentence of six months RI. The period of

incarceration that the appellant underwent during investigation and trial is directed to be set off under Sec.428 Cr.PC.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

ds

To:

1. The District Sessions Judge,
Magalir Neethimandram, [Fast Track Mahila Court],
Namakkal.
2. The Inspector of Police,
Vennandur Police Station, Namakkal District.
3. The Judicial Magistrate,
Rasipuram.
4. The Chief Judicial Magistrate,
Namakkal.
5. The Principal Sessions Judge,
Namakkal.
6. The District Collector,
Namakkal.
7. The Director General of Police,
Mylapore, Chennai.
8. The Superintendent of Prison,
Central Prison, Salem.
9. The Public Prosecutor
High Court, Madras.
10. The Superintendent of Police,
Namakkal.
11. The Section Officer,
Criminal Section, High Court, Madras.

+lcc to Mr.S.N.Arun Kumar, Advocate, S.R.No.74987

CrI.A.No.223 of 2017

KS(CO)
CS/21/11/17