

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22.03.2018

CORAM

THE HONOURABLE MR.JUSTICE C.T. SELVAM
AND
THE HONOURABLE MR. JUSTICE N.SATHISH KUMAR

CrI.A.No.636 of 2017

Kannadasan ..Appellant/accused

Vs.

State rep. by
The Inspector of Police
Chithamur Police Station
[Cr.No.104 of 2012] ..Respondent/complainant

Criminal Appeal filed under Section 374(2) of the Criminal Procedure Code to set aside the conviction and sentence made in S.C.No.58 of 2013 dated 17.04.2017 on the file of the Principal Sessions Judge, Kancheepuram District at Chengalpattu and allow the criminal appeal.

For Appellant : Mr.J.C. Durairaj
For Respondent : Mr.M. Prabavathi,
Additional Public Prosecutor

JUDGMENT

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

Originally, the appellant/accused was convicted for the offence u/s.302 IPC and was sentenced to undergo life Imprisonment and to pay a fine of Rs.5,000/- in default to undergo six months rigorous imprisonment in S.C.No.58 of 2013 on the file of the learned Principal Sessions Judge, Kancheepuram District at Chengalpattu, under judgment dated 17.04.2017. The Trial Court ordered the detention period already undergone to be set off u/s 428 Cr.P.C. Aggrieved over the above conviction and sentence the present appeal came to be filed by the appellant.

2. The brief facts leading to the prosecution case is as follows:-

2.(a) The deceased Sasikala and accused were developed intimacy and the accused used to demand money from the deceased. He had already received 9 sovereign from the deceased. Even after that he used to demand money from the deceased. On 2.3.2012 at about 9.00 a.m. the accused poured kerosene on the deceased and set her ablaze. On seeing the deceased running with burn injuries P.W.5 and one Mr.Sathish set off the fire and Mr.Sathish admitted the deceased in Chengalpattu Government Hospital. D.W.1 Assistant Professor attached to Chengalpattu Government Hospital, examined the deceased. P.W.3 sister of the deceased, on information from Mr.Sathish, went to the hospital along with her husband at 1.30 p.m. Since the deceased was unconscious in the hospital, on the next day when enquired, the deceased informed P.W.3 that on 2.3.2012 the accused asked the deceased to come over the temple in the village, poured kerosene and set her ablaze. When his first attempt to set the fire was not successful, he has used 4 or 5 match sticks and again set her ablaze. Therefore, P.W.3 lodged the complaint Ex.P.2.

2.(b) P.W.4 is the mother of the deceased. She also reached to the hospital on 2.3.2012. P.W.5 is the resident of Murugambakkam Colony. On the date of occurrence at about 9.00 a.m., he saw the deceased running with burn injuries and P.W.5 and Mr. Sathish doused the fire and enquired the deceased. She told them that the accused set her ablaze. P.W.11 Sub-Inspector of Police on 3.3.2012 at 19.30 hours received complaint Ex.P.2 from P.W.3 and registered a case in Cr.No.104 of 2012 under Section 307 I.P.C.under Ex.P.9, forwarded the same to the court and copy to the investigating officer. In the meanwhile P.W.7 Judicial Magistrate of Thiruvotriyur, on intimation from the hospital on 3.3.2012 went to the hospital at 5.15 p.m. and after ascertaining her mental condition, in the presence of Medical Officer he recorded the Dying Declaration of the deceased and obtained her left toe print. The Dying Declaration is Ex.P.6. In the Dying Declaration, the deceased gave a statement to the effect that after the death of her husband she came to her father's house. The accused used to demand money whenever he desire. To avoid his torture, on the date of occurrence, in order to cause intimidation the deceased herself poured kerosene on her. At that time the accused set her ablaze.

2.(c) P.W.13 Investigating Officer took up the investigation and went to the Hospital on 3.3.2012. Since the deceased was not in a position to give statement he recorded statements of P.W.3 and 4 and one Smt.Sivagami and thereafter on 4.3.2012 went to the place of occurrence, prepared Observation Mahazar Ex.P.3 in the presence of P.W.6 and one Mr.Marimuthu and also drawn rough sketch Ex.P.10. After receipt of the death intimation from the hospital he altered the crime from 307 IPC

to 302 I.P.C. under Ex.P.11. Thereafter, he conducted the inquest over the dead body on the same day and prepared Inquest Report Ex.P.12 and gave requisition to the Medical Officer to conduct post mortem. P.W.2 Medical Officer attached to the Government Hospital, Chengalpattu, conducted the autopsy over the dead body and found the following injuries:

"1. Superficial burns seen over the chin, whole neck region front and back of chest and abdomen, front and back of both upper limbs, upper part of gluteal regions, upper 1/3rd of front and back of both thighs with intact genitalia.

2. Venflon in situ seen over back ankle."

She gave Ex.P.3 Post Mortem Certificate and opined that the death would have occurred due to the effects of burns hypovolemic shock. She sent viscera for chemical examination.

2.(d) In continuation to his investigation P.W.13 arrested the accused on 4.3.2012 at 7.00 p.m. in the presence of P.W.6 and one Mr.Marimuthu and recorded the confession statement of the accused. He also seized partly burnt saree, burnt jacket, kerosene can, Match Box, kerosene stained earth, ordinary earth and one pair of chappal [M.O.1 to M.O.7] from the scene of occurrence under Ex.P.4 Mahazar and sent the same to the court and also for Chemical Examination. P.W.9 Assistant Chemical Examiner examined the same and gave Ex.P.8 chemical report. P.W.8 Scientific Officer examined the Viscera and gave Toxicology Report Ex.P.7. After completion of the investigation P.W.13 lodged final report under Section 302 I.P.C. before the Court against the accused.

3. The accused was put on trial. In order to establish the case, the prosecution examined P.Ws.1 to 13 and marked Exs.P.1 to 13 and M.Os.1 to 7. On the side of the appellant/accused Dr.Lakshmipathi, Assistant Surgeon, Government Hospital, Chengalpattu was examined. It the version of D.W.1 that while admitting the deceased in the hospital it is stated that accidentally stove burst with kerosene at the time of cooking at 9.00 a.m. on 02.03.2012. He found at that time the patient was conscious. The accident register copy was marked as Ex.D.1 through him. After the examination of prosecution witnesses the accused was questioned under Section 313 Cr.P.C. with regard to the incriminating circumstances for which he denied the complicity. The Trial Court, after analyzing the evidence on record, convicted and handed down the sentence on the appellant/accused as stated above. Aggrieved over the same the present appeal has been filed.

4. Learned counsel appearing for the appellant submitted that the entire case of prosecution based on the different

versions of dying declaration. The oral dying declaration said to have given to P.W.3 is nothing but improved version and the dying declaration recorded by the Judicial Magistrate was only after P.W.3 reached to the hospital. Therefore, there is every possibility of tutoring. The learned counsel further submitted that it is the version of D.W.1 that while the deceased admitted in the hospital she has stated that she sustained accidental burns. This evidence is totally contrary to the oral dying declaration said to have given to P.W.3 and the dying declaration given to the Magistrate. Learned counsel also submitted that P.W.4, mother of the deceased, though was present in the hospital she never stated anything about the oral dying declaration given by the deceased. P.W.5 has stated different version. She stated in his evidence that while the deceased running with burn injuries, on enquiry, she has stated as if the accused set fire on her. She and one Mr. Sathish rescued her and Mr.Sathish took her to the hospital. These different versions create serious doubt about the dying declaration and the evidence of P.Ws.3, 4 and 5 not corroborated with each other. He further stated that the trial Court has not appreciated the entire facts properly. Hence, he prayed for allowing the appeal.

5. Learned Additional Public Prosecutor has fairly conceded that there are different versions in the dying declaration. But the conviction of the trial court has convicted the accused not only based on the dying declaration but also other oral evidence of witnesses. However, she submitted that it is for the assessment of the evidence by the court.

6. We have perused the entire materials and evidence on record.

7. In the light of the above submissions, we have to analyse whether the prosecution was able to bring home the guilt of the appellant/accused beyond all reasonable doubt.

8. The deceased Sasikala and accused had developed illegal contact. The accused used to demand money from the deceased. On 2.3.2012 the accused decided to do away with the deceased and called up to the place of occurrence in the village near the temple and poured kerosene on the deceased and set fire. The law was set in motion on the basis of Ex.P.2 complaint lodged by P.W.3 sister of the deceased and on the basis of the alleged oral Dying Declaration given by the deceased to P.W.3 while she was in the hospital. P.W.4 is the mother of the deceased. P.W.3 evidence shows that on receipt of intimation from Mr.Sathish about burn injuries on the deceased, she and her husband rushed to the hospital on the same day at 1.30 p.m., there the deceased was unconscious. However, the deceased on the next day given oral dying declaration to P.W.3 to the effect that the accused

demanded money and called her to the place of occurrence in the village near temple and poured kerosene and tried to set her ablaze. Since the first match stick did not lit, he used 4 or 5 match sticks and set her ablaze. Therefore, P.W.3 lodged compliant. P.W.4 mother of the deceased though reached the hospital, she never stated anything about the deceased giving oral dying declaration to P.W.3. P.W.5 stated that at the time of occurrence at about 9.00 a.m. while she was in the house the deceased came running with burn injuries. When she enquired, the deceased informed that the accused set her fire and P.W.5 and Mr.Sathish douse the fire by using blankets. Thereafter, Mr.Sathish took her to the hospital. Though P.W.5 has stated that immediately after the occurrence, she and Mr.Sathish extinguished the fire and Mr.Sathish took her to the hospital. It is to be noted that the said Mr.Sathish only took the deceased to the hospital at the relevant point of time.

9. Ex.D.1 and the evidence of D.W.1 shows the different version given by the deceased before the medical officer and the Magistrate about the burn injuries. D.W.1 Medical Officer, was not cited as witness on the side of the prosecution. When he was examined as defense side witness he has deposed that the deceased was conscious at the time of admission and given statement that she got burn injuries at the time of cooking at 9.00 a.m.. It is the specific version of D.W.1 that the deceased was conscious at that time. It is also asserted that even 100% burn injury, patient will be conscious to give a statement. It is to be noted that the deceased was brought to the hospital by a close relative of the deceased. He is not the relative of the accused. So there was no reason for him to speak in favour of the accused by giving different version. Admittedly the accused is not the husband of the deceased, in fact, he had illegal contact with the deceased. Such being the position, normally the relatives would be against such contact. Even then, the deceased or Mr. Sathish have not implicated the accused at the first instance. Ex.P.2 shows that as if the accused poured kerosene on the deceased and set her ablaze.

10. The dying declaration Ex.P.6 recorded on 3.3.2012 at 5.00 p.m. by the Judicial Magistrate when carefully seen, it is clear that the different version has been given by the deceased. In fact, the deceased has given a statement to the effect that in order to threaten the accused she herself poured kerosene on her body at that time the accused set fire. It is to be noted that the dying declaration was recorded at 5.00 p.m. and Ex.P.2 complaint has given to the police on 19.30 hours i.e., 2 ½ hours after recording the dying declaration, which creates serious doubt about Ex.P.2. The medical evidence shows that at the time of admission of hospital the deceased was conscious. Therefore, P.W.3 evidence that the deceased was unconscious in the hospital on 02.03.2012 creates a serious

doubt about her version and she has also stated before the police that the deceased gain conscious only two days later. When different dying declaration recorded by the Judicial Magistrate gives different version, the oral dying declaration said to have been given to P.W.3, much after the dying declaration recorded by the Magistrate gives a different version creates serious doubt. If really the deceased has given a dying declaration as stated by P.W.3, P.W.4 mother of the deceased would have deposed the same. But she has not aware of anything about the oral Dying Declaration given by the deceased to P.W.3.

11. When there are two dying declarations, one, oral dying declaration before P.W.3 and the another recorded by the Judicial Magistrate at a time, that too when the relatives had already visited the deceased, to base a conviction by placing reliance on such dying declarations, is unsafe, since the possibility of tutoring cannot be ruled out and as the oral dying declaration given to P.W.3 is totally contrary to the dying declaration recorded by the Magistrate. Therefore, in this back ground we are unable to give any weightage to the Dying Declaration to base conviction. It is well settled that when there are discrepancies and differences between Dying Declarations and improvement in the subsequent Dying Declaration, it is unsafe to accept such Dying Declarations in a grave crime to base the conviction and the benefit has to be given to the accused. Trial Judge observation that normally the person accompanying injured to the hospital gives some details. The learned trial judge has come to the conclusion based on the oral dying declaration given to P.W.3 and such conclusion is really based on the perception. The assumptions, conjectures and surmises have no role in proving the facts before the Court of law. When the doctor has first seen the deceased, she was conscious and he recorded a statement. The court cannot subscribe its own assumption to disbelieve such documents. The trial Judge also held that the injuries sustained by the deceased would not have been occurred while cooking. Such conclusion also is not based on any evidence. It cannot be ascertained in what manner the injuries were caused to the deceased at the time of cooking. It cannot be expected that whenever injuries are sustained while cooking, there must be injuries on the face. It all depends upon the position how the victim was at that particular point of time, whether she was closely in the vicinity of the stove etc., those things cannot be inferred merely in the absence of injuries on the face. Hence, we are of the view that it is highly unsafe to rely upon the subsequent dying declarations which is totally contradiction with the statement given before the Medical Officer D.W.1. Hence, we have no other option except to hold that it is unsafe to rely upon Ex.P.6 Dying Declaration or Ex.P.2 or evidence of P.W.3, to base a conviction in a grave crime. Accordingly, the appellant/accused is entitled to get the benefit of doubt. The

point is answered accordingly.

. 12. In the result, the criminal appeal is allowed and the conviction and sentence imposed on the appellant/accused by the Trial Court vide impugned Judgment in S.C.No.160 of 2016 dated 18.07.2017 are set aside and he is acquitted of all charges levelled against him.

17. It is reported that the appellant/accused is in jail. Hence, he is directed to be released forthwith unless his presence / custody is required in connection with any other case/proceedings.

-s/d-

Assistant Registrar (CS-II)

True Copy

Sub-Assistant Registrar

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To

1. The Inspector of Police, Chithamur Police Station
2. The Superintendent of Prison Central Prison, Puzhal, Chennai.
3. The Public Prosecutor, High Court, Madras.
4. The Judicial Magistrate, Maudranthagam.
5. Through The Chief Judicial Magistrate Kancheepuram.
6. The District Collector Chennai.
7. The Principal Sessions Judge Chengalpattu.
8. The Director General of police Mylapore, Chennai.
9. The Superintendent of police Kancheepuram District.
10. The Section officer Criminal Section, High Court, Madras

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NRL (CO)
SP(12/04/2018)