

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 07.08.2019

DELIVERED ON : 16.08.2019

CORAM

THE HON'BLE MR.JUSTICE M.M.SUNDRESH
AND
THE HON'BLE MR.JUSTICE M.NIRMAL KUMAR

Criminal Appeal No.564 of 2017
& CrI.M.P.No.15592 of 2017

Sanavullah(aged 27 years)
S/o Durab
No.16/32, 5th Street,
Meenambal Nagar,
Chennai-600 021.

...Appellant/sole Accused

Vs.

The State, represented by
The Inspector of Police,
H-6, R.K.Nagar Police Station,
Chennai.

...Respondent/complainant

Criminal Appeal is filed under Section 374(2) of Criminal Procedure Code seeking to set aside the judgment passed in S.C.No.45 of 2014 on the file of the Sessions Judge, Magalir Neethimandram, Chennai, dated 24.04.2017.

For Appellant : Mr.C.Vijayakumar

For respondent : Mr.R.Prathap Kumar,
Additional Public Prosecutor

JUDGMENT

M.M.SUNDRESH, J.

Challenge in this appeal is to the conviction and sentence rendered by the Sessions Judge, Magalir Neethimandram, Chennai, on 24.04.2017 in S.C.No.45 of 2014 to undergo life imprisonment for the offence committed under Section 302 IPC and to pay a fine of Rs,5000/- in default to undergo further period of six months rigorous imprisonment while the accused was acquitted under Section 235(1) Cr.P.C. for the offences punishable under Sections 506(ii) and 342 iPC.

2. Facts in Brief:

2.1. The appellant was in relationship with P.W.1-Balgisbanu, the mother of the deceased. He was made to reside at the nearby room to the residence of P.W.1. Through him, an arrangement was made for the marriage of her daughter, the deceased Nymun Nisha. The deceased did not want to go through with the marriage after the date was fixed. Enraged over the same, the appellant beat the deceased with the belt. This was questioned by P.W.1. The appellant threatened P.W.1 that if the marriage is not conducted with the person arranged by him as against any third party, the deceased would be poured with Kerosene. Thereafter, he picked up the quarrel with the deceased on 09.03.2013 at about 2.20.p.m. At that time, when the deceased tried to go out, the appellant poured Kerosene from the 5 litres can on the deceased, set fire and caused death. Immediately she was taken to the Kilpauk Medical College Hospital, Chennai, where she died on 11.03.2013 at about 11.15a.m

2.2.P.W.11-Mariadoss, the Sub Inspector of Police, received the intimation from the Kilpauk Medical College Hospital, Chennai, and obtained statement from the deceased under Ex.P1-complaint. He registered a case in Crime No.238 of 2013 of H6 R.K.Nagar Police Station for the offence punishable under Sections 506(ii), 341 and 302 IPC. An intimation was given to P.W.6-XIV Metropolitan Magistrate, Chennai, under Ex.P14. The registration of the First Information Report was marked as Ex.P10 and the investigation was done at about 11.00p.m., on 09.03.2013. Thereafter, P.W.16-Inspector of Police, who was the Investigation Officer, took over the investigation. The deceased gave a dying declaration before P.W.6 at about 8.20p.m., on the same day. It is the statement of the deceased that Kerosene was poured by the appellant. The process was completed at about 9.30p.m., Ex.P4 is the requisition letter given by P.W.11 and the dying declaration was marked as Ex.P5. The declaration was also certified by P.W.12-Doctor by name Dr.Sankari, Assistant Professor, Government Kilpauk Medical College Hospital, Chennai, who treated the deceased, to the effect that she was conscious and in fit state of mind.

2.3. Thereafter, P.W.16 arrested the appellant on 10.03.2013 at about 1.15p.m. Though he had stated about M.Os.1 and 2 the plastic can and match box respectively in his confession statement, the observation mahazar prepared on 10.03.2013 at about 6.00a.m., makes a mention of it. P.W.16 also prepared seizure mahazar following the observation mahazar under Ex.P3. The body was sent to P.W.10, who gave the post mortem report dated 12.03.2013 to P.W.8 followed by Chemical Analysis Report-Ex.P8. The deceased died on 11.03.2013 at about 11.15a.m., and thereafter, alteration report was made ready under Ex.P17 and Ex.P18 is the Inquest Report.

2.4. The trial Court, after framing charges, questioned the appellant with the incriminating materials under Section 313 of the Criminal Procedure Code, who denied it by a mere refusal. Thereafter, the trial proceeded with 16 witnesses on behalf of the prosecution, who also marked Exs.P1 to P18 along with M.Os.1 to 3. The appellant did not choose to either examine the witness nor marked any document.

2.5. After hearing the prosecution and the defence, the trial Court found that the motive has been established coupled with the dying declaration and the evidence of P.Ws.1 to 4 and 6 and came to the conclusion that the appellant has committed an offence punishable under Section 302 IPC. Accordingly, while acquitting the accused for the offences punishable under Sections 506(ii) and 342 IPC, a life imprisonment was imposed. Challenging the same, the present criminal appeal is before us.

2.6. Before proceeding to consider the submissions on behalf of the appellant as well as the State, let us consider the evidence available on record.

2.7. P.W.1 is the mother of the deceased Nymun Nisha. P.W.2 is the brother of the deceased. P.W.3 is the witness, who saw the deceased influenced. P.W.4 is stated to have given an intimation about the occurrence to P.W.1. P.W.5 is the witness to Ex.P2 observation mahazar and seizure mahazar Ex.P3, by which M.Os.1 and 2 have been recovered. P.W.6 is the learned Magistrate, who recorded the dying declaration but under Ex.P4-requisition of the Inspector of Police. P.W.7 is the Photographer. P.W.8 is the witness, who signed Ex.P6-confession statement. P.W.9 is the Doctor, who was on duty when the deceased was brought to the hospital. She is the author of Ex.P7 Accident Register, P.W.10 is the Doctor, who conducted post mortem on the body of the deceased. P.W.11 is the Sub Inspector of Police, who received the statement of P.W.1 and registered the complaint under Ex.P10. P.W.12 is the Doctor, who certified the dying declaration as per Ex.P11. P.W.16 is the Investigating Officer, who conducted inquest and continued the investigation after alteration of the charges and filed a final report.

3. Submission of the appellant:

3.1. The learned counsel appearing for the appellant would submit that P.W.1 would not have been present even after the occurrence and could not have accompanied the deceased. The statement given by her is contrary to Ex.P1-complaint. The contradiction is also to the effect that she herself has stated that she did not know the occurrence directly. It is also her case that she was informed by P.W.2 about the occurrence. Therefore, the aforesaid discrepancy will have to be taken into consideration. The evidence of P.W.2 also cannot be accepted as

the same is contrary to the evidence of P.W.1. His statement is also contrary to the dying declaration given. P.W.4 gave the statement contrary to the statement of P.W.2. After P.W.4 was informed by the deceased on the offence committed by the appellant, action would have been taken at that point of time itself.

3.2. The First Information Report has been registered after the dying declaration. Thus, the complaint itself ought to have been registered as against the dying declaration. The trial Court has not considered the contradictory evidence given by the prosecution witnesses. The evidence let in by P.W.9 has not been considered in the proper perspective. The conduct of the appellant ought to have been seen. It is the appellant, who brought the Ambulance, took the deceased and admitted her in the hospital. This could also be seen on a perusal of Ex.P7 Accident Register. The confession statement itself would show that the deceased locked the house inside and the appellant poured kerosene through the window and there was no reason found as to how the appellant poured kerosene from the 5 litres can through the window and it is not known as to how the appellant got into the house with five litres plastic can. The trial Court has merely relied upon the evidence of P.Ws.1 to 4 and 6 coupled with the dying declaration. Therefore, the conviction rendered will have to be reversed.

4. Submission on behalf of the State:

The learned Additional Public Prosecutor appearing for the State would submit that the motive has been clearly established. Though there is no eye witnesses as such, the evidence of P.Ws.1 to 4 would show the deceased in flames and it clearly established the case of the prosecution. The dying declaration has been given voluntarily in a fit state of mind. Therefore, the trial Court has rightly considered the evidence both oral and documentary coupled with the dying declaration in rendering conviction, Hence, there is no interference is required.

5. Discussion:

5.1. Before dealing with the dying declaration, let us consider the other evidence available on record especially the deposition of the witnesses. P.W.1, as stated, is the mother of the deceased, who was having an affair with the appellant. In the complaint given under Ex.P1, she has stated that while she was returning home, she saw the appellant coming in 108 Ambulance. According to her, the appellant has told her that the deceased made an attempt to self immolate. It is also not in dispute that it is the appellant who took the deceased in 108 Ambulance to the hospital. However, in the deposition, P.W.1 has stated that she was informed accordingly by P.W.2, her son. Thereafter, she reached the house and saw her daughter sitting in front of the house. The deceased was also talking to P.W.1.

It is her specific case that the deceased told her that the appellant has set her fire. It is rather strange that P.W.1 has not chosen to give any complaint at that point of time. This evidence is also contrary to the complaint given under Ex.P1. The occurrence was at 2.00 p.m., on the fateful day. We may note that there was indeed a marriage fixed followed by printing the invitation. The problem arose because of refusal to go through with the marriage, though as stated by P.W.2, the prospective bridegroom gave her cell phone and there was frequent conversation between them. Thus, the evidence given by P.W.1 on the face of it is contrary to her own statement Ex.P1 apart from the dying declaration given by the deceased under Ex.P5.

5.2. P.W.2 is the brother of the deceased. He has deposed that he went and brought P.W.1 to the scene of occurrence. It is his evidence that the deceased was taken to the hospital and thereafter, he went and brought P.W.1. The alleged threat to pour kerosene on the deceased by the appellant has been spoken by P.W.2 though not by P.W.1. We make a reference to this statement for the reason that P.W.2 has stated that he came to know about this from P.W.1. His statement that he saw the deceased in flames and the accused was staying nearby is also contrary to Ex.P6, dying declaration.

5.3. P.W.3 has stated that she did not see the incident, but only brought the cloth to cover the body of the deceased. She has further stated that she along with others doused the fire. However, in her cross examination she has stated that she has not seen the deceased while burning. But she has stated about the presence of the appellant. However, she has not stated anything about the appellant taking the deceased to the hospital.

5.4. P.W.4 apart from speaking about the prior occurrence, has stated that it is he who gave the complaint to P.W.11. P.W.4 also says that the deceased indicated after the occurrence that it is the appellant, who committed the offence. Strangely, P.W.4 has not given any complaint nor informed anybody. If it is true then, it was not known as to how the accused was allowed to in the Ambulance with the deceased. Thus, not much reliance can be made on the abovesaid evidence.

5.5. P.W.5 is the witness who signed Ex.P2 Observation Mahazar followed by recovery under Ex.P3-Seizure mahazar. As stated earlier, M.Os.1 and 2 have already been recovered from the scene of occurrence. In any case, P.W.5 is not an eye witness even after the occurrence nor he knew about the deceased travelling in the Ambulance.

5.6. P.W.6 is the learned XIV Metropolitan Magistrate, Chennai, who recorded the statement after getting intimation under Ex.P4 at 8.30p.m., and concluded it between 9.05p.m. and

9.30p.m. After conclusion, the declaration has been registered under Ex.P5. We may note that this recording is anterior to the registration of the complaint under Ex..P10 by P.W.11.

5.7. P.W.8 is the witness, who signed Ex.P6, which is the part of the confession statement given by the appellant. P.W.8 ultimately stated that no recovery has been made in his presence. In this connection, we may note that it is not known as to how the arrest could be made, when the accused was also present in the hospital as seen from Ex.P7. Therefore, the very arrest itself appears to be highly doubtful.

5.8. Further P.W.8 has also stated that he did not know anything about the appellant while in the chief examination he says that he knew him. Therefore, there is also a contradiction in the statements made.

5.9. P.W.9 is the Doctor, who was in-charge when the deceased was brought into the hospital. He has stated that it is the appellant, who brought the deceased. There is no evidence to show that P.W.1 has made a complaint nor anybody else. Even in her chief examination, it has been stated that the appellant has informed about the occurrence. This statement of P.W.9 corroborates with Ex.P7 Accident Register. We may note that Ex.P7 has been signed at about 4.30p.m., on 09.03.2013.

5.10. P.W.11 is the Sub Inspector of Police, who recorded the statement of P.W.1 under Ex.P1. This has been registered at 23.00 hours on 09.03.2013 as against the recording of confession statement by P.W.1 between 9.05 and 9.30 hours. Thus, the very case of the prosecution itself creates a serious doubt and suspicion. The dying declaration given under Ex.P6 ought to have been the basis for the registration of the complaint. The evidence of P.W.11 is also contrary to the evidence of P.W.16-Inspector of Police. P.W.11 says that requisition was made and thereafter, case has been registered followed by investigation by P.W.16. However, P.W.16 has stated that the requisition has been given to the Magistrate resulting in Ex,P6 after registration, pursuant to which, he took up the investigation. Thus, we find material contradiction between the evidence of P.Ws.11 and 16. If P.W.11 has obtained the statement at the earliest point of time, nothing prevented him from arresting the appellant immediately thereafter as he was very much present.

5.11. Now, let us deal with the dying declaration. There is no difficulty in appreciating the settled position of law on the admissibility of the dying declaration. When it inspires the confidence of the Court certainly reliance can be made. If we peruse the dying declaration, we could see that the deceased has stated that the appellant poured Kerosene through the window when the deceased was cooking in the kitchen. This statement is totally contrary to the case of the prosecution. It is the case

of the prosecution that the appellant/accused was inside the house and he poured Kerosene from a five litres plastic can and thereafter, set fire by lighting the match box. M.Os.1 and 2 are the plastic can and match box with sticks. The deceased has also stated that she locked the door from inside. How did the appellant get into the house nobody knew. He would not have thrown the kerosene from the window through 5 litres cane, which was found actually inside the house. The deceased has also stated that the appellant ran thereafter even as per the evidence of the deceased and the deposition of the witnesses. It is the appellant, who called for the Ambulance, took the deceased and admitted her in the hospital. The aforesaid fact is also corroborated by Ex.P7 and the evidence of the Doctor PW.9. It is not the neighbours who admitted the deceased in the hospital, but the appellant alone. Therefore, the entire statement of the deceased contradicts the case of the prosecution. The deceased also has not stated anything about the presence of her mother nor the statement made on the information given by her that the offence was committed by the appellant. We also find that the conduct of the appellant will have to be seen by placing reliance upon Section 8 of the Indian Evidence Act, 1872. As stated above, it is the appellant, who took necessary steps to get the deceased admitted. The trial Court has merely relied upon the evidence of P.Ws.1 to 4 and 6 read with Exp5. We are conscious of the fact that we are dealing with the case of circumstantial evidence involving dying declaration. Thus, we are unable to give due credence to the declaration given by the deceased. While there is no dispute on the occurrence, we are concerned with the offence attributed against the appellant. In the light of the discussion made above, we are unable to agree with the reasoning of the trial Court. Therefore, we are inclined to set aside the conviction and sentence rendered by the trial Court.

6. Accordingly, the conviction and sentence imposed on the appellant-Sanavullah in S.C.No.45 of 2014 dated 24.04.2017 on the file of Sessions Court, Magalir Neethimandram, Chennai, are set aside and the Criminal Appeal stands allowed. The appellant is acquitted of the charges under Sections 302 I.P.C., and the fine amount if any paid, shall be refunded to him. The appellant-Sanavullah is directed to be released forthwith, unless his custody is required in connection with any other case. Consequently, Connected criminal miscellaneous petition stands closed.

raa

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

1. The Sessions Judge, Maglir Neethimandram,
Chennai.
2. The Inspector of Police,
H-6, R.K.Nagar Police Station,
Chennai.
3. The Additional Public Prosecutor,
High Court, Chennai.
4. The Superintendent,
Central Prison, Puzhal,
Chennai.

Criminal Appeal No.564 of 2017

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