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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated : 17.09.2019

CORAM:

**THE HON'BLE MR.JUSTICE S.VAIDYANATHAN
AND
THE HON'BLE MR.JUSTICE N.ANAND VENKATESH**

Cr1.A(MD)No. 478 of 2017

Gurusamy

... Appellant / Sole Accused

Vs.

The State represented by,
The Inspector of Police,
Ettayapuram Police Station,
(Crime No.79 of 2012)

... Respondent / Complainant

PRAYER: Appeal is filed under Section 374(2) of the Code of Criminal Procedure, to call for the records relating to the judgment in S.C.No.148 of 2014, dated 15.03.2017, on the file of the Principal Sessions Judge, Tuticorin and set aside the same and acquit the appellant / accused from the charge levelled against him.

For Appellant : Mr.V.Kathirvelu
Senior counsel
for Mr.C.Meenakshi Rama Prabu
For Respondent : Mr.M.Chandrasekaran
Additional Public Prosecutor

JUDGMENT

S.VAIDYANATHAN, J.
AND
N.ANAND VENKATESH, J.

This Criminal Appeal has been filed by the sole accused aggrieved by the Judgment passed by the learned Principal Sessions Judge, Tuticorin in S.C.No.148 of 2014 dated 15.03.2017, wherein, the appellant was convicted for an offence under Section 302 of the Indian Penal Code and was sentenced to life imprisonment and to pay a fine of Rs.1000/- in default to undergo six months rigorous imprisonment.



2. The case of the prosecution :

The deceased viz., Marilakshmi is the wife of the accused. They were running a hotel named "Vinayagar". The deceased was having a grievance that the accused was spending money from the income derived from the hotel only for his family members. There used to be frequent quarrels between the deceased and the accused. On 11.05.2012, at about 09.30 p.m., there arose a quarrel between the deceased and the accused and the accused is said to have poured kerosene on the deceased and set her on fire. As a result of which, the deceased died on 12.05.2012 at about 04.15 a.m. in the hospital.

3. The complaint and evidence collected during the investigation:-

(3.1). An information was received by the Sub Inspector of Police, Ettayapuram Police Station (P.W.17) on 11.05.2012, at about 11.30 p.m. from the Government Hospital and she reached the Kovilpatti Government Hospital on 12.05.2012 at 01.00 a.m. and took the statement from the deceased in the Hospital (Ex.P.11) and a First Information Report came to be registered at 02.30 a.m. in Crime No.79 of 2012 (Ex.P.12) for the offence under Section 307 of the Indian Penal Code. An express First Information Report was immediately sent along with the statement recorded from the deceased to the learned Judicial Magistrate No.II, Kovilpatti.

(3.2). In the mean time, the learned Judicial Magistrate No.I, Kovilpatti received the information from the Government Hospital at about 12.40 a.m. on 12.05.2012 and he immediately rushed to the hospital and recorded the dying declaration of the deceased, after satisfying himself that the deceased is in a conscious state of mind and is capable of giving the statement. He also ascertained the conscious state of mind from the Doctor. The deceased is said to have informed the learned Judicial Magistrate that there was a fight between the deceased and the accused and the accused had set her on fire. The learned Judicial Magistrate found that the deceased had suffered 100% burn injuries. Therefore, the learned Judicial Magistrate took hallux impression in the statement recorded from the deceased along with the Certificate from the Doctor. The learned Magistrate completed the recording of the statement at about 01.10 p.m.

(3.3). After registration of the First Information Report, the investigation was handed over to P.W.18, who proceeded to the scene of occurrence on 12.05.2012 at about 03.45 a.m. and prepared the Observation Mahazar (Ex.P.4) and Rough Sketch (Ex.P.13) and he examined the witnesses and recovered the material objects. He received an information around 04.30 a.m. that the deceased had died in the hospital and therefore, he went to the hospital around 05.00 a.m. and got the death report (Ex.P.3) and he thereafter, altered the First Information Report under Section 307 of the Indian Penal



Code to Section 302 of the Indian Penal Code. This was immediately sent to the learned Judicial Magistrate No.II.

(3.4). On the same day at about 08.30 a.m, P.W.18 who conducted inquest over the body of the deceased, prepared the Inquest Report (Ex.P.15) and at about 10.35 a.m., he prepared requisition for sending the body for postmortem. The body was taken for postmortem and thereafter, the body was handed over to the relatives.

(3.5). P.W.18 recorded the statement of the witnesses and on 13.05.2012 at about 06.00 a.m., he arrested the accused person and produced him before the concerned Judicial Magistrate Court and he was remanded to judicial custody. Immediately after the arrest, based on the confession made by the accused, the match box was seized from his pocket. All the material objects that were seized / recovered were sent to the concerned Court. P.W.18 also collected the Postmortem Report, Chemical Examination Report (Ex.P.17 and Ex.P.18). On completion of the investigation, he laid the final report before the concerned Court and the same was thereafter, committed to the file of the learned IIIrd Additional Sessions Judge, Tirunelveli.

4. The IIIrd Additional Sessions Judge, Tirunelveli, framed charges against the accused person for the offence under Section 302 of the Indian Penal Code. The prosecution examined 18 witnesses (P.W.1 to P.W.18) and marked documents Ex.P.1 to Ex.P.18 and the material objects M.O.1 to M.O.7.

5. The Trial Court had put all the incriminating materials collected during the trial to the accused person and questioned him under Section 313 (1) (b) of the Code of Criminal Procedure and he denied the same as false.

6. The Court below on considering the facts and circumstances of the case and after assessing the oral and documentary evidence, came to the conclusion that the prosecution has proved the case beyond reasonable doubts and therefore, proceeded to convict and sentence the appellant in the manner mentioned supra.

Submissions:

7. The learned Senior counsel appearing on behalf of the appellant made the following submissions:

- All the witnesses who were examined on the side of the prosecution had turned hostile and the Court below has found the appellant guilty only based on the two dying declarations. One given to the learned Judicial Magistrate (P.W.14) (Ex.P.2)



and another given to the Sub Inspector of Police (P.W.17) (Ex.P.11).

- The deceased had suffered 100% burn injuries and she was not in a conscious state and was also administered with pain killers. Therefore, the prosecution cannot solely rely upon the dying declaration of the deceased to substantiate their case.
- Admittedly, there were frequent quarrels between the deceased and the accused and even on the date of occurrence, there was a fight and the same is very clear even on a reading of the charge against the appellant and therefore, the appellant had committed the offence under grave and sudden provocation. The case squarely falls under first exception to Section 300 of the Indian Penal Code and the appellant ought not to have been convicted for the offence of murder under Section 302 of the Indian Penal Code.

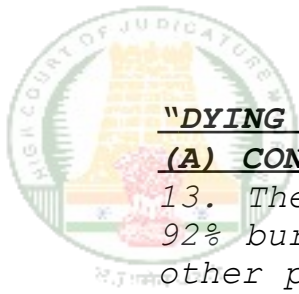
8. The learned Additional Public Prosecutor appearing on behalf of the State made the following submissions:

The learned Additional Public Prosecutor appearing on behalf of the respondent Police submitted that the dying declaration that was recorded from the deceased clearly point out to the fact that it was the appellant alone, who had poured kerosene and set on fire the deceased and there is absolutely no ground to suspect the dying declaration. He further submitted that the evidence of the postmortem Doctor (P.W.15) and the Postmortem Certificate, marked as (Ex.P.8) clearly point out to the fact that the deceased had died only due to burn injuries. The learned Additional Public Prosecutor therefore concluded his arguments by submitting that the Court below has considered the oral and documentary evidence and has come to the correct conclusion that the appellant has committed the murder and the case squarely falls under Section 302 of the Indian Penal Code. In order to substantiate his arguments, the learned counsel relied upon the judgment of the Hon'ble Supreme Court in ***Bhagwan Vs. State of Maharashtra*** in ***Criminal Appeal No.385 of 2010*** dated **07.08.2019**.

9. This Court has carefully considered the submissions made on either side and the entire oral and documentary evidence.

Discussion:-

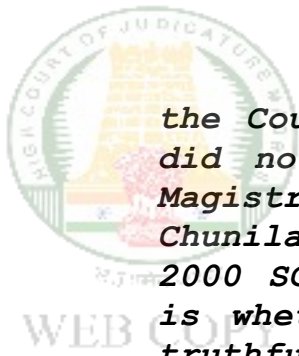
10. The entire case of the prosecution hinges upon the dying declaration since almost all the witnesses had turned hostile. At this juncture, it will be relevant to rely upon the Judgment of the Hon'ble Supreme Court referred supra. The relevant portion of the Judgment is extracted hereinunder.

**"DYING DECLARATION"****(A) CONSCIOUSNESS AND FIT STATE OF MIND**

13. The appellant would urge that the deceased was having 92% burn injuries. Except her head, neck and face, on all other parts of the body she had lost the whole skin. There would be loss of fluids and consciousness. The doctor (PW 14) is unable to depose what was the pulse rate of the patient. In the dying declaration certified by the medical officer, what is certified is that the patient is conscious throughout. P.W. 14 was the medical officer. He has deposed that he examined her and she was conscious throughout. Learned senior counsel for the appellant would point out that in the cross examination, the medical officer deposed that it may be possible that the patient is conscious but he may not be mentally and physically fit. He also says that pain killer was given to the patient but unable to tell which pain killer was given. He has not mentioned in the certificate which questions were put to patient. It is not necessary that the pain killer contains situ drug, PW-14 deposed.

14. It is true that in the dying declaration the medical officer P.W. 14 has only certified that patient was conscious. The question as to whether a dying declaration which otherwise inspires confidence of the court should meet with disapproval for the reason that all that is certified is that the patient was conscious and that it is further not certified that she was physically and mentally fit is no longer res integra. A constitution Bench of this Court in Laxman vs. State of Maharashtra; 2002 (6) SCC 710 had this to say:

"4. Bearing in mind the aforesaid principle, let us now examine the two decisions of the Court which persuaded the Bench to make the reference to the Constitution Bench. In Paparambaka Rosamma v. State of A.P. [(1999) 7 SCC 695 : 1999 SCC (Cri)1361] the dying declaration in question had been recorded by a Judicial Magistrate and the Magistrate had made a note that on the basis of answers elicited from the declarant to the questions put he was satisfied that the deceased is in a fit disposing state of mind to make a declaration. The doctor had appended a certificate to the effect that the patient was conscious while recording the statement, yet the Court came to the conclusion that it would not be safe to accept the dying declaration as true and genuine and was made when the injured was in a fit state of mind since the certificate of the doctor was only to the effect that the patient is conscious while recording the statement. Apart from the aforesaid conclusion in law



the Court had also found serious lacunae and ultimately did not accept the dying declaration recorded by the Magistrate. In the latter decision of this Court in Koli Chunilal Savji v. State of Gujarat [(1999) 9 SCC 562 : 2000 SCC (Cri) 432] it was held that the ultimate test is whether the dying declaration can be held to be a truthful one and voluntarily given. It was further held that before recording the declaration the officer concerned must find that the declarant was in a fit condition to make the statement in question. The Court relied upon the earlier decision in Ravi Chander v. State of Punjab [(1998) 9 SCC 303 : 1998 SCC (Cri) 1004] wherein it had been observed that for not examining by the doctor the dying declaration recorded by the Executive Magistrate and the dying declaration orally made need not be doubted. 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 was in any way interested for fabricating a dying declaration, question of doubt on the declaration, recorded by the Magistrate does not arise.

5. The Court also in the aforesaid case relied upon the decision of this Court in Harjit Kaur v. State of Punjab [(1999) 6 SCC 545 : 1999 SCC (Cri) 1130] wherein the Magistrate in his evidence had stated that he had ascertained from the doctor whether she was in a fit condition to make a statement and obtained an endorsement to that effect and merely because an endorsement was made not on the declaration but on the application would not render the dying declaration suspicious in any manner. For the reasons already indicated earlier, we have no hesitation in coming to the conclusion that the observations of this Court in Paparambika Rosamma v. State of A.P. [(1999) 7 SCC 695 : 1999 SCC (Cri) 1361] (at SCC p. 701, para 8) to the effect that

"in the absence of a medical certification that the injured was in a fit state of mind at the time of making the declaration, it would be very much risky to accept the subjective satisfaction of a Magistrate who opined that the injured was in a fit state of mind at the time of making a declaration"

has been too broadly stated and is not the correct enunciation of law. It is indeed a hypertechnical view



that the certification of the doctor was to the effect that the patient is conscious and there was no certification that the patient was in a fit state of mind especially when the Magistrate categorically stated in his evidence indicating the questions he had put to the patient and from the answers elicited was satisfied that the patient was in a fit state of mind whereafter he recorded the dying declaration. Therefore, the judgment of this Court in *Paparambika Rosamma v. State of A.P.* [(1999) 7 SCC 695 : 1999 SCC (Cri) 1361] must be held to be not correctly decided and we affirm the law laid down by this Court in *Koli Chunilal Savji v. State of Gujarat* (1999) 9 SCC 562 .

(emphasis supplied)

18. Can a person who has suffered 92% burn injuries be in a condition to give a dying declaration? This question is also no longer res integra. In *Vijay Pal v. State (Government of NCT of Delhi)* 2015 (4) SCC 749, we notice the following discussion:

"23. It is contended by the learned counsel for the appellant that when the deceased sustained 100% burn injuries, she could not have made any statement to her brother. In this regard, we may profitably refer to the decision in *Mafabhai Nagarbhai Raval v. State of Gujarat*; (1992) 4 SCC 69: 1992 SCC (cri) 810 wherein it has been held that a person suffering 99% burn injuries could be deemed capable enough for the purpose of making a dying declaration. The Court in the said case opined that unless there existed some inherent and apparent defect, the trial court should not have substituted its opinion for that of the doctor. In the light of the facts of the case, the dying declaration was found to be worthy of reliance.

24. In *State of M.P. v. Dal Singh*; (2013) 14 SCC 159: (2014) 4 SCC (Cri) 141, a two-Judge Bench placed reliance on the dying declaration of the deceased who had suffered 100% burn injuries on the ground that the dying declaration was found to be credible."

19. Therefore, the mere fact that the patient suffered 92% burn injuries as in this case would not stand in the way of patient giving a dying declaration which otherwise inspires the confidence of the Court and is free from



tutoring, and can be found reliable.

Whether the absence of any thumb impression of the deceased is fatal?

20. PW-7 who recorded the dying declaration has categorically deposed that both the thumb and both the hands were burnt and therefore her thumb impression could not be taken. This deposition is borne out by the statement in the dying declaration to the fact that since there are burn on both the hands, thumb impressions could not be obtained.

EFFECT OF PAIN KILLERS

21. The post-mortem report would show that both upper limbs and lower limbs, that is, about 54% were burnt. It shows that the chest [trunk on the front] and back constitute another 36% and it is burnt. It is only in the HNF portion that it was not completely burnt. As far as pain in regard to a burn injury, we would rely on what is produced by the appellant himself along with the written submission namely, Burn- 'Brittanica Online Encyclopaedia'.

"The damage in a second-degree burn extends through the entire epidermis and part of the dermis. These injuries are characterized by redness and blisters. The deeper the burn the more prevalent the blisters, which increase in size during the hours immediately following the injury. Like first-degree burns, second-degree injuries may be extremely painful. The development of complications and the course of healing in a second-degree burn depend on the extent of damage to the dermis. Unless they become infected, most superficial second-degree burns heal without complications and with little scarring in 10 to 14 days.

Third-degree, or full-thickness, burns destroy the entire thickness of the skin. The surface of the wound is leathery and may be brown, tan, black, white or red. There is no pain of the wound is leathery and may be brown, tan, black, white, or red. There is no pain, because the pain receptors have been obliterated along with the rest of the dermis. Blood vessels, sweat glands, sebaceous glands, and hair follicles are all destroyed in skin that suffers a full-thickness burn. Fluid losses and metabolic disturbances associated with



these injuries are grave.

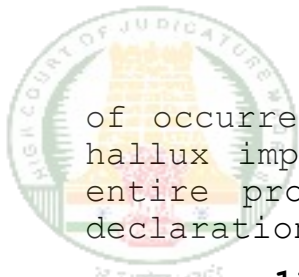
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Surgeons measure the area of a burn as percentage of the body's total skin area. The skin area on each arm is roughly 9 percent of the body total, as is the skin covering the head and neck. The percentage on each leg is 18, and the percentage on the trunk is 18 on the front and 18 on the back. The percentage of damaged skin affects the chances of survival. Most people can survive a second-degree burn affecting 70 percent of their body area, but few can survive a third-degree burn affecting 50 percent. If the area is down to 20 percent, most people can be saved, though elderly people and infants may fail to survive a 15 percent skin loss."

22. The degree of the burn is not clear in this case. However, once the dermis is completely affected when there is third degree burn there would be no pain for the reason that the pain receptor found in the dermis would die. In fact P.W.14 doctor in his deposition has stated that it is not necessary in severe burn that there must be pain. It is true that the pain killer may have been given as was stated by the doctor as burns may not have evenly impacted the skin. But what is important is whether despite the extensive burn, the patient was conscious and mentally and physically in a condition to understand the questions put to her and to give answers to the same."

11. If the dictum of the Hon'ble Supreme Court is applied to the facts of the present case, it is seen that the deceased had suffered 100% burn injuries. As held by the Hon'ble Supreme Court, this, by itself cannot be taken to be factor dis-entitling the deceased to give dying declaration and what is important for the Court is to satisfy itself that the deceased was in a conscious state of mind while recording the dying declaration.

12. The learned Judicial Magistrate No.I, Kovilpatti, on receiving the information at about 12.40 a.m. on 12.05.2012, rushed to the Kovilpatti Government Hospital within five minutes and he went to the emergency ward. He enquired Doctor Srikumar (P.W.9), who certified that the deceased was in a conscious state of mind and immediately, thereafter, he started recording the dying declaration around 12.47 a.m. The deceased had clearly stated that there was a wordy quarrel between her and her husband on 11.05.2012 at about 09.30 p.m., and he had set her on fire and ran away from the scene



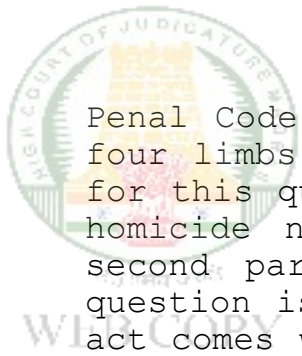
of occurrence. The learned Magistrate had also received the right hallux impression. This was also certified by the Doctor and the entire process was completed at around 01.10 a.m. This dying declaration was marked as (Ex.P.7).

13. The other dying declaration was recorded by P.W.17, who was the Sub Inspector of Police at Ettayapuram Police Station. She got information from the hospital and she went to the hospital at around 1.15 a.m on 12.05.2012 and recorded her statement, which was treated as dying declaration and this was marked as Ex.P.11. Based on the same, the First Information Report came to be registered at about 02.30 a.m. in Crime No.79 of 2012 for the offence under Section 307 of the Indian Penal Code. The statement recorded from the deceased by P.W.17 also does not contradict the earlier dying declaration that was made to the learned Judicial Magistrate. There is no material to show that the medicines that were given to the deceased, made her unconscious or that she was not conscious enough to give a dying declaration.

14. A careful reading of the dying declaration along with the evidence of the Doctor and the postmortem report clearly proves the fact that it is the appellant alone, who was the cause of the death of his wife. Therefore, the Court below was perfectly right in relying upon the dying declaration to sustain the conviction against the appellant. This Court does not find any ground to interfere with the said findings.

15. The next ground that has been urged by the learned Senior Counsel appearing on behalf of the appellant is that the facts of the present case will squarely fall under Exception 1 to Section 300 of I.P.C. In order to substantiate the said arguments, the learned Senior counsel brought to the notice of this Court, the charges framed against the appellant and also the dying declaration given by the deceased. The learned Senior counsel submitted that there used to be frequent quarrels between the appellant and his wife and even on the date of incident on 11.05.2012, there was a verbal fight between the parties and due to grave and sudden provocation he had caused the death of the deceased and therefore, the appellant can be convicted for culpable homicide not amounting to murder and sentenced under Section 304 (i) of the Indian Penal Code.

16. This Court finds lot of force in the submissions made by the learned Senior Counsel. When the Court is confronted with the question whether the offence is "murder" or "culpable homicide not amounting to murder", it has to be approached in three stages. First stage is to see if the accused has done any act which has caused the death of any person. Once the Court is satisfied with the first stage, it leads to the second stage in order to see if the act of the accused person amounts to "culpable homicide" as defined under Section 299 of the Indian Penal Code and if the answer of this question is found in the affirmative, the Court has to reach the next stage to consider the operation of Section 300 of the Indian



Penal Code and see if the act can be brought under any one of the four limbs of Section 300 of the Indian Penal Code. If the answer for this question is in the negative, the offence would be culpable homicide not amounting to murder punishable under the first and second part of Section 304 of the Indian Penal code. If the question is found to be positive, then the Court has to see if the act comes within any of the exceptions enumerated under Section 300 of the Indian Penal Code and if it falls under the exception, it will again come within the category of culpable homicide not amounting to murder, punishable under Section 304 of the Indian Penal Code.

17. In the present case, it is found that the appellant was completely deprived of the power of self-control due to grave and sudden provocation and he caused death of the deceased by pouring kerosene and setting her on fire. It is found that the appellant had not voluntarily provoked himself and there were obviously earlier fights between the parties for a very long time and the verbal fight that took place on 11.05.2012, became the last straw on the camel's back. Therefore, this Court is convinced that the facts of the present case falls under Exception 1 of Section 300 and consequently, it is a culpable homicide not amounting to murder.

Conclusion

18. Taking into consideration the facts and circumstances of the case and in view of the above discussions, this Court is of the considered view that the conviction and sentence passed by the Court below requires modification.

19. The facts of the present case clearly falls under exception 1 to Section 300 of the Indian Penal Code and therefore, the appellant is convicted for "culpable homicide not amounting to murder" and he is sentenced under Section 304 (i) of the Indian Penal code, to undergo Rigorous Imprisonment for a period of seven years.

20. The conviction and sentence passed by the Court below in S.C.No.148 of 2014, dated 15.03.2017, is modified to that extent and accordingly, this Criminal Appeal is allowed in part. It is made clear that the appellant shall be entitled for set off in accordance with Section 428 of the Code of Criminal Procedure, for the period of detention already undergone by him.

Sd/-

Assistant Registrar

// True Copy //

Sub Assistant Registrar(CS)



To

1. THE PRINCIPAL SESSIONS JUDGE,
TUTICORIN

2. THE JUDICIAL MAGISTRATE NO.II,
KOVILPATTI

3. -DO- THROUGH THE CHIEF JUDICIAL MAGISTRATE,
TUTICORIN

4. THE DISTRICT COLLECTOR,
TUTICORIN

5. THE DIRECTOR GENERAL OF POLICE,
MYLAPORE, CHENNAI

6. THE SUPERINTENDENT,
CENTRAL PRISON, PALAYAMKOTTAI

7. THE INSPECTOR OF POLICE
ETTAYAPURAM POLICE STATION,

8. THE ADDITIONAL PUBLIC PROSECUTOR,
MADURAI BENCH OF MADRAS HIGH COURT, MADURAI

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18/09/2019)

Judgment made in

Cr1.A(MD)No.478 of 2017

17.09.2019

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MK (03.10.2019) 12P 12C