



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Judgment Reserved on : 04.10.2021

Judgment Delivered on : 22.10.2021

CORAM :

THE HONOURABLE MR.JUSTICE V. BHARATHIDASAN

and

THE HONOURABLE MR.JUSTICE R.PONGIAPPAN

Criminal Appeal (MD) Nos.196 and 209 of 2020

WEB COPY

Vijayakumar
Gomathi alias Saranya

... Appellant/Accused No.1
... Appellant/Accused No.2

vs.

The State rep by
The Inspector of Police,
Orathanadu Police Station,
Thanjavur District.
(Crime No.279 of 2015)

... Respondent/Complainant

Appeals filed under Section 374 of the Code of Criminal Procedure, 1973, to call for the records pertaining to the order made in S.C.No.267 of 2016 dated 21.02.2020 on the file of the learned Sessions Judge (Mahila Court) (Fast Track Mahila Court), Thanjavur and set aside the same by allowing the above appeal.

For Appellant in Crl.A.196/20 : Mr.R.Johnsathyan for
Mr.R.Nageshwara Rao
For Appellant in Crl.A.209/20 : Mr.K.Selvakumarasamy
For Respondent (in both appeals) : Mr.A.Thiruvadi Kumar
Additional Public Prosecutor

COMMON JUDGMENT

(Judgment of the Court was made by V. BHARATHIDASAN, J.)

The appellants are A1 and A2 in S.C.No.267 of 2016, on the file of the learned Sessions Judge (Mahila Court), (Fast Track Mahila Court), Thanjavur. A1 stood charged, for the offence under Section 302 IPC, and A2 stood charged, for the offence under Sections 294(b), 302 read with 109 IPC. The trial Court, convicted A1, under Section 302 IPC, and sentenced to undergo life imprisonment and also to pay a fine Rs.5,000/-, in default, to undergo one year simple imprisonment and convicted A2, under Section 294(b) and imposed a fine of Rs.500/-, in default, to undergo one month simple imprisonment. A2 was also convicted, for the offence under Section 302 read with 109 IPC and sentenced to undergo life imprisonment and to pay a fine of Rs.5,000/-, in default, to undergo one year simple imprisonment. Now, challenging the conviction and sentence, A1 filed Crl.A(MD)No.196 of 2020 and A2 filed Crl.A(MD) No.209 of 2020. Both the appeals were heard together and disposed of by this common judgment.

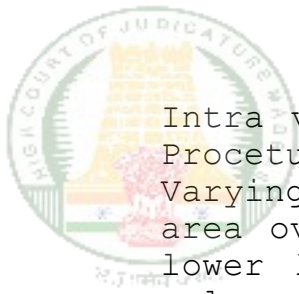


2.The case of the prosecution, in brief, is as follows:-

The deceased in this case, one Bodhanai Selvi, is the wife of A1. After marriage, A1 developed illicit intimacy with A2, which was questioned by the deceased and there was a frequent quarrel between the deceased and A1. Despite fervent appeal made by the deceased, A1 failed to snap the tie with A2 and continued to meet her. Prior to the occurrence, both A1 and A2 were found in the A2's house, which was questioned by the deceased, and A1 beaten the deceased. On the date of occurrence i.e., on 10.06.2015, there was a quarrel at about 02.00 p.m., A1 beaten the deceased, in the main road, in front of his house, thereafter, he took her inside, poured kerosene and set fire on her. When the deceased started crying, neighbours came there, doused the fire and took her to the Government Hospital, Orathanadu. After giving first aid, she was referred to Government Medical College Hospital, Thanjavur. PW19, Doctor, working in the Casualty, admitted the deceased and found that she sustained 100% burn injuries. On receipt of the intimation from the hospital, PW15, Judicial Magistrate, Thiruvaiyaru, who was in-charge of the Judicial Magistrate-III, Thanjavur, recorded the dying declaration of the deceased, at about 09.40 p.m., wherein, the deceased has given a declaration that it is only A1 poured kerosene, set fire on her, the said dying declaration has been marked as Ex.P7. Thereafter, on the next day, 11.06.2015, PW14, Sub Inspector of Police, Orathanadu Police Station, on receipt of the information from the Government Medical College Hospital, Thanjavur, recorded the statement of the deceased at hospital, based on that, he registered the FIR at about 06.00 p.m in Crime No.279/2015(Ex.P6), for the offences under Sections 294(b), 323, 307 read with 109 IPC, sent the same to the concerned Judicial Magistrate Court, copies to the investigating officer and higher officials. On receipt of the FIR, PW16, the Inspector of Police, Orathanadu Police Station, commenced the investigation, and proceeded to the scene of occurrence, where, he prepared the observation mahazar(Ex.P1), rough sketch(Ex.P8), and recovered a plastic bottle(MO1), match box(MO2) in the presence of witnesses, then, he recorded the statement of witnesses. Thereafter, he proceeded to the hospital, where, he recorded the statement of the deceased. Subsequently, on 13.06.2015, at about 12.10 p.m., the deceased succumb to injuries, hence, he altered the FIR, for the offences, under Sections 294(b), 323, 302, 307 read with 109 IPC and sent the altered FIR(Ex.P10) to the Court. At about, 01.00 p.m., he conducted inquest on the dead body, in the hospital and prepared inquest report(Ex.P11), then, he sent the body for postmortem autopsy, through a Police Constable. PW13, Doctor, working in the Medical College Hospital, Thanjavur, conducted postmortem autopsy, given postmortem report(Ex.P4) and found the following injuries:-

'Appearance found at the Post Mortar:-

Moderately nourished body of a female. Finger toe nail



Intra venous cut down wound noted right lower leg(Treatment Proceture).

Varying degree of burns seen all over the body except patchy area over face, lower part of abdomen, genital region, left lower leg and both soles. Base of the burnt area red in colour. Some of the burnt area shows green colour. Partial singeing of scalp hair and public hair noted and complete singeing of eye brow, eye lashes and axillary hair noted...

Other Findings:-

Heart: Normal and Coronary vessels: Patent. Hyoid bone: Intact. Stomach: Empty, no specific smell, mucosa - pale Lungs: Normal, c/s - pale and edematous. Liver, Spleen & Kidneys : Normal, c/s- pale. Small Intestine: Empty, no specific smell, mucosa- pale.. Bladder: contains 20ml of urine. Uterus: Normal, c/s - empty.. Brain: Normal, c/s- pale and edematous. Spinal column: Intact.

Opinion as to the cause of death:

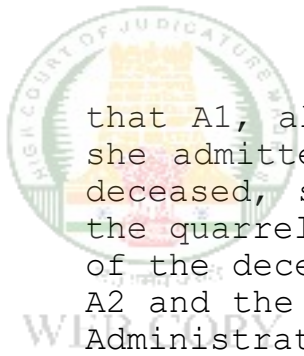
The deceased would appear to have died of complications of burns.'

and he was of the opinion that the deceased appeared to have died of complications of burn injuries.

3.On 19.06.2015, A2, said to have appeared before PW10, Village Administrative Officer, gave extra judicial confession, he produced her before PW16, who recorded her confession and sent her to judicial custody. In the meantime, as PW16, was transferred, he handed over the investigation to PW17. PW17, Inspector of Police (in-charge), Orathanadu Police Station, arrested A1, sent him to judicial custody and handed over the investigation to PW18, Inspector of Police, Orathanadu Police Station. He continued the investigation, recorded the statement of the Doctor, other witnesses and after completion of investigation, filed final report. PW19 is the Doctor in Medical College Hospital, Thanjavur, admitted the deceased and issued accident register Ex.P13.

4.Based on the materials, the trial Court framed the charges as mentioned above and both the accused denied the same as false. In order to prove the case, the prosecution has examined 19 witnesses and marked 13 documents, apart from 3 material objects.

5.Out of the witnesses examined, PW1 and 2 are neighbours of the accused and the deceased, they turned hostile. PW3, driver, known to the accused, also turned hostile. PW4, another known person, turned hostile. PW5, is the neighbour of the deceased, he is a witness to the observation mahazar and also recovery of the material objects. PW6, is also a neighbour to the accused, turned hostile. PW7, is the mother of A1, according to her, after coming to know of the occurrence, she rushed to the Government Hospital, Orathanadu, from there, she took both the deceased and A1, to the Government Hospital, Thanjavur, and further stated



that A1, also sustained burn injuries in hands, shoulders, legs and she admitted the deceased in the hospital. PW8, is related to the deceased, spoke about the illicit intimacy of A1 with A2, and also the quarrel between the deceased and A1. PW9, is the paternal uncle of the deceased, he also spoke about the illicit intimacy of A1 with A2 and the quarrel between the deceased and A1. PW10, is the Village Administrative Officer, Muthambalpuram(Orathanadu), before whom, A2, appeared and given extra judicial confession and he produced her before the investigating officer, PW16. PW11, is a Head Clerk, working in the Judicial Magistrate Court, Orathanadu, and he received the material objects. PW12, is a Head Constable, identified the body, for postmortem. PW13, Doctor, who conducted postmortem autopsy of the body of the deceased. PW14, Sub Inspector of Police, recorded the statement of the deceased and registered the FIR. PW15, Judicial Magistrate, recorded the dying declaration of the deceased. PW16, is the Inspector of Police, commenced the investigation, arrested A2 and recovered the material objects. PW17, Inspector of Police(in-charge), Orathanadu Police Station, during the investigation arrested A1. PW18, Inspector of Police, Orathanadu Police Station, continued the investigation and after recording the statement of other witnesses, filed final report.

6. When the above incriminating materials put to the accused, under Section 313 Cr.P.C., both the accused denied the same and they have not examined any witness, nor marked any documents. Considering the materials available on record, the trial Court, convicted both the accused, as stated above. Now, challenging the conviction and sentence, the accused are before this Court, with these appeals.

7. Mr. R. Johnsathyan, learned counsel for A1, would submit that, the entire prosecution case rests on the dying declaration given by the deceased. There are multiple dying declarations with material inconsistencies in each declarations, and it is highly unsafe to believe those dying declarations, to convict the accused. According to the learned counsel, while the deceased was admitted in the hospital, she has given the first dying declaration stating that due to quarrel with her husband/A1, she herself poured kerosene and set fire on her and it is a self-immolation. Thereafter, on the very same day, at about 09.40 p.m., a judicial dying declaration has been recorded by PW15, Judicial Magistrate, wherein, she has stated that A1 poured kerosene and set fire on her and A1 along with neighbours, doused the fire, in which, A1 also sustained injuries. On the next day morning, she has given a statement before PW14, Sub Inspector of Police, Orathanadu Police Station, wherein, she has given a different version, as if, A1 poured kerosene and set fire and ran away from the house. The trial Court, believing those inconsistent dying declarations, had convicted the accused. It is further submitted that all the neighbours turned hostile. To prove the motive, there is no evidence available on record, except the testimony of the relatives of the deceased. Admittedly,



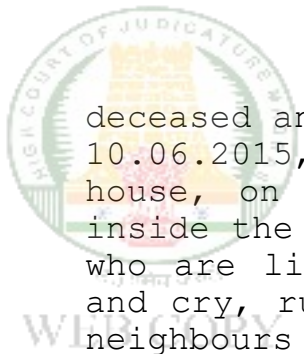
while recording the dying declaration, the relatives of the deceased were present in the hospital and there is a likelihood of tutoring also.

8.Mr.K.Selvakumarasamy, learned counsel for A2, would submit that, except the doubtful extra judicial confession said to have given by A2, there is no material evidence available on record, that A2 has abetted A1, to commit the offence. The alleged extra judicial confession is said to have given after 9 days of the occurrence and the same was also not marked before the Court, only a special report, filed by the Village Administrative Officer, has been marked as Ex.P3. The learned counsel further submitted that even in the alleged dying declarations given by the deceased, she has not stated anything about the abetment, she has only stated that both A1 and A2 has illicit intimacy, and that is not sufficient to convict A2, with the aid of Section 109 IPC.

9.On the other hand, the learned Additional Public Prosecutor, would submit that there are three dying declarations in this case, except in the first dying declaration given before the Doctor, in the judicial dying declaration and the subsequent statement given before the Inspector of Police, the deceased has clearly stated that only A1 poured kerosene and set fire on her. The learned Judicial Magistrate, after following all the necessary precautions, recorded the statement of the deceased, wherein, she has clearly implicated A1. So far as the first dying declaration given before the Doctor, it is only PW7, mother of A1, took her to the hospital, hence, under her influence, she might have given such statement. The judicial dying declaration is voluntary, reliable and the deceased has given the same in a fit state of mental condition and there is no reason to disbelieve the same. According to the learned Additional Public Prosecutor, there is no material inconsistency in the dying declarations, and sufficient to convict A1. So far as A2 is concerned, according to the learned Additional Public Prosecutor, she herself voluntarily appeared before the Village Administrative Officer, PW10, given confession, and based on that, she was arrested and the other witnesses also clearly spoke about the illicit intimacy of A1 with A2, and A2 only abetted A1, to commit the offence. The trial Court, after considering all the evidence available on record, rightly convicted the accused and there is no reason to interfere with the well considered judgment of the trial Court.

10.We have considered the rival submissions and perused the materials carefully.

11.The deceased is the wife of A1. The marriage took place, 4 years prior to the occurrence. It is the case of the prosecution that after the marriage, A1 developed illicit intimacy with A2, who is his neighbour. After coming to know about the same, quarrel



deceased and also beaten her frequently. On the date of occurrence, 10.06.2015, A1 said to have attacked the deceased, in front of his house, on the road, when the neighbours advised him, he took her inside the house, poured kerosene and set fire on her. PWs.1 and 2, who are living in the first floor of the house, after hearing hue and cry, rushed to the house of the deceased, they along with other neighbours poured water and doused the fire. Thereafter, the deceased was taken to the Government Hospital, Orathanadu, by PW7, mother of A1, and after giving first aid, she was referred to the Government Medical College Hospital, Thanjavur. According to PW7, A1 also sustained burn injuries, and he was also accompanying the deceased in the Ambulance to the hospital. Both PW1 and 2 along with other neighbours, namely, PW3, PW4 and PW6, all turned hostile. PW9, closely related to the deceased, spoke about the illicit intimacy of A1 with A2 and the frequent quarrel between the deceased and there is no eye-witness to the occurrence.

12.The entire prosecution case rests on the dying declarations given by the deceased and also the extra judicial confession said to have given by A2. There are three dying declarations in this case. After the occurrence, the deceased was taken to a nearby Government Hospital, Orathanadu, after giving first aid, she was referred to the Government Medical College Hospital, Thanjavur, and she was admitted there, at about 03.25 p.m., on 10.06.2015, by PW19, Doctor, in the Casualty, and issued accident register(Ex.P13). Before PW19, the deceased has stated that due to the quarrel between a known person, she poured kerosene and set fire on herself. This is the first dying declaration given by the deceased, wherein, she has stated it is a self-immolation. The next dying declaration is the judicial dying declaration, given before PW15, Judicial Magistrate, Thanjavur, at about 09.40 p.m. The Judicial Magistrate, after getting certificate, from the Doctor, that the deceased is conscious and fit to give dying declaration and also being satisfied himself, about the fit state of mind of the deceased, recorded the dying declaration, wherein, the deceased, has narrated the earlier quarrel elaborately, and stated that at about 02.00 p.m., A1 poured kerosene, set fire on her and gone out, when she shouted, PW2 and other neighbours along with A1, came inside the house and A1 was trying to douse the fire, in which, he has also sustained injuries, thereafter, she was taken to hospital. This is the second dying declaration. Thereafter, on the next day, PW14, the Sub Inspector of Police, from the respondent police station, on receipt of the intimation from the hospital, recorded the statement of the deceased, wherein, she has given a different version that, at about 02.00 p.m., A1 poured kerosene, set fire on her and ran away from the house, further stated that he should be punished. This is the third dying declaration. It is the contention of the learned counsel for the appellants, there are material inconsistencies in all the three dying declarations and not reliable. Without any corroborating evidence, based on that inconsistent dying declarations, conviction cannot be recorded.



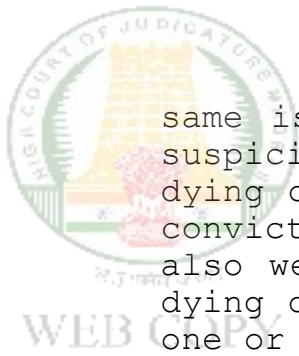
13.The law is settled that, if a dying declaration is found to be voluntary, reliable and made in fit state of mental condition, it can be relied for convicting the accused without any corroboration. However, in cases of multiple dying declarations and there are inconsistencies, then the Court has to examine whether the inconsistencies are material or not. On examining the dying declarations, if the Court found inconsistencies are material in nature, then, it is unsafe to convict the accused based on the dying declarations. The Hon'ble Supreme Court in **Amol Singh v. State of M.P. [(2008) 5 SCC 468]**, held as follows:

"8.Law relating to appreciation of evidence in the form of more than one dying declaration is well settled. Accordingly, it is not the plurality of the dying declarations but the reliability thereof that adds weight to the prosecution case. If a dying declaration is found to be voluntary, reliable and made in fit mental condition, it can be relied upon without any corroboration. The statement should be consistent throughout. If the deceased had several opportunities of making such dying declarations, that is to say, if there are more than one dying declaration they should be consistent. (See: **Kundula Bala Subrahmanyam v. State of A.P. [(1993) 2 SCC 684]**). However, if some inconsistencies are noticed between one dying declaration and the other, the court has to examine the nature of the inconsistencies, namely, whether they are material or not. While scrutinising the contents of various dying declarations, in such a situation, the court has to examine the same in the light of the various surrounding facts and circumstances."

14.In **Raju Devade vs. State of Maharashtra** reported in **(2016) 11 SCC 673**, the Hon'ble Supreme Court has held as follows:-

"23.It is also relevant to refer to judgment of this court in **Ranjit Singh and others versus State of Punjab, 2006 (13) SCC 130** wherein this court has clearly laid down that the conviction can be recorded on the basis of the dying declaration alone if the same is wholly reliable. In the event, if there are suspicions as regards to the said dying declaration, the court should look for some corroborating evidences. Court has further observed that in the event of inconsistencies in the dying declarations the court should lean towards the first dying declaration. Following was observed in para 13:

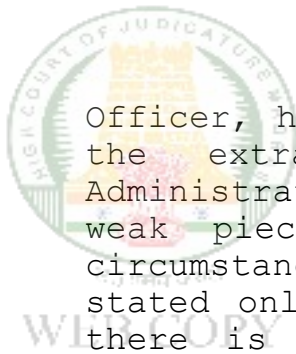
It is now well settled that conviction can be recorded on the basis of a dying declaration alone, if the



same is wholly reliable, but in the event there exists any suspicion as regards correctness or otherwise of the said dying declaration, the courts in arriving at the judgment of conviction shall look for some corroborating evidence. It is also well known that in a case where inconsistencies in the dying declarations, in relation to the active role played by one or the other accused persons, exist, the court shall lean more towards the first dying declaration than the second one.''

15.A careful examination of three dying declarations given by the deceased, in the first dying declaration given at 03.25 p.m., she has clearly stated that it is a self-immolation. PW19, Doctor, who has admitted the deceased, in the hospital, also spoke about the statement given by the deceased and the accident register Ex.P13 issued by him, stating that the deceased was conscious and oriented. On the very same day, at about 09.40 p.m., while giving a judicial dying declaration, before PW15, Judicial Magistrate, the deceased has stated A1 poured kerosene and set fire on her, thereafter, he along with other neighbours, doused the fire, while doing so, A1 also sustained injury. PW7, mother of the deceased, who took the deceased from Orathanadu to Thanjavur in Ambulance, along with A1, also stated that A1 sustained severe burn injuries. On the next day, the deceased has given a third dying declaration, before PW14, Sub Inspector of Police, Orathanadu Police Station, wherein, she has stated that A1 poured kerosene, set fire on her and ran away from the house. From the perusal of all the three dying declarations, there is a noticeable inconsistency looming large. In the earliest dying declaration, it is stated as a self-immolation. The second dying declaration says that A1 set fire, he was also present after the occurrence, and he along with others, doused the fire, in which, A1 also suffered burn injuries all over the body. The third dying declaration is that, after setting fire, A1 ran away from the house. Thus, the inconsistencies found in all the three dying declarations, are material in nature. That apart, as rightly contended by the learned counsel for the appellants, before giving the second and third dying declarations, the relatives of the deceased present there, there is a likelihood of tutoring of the deceased. Except the dying declarations, there is no other corroborating material available on record, to support the prosecution case. In the said circumstances, in the absence of any corroborating material, we are of the view that, it is unsafe, to rely upon the inconsistent multiple dying declarations, to convict the accused.

16.So far as A2 is concerned, she has been convicted, with the aid of Section 109 IPC, based on the extra judicial confession, said to have given by her, before PW10, Village Administrative Officer. As rightly contended by Mr.SelvaKumarasamy, learned counsel for A2, the alleged extra judicial confession given after 9 days of the occurrence, and that was also not marked, before the



Officer, has been marked as Ex.P3. It is settled law that, though the extra judicial confession, given before the Village Administrative Officer, is admissible in evidence, but it is a very weak piece of evidence and should be considered with other circumstances. Even in the dying declarations, the deceased has stated only A2 is having illicit intimacy with A1 and absolutely, there is no allegation that A2 has abetted A1, to commit the offence. In such circumstances, in the absence of any other material, to establish that A2 has intentionally abetted A1, to commit the offence, she cannot be convicted, with the aid of Section 109 IPC and so far as the charge under Section 294(b) also, there is no material available on record, to show that A2 has abused the deceased. Considering all those circumstances, we are of the considered view that the prosecution has failed to prove the charges, against the accused, beyond any reasonable doubt and hence, the appellants are entitled for acquittal.

17. Accordingly, these Criminal Appeals are allowed and the conviction and sentence passed by the trial Court in the judgment, dated 21.02.2020, made in S.C.No.267 of 2016, on the file of the learned Sessions Judge (Mahila Court) (Fast Track Mahila Court), Thanjavur, is set aside and the appellant in both the appeals are acquitted of all the charges. Fine amount, if any, shall be refunded to the appellants. Bail bond executed by the appellants, shall stand cancelled.

Sd/-

Assistant Registrar (P & A)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

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Note: In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate / litigant concerned.

To

1. The Sessions Judge
(Fast Track Mahila Court),
Thanjavur.

2. The Judicial Magistrate,
Orathanadu.



3.The Inspector of Police,
Orathanadu Police Station,
Thanjavur District.

4.The Superintendent,
Central Prison,
Trichy.

5.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

6.The Superintendent,
Central Prison (Womens Cell),
Thiruchirappalli.

Copy to:

The Section Officer,
Criminal Section (Records),
Madurai Bench of Madras High Court,
Madurai. (2 Copies)

+1 CC to Mr.K.Selvakumarasamy, Advocate (SR-32299 DATED 22.10.2021)

CRL.A(MD)Nos.196 and 209 of 2020

DATED : 22.10.2021

PS (CO)/RS (22.10.2021) 10P 10C