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Crl.A.No.7 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 10.01.2024

CORAM :

THE HON'BLE MR. JUSTICE M.S.RAMESH

AND

THE HON'BLE MR. JUSTICE SUNDER MOHAN

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Dharmakumar

... Appellant/Sole Accused

v.

State by Inspector of Police
Kelambur Police Station,
Thiruvannamalai District.
(Crime No.441/2009)

... Respondent/Complainant

Criminal Appeal filed under Section 374(2) of Code of Criminal Procedure, 1973, against the conviction of the appellant and sentence in S.C. No.121 of 2011 dated 23.10.2018, on the file of the learned Additional District and Sessions Judge (Fast Track Court), Arni, Tiruvannamalai District and set aside the conviction and sentence imposed in judgment dated 23.10.2018 and acquit the appellant.

For Appellant : Mr.S.T.Raja

For Respondent : Mr.E.Raj Thilak



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Additional Public Prosecutor

JUDGMENT

(Order of the Court was delivered by SUNDER MOHAN,J.)

This Criminal Appeal has been filed by the sole accused, challenging the conviction and sentence imposed upon him vide judgment dated 23.10.2018 in S.C.No.121 of 2011 on the file of the learned Additional District and Sessions Judge (Fast Track Court), Arni, Tiruvannamalai District

2(i) It is the case of the prosecution that the deceased and the appellant were friends; that the accused was in the habit of demanding money from the deceased for purchasing liquor; that on 04.10.2009 at about 12.30pm, the appellant demanded money from the deceased and the deceased refused; that on 06.10.2009 at about 8.00 to 8.30am, the accused got into the lorry and picked up a quarrel with the deceased; that when PW1, PW2, and PW8 asked the appellant to get down from the lorry, the appellant got down and followed the lorry in a two-wheeler that was ridden by one Pushparaja, stopped the lorry and attacked the deceased with a knife



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on the chest and the stomach.

(ii) It is the further case of the prosecution that the victim was taken to the hospital. On information given by the authorities of Polur Government Hospital to the respondent police, PW14 went to the hospital and found that the deceased was taken for further treatment at Vellore Government Hospital. Thereafter, PW14 recorded the statement of the deceased on 07.10.2009 at about 12.05am. At about 12.45am, he registered the case in Cr.No.441 of 2009 for the offences under Sections 324 and 307 of IPC.

(iii) PW16 took up the investigation and went to the scene of the occurrence at about 5.30am, on 07.10.2009 and prepared the Observation Mahazar (Ex.1) and the Rough Sketch (Ex.P11). At about 10.00am, on the same day, he recorded the statement of the deceased and seized the bloodstained lungi [M.O.1] from the deceased under Seizure Mahazar (Ex.P2). At 2.00pm, he arrested the accused near Polur Bus Stand and, on his confession, seized the knife [M.O.2] and a shirt [M.O.3] under the Seizure Mahazar [Ex.P13].



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(iv) On 19.10.2009, on information from the hospital authorities that the deceased succumbed to injuries, PW16 altered the offence to Section 302 of the IPC and sent the alteration report Ex.P14 to the learned Magistrate. On 20.10.2009, he conducted the inquest in the presence of the panchayatars and prepared the inquest report, Ex.P15. He examined the witnesses, the doctors and the Forensic Science experts and filed the final report for the offence under Sections 341, 324, and 307, altered to 302 of the IPC on 31.12.2009 against the appellant before the learned Judicial Magistrate, Arni.

(v) On the appearance of the appellant, the provisions of Section 207 Cr.P.C., were complied with, and the case was committed to the Court of Session in S.C.No.121 of 2011 and was made over to the learned Additional District and Sessions Judge (Fast Track Court), Arni, Tiruvannamalai District, for trial. The trial Court framed charges u/s.302 of the IPC as against the appellant, and when questioned, the appellant pleaded 'not guilty'.



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(vi) To prove the case, the prosecution examined 16 witnesses as P.W.1 to P.W.16 and marked 16 exhibits as Exs.P1 to P16, and marked 3 Material Objects as M.O.1 to M.O.3. When the appellant was questioned, u/s.313 Cr.P.C., on the incriminating circumstances appearing against him, he denied the same. The appellant/accused neither examined any witness, nor marked any documents.

(vii) On appreciation of oral and documentary evidence, the trial Court found that the prosecution had established the case beyond reasonable doubt, and held the accused guilty of the offences under Section 302 of the IPC and sentenced him to undergo imprisonment for life and to pay a fine of Rs.1000/- in default to undergo simple imprisonment for one month. Hence, the accused/appellant has preferred the appeal challenging the said conviction and sentence.

3. Heard, Mr.S.T.Raja, learned counsel appearing for the appellant/accused, and Mr.E.Raj Thilak, learned Additional Public



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Prosecutor appearing for the respondent/State. This Court also perused all the materials available on record.

4. (i) The learned counsel for the appellant submitted that the witnesses in the case are either hearsay witnesses or have turned hostile. The learned Judge had convicted the appellant only on the sole basis of the complaint of the deceased, which was registered as an FIR. In the absence of any corroboration, the learned Judge ought not to have accepted the said statement and convicted the appellant.

(ii) The learned counsel submitted that in any event, PW5's evidence would show that the deceased had sustained only one cut injury measuring 2x2cm in the right stomach region [Abdomen]. Therefore, the appellant had no intention to cause the death of the deceased, and if the evidence let in by the prosecution is accepted to be true, it would only amount to culpable homicide not amounting to murder and he prayed for a lesser sentence.

5. The learned Additional Public Prosecutor *per contra* submitted that



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it is true that the appellant had caused a single stab injury, however, he submitted that the prosecution had established the said fact by cogent evidence, and the complaint given by the deceased, marked as Ex.P16, has to be treated as a dying declaration, as it satisfies the conditions under Section 32 of the Indian Evidence Act. Therefore, the learned Additional Public Prosecutor submitted that there is no infirmity in relying upon Ex.P16 and the other circumstances proved by the prosecution to establish the guilt of the appellant. Hence, he prayed for dismissal of the appeal.

6. We have carefully considered the rival submissions and perused the materials on record.

7. There are no eyewitnesses to the occurrence. The deceased was attacked on 06.10.2009 at about 8.30pm. He succumbed to the injuries sustained by him 14 days after the occurrence i.e., on 19.10.2009.

8. As stated supra, there are no eyewitnesses to the occurrence. PW1 is the wife of the deceased who speaks about the motive; PW2 is a hearsay



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witness; PW3 is the witness to the Observation Mahazar [Ex.P1] and Seizure Mahazar [Ex.P2]. PW4 is the witness in the confession recorded by the police. PW5 is the Doctor who first treated the deceased at Polur Government Hospital; PW6 is the Forensic Science expert, who examined the Lungi [M.O.1] and the knife [M.O.2] and speaks about Ex.P6 report made by him, in which it is stated that both articles contained human blood. PW7 and PW8 are the hearsay witnesses; PW9 is one of the witnesses to the Observation Mahazar [Ex.P1] and Seizure Mahazar [Ex.P2]; PW10 is the another hearsay witness, who was examined during the inquest; PW11 is the Head constable who had handed over the FIR to the learned Judicial Magistrate, Arni, on 07.10.2009 at 8.30am; PW12 is the postmortem Doctor; PW13 is the Head Constable who assisted in the investigation; PW14 is the Sub Inspector of Police who recorded the statement of the deceased and registered the FIR. PW15 is the Assistant Director of the Forensic Science Laboratory and has deposed that the blood found in the Lungi (M.O.1) and the knife [M.O.2] is human blood ('O' Group and marked the reports [Ex.P7 to Ex.P10]; and PW16 is the Investigation officer, who conducted the investigation and filed the final report against the



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appellant.

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9. From the above list of witnesses, it could be seen that the prosecution seeks to prove their case on the basis of the complaint given by the deceased, the arrest and recovery from the appellant, besides the motive of the appellant, which is spoken to by some of the witnesses. There is no dispute with regard to the fact that the appellant and the deceased were known to each other. It is also established by the prosecution through evidence that the appellant was an alcoholic and in the habit of demanding money from the deceased for buying liquor. PW1 had spoken about the demand made by the appellant to the deceased on 04.10.2009 and about his constant harassment of the deceased. The appellant has not elicited anything in the cross-examination of PW1 to disbelieve PW1's version with regard to the motive.

10. PW3, who was the witness to the seizure of lungi [M.O.1] under Seizure Mahazar [Ex.P2] from the deceased, shows that the said lungi was bloodstained. The recovery of the knife [M.O.2] and shirt [M.O.3] from the



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appellant is spoken to by PW6, the investigation officer [PW16], PW3, and PW15. The shirt of the appellant also had bloodstains, and PW6 and PW15 confirmed the fact through their reports. Ex.P6 to Ex.P10 confirmed the fact that both had the human blood of the 'O' group.

11. Ex.P16 complaint given by the deceased to PW12 satisfies the requirement under Section 32 of the Indian Evidence Act to be treated as a dying declaration as it relates to the circumstances of the death although the deceased was not under expectation of death at the relevant point in time when he made the complaint. This position of law is well settled and is reiterated by the Hon'ble Supreme Court in ***Harendra Rai Vs. State of Bihar and Others***, reported in **2023 SCC OnLine SC 1023**. The relevant observations are extracted hereunder.

"92. Now further issue crops up about the treatment of the FIR/Bayan Tahriri as dying declaration and in this respect various earlier pronouncements of this Court have clarified the position of law that the statement by an injured person recorded as FIR can be treated as a dying



declaration and such a statement is admissible under Section 32 of the Indian Evidence Act. It was also held that the dying declaration must not cover the whole incident or narrate the case history. Corroboration is not necessary for this situation; a dying declaration can be the sole basis for conviction.

93. In the case of Munnu Raja v. State of M.P., the following observations are relevant:

“Para 5. In regard to these dying declarations, the judgment of the Sessions Court suffers from a patent infirmity in that it wholly overlooks the earliest of these dying declarations, which was made by the deceased soon after the incident in the house of one Barjor Singh. The second statement which has been treated by the High Court as a dying declaration is Ex. P-14, being the FIR which was lodged by the deceased at the police station. The learned Sessions Judge probably assumed that since the statement was recorded as a FIR, it could not be treated as a dying declaration. In this assumption, he was clearly in error. After making the statement before the police, Bahadur Singh succumbed to his injuries and therefore the statement can be treated as a dying declaration and is admissible under Section 32(1) of the Evidence Act. The maker of the statement is dead and the statement relates to the cause of his death.

Para 6. The High Court has held that these statements are essentially true and do not suffer



from any infirmity. It is well settled that though a dying declaration must be approached with caution for the reason that the maker of the statement cannot be subject to cross-examination, there is neither a rule of law nor a rule of prudence which has hardened into a rule of law that a dying declaration cannot be acted upon unless it is corroborated...

Para 10. We are in full agreement with the High Court that both of these dying declarations are true. We are further of the opinion that considering the facts and circumstances of the case, these two statements can be accepted without corroboration. Bahadur Singh was assaulted in broad day light and he knew the appellants. He did not bear any grudge towards them and had therefore no reason to implicate them falsely. Those who were in the constant company of Bahadur Singh after the assault, had also no reason to implicate the appellants falsely. They bore no ill-will or malice towards the appellants. We see no infirmity attaching to the two dying declarations which would make it necessary to look out for corroboration.”

94. This Court in the case of Ram Bihari Yadav v. State of Bihar , has discussed the law in paragraph 6 as follows:

“Para 6. The law relating to dying declaration - the relevancy, admissibility, and its probative value-is fairly settled. More often the expressions ‘relevancy and admissibility’ are used as synonyms but their legal implications are



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distinct and different for more often than not facts which are relevant are not admissible; so also facts which are admissible may not be relevant, for example, questions permitted to be put in cross-examination to test the veracity or impeach the credit of witnesses, though not relevant are admissible. The probative value of the evidence is the weight to be given to it which has to be judged having regard to the facts and circumstances of each case. in this case, the thrust of the submission relates not to relevancy or admissibility but to the value to be given to Exh.2. A dying declaration made by a person who is dead as to cause of his death or as to any of the circumstances of the transaction which resulted in his death, in cases in which cause of his death comes in question, is relevant under Section 32 of the Evidence Act and is also admissible in evidence. Though dying declaration is indirect evidence being a specie of hearsay, yet it is an exception to the rule against admissibility of hearsay evidence. Indeed, it is substantive evidence and like any other substantive evidence requires no corroboration for forming basis of conviction of an accused. But then the question as to how much weight can be attached to a dying declaration is a question of fact and has to be determined on the facts of each case.”

95. We may usefully reproduce the relevant paragraphs of the judgment of this Court in the case of Suresh Chandra Jana v. State of West Bengal, (2017) 16



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SCC 466, which reads as follows:

“32. It would not be out of place to discuss the importance of dying declaration under Section 32 of the Evidence Act. The principle underlying Section 32 of the Evidence Act is ‘Nemo moriturus praesumitur mentire’ i.e., man will not meet his maker with a lie in his mouth. Dying declaration is one of the exceptions to the rule of hearsay. It is well settled that there is no absolute rule of law ‘that the dying declaration cannot form the sole basis of conviction unless it is corroborated’. The rule requiring corroboration is merely a rule of prudence [refer Paniben (Smt.) v. State of Gujarat, (1992) 2 SCC 474; Munnu Raja v. State of Madhya Pradesh, (1976) 3 SCC 104; State of U.P. v. Ram Sagar Yadav, (1985) 1 SCC 552; Ramawati Devi v. State of Bihar, (1983) 1 SCC 211]. Moreover, if the person making the dying declaration survives, then such statement would not be admissible under Section 32 of the Evidence Act, rather such Statements may be admissible under Section 157 of the Evidence Act [refer Gajula Surya Prakasrao v. State of A.P., (2010) 1 SCC 88]

33. In light of the importance the dying declaration holds in a criminal trial, the dereliction of duty in recording the dying declaration and the doctor's ignorance of medico-legal jurisprudence is apparent from the material placed before us. My attention has been drawn to various judgments, which have addressed the aspects of dereliction of duty by the doctors and importance of medico-legal aspect in medical jurisprudence [refer State of Gujarat v. Hasmukh @ Bhikha Gova Harijan, (1996) 1 GLR 292, Muniammal v. Supt. of Police, 2008 SCC



OnLine Mad 1251 and Indrajit Khandekar v. Union of India, 2014 SCC OnLine Bom 4810]. It has to be remembered that every stakeholder in this criminal justice system is expected to act with a sense of fairness to bring out the truth so that punishment can be meted out to those who deserve. Although courts are provided with the duty to dispense justice, it cannot be denied that effective dispensation of justice by the courts in this country requires support of all the stakeholders. In light of the above, every stakeholder is expected to be aware of their responsibility and work towards achieving ends of the criminal justice system.

34. The last aspect is regarding the defective investigation and prosecution. If a negligent investigation or omissions or lapses, due to perfunctory investigation, are not effectively rectified, the faith and confidence of the people in the law enforcing agency would be shaken. Therefore the police have to demonstrate utmost diligence, seriousness and promptness. [refer Ram Bihari Yadav v. State of Bihar, (1998) 4 SCC 517].

35. The basic requirement that a trial must be fair is crucial for any civilized criminal justice system. It is essential in a society which recognizes human rights and is based on values such as freedoms, the rule of law, democracy and openness. The whole purpose of the trial is to convict the guilty and at the same time to protect the innocent. In this process courts should always be in search of the truth and should come to the conclusion, based on the facts and circumstances of each case, without defeating the very purpose of justice.”



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96. In the case at hand, the deceased Rajendra Rai gave his statement in the form of Bayan Tahriri and narrated the entire incident and circumstances of the transaction which resulted in his death. Subsequently, he died on account of injuries suffered by him in the incident in question. This fact is not in dispute and hence, following the above case laws, the FIR lodged on the basis of Bayan Tahrir of injured Rajendra Rai is liable to be treated as a dying declaration, which itself is a substantive piece of evidence and is admissible under Section 32 (1) of the Evidence Act."

12. We find from the said dying declaration that the deceased had clearly stated about the motive and the attack made by the appellant on him. The said statement appears to be true and voluntary. Nothing has been brought on record by the appellant to disbelieve the said statement of the deceased. When the dying declaration is found to be voluntary and truthful, it is well established that it can be the sole basis for conviction. In the instant case, the motive has been established. The fact that the bloodstained shirt of the appellant was seized and tallied with the blood group of the



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deceased, this Court is of the view that the prosecution has established its case that the appellant attacked the deceased with the knife beyond reasonable doubt.

13. The next question is whether the said act would amount to an offence under Section 302 IPC. The injury as could be seen from Ex.P5, is a lacerated injury measuring 2x2cm. The deceased died due to the injuries after 14 days. The cause of death as per the evidence of the postmortem Doctor [PW12] and his postmortem report [Ex.P8] is as follows:

“The deceased would appear to have died of Septic
Complication of Stab-Injury-Abdomen]



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14. PW5 is the Doctor who made entries in the Accident Register [Ex.P5]. He has stated in the Accident Register as follows:

- “1. Laceration 2x2cm (R) Flank Skin Deep Red Colour
 2. C/o. Head Ache – Local tenderness present.
- Refer to GVMCH, Vellore”

Thus, we find that the nature of injury sustained by the deceased does not suggest that it is sufficient in the ordinary course of nature to cause the death of the deceased.

15. Considering the fact that the injury sustained by the deceased is a laceration injury of 2x2 cm; the opinion of the doctor that the deceased died due to a septic complication of stab-Injury-Abdomen, and the deceased died 14 days after the accident, we are of the view that the injury inflicted on the deceased was not sufficient in the ordinary course of nature to cause death, though it is likely to cause death. Therefore, we are of the considered view that the prosecution has established its case of intentional attack made by the appellant on the deceased and the said act would constitute an offence of culpable homicide not amounting to murder punishable under Section 304



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(I) IPC.

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16. The learned Additional Public Prosecutor produced a certificate of incarceration issued by the Superintendent of Prisons, Central Prison, Vellore, and stated that the accused is in custody from the date of conviction i.e. 23.10.2018 and upto 09.01.2024 in prison for a total period of 5 years, 2 months, and 16 days.

17. The appellant was directed to pay a fine of Rs.1000/- in the trial Court, and we are informed that the appellant has already paid the said amount. Therefore, in the interest of justice, we deem it appropriate to impose a sentence of imprisonment already undergone and to pay a fine of Rs.1000/-, for the offence under Section 304 (I) IPC. Since the appellant has already paid the said amount, he is directed to be set at liberty forthwith.

18. Accordingly, the Criminal Appeal is partly allowed.

(M.S.R.,J.) (S.M.,J.)
10.01.2024

Index : yes/no



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To

1. The Additional District and Sessions Judge
(Fast Track Court), Arni, Tiruvannamalai District
2. The Inspector of Police,
Kelambur Police Station,
Thiruvannamalai District.
3. The Superintendent,
Central Prison, Vellore.
4. The Public Prosecutor,
High Court, Madras



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