

Doddanayaka and Others Vs. State of Karnataka

Doddanayaka and Others Vs. State of Karnataka

SooperKanoon Citation : sooperkanoon.com/1143919

Court : Karnataka

Decided On : Apr-09-2014

Judge : The Honourable Dr. Justice K. Bhakthavatsala & K.N. Keshavanarayana

Appeal No. : Criminal Appeal No. 319 of 2011

Appellant : Doddanayaka and Others

Respondent : State of Karnataka

Judgement :

(Prayer: This Criminal Appeal is filed under Section 374(2) of the Code of Criminal Procedure, praying to set aside the order dated 5/7.2.2011 passed by the IV Addl. District and Sessions Judge, Mysore, in SC No.39/2010 convicting the appellants/accused for the offences punishable under Sections 498A and 302 r/w Section 34 of IPC.)

1. Every female child born under the sun is a boor: to the Society. It is the Woman who suffers in silence, for the sake of love and affection and welfare of her family, but she is being killed like cattle.

Real culprit escapes punishment for want of legal and direct evidence and in the absence of direct evidence; dying declaration of a victim plays a prominent role in adjudication of a criminal case and punishing the real culprit.

It is seen at the time of admission of a victim of burn injuries etc., the history is recorded by a medical officer in the Hosoiial; thereafter by Police and Taluka Executive Magistrate. If there is variance in the statements and when there is no direct witness to the incident, it becomes a tough task for the court to decide the case as to which of the statements of Lhe victim is acceptable. Therefore, we deem it fit to observe that i; is the high time for the legislature to amend the iaw and provide that the dying declaration of a victim shall be recorded in the presence of a judicial officer.

2. In the instant case, it is alleged that wife of Accused No.1 was killed by pouring kerosene and setting her ablaze by her husband, brother-in-law and mother in law. The trial court has convicted all the three accused on the basis of her dying declaration for the offences punishable under section 498A and 302 read with section 34 of IPC. Therefore, the accused have preferred the present Appeal under Section 374(2) of the Code of Criminal Procedure challenging the impugned judgment of conviction dated 5.2.2011 and order of sentence dated 7.2.2011.

3. Brief facts of the case leading to the filing of the Appeal may be stated as under:

"Respondents No.1 to 3 herein are the accused Nos.1,2 and 3, respectively. The marriage of the deceased-Mahadevamma was performed with accused No.1 resident of the same village, about 5 years prior to her death. P.W4/Chikkamma and P.W-5/Mahadevanaika are the parents of the deceased-Mahadevamma. P.WS/Mahadevaswamy is the elder brother of the deceased. After the marriage, she came to the house of accused situated nearby to their house and lived happily with him for a period of one year; thereafter the accused viz., her husband, brother-in-law and mother-in-law started abusing, ill-treating and subjecting her to cruelty on the ground of sterility. In spite of the advice given by elders in the village not to ill-treat, the accused did not change their attitude and they continued to ill-treat and subject Mahadevamma to cruelty, both mentally and physically. On 22.11.2009 at about 9.00 p m, the accused started quarrelling with Mahadevamma on the ground that she was issueless; they dragged her outside the house; accused No.3/mother-in-law held her; accused No.1/husband poured kerosene on her person and accused No.2/elder brother of accused No.1 (brother-in-law of the

deceased) set her ablaze with a match stick. As a result of which she sustained severe burn injuries and she made hue and cry. It attracted the neighbours and P.W-8/her brother. They rushed to the house of accused; PW-8 with the help of neighbours, extinguished fire on her person and took victim to Nanjangud Hospital, later on she was taken to K R Hospital, Mysore. On 23.11.2009, Nanjangud Rural police namely P.W-14/Raghavendra, PSI, along with his staff went to Devaraja Police station and collected MLC and then went to K.R.Hospital, where the deceased was undergoing treatment and made enquiries with Doctor on duty namely P.W-11/Dr. Dinesh and after he certified that the victim was in a position to give her statement, he recorded the statement of the victim as per Ex.P8 in the presence of P.W-11 and returned to the Police Station at 2.00 p m and registered the case in Crime No.312/2009 against the accused persons for the offences punishable under Sections 498A and 307 r/w Section 34 of IPC and submitted FIR to the Court. The accused was arrested on 26.11.2009. P.W-12/Arun Kumar, TEM, also recorded the statement of the victim in the Hospital as per Ex.P7. The victim died in the Hospital on 25.11.2009 at 2.45 am. After the receipt of death report, the Investigating Officer issued FIR adding Section 302 of IPC. After the investigation was over, charge sheet came to be filed against all the three accused for the offences punishable under Sections 498A and 302 r/w Section 34 of IPC. The accused faced trial before the Court of Session. The accused denied the case of prosecution and pleaded not guilty and claimed to be tried. In support of the case of prosecution, it has got examined as many as 15 witnesses, got marked Exs.P1 to P13 and got exhibited M.Os.1 to 4. During the course of cross-examination of P.Ws.5 and 8, the defence has got marked Exs.D1, D2 and D3 and Letter dated 19.11.2009 written by the Taiuka Executive Magistrate to Nanjangud Rural Police as Lx.D4. After the evidence on the side of prosecution was over, statement of accused under Section 313 of Cr.PC was recorded. The accused have denied all the incriminating circumstances appearing in the evidence of prosecution witnesses. The accused did not adduce any defence evidence. The trial Court, after hearing arguments, perusing the oral and documentary evidence on record, came to a conclusion that the prosecution proved the guilt of the accused for the offences punishable under Sections 498A and 302 r/w Section 34 of IPC.

The trial court, after hearing the accused on the point of sentence, by the impugned order of sentence dated 7.2.2011, sentenced them to undergo SI for 3 years and pay fine of Rs.2,000 each, in default in payment of fine,, to undergo SI for 6 months for the offence punishable under section 498A of IPC and to undergo imprisonment for life and pay fine of Rs. 10,000 each, in default in payment of fine, to undergo SI for 6 months for the offence punishable under section 302 of IPC. This is impugned in this appeal."

4. Learned Counsel for the appellants submits that the trial Court has not properly appreciated the evidence on record and the evidence on record would establish that the deceased-Mahadevamma, who was issueless and suffering from stomach ache disgusted in life and therefore committed suicide by dousing herself with kerosene and setting ablaze. It is also contended that since the deceased-Mahadevamma had sustained 90% of burns, she was not in a position to give any statement and the dying declaration of the deceased recorded by the Police and the Taluka Executive Magistrate at Exs.PS and P7, respectively, are concocted; and the Doctor who treated her in Nanjangud hospital was not examined and there is inordinate delay in lodging complaint. Therefore, he submits that the appellant/accused are innocent of the offences alleged against them and the impugned judgment may be set aside and the accused may be acquitted of the charges levelled against them.

5. Sri K R Keshavamurthy, learned Addl. SPP, submits that the trial Court, on appreciation of the evidence placed on record, has rightly held that the accused have committed the offences punishable under Sections 498A and 302 r/w Section 34 of IPC and awarded adequate punishment and the same does not call for interference by this Court.

6. In the light of the arguments addressed by the learned Counsel for the parties, we formulate the following points for our consideration:

i) Whether the impugned judgment of conviction and order of sentence call for our interference?

ii) Whether it is a fit case to suggest for amending the law for recording dying declaration of a victim of burns or in the allied cases, under Section 32 of the Evidence Act, in the presence of a judicial officer?

7. Our answer to the above points is as per final order.

Rs. Point No. (i);

Out of the 15 witnesses examined by the prosecution, P.W- 1/Mahadevanayaka and P.W-2/Karinayaka, who witnessed the spot mahazar, have not supported the case of prosecution. Further, P.W- 6/Thothanayaka and P.W-7/Radha-neighbours of the accused, who were supposed to speak about the ill-treatment given by the accused to the deceased-Mahadevamma and that they witnessed the incident of the accused pouring kerosene on the deceased-Mahadevamma and setting her ablaze, have not supported the case of prosecution. PW-8/Mahadevaswamy, who is the elder brother of the deceased- Mahadevamma, and resident of same village of the accused namely Kalale village, has deposed that his sister, the deceased, was given in marriage to accused No.1 about 5 years back, Accused Nos.2 and 3 are elder brother and mother of accused No.1, respectively. He has further deposed that accused No.1 was quarrelling with Mahadevamma on the ground that she has not begotten any child and he was not permitting his sister to come to their house for festivals; on the date of incident at about 6.00 p m or 7.00 p m, when he was present in his house, he heard galata from the house of accused, therefore, he and his mother went to the house of the accused and noticed accused No.1 had assaulted Mahadevamma and quarrelling; his sister was sitting in front of their house. Thereafter, he and his mother-P.W 4/Chikkamma returned to their house. On the same day at about 8.00 pm, on hearing hue and cry of Mahadevamma, he went to the house of accused and saw that she had sustained burn injuries, he extinguished fire on her person with the help of the neighbours, and took her to Nanjangud Government Hospital for treatment. The Medical Officer, after examining Mahadevamma, advised him to take her to Mysore for treatment. Accordingly, he took Mahadevamma in an ambulance to K R Hospital at Mysore. It is in his evidence that Mahadevamma was telling him to save herself and when he asked her as to how she sustained burn injuries, she told him stating

that accused No.3/mother-in-law held her, accused No.1/husband poured kerosene on her and accused No.2, her brother-in-law set fire with a match stick. P.W-8 has been exhaustively cross-examined by the defence, but nothing worthwhile is elicited to disbelieve his evidence deposed before the court.

P.W-14/Raghavenrira, P3I of Nanjangud Rural Police, has deposed that on 23.11.2009 at about 9.00 a.m., he received a message from Devaraj Police Station at Mysore about MLC case admission to KR Hospital at Mysore and he was directed to go to Devaraja Police Station and collect the MLC report. Accordingly he went to Devaraja Police Station and collected the MLC report at 10.30 a.m. and made enquiry with P.W-11/Medical Officer about condition of the victim to make statement. The Medical Officer certified that the victim was in a fit condition to give statement. Therefore, he recorded statement of the victim as per Ex.P8 from 12.15 noon and 1.00 p.m. and returned to the Police Station and registered a case and issued FIR to Court. The FIR reached the learned J.M.F.C. on the same day at 8.15 p.m. and took up investigation.

The evidence of P.W-12/Arul Kumar-Tahsildar of Nanjangud has deposed that he received a request from the Nanjangud Rural Police for recording dying declaration of the victim and accordingly he went to the hospital and recorded statement of the victim as per Ex.P7 and forwarded the same to Nanjangud Rural Police. As per Ex.P8 and Ex.P7, dying declarations of the deceased, she has stated that accused No.3 held her, accused No.1 poured kerosene on her and accused No.2 set her ablaze with a match stick. P.W-11/Dr. Dinesh has deposed that the victim's statement was recorded in his presence as per Ex.P8.

During the course of cross-examination of P.W-12/Taluka executive Magistrate, by the counsel for the accused, he has got marked covering letter dated 19.11.2009 addressed to Nanjangud Rural Police enclosing dying declaration of the victim and the same has been marked as Ex.D4. The incident itself occurred on 22.11.2009. Therefore, the date mentioned in Ex.D4(a) covering letter whereby the statement of the victim-Mahadevamma was forwarded to the Police Station and date mentioned in it as '19.11.2009' is a typographical error and there is no good ground to hold that the statement of the victim was not recorded as deposed by him.

(TEM). P.W-4/Chikkamma (mother of the deceased) and P.W-5 (father of the deceased) have corroborated the evidence of P.W-8.

The defence contention is that the deceased herself doused with kerosene and set fire with an intention to commit suicide on the ground of stomach ache, but the same was not established in evidence. According to post mortem report of the deceased, she had sustained 90% to 95% of burn injuries and the cause of death was as a result of extensive burns sustained. She was admitted to Hospital on 22.11.2009 and treated till her death on 25 11.2009 at about 2.45 a.m. As per the dying declarations, apart from accused No.1-her husband, she has implicated accused No.-2/brother-in-law and accused No.3/mother-in-law. It is stated that accused No.2 was residing in the same village, separately. It was accused No.1 and his mother/accused No.3 and deceased were residing together. It is the case of prosecution that the accused were ill-treating the deceased on the ground of sterility. P.W- 8/Mahadevaswamy has not deposed that at the time of incident, he had seen the accused Nos 2 and 3 in the house of accused No.1. There is no cogent evidence to hold that accused Nos.2 and 3 were also present in the house at the time of incident. There is no direct and circumstantial evidence to connect the accused Nos. 2 and 3. In our view, it is not safe to convict the accused Nos. 2 and 3, solely on the basis of the Dying Declaration of the deceased in the absence of cogent and satisfactory evidence on record. The trial Court committed an error in convicting respondent Nos.2 and 3 for the alleged offences. By the evidence of her brother, parents of the deceased and the dying declaration, the prosecution has established that the accused No.1 intentionally harassed and killed her by pouring kerosene and setting fire. There is no inordinate delay in lodging the report and submission of FIR to the court. Thus, we answer point No.(i) partly in the affirmative in so far as the accused No.2 and 3 are concerned, but in the negative in so far as accused No.1 is concerned.

Re. Point No.(ii):

8. The general rule is that in order to prove a fact, direct evidence is the best evidence. As a general rule, the admissibility of hearsay evidence is excluded though there are exceptions to it. Dying declaration is one of the exceptions to the

direct evidence. The victim, a prominent witness to the occurrence, being dead, in the absence of any other witness, exclusion of the dying declaration may lead to acquittal of the accused resulting in mis-carriage of justice. It may be stated that the law requires that the evidence in a Court of justice should be given on oath. A witness who violates the sanctity of oath by narrating facts untrue to his knowledge exposes himself to be punished for perjury. Further, the testimony of a witness in a Court is liable to be scrutinized by cross-examination, but the dying declaration is an exception to the general rule. Dying declaration is based on the maxim *œNemo moriturus praesumitur mentire*" i.e., a man will not meet his maker with a lie in his mouth. The Court is under an obligation to closely scrutinize all the pros and cons of the circumstances while evaluating a dying declaration since it is not a statement made on oath and is not subject to cross-examination. The Apex Court in *RAM NATH Vs. STATE OF MADHYA PRADESH* (AIR 1953 SC 420) has held that "it is not safe to convict an accused person merely on the evidence of a dying declaration without further corroboration because such a statement is not made on oath and is not subject to cross examination and because the maker of it might be mentally or physically in a state of compassion and might be drawing upon his imagination while he was making the declaration". The Apex Court, in *KUSHAL RAO Vs. STATE OF BOMBAY* (AIR 1958 SC 22) has held that "it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of the conviction unless it is corroborated". In the case of *HARBANS SINGH Vs. STATE OF PUNJAB* (AIR 1962 SC 439), the Apex Court has held that "it is neither a rule of law nor of prudence that a dying declaration requires being corroborated by other evidence before a conviction can be based thereon". The Apex Court, in the *STATE OF U.P. Vs. RAM SAGAR YADAV* (AIR 1985 SC 416), has observed: "there is not even a rule of prudence which has hardened into a rule of law that a dying declaration cannot be acted upon unless corroborated. The primary effort of the court has to be to find out whether the dying declaration is true. If it is, no question of corroboration arises. It is only if the circumstances surrounding the dying declaration are not clear or convincing that the court may, for its assurance, look for corroboration to the dying declaration". Hence, as a rule of law or prudence there is no requirement as to corroboration of the dying declaration before it is acted upon. The basis for its admissibility is the conviction of the court

that it is true. The court may look for the corroboration of a dying declaration if the circumstances under which it is made happen to be vague. The element of vagueness could crop up due to several reasons, namely, the inability of the dying man to perceive things properly due to pain or injury inflicted upon him or due to dwindling vision when he is on the verge of death. Another important factor that forms basis of the admissibility of a dying declaration is the morality c religious condition of the dying man, Truth sits on the lips of a dying man who has a sense of impending death. But if the dying man was under no expectation of death, could it be presumed that even then his religious or moral fiber would get strengthened impelling him to speak the truth. In our view, truth would sit on the lips of a dying man only if he is under expectation of death.

9. Dying declaration is admissible in evidence under Section 32 of the Indian Evidence Act. We have come across in many number of cases that dying declaration recorded in presence of the culprits namely husband/in laws; the real names of the culprits would not find a place in her statement and other hand, at the instance of near relatives of the victim, there would be false implication of the husband and his relatives. As a result, it would become a tough task for the court to test the veracity of the statement of the victim who is dead. In that process a real culprit may escape. Law does not prescribe who has to record and in which format. Hence, we trust and hope that the legislature would amend the law and adopt a procedure for recording dying declaration of a victim of burns or allied cases, in the presence of a judicial officer.

Accordingly, we answer point No.(ii).

10. In the result, we pass the following order:

I. Appeal filed by the appellant No.1 fails and the same is hereby rejected. The impugned judgment of conviction and sentence made against the appellant No.1/Accused No.1, for the offences punishable under section 498A and 302 of IPC, are confirmed.

II. Appeal filed by the appellant Nos.2 and 3 is allowed and the impugned judgment of conviction and sentence made against them, for the offences

punishable under Sections 498A and 302 r/w Section 34 of IPC are set aside and they are acquitted of the charges leveled against them. As they are in judicial custody, they shall be set at liberty forthwith, if their presence is not required in any other case.

III. The Registrar General, High Court of Karnataka, is directed to send copy of this order to the Ministry of Home affairs, New Delhi and the Prl, Secretary to Home department, Govt, of Karnataka, Bangalore, for information and needful action in the light of observation made in paragraph No.9 of this Judgment.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com