

Arokiasamy Vs. State Represented by

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Court : Chennai

Decided On : Apr-25-2014

Judge : P.N.Prakash

Appellant : Arokiasamy

Respondent : State Represented by

Judgement :

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT DATED: 25.04.2014 CORAM THE HONOURABLE Mr.JUSTICE P.N.PRAKASH Criminal Appeal (Md.No.615 of 2005 Arokiasamy ..Appellant -versus State represented by Inspector of Police Tuticorin South Cr.No.808/2002 Tirunelveli District..Respondent This Criminal Appeal has been preferred as against the judgment passed by the Assistant Sessions Judge-cum-Chief Judicial Magistrate, Tuticorin, Tuticorin District in his S.C.No.57/2005 dated 29.11.2005, wherein he found the appellant guilty convicted and sentenced to suffer Rigorous Imprisonment for a period of 10 years for each count [3 counts].and also imposed a fine of Rs.1000/- for each count [3 counts].in default to suffer simple imprisonment for a period of 1 month for an offence under Section 306 IPC.

!For Appellant : Mr.V.Kathirvelu Senior Counsel for Mr.K.Prabhu ^For Respondent: Ms.S.Prabha Govt.Advocate [Crl.side].*** :

JUDGMENT

This Criminal Appeal has been filed against the judgment dated 29.11.2005 in S.C.No.57/2005 passed by the learned Assistant Sessions Judge-cum-Chief Judicial Magistrate, Tuticorin, convicting the appellant under Section 306 [3 counts].IPC and sentencing him to undergo 10 years R.I.on each count and pay a fine of Rs.1,000/- for each count, in default to undergo one month R.I.2.It is the case of the prosecution that Mary Christina @ Sheeba [Deceased 1].and the accused got married some time in 1991 and they had two daughters Josephine [Deceased 2].and Monisha [Deceased 3].That the marital relationship between Sheeba and the accused became strained, since it was alleged that the accused was wanting to marry another lady by name Devi, who was working in the shop of the accused.

On account of the strained relationship, Sheeba, Josephine and Monisha consumed Organo Phosphorous compound on 30.10.2002 at 8.30 in the morning.

They were found in an unconscious state by Sagayam [P.W.4].brother of the accused, who went to the house around that time.

Immediately P.W.4 took Sheeba, Josephine and Monisha in an auto rickshaw and dropped them in the house of her father Antony Augustine [P.W.1].around 9.30 a.m.on 30.10.2002.

All the three were not fully conscious and they were not able to speak.

(a) P.W.1 took them to Thenmani Hospital for treatment around 10.15 a.m and they were seen by Dr.Dhanushkodi [P.W.8].On enquiries made with the parents of Sheeba, it came to the knowledge of Dr.Dhanushkodi [P.W.8].that all the three had consumed insecticide and therefore, he gave them immediate fiRs.aid and directed them to a bigger hospital for better treatment.

The parents of Sheeba refused to follow the advice of P.W.8 and insisted that the treatment should be given by him.

Dr.Dhanushkodi [P.W.8].sent an intimation to the police, as their condition was deteriorating.

Sheeba and Josephine died around 3.15 p.m.on 30.10.2002 in Thenmani Hospital itself.

Thereafter, Monisha was shifted to Government Hospital, Thoothukudi where Dr.Padmanabhan [P.W.9].immediately admitted her as in-patient for intensive treatment.

Around 6.30 p.m Monisha also passed away.

The Accident Register was marked as Ex.P8 and Death Intimation was marked as Ex.P9.

On receiving intimation from Thenmani Hospital, Karuppuchamy [P.W.14]., Head Constable of the Police Station went to the said Hospital and recorded the statement from Antony Augustine [P.W.1]., the father of Sheeba.

The said statement was treated as complaint [Ex.P1].and a case in Thoothukudi South Police Station Cr.No.808/2002 under Section 174 Cr.P.C.was registered by P.W.14 at 17.30 hours on 30.10.2002.The printed FIR is Ex.P16.

On the same day at 7.00 p.m.he received intimation from the Government Hospital, Thoothukudi and when he went to the hospital, he learnt about the death of Monisha and obtained the Death Intimation [Ex.P17].(b) The investigation in this case was taken over by Rakan [P.W.15]., the Inspector of Police, who was in charge of Tuticorin South Police Station.

P.W.15 went to the house of the accused and in the presence of witnesses Sudhakar [P.W.6].and Kirubakaran [P.W.7].inspected the house and prepared the Observation Mahazar [Ex.P5].and Rough Sketc.[Ex.P18].On the same day, he recovered a letter supposed to have been written by Josephine [D2].from the house and the same was seized under the cover of Mahazar [Ex.P6].in the presence of Sudhakar [P.W.6].and Kirubakaran [P.W.7].Thereafter, he proceeded to the Government Hospital, Thoothukudi on 31.10.2002 and conducted inquest over the body of Sheeba, Josephine and Monisha and the Inquest Reports are Exs.P19, P21 and P23.

Immediately after the inquest, the three bodies were despatched for postmortem.

Dr.Neelagandaraj [P.W.10].conducted the postmortem on the body of the three deceased and obtained the viscera of the internal organs and sent the same to the Forensic Sciences Laboratory for Chemical Examination.

After receiving the viscera reports, he has given his final opinion that, all the three have died of consuming Organo Phosphorous compound.

(c) At this juncture, it may be relevant to state here that the Viscera Report [Ex.P26].relating to Sheeba reads thus: ".The above items were examined but poison was not detected in any of them.".

Similarly in the Viscera Report relating to Josephine, the Chemical Examiner has stated that they have not detected poison in any of the items received from the police, surgeon.

Only in the Viscera Report relating to Monisha [D3].organo phosphorous compound was detected in stomach, intestine and liver.

In any event, the postmortem Doctor has opined that the death was due to consumption of organo phosphorous compound.

(d) After the inquest, the alteration report was sent by the Investigation Officer altering the accusation from Section 174 Cr.P.C to Section 306 IPC to the learned Judicial Magistrate-I, vide Ex.P25.

Thereafter, he handed over the investigation to the regular Inspector of Police, Paramasivam [P.W.16].of the Thoothukudi South Police Station.

(e) P.W.16 collected various reports from the experts and examined some witnesses.

After completing the investigation, he filed a final report against the accused for the offence under Section 306 [3 counts].IPC before the learned Judicial Magistrate-I, Thoothukudi, who took the same on file as PRC No.17/2004.

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 Sessions.

The Sessions Court made over the case to the learned Assistant Sessions Judge-cum-Chief Judicial Magistrate, Tuticorin, who framed the charge under Section 306 IPC [3 counts].against the accused.

(f) When questioned, the accused pleaded not guilty and so the prosecution examined 19 witnesses and marked 28 exhibits.

When the accused was questioned about the incriminating circumstances under Section 313 Cr.P.C., he denied the same.

After analyzing the evidence adduced by the prosecution, the trial Court convicted and sentenced the accused as aforesaid and hence, this appeal.

3.The parents of Sheeba, namely Antony Augustine [P.W.1].and Agnes [P.W.2].were examined on behalf of the prosecution in order to speak about the factum of marriage between the accused and Sheeba in the year 1991 and also speak about the two children Josephine and Monisha, who were born to them.

They also stated that there was misunderstanding between the couple and that on the previous day, namely 29.10.2002, the accused seems to have fought with his wife in connection with an affair he was alleged to be having with one Devi.

Johnson, the brother of Sheeba was examined as P.W.3 and in his evidence he has stated that he went to his sister's house on 29.10.2002 around 7.30 in the evening and at that time the accused seems to have scolded Sheeba saying ".Why are you alive?.

Go and die.".

When P.W.3 enquired with his sister Sheeba, she seems to have told him that the accused wants to marry one Devi and hence the rift.

In the cross examination, he admitted that he does not know who Devi is and that he had not even told his father [P.W.1].about this incident.

In his cross examination, he has stated that it was he who had taken the letter [Ex.P2].supposed to have been written by Josephine and gave to the police.

4.Sagayam [P.W.4].the brother of the accused turned hostile to the prosecution case.

Devi [P.W.5].who was examined in order to show that she was having an affair with the accused turned hostile to the prosecution case.

Sudhakar [P.W.6].who was a signatory to the Observation Mahazar and Recovery Mahazar, turned hostile to the prosecution case and stated that he went to the Police Station and signed the documents.

Kirubakaran [P.W.7]., who is the witness to the Observation Mahazar and the Seizure Mahazar [Ex.P6].supported the prosecution case.

In his cross examination he stated that the police called him to the place on the 31st evening and he signed the Mahazars and the contents of which he stated that he does not know.

5.With regard to the recovery of the letter [Ex.P2].he has stated that he does not know as to where from the letter was taken and who handed over the letter to the police.

P.Ws.8, 9 and 10 are Dr.Dhanushkodi, Dr.Padmanabhan and Dr.Neelagandaraj, whose role in this case has already been explained above.

Kumar [P.W.11]., Asai Thambi [P.W.12].and Munusamy [P.W.17].are Police Constables, who handed over the three bodies after postmortem to the relatives.

Karuppachamy [P.W.14].registered the FIR [Ex.P16].Rakan [P.W.15].and Paramasivam [P.W.16].are the two Investigating OfficeRs.Madasamy [P.W.13].the Head Constable received the death intimation from the hospital relating to Monisha and handed over the same to the Investigating Officer.

Paul [P.W.18].was sought to be examined by the police to show that he knew the accused well, as he was running a shop near the house of the accused but

unfortunately, he turned hostile to the prosecution case.

Sheik Arif [P.W.19].was examined to show that he had taken the deceased from the house of P.W.1 to the hospital by his vehicle.

6.The entire case revolves upon the evidentiary value of the letter [Ex.P2].that was allegedly written by Josephine [D2].to her maternal uncle, P.W.3.

The English translation of the letter reads as follows: ".30.10.2002 My dear Babu uncle This is Josephine.

As we are not able to live with our father, all three of us are going to die.

The reason for this is Devi who is working in the shop is the fiRs.reason; next is dowry harassment; next is grandfather and grandmother are being humiliated.

In this situation, we are not able to live peacefully.

Dear Goddess Fathima mother and Rev.Fr.

bury us in the corner and pray for us.

Thanking you, Yours Loving Josephine".

7.Apart from this material, there is no substantive evidence to show that the accused was having an affair with Devi.

On the contrary, the defense in the cross examination of P.W.1, father of Sheeba have elicited the following reasons: (a) I do not know anything about Devi and I have not seen her and that is why I did not say anything about Devi in my statement to the police.

(b) It was my daughter who gave poison to the children and took poison for herself.

(c) It is true that my daughter has attempted to commit suicide several times before; twice she attempted to commit suicide by consuming poison and we gave treatment and saved her.

(d) She attempted to commit suicide by self immolation; that was in 1999 October; thereafter, she was admitted to hospital and she escaped from that.

(e) She was a very emotional and sensitive girl and was nurturing worries deep in her mind.

(f) My daughter was married earlier to one James; that was a registered marriage; that James was her cousin brother and it was a prohibited relationship.

Since it was a consanguineous marriage, the father of James had not approved of this marriage and so, Sheeba remained with us.

(g) At the time of the marriage to the accused, the fiRs.marriage was not disclosed to the Parish Priest.

(h) There are no rose plants in the house of the accused.

8.From the reading of the evidence of P.Ws.1 to 3 it appears that there was a serious problem with Sheeba because her marriage with her own cousin brother was rightly not accepted by the parents.

Thereafter, she has been given in marriage to the accused.

She has attempted to commit suicide thrice and has survived by a quirk of fate.

Ultimately on the fateful day, she has consumed Organo Phosphorous compound and has administered it to the children also.

There is absolutely no evidence to show as to how she acquired the said insecticide.

Neither the container was recovered nor the police were able to show the source from where this insecticide was got.

It is not the police case that the accused has purchased insecticide and kept it in his house.

Admittedly, the accused was not in the house when the incident had taken place and he was in his shop.

It was P.W.4, the brother of the accused, who accidentally came to the house, saw the three in a precarious condition and took them to the house of P.W.1.

At that time, Sheeba was alive and the Dr.Dhanushkodi (P.W.8) had advised P.W.1 to immediately take her to a big hospital.

Instead of doing that, they were dilly dallying and ultimately, only at 3.00 p.m., Sheeba and Josephine died.

Only after the death of them, it dawned upon the parents to take Monisha to the Government Hospital to save her life.

9.Coming to the suicide note (Ex.P2).according to the Police, it was recovered on 30.10.2002 under the cover of Mahazar [Ex.P6].The Mahazar has gone to the Court only on 20.06.2003 as could be seen from the initials made thereon by the learned Magistrate.

There is no evidence to show as to when the letter [Ex.P2].had gone to the Court.

The police did not send the letter to the Handwriting Expert along with the admitted handwritings of Josephine for comparison and report.

The authorship of the letter is through the evidence of P.W.1, who says that Ex.P2 was written by his grand daughter.

Apart from this evidence, there is no other material to show that it was Josephine who had written this letter.

Johnson [P.W.3]., the brother of Sheeba and the maternal uncle of Josephine to whom this letter is addressed, has stated in his evidence that, it was he who handed over the letter to the police, but whereas, according to the Investigating Officer, this letter was seized in the house of the accused in the evening on 30.10.2002.

10. At the time of her death, Josephine was only 10 years old and she must have been studying 5th standard.

It looks very artificial for a fifth standard girl to write such a letter cataloging the reasons for ending her life.

I am unable to fathom as to how a ten year old girl would have the desire to commit suicide along with her mother and sibling and in anticipation of which, she would leave such a passionate suicide note.

The alleged suicide note is written in Tamil and the police could have easily examined her school teachers or collected her Tamil note books and sent the same to the Handwriting Expert for comparison.

11. Viewed from any angle, it seems to me that all is not well with the alleged suicide note [Ex.P2]. 12. Giving the benefit of doubt to the prosecution that the suicide note was in fact written by Josephine, let us analyse if that would incriminate the accused.

A suicide note is relevant under Section 32(1) of the Evidence Act, when the cause of death is in question.

In *Pakala Narayana Swami versus Emperor* (AIR 1939 PC47) the Privy Council has enlarged the scope of Section 32(1) and has even brought into the fold of dying declarations statements that were made by the deceased when he was not at all expecting his death.

The law laid down in *Pakala Narayana Swami's* case has come to stay and going by the standard set therein, Ex.P2 may be relevant under Section 32(1) when the cause of the death of Josephine is in question.

In other words, if the Court has a doubt as to whether the death of Josephine was a natural death or suicidal death or homicidal death, the suicide note (Ex.P2) would throw light on this aspect and the Court can place reliance on it to conclude that the death of Josephine was neither a natural death nor homicide, but suicide.

Only to that extent the suicide note (Ex.P2) can be used.

Beyond that, we cannot extend the usage of Ex.P2 to say that the accused had abetted the suicide.

The word ".abetment".

has been defined under Section 107 IPC and it may be necessary to extract both Sections 107 and 306 IPC.

".107.

Abetment of a thing: A person abets the doing of a thing, who- First: -Instigates any person to do that thing; or Secondly: -Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or Thirdly: -Intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation 1:- A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.

".306.

Abetment of suicide: If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine."

13.

To convict a person under Section 306 IPC, it is essential that the prosecution should prove that the accused had committed any one of the overt acts enumerated in Section 107 IPC.

In other words, the prosecution should prove that the accused had: (a) Instigated; or (b) Entered into a conspiracy; or (c) Intentionally aided by any act or illegal omission.

14.

In this case, there is absolutely no evidence to show that the accused had instigated his wife and children to commit suicide; or that the accused entered into a criminal conspiracy with someone else for causing the suicide of his wife and children or had intentionally aided them in any manner for committing suicide.

In the absence of any of these three ingredients, the accused cannot be convicted for an offence under Section 306 IPC merely with the aid of a dying declaration of such a nature.

The suicide note [Ex.P2].narrates the reasons for committing suicide and it does not throw light on any of the three ingredients set out in Section 107 I.P.C.Had the suicide note disclosed any of the overt acts that is pre-requisite for abetment of suicide, then it can definitely be used as an incriminating material against the accused to fasten criminal liability.

15.Had Sheeba committed suicide within 7 years of marriage and if it is shown that the accused had inflicted cruelty on her, then the accused can be convicted under Section 306 I.P.C.with the aid of Section 113A of Evidence Act.

In this case Sheeba committed suicide 7 years after her marriage and so Section 113A of Evidence Act cannot be invoked.

16.No one has a right to commit suicide however difficult position he is in.

In fact, an attempt to commit suicide by itself is an offence under Section 309 IPC.

If the three had survived, then Sheeba would have been prosecuted for an offence under Section 309 IPC for attempting to commit suicide and also for an offence under Section 307 IPC for attempting to commit the murder of her two children.

Had such a situation arisen, the accused herein would never have been in the dock.

Just because the three had died, he cannot now be put in the dock and made responsible for their deaths.

17. Through the evidence of Johnson (P.W.3) the prosecution made a faint attempt to implicate the accused by arguing that on 29.10.2002 when P.W.3 went to Sheeba's house, he heard the accused abusing her by saying ".why are you alive?.

Go and die."

The learned Senior Counsel for the accused repelled this argument by rightly relying upon the judgment of the Supreme Court in Sanju @ Sanjay Singh Sengar v.

State of Madhya Pradesh (CDJ 2002 SC371.

The following passage from the said judgment will adequately answer the prosecution contention.

".13..Even if we accept the prosecution story that the appellant did tell the deceased 'to go and die', that itself does not constitute the ingredient of 'instigation'.

The word 'instigate' denotes incitement or urging to do some drastic or unadvisable action or to stimulate or incite Presence of mens rea.

Therefore, is the necessary concomitant of instigation.

It is common knowledge that the words uttered in a quarrel or in a spur of the moment cannot be taken to be uttered with mens rea.

It is in a fit of anger and emotional."

18. In Amalendu Pal alias Jhantu versus State of West Bengal [2010 (1) SCC707 the Supreme Court has held that: ".In order to bring a case within the purview of Section 306 IPC there must be a case of suicide and in the commission of the said offence, the person who is said to have abetted the commission of suicide must have played an active role by an act of instigation or by doing certain act to facilitate the commission of suicide.

Therefore, the act of abetment by the person charged with the said offence must be proved and established by the prosecution before he could be convicted under Section 306 IPC."

The principle laid down in the said judgment applies in all fours to the facts of this case.

19. In the result, the Criminal Appeal is allowed.

The conviction and sentence imposed upon the accused is set aside.

The fine amount paid, if any, shall be refunded to the appellant.

gms To 1. The Inspector of Police Tuticorin South Tirunelveli District.

2. The Assistant Sessions Judge-cum-Chief Judicial Magistrate, Tuticorin, Tuticorin District
3. The Public Prosecutor High Court, Chennai.

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