

A. Vasanth Kumar Vs. State of Karnataka

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Court : Karnataka

Decided On : Jul-14-2003

Reported in : 2003CriLJ4354; ILR2003KAR3452

Judge : N.S. Veerabhadraiah, J.

Acts : [Evidence Act, 1872](#) - Sections 32

Appeal No. : C.A. No. 890/1997

Appellant : A. Vasanth Kumar

Respondent : State of Karnataka

Advocate for Def. : H.V. Ramesh, HCGP

Advocate for Pet/Ap. : Tomy Sebastian and Associates

Disposition : Appeal allowed

Judgement :

Veerabhadraiah, J.

1. This appeal is by the accused being aggrieved of the Judgment of conviction and sentence passed in S.C.No 52/94 by the learned Additional District and Sessions Judge, Chickmagalur dated 11.11.1997 convicting the accused for the offence under Section 306 IPC sentencing him to undergo S.I. for a period of 4

years and to pay a fine of Rs.2,000/- and in default of payment of fine, to undergo simple imprisonment for 3 months.

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

The accused Vasanth Kumar was working as a writer in, Gavanahalli Nanda Kumar Slate Frame Cutting Saw Mill, whereas the deceased Shanthi was also working as a labourer therein and she was residing with her parents and a child by name Asha. The accused developed intimacy with the deceased and she gave birth to a child and both were residing at Rampura, which is by the side of Gavanahalli. In the meanwhile, the accused secured a Government job at Bantwal and visiting the house of the deceased frequently. It is further alleged that the accused started neglecting the deceased and was making efforts to marry another girl. On account of the attitude of the accused it is alleged that on 14.4.1994, the deceased Shanthi consumed poison and also administered poison to both her children. Immediately, Shanthi was shifted to the Government hospital by the accused and admitted. The accused lodged a complaint as per Ext.P. 13 with the Town Police, Chickmagalur, and a case was registered against Shanthi for the offence under Section 307 and 309 IPC on 14.4.1994. In the meanwhile, P. W. 8 visited the hospital with a requisition to the doctor to record the statement of Shanthi. He recorded the statement of Shanthi on 16.4.1994 in the presence of the doctor P. W. 2, Sundar and returned to the Police Station. On 17.4.1994, he received the death intimation of Shanthi as per Ext.P. 17. Accordingly he conducted the inquest proceedings as per Ext.P 18 in the presence of panch witnesses and also recorded the statements of Rangashetty, Smt. Leela, Krisdhna and H.H. Narayana. On 19.4.1994, he registered a case against the accused in Crime No. 121/94 for the offence under Section 306 IPC and issued FIR as per Ext-P.19 and after completion of the investigation, filed charge sheet.

3. The learned Sessions Judge secured the presence of the accused and framed charges for the offence under Section 306 IPC. The accused pleaded not guilty and claimed to be tried. The prosecution in all examined P.Ws. 1 to 8, produced Exts P. 1 to P. 20. The defence is one of total denial. The statement of the accused was recorded under Section 313 Cr P.C. Though an opportunity was

provided, the accused did not choose to lead any defence evidence. The learned Sessions Judge, relying on the evidence of P.W. 2, Dr. Sundar and the dying declaration of the deceased recorded by P.W. 8, Nagesh Shetty, PSI convicted the accused for the offence under Section 306 IPC sentencing him to undergo S.I. for a period of 4 years and to pay a fine of Rs. 2,000/- and in default of payment of fine, to undergo simple imprisonment for 3 months. It is this judgment of conviction and sentence, which is now questioned by the accused in the present appeal.

4. Learned Counsel for the appellant contended that P.W. 1, Asha is the daughter of the deceased, P.W. 3, Gangamma, is the mother of the deceased, P.W. 4 Leelavathi is the maternal aunt of the deceased, P.W. 5, Premakumari is the landlady in whose house the deceased was residing - and P.W. 6, Kalachari is the inquest panch as well as P.W. 7, Narayana who was a co-worker in the Saw Mill have all turned hostile and have not supported the case of the prosecution. The evidence of P.W. 2, Dr. Sundar, does not disclose whether the deceased has made any statement regarding the cause for having consumed poison. The said statement was made on 16.4.1994, whereas the case against the accused was registered on 19.4.1994 which is an after thought, appears to be at the instance of the owner of the saw mill. He has further contended that Ext.P. 3 cannot be construed coming within the meaning of Section 32 of the evidence Act and it is not at all a dying declaration. The tenor of recording the dying declaration for more than 11/2 hours cannot be believed at all. The alleged dying declaration is also not certified by the doctor to the effect that the maker of the statement was in a fit condition to give such statement. Therefore, the learned Sessions Judge has erred in holding the statement of the deceased as a dying declaration. The learned Counsel further contended that absolutely the prosecution has not placed any materials and proved the ingredients of Section 306 IPC so as to hold that the accused was responsible for abetting the deceased to commit suicide. Accordingly, prayed to set aside the judgment of conviction and sentence passed by the learned Sessions Judge and to allow the appeal.

5. On the other hand, the learned High Court Government Pleader vehemently contended that though P.W. 1, and P.Ws. 3 to 7 have turned hostile, the fact remains that P.W. 8, Nagesh Shetty, the PSI visited the hospital on 16.4.1994 and

gave a requisition to record the statement of Shanthi. The doctor P.W. 2, Sundar certified that she is in a position to talk. It is thereafter that he recorded the statement of the deceased Shanthi which clearly reveals that as the accused has neglected to maintain her and her children, she has consumed poison and also administered poison to her two children. He has further contended that it is only on account of the conduct of the accused that she was driven to consume poison, which attracts the ingredients of Section 306 IPC. Accordingly, justified the judgment of conviction and sentence.

6. In the light of the contentions, the points for consideration that arise are:

1. Whether the statement of the deceased recorded by P.W. 8 on 16.4.1994 does satisfy the ingredients of Section 32 of the evidence Act so as to justify the conviction?

2. Whether the ingredients of Section 306 IPC have been proved by the prosecution so as to hold that the accused is guilty of the offence under Section 306 IPC?

3. Whether the Judgment of conviction and sentence calls for interference?

7. It is an admitted fact that the deceased Shanthi and her parents were working in the Saw Mill at Gavanahalli. At the relevant point of time, the accused Vasanth Kumar was working as writer in the said Saw Mill. It is also the case of the prosecution that the deceased Shanthi had a child by name Asha born to someone. While she was working, Vasanth Kumar gradually developed intimacy with her which turned into love and promised her to look after and maintain. On account of their love, she became pregnant and gave birth to a second child. While they were residing at Rampura, which is by the side of Gavanahalli, the accused secured a Government job at Bantwal. It is therefore the accused frequently once in a week or a fortnight, used to visit the deceased. According to the case of the prosecution that the accused neglected Shanthi. It is on account of the said fact, she consumed poison and also administered poison to her two children. Though the prosecution has examined the independent witness viz , P.W. 1, Asha, aged about 12 years, the daughter of the deceased, she has turned

hostile and has been cross-examined by the prosecution.

8. P.W. 3, Gangamma, the mother of the deceased has stated that the marriage of Shanthi took place about 18 years back and she was residing in her husband's house for about 5 years and she was brought for delivery. Thereafter, there was some misunderstanding between the husband and wife and she did not go to her husband's house. She has further stated that her daughter committed suicide by taking poison with rice. She has also stated that her daughter did not remarry any person and that she does not know the reason for consuming poison. The prosecution treated this witness as hostile and cross-examined. From the evidence of P.W. 3, Gangamma, it reveals that the marriage of the deceased had taken place about 18 years back and that she was brought for delivery and that she did not return to the house of her husband on account of some misunderstanding. Except this, nothing is coming out against the accused. But in the cross-examination of this witness, it is elicited that P.W. 1, Asha was born to one Ramu. The said Ramu was the owner of the Saw Mill and it is also stated that the said Ramu helped in the second marriage of her daughter. It has also come in her evidence that after about 6 years of the marriage of her daughter, she gave birth to a male child and brought her to their house for delivery. After the birth of the male child, her son-in-law Shekar came to see her. At that time, there was a galata between himself and her daughter. Her testimony shows that the deceased developed love with Ramu, the owner of the Saw Mill and gave birth to Asha. It is thereafter that she gave her daughter for the second marriage to one Shekar. But she has not stated anything about this accused Vasanth Kumar and it is also not coming whether the said Vasanth Kumar is Shekar or not. It has also come in her cross-examination that they found their daughter in an unconscious state. Immediately, her son admitted her to the hospital. Even her grand daughter was also admitted to the hospital. It is herself, her husband and her son who were looking after them in the hospital and stated that her daughter did not regain her consciousness till her death. However, she has also stated that Raju (the accused), had agreed to bear the maintenance of Asha, but subsequently, he refused to pay and in that connection also there was some galata.

9. Coming to the testimony of P.W. 4, Leelavathi, it only reveals that she visited the Government hospital and nothing else.
10. P.W.5, Prema Kumari has given a complete go by to the case of the prosecution in so far as leasing her house to the deceased.
11. P.W. 6, Kalachari has given a go by to the mahazar prepared by the police as per Ext. P.11 in the hospital and he is treated as hostile.
12. The evidence of P.W. 7, Narayana shows that he was knowing the owner of the Mill Ramu and that he was also knowing the accused. Except this, he has not stated anything about the incident.
13. According to the evidence of P.W. 8, Nagesh Shetty, that he visited the hospital on 15.4.1994 and came to know that Shanthi was not in a position to give her statement. Again on 16.4.1994, he went to the hospital and gave a requisition to the doctor as per Ext.P. 2 and the doctor informed him that Shanthi was in a position to talk. Thereafter, he recorded her statement on 16.4.1994 from 11.30 AM to 1.00 PM as per Ext.P. 3. Subsequently, on receipt of the death memo, he conducted the formalities and registered a case against the accused for the offence under Section 306 IPC on the basis of the statement of the deceased.
14. The evidence of P.W. 2, Dr. Sundar shows that he conducted the post mortem examination on the dead body of Shanthi on 18.4.1994. It has also come in his evidence that on 16.4.1994, he informed the police that Shanthi was in a position to give her statement. The police recorded her statement as per Ext.P. 3. In the cross-examination, he has categorically stated that he does not remember whether the deceased Shanthi has stated anything before him. He cannot say how long he was before the deceased Shanthi on 16.4.1994. He has further stated that he cannot say who brought the police intimation and at what time and that he does not remember whether he was before Shanthi when her statement was recorded and stated that if the patient is in a position to sign, they will take signature to admission register. Unless, he sees the admission register he cannot say whether the deceased Shanthi has signed it or not. He has further stated that her statement was not in the form of question and answer. He has also stated that in

during her admission, she was in a position to talk. Unless he sees the records, he cannot say when actually she was admitted to the hospital. He has further stated that he does not remember whether Shanthi has not spoken anything with any body. He also stated that if the patient were to die due to consuming of poison, her health condition will deteriorate day by day.

15. Though the doctor P.W. 2, Sundar in the examination in chief has stated that the police have recorded the statement of Shanthi as per Ext.P. 3 in the cross examination, he could not able to say whether he was present at the time of recording the statement of Shanthi or her statement was recorded in his presence. The evidence of P.W. 1, the daughter of the deceased Shanthi, P.W. 3, Gangamma, P.W. 4, Leelavathi, P.W. 5, Prema Kumari, and P.W. 7, Narayana are of no help to the prosecution and nothing has been made out from their testimony regarding the cause of death of Shanthi. The only evidence that is relied on by the learned Sessions Judge is that of P.W. 2, Dr. Sundar which is said to have been recorded in his presence by P.W. 8 Nagesh Shetty, PSI on 16.4.1994. The learned Sessions Judge construed the statement of the deceased as one of dying declaration and convicted the accused.

16. Section 32 of the Evidence Act reads thus:

'32. Cases in which statement of relevant fact by person who is dead or cannot be found etc is relevant,- Statements, written or verbal of relevant facts made by a person, who is dead or who cannot be found or who has become incapable of giving evidence or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts in the following cases.

(1) When it relates to cause of death,- when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are relevant whether the person who made them was or was not, at the time when they were made under expectation of death and whatever may be the nature of the proceeding in which the cause of his death comes into question.

(2) Or is made in course of business,- when the statement was made by such person in the ordinary course of business and in particular when it consists of any entry or memorandum made by him, in books kept in the ordinary course of business or in the discharge of professional duty; or of an acknowledgment written or signed by him of the receipt of money, goods, securities or property of any kind, or of a document used in commerce written or signed by him, or of the date of a letter or other document usually dated, written or signed by him.

(3) Or against interest of maker,- when the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages.

(4) or gives opinion as to public right or custom or matters of general interest,- When the statement gives the opinion of any such person, as to the existence of any public right or custom or matter of public or general interest, of the existence of which, if it existed. He would have been likely to be aware, and when such statement was made before any controversy as to such right, custom or matter had arisen.

17. Where a statement made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence can be made use of against the accused person, if the ingredients of sub-section (1) of Section 32 are made out.

18. Learned Counsel relied on the decision of this Court in the case of M. RAJU vs THE STATE OF KARNATAKA, ILR 2001 KAR 5600, and contended that when the doctor has not certified the fitness and condition of the maker of the statement, it raises a serious doubt and goes to the very root of the case. Therefore, the present case also stands on the same footing wherein the doctor P. W. 2, Sundar has not certified the condition and fitness of the deceased at the time of recording the statement and therefore, it cannot be acted upon. It is well settled principle that the statement of the deceased is admissible in evidence even without there being any corroborative piece of evidence if such statement fulfils the ingredients of Section 32 of the evidence Act and if the condition of the maker were to be certified by the doctor, such statements are admissible. In the present case, though it is stated by the doctor P. W. 2, Sundar that the statement of Shanthi was

recorded by P. W. 8 as per Ext.P. 3, the doctor P. W. 2 has not certified the condition of Shanthy regarding her fitness to give statement. It is no doubt true that though there is no certificate of fitness, if any corroborative piece of evidence is available even such evidence can be acted upon. In the present case, as already mentioned that none of the witnesses have spoken regarding the cause of death of the deceased Shanthy. When the doctor has not certified the fitness of the - deceased Shanthy while recording her statement, it cannot be construed as one of dying declaration.

19. From the evidence of P.W 8, Nagesh Shetty, PSI it reveals that he started recording the statement of the deceased at 11.30 AM and concluded at 1.00 PM. It has come in the evidence of the doctor P.W. 2 that when a person has consumed poison, her health goes on deteriorating. Under such circumstances, it is rather difficult to hold that Shanthy was conscious throughout for a period of 1 1/2 hours. In the evidence of P.W. 3, Gangamma in the cross examination, it is elicited that it is herself, her husband and son, who were present in the hospital. But she does not speak anything about the police recording the statement of the deceased. Nevertheless, it is necessary to examine what has been stated by the deceased in Ext.P. 3 in order to hold, whether such a statement can be acted upon or not. On a perusal of Ext.P. 3, it reveals that the owner of the Saw Mill viz , Ramu was responsible for causing pregnancy of the deceased Shanthy. Ultimately, she gave birth to a child by name Asha. It further shows that the brothers of the owner of the Saw Mill viz , Venkataramu, Subba Rao and Venkatasubbaiah made Ramu to leave the place and stay at Andhra Pradesh and it is these three persons who were responsible to perform the marriage of Shanthy with one Kumar knowing fully well that Shanthy was pregnant at that point of time. While Shanthy was working in the Mill, the accused came in contact with her and was residing at Rampura. It is only after he secured a job at Bantwal, he left the place. It is further seen that deceased had once visited the office of the accused at Bantwal and the accused had paid an amount of Rs.70/- for which she objected, as it was a small amount. Her statement also shows that even as on 14.4.1994, she had purchased a bottle of poison and kept it in the house and that she wanted to go near the accused.s parents' house and consume the poison and die in their presence and that, while she was waiting for an Auto to go to the house of the parents of the accused, she

noticed the accused Vasanth Kumar coming in the Bus. Then she went to the house of the accused's parents, administered poison to her children and she also consumed poison. But it is in the evidence of the mother of the deceased P. W. 3, Gangamma, that her daughter deceased Shanthi committed suicide by taking poison with rice, which is not the case of the prosecution. Therefore, it is rather difficult to hold and act on such a statement which is not certified by the doctor in the absence of any corroborative piece of evidence. That apart, when P. W. 2, Dr. Sundar has clearly stated that the condition of the patient who has taken poison will go on deteriorating, under such circumstances, it is rather difficult to hold that the deceased Shanthi was capable of making a statement for over a period of 1 1/2 hours. Therefore, it is not possible to hold that she was in a fit condition to make such a statement for over a period of 1 1/2 hours.

20. It is sorry state of affairs on the part of the Investigating Officer, even assuming for a while that such a statement has been recorded, the Investigating Officer having come to know the real person responsible for spoiling the life of Shanthi viz , Ramu, the owner of the Saw Mill, failed to take any criminal action against him, who is mainly responsible to spoil the life of Shanthi resulting in her pregnancy. It is also a sorry state of affair on the part of the Investigating Officer who has allowed the real culprits to escape from the clutches of law who were mainly responsible for causing the pregnancy of Shanthi and even after coming to know of the said fact, it is further unfortunate that no criminal action was initiated against them and thereby the life of Shanthi ended in an agony.

21. The learned Sessions Judge failed to appreciate the evidence of P.W. 2, Dr. Sundar and erroneously acted on Ext.P. 3, though the ingredients of Section 32 of the Evidence Act are not complied with. When the statement of the deceased Shanthi has not been duly certified, in the absence of any corroborative piece of evidence, the learned Sessions Judge ought not to have held that the statement is one of dying declaration.

22. For the foregoing reasons, the judgment of conviction and sentence passed by the learned Sessions Judge is liable to be interfered with. Accordingly, the appeal is allowed by setting aside the judgment of conviction and sentence passed by the

learned Sessions Judge. The bail bonds of the accused shall stand cancelled.

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