

ismail Vs. State of Karnataka

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Court : Karnataka

Decided On : Oct-12-1999

Reported in : 2000CriLJ1994

Judge : M.F. Saldanha and N.S. Veerabhadraiah, JJ.

Acts : Indian Penal Code (IPC) - Sections 302, 307 and 316; [Evidence Act, 1872](#) - Sections 32; Code of Criminal Procedure (CrPC) - Sections 313

Appeal No. : Criminal Appeal No. 666/1995

Appellant : ismail

Respondent : State of Karnataka

Advocate for Def. : B.V. Pinto Addl. S.P.P.

Advocate for Pet/Ap. : G.S. Anasuya, Adv.

Disposition : Appeal dismissed

Judgement :

1. This is one more of the wife burning cases but unfortunately, the facts are even more gruesome than the usual ones in so far as the victim wife in this case by the name of Smt. Kursheed Begum was five months pregnant when she was set on fire by the accused as a result of which, not only did she lose her life but the unborn foetus was also killed. The case in question, namely S.C. No. 26/1992 on

the file of the Pri. Sessions Judge, Bellary was disposed of on 6-9-1995 and the accused-husband by the name of Ismail, son of Hannur Sab was convicted of the offence punishable under Section 302, IPC and awarded a sentence of imprisonment for life. The present appeal is directed against the conviction and sentence.

2. Briefly stated, it is alleged that on the afternoon of 29-12-1991 at about 2 PM at their residential house at Chapparadahalli, Hospet that the accused had returned home and while taking his meals a quarrel ensued between him and the wife Kursheed Begum as a result of which he is alleged to have doused her clothes with kerosene and set fire to her. Kursheed Begum caught hold of the accused and screamed at the same time and the neighbours rushed there. Between the neighbours and the accused the flames were extinguished and she was taken to the hospital. She was very extensively burnt and the hospital records indicated that the burns were to the extent of about 90% and the records also indicated that she was in a semi-conscious condition when she was taken to the hospital at about 3.20 PM. The accused had also sustained burn injuries and was also admitted to the hospital for treatment of those burns as is deposed to by PW 13 Dr. Shailaja. Being a medico-legal case, intimation was given to the police who came to the hospital but did not record the statement of the injured as she was in a semi-conscious condition. Dr. Shailaja has deposed to the effect that on the next day i.e. 30-12-1991 at about 2.30 PM. since the patient was fully conscious she informed the police who came there and PW 14 Bimalingamma who is a woman Head Constable recorded the complaint of the patient which is Ex, P. 23. A case was registered under Section 307, IPC but since Kursheed Begum died on the same night the charge was altered to one under Section 302, IPC. The investigations were concluded and the accused-husband was charge sheeted and put up on trial for the offence under Section 302, IPC. The main evidence in the case consisted of the complaint which had been taken down and which was treated as the dying declaration since Kursheed Begum had died on the same night. The learned trial Judge after a careful scrutiny of the evidence held that the prosecution had established the main charge under Section 302, IPC and convicted and sentenced the accused-appellant as indicated by us above. As regards the subsidiary charge under Section 316, IPC. namely causing the death

of an unborn child, the learned Judge acquitted the accused of this and we refrain from making any observations about this charge because the State has not appealed against the order of acquittal.

3. At the hearing of the appeal, Smt. Anasuya, learned counsel who represents the appellant-accused submitted before us that apart from the dying declaration and the evidence of the father of the girl who is PW 5 Khaja Sab that there is virtually no evidence on which the prosecution can rely on in this case because none of the other witnesses including the mother of the deceased Khatoon Bee PW 4 have really supported the prosecution. Dealing first with the evidence of PW 5, the learned counsel pointed out to us that the only incriminating part of the evidence is the statement that is attributed to the deceased Kursheed Begum who is supposed to have told Khaja Sab, the father at about 4 PM. that it was the husband who had set her on fire. What is pointed out to us is that the doctor PW 13 has deposed to the fact that when the injured was brought to the hospital she was in a semi-conscious condition and furthermore that even when the police came there pursuant to the intimation from the hospital that her statement was not recorded because she was not fully conscious. The doctor has next deposed to the effect that at 2.30 PM. on the next day she informed the police that the patient is fully conscious and that was when her statement was recorded. From this evidence, Smt. Anasuya submits that there can be no dispute about the fact that the deceased Kursheed Begum was in no condition to talk or make a statement on 29-12-1991 when she is alleged to have told her father PW. 5 that the accused had set her on fire. She also relies on the fact that Kursheed Begum had sustained 90% burns and that her condition was precarious and the submission is that having regard to her low state and condition that even the doctor did not permit a statement to be recorded by the police and that it was impossible for her to have made any statement to her father on that day. There are two difficulties in the way of accepting this submission, the first of them being that if the defence contends a particular impossibility then it is the duty of the defence to establish that position in the course of the cross-examination of the relevant witnesses. Nothing has been brought on record in the doctor's evidence to establish that Kursheed Begum was continuously in a semi-conscious condition from the time when she was admitted upto 2.30 PM. the next day when her statement was recorded. These are serious

issues and if the defence contends that the girl was in no position to speak to persons around her i.e. her mother and father who were present there then it should have been established through the evidence of the doctor or the case papers that this was the factual position. In the absence of this specific factual evidence being brought on record merely because the doctor refers to her being conscious at 2.30 PM. the next day, we cannot discard the evidence of PW. 5 on this ground; moreso because this statement of PW. 5 has not only gone uncontroverted but in the cross-examination what has come on record is that whereas she was not in a fit condition at 3 PM., that at 4 PM. she had regained consciousness and spoke to her father implicating the accused. Again, PW. 4 has not fully supported the prosecution. As far as PW. 4 the mother is concerned, for reasons best known to her she has not supported the prosecution case and was declared hostile and her evidence is therefore of no avail to the prosecution. Coming back to the evidence of PW. 5, we have already indicated that the defence has not succeeded in overcoming the specific allegation in the father's evidence to the effect that it was the accused who was responsible for the burn injuries caused to the deceased Kursheed Begum.

4. We need to advert at this stage to the most important piece of evidence namely the dying declaration Ex. P. 23. As indicated by us earlier, PW. 14 B. Bimalingamma who is the Woman Head Constable attached to the Hospet Town Police Station came to the hospital at about 2.30 PM. on 30-12-91 and recorded the complaint of Kursheed Begum. The thumb impression of the patient was obtained on the document and the document has also been certified by the doctor Smt. Shailaja. This particular document very clearly implicates the accused and also sets out the reason why he committed the act in question because according to Smt. Kursheed Begum who is the second wife of the accused he found fault with her on the ground that her cooking was not up to the mark but more importantly that she was not good looking and he got aggressive and demanded that she should leave the house. It was at this stage that the alteration took place and he closed the door and doused Kursheed Begum's clothes with kerosene and set her on fire. She has also indicated that when she screamed and when she caught hold of the accused and virtually embraced him that he sustained burn injuries and with the assistance of those who gathered there the fire was

extinguished and she was taken to the hospital. As far as this document is concerned, what we need to point out is that undoubtedly it was originally recorded as a complaint in the form of a statement and was being treated as the F.I.R. on the basis of which an offence under Section 307, I.P.C. was registered against the accused. Kursheed Begum having died, the complaint changed complexion and became a dying declaration on which the prosecution has relied. Smt. Anasuya submitted that the dying declaration which is a piece of evidence and is admissible under Section 32 of the Indian Evidence Act is a special type of evidence and the law allows such a statement to be used in evidence without going through the other formalities of proof etc. because of the fact that it is a recording of the cause and circumstances under which the person sustained injuries and ultimately died and that in the present instance it was a statement in the form of a complaint and not a dying declaration and that therefore, the Court should not attach the high level of evidentiary value to it and should not treat it as a dying declaration. We need to clarify that this is one of the unusual cases where it is true that the statement that was recorded was effectively not recorded as a dying declaration but as a complaint. The real test is as to whether it is a statement written or verbal of relevant facts made by a person who is dead...as to the circumstances which resulted in death...(Section 32 of the Evince Act). The real test that is required to be applied by us is as to whether in the first instance the statement throws light on the circumstances under which the injuries were sustained and the death was caused and secondly, whether it is made by the injured person and thirdly whether it has been done at a point of time when the condition of the injured person was precarious and there was a strong possibility of the person not surviving and lastly as to whether in fact the maker of the statement has died shortly thereafter. These are the tests which the law prescribes for purposes of deciding as to whether such a document could come within the legal definition of a dying declaration and it cannot be treated by the police as a statement or a complaint as long as it conforms to the aforesaid requirements. It is true that as indicated by us earlier the statement recorded by PW. 14 has virtually changed complexion from being a complaint or a F.I.R. to a dying declaration but in our considered view, there are no technical compartments which prescribe that a statement or a complaint cannot be treated as a dying decoration if it satisfies all the ingredients. It is true that this

is very unusual case but after having carefully considered the law on the point, we are of the considered view that Ex. P. 23 has rightly been treated as a dying declaration.

5. Smt. Anasuya then pointed out to us that Ex. P. 23 is not in question and answer form and is not in the actual words of the deceased nor for that matter is it certain as to whether it is in the very language in which the deceased had spoken. There are various guidelines that the Courts have laid down for purposes of ensuring the high quality and evidentiary value of 2 dying declarations but having regard to the aspect of expediency, a Court will not reject a dying declaration that is not in question and answer form or in the exact words of the deceased or in that particular language provided the Court is satisfied that it is true, absolutely correct and a complete reproduction of exactly what the deceased said. From this point of view, the Courts invariably look to supportive evidence the first being the status and credibility of the person who has recorded the dying declaration and in this case, we need to mention that the evidence of PW. 14 inspires total confidence and establishes that there is no doubt about the fact that PW. 14 has clearly and correctly reproduced whatever Kursheed Begum said to her. We find further support from the evidence of Dr. Smt. Shailaja who has not only certified that the statement was recorded in her presence and that Kursheed Begum was not only conscious but was in a good condition while making the statement and we have no hesitation in accepting the dying declaration in this case as being absolutely unimpeachable.

6. There is one more circumstance that heavily incriminates the accused namely the fact that apart from his admitting that he was present when the incident took place that the medical evidence indicates that he had several burn injuries on his body, the relevant document being Ex. P. 19 and this document further indicates that he was undergoing treatment right up to 14-1-1992 i.e. for about 16 days. The submission canvassed by Smt. Anasuya is that the accused tried to extinguish the flames because the wife's saree had caught fire and this was how he sustained the injuries. We have carefully scrutinised the statement under Section 313, Cr.P.C. of the accused and the answers given to the various questions put to him and we find that there is no such explanation put forward by the accused. The law

provides an accused person a specific opportunity to explain away circumstances that appear against the accused and if no explanation is forthcoming then an adverse inference has to follow. What the burn injuries establish is that the accused was present when the fire took place and this fully corroborates the version set out in the dying declaration which is to the effect that deceased Kursheed Begum virtually clutched on to him and that this was how he sustained the burn injuries. This in our considered view is a strong circumstance that goes heavily against the accused. In this regard, even though PW. 2 Chidananda who is the person who took the injured to the hospital and admitted her has turned hostile, the M.L.C. register entry clearly shows that while giving the history of the incident to the doctor, he has stated that it was the accused who set Kursheed Begum on fire.

7. Having very carefully reappraised and reanalyzed the evidence on record, we do find that there is overwhelming conclusive reliable evidence to establish that it was the accused who set his wife Kursheed Begum on fire and that it was as a result of these injuries that she died. The learned trial Judge has recorded the finding that the accused is guilty of the offence punishable under Section 302, I.P.C. and, having reconsidered the entire case, re-examined it and heard the two learned counsel both on facts and law, we see no ground on which this finding can be disturbed. It is true that Smt. Anasuya did make a strong plea that for a variety of reasons including the fact that the incident took place pursuant to an altercation that the charge be brought down to a lower section but having carefully applied our minds to the present record and to the law we see absolutely no ground on which this can be done.

8. Having regard to the aforesaid position, the appeal fails and stands dismissed.