

State of Karnataka Vs. Thippeswamy

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Court : Karnataka

Decided On : Feb-28-2001

Reported in : II(2001)DMC190; ILR2001KAR1756

Judge : Kumar Rajaratnam and ;V.G. Sabhahit, JJ.

Acts : [Evidence Act, 1872](#) - Sections 32; [Indian Penal Code \(IPC\), 1860](#) - Sections 304B and 498A

Appeal No. : Criminal Appeal No. 263 of 1995

Appellant : State of Karnataka

Respondent : Thippeswamy

Advocate for Def. : Manjula R. Kamadolli M., Adv. as Amicus Curiae

Advocate for Pet/Ap. : Mohan Shanthana Gowder, S.P.P.

Judgement :

Kumar Rajaratnam, J.

1. This is a ghastly case where a pregnant bride was set on fire by her husband and ultimately the girl succumbed to the burn injuries.

2. In this atrocious bride burning case, the accused may have to go scot-free for the cardinal error committed by the Trial Court in not framing charges under '

Sections 498A and 304B along With Section 302, IPC but framing a charge only under Section 302, IPC.

3. As we deal with the facts of the case we cannot but express our anguish that the Trial Court did not frame alternative charges under Sections 498A and 304B in ; spite of ample materials before Court for framing charges under Sections 498A and 304B, IPC.

4. We are now necessarily left with this appeal against acquittal for an offence only under Section 302, IPC.

5. The State being aggrieved by the judgment of the Trial Court dated 31.12.1994 in S.C. No. 45/1993 in acquitting the accused for an offence under Section 302, IPC has preferred this appeal against acquittal.

5a. The prosecution case as set out succinctly by PW 1 the father of the deceased is as follows :

6. PW 1 is the father of the deceased Rangalaxmamma. The deceased was married to the accused about 5 months prior to her death. The accused hails from a village known as Sheshappanahalli. PW 1 was an ordinary coolie by profession and being Dalit lived away from the main colony.

7. At the time of marriage, PW 1 paid Rs. 800/- to the accused. After the marriage the deceased went to her husband's house. After some days PW 1 asked her daughter the deceased to come to PW 1's house for different festivals which the deceased did. Last time the deceased came to PW 1's house was during the Gowri festival. The father of the accused came and took the deceased back to their house. After the deceased left the house, PW 1 was informed by his wife that the accused was saying that if he had married another girl, he would have got Rs. 5,000/- as dowry but he got only Rs. 800/- as dowry from PW 1. PW 1 assured his wife that the matter would be settled amicably.

8. PW 1 received a message from a little girl that her daughter-the deceased, was set on fire. He reached the place at 9 p.m. He went to the house of the accused. PW 1 and his family lived in a different village called Kallanahalli. The accused and

the deceased lived in Sheshappanahalli. The distance between Kallanahalli and Sheshappanahalli is approximately 2 miles. When PW 1 went to the house of the accused, he found his daughter-the deceased was lying with burn injuries and she was kept on mat in front of the house of the accused. He desperately tried to talk his daughter. She could not talk and showed signs that she wanted some water to drink. PW 1 gave some water to the deceased to drink. The deceased drank a few sips of water and told her father (PW 1) that while she was grinding ragi, accused took her inside the house and asked her to serve food and while she was serving food, the accused poured kerosene on her body and set fire to her. As it was in the night, PW 1 did not take the deceased to the hospital. The deceased was alive till 4 a.m. She died according to PW 1 at 4 a.m.

9. In the morning PW 1 went to the Police Station at Hiriyur and gave a complaint Ex. P-I. It is relevant to state that the distance between the scene of occurrence and the police station was about 30 kms.

10. PW 8 is the mother of the deceased. PW 8 speaks about the accused being paid Rs. 800/- as dowry. PW 8 states that her daughter-the deceased was married to the accused about 5 months prior to her death. She also speaks about her daughter-the deceased coming to their house. She also states that the deceased had told her that the accused had stated that if he had married some other person, he would have got more dowry. The deceased also told PW 8 that the deceased was demanding that the deceased should bring more ornaments. She does not come to the scene of occurrence on the same day. She comes to know about the death of her daughter and she rushes on the next day to the scene of occurrence and set the dead body of the deceased with burn injuries.

11. PW 2 is the maternal aunt of the deceased. She learnt about ghastly occurrence from the local people. She along with PW 1 reached the scene of occurrence at about 9 p.m. She saw the deceased in front of the house of the accused and her body had severe burns except for her face. She asked for water. Her father PW 1 gave her some water. She told PW 1 that her husband poured kerosene on her and set fire to her.

12. PW 3 is also another maternal aunt of the deceased. She also learnt about the ghastly incident. She also accompanied PW 1 and others. They all reached at the scene of occurrence at about 9 p.m. The body of the deceased was kept in front of the house of the accused on a mat. PW 3 states that the deceased stated to PW 1 that she was thirsty. PW 1 gave the deceased some water to drink. After drinking some water she stated that the accused poured kerosene and set fire to her. PW 3 further stated that the deceased died early in the morning.

13. PW 4 is a close friend of the accused and the deceased. He stated that a boy from the village of the accused had informed him about the incident. He also along with PW 1 and others went to the house of the accused. He also heard the deceased giving an oral dying declaration to PW 1 after PW 1 gave some water to drink.

14. PW 6 is also a close relation of the deceased. She along with others reached the scene of occurrence at about 9 p.m. PW 6 also speaks about the oral dying declaration given by the deceased to PW 1 implicating the accused.

15. PW 7 is a close relation of the deceased. She also accompanies PWs 1, 2, 3 and 6 and comes to the house of the accused. She also speaks about the oral dying declaration given to PW 1, father of the deceased.

16. We have before us the evidence of PWs 1, 2, 3, 6 and 7 who speak about the oral dying declaration given by the deceased to PW 1, the father of the deceased implicating the accused.

17. The oral dying declaration given by the deceased was at about 9 p.m. The occurrence is alleged to have taken place on 23.9.1992 at about 4 p.m. As stated earlier an oral dying declaration was said to have been given at about 9 p.m. According to the witnesses the deceased succumbed to the injuries on the next day that is, on 24.9.1992 at about 4.30 a.m.

18. We have to satisfy ourselves whether the oral dying declaration given by the deceased to PWs 1, 2, 3, 6 and 7 could be believed. If we believe that the deceased gave the oral dying declaration, we have no hesitation in allowing the

appeal.

19. It is in this context the post-mortem report Ex. P4 and the evidence of the doctor PW 5 assumes significance.

20. PW 5 is the doctor who conducted the post-mortem on the deceased on 25.9.1992. She stated that the 'dead body was charred out, skin was burnt and rigor mortis were present'. The sole and face was free from burns. Froth was coming through the nose. She stated that except the burn injuries there were no external injuries. There were also no internal injuries.

21. What the doctor said in her opinion as to the cause of death is of paramount importance. The doctor said that in her opinion the cause of death was due to cardio respiratory arrest after the burns. She issued post-mortem report at Ex. P4.

In the cross-examination the doctor stated as follows :

'The burns were 100% burns. A person having 100% burns is likely to die within 1 or 2 hours.'

In the cross-examination the doctor stated that a person having 100% burns may also survive up to 8 to 10 hours depending on his health conditions and resistance power.

22. In the light of the doctor's evidence let us recall the evidence of the witnesses to whom the deceased gave an oral dying declaration at 9 p.m. on 23.9.1992. All the witnesses PWs 1, 2, 3, 6 and 7 state that they heard about the occurrence and went to Sheshappanahalli about 2 miles away from Kallanahalli where the accused and the deceased lived. They reached Sheshappanahalli at about 9 p.m. The witnesses also state that the deceased died at about 4 a.m. on the next day. According to the prosecution, the occurrence is alleged to have been taken place at about 4 p.m.

23. The inquest report also indicates that the occurrence took place on 23.9.1992 at about 4 p.m. Whether it is possible to hold in the light of the medical evidence that the deceased was alive at 9 p.m. when the oral dying declaration was given is

the only question before us. There is a gap of five hours. Whether the deceased could have survived for five hours to give the oral dying declaration.

24. We have now necessarily to revert to the medical evidence. The medical evidence clearly indicates that the deceased had suffered 100% burns. The medical evidence also clearly indicates that the dead body was charred and the skin was burnt. Lower limbs were flexed and froth was coming through the nose. The opinion of the doctor was that the cause of death was due to cardio respiratory arrest after the burns.

25. In the Taylor's Principles and Practice of Medical Jurisprudence in Thirteenth Edition, the learned author states that the clinical method of classification by the 'Rule of Nines' has value. However, the author has given word of caution by stating in making an autopsy report an accurate record, by words and diagrams, of the exact distribution, size and depth of each burn is necessary.

26. According to the 'Rule of Nines' 9% has given to the head. In Ex. P4, the P.M. report, the doctor PW 5 states that 'the sole and face was free from burns'. However, PW 5 does not state this in evidence. If the face was free from burns, 9% according to the 'Rule of Nines' would have to be deducted and the deceased would have suffered only 91%. But unfortunately learned P.P. in the Trial Court did not elicit this information from the doctor.

27. We have to necessarily make a reference to this fact.

28. The Supreme Court has held that even if the deceased suffered 90% burns, it is possible for the deceased to give a dying declaration.

29. But in the judgment of the Supreme Court in Charipalli Shankara Rao v. P.P., A.P. High Court, 1 : AIR 1995 SC777 , the Supreme Court dealt with a situation where dying declaration was recorded in writing by the doctor.

30. In this case the deceased had suffered 100% burns and has died of cardio respiratory arrest after the burns. The evidence of the doctor PW 5 is also to the effect that the deceased will be unconscious. The doctor PW 5 states as follows :

'The burns were 100% burns. A person having 100% burns cannot speak and the said person will be unconscious.'

31. In Jhala and Raju's Medical Jurisprudence (Sixth Edition), the learned authors state that if the burns are severe and extensive, they prove fatal because of shock, dehydration and victim collapses in a very short time.

32. In Medical Jurisprudence and Toxicology by Dr. K.S. Narayan Reddy (1st Edition), the learned author states that a victim can die of primary (neurogenic) shock due to pain.

33. In Modi's Medical Jurisprudence and Toxicology (Twenty First Edition), the learned author has stated as follows :

'Immediate Causes of Death :

(1) Shock - Severe pain and marked protein rich fluid loss from extensive burns which result in increased capillary permeability cause shock and produce a feeble pulse, pale and cold skin, hypotension and collapse, resulting in death instantaneously or within 24 to 48 hours. In children it may lead to stupor and insensibility deepening into coma and death due to primary shock within 48 hours.

Shock may also occur from fright before the individual is affected by burns, if his heart is weak or diseased.

If death does not occur from shock, it may subsequently occur from toxemia due to the absorption of toxic products from the injured tissues in the burned area. In this condition the temperature rises perhaps to 104F, the pulse rate increases in frequency, and restlessness supervenes and passes into unconsciousness and death, due to delayed shock.'

34. The evidence of the doctor also indicates that the deceased was 3 months pregnant at the time of her demise.

35. On going through all the materials placed before us, it cannot be ruled out that the deceased may have succumbed to the injuries instantly due to either heart failure or because of charring of the body. The doctor also states that immediately

after the incident the deceased would have been unconscious as a result of the shock. In these circumstances the Court has no alternative except to discount the oral dying declaration given by the deceased to PWs 1, 2, 3, 6 and 7. These witnesses arrived at the scene of occurrence nearly five hours after the incident. Apart from the alleged oral dying declaration there is no material to connect the accused with the crime such as last seen together or seen immediately after the occurrence in evidence.

36. The facts of this case are a poignant reminder as to what should never happen and yet is happening with eerie recurrence. Who is responsible for this :

- (1) the society which cannot get rid of the dowry system in spite of stringent laws;
- (2) or the Trial Court which did not frame charges for offences under Sections 498A and 234B in spite of ample materials;
- (3) or is it the police who did not file a charge-sheet for offences under Sections 498A and 304B on the materials placed before it.

37. In our view all of them are partly responsible in some measure.

38. The next question that arises for consideration is whether we can convict the accused for offences under Sections 498A and 304B in the absence of a charge.

39. The Supreme Court says No.

40. The Supreme Court in *Shamasaheb M. Multani v. State of Karnataka*, 1 (2001) SLT 682=1 (2001) CCR 172 (SC)=2001(1) Supreme Today 348, pronounced that if a person is not put on notice of the charge under Section 304B or 498A, it would not be possible for the Courts to convert a charge under Section 302 into one under Section 304B since the ingredients for an offence under Section 302, IPC are entirely different from that of one under Section 304B read with Section 113B of the Evidence Act. The Supreme Court has eloquently dealt with this aspect of the matter.

After dealing with the facts of the case and also dealing with the legal position under Sections 221 and 222 of the CrP.C and Section 464(1) of the Code and

after dealing with the ingredients of the offence under Section 304B as distinct from one under Section 302, IPC the Supreme Court pronounced at paragraphs 18 and 19 of the judgment as follows :

'18. We often hear about 'failure of justice' and quite often the submission in a Criminal Court is accentuated with the said expression. Perhaps it is too pliable or facile an expression which could be fitted in any situation of a case. .The expression 'failure of justice' would appear, sometimes, as an etymological chameleon (The smile is borrowed from Lord Diplock in *Town Investments Ltd. v. Department of the Environment*. The. Criminal Court, particularly the Supreme Court should make a close examination to ascertain whether there was really a failure of justice or whether it is only a camouflage.'

'19. One of the cardinal principles of natural justice is that no man should be condemned without being heard, ('Audi alterum partem'). But the law reports are replete with instances of Courts hesitating to approve the contention that failure of justice had occasioned merely because a person was not heard on a particular aspect. However, if the aspect is of such a nature that non-explanation of it has contributed to penalising an individual, the Court should say that since he was not given the opportunity to explain that aspect there was failure of justice on account of non-compliance with the principle of natural justice.'

41. We examined the possibility of remanding the matter to the Trial Court from the stage of defence as was done by the Supreme Court in the case of *Shammasaheb M. Multani v. State of Karnataka*.

42. The learned State Public Prosecutor fairly submitted that the Investigating Officer in this case has long ago retired from service. He also submitted that there was materials to show into evidence of PW 1 in cross-examination that the accused never demanded any dowry from PW 1. PW 1 also stated that his daughter was living happily with her husband, father-in-law and mother-in-law.

43. PW 8 the mother of the deceased has also stated in cross-examination that the accused never demanded any dowry from her or from her husband PW 1.

44. The State Public Prosecutor also submitted that the accused and the witnesses are all Dalits and the occurrence took place 9 years ago and it would be practically impossible to order a re-trial in the facts and circumstances of this case after a lapse of 9 years.

45. Learned Amicus Curiae Mrs. Manjula Kamadolli M. to whom we are beholden for her assistance, fairly submitted that the accused would be entitled to call other defence witnesses to prove that there is no dowry harassment and the accused had also right to recall the prosecution witnesses under law to establish that no offence under Section 304B, IPC was committed by the accused.

46. We have examined the legal position of a case being remanded from the stage of defence evidence. The Supreme Court at paragraphs 29 and 30 of the judgment in the Shamnasaheb M. Multani's case, concluded as follows :

'29. As the appellant was convicted by the High Court under Section 304-B, IPC, without such opportunity being granted to him; we deem it necessary in the interest of justice to afford him that opportunity. The case in the Trial Court should proceed against the appellant (not against the other two accused whose acquittal remains unchallenged now) from the stage of defence evidence. He is put to notice that unless he disproves the presumption, he is liable to be convicted under Section 304-B, IPC.'

'39. To facilitate the Trial Court to dispose of the case afresh against the appellant in the manner indicated above, we set aside the conviction and sentence passed on him by the High Court and remand the case to the Trial Court.'

47. Chapter XVIII of the Code deals with the trial before a Court of Sessions. Section 233 dealing with entering upon defence. Section 233 reads thus :

'(1) Where the accused is not acquitted under Section 232, he shall be called upon to enter on his defence and adduce any evidence he may have in support thereof.

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(2) If the accused puts in any written statement, the Judge shall file it with the record.

(3) If the accused applies for the issue of any process for compelling the attendance of any witness or the production of any document or thing, the Judge shall issue such process unless he considers, for reasons to be recorded, that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice.'

48. The Supreme Court did not specifically deal with the Section 233. What the Supreme Court meant was that although the matter was remanded to the Trial Court from the stage of defence in view of the presumption under Section 113 of the Evidence Act read with Section 304B of the IPC, the Supreme Court however did not exclude the right of the accused to recall the witnesses under Section 311 of the Code.

49. Section 311 reads thus :

'Power to summon on material witness, or examine person present-Any Court . may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case.'

50. The power of the Court to recall the prosecution witnesses cannot be denied to the accused to arrive at a just decision of the case, before the accused is examined under Section 313 of the Cr.P.C. The Supreme Court in Shamnasaheb M. Multani's case at paragraph 22 has by inference clearly included and not excluded the power of the Trial Court under Section 311 of the Code.

51. Paragraph 22 of the Supreme Court judgment reads as follows :

'22. Under Section 4 of the Evidence Act 'whenever it is directed by this Act that the Court shall presume the fact it shall regard such fact as proved unless and until it is disproved'. So the Court has no option but to presume that the accused had caused dowry death unless the accused disproves it. It is a . statutory

compulsion on the Court. However, it is open to the accused to adduce such evidence for disproving the said compulsory presumption, as the burden is unmistakably on him to do so. He can discharge such burden either by eliciting answers through cross-examination of the witnesses of the prosecution or by adducing evidence on the defence side or by both.'

52. The words 'he can discharge such burden either by eliciting answers through cross- examination of the witnesses of the prosecution or by adducing evidence of the defence side or by both' clearly indicates, that the Supreme Court did not exclude the power of the Trial Court to recall the prosecution witnesses to enable the accused to rebut a presumption under Section 113B of the Indian Evidence Act in order to arrive at a just decision of the case.

53. Now coming to the facts of this case, PW 1, the father of the deceased, has stated in cross- examination, that the accused never demanded any dowry from PW 1. PW 1 has also stated in cross-examination that his daughter was living happily with her husband, father-in-law and mother-in-law.

54. PW 8, the mother of the deceased has stated in cross-examination that the accused never demanded dowry from the parents of the deceased. She has further stated that the relationship between them and the family of the accused were cordial.

55. There are no other witnesses who speak about the demand of dowry by the accused from the parents of the deceased or there are no other materials apart from the evidence of PW 1 and PW 8 to speak about the demand of dowry by the accused. However, as stated earlier, in the cross- examination PWs 1 and 8 have retracted from their statement with regard to the demand of dowry by the accused.

56. In the light of the evidence of PW 1, the father of the deceased and PW 8, the mother of the deceased that the accused never demanded dowry and in the absence of any other materials, it would not be appropriate to remand the case from the stage of defence for the accused to be tried by the Trial Court for offences under Sections 498A and 304B, IPC.

57. We feel that the ends of justice will be met while dismissing the State appeal to request the State Government to consider granting a sum of Rs. 30,000/- in all, as solatium to PW 1 and PW 8, the father and the mother of the deceased respectively.

58. The State appeal stands dismissed with the above recommendation.

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