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Court : Karnataka

Decided On : Jun-20-2002

Reported in : 2003CriLJ252; I(2003)DMC606

Judge : M.F. Saldanha and ;N.K. Patil, JJ.

Acts : [Evidence Act, 1872](#) - Sections 32; [Indian Penal Code \(IPC\), 1860](#) - Sections 300 and 302

Appeal No. : Criminal Appeal No. 123 of 1999

Appellant : Sri Kumar Alias B.A. Jayakumar

Respondent : State of Karnataka

Advocate for Def. : G. Bharani Singh, Addl. SPP

Advocate for Pet/Ap. : Rajamani, Adv.

Disposition : Appeal dismissed

Judgement :

1. This is one more of the very distressing situations in which the prosecution alleges that the accused; pursuant to some quarrel between the spouses, had doused the cloths of the deceased wife by the name of Laxmi with kerosene oil and set fire to them in their house at about 5 PM on 20-8-1995. The couple had been married for about ten years and the record indicates that the accused was

working for the railways, that he took to the habit of drinking and not attending to his duties properly, that he lost his job and that he was thereafter working as a coolie. His wife Laxmi who was the mother of two children apparently used to live part of the time with her mother P.W. 6 Muniyamma. On that day she had come from her mother's place and there was some quarrel between the spouses in the course of which the accused is alleged to have kicked and assaulted Laxmi and then set her clothes on fire. P.Ws. 3, 4 and 5 who are the neighbours sought to intervene and they maintain that despite knocking on the door it was not opened and therefore, seeing smoke and realising that something was amiss they broke the door open. They saw Laxmi with her clothes blazing and the accused was also standing there. These persons extinguished the flames within which time the accused left that place. Laxmi was taken to the hospital by the police constable who is P.W. 10 Head Constable Srinivas who maintains that on the way to the hospital she told him that she had been burnt by her husband. The medico-legal register also records a statement to this effect and later on that evening Head Constable Srinivas took down the statement or rather dying declaration of Laxmi. The recording indicates that she had sustained close to 100% burns and that she died the same night. The accused was arrested and charge sheeted at the end of the investigation for an offence punishable under Section 302, IPC. The learned trial Judge has convicted the appellant for the offence of murder and directed that he shall undergo rigorous imprisonment for life. This appeal assails the validity of that conviction.

2. The appellant has been denied interim bail and the appeal was consequently expedited. At the hearing, we have heard the appellant's learned Advocate Smt. Rajamani as also the learned Addl. SPP, for the State. We have perused the record and we have done a total reappraisal of facts and the law. We need to mention here that the conviction is virtually based on the dying declaration which is Ex. P-2 even though the learned trial Judge finds support from certain other material on record. The principal attack has been directed against this document and we shall deal with the various factual and legal aspects presently. We do need to record at the outset however that for several years the Courts had been adopting the ultra strict approach with regard to the acceptance of dying declarations and if there were any infirmities even technical or procedural, by

default the accused was given the benefit. The result was that on the basis of these technicalities and virtually because of some errors and mistakes which were not all that consequential, an acquittal order would result and the Supreme Court had occasion to observe that such miscarriage or failure of justice is not within the approved scheme of the law. On a total overall appreciation of the legal position the Supreme Court laid down two principles which are now the standard law. The first of them being that a conviction is permissible in this class of cases on the basis of a dying declaration alone provided that this piece of evidence inspires complete and total confidence in the mind of the Court. The second principle which is a corollary to the first one prescribe that procedural errors such as non-obtaining of the requisite certificate or endorsement in the prescribed form from the doctor and such other infirmities which were earlier considered fatal will not be good enough to destroy reduce the acceptability of a dying declaration. We do concede that there has been a considerable shift in the legal position in recent times but as far as the present appeal is concerned it is these principles that we are required to apply.

3. The appellant's learned Advocate started by pointing out to us that this was a case in which Laxmi was found with her clothes blazing and by the time the fire was extinguished that she had sustained virtually 100% burns. The learned Counsel submitted that there are indications from the evidence of P.W. 10, from the evidence of the doctor, from the evidence of the sister Rathna and her mother Muniyamma that even her face had been burnt and what is emphasised is the fact with this degree and level of burns that even when Laxmi was brought to the hospital her condition was precarious. There are entries to this effect in the case papers and the learned Counsel submits that it would have been totally and completely impossible for Laxmi to have either spoken to the doctor or given any case history and that as has now been routine that since she was taken to the hospital by the Head Constable that he must have told the doctor that she was burnt by the husband and that this is what has been taken down. Furthermore, from the fact that Laxmi did not even survive in the hospital for a few hours. What is further pointed out to us is that she was virtually hanging between life and death during that period of time and that with every hour that passed she was virtually sinking. The dying declaration is supposed to have been recorded sometime

around 9 PM and the learned Counsel submits that this was hardly 3 to 4 hours before Laxmi died; that the doctors have admitted that she was given sedatives and tranquilizers and that consequently, it is totally and completely impossible for the Court to accept the prosecution version that she was in a fit condition mentally and physically to make a valid dying declaration. Our attention was drawn to the fact that even though the doctor has endorsed the dying declaration to the effect that it was recorded before him that the dying declaration does not contain the most important endorsement namely the certificate from the doctor that the patient was in a fit condition to understand questions and give rational and cogent answers. It is true that a perusal of this dying declaration does indicate to us that it does not contain the certificate from the doctor in this form. The Supreme Court has further clarified the legal position in more than one judgment laying down that in a given case if there is sufficient evidence before the Court to indicate that the dying declaration is a valid and genuine document and that it reflects the true, correct and complete statement made by the deceased that the mere omission to obtain the fitness certificate from the doctor is not a fatal infirmity. In the present case however, there are two aspects which the learned Addl. S.P.P. has very vehemently laid emphasis on. Firstly, he points out that the doctor who is P.W. 1 has in no uncertain terms stated that Head Constable Srinivas sought his permission to record the dying declaration and that he accorded the permission because Laxmi was in a fit condition to make a statement. He has been seriously grilled by the defence and he has withstood the cross-examination in the course of which he has in terms stated that he was present right through the recording of the statement and that her mental condition was perfectly stable and furthermore that she was in a fit condition to understood the questions put to her and to give the answers and that she in fact did so. We then have the evidence of Head Constable Srinivas who is the scribe of the dying declaration and he has given evidence in identical terms. He points out that he had put the questions to Laxmi, that she answered the questions without any difficulty and that the dying declaration recorded by him represents Laxmi's statement. What we need to point out in this case is that the fitness certificate which was perhaps technically lacking on the original dying declaration has been more than completely established and strangely enough, the majority of these answers have been elicited in the course

of cross-examination. We have no hesitation whatsoever in holding that even though Laxmi's condition was precarious because of the 100% burns that she was still in a mentally fit and clear state of mind around 10 to 10.15 PM on that night to make a correct and cogent statement. Under these circumstances, in our considered view, Ex.P-2 which has been seriously attacked by the defence will have to be accepted.

4. It was pointed out to us that Ex. P-2 is a long statement virtually covering two full pages and that it is too much to believe that Laxmi who was very close to her end at that point of time could have been in a position to recount all this history when questions were put to her. It is true that the doctor was confronted with the position that she had been administered pain killers and sedatives but the doctor has still maintained that despite these medications that the patient was still in a fit condition. Speaking for ourselves all that we need to observe is that the doctor whose credibility we have no reason to doubt has given evidence and his evidence has withstood cross-examination and secondly that the Courts have come across numerous instances where as a result of the treatment meted out in the hospital particularly after pain killers and sedatives are administered that for some period of time the condition of the patient stabilizes even if there is a sudden collapse thereafter. It appears from the case papers that Laxmi did survive till 5AM the next morning but the number of hours or the time factor is not the parameter in so far as the Court is always guided by the evidence of the medical persons namely the doctor.

5. The appellant's learned Counsel very strongly relied on the evidence of the mother Muniyamma who is P.W. 6 and of the sister Rathna P.W. 7 to point out in the first instance that even though there were some quarrels between the husband and wife that it was nothing of any seriousness that could have led to an incident of the present type. Much more than this, the learned Counsel submitted that both these witnesses who came to the hospital and remained for a considerable period of time, both very clearly state that Laxmi did not tell them that she had been burnt by her husband. This is an important angle of the case because the learned Counsel submitted that it is always customary for the relatives of the victim to make allegations against the husband and particularly in this case where Laxmi

had been burnt. The fact that they have not done this even though they were clearly ill-disposed towards him because of his bad behaviour, would be indicative of the fact that the prosecution allegation against the accused is incorrect. Learned Counsel also pointed out to us that P.Ws. 3, 4 and 5 who were the first persons to come on the scene have not made any allegation against the accused and even in cross-examination they have admitted that Laxmi did not allege anything against her husband when they came there. We do not attach too much importance to this aspect of the record because the statements made to the doctor and the statements made in the dying declaration are in answer to questions from persons in authority. There is no indication as to when and under (sic) circumstances Laxmi would have had occasion if at all, to relate the manner in which she sustained the burn injuries to the aforesaid witnesses and the non-mention therefore would not have the effect of being destructive of the dying declaration.

6. There is one other very significant aspect which the appellant's learned Advocate has placed heavy reliance on namely the fact that the P.Ws. 3, 4 and 5 as also the investigating Officer and the doctor all confirm the burn injuries in the course of the incident. Appellant's learned Advocate submitted that this is the strongest indication of the fact that the accused was not responsible for the fire and that he had in fact tried to extinguish it. We need to point out here that in the first instance P.Ws. 3, 4 and 5 very emphatically state that even when they kept tapping at the door knowing that something was seriously amiss that the door was not opened and this in our considered view is a seriously incriminating statement. Whatever would be the cause of the fire Laxmi was in flames at that time. The accused was in the house and he still did not open the door. Even after the door was opened, the accused walked away from, that place and from this conduct, we need to draw an adverse inference. That the accused did have some injuries is a matter of record but there is nothing to indicate precisely how this happened because even in the Section 313, Cr. P.C. statement he has not clarified the position. On the other hand, it has come on record that their house was a very small room of hardly 8' x 8' and even if he was responsible for starting the fire in such a small area, it is but natural that he would have sustained some burn injuries purely because of the proximity. Again, even assuming that the accused tried to extinguish the flames, that this would not mean that the evidence establishes that

he had not started the fire is unacceptable because there are two situations in this class of cases which invariably surface, the first one being that immediately after the flames started blazing there is often times a sense of remorse or desperation but more importantly since it attracts the attention of other persons there is a naturally defensive tendency to act as though one is innocent and to project the image to third parties that one is in fact trying to put out the fire. The fact that the accused sustained some minor burn injuries is not destructive of the prosecution evidence nor is it necessarily indicative of his innocence. The trial Court has also taken judicial notice of the conduct of the accused for a period of time. What has emerged from the record is that he appeared to have become an orphan and that Muniyamma had sheltered him in her house. Laxmi was her married daughter and the accused, irrespective of her status and the presence of her husband who is P.W. 8 virtually seduced her and then induced her to leave the house and take up residence with him. Having done all this, he then continued with his delinquent behaviour of drinking and not attending to his job functions as a result of which he lost his job with the railways and ended up as a coolie. Despite the birth of two children there was no improvement in his conduct and even though Laxmi was virtually existing by basically living with her mother P.W. 6 the accused continued his aggression and hostility and these are a set of circumstances which the trial Court has very rightly taken into account for purposes of assessing the conduct of the accused. In our considered view, these aspects of the case are very relevant and have rightly been relied upon by the trial Court.

7. On a total and complete reconsideration of the record and of the law we confirm the findings of the trial Court that the accused was responsible for the murder of deceased Laxmi on the evening of 20-8-1995. The trial Court has convicted the accused for the offence punishable under Section 302, IPC and awarded a sentence of rigorous imprisonment for life and this Court sees no ground on which that order can be interfered with and accordingly confirms the same. We are informed that the accused has been in custody since the date of his arrest. He will be entitled to set off for the period undergone by him.

8. The appeal accordingly fails on merits and stands dismissed.

