

Lingaiah Vs. State of Andhra Pradesh

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Court : Andhra Pradesh

Decided On : Dec-02-1993

Reported in : 1994(1)ALT(Cri)363; 1994CriLJ1242; I(1994)DMC322

Judge : G. Radhakrishna Rao and ;M. Ranga Reddy, JJ.

Acts : Criminal Rules - Rule 31(4) ; [Indian Penal Code \(IPC\), 1860](#) - Sections 302

Appeal No. : Criminal Appeal No. 152 of 1993

Appellant : Lingaiah

Respondent : State of Andhra Pradesh

Advocate for Def. : Public Prosecutor

Advocate for Pet/Ap. : P. Raghava Reddy, Adv.

Judgement :

G. Radhakrishna Rao, J.

1. The sole accused in Sessions Case No. 32 of 1990 on the file of the Additional Sessions Judge, Medak at Sangareddy, is the appellant. The appellant-accused was charged for the offence of intentionally causing the death of his wife Satyamma (deceased) by pouring kerosene on her and throwing a burning match-stick on her at 7 a.m. on 27-4-1989 at Masanpally cross-roads. The learned

Additional Sessions Judge found him guilty of the offence; convicted him under S. 302 I.P.C. and sentenced him to undergo imprisonment for life.

2. The case of the prosecution is as follows : On 27-4-1989 at about 7.00 p.m. the accused came in a fully drunken state to his hotel at Masanpally cross-roads and demanded money from his wife-deceased for his drinking. As, by that time, he was already in a drunken condition, his wife refused to give money. On that, he poured kerosene on her and set her fire by throwing a burning match stick. Then she was admitted in the Government Civil Hospital at Narayankhed. On a requisition sent by the doctor, P.W. 3, the Mandal Revenue Officer, Narayankhed (P.W. 7) came and recorded the dying declaration of the deceased (Ex. P. 6) in the presence of P.W. 8. On the basis of Ex. P. 1, first information report, given by P.W. 1, the Sub-Inspector of Police, Narayankhed Police Station (P.W. 9) registered the crime under S. 307, I.P.C. The deceased was referred to Gandhi Hospital Secunderabad, for treatment of the burn injuries. She was taken back to her mother's house in Yenuguluru village on 9-5-1989 and she succumbed to the burn injuries on 9-5-1989. On receiving information about the death of the deceased, the provision of law has been altered into one under S. 302, I.P.C.

3. In all, the prosecution has examined 9 witnesses and marked Exs. P. 1 to P. 12. Neither any witness has been examined nor any document has been marked on behalf of the defence.

4. The plea of the accused is one of total denial.

5. In the F.I.R., Ex. P. 1, one Narayan (D.W. 2) was cited as an eye-witnesses. But, he was not produced before the Court. Bailable warrant also was issued and ultimately, he was given up.

6. The inquest panchayatdars came to the conclusion that the deceased died due to burn injuries. The doctor, P.W. 8, who treated her for the burn injuries and who conducted post-mortem, opined in the post-mortem certificate, Ex. P. 8, that the deceased died due to 'toxaemia and renal failure due to burns'. The cause of death, according to the complain, the version given in the dying declaration that has been recorded by P.W. 7, the opinion of the inquest panchayatdars and the

post-mortem certificate, is the burn injuries received by her on 27-4-1989.

7. The only direct witness, who was examined as P.W. 2, turned hostile and did not support the version of the prosecution. He was permitted to be cross-examined by the Public Prosecutor and his statement that has been made before the police under S. 161, Cr.P.C. has been marked as Ex. P. 2.

8. The prosecution case, therefore, solely rests on the dying declaration recorded by P.W. 7 in the presence of P.W. 8. The trial Court found that the during declaration, Ex. P. 6, which was recorded very shortly after the occurrence, supported by the oral dying declaration made before P.W. 1, brother of the deceased and P.W. 4, mother of the deceased, establishes the guilt of the accused beyond reasonable doubt and convicted and sentenced him as mentioned above.

9. Mr. P. Raghava Reddy, learned counsel for the appellant, raised the following contentions. Firstly, the dying declaration, Ex. P. 6, that has been recorded by P.W. 7 cannot be relied upon. In support of this contention, he relied upon the following circumstances - that no explanation has been placed before the Court as to why a requisition has not been sent of the Judicial First Class Magistrate at Narayankhed where the hospital was located. Secondly, the doctor, P.W. 8, who issued the intimation for recording the dying declaration has not stated the reason why he has sent the requisition directly to the Executive Magistrate and not to the Judicial Magistrate. Thirdly, the Executive Magistrate has not followed the guidelines that have been issued by the High Court with regard to recording of dying declarations as envisaged in Rule 31(4) of the Criminal Rules of Practice. Fourthly, the doctor, P.W. 8, who has signed on the dying declaration, Ex. P. 6 has not appended a certificate that the deceased was in a 'fit condition', or in a 'fit state of mind', or 'conscious' at the time of recording the dying declaration. Further, the oral dying declaration alleged to have been given by the deceased before P.Ws. 1 and 4 does not, in material particulars, corroborate with the dying declaration, Ex. P. 6, made by the deceased before the Mandal Revenue Officer, P.W. 7.

10. In this case the dying declaration assumes importance for the reason that the injured eye-witness was not examined and the other direct witness, who was

examined as P.W. 2, turned hostile. Therefore, we will have to examine the truthfulness of the contents of the dying declaration with great care and caution.

11. Rule 31 of the Criminal Rules of Practice, which prescribes the procedure for recording a dying declaration, reads as under :

'31. Dying declaration :-

(1) While recording a dying declaration, the Magistrate shall keep in view the fact that the object of such declaration is to get from the declarant the cause of death or the circumstances of the transaction which resulted in death.

(2) Before taking down the declaration, the Magistrate may put some simple questions to elicit answers from the declarant with a view to knowing his state of mind. He should record the questions and answers together with his own conclusions in the matter.

(3) The declaration should be taken down in the words of the declarant as far as possible. Every question put to the declarant and every answer or sign made by him in reply shall be recorded.

(4) After it is recorded, the statement shall be read over to the declarant and his signature obtained thereon, if possible, and then the Magistrate shall sign the statement. It shall also be signed wherever possible by the Medical Officer concerned with regard to the state of mind of the declarant.'

12. The above rule lays down the guidelines to the Magistrates for recording a dying declaration so that it may stand scrutiny of the original court or the appellate court. Normally, the dying declaration recorded by a competent Judicial Magistrate has to be given due weight. Similarly, in the absence of a Judicial Magistrate, the dying declaration recorded by the Executive Magistrate can also be given due weight. It is not always the rule of law that invariably the dying declaration should be recorded only by the Judicial Magistrate and not the Executive Magistrate. The doctor also can record the statement of a dying person, if the circumstances so justify it. It can also be taken as a correct version, as the doctor, who is holding an official position of responsibility, is expected not to have any bias against the

accused. Normally, because these persons are officials, they cannot be expected to be bent towards the line of investigation as desired by the police.

13. The object of putting questions under the Rule is to find out the fit mental condition of that person - whether he is in a position to give a statement or not. When we are dealing with a person who is about to die and in whose case a dying declaration has to be recorded, we cannot expect that he is completely in a fit state of mind like an ordinary man. In a case of burn injuries naturally sedative and similar other medicines have to be given and they cannot be expected so much in a fit condition to give a statement. The court will not be in a position to cross-examine and find out that he is completely in a fit state of mind at the time of giving the statement. The only thing that can be recorded is that the injured was in a fit condition while giving the statement. That fit condition again depends upon the circumstances and facts of each case. The 'fit condition' must be to the subjective satisfaction of the Magistrate or the person recording the same. With that object, preliminary questions are usually put and by those questions the Magistrate has to satisfy himself that the injured person is in a conscious and fit condition to give a statement. The conscious state also differs from time to time, as some medicines of sedative nature will be given. In certain cases we also find that while giving a statement, the injured may go into a state of illusion. It is for that reason it has been laid down that the Magistrate should append a certificate that the injured was in a fit condition while giving the statement as recorded by him. The certificate appended by the Magistrate with regard to the fit condition of the person, will have a great material bearing. The dying declaration is not made in the presence of the accused and the accused is deprived of an opportunity of testing the veracity and truthfulness of the statement by cross-examination. The dying declaration is not a weak piece of evidence. It by itself forms basis for conviction without any corroboration, provided it is truthful and reliable. The truthfulness, reliability and acceptability of the dying declaration has to be adjudged in the light of the attendant facts and circumstances of each case and it has to be subjected to strict scrutiny like any other piece of evidence, either direct or circumstantial.

14. In this case, the Executive Magistrate (PW 7) recorded the dying declaration, which is to the following effect :

' Date : 28-4-89 at 2 a.m. Narayankhed Govt. Hospital.

Dying declaration of Smt. Natukar Sathamma W/o. Lingam, aged 22 years, occupation hotel business, residence - Cheelapally. Present residence; Masanpally gate, Kalher Mandalam, written by Sri B. Bichappa. Mandal Revenue Officer, Narayankhed on 28-4-89 at 2 1/2 hrs. a.m. in the Govt. Hospital, Narayankhed.

I namely Srimathi Sathamma state as follows :-

'I and my husband Cheelapally Lingam both have been living by running a tea hotel jointly at Masanapalli gate for the past about three months. On 27-4-89 at 7 a.m. my husband came in a much drunken state and asked me to give money. I said you have already drunk much. Why do you still want money and did not give money. Immediately my husband using foul language poured on me the kerosene oil which was in our hotel struck a match stick, threw it on me and went to side. Then immediately after the flames arose, I came outside running. Somebody poured water on me'. To this effect she has given an oral statement.

R.T.I. of Smt. Sathamma Sd. Illegible 28-4-89 M.R.O., Narayanakhed. The above oral statement has been written in the presence of the Medical Officer, Narayankhed. Sd/- illegible 28-4-89 Medical Officer, Govt. Civil Hospital, Narayankhed.'

15. We see PW 7, who has recorded the dying declaration, has not put any preliminary questions to find out the fit condition of the deceased. Apart from not putting any questions, nowhere it has been mentioned that the deceased was in a fit condition to give a statement. If we come to the doctor, PW 8, he also simply signed at the end of the statement. That means, neither the Executive Magistrate (PW 7) made an attempt to find out the mental condition of the deceased, nor any certificate has been appended by him or the doctor, who was present there, that she was in a fit condition or in a conscious state while giving the statement and it was voluntary and uninfluenced. So, when this main drawback in the dying declaration is there, any statement made by the Executive Magistrate as PW 7 and the Doctor as PW 8 on oath, will not improve the situation, particularly when

the injured eye witness, mentioned in the FIR, has not been examined.

16. P.W. 9 is the Sub-Inspector of Police, who has investigated the case. PW 8 is the doctor, who sent requisition to the Executive Magistrate. Neither PW 8 nor PW 9 has offered any explanation as to why no intimation for recording the dying declaration has been sent to the Judicial Magistrate, particularly so when the Judicial Magistrate's court is located in the very same station. If a Judicial Magistrate is available in the very same station, then the duty of the investigating officer is to send intimation to the Judicial Magistrate. In the absence of a Judicial Magistrate, the Executive Magistrate can be preferred. No explanation has been given and no material has been shown with regard to the steps taken to send requisition to the Judicial Magistrate. Even though the court is competent to take into account the dying declaration recorded by an Executive Magistrate, if it strikes to the Court that it is a reasonable one and that it was recorded when the deceased was in a fit state of mind, we find that preferring Executive Magistrate, in the circumstances mentioned above, is not desirable. Since these two ingredients are lacking, the non-disclosure of reasons for not sending a requisition to the Judicial Magistrate, has assumed importance. That is also an additional ground to discredit the dying declaration. In view of the above, we find that the due procedure prescribed for recording a dying declaration has not been followed.

17. There is a catena of cases where courts have rejected dying declarations on the grounds that preliminary questions have not been put to the deceased; that in the certificate it has not been mentioned that the deceased was in a fit condition; and that the doctor has not certified the fit condition of the deceased.

At certain times it is impossible to get the signature of the victim also; at certain times the injured may be at the last lap of breath and it may not be possible to put questions; at certain times the doctor might have appended the certificate in a hurried mood also. However, each and every case has to be considered in the light of the evidence on record.

18. Here, in this case neither the Executive Magistrate (PW 7), nor the doctor (PW 8) has made any attempt to find out the fit condition of the deceased. The Courts, of course, have used different words - 'fit condition', 'fit state of mind' and

'conscious state. But, what all required is that we must find the condition of the victim and the treatment that has been given. In the light of the above, we find that the dying declaration that has been given, does not satisfy the requirement of test that the deceased was in a fit condition to give it.

19. More over, if any close relations or friends were present just before or while recording the statement, the court can also draw an inference that it may be a product of tutoring. In this case, PW 1 and PW 4, who are brother and mother of the deceased respectively, also were present at the time when the dying declaration was recorded. They also stated in their evidence that an oral dying declaration was made to them. PW 4, in his evidence, stated that the deceased told her that the accused tied her hands and thereafter set fire. But, that does not find place in the dying declaration recorded by the Executive Magistrate. It is a vital lacuna in the statement. When there is an improvement either in the form of omission or commission or any other form which does not conform to the original dying declaration made by the victim, such a dying declaration has to be scrutinised with great care and caution before acceptance. Since there is a discrepancy with regard to the circumstances that are available before setting the deceased on fire, we find that the dying declaration as such in this case cannot be acted upon.

20. The probable person that can throw light on the incident proper is the person injured along with the deceased. That injured person is one Narayan, who is mentioned in the FIR Ex. P. 1. He was also treated by the doctor. Except issued bailable warrants, no serious effort was made by the police to examine him. The direct witness was not examined had he was given up. Of course, the witness mentioned in the FIR, if he is not examined, it cannot be said that the prosecution version is false. Certain persons named in the FIR might not be examined for various reasons. Mere non-examination of the person mentioned in the FIR by itself is not fatal. But, in this case, DW 2's non-examination assumes importance in view of our finding that the dying declaration cannot be accepted as such. Another directed witness, who was examined as PW 2, turned hostile and did not support the prosecution case. Therefore, there is no direct evidence in this case.

21. Keeping in view the cumulative effect of the circumstances and the reasoning given above, we hold that the bare dying declaration, without the certificate being appended either by the Executive Magistrate or the doctor, who was present there, cannot be acted upon and that the prosecution has failed to bring home the guilt of the accused beyond reasonable doubt.

22. In the result, the Criminal Appeal is allowed. The conviction of the accused under section 302 IPC and the sentence of imprisonment for life are set aside. The appellant shall be released forthwith, if he is not required in any other case.

23. Appeal allowed.

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