

Razik Naina Mohamed, Vs. State, Through

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Court : Chennai

Decided On : Jan-07-2013

Judge : The Honourable Mr.Justice M.Jaichandren

Appellant : Razik Naina Mohamed,

Respondent : State, Through

Judgement :

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT DATED:

07. 01/2013 CORAM THE HONOURABLE Mr.JUSTICE M.JAICHANDREN and THE HONOURABLE Mr.JUSTICE S.NAGAMUTHU Criminal Appeal (MD) No.4 of 2012 and M.P.(MD)No.1 of 2012 Razik Naina Mohamed, S/o.Mohamed Kasim ... Appellant/ Accused vs. State, through The Inspector of Police, Thondi Police Station, Ramanathapuram District. (Cr.No.96/2009) ... Respondent/ Complainant Criminal Appeal under Section 374 of the Code of Criminal Procedure against the judgment of conviction and sentence, dated 07.09.2011, in S.C.No.175 of 2010 on the file of learned Additional District and Sessions Judge, Fast Track Court, Ramanathapuram. !For Appellant ... Mr.M.Daniel Manoharan ^For Respondent ... Mr.K.S.Duraipandian, Addl.Public prosecutor. :JUDGMENT (Judgment of the Court was delivered by S.NAGAMUTHU,J) Challenging the conviction and sentence imposed on the appellant in S.C.No.175/2010 on the file of the learned Additional District and Sessions Judge, Fast Track Court, Ramanathapuram, vide judgment dated 07.09.2011, the appellant, who is the sole accused in the case, has come up with this appeal. The trial court, on finding the appellant guilty under

Section 302 IPC, has sentenced him to undergo imprisonment for life and to pay a fine of Rs.1000/-, in default to undergo two months rigorous imprisonment. 2.The case of the prosecution is briefly as follows: (a)The deceased in this case was one Nooriya Banu. She was the wife of the accused. After the marriage, the accused and the deceased were living together, as husband and wife, for some time. In due course, there arose frequent quarrels, as a result, the deceased left the matrimonial home and started residing with her parents. Five years passed-off like that. Some time before 19.06.2009, the accused persuaded the deceased to return to the matrimonial home. The deceased, thus, started living with the accused. (b)While so, on 19.06.2009, the accused, who went out, returned to his house at 4.00 p.m. At that time, the deceased was sleeping. The accused woke her up. At that time, the deceased asked money from the accused for purchasing firewood for cooking. This resulted in a wordy quarrel between them. In culmination of the said quarrel, the accused poured kerosene on the deceased and set her ablaze. The deceased sustained extensive burn injuries on her body. The accused himself took the deceased to the Government Hospital at Thiruvadanai. The Doctor, in the said hospital, gave first-aid treatment and then advised her to be taken to the Government Hospital at Ramanathapuram. Accordingly, the accused took her to the Government Hospital at Ramanathapuram at 7.20 p.m., on the same day. At that time, the deceased told P.W.3 Dr.Sadiq Ali that at 4.00 p.m., on the same day, her husband poured kerosene on her and set fire. P.W.3 found 40% burn injuries. Ex.P-1 is the Accident Register issued by P.w.3. P.W.3 admitted her as in-patient, for treatment and also sent messages to the police as well as to the learned Judicial Magistrate, for recording dying declaration. (c)P.W.14 was the then Judicial Magistrate not II, Ramanathapuram. He received the said message from the Hospital at 9.30 p.m and went to the Hospital at 9.45 p.m. on 19.06.2009. One Dr.Mohideen Pitchai was attending on the deceased. On the request made by P.W.14, Dr.Mohideen Pitchai examined the deceased and certified that the deceased was conscious and she was in a fit state of mind to give statement. P.W.14 held further enquiries with the deceased and from the answers given by the deceased and the opinion of the Doctor, got satisfied that the deceased was conscious and also in a fit state of mind to give statement. Then, he recorded the dying declaration of the deceased

(Ex.P-8). P.W.14 recorded that the deceased was conscious and in a fit state of mind throughout the recording of dying declaration. (d)In Ex.P-8 - dying declaration, the deceased has stated that at 4.00 p.m., on 19.06.2009, when she requested the accused to give money for purchasing firewood, there arose quarrel between them and in culmination of the same, the accused poured kerosene and set fire to her. (e)On receipt of a similar message from the hospital, P.W.19 proceeded to the Government Hospital at Ramanathapuram on 21.06.2009 and recorded the statement of the deceased at 4.00 p.m. (Ex.-11). On returning to the police station, at 6.00 p.m., he registered a case in crime No.96/2009 under Section 307 IPC. Ex.P-12 is the First Information Report. He forwarded Ex.P-11 and Ex.P-12 to the Court and then handed over the Case Diary to P.W.20, for investigation. (f)Taking-up the case for investigation, P.W.20, the then Inspector of Police, attached to Thondi Police Station, proceeded to the place of occurrence and prepared an Observation Mahazar (Ex.P-5), in the presence of P.W.12 and another witness. He also prepared a Rough Sketch (Ex.P-13). Then, he examined the deceased and recorded her statement under Section 161 Cr.P.C. P.W.6 is the mother of the deceased. P.W.20 examined her on 21.06.2009 and recorded her statement. (g)On 22.06.2009 at 2.00 p.m., P.W.20 arrested the accused in the presence of P.W.13 and P.W.16. On such arrest, the accused gave a voluntary confession. In the said confession, the accused disclosed that he would identify the place where he had hidden a match box and the plastic can, contain kerosene. In pursuance of the said statement, he took the police to his house and produced the above material objects. Then, P.W.20 forwarded the accused for judicial remand and produced the material objects to the Court. (h)P.W.21 took up the case for further investigation, from P.W.20. In the meanwhile, the Doctor, who treated the deceased at Government Hospital, Ramanathapuram, advised the mother of the deceased (P.W.6) to take the deceased to Government Rajaji Medical College Hospital, Madurai, for treatment. But, P.W.6, instead of taking her to the Government Rajaji Hospital, Madurai, took the deceased to her house. P.W.6 would say that out of poverty, she could not take her daughter to the Government Rajaji Hospital at Madurai. P.W.6 would further state that she gave native treatment to the deceased. The deceased succumbed to the injuries on 25.07.2009. After the death, P.W.6 proceeded to Thondi Police Station and

submitted a written statement (Ex.P-14). Based on the same, P.W.21 altered the case into one under Section 302 IPC and prepared Ex.P- 15 Altered F.I.R. On the same day, he conducted inquest on the body of the deceased in the presence of panchayatdars and prepared Ex.P-16 Inquest Report. During inquest, P.W.21 examined few witnesses, including P.W.6, and recorded their statements. Thereafter, he sent the body of the deceased for postmortem. (i)P.W.4 Dr.Sakila, attached to Government Headquarters Hospital at Ramanathapuram, conducted autopsy on the body of the deceased at 11.00 a.m. on 26.07.2009. She noticed the following external injuries. "Moderately nourished female body lies on its back with upper limbs flexed at elbow and lower limbs extended. Rigor mortis present in upper limbs and trunk. Eyes closed, mouth closed, no discharge per mouth. Burn wounds present in neck, anterior and posterior aspect of trunk, gluteal region. Yellow coloured ulcer with slough present in the wound."" She reserved opinion as to cause of death, pending report of Chemical analysis of viscera. Ex.P-2 is the Postmortem Certificate issued by P.W.4. After obtaining Chemical Analysis Report, on viscera, P.w.4 gave Ex.P-3 Final Opinion, opining that the deceased would appear to have died of septicemia shock, due to infected burn wounds. (j)Continuing the investigation, on 15.08.2009, P.W.21 examined few more witnesses and recorded their statements. On 25.11.2009, he made a request to the Court to forward the viscera organs of the deceased for chemical examination. According to the Chemical Analysis Report, there was no poison detected. Finally, P.W.21 filed final report against the accused under Section 302 IPC. 3.Based on the above materials, the trial court framed the lone charge under Section 302 IPC. The accused pleaded innocence. In order to prove the charge, on the side of prosecution 21 witnesses were examined and 16 Exhibits were marked, besides 6 M.Os. 4.Out of the said witnesses, P.Ws.1, 2, 6, 8, 9 and 11 have turned hostile and they have not supported the case of the prosecution, in any manner. Thus, the prosecution has been left only with the dying declarations of the deceased, in order to prove the charge. P.W.14 has spoken to about the judicial dying declaration given by the deceased, under Ex.P-8. P.W.19 has spoken to about the dying declaration given, by way of complaint, by the deceased under Ex.P-11. P.W.3 has spoken to about the dying declaration made by the deceased as entered in Ex.P-1 Accident Register. The statement of the deceased recorded

under Section 161 Cr.P.C. by P.W.20, though is a dying declaration falling within the ambit of Section 32(1) of the Indian Evidence Act, the same has not been marked and proved in evidence for the reasons best known to the prosecution. P.W.4 Dr.Sakila has spoken to about the cause of death. 5.When the above incriminating materials in evidence were put to the accused under Section 313 of the Criminal Procedure Code, he denied the same as false. However, he did not choose to examine any witness on his side nor to mark any document. Having considered the above materials, the trial court found him guilty under Section 302 IPC, convicted him thereunder and sentenced him to undergo imprisonment for life and to pay a fine of Rs.1000/-, in default to undergo two months rigorous imprisonment. That is how the appellants are before this Court with this appeal. 6.We have heard the learned counsel for the appellant and the learned Additional Public Prosecutor appearing for the State and we have also perused the records, carefully. 7.The foremost contention of the learned counsel for the appellant is that though the alleged occurrence was at 4.00 p.m., on 19.06.2009, FIR, in this case, was registered only on 21.06.2009 at 8.00 p.m. According to the learned counsel, absolutely there is no explanation for the said delay. 8.The next contention of the learned counsel for the appellant is that neither the Doctor, who treated the deceased initially at the Government Hospital, Thiruvadanai, has been examined nor the Accident Register issued by him, which would have contained the statement of the deceased, had been marked in evidence. 9.Learned counsel for the appellant would next contend that the deceased was not given treatment properly, inasmuch as though the Doctor, who attended on the deceased at the Government Hospital at Ramanathapuram, advised her to be taken for further treatment in the higher medical institution at Madurai, P.W.6 had taken her back home and there was no further treatment given. Thus, according to the learned counsel, had there been proper treatment given to the deceased at the Government Rajaji Hospital, Madurai, the deceased would have survived. Learned counsel would further submit that according to P.W.4 Dr.Sakila, the deceased died due to septicemia. Thus, according to the learned counsel, the death was not due to the direct cause of the injuries. 10.Next contention of the learned counsel for the appellant is that the Doctor, who was attending on the deceased at Government Hospital, Ramanathapuram, and certified as to the mental fitness of the deceased

to give statement, also has not been examined in respect of the dying declaration recorded by P.W.14. It is the contention of the learned counsel that the same cannot be given any weightage, because the doctor who certified that the deceased was in a fit state of mind has not been examined before the lower Court. 11. In respect of other declarations, the learned counsel would submit that since the earliest information passed on by the deceased to the doctor at Thiruvadanai Government Hospital has not been marked, all the subsequent dying declarations should be rejected as tutored versions. Thus, the learned counsel would submit that the prosecution has failed to prove the case beyond reasonable doubts and therefore the appellant is entitled for acquittal. 12. The learned counsel would further submit that assuming that the death of the deceased was caused by the accused, still the offence committed by the accused would fall only under Section 304(ii) IPC. 13. The learned Additional Public Prosecutor would, however, contend that though there are certain flaws in the prosecution evidence, that by itself would not, in any manner, go to the detriment of the prosecution case, which is solely based on three dying declarations given by the deceased, including the dying declaration recorded by P.W.14, the learned Judicial Magistrate. Thus, according to the learned Additional Public Prosecutor, the conviction and sentence imposed on the appellant, by the trial court, does not require any interference at the hands of this Court. Learned Additional Public Prosecutor would also submit that the act of the accused squarely falls within the ambit of Section 302 IPC and it does not fall within any of the exceptions to Section 300 IPC. 14. As we have already pointed out, the occurrence was at 4.00 p.m. on 19.06.2009. The deceased was taken to Thiruvadanai Government Hospital, from where she was taken to the Government Hospital at Ramanathapuram, at 7.20 p.m. Admittedly, the deceased was taken to the hospital only by the accused. Thus, the deceased was in the company of the accused. While so, at 7.20 p.m., she told the Doctor (P.W.3) that the accused poured kerosene and set fire to her. This statement has been duly corroborated by Ex.P-1, which is the Accident Register issued by P.W.3. No doubt, this statement falls within the ambit of Section 32(1) of the Indian Evidence Act and thus it is dying declaration. There is no reason to reject this earliest dying declaration given by the deceased. Thereafter, P.W.14 recorded judicial dying declaration at 9.45 p.m. on 19.06.2009. In the said dying declaration also, the

deceased has clearly stated that it was this accused who poured kerosene and set fire to her. 15. The contention of the learned counsel for the appellant is that FIR in this case was registered only on 21.06.2009 at 8.00 p.m. Thus, according to the learned counsel, there was a delay of more than two days in registering FIR. Of course, we find no explanation for the said delay. P.W.3 has stated that he sent intimation simultaneously to the Police Station and to the learned Judicial Magistrate, in respect of the admission of the deceased, as an in-patient. When the learned Magistrate had rushed to the hospital and recorded the dying declaration at 9.45 p.m. on 19.06.2009 itself, it is not explained to the Court as to why P.W.19 went to the hospital and recorded the statement of the deceased only on 21.06.2009 at 6.00 p.m. and then registered the case at 8.00 p.m. This, in our considered opinion, is a lapse on the part of the police. But, the question is whether on this score the dying declaration made by the deceased could be discarded, as unbelievable. Ex.P-11 Complaint was made by the deceased. Of course, it is also a dying declaration falling within the sweep of Section 32(1) of the Indian Evidence Act. Because there had occurred so much delay, at the worst, this Court could only disbelieve Ex.P-11. We do not find any other benefit out of the said delay in the case, as the judicial dying declaration (Ex.P-8) and the dying declaration made to the Doctor (as recorded in Ex.P-1 Accident Register) remain unassailable. 16. In respect of Ex.P-8, Judicial Dying Declaration, the contention of the learned counsel for the appellant is that Dr.Pitchai Mohideen, who certified that the deceased was conscious and was in a fit state of mind to give dying declaration has not been examined. The learned Additional Public Prosecutor is not in a position to place any explanation as to why the said vital witness, namely, Dr.Pitchai Mohideen, has not been examined. We have called for the Case Diary from the respondent and had the benefit of going through the same, which revealed that Dr.Pitchai Mohideen was not at all cited as a witness. We do not understand as to how it did not strike the conscience of the learned Public Prosecutor, who conducted the case before the trial court, to summon Dr.Pitchai Mohideen, as a witness, for the prosecution and to examine. We are equally unable to understand as to how it did not strike the mind of the trial court to summon the said doctor, by invoking its power under Part-1 of Section 311 Cr.P.C. Thus, the non-examination of Dr.Pitchai Mohideen, who certified that the

deceased was in fit state of mind is a serious flaw in the case of the prosecution. 17. Again the question is whether on this score Ex.P-8, Judicial Dying Declaration, needs to be rejected as unbelievable. In this regard, we would like to state that before recording any dying declaration, it is the duty cast upon the learned Judicial Magistrate to satisfy himself that the injured had been in a fit state of mind to make dying declaration. Such a satisfaction can be arrived at by the learned Judicial Magistrate even in the absence of a doctor to certify about the mental fitness of the injured. It is needless to point out that a person may be medically fit to make a statement. But, what is required of for making a judicial dying declaration believable is the mental fitness to make a statement. In a given case, suppose there is no doctor available and the condition of the injured is so serious, considering the urgency of the matter, even without waiting for the arrival of the doctor, the learned Judicial Magistrate could proceed to record the dying declaration, after having satisfied himself about the mental fitness of the injured by adopting other modes. For example, by making enquiries with the injured and from the answers elicited from the injured, if the Magistrate is satisfied that the injured is in a fit state of mind to give a dying declaration, he can very well go ahead to record the dying declaration. Thus, the opinion of the doctor regarding the mental fitness is one of the materials before the Magistrate, besides other materials, as we have pointed out earlier, to arrive at a satisfaction in respect of the mental fitness of the injured. 18. In the case on hand, because Dr. Pitchai Mohideen was not examined, the accused did not have the benefit of challenging his opinion by examining him. It is the fundamental principle of criminal law that every opportunity should be afforded to the accused, as a part of fair trial, as guaranteed under Article 21 of the Constitution of India, either to challenge or to admit an evidence placed before the Court. If no opportunity is afforded to the accused, either to accept the evidence or to challenge the same, it will amount to violation of the principles of natural justice and denial of fair trial required to be afforded under Article 21 of the Constitution of India. In the case on hand, since the opinion of the doctor was not spoken to by the doctor in the court and since there was no opportunity afforded to the accused to challenge the same, in our considered view, the said opinion recorded by the doctor at Ex.P-8 cannot be given any weightage of at all. 19. When we look into the evidence of P.W.14, we find that apart from the

opinion of the doctor, the learned Magistrate has considered other facts by making enquiries with the injured and based on the same, he had arrived at the satisfaction regarding the mental fitness of the injured. This fact, spoken to by P.W.14, has not been challenged, by way of cross-examination, by the accused at all. Thus, the satisfaction regarding mental fitness arrived at by P.W.14 has been impliedly admitted by the accused. Therefore, we find no reason to accept the contention of the learned counsel for the appellant that Ex.P-8 is not reliable. We hold that the deceased had made the dying declaration to P.W.14, while she was in a fit state of mind and thus Ex.P-8 requires full credence. 20. Next, on 21.06.2009, after the registration of the case, P.W.20 had recorded the statement of the deceased, falling within the sweep of Section 161 Cr.P.C. The same also refers to the cause of death of the deceased and so it also falls squarely within Section 32(1) of the Indian Evidence Act, as a dying declaration. But, unfortunately, this statement has not been exhibited in evidence by the prosecution. A perusal of the Case Diary reveals that this document has been mentioned as one of the documents to be relied on by the prosecution. But, alas, we find no explanation as to why this statement was not proved in evidence. 21. The learned counsel for the appellant would contend that the non-examination of the Doctor at Government Hospital at Thiruvadanai is fatal to the case of the prosecution because, the earliest information passed on by the deceased to the doctor has not been brought on record. The learned Additional Public Prosecutor is not in a position to explain as to why the said doctor, who treated the deceased at Government Hospital, Thiruvadanai, was not examined and the Accident Register containing the statement of the deceased has also been exhibited in evidence. Of course, this is yet another flaw in the case of the prosecution. But, from the facts placed before us, it is the admitted case that the deceased was taken to the Government Hospital at Thiruvadanai, only by the accused. Had it been true that the deceased had made a different statement which would be in favour of the accused, nothing would have prevented him from summoning the said document in his favour. Therefore, in our considered view, the non-examination of the said doctor as well as the non-production of the Accident Register does not, in any manner, harm the case of the prosecution. Admittedly, the deceased was in the company of the accused at her house. It was this

accused who took the deceased to the hospital for treatment. There were none else who accompanied the deceased, like P.W.6, so that it could be contended that the deceased would have been tutored to make a dying declaration against the accused. Before this Court, it is not even pleaded that the dying declarations are out of tutoring by any interested persons. 22. In view of these facts and circumstances, we find that Ex.P-8 requires to be given utmost weightage and the same has been corroborated by Ex.P-1 and the evidence of P.W.3 Dr.Sadiq Ali. Atleast from these evidences, the prosecution has proved that it was this accused who poured kerosene on the deceased and set fire to her. 23. The learned counsel for the appellant would contend that though the doctor at Government Hospital, Ramanathapuram, advised the deceased to be taken to the Government Rajaji Hospital at Madurai, for further treatment, P.W.6 had taken the deceased back to her house and she died on 25.07.2009. The learned counsel would contend that because the deceased was not given proper medical attention, she died of septicemia. This contention of the learned counsel for the appellant deserves only to be rejected for more than one reason. In this regard, we may refer to Explanation 2 to Section 299 of the Indian Penal Code, which reads as follows: "Explanation 2.--Where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skilful treatment the death might have been prevented." In the case on hand, it is not the case as though septicemia was due to some other cause other than the burn injuries caused by the accused. It is the evidence of P.W.4, the doctor who conducted autopsy on the body of the deceased, that septicemia was only due to the burn injuries. Of course, it is true that the deceased was not given proper medical treatment. But, as per Explanation 2 to Section 299 IPC, it is no defence for the accused to say that the deceased would have been saved by proper medical treatment and so it will not amount to homicide. As has been spoken to by P.W.4, the death in this case was due to septicemia, resulted out of burn injuries caused by the accused. This act of the accused is culpable homicide and in turn it is a murder, as it clearly falls within the first limb of Section 300 IPC. 24. After the death of the deceased, P.W.6 had gone to the police station and made a written statement. The said statement has been admitted in evidence and marked as Ex.P-14. Curiously, the prosecution

also relies on Ex.P-14. It is really disturbing that a statement made during the investigation by a witness, though in writing, falling under Section 161(3) Cr.P.C. had been admitted in evidence, de hors the bar contained in Section 162 Cr.P.C. Probably, the trial court was of the view that since the statement was made in writing by P.W.6, it is admissible in evidence. If that is the impression of the trial court, we want to make it clear that such a statement made by a witness, either in writing or orally and got reduced into writing, cannot be used, except for the purpose of contradicting the maker of the statement as enshrined in Section 162 Cr.P.C. Therefore, Ex.P-14 is eschewed from consideration. 25. Next contention of the learned counsel for the appellant is that the doctor who treated the deceased at Government Hospital, Ramanathapuram, has not been examined. For this also, there is no explanation. But, as we have already pointed out, this will not have any bearing in the dying declarations which we are prepared to believe and accept as stated above. 26. Lastly, learned counsel for the appellant would submit that assuming that the burn injuries were caused by the accused, still the act of the accused would fall within the 1st Exception to Section 300 IPC. In this regard, learned counsel would rely on Ex.P-8, wherein the deceased had told to the learned Judicial Magistrate that when she asked for money, there was a quarrel between them and in the said quarrel, the accused set fire to the deceased. From the facts narrated, the strained relationship between deceased and the accused, for a long time and the fact that the accused took the deceased to the hospital with a view to save her, would all impel us to draw inference that the deceased would have acted out of grave and sudden provocation caused by the deceased in the quarrel. Thus, we hold that the act of the accused falls within the 1st Exception to Section 300 I.P.C. and, therefore, the accused is liable to be punished under Section 304(i) IPC. 27. In the result, the criminal appeal stands partly allowed with the following modification in the conviction and sentence imposed by the trial court. The conviction and sentence imposed on the appellant/accused by the trial court under Section 302 IPC are set aside, instead, he is convicted under Section 304(i) IPC and sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs.1,000/-, in default to undergo two months rigorous imprisonment. The fine amount, if any, already paid by the accused shall be treated as the fine paid as per the modified sentence. The period of sentence already undergone by

the appellant/accused shall be given set-off under Section 428 of the Code of Criminal Procedure. Consequently, connected M.P.(MD)No.1 of 2012 is dismissed. gb. To:

1. The Principal District and Sessions Judge, Ramanathapuram District, Ramanathapuram. 2.The Additional Sessions Judge, Fast Track Court, Ramanathapuram. 3.The Judicial Magistrate, Thiruvadanai. 4.The Inspector of Police, Thondi Police Station, Ramanathapuram District. 5.The Additional Public Prosecutor, Madurai Bench of Madras High Court, Madurai.

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