

Crl.Appeal No.143/03

The Ist Appellant/ Accused No.1 Viz., Mahalingam was directed to be released on bail by the order of this Court dated 6.11.2003 and made in Crl.M.P.No.9871 of 2003 in Crl.Appeal.No.143/03.

The 2nd Appellant/Accused No.2 Viz., Loganathan @ Kodari @ Kannpaiyan was directed to be released on bail by the order of this Court dated 16.4.03 and made in Crl.M.P.No.2989/03 in Crl.Appeal.No.143/03.

In the High Court of Judicature at Madras

Dated: 28.04.2006

Coram

The Honourable Mr.Justice M.KARPAGAVINAYAGAM

and

The Honourable Mr.Justice S.R.SINGHARAVELU

Criminal Appeal No.143 of 2003

1. Mahalingam
2. Loganathan @ Kodarai
@ Kannupaiyan ..Appellants/ Accused

State rep.by
Inspector of Police,
Gopichettipalayam.
(Crime No.425/01) ..vs..
..Respondent/ Complainant

Criminal Appeal under Section 374(2) of Criminal Procedure Code filed against the judgment dated 10.12.2002 in S.C.No.60 of 2002 on the file of Additional District and Sessions Judge, Fast Track Court-II, Gobichettipalayam, Erode.

For Appellants : Mr.V.K.Muthusamy,
Senior Counsel for Mr.M.M.Sundresh

For Respondent : Mr.E.Raja,
Additional Public Prosecutor.

JUDGMENT

S.R.SINGHARAVELU, J.,

A1 and A2 in S.C.No.60 of 2002 are the appellants. A1 was convicted for an offence under section 302 IPC and sentenced to undergo life imprisonment and A2 was convicted for an offence under Section 302 read with 34 IPC and sentenced to undergo life imprisonment and both of them were directed to pay a fine of Rs.500/- each, in default to undergo one month rigorous imprisonment by the Fast Track Court No.II, Gobichettipalayam. Challenging the same, this appeal has been filed.

2. The facts leading to the conviction are as follows:-

(a) The deceased (Parameswaran) is the brother of P.W.1. The accused, P.W.1 and the deceased are residents of Goundanputhur Village. P.W.10, Radha, the daughter of A1, eloped with the deceased in 1997 and on a complaint given by A1, the girl was rescued and in that case, after completing trial, it was posted for orders on 06.08.2001. After 1997, the family of A1 and P.W.1 were not in cordial terms. The deceased and P.W.2 were friends and were cultivating together a land.

(b) In that background, A1 and A2 joined together and on 03.08.2001 at about 10.15 PM, when Parameswaran was coming from the house of P.W.2, followed by P.Ws.1 to 3, he was intercepted by A2 and enquired the said case and the deceased replied. Suddenly, A2 caught hold of the hands of Parameswaran and A1 poured kerosene, from a bottle which he was carrying, and set him on fire. He raised alarm and the accused ran away from the scene. P.Ws.1 to 3 witnessed the occurrence and they put out the fire by using coconut and plantain stem. The injured was admitted in Government Hospital, Gobi at about 11.45 PM.

(c) P.W.20 Duty Doctor sent an intimation to Police as well as P.W.19, Judicial Magistrate-II, Gobi. On receipt of intimation Ex.P-13 at 00.45 hours on 04.08.2001, P.W.16, Head Constable came to the hospital and recorded a statement, Ex.P-14 from the said Parameswaran and he registered a case in Crime No.425 of 2001 for an offence under Section 307 IPC and sent the copy of first information report Ex.P-15 to higher officials.

(d) On receipt of intimation Ex.P-16, P.W.19 Judicial Magistrate No.II, Gobi came to the hospital and recorded a dying declaration Ex.P-17 from the said Parameswaran. As per Ex.P-17, the deceased told the Magistrate that the accused poured kerosene and set fire on him.

(e) After getting Ex.P-15, the Inspector of Police, P.W.23 came to the scene of occurrence and prepared observation mahazar Ex.P-1. He went to the hospital and after getting death intimation, he altered the offence into one under Section 302 IPC. He recovered M.Os.1 to 6 and held inquest over the body of deceased in the presence of witnesses. He sent the body for post mortem.

(f) P.W.21 Dr.Krishnakumari conducted post-mortem and issued Ex.P-24 post-mortem certificate, giving opinion that the deceased would appear to have died of 90% burn injuries.

(g) On 04.08.2001, while P.W.9 Village Administrative Officer was in his office, both the accused came and informed him about the setting up of fire on the deceased. He recorded the extra judicial confession, attested by P.W.17 and they were produced before the Inspector of police P.W.23 with his report Ex.P-5. Ex.P-4 is the confession statement given by A2. After receiving the same, P.W.23 arrested the accused. He sent the material objects for chemical examination under Ex.P-25 and Ex.P-27 is the report of Chemical Analyst. Ultimately, after completion of the investigation, the charge sheet was filed against the accused under Section 302 I.P.C.

(h) During the course of trial, on the side of prosecution, P.Ws.1 to 23 were examined; Exs.P-1 to P-33 were filed and M.Os.1 to 10 were marked.

(i) The plea of the accused, while they were questioned under Section 313 of Cr.P.C., is one of denial. No evidence was adduced on the side of defence and Ex.D-1 was marked.

(j) The trial Court relied upon the evidence adduced by the prosecution and convicted A1 for the offence under Section 302 IPC and convicted A2 for the offence under Section 302 read with 34 IPC and sentenced them as aforesaid. Aggrieved by the said conviction and sentence, the accused have filed this appeal.

3. We have heard the learned Senior Counsel for the appellants as well as the learned Additional Public Prosecutor. We have also gone through the entire records.

4. According to the prosecution, due to prior motive hereinbefore described, both the accused joined together and on 03.08.2001 at about 10.15 PM., A2 caught hold of the hands of Parameswaran and A1 poured kerosene and set fire on him. It was submitted by the learned counsel for the appellants that there are inconsistencies in the statement of accused made earlier and that made in the course of dying declaration and therefore, the contents in the dying declaration cannot be very much relied upon. It was further submitted that excluding the dying declaration, there is no

substantial evidence against the accused. This is the gist of the contention made in the course of arguments on behalf of the accused.

5. True it is that there are three statements made by the deceased on various points of time. They are Exs.P-14, P-17 and P-19.

6. Ex.P-19 is the copy of the accident register, wherein at 11.45 PM on 03.08.2001 when the deceased was first admitted before Dr.Vaithiyalingam, P.W.20, it was stated that "Two known persons poured kerosene on him and set fire today 3.8.2001 10 PM at Kavandampudur, Ganapathipalayam, Gobi (TK)".

7. What has been stated before the Judicial Magistrate, P.W.19 at 1.20 AM on 04.08.2001 through Ex.P-17, the dying declaration is as follows:

"நான் தங்கராஜ் வீட்டுக்கு போய் வந்தேன். மகாலிங்கமும், கடாரியும் நான் சிறுநீர் கழித்து எழும்போது சீமெண்ணை ஊற்றி விட்டார்கள். தீக்குச்சியை உரசி வைத்து விட்டார்கள். ராதாவை கூட்டிக்கொண்டு போன கேஸ் விடியமாக என்னை தீ வைத்து விட்டார்கள்".

8. The statement of deceased made at 1.30 AM on 04.08.2001 was before the Head Constable Rajendran, P.W.16 through Ex.P-14, wherein it was stated that while A2 Kedari caught hold of the hands of the deceased, A1 poured kerosene and set fire.

9. In this context, the learned Senior counsel for the appellants relied on the decision reported in BASITH & OTHERS ..vs.. STATE BY INSPECTOR OF POLICE, TIRUCHIRAPPALLI (1997-2-L.W.(Cr1.) 465), wherein it has been stated that four dying declarations made by victim before doctor, Magistrate, Head Constable and Sub Inspector; Court should be on guard that statement of victim was not as a result of tutoring, prompting or imagination and it was further observed that in case of more dying declarations than one, court has to scrutinise all of them to find out if each of them passed the test of being untrustworthy.

10. Reliance was also placed upon STATE OF PUNJAB ..vs.. PARVEEN KUMAR ((2006) 1 SCC (Cri) 146), wherein it was observed as follows:

"While appreciating the credibility of the evidence produced before the court, the court must view the evidence as a whole and come to a conclusion as to its genuineness and truthfulness. The mere fact that two different versions are given but one name is common in both of them cannot be a ground for convicting the named person. The court must be satisfied that the dying declaration is truthful. If there are two dying declarations giving two different versions, a serious doubt is created about the truthfulness of the dying

declarations. It may be that if there was any other reliable evidence on record, this Court could have considered such corroborative evidence to test the truthfulness of the dying declarations. The two dying declarations, however, in the instant case stand by themselves and there is no other reliable evidence on record by reference to which their truthfulness can be tested. It is well settled that one piece of unreliable evidence cannot be used to corroborate another piece of unreliable evidence".

11. In *LEELA SRINIVASA RAO ..vs.. STATE OF A.P.* ((2004) 9 SCC 713), it was held that in view of the inconsistency between the two dying declarations and no other evidence to prove the charge under Section 498-A IPC, husband and his mother acquitted thereunder.

12. Even if many dying declarations are consistent between itself it cannot overcome the infirmity arising out of the deceased not being fit, mentally and physically, to make the alleged statements. This was also held in *LAXMI ..vs.. OM PRAKASH* ((2001) 6 SCC 118).

13. At the same time, there are decisions indicating the circumstances when dying declaration shall be relied upon.

14. As a matter of fact, where dying declaration was acceptable in view of corroboration of material particulars, it was held in *SHAMBHU ..vs.. STATE OF M.P.* ((2002) 3 SCC 561), the trial court erred in disbelieving the same relying on flimsy grounds based on irrelevant considerations.

15. As the dying declaration was inspiring confidence as was so held in *SHANTHI ..vs.. STATE OF HARYANA* ((2006) 1 SCC 557), it shall have to be accepted.

16. It was held in *LALJIT SINGH ..vs.. STATE OF U.P.* (2000 SC (Cri) 1501) that on facts, detailed account of occurrence could not be expected from a severely injured person, particularly, when he died the next day. This decision is applicable to the case on hand.

17. Coming to the facts of the present case before us, there may be variations and those variations in its natural process are not going deep into substance of the matter and thus not making it as inconsistent with the earlier statement.

18. On a careful perusal of the three statements of deceased through Exs.P-14, P-17 and P-19, the complicity of both A1 and A2 has been depicted. While P.Ws.17 and 19 say generally about the involvement of both the accused in the offensive act, under Ex.P-14, the actus reus of the individual accused has been cogently described

by mentioning that while A2 caught hold of the limbs of the deceased, A1 poured kerosene and set fire. A normal prudent person with all burn injuries of 90% all over the body may say only to this level and he cannot repeat things in a parrot like form and if that is done, then only the artificiality may occur. While statements made in natural manner, it is liable for small variation and that will only indicate the naturality behind it. Small variations not making any inconsistency have to be accepted.

19. Further, even though the burn injuries was 100%, doctor's certificate and his evidence was to the effect that the patient was alert mentally and physically fit in depicting the offence made against him.

20. Apart from the above facts, there is also extra-judicial confession of both the accused made before P.W.9, Village Administrative Officer through Exs.P-3 and P-4, which was recorded at 12.30 PM on 04.08.2001. A1 was arrested on 04.08.2001 at 2.30 PM at police station after production by P.W.9. A2 was similarly arrested with his statement Ex.P-7 recorded at 3.00 PM in the Gobi Police Station and material objects were recovered under Ex.P-9 seizure mahazar, which were sent to chemical analysis. Ex.P-27 is the report of the chemical analyst.

21. Although P.Ws.1 to 3 alone had described the occurrence as ocular witnesses and even though the evidence of P.W.4 is eschewable as he turned hostile and that of P.Ws.5 and 6 do speak only about the event subsequent to the offensive occurrence, there is no inconsistency found in the evidence of the ocular witnesses (P.Ws.1 to 3) nor was there any improbability for them to have witnessed.

22. In the light of the above materials, which do not suffer from any infirmity, we are to hold that the prosecution has established its case beyond reasonable doubt to the effect that the accused alone perpetrated this crime. As such, the conviction and sentence imposed on the appellants / accused by the trial court are liable to be confirmed.

23. Accordingly, the conviction and sentence imposed on the appellants / accused are confirmed. The appeal is dismissed. Since the appellants are on bail, the trial court is directed to take steps to secure their custody to undergo the remaining period of sentence.

Sd/-

Asst. Registrar.

/true copy/

Sub Asst. Registrar.

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To

- 1) The Additional District & Sessions Judge,
Fast Track Court II,
Gobichettipalayam.
 - 2) Thro' The Principal Sessions Judge,
Erode.
 - 3) The Judicial Magistrate No.I,
Gobichettipalayam.
 - 4) Thro' the Chief Judicial Magistrate,
Erode.
 - 5) The Inspector of Police,
Gobichettipalayam.
 - 6) The Superintendent,
Central Prison,
Coimbatore.
 - 7) The District Collector,
Erode.
 - 8) The Director General of Police,
Chennai-600 004.
 - 9) The Public Prosecutor,
High Court, Madras.
- 1 cc to Mr.M.M. Sundaresh, Advocate, Sr. 23004

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