

(1994) 12 KL CK 0026

High Court Of Kerala

Case No: Criminal Appeal No. 343 of 1991

Chinnamma

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision: Dec. 20, 1994

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 161, 162
- Evidence Act, 1872 - Section 145
- Penal Code, 1860 (IPC) - Section 302

Citation: (1995) 2 ALT(Cri) 469 : (1995) CriLJ 1711 : (1995) 1 ILR (Ker) 775

Hon'ble Judges: K.G. Balakrishnan, J; K. Narayana Kurup, J

Bench: Division Bench

Advocate: Pirappancode V. Sreedharan Nair, for the Appellant; G. Krishnakumari, Public Prosecutor, for the Respondent

Final Decision: Dismissed

Judgement

K.G. Balakrishnan, J.

The appellant was convicted by the Court of Sessions, Pathnathitta for the offence punishable u/s 302, IPC and was sentenced to undergo imprisonment for life. Appellant challenges the conviction and sentence.

2. Deceased Suma Varghese was the wife of appellant's brother Jose Mathew, Suma Varghese and her husband Jose Mathew were residing with their parents and two children in Nellickal house within the jurisdiction of Vechoochira Police Station. On the date of the incident i.e. on 8-7-89, Jose Mathew and his parents were doing agricultural work in their property. Then they heard an outcry from the house. P. W. 1 Jose Mathew and his father Ulahannan Mathai (P. W. 2) ran to the house and found Suma Varghese lying on the courtyard with extensive burn injuries. According to P. Ws. 1 and 2, Suma Varghese was not in a position to talk anything. Suma Varghese was taken to Kanjirappally Govt. Hospital from where she was referred to Medical

College Hospital, Kottayam. Suma Varghese died at 11.30 p.m. on 2-7-89 while undergoing treatment.

3. When Suma Varghese was in the hospital, Ext. P15 statement was recorded from her. The statement is to the effect that on the date of the incident she had intended to go to her parent's house though her husband had objected to the same. When she changed her dress and got ready, appellant Chinnamma came there and asked whether she had been going. Suma Varghese did not give any reply. Chinnamma then gave a blow on the back side of her head and thereafter poured kerosene on her chest and she felt burning sensation. She ran out of the house and fell on the courtyard and later she was admitted in the hospital.

4. On the basis of the above information, P. W. 14 registered a crime and implicated the appellant herein as the accused. Investigation was conducted and Ext. P9 mahazar was prepared and M.Os. 1 to 6 were taken into custody. P. W. 17 took over the investigation on 13-7-89 and submitted a report to the Judicial First Class Magistrate, Ranni requesting to record the dying declaration of Suma Varghese. The Magistrate went to the Medical College Hospital and recorded Ext. P10 dying declaration. Appellant surrendered before the Circle Inspector of Police on 20-9-89. P. W. 17 held inquest over the dead body and Ext. P11 inquest report was prepared and it was duly attested by P. Ws. 9 and 10. The dead body was subjected to post-mortem examination and P. W. 12 prepared Ext. P13 post-mortem certificate. After completion of the investigation, final charge-sheet was filed against the appellant.

5. To prove the prosecution case, 17 witnesses were examined. P. Ws. 1 and 2 the husband father-in-law of the deceased respectively. P. W. 3 is a neighbour, who accompanied the deceased to the hospital. P. W. 4 is the driver of the jeep in which Suma Varghese was removed to the hospital. P. W. 5 was examined to prove the presence of the appellant in the house of Suma Varghese, but he did not support the prosecution case. P. Ws. 6 and 7 are the parents of Suma Varghese. P. W. 8 is the Magistrate who recorded the dying declaration of the deceased. P. W. 9 is a neighbour, who was examined to prove the dying declaration. P. W. 10 was examined to identify the dead body of deceased. P. W. 11 is the Doctor who first treated Suma Varghese and prepared the wound certificate. P. W. 12 conducted post-mortem examination. P. W. 16 is another Doctor who treated the deceased at the Medical College Hospital. The learned Sessions Judge relied on the dying declaration recorded by P. W. 8 and other evidence adduced in this case found the appellant guilty of the offence charged against her.

6. At the outset, we may consider one important point urged by the appellant's counsel. It is submitted that the Sessions Court used Section 161 statement as substantive evidence against the appellant and the appellant is seriously prejudiced by that. We find force in this contention. According to prosecution appellant Chinnamma struck a blow on the back side of the head of Suma Varghese and

poured kerosene on her body and set her ablaze. There is no direct evidence to prove the guilt of the accused. P. Ws. 1 and 2 are the persons who immediately rushed to the scene of occurrence. P. W. 3 also came to the place of occurrence. P. Ws. 2, 3 and others took the injured to hospital in a jeep. According to these witnesses, Suma Varghese was not in a position to speak anything when she was being taken to the hospital and when she was in the Medical College Hospital she made a statement to the effect that she sustained injuries as a result of an accident. The prosecution examined P. Ws. 1 to 3 to prove that Suma Varghese had given a statement to the effect that she was struck by the appellant and was set on fire by the appellant. But, they did not support this version. These 3 witnesses were declared hostile and were allowed to be cross-examined by the Public Prosecutor. The case diary statements were read over to them and they denied. Portions in the case diary statement which were denied by P. Ws. 1 to 3 were marked as Exts. P1 to P8. In paragraphs 12, 13 and 14 of the judgment, the learned Sessions Judge held that the case diary statements corroborated the prosecution version and she relied on them and while considering point No. 2, the learned Sessions Judge based her conclusions finally on the basis of these statements recorded u/s 161 of Cr. P. C. A finding is entered in the following terms:-

"So in the light of Exts. P1 to P5 and in the light of the circumstances mentioned above, I can definitely rule out the possibility of committing suicide."

7. Section 161 of Code of Criminal Procedure empowers the police officer conducting investigation of the case to examine orally any person supposed to be acquainted with the facts and circumstances of the case. The police officer may reduce into writing any statement made to him in the course of such examination. Section 162 of Cr. P. C. explains the purpose for which such statement could be used. Section 162 of the Code of Criminal Procedure imposes a bar on the use of any statement made by any person to a police officer in the course of investigation at any enquiry or trial in respect of any offence under investigation at the time when such statement was made, except for the purpose of contradicting the witness in the manner provided by Section 145 of the Indian Evidence Act. Any part of such statement may be used in re-examination also for the purpose of explaining any matter referred to in cross-examination. Section 145 of the Evidence Act provides that a witness may be cross-examined as to previous statements made by him in writing or reduced into writing and relevant to matters in question, without such writing being shown to him, or being proved but, that if it is intended to contradict him by writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him. This is the limited use to which a statement recorded u/s 161 Cr. P. C. can be used. The statement recorded by the police in the course of investigation are confronted to the witness to impeach the credibility of the witness. If the witness had given contradictory statements, that is a ground to raise suspicion against the credibility of the witness. The statements recorded u/s 161, Cr. P. C. could be used to show that

the witness had given different versions one before the police during the course of investigation and another before the Court and it could be argued that his evidence before the Court cannot be believed. But, under no circumstances, the statement given by the witness to the police during investigation could be used as a substantive evidence. This position has been settled by a long line of decisions and, if any authority is required, we may find it in [Hazari Lal Vs. State \(Delhi Administration\)](#),; [Baldev Singh Vs. State of Punjab](#), and [Tahsildar Singh and Another Vs. The State of Uttar Pradesh](#),.

8. The learned sessions Judge completely disregarded these relevant aspects and placed reliance on the case diary statements to accept the prosecution case. What the learned Sessions Judge did is plainly illegal and opposed to the clear mandate of Section 162 of Cr. P. C. We have to eschew from consideration that part of the "evidence". The evidence of P. Ws. 1, 2 and 3 is only capable of proving that Suma Varghese sustained burn injuries on that day. They speak to an alleged dying declaration which we shall consider later.

9. The other item of evidence is the dying declaration allegedly made by deceased Suma Varghese. As already noticed, P. Ws. 1, 2 and 3 did not support the prosecution that the deceased had made a dying declaration while she was being taken to hospital. P. W. 8, the Judicial First Class Magistrate, Ranni recorded the dying declaration pursuant to the requisition made by the investigating officer. P. W. 8 complied with all the formalities and recorded the dying declaration while the deceased was in the Medical College Hospital, Kottayam. In the dying declaration what is alleged to have been stated by Suma Varghese is that on the date of the incident when she was in the kitchen after feeding the pigs, she was struck on the back side of her head. She stated that it was her sister-in-law, the accused. She further stated that she fell on the ground immediately and she regained consciousness when the flames were all over her body and there was smell of kerosene. The learned Magistrate, during the course of recording the dying declaration, asked whether she knew as to who poured kerosene on her body. The deceased said that she was struck by the accused, and therefore, she suspected that kerosene also might have been poured by the accused. Ext. P15 is her statement before the police. The statement was recorded by the Head constable No. 766 attached to Vechocchira Police Station on 10-7-89 at 10.45 p.m. Ext. P15 statement is two days after the incident and Ext. P10 dying declaration is dated 14-7-89. In Ext. P15, she stated that on 8-7-89 at about 9 a.m. her husband's sister tried to murder her by pouring kerosene and setting fire on her. In Ext. P15 she narrated the circumstances leading to the incident as follows: On the date of the incident deceased stated to her husband that she wanted to go to her parent's house. Her husband Jose Mathew objected to the deceased going to her parent's house. Deceased Suma Varghese changed her dress and got ready to go to her parents house. The accused asked the deceased whether she was going but the deceased did not give any reply. It is further stated that the accused struck a blow on the back

side of her head and the deceased fell on the ground. The accused took the kerosene kept there and poured on the chest of the deceased and the deceased felt warmth on her chest and she suddenly got up and rushed towards the court-yard and she fell their unconscious.

10. Counsel for the appellant contended that Ext. P15 and P10 dying declarations are mutually contradictory and there is no corroboration in any of the material particulars. This contention cannot be fully accepted. It was also argued that in the other dying declaration alleged to have been made by the deceased to P. Ws. 6 and 7 is to the effect that the deceased was struck by a firewood by the accused. But, in Exts. P15 and P10, it is only stated that she was struck from behind. The nature of the weapon is not mentioned. In our view, there is no substantial difference between Exts. P15 and P10. In this case, even though Ext. P15 is a first information statement, it assumes some importance as the maker of the statement died subsequently. So, it assumes the character of a dying declaration. But, we do not give much emphasis on Ext. P15 as there is a properly recorded dying declaration. However, Ext. P15 could be used for testing the veracity of Ext. P10 dying declaration.

11. The accused has no case that there was any special enmity towards her. Ext. P15 statement was given on the third day of the incident. In that statement itself the deceased implicated the accused. When the deceased gave Ext. P10 statement, she knew that she was giving a statement before the Magistrate. There was no necessity for the deceased to unnecessarily implicate the accused. The statement of the deceased appears to be honest and convincing. She did not say that it was the accused who poured kerosene on her body and set fire. She stated that it was the accused who struck a blow on the back side of her head and, therefore, it is to be presumed that she alone had poured kerosene and set fire. We do not find any reason to reject the dying declaration. The evidentiary value of dying declaration was considered by the Supreme Court in [K. Ramachandra Reddy and Another Vs. The Public Prosecutor](#), . The Supreme Court held: (Para 6)

"A dying declaration which has been recorded by a competent Magistrate in the proper manner, that is to say, in the form of questions and answers, and, as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character. In order to test the reliability of a dying declaration, the Court has to keep in view the circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the facts stated had not been impaired at the time he was making the statement by circumstances beyond his control" the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and the statement had been made at

the earliest opportunity and was not the result of tutoring by interested parties".

Reliance was placed in [Khushal Rao Vs. The State of Bombay](#),

12. In [Smt. Kamla Vs. State of Punjab](#), the Supreme Court observed thus: (Para 8)

"A dying declaration should satisfy all the necessary tests and one such important test is that if there are more than one dying declarations they should be consistent particularly in material particulars.

If the dying declaration allegedly made by the deceased is testified in the light of the guidelines prescribed by the Supreme Court, we find no difficulty in accepting Ext. P10 as a true and correct version of the incident.

13. Another ground on which the appellant's counsel seriously disputed Ext. P10 dying declaration and Ext. P15 FIR statement is that in Ext. P12 wound certificate and Ext. P17 treatment records, the deceased had stated that it was an accident and that she was not attacked by anybody. P. W. 11 was examined to prove Ext. P12 and P. W. 16 was examined to prove the alleged statement in the case-sheet. P. W. 11 stated that when he examined the patient she was able to talk and he asked her about the cause of injury and in Ext. P17 it is mentioned that her blouse caught fire from hearth and it is further mentioned that this was stated by the patient. Ext. P12 wound certificate was prepared within hours after the incident and Ext. P17 was recorded immediately thereafter. In Ext. P10 dying declaration the deceased had stated that when she was taken to the hospital she was in serious condition. She had extensive burn injuries. P. Ws. 2 and 3 were present in the hospital and P. W. 1 also might have been present when the relevant entry in Ext. P7 was recorded. When the husband and her father-in-law were present, it is not likely that the deceased would give a statement so as to implicate the accused, who is none other than the daughter of P. W. 2 and the sister of P. W. 1. Even if it is assumed that deceased gave such a version to the Doctor, that might not have been the correct version and we do not think that the entries in Exts. P12 and P17 are sufficient to discard the dying declaration. Moreover, the version given in Ext. P17 itself is highly improbable because the statement is to the effect that her blouse caught fire from hearth.

14. Counsel for the appellant contended that the parents of the deceased came to the hospital on the next day and since then she was under the influence of her parents and Exts. P15 and P10 might have been given at their instance. The parents of the deceased were examined as P. Ws. 6 and 7. They had also stated that the deceased had explained the circumstances under which she sustained injury. But, we do not attach much importance to the so-called dying declaration made by the deceased to P. Ws. 6 and 7 as both of them are interested witnesses. Counsel for the appellant contended that in the statement of P. Ws. 6 and 7 they stated that that deceased had told them that the accused had struck her with a firewood. But such a statement is not seen in Ext. P15 and P10. It is true that in Exts. P15 and P10 it is not stated that the deceased was struck by a firewood, but it is pertinent to note that in

both these statements she had not stated as to by what weapon she was struck. The weapon used by the appellant was not mentioned probably due to the fact that she was not asked while her statement was recorded. That cannot be said to be an inconsistency which would belie Ext. P10 statement.

15. The counsel for the appellant contended that Ext. P10 dying declaration ought to have been rejected by the Sessions Court as it was inconsistent with the statement allegedly made to P.Ws. 1 to 3. These witnesses deposed that on the date of the incident while the injured was undergoing treatment in the medical college hospital, gave a statement to the effect that she sustained burn injuries as a result of an accident. These witnesses deposed that a piece of Saree which was on her shoulder caught fire when the deceased was igniting fire in the hearth. The arguments of the appellant's counsel that in this case, there is contradictory dying declaration, and therefore, Ext. P10 is to be rejected. Reliance was placed on two decisions - one reported in [Govind Narain and another Vs. State of Rajasthan](#), and the other in [Smt. Kamla Vs. State of Punjab](#). In Kamla v. State of Punjab there were four dying declarations. One was made to the Doctor who examined her first. In that the deceased implicated her mother in law and alleged that mother in law has sprinkled kerosene from behind on her and burned her. In the case sheet of the treatment another doctor had recorded the history of the illness the patient got burnt by her clothes catching fire from stove. The third dying declaration was to the Sub-Inspector wherein the deceased implicated her mother-in-law and father-in-law and in the fourth dying declaration made to a team of three doctors the deceased stated that her mother-in-law and father-in-law were talking behind her and they suddenly poured kerosene over her. The Honourable Supreme Court observed that there was glaring inconsistency in the dying declaration vis-a-vis naming the culprit.

16. [Govind Narain and another Vs. State of Rajasthan](#), is a case where the deceased was thrown to a well. There were four dying declarations. One was given to P. W. 2, and that was disbelieved by the Court. The other dying declaration was given in the presence of several witnesses. When all these witnesses deposed, they differed in material aspects. There was variation in their testimony as regards the assault by lathis and the participation of the accused in the commission of the crime. Another dying declaration was allegedly made to P. W. 1 and that too was disbelieved by the Court. The 4th dying declaration which was reduced to writing and was recorded by a police constable but the police constable was not examined and this too was rejected by the Court. It was in this context the Supreme Court held that dying declaration shall not be accepted in evidence when the witnesses give different versions on material points. When there are different versions of dying declarations, the Court should be extremely cautious in accepting the dying declaration as an item of evidence to convict the accused. Even then when there is reliable and convincing dying declaration which would inspire confidence of the Court, there is nothing wrong in accepting the same as an evidence even if there are other contradictory versions of dying declarations given by interested parties. We find Ext.

P10 as one such dying declaration which is properly recorded by the Magistrate and the deceased was in good state of mind to give the same. The so-called other dying declarations are not capable to shake the credibiity of Ext. P10. We find nothing wrong in accepting the same.

17. Even though the learned Sessions Judge seriously erred in placing reliance on the case diary statements, which were marked as Exts. P1 to P8, it does not affect the final decision in the case. Even if the evidence of these witnesses and Exts. P1 to P8 statements were eschewed from consideration, there is the dying declaration which firmly and convincingly proved the prosecution case. This item of evidence is further corroborated by the medical evidence. Ext. P13 is the post-mortem certificate. The deceased had extensive burns injuries. There were burn involving the ears, face (except forehead, eyes, nose and lips), front and sides of neck, front and inner aspect of both upper arms, front sides of chest abdomen and back of trunk. The deceased died of infected burns.

There are no circumstances which impel the deceased to commit suicide. It is proved beyond reasonable doubt that the appellant in this case committed this heinous crime. The Court below has rightly found the appellant guilty of the act. We find no reason to interfere with the conviction and sentence entered against the appellant.

Criminal Appeal is dismissed.