(2007) 03 MAD CK 0086

Madras High Court (Madurai Bench)

Case No: Criminal Appeal (MD) No. 23 of 2006

Soundaram	APPELLANT
Vs	
State	RESPONDENT

Date of Decision: March 21, 2007

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Penal Code, 1860 (IPC) - Section 302, 304, 307, 341, 452

Hon'ble Judges: P.R. Shivakumar, J; M. Chockalingam, J

Bench: Division Bench

Advocate: A. Padmanaban, for the Appellant; N. Senthurpandian, Additional Public Prosecutor, for the Respondent

Final Decision: Dismissed

Judgement

M. Chockalingam, J.

This appeal has arisen from the judgment of the Principal Sessions Division, Ramanathapuram, made in S.C. No. 31 of 2005, whereby the appellant ranked as A-2, along with two others ranked as A-1 and A-3, stood charged, tried, found guilty under Sections 452 and 302 of I.P.C. and awarded 1 year Rigorous Imprisonment with a fine of Rs. 500/- and default sentence and life imprisonment with a fine of Rs. 1,000/- and default sentence respectively.

2. The short facts necessary for the disposal of this appeal can be stated thus:

(a) P.W.1 is the father of the deceased Aarthy and the brother of A-2. P.W.1''s sister namely A-2, was given in marriage to A-1. A-1 and A-2 are the parents of A-3. The deceased Aarthy was the daughter of P.W.1. A-1 and A-2 were desirous of taking Aarthy as their daughter-in-law by a marriage with A-3, to which course the family of P.W.1 was not amenable. But, the accused were adumbrating in public that they would kidnap Aarthy or at least, they would outrage her modesty. While the matter stood thus, on 24.11.2004 at about 10.00 A.M., all the three accused proceeded to

the house of the deceased. When all other family members were absent, it was A-2 who dragged her hand, and Aarthy refused to come. Immediately, A-1 uttered the words "If she could not come with us, fire her". So saying, A-1 held her hand. At that time, it was A-2 who went inside the kitchen, took the kerosene and poured on her, and A-3 set her ablaze. When there was a distressing cry from Aarthy, all the three accused fled away from the place of occurrence. Immediately, P.W.1 and others were able to see Aarthy coming out with flames and burn injuries. Aarthy was taken to the Government Hospital, Madurai, where P.W.16, the Doctor, was on duty. At 3.55 P.M., Aarthy, who was brought by P.W.1, was admitted, and she was conscious enough to give the statement as to how she sustained injuries. The Doctor noted the same in the accident register copy marked as Ex.P15. An information was given to the Judicial Magistrate No. II, Madurai, who rushed over there, and after being certified that she was in a fit state of mind to give the dying declaration, the same was recorded by P.W.9, the Judicial Magistrate. The dying declaration is marked as Ex.P8.

(b) On receipt of the information, P.W.14, the Sub Inspector of Police, proceeded to the Government Hospital and recorded the statement of P.W.1, which is marked as Ex.P11. On the strength of Ex.P11, the complaint, a case came to be registered by the respondent police in Crime No. 152/2004 under Sections 341, 452 and 307 of I.P.C. The First Information Report, Ex.P12, was despatched to the Court.

(c) On receipt of the copy of the F.I.R., P.W.17, the Inspector of Police of the said Circle, took up investigation, proceeded to the spot, made an inspection in the presence of witnesses and prepared Ex.P16, the observation mahazar, and Ex.P17, the rough sketch. Then, he arrested A-1 on 25.11.2004 at 5.30 P.M. A-1 was sent for judicial remand. An information was received by the Investigator that on 27.11.2004 at 3.00 P.M., Aarthy died. Then, the case was converted to Section 302 of I.P.C. The express report, Ex.P19, was sent to the Court. Thereafter, the Investigating Officer conducted inquest on the dead body of Aarthy in the presence of witnesses and panchayatdars and prepared an inquest report, Ex.P20. A requisition, Ex.P9, was sent to the hospital authorities for the purpose of autopsy.

(d) P.W.12, the Tutor in Forensic Medicine, Madurai Medical College, Madurai, on receipt of the said requisition, conducted autopsy on the dead body of Aarthy, and issued a postmortem certificate, Ex.P10, with his opinion that the deceased would appear to have died of extensive superficial burns of about 60% and its complications thereof.

(e) Pending the investigation, A-3 was arrested on 29.11.2004 at 8.00 A.M. He volunteered to give a confessional statement, the admissible part of which is marked as Ex.P21. Pursuant to the same, he produced M.O.3, a plastic can, which was recovered under a cover of mahazar. A-3 was sent for judicial remand. On completion of investigation, the Investigator filed the final report.

3. The case was committed to Court of Session, and necessary charges were framed. In order to substantiate the charges, the prosecution examined 17 witnesses and also relied on 22 exhibits and 3 material objects. On completion of the evidence on the side of the prosecution, the accused were questioned u/s 313 of Cr.P.C., as to the incriminating circumstances found in the evidence of the prosecution witnesses, which they flatly denied as false. No defence witness was examined. The trial Court heard the arguments advanced on either side, took the view that the prosecution has proved the case so far as A-2 was concerned, found her guilty as per the charges and awarded the punishment as referred to above, while it acquitted A-1 and A-3. Hence, this appeal at the instance of A-2, the appellant herein.

4. Advancing his arguments on behalf of the appellant, the learned Counsel Mr. A.Padmanaban, would submit that in the instant case, the lower Court has taken an erroneous view; that all the witnesses namely P.Ws.1 to 8, have turned hostile; that there were no circumstances to treat them hostile; but, the prosecution has declared them hostile; that apart from that, in the instant case, there was no evidence for the prosecution at all to find the appellant/A-2 guilty; that even as per the prosecution case, at the time of occurrence, it was A-1 who held Aarthy and also instigated, and it was A-2, who poured kerosene, and it was A-3 who set her ablaze; that when the prosecution came before the trial Court, this was not the evidence projected before the Court; that the prosecution projected its evidence as if it was A-2 who was responsible for pouring kerosene and setting her ablaze, and thus, there is deviation from the case of the prosecution and the evidence adduced before the trial Court, and on that ground, the case must fail.

5. The learned Counsel would further add that in the instant case, the prosecution placed reliance on and the lower Court has also accepted the dying declaration which was recorded by P.W.9, the Judicial Magistrate, and marked as Ex.P8; and that there are number of discrepancies and inconsistencies, which would lead to the irresistible conclusion that it cannot be accepted as a piece of evidence.

6. The learned Counsel would submit that even a reading of the dying declaration would clearly indicate that there was no motive attributed for the act of the accused; that apart from that, the time of the occurrence, at one place, is stated as 1.00 P.M., and in the other place, it is stated as 10.00 A.M.; that the time of occurrence cannot be like this; and that if really she was conscious enough, she could not have given such a statement.

7. The learned Counsel would further add that in the instant case, pouring of kerosene was also doubtful; that according to the prosecution, by pouring of kerosene, she was set ablaze; that the occurrence has taken place in a kitchen; that the observation mahazar does not speak about any spilling of kerosene on the floor; that according to P.W.17, the Investigating Officer, the kerosene was spilt on the floor; but, he did not recover it; that in a case like this, where a specific accusation that A-2 poured kerosene and set her ablaze was made, a duty was cast upon the

Investigating Officer to collect such a piece of evidence, but not done so; that it would not only indicate the failure on the part of the investigation, but also speak about the falsity of the case; that apart from that, in the instant case, even the Doctor, who examined her immediately, does not speak about the fact that he was able to smell kerosene from the body; that the clothes which were all recovered from the dead body, were not even subjected to chemical analysis; that had it been put to chemical analysis, it would have shown the availability of kerosene, but not done so; and that all would render the prosecution case improbable.

8. Added further the learned Counsel that in the instant case, it is highly impossible for A-2, a female, who is the appellant before this Court, to pour kerosene and set her ablaze by lighting fire; and that all put together would go to show that the prosecution has not proved its case beyond reasonable doubt; but, the lower Court has erroneously come to the conclusion that it was A-2 who committed the offence.

9. In support of his contention, the learned Counsel relied on a decision of the Apex Court, reported in 2003 SCC (Cri) 1232 (Muneer Khan and Ors. v. State of M.P.).

10. The learned Counsel would further contend that in the instant case, at best, the act of the accused would not attract the penal provisions of murder; that it would fall u/s 304 (Part II) of I.P.C., since there was no motive at all; that apart from that, the case sheet was not produced before the trial Court; that the Doctor, who gave treatment, was also not examined; and that applying the decision rendered by the Division Bench this Court and reported in 2002 - 2 - L.W. (CRL.) 769 (Rajan and Ors. v. State rep. by Inspector of Police), that benefit has got to be given to the appellant.

11. The Court heard the learned Additional Public Prosecutor on the above contentions, paid its anxious consideration on the rival submissions made and also made a thorough scrutiny of the available materials.

12. It is not a fact in controversy that one Aarthy, the daughter of P.W.1, following an incident that took place in the morning hours of 24.11.2004 in the residence of P.W.1, was taken to the hospital, where she was given treatment by P.W.16, the Doctor, who has given the accident register copy, Ex.P16. Following the same, she was in the hospital. After a few days, that was on 27.11.2004, she died, and after her death, the dead body was subjected to postmortem. The fact that she died out of burn injuries was never questioned by the appellant/A-2 at any stage of the proceedings. Thus, from the evidence available, it would be quite evident that she died out of the burn injuries following an incident on 24.11.2004 at the place as put forth by the prosecution.

13. In order to substantiate the contention that it was the appellant/A-2, who poured kerosene on her and set her ablaze, the prosecution examined P.Ws.1 to 8. True it is, all these witnesses have turned hostile, and their evidence was not available for the prosecution. But, in the instant case, it is pertinent to point out that the case of the prosecution was not rested on the direct evidence of any one of the witnesses.

According to the prosecution, no one of the witnesses was an eyewitness. If at all, they can come before the Court to speak about the maximum what was declared by the deceased to them and nothing more. The fact that they have turned hostile will, in no way, affect the prosecution case, in the considered opinion of this Court. There are two pieces of materials available in the instant case. Firstly, P.W.1 has taken Aarthy to the Government Hospital, where she was admitted by P.W.16, the Doctor, at 3.55 P.M. Secondly, the dying declaration given by her to the Judicial Magistrate. The accident register copy has also been marked through P.W.16, as Ex.P15, wherein she has clearly stated as follows:

Alleged to have sustained burns when a known person poured kerosene over her & burnt at her house at 10.00 A.M. on 24.11.2004.

This was the earliest statement made by Aarthy to P.W.16, the Doctor, wherein she has spoken about the place of occurrence namely her father''s house, the time of occurrence as 10.00 A.M. and the act of pouring of kerosene and setting her ablaze by a known person. Following the same, on information, the Sub Inspector of Police came to the hospital, and he also recorded the statement of P.W.1. Further, an intimation was given to P.W.9, the Judicial Magistrate No. II, Madurai, who went over there and recorded the dying declaration given by Aarthy, wherein she has stated that it was only Soundaram, A-2, who was responsible for pouring kerosene and setting her ablaze.

14. Now, the contentions put forth by the learned Counsel for the appellant assailing the dying declaration have got to be considered. The learned Counsel first pointed out that as to the time of occurrence, at one place in the Dying Declaration, it is mentioned as 10.00 A.M., and in the other place, it is mentioned as 1.00 P.M. This Court is of the view that it can be taken only as a mistake committed. Now, at this juncture, the dying declaration can also be tested from the earliest version made by her to P.W.16, the Doctor. That apart, the Court must also take into consideration that she was found with all burn injuries, and what could have been the frame of mind at that stage, since she was under a grip of fear and terror, and hence, she has done so. Because of the mistake that has crept in, this Court cannot give much weight for the said discrepancy to reject the statement. This dying declaration what is given to the Judicial Magistrate No. II, is consistent with the earliest statement given to the Doctor. This piece of evidence, in the opinion of this Court, would be sufficient to sustain a conviction. The decision of the Apex Court now placed in the hands of this Court and perused, in the considered opinion of this Court, cannot be applied to the present facts of the case. In the instant case, all those witnesses have turned hostile. As pointed out above, no one of the witnesses in the case was an eyewitness to the case, and thus, the materials available for the prosecution were only the statement given to the Doctor and the dying declaration given to the Judicial Magistrate. Both consistently speak about the fact that it was A-2, the appellant herein, who poured kerosene and set her ablaze.

15. The contention put forth by the learned Counsel is that kerosene was not recovered from the place of occurrence, and according to the Investigating Officer, it was spilt over the floor, but not recovered. It is true that it is a fault committed by the Investigator in not recovering so. When the available evidence would clearly indicate the fact of pouring of kerosene and setting her ablaze, this Court is of the opinion that the non-recovery of earth containing kerosene that was spilt, cannot be a reason to doubt the prosecution case. This, in the opinion of the Court, would not cast a doubt on the prosecution case. Thus, the evidence available would be pointing to the guilt of the appellant/A-2. Hence, the lower Court was perfectly correct in recording a finding that it was A-2, who poured kerosene and set her ablaze. This part of the finding of the trial Court does not require any disturbance in the hands of this Court, and hence, it has got to be sustained.

16. Coming to the second line of argument that the act of the appellant/A-2 would not attract the penal provisions of murder, but only culpable homicide not amounting to murder, and at best, he can be found guilty u/s 304 (Part II) of I.P.C., the Court has to necessarily disagree with the learned Counsel for the appellant. Attractive though the contention put forth by the learned Counsel for the appellant at the first instance, it will not stand the scrutiny of law. In the instant case, even as per the dying declaration, they were under strained relationship. In such circumstances, the appellant had gone to the house of the deceased. Without an intention, she could not have gone over there. That apart, it would be indicative of the fact that she poured kerosene and set her ablaze. It is true that the prosecution has neither placed the case sheet nor examined the Doctor, who gave her treatment, and she also died on 27.11.2004 after a few days. The Court perused the decision of the Division Bench of this Court placed by the learned Counsel for the appellant and reported in 2002 2 L.W. (Crl) 769 (Rajan and Ors. v. State rep. by Inspector of Police). In that case, the Division Bench of this Court has come to the conclusion that in the facts of that case, it would not attract the penal provisions of murder, since there was no motive, and there was a quarrel preceding, and apart from that, the case sheet was not filed, and the Doctor who gave treatment, was not examined. In the instant case, this Court is able to see that the occurrence has taken place in the house of the deceased, and the appellant/A-2 had gone over there, poured kerosene and set her ablaze. Thus, it would be indicative of her intention to commit the crime. It is further to be pointed out that there is no material to show that there was any quarrel. In such circumstances, it was an act committed by the appellant/A-2 without any quarrel or without anything to provoke her. Hence, the judgment of the Division Bench of this Court, referred to above, cannot be applied to the present facts of the case. Therefore, the act of the accused can only be termed as murder. As regards the charge u/s 452 of I.P.C., there is nothing to disturb the conviction and sentence awarded by the trial Court. Hence, the judgment of the trial Court has got to be sustained. Accordingly, it is sustained.

17. In the result, this criminal appeal must fail and fails. Accordingly, it is dismissed.