(2009) 06 MAD CK 0259

Madras High Court (Madurai Bench)

Case No: Criminal A. (MD) No. 153 of 2008

S. Arulmariyanathan	APPELLANT
Vs	
State by, Inspector of Police, Kabistalam Police Station, Thanjavur District Crime No. 219/2006	RESPONDENT

Date of Decision: June 16, 2009

Hon'ble Judges: R. Mala, J; R. Banurnatin, J

Bench: Division Bench

Advocate: M. Karunanithi, for the Appellant; Daniel Manoharan, Assistant Public Prosecutor, for the Respondent

Final Decision: Allowed

Judgement

R. Mala, J.

This appeal arises out of the verdict of conviction in S.C.No.36/2007 convicting the appellant/accused U/s.302 IPC for committing murder of his daughter Vinolia by pouring kerosene and set fire on her and imposing Life Imprisonment and imposing fine of Rs. 10,000/-.

2. Briefly stated case of prosecution is as follows:-

PWl-Joculin is the wife of accused-Arulmariyanathan. PW2-Sebastian and PW3-Edwinraj are their children. Deceased Vinolia is eldest daughter of accused and PW1 and they were living in Door No. 2/5, Pinnai Marathu Pillaiyar Kovil street, East Kabisthalam village.

3. On 25.7.2006 at about 4.00 P.M. accused beat his wife-PWl demanding money from her and PW1 went away from the house and came back at 11.00 P.M. Doubting her fidelity, accused asked her not to sleep in the house by pouring water over her. Alarmed by the incident, PWs.2 and 3 and deceased Vinolia woke up and at that time, accused brought MOl-kerosene cane and poured kerosene over his daughter

Vinolia and threw lighted match stick and thereby set her on fire. Vinolia sustained serious burnt injuries in her legs, hands and face. Immediately, she was taken to Government Headquarters hospital at Kumbakonam.

4. PW 10-Dr.Radhakrishnan, Assistant Medical Officer attached to Government Headquarters hospital, Kumbakonam admitted Vinolia and treated her. Ex.A9 is the Accident Register issued to the deceased Vinolia. On requisition by PW10, PW9-Judicial Magistrate, Kumbakonam went to the hospital and recorded Dying Declaration of deceased Vinolia between 0.45 A.M. and 1.00 A.M. PW 10-Dr. Radhakrishnan certified fit mental condition of Vinolia at the time of recording of Dying Declaration. Ex.P8 is the Dying Declaration recorded by PW9-Judicial Magistrate.

5. PW12-Kannappan, Head Constable attached to Out-post Police Station situated at Kumbakonam Govt. hospital received intimation from the hospital and saw the victim at 00.30 A.M. PW12-Head Constable sent VHF message to Kabisthalam Police Station. On receipt of VHF message, PW16-Inspector of Police went to Govt. Headquarters hospital, Kumbakonam and saw the victim at 1.30 A.M. on 26.7.2006 and found that victim was unconscious and PW16 recorded statement of PWl [Ex.P17].

6. On the basis of Ex.P17, case was registered in Cr.No.219/2006 U/s.307 IPC. Ex.P18 is the FIR. PW16 recovered MOl-half burnt suridhar tops under Ex.P19-Mahazar in the presence of PW6-Vincent and PW7-John Xavier.

7. PW16-IO inspected the scene of occurrence at about 6.00 A.M. and prepared Ex.P2-Observation Mahazar and Ex.P20-Rough Plan in the presence of PW5-Ramalingal [VAO] and one Marudhu and recovered M02[match box], M03[Unburnt match stick], M04[Plastic cane] and M05[Blanket] under Ex.P3-Mahazar. PW16 examined the witnesses. On 26.7.2006 - 10.00 A.M., PW16-IO arrested the accused at the bus stop at Umayalpuram and accused was remanded to judicial custody.

8. On 03.8.2006 at about 1.30 P.M. injured Vinolia succumbed to injuries. PW15-Manavalan [Inspector of Police holding addl. charge of Kabisthalam Police Station] received intimation [Ex.P14] regarding death of Vinolia and altered the case in Cr.No.219/2006 from Sec. 307 IPC to 302 IPC under Ex.P15-Express Report. Witnesses were examined in the presence of panchayatdars and PW15 conducted Inquest on the body of deceased Vinolia in Kumbakonam Govt. Headquarter hospital. Ex.P16 is the Inquest Report. After Inquest, body was sent to autopsy.

9. One Dr. Ramesh conducted post-mortem on the body of deceased Vinolia and noting injuries, he issued Ex.P13 postmortem certificate which was marked through PW 10 -Dr. Radhakrishanan. PW15-IO handed over the case records to PW16-Inspector of Police and PW16 continued further investigation. After examination of witnesses and on completion of due investigation, PW16 filed final

report against the accused on 24.8.2006 U/s.302 IPC.

10. To substantiate the Charges against the accused in the trial court, prosecution examined PWs.l to 16 and Exs.Pl to 21 and MOs. l and 5 were marked. Accused was questioned U/s. 313 Cr. P.C. about the incriminating evidence and circumstance. Accused denied all of them and stated that a false case is foisted against him.

11. Upon consideration of evidence, learned Sessions Judge held that Dying Declaration recorded by PW9-Judicial Magistrate under Ex.P8 is true and voluntary observing that no chimney light was recovered from the scene of occurrence by PW16. Learned Sessions Judge rejected the defence plea that Vinolia sustained burn injuries by falling of chimney light and that accused only attempted to extinguish the fire by pouring water. Holding that prosecution has established the guilt of the accused, learned Sessions Judge convicted the appellant/accused U/s. 302 IPC and sentenced him to undergo life imprisonment.

12. The learned appellant counsel would contend that the cause of death is not proved in this case. The Doctor, who conducted post-mortem has not been examined before the trial Court, but, another Doctor, P.W.10, who was well acquaintance of his signature and writing, alone has been examined. It was therefore argued that the prosecution has not followed the procedure laid down in G.O.Ms.No.258 dated 08.02.1983 for marking post-mortem certificate u/s 294 of the Code of Criminal Procedure and post-mortem certificate is not an admissible document. In support of his contention, the learned counsel placed reliance upon the decision reported in 2001 (2) L.W. 773 (Arumugam v. State by Sub Inspector of Police, Uttukuli Police Station, Erode District) and arguing that the benefit of doubt to be given to the accused.

13. The learned appellant counsel also vehemently canvassed the genuineness of Dying Declaration which has been marked as Ex.P8 and arguing that the victim was not in a fit state of mind while she has given Dying Declaration and hence, he prayed for the allowing of the appeal.

14. The learned appellant counsel focused mainly upon the argument that the Doctor who conducted post-mortem has not been examined. Moreover, inpatient case sheet also has not been marked before the trial Court. The date of occurrence was 25.07.2006, the victim died on 03.08.2006. It was contended that there is no evidence to show that the injuries sustained by the victim in the above said incident which has been sufficient to cause death and in such circumstances, the Court could not come to the conclusion that the accused is guilty u/s 302 of I.P.C which would come only u/s 323 of I.P.C. To substantiate the same, the learned counsel relied upon the decisions reported in 2001 1 L.W.(Crl.) 354 (Nammalwar v. State by: Inspector of Police, Valasaravakkam Police Station) and 2002 (2) L.W. (Crl.) 826 (Kothandapani and three others v. State rep. by Inspector of Police, Chidambaram Taluk) and arguing that if at all the Court came to the conclusion that the

accused/appellants is guilty only u/s 323 of I.P.C.

15. The learned Additional Public Prosecutor vehemently opposed the argument advanced by the learned appellant counsel and submitted that the post-mortem certificate has been marked through the proper person. As per law, the person, who is well acquainted with the signature and writings of the author of the documents is competent to depose about the same. Hence, it was submitted that P.W.10 Doctor is a competent person to speak about the post-mortem certificate (Ex.P13) and the decision relied upon by the learned appellant counsel reported in 2001 (2) L.W. 773 (Arumugam v. State by Sub Inspector of Police, Uttukuli Police Station, Erode District) is not applicable to the facts of this case. The learned Additional Public Prosecutor relied upon the decision reported in Kudumula Pratap Reddy and Others Vs. State of A.P., and contended that the contents of the post-mortem certificate was proved by the prosecution since the appellant herein has not made any objection while the said document has been marked through P.W.10. Hence, he prayed for the dismissal of the appeal.

16. The accused is none other than the father of the deceased. On the fateful day of 25.07.2006 at 11.00 P.M., the accused/appellant poured kerosene over the deceased and set her on fire. The eye witnesses are P.W.I, who is none other the mother of the deceased, P.Ws.2 and 3, the brothers. But, they all were turned hostile. The case is solely based on dying declaration (Ex.P8). So, the learned appellant counsel would put forth his argument that the death of the deceased has not been proved by the prosecution by way of examining the author of the postmortem certificate (Ex.P13). But, Ex.P13 has been marked through P.W.10, Dr. Radhakrishnan, who has given treatment to the deceased on the date of admission and also the attester of the Dying Declaration (Ex.P8). Post-mortem has been conducted by one Dr. Ramesh. But, at the time of trial, he was on medical leave. P.W.10, in his evidence, has clearly stated that he has well acquaintance with the signature of Dr. Ramesh. Hence, P.W.10 was examined and through him, the postmortem certificate (Ex.P13) has been marked. At that time, the appellant has not made any objection.

17. Contending that marking of Ex.P13 was not in accordance with the procedure, the learned appellant counsel would rely upon Section 294 of the Code of Criminal Procedure which reads as follows:

1. Where any document is filed before any Court by the prosecution or the accused, the particulars of every such document shall be included in a list and the prosecution or the accused, as the case may be, or the pleader for the prosecution or the accused, if any, shall be called upon to admit or deny the genuineness of each such document.

2.The list f documents shall be in such from as may be prescribed by the State Government.

3. Where the genuineness of any document is not disputed, such document may be read in evidence in any inquiry, trial or other proceeding under this Code without proof of the signature of the person to whom it purports to be signed:

Provided that the Court may, in its discretion, require such signature to be proved.

In pursuance of the same, the Government has issued G.O.Ms.No.258 dated 08.02.1983. The learned appellant counsel has vehemently put forth his argument that the prosecution has not followed the procedure as per the above said G.O and hence, the post-mortem certificate cannot be relied upon.

18. At this juncture, he relied upon the decision reported in 2001(2) L.W. 773 (Arumugam v. State by Sub Inspector of Police, Uttukuli Police Station, Erode District). But, while considering his argument, the same is not holds good. Because in the above citation, it was stated that in cases u/s 279 and 304(A) of I.P.C., the postmortem certificate and Motor Vehicle Inspector''s certificate are being marked only through the investigating officer. But, in that case, the investigating officer was not well acquainted with the signature and writings of the author of those documents. So, invoking Section 294 of the Code of Criminal Procedure, the learned Single Judge had come to the conclusion that the prosecution has not followed the procedure laid down in G.O.Ms.No.258 dated 08.02.1983 and set aside the conviction. But, in the case on hand, the procedure has been properly followed and all the documents have been furnished in early point of time and the person who well acquaintance of the signature of Dr. Ramesh, has been examined as P.W.10 and the post-mortem certificate has also been marked through him, at the time of marking of Ex.P13, the appellant herein has not made any objections.

19. Besides this, we have considered the following portion of the decision reported in Kudumula Pratap Reddy and Others Vs. State of A.P., relied on by the learned Additional Public Prosecutor.

Sec. 294 is a new provision contained in the Cr. P.C.(of 1974). It provides for the admission in evidence of certain documents without formal proof. It requires each party to produce a list of documents and requires the opposite party to admit or deny the genuineness of all or any of those documents, where the genuineness of any document is not disputed, such document can be read in court can, however, in its discretion, require such signature to be proved. A bare reading of the aforesaid section would reveal that it contemplates reading in evidence. Upon admission about genuineness by the opposite party, only such documents which where formally proved, speak for themselves. It does not refer to a document which, even it exhibited, cannot be read in evidence as substantive piece.

Ss. 293 and 294 Cr. P.C. are obviously intended to slim the proceedings by dispensing with elaborate and sometimes long draw procedure of examining the concerned person when the genuineness of document is not in dispute. To refrain from such procedure is not invariable and the court is empowered to examine

depending upon the circumstances and expediency. The report of Deputy Controller of Explosives is taken as evidence in the absence of any demur and the court did not consider it necessary to examine the expert in view of express consent for reception of the report. Similarly Ex.P16 is admitted an evidence as no exception is taken for reception of the same. S. 294 Cr. P.C. empowers court to admit the document as evidence in the situations embodied in S. 294 Cr. P.C. namely when no objection is taken as to the admission of the document by either side and when it is not possible to examine the person connected with the document. In the instant case both the requirements have been satisfied as there was no objection for the admission of the document and further the doctor who conducted the postmortem was laid up ion the hospital. The postmortem certificate clearly discloses that the whole face is disfigured and the case of death was shock and hemorrhage. In the circumstances, the learned Sessions Judge is justified in admitting the report of the Deputy Collector of Explosives and postmortem report as evidence without insisting upon the evidence of expert of doctor.

As per the above decision and law, the person, who is well acquainted with the signature is competent to depose about the document. Hence, P.W.10 is well acquainted with the handwriting and signature of Dr. Ramesh, has deposed about the document and the same has been marked as Ex.P13. We find no erroneous approach in marking Ex.P13 and admitting it in evidence. The argument advanced by the learned appellant counsel that the death of the deceased has not been proved does not merit acceptance. Hence, the postmortem (Ex.P13) has been proved by way of P.W.10 and the contents are admissible in evidence. So, as per the contents in Ex.P13, the death of the deceased would appear to have died of shock due to burns sustained.

20. The learned appellant counsel has mainly attacked the Dying Declaration (Ex.P8) and argued that Ex.P8 has been recorded on 26.07.2006 from the victim Vinolia and she died on 03.08.2006 and hence it would not be considered as a Dying Declaration. In our view, there is no substance in the above argument and the same is not holds good. As per Section 32 of the Indian Evidence Act, it is not necessary that the maker of the statement at the time of making the statement should be under shadow of death and should entertain the belief that his death was imminent. The expectation of imminent death is not the requirement of law. If the statement had been made when the deceased was under expectation of death, it becomes a dying declaration in evidence after her death. Nonetheless, even if she was nowhere near expectation of death, still such statement would become admissible u/s 32(1) of the Evidence Act. Besides this, as soon as the occurrence had taken place, the victim was admitted by her mother P.W.I in the hospital. At the time, the victim was conscious as per Ex.P9, A.R. Copy. She has stated before the Doctor that on 25.07.2006 at 11.00 P.M, her father poured kerosene and set fire to her. The Doctor has specifically made an endorsement that the patient was conscious.

21. It has been held that a time gap between the statement and death does not destroy the evidentiary value of the statement. The statement does not lose its credibility if the declaring chances to live longer than anticipated. (Najjam Faraghi @ Nijjam Faruqui Vs. State of West Bengal,).

22. To prove the dying declaration to be voluntary and true, P.W.9, the learned Judicial Magistrate has been examined. P.W.10 Dr. Radhakrishnan has given a certificate that the patient was conscious at the time of giving dying declaration. P.Ws.9 and 10 had deposed that the time of giving dying declaration, the deceased was in a fit state of mind. The certificate of doctor is not a mandatory. But, here in this case, P.W.10 was present at the time of recording dying declaration by P.W.9 throughout, and Ex.P8 dying declaration is proved to be voluntary and true. So, the trial Curt has come to the correct conclusion that Ex.p8 dying declaration is true and voluntary.

23. It is also pertinent to note that in Ex.P12, A.R. Copy of P.W.I, who is the mother of the deceased, when her husband poured kerosene and set fire on her daughter Vinolia, she had attempted to put off the same, she sustained injuries on her own. She was also treated by the same Doctor on 05.08.2006. The fact that P.W1 also sustained injuries while trying to save Vinolia strengthens prosecution version. Since, dying declaration Ex.P8 is true and voluntary, Ex.P13 post-mortem certificate, Ex.P9, A.R. Copy of the deceased, Ex.P12 and A.R. Copy of P.W.I, the mother of the deceased also have clearly proved that the accused/appellant poured kerosene and set fire on her daughter and caused burn injuries to her.

24. The learned appellant counsel would contend that the victim sustained injuries on 25.07.2006 at 11.00 P.M. and she died only on 03.08.2006. It was therefore contended that the prosecution has not proved that in the interregnum period, what treatment has been given to the victim and since the inpatient case history sheet has not been produced by the prosecution to prove that the burn injuries alone the victim died, the accused is only guilty u/s 323 of I.P.C not u/s 302 of I.P.C. To substantiate this, he relied upon the decision re-ported in 2001 1 L.W.(Crl.) 354 (Nammalwar v. State by: Inspector of Police, Valasaravakkam Police Station) and culled out the following portion:

...It is the duty of the prosecution to examine all the Doctors, who had treated injured persons in all Medico-legal cases and in cases in which the presence of doctors could not be secured for some reason, the case sheets showing the treatment given to the inpatients can be marked through available doctors in the hospital and those doctors can testify the actual treatment that was given in the hospital. In the present case, the prosecution has miserably failed in this regard. When the injury sustained by the victim had not been connected as the primordial or sole cause for the death of the victim and it has been made to appear that the cause for death including complication following, the injury and the death itself was after several days, we are bound to consider if it can be safely held that the accused

had intended to cause the very injury which had ultimately ended in the death of the deceased.

He also relied upon the decision reported in 2002 (2) L.W. (Crl.) 826 (Kothandapani and three Others v. State rep. by Inspector of Police, Chidambaram Taluk) and culled the following portion:

The learned counsel would persuade us to hold that the accused would at best be liable to be convicted only for an offence u/s 326 I.P.C and not u/s 302 I.P.C. We consider that there is considerable force in the argument of the learned counsel and we are inclined to accept, solely because of the failure on the part of the prosecution to show as to what had transpired from 25.11.89 to 30.12.89 and the nature of treatment and whether there were any complications and other intervening circumstances that would have aggravated or caused the death. The non-examination of any of the Doctors who had treated the patient and in the absence of the evidence relating to the same, we are not in a position to conclude that A-4 is liable to be convicted for an offence u/s 302 I.P.C but would come only u/s 326 I.P.C and we are inclined to modify the conviction from one u/s 302 I.P.C to one u/s 326 I.P.C and sentence him to undergo rigorous imprisonment for five years.

Placing reliance on the above observations in the above decisions, the learned counsel contended that in this case also, the case sheet has not been filed by the prosecution. In such circumstances, it will not attract Sec. 302 I.P.C, even though the victim died.

24-A. The learned appellant counsel also relied upon some portion of Dying Declaration (Ex.P8) and arguing that if the father having the intention to murder his daughter, he would not put off the fire. He culled out the following portion:

This shows that the accused did not have any intention to murder his daughter. If really, he was having that intention, he would not put off the fire by pouring water on her daughter. Since, there was no intention for causing murder, the Section 302 I.P.C will not be attracted on the accused. To substantiate the same, he relied upon the decisions reported in 2002 (2) L.W. (Crl.) 826 (Kothandapani and three Others v. State rep. by Inspector of Police, Chidambaram Taluk) and 2001 1 L.W.(Crl.) 354 (Nammalwar v. State by: Inspector of Police, Valasaravakkam Police Station). Considering the above said two citations, even though the appellant poured kerosene and set fire on her, she died after 8 days from the date of occurrence. There is no evidence to show as to what treatment has been given to the deceased during the interregnum period, more specifically that regarding the condition of the deceased, what happened during the interregnum period. There is (also no evidence for the nature of the treatment whether there were any complications and other intervening circumstances that would have aggravated or caused death. Non examination of doctor who had treated the patient and in the absence of the evidence relating to the same, it would be unsafe to come to the conclusion that the

accused is guilty u/s 302 I.P.C.

25. Since, the case is based only on the eye witnesses, even though P.W. l, mother of the deceased has turned hostile, her A.R. Copy (Ex.P.12) and complaint Ex.P.17, A.R. Copy of the deceased Ex.P9, Dying Declaration Ex.P8 have clearly proved that the accused/appellant alone poured kerosene and set fire on her daughter/deceased. But, the prosecution has failed to prove that whether any complications have arisen during the interregnum period. The cause of death cannot be solely connected with the injury caused by the accused. Hence, in such circumstances, the accused had no intention to murder his daughter. But, he had the knowledge that he would cause such burn injuries as was likely to cause death.

26. Even though, the learned appellant counsel would contend that only offence u/s 323 is attracted on the accused and not 302 I.P.C, the same is not an acceptable one. As per Section 320 (8) of I.P.C, any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits. In this case, the deceased Vinolia died during the course of treatment within 8 days from the date of occurrence and hence the arguments advanced by the learned appellant counsel that the accused is guilty only u/s 323 is an unacceptable one. But, considering the facts as narrated above in paragraph Nos. 23 to 25, we are of the considered view that the accused is guilty u/s 304 (Part I) of I.P.C.

27. Upon careful analysis of evidence and having gone through the judgment of trial Court, We are of the considered view that the appellant/accused will have to be necessarily excluded from the charge of murder. However, Exs.P8, 9 and 12 have clearly proved that the accused, by his act, had an intention to cause such bodily injuries as was likely to cause death. When that being so, the appellant/accused will be liable to be convicted tinder Section 304(Part I) I.P.C and not u/s 302 I.P.C. In that view, we set aside the conviction and judgment imposed on the appellant/accused u/s 302 I.P.C and convict him u/s 304(Part I) I.P.C and modifying the sentence to undergo five years rigorous imprisonment and to pay a fine of Rs. 1,000/- in default, to undergo one month rigorous imprisonment.

28. In the result, the Criminal Appeal is allowed to the extent indicated above.