

(2015) 07 KAR CK 0186
In the Karnataka High Court
Case No : Criminal Appeal No. 609 of 2011

Gavisiddappa

APPELLANT

Vs

State of Karnataka

RESPONDENT

Date of Decision : 27-07-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 428
Penal Code, 1860 (IPC) — Section 302, 326, 342, 394

Citation : (2015) 07 KAR CK 0186

Hon'ble Judges : Mohan M. Shantana Goudar, J; Budihal R.B., J

Bench : Division Bench

Advocate : K.B.K. Swamy, for the Appellant; Vijayakumar Majage, Addl. S.P.P.,
Advocates for the Respondent

Final Decision : Partly Allowed

Judgement

Mohan M. Shantana Goudar, J—The judgment and order dated 26.2.2011 passed by the Fast Track Court-I, Bangalore City in SC. No. 828/2008 is called in question in this appeal by the convicted accused.

The accused was tried and convicted for the offence punishable under Sections 342, 394 and 302 of IPC. He is sentenced to undergo imprisonment for life.

2. Case of the prosecution in brief is that the deceased Vijaya @ Vijayamma was a maid servant working in the house of the complainant-Ashalatha Shetty (PW. 5) since 4 to 5 years prior to her death; accused was the Gardner in the house of the complainant (PW. 5); wife of the accused was also engaged as maid servant for certain period by PW. 5 in her house; however, PW. 5 did not allow the wife of the accused to continue to work as maid servant in her house, inasmuch as her conduct was not good; on 25.6.2007, at about 4.00 p.m., the accused went and asked PW. 5 to continue his wife as maid servant; however the said request was refused by the complainant-PW. 5; at about 2.30 p.m. on 26.6.2007, accused went to the house of PW. 5 and once again pressurized her to take the services of his wife as maid servant; however, again the said request was refused by the

complainant-PW. 5; when the complainant was talking with the auditor over phone, the accused started stabbing Vijaya @ Vijayamma with knife; on being questioned by the complainant, the accused tried to snatch her ear-studs; he snatched the gold neck chain along with the pendent from the complainant; accused stabbed the complainant also with the knife on the left forearm and left wrist; thereafter he ran away from the scene along with the gold chain; the complainant saw Vijaya @ Vijayamma who had fallen on the floor with bleeding injuries; on raising hue and cry, the neighbours came inside the house; police came to the house of the complainant and shifted the injured Vijayamma to the hospital; Vijayamma succumbed to the injuries on 15.10.2007; till then, Vijayamma was treated in Shanabhag Nursing Home and thereafter in Penasia Hospital and subsequently to K.C. General Hospital, Bangalore; the injured complainant (PW. 5) was also treated in Shanbhag Nursing Home; the gold ornaments robbed by the accused were valued at Rs. 70,000/- during the relevant point of time.

Since the victim Vijayamma was not in a position to give statement while she was under treatment in Shanbhag Nursing Home, the Police Inspector went to Chord Hospital wherein PW. 5 was admitted, and recorded her statement as per Ex. P2, based on which the case in Crime No. 155/2007 came to be registered; after completion of investigation, PW. 21, the Inspector of Police laid the charge sheet.

3. In order to prove its case, the prosecution in all has examined 24 witnesses and got marked 25 Exhibits and 6 Material Objects. On behalf of the defence, one Exhibit came to be marked. On evaluation of the material on record, as aforementioned, the Court below convicted the accused for the offences punishable under Sections 342, 394 and 302 of IPC.

Hence, this appeal is filed by the convicted accused.

4. Sri Swamy, learned advocate appearing on behalf of the accused-appellant herein taking us through the entire material on record, submits that the Court below is not justified in convicting the accused either for the offence punishable under Section 302 of IPC or for the offence punishable under Section 394 of IPC; there is no direct nexus between the injuries sustained by Vijayamma and her death; the incident has taken place on 26.6.2007 and the death has occurred on 15.10.2007; since the doctor who treated the victim at Penasia Hospital is not examined before the Court and as no medical records are forthcoming, it would not be possible for the Court to connect the death of the victim to the injuries sustained by her. He further submits that the evidence of eye witness-PW. 5 appears to be artificial, inasmuch as she has not lodged the complaint immediately after the incident. On these among other grounds, he prays for allowing the appeal.

Sri Vijayakumar Majage, learned Additional SPP appearing for the State argued in support of the judgment of the Court below.

5. PW. 1 is the witness for scene of offence mahazar at Ex. P1.

PW. 2 is the daughter of the complainant. She is a hearsay witness, inasmuch as she came to the spot after hearing about the incident over phone. She has deposed that the accused was working as Gardner in her house.

PW. 3 is the brother of the deceased. He has deposed that he came to know about the incident through phone. He is a hearsay witness.

PW. 4 is the neighbour of PW. 5 who shifted PW. 5-complainant to Chord Road Hospital for treatment.

PW. 5 is the injured eye witness. She is the complainant.

PW. 6 is the friend of PW. 3. He claims to have seen the dead body at K.C. General Hospital.

PW. 7 is the daughter of the deceased. She is also a hearsay witness. She has admitted in her evidence that the doctors have not properly treated her mother in the hospital.

PWs. 8, 10, 12, 15, 19 and 20 are the Police Constables who participated during the course of investigation at different levels.

PW. 9 is the owner of the house wherein the accused had stayed for some time.

PW. 11 is the doctor in whose presence the statement of the deceased Vijayamma was recorded at Shanbhag Nursing Home as per Ex. P7.

PW. 13 is the witness for seizure of gold chain from a jewelry shop at Hubli, on 10.4.2008 under seizure panchanama at Ex. P8.

PW. 14 is the son of the deceased. He is also hearsay witness. He has also deposed that his mother was not treated properly in the hospital.

PW. 16 is the doctor who treated both the deceased and the complainant in Shanbhag Nursing Home. He has issued wound certificate of the deceased Vijayamma as per Ex. P11 and of the complainant as per Ex. P14. He has given his opinion as per Ex. P12 after examining the weapon used by the accused for commission of offence.

PW. 17 is the doctor who issued death intimation memo to the police.

PW. 18 is the Assistant Sub-Inspector of Police who shifted the injured Vijayamma to the hospital in Hoysala jeep.

PW. 21 is the Inspector of Police who completed the investigation and laid the charge sheet.

PW. 22 is the doctor who conducted postmortem examination over the dead body and issued P.M.report as per Ex. P18.

PW. 23 is the Police Inspector who conducted the investigation in part.

PW. 24 is the Scientific Officer attached to Forensic Science Laboratory. He has given his report as per Ex. P22 after examining the articles sent to him.

6. From the above, it is clear that the case of the prosecution mainly depends upon the ocular testimony of PW. 5 and the dying declaration at Ex. P7 apart from the medical evidence.

Ex. P7, the dying declaration made by the deceased Vijayamma is in consonance with the complaint at Ex. P2 lodged by PW. 5. As aforementioned, the complaint is lodged at about 4.45 p.m. on the date of the incident. The incident has taken place at about 3.00 p.m., which means that there is virtually no delay in lodging the complaint, inasmuch as the complaint came to be lodged while the injured-PW. 5 was taking treatment in the hospital. First priority was to save her life than to lodge the complaint. Injured Vijayamma was not in a position to speak immediately after the incident. However, she was able to speak on the next day, i.e., on 27.6.2007 after taking treatment to certain extent. The statement of Vijayamma was recorded between 12.15 p.m. and 1.00 p.m. on 27.6.2007 in Shanbhag Nursing Home in the presence of the doctor-PW. 11.

7. The declaration of the victim Vijayamma at Ex. P7 not only discloses the motive for commission of offence, but also about the incident in question. It is mentioned in Ex. P7 that the accused was suspecting the hands of the deceased Vijayamma in getting the services of the wife of the deceased terminated. In other words, the accused had a grouse against the deceased, inasmuch as he was under the impression that the deceased Vijayamma was responsible for removing the wife of the accused as maid servant from the house of PW. 5. With this motive in background, the accused came to the house of PW. 5 along with a knife hidden with him and after quarrelling with Vijayamma for sometime, stabbed her, consequent upon which Vijayamma fell down on the floor with bleeding injuries. It is also mentioned in Ex. P7 that chilli powder was thrown on the face of Vijayamma by the accused before stabbing her. After sustaining severe injuries because of the assault by the accused, Vijayamma bolted herself in a room, however she opened the door only after the neighbours requested her to open the door and thereafter she was shifted to the hospital. The said declaration (Ex. P7) is recorded in the presence of the doctor-PW. 11 attached to Shanbhag Nursing Home. The said doctor was about 63 years at the time of the incident in question. He is the owner of the said Nursing Home. Shanbhag Nursing Home is one of the reputed Hospitals in Basaveshwarnagar, Bangalore City. The said Nursing Home is in existence since 20 years. The doctor (PW. 11) clearly endorsed on Ex. P7 that the injured Vijayamma was physically and mentally fit to give statement and that the said statement was recorded in his presence. PW. 23-Mr. Hanumanthappa, Inspector of Police attached to Basaveshwaranagar Police Station has recorded the said statement of Vijayamma as per Ex. P7.

8. The doctor (PW. 11) as well as the Inspector of Police (PW. 23) have reiterated in their evidence that the statement of Vijayamma was recorded by PW. 23 in the

presence of PW. 11 and at that point of time, injured Vijayamma was in fit condition to make statement. The very fact that injured Vijayamma lived up to 15.10.2007 would clearly reveal that she was in a position to give statement while she was under treatment. In order to clarify the question as to why the said statement (Ex. P7) was not recorded just prior to the death of the deceased Vijayamma, the State argues that the said statement was recorded within a day of the incident in the presence of the doctor and the same can be made use of against the accused in view of the death of the deceased subsequently.

We may hasten to add here itself that we cannot rely upon such statement of the deceased for coming to the conclusion in this case. However, we are taking the assistance of the said statement of the deceased Vijayamma only to corroborate the other circumstances and the ocular testimony of PW. 5.

9. Smt. Ashalatha Shetty (PW. 5) is the injured eye witness and she was very much present in her house wherein the incident took place. She is the person who lodged the complaint immediately after the incident implicating the accused. Absolutely no allegation is forthcoming against anybody except the accused. The injured generally would not shield the real culprit for implicating an innocent person. The evidence of PW. 5 fully supports the case of the prosecution as well as the version as found in the complaint at Ex. P2. PW. 5 has also deposed about the motive for commission for offence as well as the incident in question. She has not only deposed about the assault on herself, but also the assault on the deceased Vijayamma with knife by the accused. Even in the cross-examination, nothing worth is elicited by the defence so as to discard her evidence.

10. Case of the prosecution with regard to the recovery of gold chain with pendent belonging to the complainant at the instance of accused is proved by the evidence of PW. 13 and the Investigating Officer. PW. 13 is the witness for recovery mahazar at Ex. P8. He has deposed that a gold chain with pendent came to be seized at the instance of the accused from Swarna Karis Jewelry Shop, Hubli. He has also deposed about drawing of seizure panchanama at Ex. P8 and producing of the purchase bill (Ex. P9) by the Manager of the said jewelry shop before the police.

11. From the aforementioned material, it is clear that the incident has taken place at about 3.00 p.m. on 26.6.2007 in the house of PW. 5 in her presence. It is also clear from the aforementioned evidence that the accused has committed the crime, as a result of which deceased Vijayamma has lost her life and PW. 5 sustained certain simple injuries. Still, the question that needs to be decided in this case is whether the accused has committed the offence punishable under Section 302 of IPC or not.

12. The incident in question has taken place on 26.6.2007 at about 3.00 p.m. Immediately thereafter, the victim Vijayamma as well as the injured PW. 5 were admitted to the hospital. Vijayamma was admitted to Shanbhag Nursing Home. She was subjected to surgery on the same day. Since her health condition did

not improve, she was shifted to Penasia Hospital on 3.7.2007. Vijayamma took treatment in Penasia Hospital up to 29.9.2007. During the interregnum, she underwent two operations. She was discharged on 29.9.2007 from Penasia Hospital. Once again she was admitted to K.C. General Hospital on 12.10.2007. She lost her life on 15.10.2007.

None of the doctors who treated the victim Vijayamma in Penasia Hospital from 3.7.2007 till 29.9.2007 is examined before the Court. The medical records pertaining to the said Hospital are also not produced before the Court. In the absence of any medical records pertaining to Penasia Hospital wherein Vijayamma has taken treatment from 3.7.2007 till 29.9.2007, we are not in a position to exactly verify as to what was the health condition of Vijayamma during the relevant point of time and what treatment was administered to her. It is not in dispute that Vijayamma was discharged from Penasia Hospital on 29.9.2007. From that date till 12.10.2007 she was in her house. The prosecution has not placed any records to show as to whether she took any treatment between 29.9.2007 and 12.10.2007, etc. Even the medical records pertaining to K.C. General Hospital from 12.10.2007 to 15.10.2007 are not placed before the Court. The doctors at K.C. General Hospital are also not examined. Except the doctor who treated the victim Vijayamma in Shanbhag Nursing Home from 26.6.2007 till 3.7.2007, no other doctor is examined before the Court to show about the manner in which the victim Vijayamma was medically treated. In the absence of such medical records, the defence is justified in arguing that the prosecution has not proved its case against the accused for the offence punishable under Section 302 of IPC, inasmuch as nothing is placed on record to show that the death has resulted because of the injuries sustained.

13. It is also clear from the evidence of the daughter of the deceased (PW. 7) that her mother Smt. Vijayamma has lost her life because of improper treatment by the doctors in the hospital.

PW. 14 - son of the deceased Vijayamma, has also admitted in his cross-examination that though his mother was not fully recovered in Penasia Hospital, the doctors at Penasia hospital discharged his mother, saying that she was alright. He further admits that there was exchange of words between the family members of Vijayamma and the doctors of Penetia Hospital.

Thus, from the evidence of PWs. 7 and 14, it is clear that family members of the victim had made allegations against the doctors at Penasia Hospital also. Aforementioned evidence has to be considered in the light of the fact that the prosecution has failed to place on record the medical records of the deceased Vijayamma pertaining to Penasia Hospital. In view of the same, we are of the opinion that the material on record is not sufficient to hold that the death of Vijayamma which has taken place after about 3 1/2 months of the incident in question was the direct result of the injuries sustained due to assault by the accused. It is very much necessary for the prosecution to prove the charge of murder. Consequently, it has to prove that the deceased had died on account of

injuries received by her. There should be a direct nexus between the death and the injuries sustained. As there is no proximity between the death and the injuries sustained, it would be very difficult for the Court to conclude that the accused is liable to be convicted for the offence punishable under Section 302 of IPC. It is incumbent upon the prosecution to prove that the death of the deceased had occurred because of the injuries sustained by her due to assault by the accused. Since the prosecution has failed to prove the said aspect of the matter, the trial Court is not justified in convicting the accused for the offence punishable under Section 302 of IPC. Having regard to the facts and circumstances of the case, the trial Court ought to have convicted the accused for the offence punishable under Section 326 of IPC.

However, we find that the trial Court is justified in convicting the accused for the offences punishable under Sections 394 and 342 of IPC.

14. We heard the learned advocate for the accused and the learned SPP on the question of sentence.

Having heard the advocates on record on the question of sentence, the following order is made:-

- i) The judgment and order of conviction dated 26.2.2011 passed by the Fast Track Court-I, Bangalore City, in SC. No. 828/2008, convicting the accused for the offence punishable under Section 302 of IPC stands modified. The accused shall undergo imprisonment for a period of seven years for the offences punishable under Sections 394 and 326 of IPC.
- ii) Consequently, the judgment and order of conviction dated 26.2.2011 convicting the accused for the offence punishable under Section 302 of IPC stands set aside.
- iii) The judgment and order of conviction dated 26.2.2011 convicting the accused for the offences punishable under Sections 342 and 394 of IPC stands confirmed.
- iv) The sentence of fine imposed by the Court below also stands confirmed.
- v) The accused shall undergo imprisonment for a period of seven years for the offence punishable under Sections 394 and 326 of IPC.
- vi) The accused is entitled to the benefit of set off for the period already undergone by him as provided under Section 428 of Cr.P.C.
- vii) Sentence imposed for the offences punishable under Sections 326 and 394 of IPC shall run concurrently.
- viii) In case if the accused has already undergone imprisonment imposed by us, he shall be set at liberty forthwith if he is not required in any other case.

Appeal is allowed in part accordingly.