
(2003) 08 MAD CK 0114

In the Madras High Court

Case No : Criminal Appeal No. 339 of 2001

Kandan @ Mayil Kandan and Murugesan

APPELLANT

Vs

State by Inspector of Police

RESPONDENT

Date of Decision : 06-08-2003

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 302, 307, 34

Citation : (2003) 08 MAD CK 0114

Hon'ble Judges : S. Sardar Zackria Hussain, J;A.S. Venkatachalamoorthy, J

Bench : Division Bench

Advocate : A. Padmanabhan, for the Appellant; V.M.R. Rajendran, Addl.Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

A.S. Venkatachalamoorthy, J.—The appellants/accused faced trial in S.C.148 of 1999 on the file of learned Principal Sessions Judge,

Tiruchirapalli for a charge u/s 302 read with 34 I.P.C. for causing the death of the deceased by name Raja at about 7.30 p.m. near Pullambadi

canal on 5.5.1997. The trial Court found them guilty as charged and sentenced them to undergo imprisonment for life as well as imposed a fine of

Rs.1,000/- each. The said Judgment is under challenge in this appeal.

2. The case of the prosecution in brief as found from the evidence let in is as follows.

(a) The accused are brothers. PW-4 Singaram is the brother of deceased Raja.

(b) The second accused was one of the partners of Kalaimagal Lucky Center, a Lottery shop in Samayapuram Bazaar and the deceased was an

employee in the said shop. There was theft of lottery tickets to the tune of

Rs.10,000/- from the said shop and the proprietors of the shop

suspected the deceased. On 4.5.1997 a Panchayat was held in this regard and in the said Panchayat it was decided that the deceased must make

good the loss. However, the deceased Raja refused to pay any amount as per the direction of the Panchayat, since according to him he had not

committed any theft of lottery tickets.

(c) On 4.5.1997 at about 10.00 a.m., the first accused went to the house of the deceased and demanded for payment and at that time the brother

of the deceased PW-4 was also present in the house. The deceased told the first accused that he had no money to pay him.

(d) On the fateful day, i.e., on 5.5.1997 at about 7.30 p.m., Pws.1 and 3 were in their respective houses near Padithurai in Samayapuram. When

they heard some crying noise from Pullambadi new canal, they rushed there. There they found the deceased Raja taking a dip in the water of the

canal. They brought him out of the canal and found that his dresses were partly burnt. They noticed that he had also sustained extensive burn

injuries. When questioned, he told them that the appellants set him to fire since he had refused to pay the amount as per the decision of the

Panchayat. By that time PW-4 also arrived at the scene of occurrence so also others and to them also the deceased told as to what had happened.

(e) Pws.1, 3 and 4 then took the deceased to Samayapuram Police Station and before PW-10 the then Head Constable at the Police station the

deceased Raja made a statement Ex.P-9. On the basis of the said statement, crime No.186 of 1997 u/s 307 I.P.c., was registered and printed

F.I.R. Ex.P-10 was prepared and the same was despatched to the Judicial Magistrate and copies thereof to superiors.

(f) PW-7 is the Doctor, who saw the deceased first at about 9.10 p.m. The Doctor noted that the deceased had sustained burn injuries to the

extent of 90%. To the Doctor he told that five known persons poured kerosene and set fire to him at 7.00 p.m. on 5.5.1997 near Samayapuram

Puduvaikalkarai.

(g) PW-11 was the Judicial Magistrate No.II, Tiruchirapalli at the relevant time. At about 10.15 p.m., he received a requisition from the

Government Hospital to come and record the dying declaration of the injured Raja. Immediately PW-11 rushed to the hospital and reached there

at 10.25 p.m., saw the injured Raja and after ascertaining that he was conscious and capable of understanding the questions and giving answers,

recorded the dying declaration. To PW-11, the deceased informed that he was beaten by A-1 and four others and that A-1 tied his hands and

four others poured kerosene and set fire to him.

(h) PW-14 is the Inspector of Police, who received copy of F.I.R. in crime No.186 of 1997 and immediately went to the scene of occurrence and

inspected the scene. On the next day i.e., on 6.5.1997 at about 7.00 a.m., he prepared Ex.P-2 observation mahazar and Ex.P-17 rough sketch in

the presence of witnesses. From the scene he seized MO-3 partly burnt match stick, Mo-4 kerosene stained earth, MO-5 ordinary earth, MO-6

Black colour plastic Can cover in the presence of witnesses. He examined Ganesan, Rengaraj, Pandiaraj and others and recorded their statements.

At about 4.00 p.m., near the arch in Samayapuram, arrested A-1 and enquired him. On arrest, he came forward and gave a voluntary confession

statement. A-1 in that statement stated that if taken, he will show the place of occurrence so also the kerosene Can, which he had thrown and also

the place where he had kept the match box. A-1 did so and the Plastic Can MO-7 and match box Mo-8 were seized under Ex.P-5 mahazar in the

presence of witnesses. On 7.5.1997 at about 11.30 a.m. the Inspector of Police arrested A-2 near the petrol bunk in Kollidam. The Inspector

then examined various witnesses on the following days.

(i) PW-13 Inspector of Police of Manachanallur Police Station continued the investigation since PW-14 was away on other duty. On 9.5.1997 the

injured Raja died in spite of the treatment given to him. On coming to know about the death of Raja, he altered the crime into one u/s 302 I.P.C.,

and prepared Ex.P-15 printed F.I.R and sent the same to the Judicial Magistrate. PW-13 then proceeded to the hospital and conducted inquest

over the body of the deceased and prepared Ex.P-16 inquest report in the presence of the Panchayatdars. Then he sent Ex.P-7 requisition to the

Doctor to conduct post mortem.

(j) PW-8 is the Doctor who conducted post mortem on the body of the deceased pursuant to the requisition Ex.P-7 made by the Inspector of

Police. The post mortem was commenced at 12.30 p.m. on 9.5.1995 and Ex.P-8 is the post mortem certificate. In the said certificate, the Doctor

has noted the following,

External Examination

Extensive burns with pustular and slough involving Head with singing of Hair, Face, neck, front and back of thorax, front and back of abdomen,

(Rt) arm, (Rt) forearm, Scrotum, (Rt) leg front and back. No other external Injuries.

Internal Examination

Head: Scalp: Burnt Hair, Skull: - No fracture skull. Membranes- Intact, Brain- Pale NAD.

Neck: Hyoid intact.

Thorax:

No fracture ribs both sides.

Both side pleura intact.

Both lungs pale, congested.

Trachea coated with tarry material.

Heart: Pale, dilated.

Abdomen: Stomach Pale. Contained brown liquid 100 ml.

Liver: Congested; Pale.

Spleen: Pale; NAD.

Both Kidneys: Pale; NAD.

Scrotum: NAD

The Doctor had opined that the deceased would have died of burn, shock and septicemia and the death would have occurred about 8 to 12 hours

prior to commencement of post mortem.

(k) PW-14, who resumed duty, made efforts to trace the other three accused but however he could not succeed. PW-14 then proceeded with

further investigation, examined witnesses on various dates and recorded their statements. Ex.P-14 is the Chemical analysis report. The Investigating

Officer, after completing the investigation, filed his final report.

3. When questioned u/s 313 of Code of Criminal Procedure, both the accused pleaded that they have nothing to do with the occurrence and they

have been falsely implicated in this case.

4. In brief, the case of the prosecution is that since the deceased refused to pay the money as per the Panchayat, the accused and three others

took him to the southern bund of new vaikal in Pullambadi and that A-1 beat him while A-2 tied his hands and thereafter, A-1 poured kerosene

and set fire. None witnessed the occurrence and Pws.1, 3 and 4 are the witnesses who reached the place immediately after the occurrence and to

whom the deceased narrated as to what had happened. These witnesses also did not see the accused at the scene of occurrence. Hence the

prosecution relies only on the dying declaration made by the deceased. They are,

(a) The dying declaration made by the deceased to PW-11 Judicial Magistrate at 10.25 p.m. on 5.5.1997 at the Government Hospital.

(b) The complaint Ex.P-1 given by the deceased to the Head Constable PW-10 at 8.00 p.m. on 5.5.1997.

(c) The evidence of PW-7, the Doctor at the Government Hospital to whom at 9.10 p.m. the deceased told about the occurrence.

(d) The evidence of Pws.1, 3 and 4 who arrived at the scene immediately after the occurrence and to whom the deceased told what had happened

before their arrival.

5. The settled legal position is a dying declaration, if found reliable, can form the basis of conviction. A Court of facts is not excluded from acting

upon an uncorroborated dying declaration for finding conviction. The dying declaration has to be judged and appreciated in the light of the

surrounding circumstances and its weight determined by reference to the principles governing the weighing of evidence. But, if in a given case a

particular dying declaration suffers from any infirmities, either of its own or as disclosed by other evidence adduced in the case or circumstances

coming to its notice, the Court may as a rule of prudence look for corroboration and if the infirmities be such as render the dying declaration so

infirm as to prick the conscience of the court, the same may be refused to be accepted as forming a safe basis for conviction. The weak points of a

dying declaration serve to put the court on its guard while testing its reliability and impose on the court an obligation to closely scrutinise all the

relevant attendant circumstances. (Refer: 1993 SCC (Cri) 655 (Kundula Bala Subrahmanyam v. State of A.P.); Smt. Laxmi Vs. Om Prakash and

Others,).

6. Let us proceed to consider whether there are material contradictions or not amongst the dying declarations made by the deceased.

7. PW-11 was the then Judicial Magistrate No.II, Tiruchirapalli, who on receipt of requisition at 10.15 p.m. on 5.5.1997, proceeded to the

hospital and reached there at 10.25 p.m. and recorded the dying declaration Ex.P-11. The learned Magistrate first put as many as six questions to

the deceased to satisfy himself that the injured was conscious and capable of giving answers to the questions. He recorded the statement in the

presence of Doctor, who has also certified that the deceased (patient) was conscious throughout. To the Magistrate, the deceased had told that at

7.00 p.m. on 5.5.1997, A-1 and four others took him to the bund of new vaikal in Samayapuram and beat him. A-1 beat him and then tied the

hands and remaining four poured kerosene and set fire and thereafter they ran away. It has to be noted that the presence of A-2 is not mentioned

in the said statement. So also the overt act of pouring kerosene and setting fire have been attributed to all the four accused other than A-1.

8. The other dying declaration is Ex.P-9, which is a complaint given by the deceased to PW-10, the Head Constable at 8.00 p.m. on 5.5.1997 in

the police station. In the said complaint, he had stated that he was taken to the tank bund by A-1 and near the foot steps of the Canal, A-2 and A-

3 and others were present. Then A-1 beat the deceased on the back and A-2 tied his hands and again A-1 poured kerosene on him and set fire.

Pws.1, 3 and others came there and informed as to what had happened.

9. When we compare these two dying declarations, we find the following differences.

(a) In Ex.P-11 it is stated that the deceased was taken near the canal by A-1 and four others, but in Ex.P-9 it is stated that he was taken there by

A-1.

(b) In Ex.P-11 the name of A-2 is not mentioned, whereas in Ex.P-9 it is mentioned.

(c) In Ex.P-11 it is stated that A-1 tied the hands, but we find in Ex.P-9 it is stated that it was A-2, who tied the hands.

(d) In Ex.P-11 it is stated that four persons other than A-1 poured kerosene and set fire. In Ex.P-9 it is stated that A-1 poured kerosene and set

fire.

(e) In Ex.P-9 the deceased had stated Pws.1, 3 and 4 arrived immediately after the occurrence and to whom he narrated as to what had followed,

but the same does not find a place in Ex.P-11.

10. Now let us proceed to consider the other two dying declarations viz., as to what the deceased told to the Doctor PW-7 and to Pws.1, 3 and 4

about the occurrence.

11. To the Doctor the deceased had told that five known persons poured kerosene and set fire and that is not the case in Ex.P-9 or Ex.P-11.

12. Coming to the evidence of Pws.1 and 3, we find they have deposed that the deceased had told them as if it was only two known persons who

poured kerosene and set him to fire. But if we turn to the evidence of PW-4, we note that the deceased had told him that A-1 and A-2 had done

so and that there were also two or three unknown persons present. It has to be pointed out that PW-4 is none else than the brother of the

deceased. Thus, we find the statement made to Pws.1, 3 and 4 by the deceased is different from Ex.P-9 and Ex.P-11.

13. Let us proceed to consider some rulings of the Supreme Court at this juncture.

(a) In *Thurukanni Pompiah and Another Vs. State of Mysore*, , the Court was considering two dying declarations. In that case, the deceased made

declaration at the place where he had fallen down, which were recorded as Ex.P-2 and P-1(a). Later, he was removed to hospital Kampli and

there he made another declaration Ex.P-9. The Court pointed out the inconsistencies and declined to accept the prosecution case. The Court

observed as under,

In the instant case, the declarations recorded in Exs.P-2 and P-1(a) were made almost simultaneously and the declaration recorded in Ex.P-9 was

made shortly thereafter. In Ex.P-2, Eranna named Pompiah and Hussaini only as his assailants, whereas in Exs.P-1(a) and P-9 he named not only

Pompiah and Hussaini, but also Siddaiah and Rudramuni as his assailants. Now, his version that Siddaiah and Rudramuni attacked him has been

found to be an afterthought. We thus find that a material and integral portion of the deceased's version of the entire occurrence is unreliable. The

truthfulness of the dying declarations as a whole is not free from doubt. The prosecution case as a whole does not inspire confidence. ...

(b) In the ruling reported in Smt. Kamla Vs. State of Punjab, , there were four dying declarations, out of which three to different Doctors and one

to the Sub-Inspector of Police. In one dying declaration, the deceased named her mother-in-law while in the other she named both her mother-in-

law and father-in-law. In the third one she had said that it might be that mother-in-law and father-in-law were the culprits. In the statement made

before the Doctor she told it was an accident. We deem it necessary to quote the relevant portions from the said judgment,

(5) It is well-settled that dying declaration can form the sole basis of conviction provided that it is free from infirmities and satisfies various tests.

(vide Khushal Rao Vs. The State of Bombay,). The ratio laid down in this case has been referred to in a number of subsequent cases with

approval. It is also settled in all these cases that the statement should be consistent throughout if the deceased had several opportunities of making

such dying declarations, that is to say, if there are more than one dying declaration they should be consistent. If a dying declaration is found to be

voluntary, reliable and made in fit mental condition, it can be relied upon without even any corroboration. In a case where there are more than one

dying declaration if some inconsistencies are noticed between one and the other, the court has to examine the nature of the inconsistencies namely

whether they are material or not. In scrutinising the contents of various dying declarations, in such a situation, the court has to examine the same in

the light of the various surrounding facts and circumstances.

(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. ...

The Court held that the prosecution has not proved its case.

(c) In yet another ruling reported in 1999 (4) Crimes 90 (SC) (Dandu Lakshmi Reddy v. State of A.P.), the Court pointed out that there should

not be any inherent improbability in a dying declaration so also there should not be any material contradiction. In that case, the deceased gave a

declaration to the Magistrate mentioning that the occurrence took place at 6.00 a.m. when she was sleeping when her mother-in-law and husband

both poured kerosene on her and lighted match stick and set her to fire. But however, in the statement given to the Sub-Inspector of Police, she

had stated that when she was lighting the stove at 6.00 a.m. her husband caught hold of her and mother in law poured kerosene on her and she

asked her son to set fire and that is how the occurrence took place. The Court pointed out that the Court while examining the dying declaration

must satisfy its judicial conscience and that the sphere of scrutiny of dying declaration is a restricted area and that the court cannot afford to sideline

such a material divergence relating to the very occasion of the crime. The Court held that the prosecution had not established its case beyond all

reasonable doubt. We hereunder extract the relevant portions from the said judgment,

11. In view of the impossibility of conducting the test on the said version with the touchstone of cross-examination we have to adopt other tests in

order to satisfy our judicial conscience that those two dying declarations contain nothing but truth.

12. First among such tests is to scrutinise whether there are inherent improbabilities in that version. We are unable to detect any such improbability

inherent therein. The next test is whether there is any inherent contradiction therein. In that scrutiny we came across one material contradiction as

between the two dying declarations regarding the context in which deceased caught fire. Ext.P-14 shows that she was set fire to when she was

lighting to stove for preparing the coffee.

In Ext.P-11 (which is a dying declaration given to the judicial Magistrate of 1st class) the context stated by the declarant was altogether different.

The relevant portion is extracted below:-

My mother-in-law's name is Narayanamma, my husband's name is Dandu Lakshmi Reddy. In the morning at 6.00 a.m. when I was sweeping,

my mother in law Narayanamma and my husband Laxmi Reddy both poured kerosene on me, lit the match-stick and set me to fire.

13.

Thus the High Court has sidelined such a noticeable discrepancy looming large as between the two different statements made by the same person.

When the sphere of scrutiny of dying declaration is a restricted area, the court cannot afford to sideline such a material divergence relating to the

very occasion of the crime. Either the context spoken to in one was wrong or that in the other was wrong. Both could be reconciled with each

other only with much strain as it relates to the opportunity for the culprit to commit the offence. Adopting such a strain to the detriment of the accused in a criminal case is not a feasible course.

14. Applying the various principles laid down by the Supreme Court of India to the facts of this case, we have no hesitation to hold that there are material contradictions amongst various dying declarations and it is totally unsafe to rely on anyone of them and convict the accused.

15. In the result, the criminal appeal is allowed. The conviction and sentence imposed on both the appellants/accused by the learned Principal

Sessions Judge, Tiruchirapalli by his Judgment dated 22.3.2001 in S.C.148 of 1999 are hereby set aside. Both the appellants/accused are

acquitted of the charge framed against them. They shall be set at liberty forthwith if they are not required in connection with some other cases. The

fine amount paid by the appellants/accused, if any, shall be refunded to them.