
(1997) 02 KAR CK 0008
In the Karnataka High Court
Case No : Criminal Appeal No. 439 of 1995

Shabeera Hafijasab Inamadar and Others	APPELLANT
Vs	
State of Karnataka	RESPONDENT

Date of Decision : 03-02-1997

Acts Referred:

Penal Code, 1860 (IPC) — Section 302, 307, 34, 498A

Citation : (1999) 1 ALT(Cri) 142 : (1998) ILR (Kar) 592 : (1998) 4 KarLJ 600

Hon'ble Judges : M.F. Saldanha, J; M.B. Vishwanath, J

Bench : Division Bench

Advocate : Sri R.B. Deshpande, for the Appellant; Sri A.B. Patil, Additional State Public Prosecutor, for the Respondent

Judgement

M.F. Saldanha, J.—This appeal presents, once again a set of most atrocious facts and concerns the death of a young wife through burning under most horrifying conditions. The deceased wife Shamshadbi was hardly aged about 20 years and had been married to A-1 about four years prior to the incident. In the early hours of the morning of 2-5-1990 at about 3.00 a.m., the prosecution alleges that the three accused were instrumental in dousing her clothes with kerosene and that they set fire to her. The deceased ran and jumped into a tub of water and the flames were ultimately extinguished, but she had suffered 90% burns by that point of time and these burns were also not superficial but were third degree burns which were so deep in certain areas that parts of some of the organs were burnt. It is the prosecution case that the accused had been ill-treating and harassing the deceased among other things on the ground that she had no children. Also, there is some allegation to the effect that A-1 who was a driver had been demanding among other things, a sum of Rs. 2,000/- which the deceased was unable to provide. The incident created a commotion and Shamshadbi was moved to the hospital where she was admitted at about 3-30 a.m. The police authorities called at the hospital in the morning and recorded her complaint in which she has implicated the three accused persons. According to the police, though the incident took place on 2-5-1990 the accused were

absconding for 12 days thereafter and they ultimately surrendered only on 14-5-1990. This is one of the guilty circumstances that have been alleged against the accused. In the complaint statement recorded by the police on the morning of 2-5-1990, the deceased has very clearly stated that the accused used to ill treat her and that it was they who set her on fire. In view of the fact that her condition was bad, the Tahasildar P.W. 19 was asked to record her dying declaration which was done on the evening of that day. On 5-5-1990, Shamshadbi died. The charge-sheet which was originally registered u/s 307, IPC was altered to one u/s 302, IPC and the accused were arrested and put up on trial.

2. The learned Trial Judge after evaluating the evidence took cognizance of the two dying declarations the first one being in the form of a complaint and the second one in the form of a regular dying declaration and he also relied heavily on the evidence of P-Ws. 4 and 5, mother and the brother respectively. These two witnesses have given evidence and their version is identical to the version appearing in the dying declaration and the complaint. The learned Trial Judge accordingly held the three accused guilty of the offence punishable u/s 302 read with Section 34, IPC and convicted and sentenced them to Rigorous Imprisonment for life. They were however acquitted of the offence punishable u/s 498-A, IPC. The three appellants have assailed of their conviction through this appeal.

3. Mr. Deshpande, learned Counsel who represents the appellants, has taken us in some detail through the evidence on record. Pausing here for a moment, we need to allude to one more important factor viz., that the three neighbours who were P.Ws. 1, 2 and 3 as also P.Ws. 6, 7, 8, 9 and 14 have not supported the prosecution case in so far as they were declared hostile. Again, the learned Additional State Public Prosecutor has pointed out to us that C.Ws. 12 and 13 were not examined and that there is no apparent reason set out anywhere in the record for why this has happened. He has sought to project a strong grievance by submitting that in case after case this Court has been faced with the most unsatisfactory situation of a whole series of prosecution witnesses having turned hostile. The record indicates that they were cited as witnesses because the Investigating Officer found that they had something useful and material to contribute to the prosecution case and despite this position, due to some intervening factors, the witnesses have suddenly somersaulted. The learned Additional State Public Prosecutor submitted that as a result of this state of affairs, in numerous instances the prosecutions virtually fail and the accused go scot-free. It was his contention that appropriate action is very necessary when such a situation manifests itself with alarming regularity and which ultimately results in acquittal orders being passed in favour of the accused in the most serious of cases. On the other hand, Mr. Deshpande, learned Counsel who represents the accused, submitted that the Investigating Officers indiscriminately attribute all sorts of knowledge to the witnesses merely because they may be neighbours or relatives or for any other reason and that in this background, it is

only when the witnesses are brought before the Court in the witness box that the real truth comes out. His submission is that there is no presumption that the statements attributed to the witnesses represents the correct state of affairs and that it is only the version which emerges before the Court that is of consequence and in this background he submits that it would be unfair and unjust to even point a finger at the witnesses who had turned hostile or for that matter to assume that the accused had something to do with such a state of affairs. We have considered what has been pointed out by the two learned Counsel and we need to record that the conscience of this Court is disturbed by the manner in which the prosecutions are virtually sabotaged through such extremely improper and down-right corrupt practices. It is impossible for us to accept that the statements and knowledge of the commission of an offence would be indiscriminately attributed to witnesses by the Investigating Authorities. The present case is one in point where P.Ws. 1, 2 and 3 are the immediate neighbours and it is very clear that they would have had not only the knowledge of the background of the case but further-more that -when a serious incident of this type took place that they would have seen and heard a considerable amount. The Investigating Officer was perfectly justified therefore in recording their statements and citing them as witnesses and the same applies to P.Ws. 6, 7, 8, 9 and 14. Despite this position, we find that significantly as large a number as 8 important witnesses have turned hostile. Normally, even if one or two of the crucial witnesses turn hostile, the prosecution case would run into serious difficulties and could fail. The direct beneficiary of this situation is the accused himself and it is therefore impossible for us to accept that when witnesses turn hostile that the accused has nothing to do with it. In our considered view, it is in order to benefit the accused that the witnesses turn hostile. It makes little difference to us that whether the tactics used consists of intimidation or inducement and furthermore, whether the Investigating authorities are taken into confidence or not, the fact remains that the working of the justice dispensation system is being seriously undermined and in this background where it is very necessary that the law be applied correctly and formally, we consider it eminently necessary that specific directions be issued to the Trial Courts in cases where witnesses of any importance turn hostile to hold and enquire as to what is the background in which this state of affairs has emerged and to take stringent action against whosoever was responsible for such a situation be it the accused the lawyers or even any of the Investigating Authorities who have joined hands with the accused for purposes of making available to the accused the benefit of such a situation. In our considered view, unless this is done, the disease which has now reached rather malignant proportions is not likely to be either checked or controlled. It is therefore very much necessary in the public interest that an example be made of those of the guilty persons responsible for this state of affairs. We make it clear that if it is disclosed that the police are responsible for bringing about such a situation that the Trial Courts shall institute appropriate counter steps against such errant authorities.

4. As indicated above, 8 of the witnesses have turned hostile. Mr. Deshpande submitted that as far as the evidence of P.Ws. 4 and 5 are concerned, who are the mother and the brother, that this evidence is based on what the deceased is alleged to have told them, his submission is that, admittedly the relationship between the deceased and her in-laws were not very cordial and in this background there is every possibility that she could have decided to end her life on her own. The learned Counsel submits that having regard to the fact that the incident took place at 3.00 a.m. at night, that it is highly unlikely that third parties who are neighbours etc., would even be aware of precisely what happened. He submits that having regard to the fact that the deceased suffered severe burn injuries that it is not surprising that her closest relations who are P.Ws. 4 and 5 would immediately conclude that it is her in-laws who are responsible for the injuries and that therefore the mental condition of the deceased to make a statement incriminating those persons. Basically what is pointed out by the learned Counsel is that P.Ws. 4 and 5 have no personal knowledge and that everything deposed to by them has its source in the information that they gathered from the deceased in the hospital. In this background, the learned Counsel submits that the statement made to the police officer which was after P.Ws. 4 and 5 arrived at the hospital becomes highly suspect insofar as even if the deceased did not implicate the accused on her own, that it is obvious that she did it under the influence of P.Ws. 4 and 5. He therefore submits that the Court would have to seriously test through independent quarters as to whether the complaint lodged by the deceased later that morning represents the true state of affairs or not.

5. Similarly, the learned Counsel vehemently submitted that this is a case in which the dying declaration which came to be recorded by the Tahasildar again follows the identical line of accusation. He submits that the Court in this regard must take serious note of the fact that Shamshadbi had suffered third degree burns which were of considerable depth and intensity and that having regard to the seriousness of her condition, the hospital authorities must have administered various forms of medicine and that having regard to the cumulative effect of all these, it would be extremely unsafe for the Court to place reliance on such incriminating statements in the absence of being totally and completely satisfied that the deceased was both in a physical and mental condition to make a cogent statement.

6. The other side of the argument presented by the learned Additional State Public Prosecutor which undoubtedly is a very convincing one is that if the deceased had been tutored that some tell-tale circumstances would have disclosed this fact. He submits that despite being cross-examined, P.Ws. 4 and 5 have maintained the quality of their evidence. He also submits that the police officer who recorded the statement on the morning of 2-5-1990 has also indicated the same version. The learned Additional State Public Prosecutor emphasised the fact that the dying declaration which came to be recorded by an independent authority viz., the Tahasildar, again follows the same consistent

sequence of facts and he submits that where the Court has not one or two but as many as four different occasions to evaluate the credibility of the statement of the deceased and where the Court finds virtually 100% regularity and consistency, that this is the highest test of the fact that the deceased was in fact not only telling the truth but had related very correctly as to what precisely happened.

7. The entire controversy boils down to one simple point of law viz., the question as to whether the Court would be justified in accepting the aforesaid versions in the absence of medical evidence supporting the fact that when these statements were made, the deceased was in a physically and mentally sound state as to inspire total confidence in the Court. This is all the more important because there is a charge of murder that the accused are facing and it is well settled law that before an accused can be convicted of such a serious offence that the prosecution must establish the case beyond all reasonable doubt. The appellants' learned Advocate has very vehemently submitted that in the first instance, Shamshadbi had suffered the burn injuries at about 3.00 a.m. in the morning and that she was admitted in the hospital by about 3.30 a.m., her close relatives arrived at the hospital some time after she was admitted there and they had occasion to spend time with her. The medical case papers had not been produced by the Investigating Officer nor has any precaution been taken by recording the statements of the doctors who were treating the deceased at that point of time nor have they been examined as witnesses. Mr. Deshpande very strongly argued that if there is not only a lacuna but virtually a yawning gap or a void in the prosecution case, that it would be highly dangerous to accept the evidence in the face of such a situation. Mr. Patil, the learned Additional State Public Prosecutor, argued with equal vigour that merely because some infirmities are there in the investigation such as not having obtained the certificate on the dying declaration from the doctor concerned that the deceased was in a sound physical and mental condition and was capable of making a statement, that the benefit of the default should not go to the accused. In this context, he relied on a decision of the Supreme Court in *Chandrakant Luxman v State of Maharashtra*, wherein the Supreme Court has categorically laid down that in situations where the evidence is otherwise good enough, that merely because there are infirmities in the investigation, that this circumstance cannot be used to destroy the evidence that is otherwise acceptable. We need to mention here that the appellants' Counsel drew our attention to an earlier Division Bench decision of this Court in *State of Karnataka v T.P. Mahesha*, wherein, the Division Bench of this Court had occasion to deal with the law relating to dying declarations and to lay down various guidelines and to specifically hold that unless the dying declaration inspires total confidence that it could not form the basis of conviction. A Division Bench of the Calcutta High Court in the decision reported in 1997 CriLJ 319, held that it is absolutely imperative that the requisite certificates be obtained with regard to the mental and physical condition and the soundness and capacity of the patient whose dying declaration is being recorded and that in the

absence of such material that it would be unsafe to rely on the dying declaration.

8. It needs to be reiterated that the principal ground on which the Courts look for total reliability as far as the dying declarations are concerned is principally because the maker of the declaration is not available for cross-examination and in this background, if an accused is to be guilty on the basis of such a statement, then it must inspire absolute confidence. It is for this reason that the Courts have insisted that the manner in which the dying declarations are recorded requires to be carefully examined and the principles laid down both by the law and the Courts in relation to dying declaration be scrupulously followed. We also need to point out here that when a patient is in a precarious condition and is virtually at death's door, that the patient is invariably suffering tremendously due to the injuries or as in the present case, the burns, that there are instances when the patient has lost a lot of blood or is otherwise in a very low state physically, that in cases particularly of burns, the unimaginable degree of pain is required to be relieved or controlled through the administration of pain killers and sedatives and that in this background, it is very essential that the doctor in attendance must certify that at the point of time when the dying declaration was recorded that the patient was conscious and more importantly that the patient was in a position to think cogently and give correct answers to the questions that have been put either by the police or by the independent authority who is recording the dying declaration. This aspect of the matter is paramount because the doctor is an independent person and he is also a professional who is specially qualified to certify on this crucial aspect of the patient's condition. The question as to whether the faculties of the patient were working and the all important question as to whether the patient was in full possession of these faculties coupled with the attendant aspect as to whether the effect or the treatment of the drugs that were administered would in any way impair the clear working of the mind of the patient are factors which cannot be left either to chance or conjectures nor can all these specialised areas of this aspect be deposed to by either the police or the person who has recorded the dying declaration because their inference is only secondary. Merely by saying that the patient appeared to be conscious and could answer the questions would not really take care of the aforesaid specialised aspect. These are angles of the matter which the Courts invariably should follow as a rule of prudence and a rule of caution. It is in this background that we are required to decide on the facts of the present case as to whether the Trial Judge was justified in having accepted the consistent version that has emerged through the evidence of four persons viz., mother, brother, Investigating Officer and the Tahasildar who has recorded the dying declaration coupled with the two documents viz., the complaint which is in writing and the dying declaration which is also in writing. What cannot be overlooked is that the source of all this evidence is ultimately traceable to deceased Shamshadbi and as far as this matter is concerned, if the Court is totally satisfied that Shamshadbi was in a sound condition mentally to make a correct and cogent statement, there could be no question of interfering with the conviction. The difficulty that has arisen is that

both at the time when the complaint was recorded by the police officer in the morning and in the evening when the dying declaration was recorded, there is no evidence before the Court to indicate that the attendant doctor was asked to certify that she was in a mentally sound condition to give a correct and cogent statement. We have taken careful note of the submission canvassed by the learned Additional State Public Prosecutor that this is one of the unusual cases where there is total consistency as far as these six heads of evidence is concerned and he submits that this is not one of the two, but virtually half a dozen heads that he is relying on and in this background, the Court can legitimately infer that Shamshadbi must have been in a totally sound condition as the Investigating Officer and the Tahasildar, who is a totally independent authority, would have had no special animus against the accused in order to implicate them. As far as the first aspect of the matter is concerned, we are not that confident because unfortunately whenever incidents of this type take place, the parents immediately and mechanically pounce on the family members presuming that they were responsible. Even if the family members are guilty, it is necessary that this has to be independently established particularly since the consequences of conviction on a murder charge are extremely grave.

9. It is in this background that after bestowing our total consideration to the various aspects of this case and after examining the position in law and in particular the guidelines laid down by the Courts from time to time that we are reluctantly required to answer the question in the negative. This is a case in which, as indicated by us earlier, the burns were extremely serious being third degree burns. The deceased was a young woman and she was taken to the hospital at about 3.30 a.m. and even in the absence of the case papers having been produced, we have no hesitation in concluding that with burns covering 90% of her body area that she would have virtually been hanging between life and death and in such excruciating pain that it would have been rather doubtful as to whether, she would have been in a position to think and answer correctly. We also take judicial notice of the fact that having been removed to hospital, that the necessary emergency treatment for saving her life would have been administered which among other things requires the administration of large doses of pain killers and sedatives. The latter would impair at least for a period of time the working of the patient's mind. It is possible that if the statement of the patient was required that the doctor would have perhaps indicated about the condition of the patient and precisely when this could be taken and he could also have possibly created a situation even through the administration of necessary medicine that the patient would have been temporarily restored to a position where she could think sufficiently and clearly. All these however require to be clearly pointed out by the prosecution. It is not the question of giving the accused the benefit of some infirmities in the investigation as had happened in the case before the Supreme Court but this situation is entirely justifiable in so far as the very foundation of the prosecution case is not free from doubt for the aforesaid reason, It is in this background that we are required to reluctantly hold

that the finding recorded by the Trial Court cannot be sustained and that the accused would be entitled to the benefit of doubt.

10. We need to record with some degree of concern that this is a case which to some extent has virtually gone by default because of the very serious lacunae on the part of the prosecution firstly in not seeing to it that the requisite certification was done when the complaint and the dying declaration was recorded and secondly in not having produced the doctors as witnesses to support the otherwise very cogent and very consistent evidence of the prosecution. This would not have been difficult and it was equally incumbent that the supportive material such as the case papers relating to the patient ought to have been placed before the Court in support of the fact that the condition of the patient was good enough to make the statement in question. These are not mere infirmities but they virtually present a gulf in the prosecution case which it is totally impossible to bridge. Again, the learned Additional State Public Prosecutor is justified when he has pointed out to us that for no ostensible reasons C.Ws. 11 and 12 were not examined. Had this been done he is right when he submits that the crucial evidence regarding the cruelty would have sustained not only the charge u/s 498-A, IPC but more importantly provided very strong basis for the commission of the main offence, has also been kept back from the Court. These are serious aspects of the matter and it is not the first case in which we have found such a situation coming up. It is difficult for us to accept this as mere negligence or accident and we are of the view that the disease was far more serious. Having regard particularly to this last aspect of the matter this Court considers that it is very necessary that appropriate curative action be ordered to prevent this unsatisfactory state of affairs recurring. The learned Additional State Public Prosecutor is again justified when he points out that merely due to this state of affairs the accused has no doubt benefitted and ultimately the rule of law is sought to be undermined. We do not approve of such a situation continuing and we therefore direct the Registrar General to forward a copy of this judgment to the Director General of Police, Karnataka State, who shall acknowledge the receipt of it and shall also indicate to the Registrar General that the observations of this Court have been taken note of and that due and adequate corrective steps will be taken by ensuring that the investigation of such offences particularly relating to atrocities against women will be taken very seriously and effectively.

11. The responsibility of presenting the prosecution case before the Trial Court is a very serious one and this devolves on the Public Prosecutor who is in charge of the prosecution. We had occasion in this case to observe that two of the crucial witnesses were not examined for reasons best known. Again, irrespective of whatever the investigating authorities might have done, nothing prevented the learned Public Prosecutor from having directed the Investigating Officer to produce the medical evidence which could easily have been procured had the effort been made. While the authorities are issuing appropriate directions to the investigating authorities viz., the policemen they shall also ensure that they bring

it to the notice of the Public Prosecutors conducting these cases in the State of Karnataka that this Court expects them to conduct the prosecutions with a degree of professionalism and competence and not to allow this state of affairs to recur.

12. Having regard to the findings recorded in this judgment, the conviction and sentence recorded by the Trial Court are required to be set aside in so far as the three appellants are entitled to the benefit of doubt. Appellants 1 and 2 are undergoing sentence and it is directed that they be released forth with if not required in connection with any other case. As far as appellant 3 is concerned, her bail bond shall stand cancelled.