REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1573/2022
(@Petition for Special Leave to Appeal (Crl.) No.5139/2020)

VIJAYA **Petitioner(s)**

VERSUS

STATE REP BY THE INSPECTOR OF POLICE **Respondent(s)**

J U D G M E N T

SURYA KANT, J.

Leave granted.

2. The appellant is wife of the de-facto complainant Mani @ Allimuthu. After about 2 years of their marriage, the couple was blessed with a daughter. It appears that on account of appellant's failure to cook sufficient food for her in-laws, who visited their house, a quarrel took place between the husband and the wife. The appellant, unfortunately, decided to commit suicide and consumed a poisonous substance, Odeuvanthlai, which she also administered to their 10 months old daughter. The husband of the appellant, namely, the de-facto complainant, had gone for work at that time and when he came back to his house after his work on 10-10-2012, he found both the appellant and their daughter unconscious. They were taken to Vinayaga Mission Hospital, Salem where the baby girl died on 13-10-2012. When the appellant gained consciousness, her purported Dying Declaration (Exhibit `P-20') was recorded on 11-10-2012 by

learned Judicial Magistrate (P.W. 13). The appellant eventually survived. The husband of the appellant had meanwhile reported the matter to the Police, which led to registration of a case under Sections 302 and 309 of the Indian Penal Code (in short 'Code') against the appellant for causing the death of their daughter.

3. The appellant was put on trial, in which 14 witnesses were examined from the prosecution side, besides reliance on 23 documents.

4. The Principal Sessions Judge, Namakkal found the appellant guilty of the offences under Sections 304(1) and 309 of the Code and sentenced her under Section 304(1) to undergo imprisonment for one year along with fine of Rs.5,000/-, in default whereof, she was required to undergo further imprisonment for three months. The appellant was also sentenced to undergo imprisonment for six months under Section 309 of the Code along with fine of Rs.1,000/-.

5. The appellant preferred appeal before the High Court of Judicature at Madras, but her appeal was turned down by the High Court on the following premise:-

> **"10. On reading of the entire materials EX.P20 recorded by P.W. 2 stated that being the dying declaration at the time when she was admitted in the hospital, the learned Magistrate recorded the statement from the appellant. The appellant has clearly admitted that she consumed poison due to the stomach pain and also she gave the poison to the child. The statement under Section 164 of Cr.P.C., made before the learned Judicial Magistrate, and the evidence of the doctor that she has consumed poison and the same was corroborated by the evidence of P.W.8. Therefore no other evidence is necessary to find out that the accused has committed the offence. The medical evidence also**

corroborated the same. The learned counsel for the appellant would submit that the accused was admitted in the Government hospital, Salem, but the medical certificate was not produced. FIR also registered after three days from the date of occurrence.

11. On considering the case, there was a wordy quarrel between the family members and due to the quarrel the accused suddenly taken the decision to consume poison and gave the same to her child also. Thereafter, she was admitted in Government hospital immediately. The statement recorded under Section 164 of Cr.P.C., from the deceased which was marked as Ex.P20 and which was corroborated by the evidence of P.W.8 doctor who has given treatment to the deceased Kanishka and the accused Vijaya."

6. The question that arises for consideration is whether it is tenable to uphold the conviction of the appellant solely on the basis of her purported dying declaration (Exhibit `P20') which also appears to have been classified as a Statement under Section 164 of the Code of Criminal Procedure, 1973, considering that Appellant has denied making any statement?

7. In this regard, there has been a clear and consistent approach taken by this Court toward a dying declaration when the individual in question subsequently survives. In *State of U.P. v. Veer Singh (2004) 10 SCC 117*, it was held:

> **"5. It is trite law that when maker of purported dying declaration survives the same is not statement under Section 32 of the Indian Evidence Act, 1872 (for short the 'Evidence Act') but is a statement in terms of Section 164 of the Code. It can be used under Section 157 of the Evidence Act for the purpose of corroboration and under Section 155 for the purpose of contradiction."**

8. There are also some decisions of this Court which cast doubt on whether such a statement can be treated as a confessional statement. We may, in this regard, rely upon two decisions, i.e., (i) "Ramprasad vs State of Maharashtra, (1999) 5 SCC 30 and (ii) "S. Arul Raja vs State of Tamil Nadu, (2010) 8 SCC 233.

9. In *Ramprasad (Supra)* the bar on classifying a statement as a dying declaration when the conveyer of the declaration does not succumb to his/her injuries, was detailed as follows:

> ***"We are in full agreement with the contention of the learned counsel that Ext.52 cannot be used as evidence under Section 32 of the Evidence Act though it was recorded as a dying declaration. At the time when PW.1 gave the statement he would have been under expectation of death but that is not sufficient to wiggle it into the cassette of Section 32. As long as the maker of the statement is alive it would remain only in the realm of a statement recorded during investigation."***

10. The Court in *S. Arul Raja (Supra)* then went on to address the issue of such a statement being treated as a confessional statement, by holding:

> ***"40. This Court in the case of Sharawan Bhadaji Bhirad & Others v. State of Maharashtra reported in (2002) 10 SCC 56 held that when a statement is recorded as a dying declaration and the victim survives, such statement need not stand the strict scrutiny of a dying declaration, but may be treated as a statement under Section 164, Cr.P.C.***
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> ***41. Therefore, with the said statement inadmissible as a dying declaration, the question that arises is: whether the statement could be admissible either as a confession or as an extra-judicial confession?***
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> ***42. The events surrounding the confession made by A1 while in hospital, and more significantly, in police custody, are too ambiguous to support conviction of the appellant.***

> ***43. Section 164 Cr.P.C. provides guidelines to be followed for taking the statement of accused as a confession. The one essential condition is that it must be made voluntarily and not under threat or coercion. This Court in Aloke Nath Dutta & Ors. v. State of West Bengal reported in (2007) 12 SCC 230 held as under: -***
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> ***"87. Confession ordinarily is admissible in evidence. It is a relevant fact. It can be acted upon. Confession may under certain circumstances and subject to law laid down by the superior judiciary from time to time form the basis for conviction. It is, however, trite that for the said purpose the court has to satisfy itself in regard to:***
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> ***(i) voluntariness of the confession; (ii) truthfulness of the confession; (iii) corroboration."***

11. Hence, the focus of our inquiry is two-fold: i) Whether the statement made by the Appellant, which does not qualify as a dying declaration under Section 32 of the Evidence Act but, rather, as a statement under Section 164 of the CrPC, may be treated as a confession statement; and ii) Whether there is corroborative evidence that supports the prosecution's case.

12. At the outset, the subsequent denial by the Appellant of the statement attributed to her is of relevance. It further appears that PWs 1 & 5, Appellant's husband who is also the complainant, and her father-in-law, have both turned hostile. However, the learned Sessions Judge brushed aside this factor based on the rationale that these individuals were, ultimately, interested in ensuring that the Appellant was acquitted and hence resiled from their earlier statements which had supported her guilt. The trail court opined that the prosecution version of events was, by far,

the more plausible and logically resulted in the demise of the Appellant's daughter.

13. Learned Senior Counsel, Mr. S. Nagamuthu, has vehemently urged that the only basis for the conviction of Appellant after the hostile turn of this class of witnesses, was the purported declaration made by the Appellant while she was admitted in hospital and the statement of the doctor entrusted with treating the Appellant, PW8. However, he assails PW8's statement as being shorn of any particulars beyond the fact that he treated Appellant and that both the Appellant and the deceased had consumed the same poisonous substance.

14. Undoubtedly there is some murkiness surrounding the exact circumstances in which the Appellant and her daughter consumed Odeuvanthlai. The Appellant has attributed her initial statement on 11.10.2012, when she had regained consciousness in the hospital, to influencing from the police who allegedly convinced her that they would apprehend the individuals who had offered her daughter and her the tainted honey, and also recover the jewelry that these unidentified persons had stolen. However, she claimed that they asked her to remain silent about these details and simply convey that the two of them had consumed Odeuvanthlai.

15. This sequence of events has been disbelieved by the Sessions Judge and the High Court. Be that as it may, this necessarily has an impact on the genuineness of the initial statement made by the Appellant. Combined with the subsequent hostile turns taken by some

of the vital witnesses in the trial, a seed of doubt is planted in terms of the conviction of the Appellant.

16. At this stage, it is important to understand the ambit of "reasonable doubt" in a criminal proceeding. In *State of Haryana v. Bhagirath & Ors. (1999) 5 SCC 96* the difficulty in demarcating the contours of "reasonable doubt" was remarked upon:

> ***"10. It is nearly impossible in any criminal trial to prove all elements with scientific precision. A criminal court could be convinced of the guilt only beyond the range of a reasonable doubt. Of course, the expression "reasonable doubt" is incapable of definition. Modern thinking is in favour of the view that proof beyond a reasonable doubt is the same as proof which affords moral certainty to the judge.***
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> ***11. Francis Wharton, a celebrated writer on Criminal Law in United States has quoted from judicial pronouncements in his book on "Wharton's Criminal Evidence" as follows (at page 31, volume 1 of the 12th Edition):***
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> ***It is difficult to define the phrase "reasonable doubt." However, in all criminal cases a careful explanation of the term ought to be given. A definition often quoted or followed is that given by Chief Justice Saw in the Webster Case. He says: "It is not mere possible doubt, because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that consideration that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.***
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> ***12. In the treatise on "The Law of Criminal Evidence" authored by HC Underbill it is stated (at page 34, Volume 1 of the Fifth Edition) thus:***
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> ***The doubt to be reasonable must be such a one as an honest, sensible and fair-minded man might, with reason, entertain consistent with a conscientious desire to ascertain the truth. An honestly entertained doubt of guilt is a reasonable doubt. A vague conjecture or an inference of the possibility of the innocence of the***

> ***accused is not a reasonable doubt. A reasonable doubt is one which arises from a consideration of all the evidence in a fair and reasonable way. There must be a candid consideration of all the evidence and if, after this candid consideration is had by the jurors, there remains in the minds a conviction of the guilt of the accused, then there is no room for a reasonable doubt."***

17. Thus, the focus for us when ascertaining reasonable doubt is not merely the possibility of doubt or of another version of events but rather a version that survives the scrutiny of an honest and conscientious judicial mind. In the present case, we note that following the incident, the marriage between the Appellant and PW1, the complainant, continues to subsist and that she has given birth to two minor children.

18. When considering the Appellant's guilt, the Sessions Judge and the High Court have not satisfactorily considered the effect and impact of PW1 & PW'5's failure to support the prosecution. When considering the disputed confession by the Appellant, the bedrock on which the prosecution's case stood was undone but the Sessions Judge and the High Court proceeded on what prima facie appears to be an almost unqualified acceptance that the confession remained unassailable. This was in spite of the fact that only PW8 remained to provide some degree of corroboration regarding the prosecution's story.

19. The reasons for why PW1 & PW5 turned hostile may be numerous and as compelling as each other. While the lower courts have

considered them to be interested witnesses concerned with the acquittal of the Appellant, we are unable to ascertain why that is a more likely reason for their non-cooperation than the fact that they believed the Appellant was being wrongly accused and that their initial statements were taken under duress.

20. Undoubtedly, it is not incumbent upon us, nor possible, to undertake such a factual analysis at this stage. We can only observe that further consideration of this point was necessary, especially in light of the guilt of the Appellant not tallying easily with her continuing marriage to PW1 and her fostering of two children after the tragic loss of her first born. It is the absence of an evaluation of this nuance on the record that creates a reasonable doubt in our minds regarding Appellant's conviction.

21. When the facts and circumstances of a case are as peculiar as the one before us, the judicial responsibility to scrape the bottom of the barrel and address the specificities head on is even greater. It is in the same vein, that we are compelled to observe that there are issues of contention that, having not been adequately addressed, benefit the Appellant.

22. For the reasons aforesaid, the appeal is allowed and the Judgment dated 27-4-2017 of the learned Trial Court and the impugned Judgment dated 19-3-2019 passed by the High Court both are set aside.

23. Needless to state that interim protection granted by this Court to the appellant on 13-8-2020 and continued on 16-10-2020, is made absolute.

.....J
(SURYA KANT)

.....J
(HRISHIKESH ROY)

NEW DELHI;
15TH SEPTEMBER, 2022.