

THE HON'BLE SRI JUSTICE NOOTY RAMAMOHANA RAO
AND
THE HON'BLE MRS. JUSTICE ANIS
+ CrI.A. No. 717 of 2010

% Dated 13.08.2015

Pathan Kareemulla & others.

....Appellants

Vs.

\$ The State of Andhra Pradesh, rep. by its Public Prosecutor,

....Respondent

! Counsel for the appellants : Sri G. Vijay Babu

^ Counsel for the Respondent : Public Prosecutor (AP)

<GIST:

> HEAD NOTE:

? Cases referred

1. 2007(3) ALT (CrI.) 253 (SC)
2. 2001 (1) ALD (CrI.) 734 (SC)

**IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA
PRADESH**

Crl.A.No. 717 OF 2010

Between:

1. Pathan Kareemulla & one another

... APPELLANTS

AND

The State of Andhra Pradesh, rep. by its Public Prosecutor,

...RESPONDENT

-
DATE OF JUDGMENT PRONOUNCED: 13.08.2015

-
SUBMITTED FOR APPROVAL:

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**THE HON'BLE SRI JUSTICE NOOTY RAMAMOHANA RAO
AND
THE HON'BLE MRS. JUSTICE ANIS**

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| 1. Whether Reporters of Local newspapers
may be allowed to see the Judgments? | Yes/No |
| 2. Whether the copies of judgment may be
marked to Law Reporters/Journals? | Yes/No |
| 3. Whether Their Lordship wish to see the
fair copy of the Judgment? | Yes/No |

**THE HON'BLE SRI JUSTICE NOOTY RAMAMOHANA RAO
AND
THE HON'BLE MRS. JUSTICE ANIS
CRIMINAL APPEAL No. 717 OF 2010**

ORDER: *(per Hon'ble Sri Justice Nooty Ramamohana Rao)*

This Criminal Appeal is preferred by Accused 1 and 2. They challenged the conviction handed down to them by the I Additional District & Sessions Judge, Krishna at Machilipatnam in S.C.No. 176 of 2008, finding them guilty of the offence punishable under Section 302 read with Section 34 of the Indian Penal Code. The learned Sessions Judge sentenced them to undergo imprisonment for life and also to pay a fine of Rs.100/- (Rupees one hundred only) each, in default to suffer simple imprisonment for one month each.

The case of the prosecution is that Smt. Shaik Kamaal Bee (hereinafter be referred to as 'the deceased') was a married woman and her husband has fallen to bad ways of life. He was not indulging in any useful activity to help the family get going. Since he was taken to bad ways of life, he was getting intoxicated most of the times and above all, has also suffered Tuberculosis disease. It is the deceased, who was working as a cooli and with the wages earned, was maintaining the family which also consists of a son and three daughters. Because of the bad ways of living by the husband, there were periodical quarrels between the deceased and her husband. The earnest request made by the deceased for change of attitude by her husband has not produced the desired result. In those

circumstances, the deceased seem to have developed intimacy with Accused No.1 which has led to an undesirable relationship between them. Upon coming to know of the illegal intimacy between the deceased and Accused No.1, Accused No.2, the wife of Accused No.1, has picked up a quarrel with the deceased. Subsequently, Accused No.1 also started distancing himself from the deceased and was also ill-treating her.

On the day of the incident, at about 01.00 P.M., Accused 1 and 2 and their son came to the house of the deceased and picked up a quarrel with her, all due to the illegal intimacy between Accused No.1 and the deceased. It is stated that not satisfied with the abuses hurled by Accused No.2, the accused pushed her inside the house and Accused No.2 picked up the kerosene tin and poured kerosene on the deceased while Accused No.1 and his son caught hold of the deceased from escaping. After pouring kerosene, Accused No.2 lit fire and bolted the door from outside and went away. Because of the unbearable pain, the deceased started shouting for help. A mother and a daughter living in the opposite house rescued her and tried to put off the flames on her body. They shifted her to the Government Hospital at Nuzvid, Krishna District where she was admitted, at about 02.00 p.m. The house was completely gutted due to the fire lit by the accused. It is the case of the prosecution that upon intimation being received from the hospital, the police visited the hospital and the Head Constable recorded her statement, based on which, Ex.P.1 First Information Report in Crime No. 22 of 2007 has been registered. Since the condition of the deceased was found to be critical, a requisition was sent to P.W.23, the local Magistrate, for recording the dying declaration of the deceased. Accordingly, P.W.23 recorded the dying declaration of the deceased between 06.50 and 07.10 p.m. The deceased succumbed to the burn injuries and died on 24.02.2007. Hence, the accused were charged for the offence under Section 302 read with Section 34 of the Indian Penal Code.

On behalf of the prosecution, P.Ws.1 to 24 were examined and Exs.P1 to P40 were marked. The kerosene tin, two stumps and the ash recovered from the scene of the offence were marked as M.Os. 1 to 3 respectively.

The entire case centers around the contents of the dying declaration made by the deceased. The first statement made by the deceased, which was marked as Ex.P24, was recorded by the Head Constable of the Police Station between 03.30 and 04.00 p.m. In Ex.P24, a clear statement was made by the deceased that due to the illness of her husband, she developed illicit intimacy with Accused No.1. P.W.7, the duty doctor has deposed that he was present at the time of recording the statement of the deceased by the police between 03.30 and 04.00 p.m. on 19.02.2007. He has made an endorsement marked as Ex.P10 that the patient was conscious and coherent through out the said time of recording her statement. It is P.W.7, who has sent intimation to the police upon admission of the patient to the hospital. The police intimation was marked as Ex.P11. It was forwarded around 03.00 p.m. It was set out therein that around 02.00 p.m., on 19.02.2007, the victim has sustained accidental thermal burns and hence, admitted to the hospital. After the First Information Report was registered, the police took up investigation into the matter. The statement of the victim under Section 161 of the Code of Criminal Procedure was recorded. That portion of the said statement, which is relevant to sustain the charge, has been marked as Ex.P27. The dying declaration recorded by P.W.23 between 06.50 and 07.10 p.m. on 20.02.2007 was marked as Ex.P32. We had gone through very carefully the original dying declaration recorded in Telugu language by P.W.23. The learned Magistrate, after putting formal questions to make an assessment about the functioning of the mental faculty of the victim, has also brought to the notice of the victim that he was the magistrate of the local Court and if the victim wants to make any statement, she can make a statement. Thereafter, the duty doctor was

also examined by him for the purpose of ascertaining whether the patient is conscious and is in a condition to make a free statement about the incident. The duty doctor has affixed his signature on Ex.P32. Thereafter, the learned Magistrate has also recorded his satisfaction that the patient is coherent to answer the questions and she is in a fit condition to make a statement. The statement made by the victim is so truthful, in that she has narrated as to how the incident occurred around 01.00 p.m, at her house, the previous day i.e. 19.02.2007. She has clearly stated that Accused 1 and his son caught hold of her, while Accused No.2 poured kerosene from out of the kerosene tin available in the house and Accused No.2 lit fire. They pushed her inside the house and locked the door from outside. She has also stated that her husband went out of the house on the pretext of attending to nature calls. In her statement, her sense of disappointment arising from out of the treatment meted out to her by her husband, has also been reflected when she stated that her husband has not come to the hospital to look her up till such time. This apart, towards the end of her statement, she said that gold ornaments (ear rings of nearly 4 gms. -) and Rs.2,500/- is due and payable to her by the accused. When we perused the first statement made by her, in view of the contention canvassed strenuously before us by the learned counsel for the appellants that there were improvements made by her, from stage to stage, we find that far from making any improvements, the victim has been very clear all through and has been maintaining the same statement. Ex.P24, the first statement recorded by the Head Constable in the presence of the duty doctor P.W.7 between 03.30 and 04.00 p.m. on 19.02.2007, the date of the incident clearly brought out that due to the illness of her husband, she developed illicit intimacy with Accused No.1 and because of this reason, Accused No.2, the wife of Accused No.1 picked up quarrels with her. We find that the victim made a very honest statement. No woman would have ever disclosed to a third person that she

developed illicit intimacy with another man than her husband. The folly committed by the victim has already been realized by her and she was very clear that because of that reason, she has been poured kerosene and put on fire by Accused 1 and 2. Because of the quarrels picked up by Accused No.2, Accused No.1 started distancing himself from the deceased and also started treating her no longer with any respect or affection. Statements of this kind, in our view, would not be made in normal circumstances by any person. Only when one knows that end is not too far away, the call of the conscience makes them to come out openly and cleanse the impure conduct exhibited till then. We are therefore, of the clear opinion that there is no contradiction whatsoever in the contents of Exs.P24 and P27 and P32.

The criticism launched by the learned counsel for the appellants about the dying declaration, based upon the statement made by the duty doctor P.W.7, during his cross-examination, wherein he said that the victim allegedly suffered burns accidentally, is not worth any serious consideration by us. The reason is very simple. The victim has not walked into a hospital on her own. She was brought to the hospital by some third parties. At the time of admission of a patient, who has suffered extensive burn injuries, one is bound to inform as to the cause of the burns and therefore, it is but only expected that the third party would have intimated the burns to have been suffered accidentally and they are under no legal obligation to disclose as to who has caused the burns. No one will be willingly committing himself to a medico legal case. Further, if one is not an eye witness to the incident, he would be assuming that the burns may not have been caused deliberately, but could be the result of an accident. Therefore, Ex.P11, the police intimation sent up by the duty doctor at 03.00 p.m., as soon as he admitted the deceased in the hospital, has only referred that a patient, who has suffered burn injuries accidentally, has been admitted to the hospital at 02.00 p.m., on 19.02.2007. Ex.P11 has clearly brought out that some third party, who is a relative

of the victim, has brought her to the hospital. In these circumstances, the alleged contradiction, which the learned counsel for the appellants has sought to stress upon, based upon the statement made by P.W.7 during the course of cross-examination, would not lend the necessary support nor would it leave any scope to suspect even remotely the contents of the dying declaration made by her. Further, Ex.P.28 Post-Mortem report revealed that the victim died of the burn injuries.

Learned counsel for the appellants tried to place reliance upon the evidence of P.Ws.1 to 3, who are the children of the deceased.

P.W.1, the son of the deceased, was 15-year-old at the time of examination by the Court, which was in June 2009. Therefore, in February, 2007, he could be possibly a 13-year-old young boy. He deposed that his mother was suffering from mental illness and that she used to beat her father, P.W.1 and the other children and that she poured kerosene two or three times previously and attempted to set fire for herself. The truth of the matter comes out if we examine the statement made by P.W.1 during his cross-examination by the learned Additional Public Prosecutor after treating him to have turned hostile. The statement reads as under:

“ My father died due to drinking. He was awful drinker since my knowledge. He was suffering from Tuberculosis. He used to demand money from my mother. My mother used to question my father about his drinking and demands for money....”

If what P.W.1 stated about his mother were to be true, his statement in the cross-examination by the Additional Public Prosecutor completely discredits the statement made by him that his mother was suffering from mental illness and that she used to beat her husband and her children. If the father of P.W.1 has taken to bad ways of life, there was nothing unusual of a sensible woman questioning the husband about it. The statement of P.W.1 that his mother was suffering from mental illness is therefore, belied by his own statement in his cross-examination when he reflected about the sensibility of his

mother in questioning his father. Similarly, P.W.2, the daughter of the deceased, stated that her mother poured kerosene on her person, went into the house, bolted from inside and set fire to herself. It is factually incorrect, as the door was bolted from outside and it was opened by P.Ws.4 and 5, the inmates of the opposite house. P.W.2 could be possibly 11-year-old when the incident took place. The Public Prosecutor cross-examined her as she turned hostile. This witness has denied the suggestion that the accused persons used to visit their house frequently, whereas her elder brother clearly revealed the relationship of Accused 1 and 2 with their father and he stated that the accused used to visit their house frequently. It is therefore, crystal clear that P.Ws.1 and 2 have come under some kind of pressure and were made to give statements, which may not be accurate reflection of the events that led to the incident. So far as P.W.3 is concerned, all we need to know is that she is still further younger than P.Ws.1 and 2. Therefore, we are not at all impressed by the strenuous contention of the learned counsel for the appellants that the deposition of P.Ws.1 to 3, being the children of the victim and being very truthful, should be taken note of and into serious consideration by us for either acquitting the accused/appellants or for reducing the sentence imposed on them.

This apart, the learned counsel for the appellants has relied upon the decision in ***Nallapati Sivaiah v. Sub-Divisional Officer, Guntur***^[1], wherein, in paragraph 40, the Supreme Court said that it is unsafe to record conviction on the basis of a dying declaration alone in cases where suspicion is raised as regards the correctness of the dying declaration. We find that the said principle has no application to the fact situation prevailing in the instant case. It may not be really safe to place reliance upon a dying declaration if an element of suspicion about the truthfulness and genuineness of the said statement is raised, but not in a case where the statement made by the victim is all though consistent and is forthright and very honest as well. We therefore, find that the principle enunciated the Supreme Court in

Nallapati Sivaiah's case (referred to supra) has no application to the present fact situation.

On the other hand, the principle enunciated by the Supreme Court in ***Uka Ram v. State of Rajasthan***^[2] is applicable. Justice R.P. Sethi, speaking for the three-judge Bench of the Supreme Court, has culled out the principle in paragraph 6 of the judgment in the following words:

“ Statements, written or verbal of relevant facts made by a person who is dead, or who cannot be found or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts under the circumstances enumerated under sub-sections (1) to (8) of Section 32 of the Act. When the statement is made by a person as to cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the case of that person's death comes into question is admissible in evidence being relevant whether the person was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question. Such statements in law are compendiously called dying declarations. The admissibility of the dying declaration rests upon the principle that a sense of impending death produces in a man's mind the same feeling as that of a conscientious and virtuous man under oath - *Nemo Moriturus praesumuntur mentiri*. Such statements are admitted, upon consideration that their declarations made in extremity, when the maker is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced and the mind induced by the most powerful consideration to speak the truth. The principle on which the dying declarations are admitted in evidence, is based upon the legal maxim “*Nemo moriturus praesumitur mentiri*” i.e. a man will not meet his maker with a lie in his mouth. It has always to be kept in mind that though a dying declaration is entitled to great weight, yet it is worthwhile to note that as the maker of the statement is not subjected to cross-examination, it is essential for the Court to insist that dying declaration should be of such nature as to inspire full confidence of the Court in its correctness. The Court is obliged to rule out the possibility of the statement being the result of either tutoring, prompting or vindictive or product of imagination. Before relying upon a dying declaration, the Court should be satisfied that the deceased was in a fit state of mind to make the statement. Once

the Court is satisfied that the dying declaration was true, voluntary and not influenced by an extraneous consideration, it can base its conviction without any further corroboration as rule requiring corroboration is not a rule of law but only a rule of prudence.”

Hence, we have no hesitation to dismiss this Appeal and accordingly, it is dismissed.

Consequently, the miscellaneous applications, if any shall also stand dismissed.

NOOTY RAMAMOHANA RAO, J

ANIS, J

13th August 2015
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[\[1\]](#) 2007(3) ALT (CrI) 253 (SC)

[\[2\]](#) 2001(1) ALD (CrI.) 734 (SC)