

THE HON'BLE SRI JUSTICE C.V.NAGARJUNA
REDDY

AND

THE HON'BLE SRI JUSTICE M.S.K.JAISWAL

CRIMINAL APPEAL No.997 of 2010

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19.04.2016

Between:

Poolakunta Sankara

..Appellant/Appellant

And

The State of A.P.,
represented by its Public Prosecutor,
Hyderabad.

..Respondent

Counsel for the appellant: Mrs. C.Vasundhara Reddy

Counsel for the respondent: Public Prosecutor (AP)

The Court made the following:

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JUDGMENT: *(Per the Hon'ble Sri Justice M.S.K.Jaiswal)*

This Criminal Appeal is filed against judgment, dated 26.7.2010, in Sessions Case No.581 of 2008 on the file of the learned Additional Sessions Judge, Hindupur, by and under which the learned Sessions Judge convicted the appellant/accused for the offence punishable under Section-302 I.P.C. and sentenced him to undergo life imprisonment and to pay a fine of Rs.100/-.

The case of the prosecution in brief is that one Poolakunta Venkataramanamma (hereinafter referred as "the deceased") was the wife of the appellant. The marriage of the deceased with the appellant was performed 1 ½ years prior to the incident and they lived happily for about six months. Thereafter, the deceased was attacked with Tuberculosis (T.B) and had been taking treatment at Kolar in Karnataka State. The doctors advised her not to participate in sex for some time. The appellant having knowledge of the deceased suffering with the said disease and the doctor's advise, was harassing and pressurizing her to participate in sex, but the deceased was refusing, for which, he used to beat her. On 23.5.2007, at about 2 pm., when the deceased was cleaning the house, the appellant wanted to have sex with her and when she refused, he grew wild and poured kerosene on her and lit fire. The deceased ran out from the house and raised cries. On hearing the cries, P.Ws.1 and 2-her mother and brother, respectively, along with P.Ws.3, 4, 6 and 7 rushed there and put off the flames. On seeing them, the appellant fled away. P.Ws.1 and 2 took the deceased to the Government Hospital, Kadiri and on intimation, P.W-14-Assistant Sub-Inspector of Police, Kadiri Police Station visited the hospital, recorded the statement of the deceased and registered a case in Crime No.30 of 2007 under Section-307 I.P.C. On receiving the medical intimation, P.W-12-Additional Judicial First Class Magistrate, Kadiri recorded Ex.P-10-dying declaration of the deceased. The deceased succumbed to the injuries on 30.5.2007 while she was undergoing treatment in General Hospital, Kurnool. On receipt of the death intimation, P.W-17 altered the Section of law in the F.I.R. from 307 IPC to 302 IPC. P.W-13-Mandal Executive Magistrate held inquest on the dead body of the deceased and later, sent the dead

body for post-mortem examination. After completion of the investigation, P.W-17 filed the charge sheet.

The plea of the appellant is one of denial.

In order to bring home the guilt of the appellant, the prosecution examined P.Ws.1 to 17 and marked Exs.P-1 to P-20 and M.Os.1 to 3. On behalf of the defence, Ex.D-1 was marked. No oral evidence was let in.

Based on the oral and documentary evidence, the learned Sessions Judge convicted and sentenced the appellant for the offence under Section-302 IPC, as aforesaid.

Mrs. C.Vasundhara Reddy, learned counsel appearing for the appellant, submitted that the evidence that is placed on record is grossly inconsistent and do not establish beyond all reasonable doubt as to whether it is the appellant who has set fire to the deceased on 23.5.2007 at around 2 pm, as alleged by the prosecution. She further submitted that except the evidence of the interested witnesses, viz., the mother, brother and sister of the deceased, no independent witnesses supported the case of the prosecution and that, relying solely upon the dying declarations said to be given by the deceased, the learned Sessions Judge found the appellant guilty of the offence punishable under Section-302 I.P.C. She further submitted that the learned Judicial Magistrate who recorded the dying declaration of the deceased has not followed the statutory requirement of Rule-33 of the Criminal Rules of Practice and therefore, the same cannot be looked into. She further submitted that there are material contradictions in between the three statements said to be have been recorded of the deceased, which affect the credibility thereof and therefore, the conviction of the appellant cannot be based on such statements.

Learned Public Prosecutor for the State of Andhra

Pradesh, on the other hand, submitted that there is consistency in the evidence of P.Ws.1, 2 and 5, who were the mother, brother and sister of the deceased respectively. That the appellant used to treat the deceased cruelly as she was refusing to cohabit with him on the ground that she was suffering from Tuberculosis. He further submitted that the evidence on record clearly shows that on the afternoon on 23.5.2007, when the appellant and the deceased were together in the house, the deceased sustained burn injuries and she came out running from the house raising cries and was taken to the Government Hospital at Kadiri. Thereafter, she was taken to the General Hospital, Kurnool for better treatment, where she succumbed to the injuries on 30.5.2007. Learned Public Prosecutor further submitted that the three dying declarations recorded by three different officials, including the jurisdictional judicial Magistrate, are consistent so far as the material aspect is concerned. It is submitted that in all the three statements, the deceased was categorical that it is the appellant who poured kerosene on her while she was cleaning the slab in her house and set fire to her on the ground that she has not satisfied him sexually. It is further submitted that the Court below has properly appreciated the evidence on record and found the appellant guilty of the offence under Section-302 I.P.C and that the said finding, which is based on legally acceptable evidence, does not warrant interference by this Court.

The points that arise for consideration are as to whether the prosecution has proved its case beyond all reasonable doubt so as to sustain the conviction and sentenced recorded against the appellant and whether the judgment of the lower Court needs to be confirmed, set aside or varied.

The admitted fact is that the deceased and the

appellant were married about 1 ½ years prior to the date of incident. Their matrimonial life was going on happily but for the fact that the deceased was diagnosed to be suffering from Tuberculosis and it was the medical advice that till she recovers, she should not cohabit with her husband. The allegation is that the appellant-husband used to insist the deceased-wife to participate in sexual activity and when she refused, he used to beat her and that, on the date of the incident, *i.e.*, on 23.5.2007, at about 2 pm, when the deceased was cleaning the house, the appellant came there, insisted her to satisfy his lust and when she refused, he got angry, poured kerosene on her, set fire on her and fled away from there. P.Ws.1 and 2-the mother and brother of the deceased, respectively, who were nearby, came running and shifted the deceased in a double bullock cart to some distance and thereafter in a jeep to the Government Hospital at Kadiri and thereafter, she was shifted to General Hospital, Kurnool for better treatment. The deceased was found to have sustained 85% burn injuries.

On being requisitioned by the hospital authorities, on 23.5.2007 and 24.5.2007, P.W-14-Assistant Sub-Inspector of Police and P.W-12-the jurisdictional Magistrate recorded the statements-Exs.P-13 and P-10, respectively, of the deceased. The earliest statement is Ex.P-13, which is recorded by P.W-14. This was at 6.15 pm on 23.5.2007 and an hour thereafter, *i.e.*, at 7.20 pm the jurisdictional Magistrate-P.W-12 recorded the statement of the deceased, which is Ex.P-10. Next day, *i.e.*, on 24.5.2007, during the course of further investigation, the Investigating Officer-P.W-16 recorded the statement of the deceased under Section-161 Cr.P.C. and the same is marked as Ex.P-16. There is no gain saying of the fact that when there are multiple statements, there needs to be consistency in between

them at least insofar as the material aspect is concerned. However, taking into consideration the physical and mental condition of a person who sustained 85% burns injuries, one cannot expect that such statements should be consistent on all aspects. On the other hand, if all the three statements are parrot like, it creates a doubt on their authenticity. Minor contradictions are bound to exist in between the statements, which the deceased gave at different points of time. Therefore, what is required to be seen is as to whether the three statements of the deceased, viz., Exs.P-10, 13 and 16 are consistent at least insofar as the material aspect with regard to the manner in which she sustained burn injuries is concerned. It is in the evidence of the Magistrate-P.W-12 that on receipt of the intimation, he proceeded to the Government Hospital at Kadiri, found the deceased undergoing treatment and that a duty doctor was also present there. In his presence, the Magistrate put simple questions to the injured to ascertain as to whether she is in a position to give proper answers. P.W-12 deposed that when the injured gave proper answers to the questions, he was satisfied that she was in a fit state of mind to give the statement and accordingly, recorded her statement, which is also certified by the Medical Officer present there. Ex.P-10 is the statement which is as brief as it should be. Hence, the entire statement is reproduced, which is as under:

“My marriage was performed about one year back and the second year is running. I have Tuberculosis disease, due to which I am unable to satisfy my husband for which he used to beat me. Like wise, today, in the afternoon, since I did not fulfill his desire, he poured kerosene on me and set fire.”

When the deposition of the jurisdictional

Magistrate- P.W-12 was confronted to the appellant during the course of his 313 Cr.P.C. examination, his answer to it is that it is false.

Prior to recording of the statement by P.W-12, the Assistant Sub-Inspector of Police, Kadiri-P.W-14 also recorded the statement of the victim, which is Ex.P-13. In this statement, the victim stated that on the date of the incident, while she was cleaning slabs in her house, her husband poured kerosene on her and lit fire to her with a match stick with an intention to kill her; that due to burn injuries, she raised huge cries and came out of the house and then her husband ran away from there; that the neighbours came there and put off the flames; and that her mother, brother and others came there and took her to Kadiri hospital for treatment.

P.W-14 in his deposition stated that on receiving the intimation, he proceeded to the Government Hospital, Kadiri and recorded the statement of the victim. On this statement also, the duty doctor endorsed that the patient is conscious and coherent while recording the same.

Next day, i.e., on 24.5.2007, after the case was registered, P.W-16-Sub-Inspector of Police proceeded to the hospital and recorded the statement of the victim under Section-161 Cr.P.C. The said statement is marked as Ex.P-16. In the said statement, the deceased stated that on 23.5.2007, at around 2 pm., while she was cleaning slabs in her house, her husband came with an intention to kill her, poured kerosene on her, set fire to her with a match stick and that, she raised huge cries, came out of the house and her husband ran away from there and she was taken to the hospital.

From these three statements, it is manifest that the deceased has consistently stated that it is the appellant who poured kerosene and set fire to her in the

afternoon on 23.5.2007 while she was in the house. The only discrepancy is that in one statement she did not say that the appellant poured kerosene on her and set fire on her refusal to cohabit with him. This discrepancy cannot be said to be detrimental for discarding the statements of the victim which she gave while she was fully conscious and in a fit mental condition to give the statement, as has been certified by the Medical Officer. It may also be stated that while the statements of the deceased were recorded on 23.5.2007 and 24.5.2007, she succumbed to the injuries nearly six days thereafter i.e., on 30.5.2007.

Learned counsel appearing for the appellant submitted that the dying declaration-Ex.P-10 recorded by the Magistrate is not in conformity with Rule-33 of the Criminal Rules of Practice. She invites our attention to Sub-rule-(2) of Rule-33 of the Criminal Rules of Practice which reads as under:

"Before taking down the declaration, the Magistrate shall disclose his identity and also ask the declarant whether he is mentally capable of making a declaration. He should also put simple questions to elicit answer from the declarant with a view to knowing his state of mind and should record the questions and answers, signs and gestures together with his own conclusion in the matter. He should also obtain whenever possible a certificate from the Medical Officer as to the mental condition of the declarant."

By placing reliance on the above provision, the learned counsel submitted that since the Magistrate did not ask the declarant as to whether she is mentally capable of making declaration, the statement recorded by him cannot be said to be in conformity with Rule-33 of the Criminal Rules of Practice. We see no substance

in this submission of the learned counsel for the simple reason that merely because the Magistrate has not asked the declarant as to whether she is in a mentally fit condition to give statement, her statement cannot be discarded, more particularly, when the duty doctor, who was treating her, has certified that she is in a mentally fit condition to give statement and not only that, even the Magistrate after putting preliminary questions was satisfied about the mental condition of the declarant and only on being satisfied that she was in a fit mental condition to give statement, he recorded her statement. Therefore, Ex.P-10-dying declaration recorded by P.W-12 cannot be discarded for the simple reason that the learned Magistrate has not put one question to her, *viz.*, whether she is mentally capable of making declaration.

What is required to be seen is the purport of the statements, but not the trivial aspects such as the one highlighted by the learned counsel for the appellant. Even at the cost of repetition it can be said that all the three statements of the deceased, recorded at different points of time by different officers, *viz.*, P.Ws-12, 14 and 16, are consistent. Learned counsel did not find fault on that aspect.

Be that as it may, what has to be seen is as to whether there is any corroboration to the dying declarations given by the deceased.

We have the evidence of P.Ws.1, 2 and 5, who are, no doubt, the mother, brother and sister of the deceased, respectively and they consistently spoke about the circumstances in which the deceased sustained burn injuries.

P.W-1-the mother of the deceased deposed that the deceased was suffering with Tuberculosis, for which she was taking treatment at Kolar; that the doctor advised her daughter to take medicines continuously and there shall be no cohabitation between the

deceased and her husband for a period of three months; that her daughter has been telling the appellant that unless she fully recovers from the said disease, she will not participate in sex with him; that the appellant was demanding the deceased for cohabitation; and that in that connection, the appellant used to ill-treat the deceased both physically and mentally. P.W-1 further deposed that on the date of the incident, at about 2 pm., when she was in the neighbouring house of the appellant splitting groundnuts, she heard cries from the house of the deceased, ran there and found her daughter coming out of the house with flames. She has also seen the appellant running away from the house. Similar is the evidence of P.Ws.2 and 5. All these three witnesses were elaborately cross-examined, but nothing contradictory is elicited from them for disbelieving their testimony. As a matter of fact, it is admitted that the deceased-the daughter of P.W-1, was married to the appellant, who was related to P.W-1 even outside the marriage. The only suggestion that was put to these witnesses is that the deceased sustained burn injuries due to accidental fire and that they demanded some money from the appellant and when he refused to give the same, a false case has been foisted. This is too far fetched a suggestion for being accepted. It has been suggested to these witnesses that at the time when the fire accident took place, the appellant was attending in his fields. If really the fire was accidental, but not homicidal, the conduct of the appellant would not have been as has been on record. He is nowhere in the picture right from 2 pm on 23.4.2007 till 06.6.2007, when he was arrested. If really, the fire was accidental, he would have been the first person not only to attend to the treatment of the deceased, but also to lodge a complaint with the Police and he would not have made himself scarce all along for a period of 1 ½ months after

the incident.

The defence of the appellant which could be culled out from the cross-examination of the material witnesses is that the fire was accidental inasmuch as it emanated from the kerosene stove. If the fire was accidental and the deceased caught fire while cooking, she would not have sustained as extensive burn injuries as were found by the medical officer, *viz.*, 85%. It is not as though the entire house was gutted or there was any explosion of the kerosene stove so as to accept the theory of accidental fire put forth by the defence. The scene of offence panchanama-Ex.P-18 shows that at the place of incident, there was a plastic can with one litre of kerosene in it, one match box drenched with kerosene and some used match sticks. It was also mentioned that there was one fire place existing. No where in Ex.P-18, there is a mention of there being any kerosene stove at the place where the incident took place.

A careful perusal of Ex.P-18-the scene of offence panchanama rules out the possibility of the fire having been caused accidentally, as has been sought to be propounded by the learned counsel for the appellant.

Taking into consideration the above evidence on record, we have no hesitation in holding that it is the appellant who is responsible for the sustaining of burn injuries by the deceased.

The next aspect of the matter is as to whether the said act of the appellant causing burn injuries to the deceased constitutes an offence punishable under Section-302 I.P.C. or whether it falls within the ambit of Section-304-Part-I I.P.C., as contended by the learned counsel for the appellant.

We have critically scrutinized the evidence on record. What we find is that excepting for the fact that the deceased was not capable of satisfying her husband

physically and fulfilling her matrimonial obligation, there does not appear to be any ill-feelings or disputes between the couple, who were married as recently as 18 months prior to the occurrence. The refusal on the part of the deceased to recuse herself from her matrimonial obligation is clinical. At the time when the incident took place, it is on record that the appellant was present in the house and he ran away immediately thereafter. What happened prior thereto is not on record. However, it is the specific statement of the deceased that when she refused to fulfill the desire of her husband, he poured kerosene on her and set fire to her. Therefore, in our opinion, the said act of the appellant can be said to fall within the ambit of Section-304 Part-I I.P.C. and not Section-302 I.P.C.

In the result, the Criminal Appeal is partly allowed. The conviction recorded against the appellant/accused in judgment, dated 26.07.2010, in Sessions Case No.581 of 2008, on the file of the learned Additional Sessions Judge, Hindupur, for the offence punishable under Section 302 I.P.C. is converted to that of the offence punishable under Section 304 Part-I I.P.C. and the sentence of life imprisonment imposed against him for the offence punishable under Section 302 I.P.C. is modified to that of rigorous imprisonment for a period of ten (10) years for the offence punishable under Section 304 Part-I I.P.C, while maintaining the sentence of fine imposed against him. The period of sentence already undergone by him is directed to be given set off.

*JUSTICE C.V.NAGARJUNA
REDDY*

JUSTICE M.S.K.JAISWAL

19th April 2016

DR