

THE HON'BLE SRI JUSTICE C.V. NAGARJUNA REDDY
AND
THE HON'BLE SRI JUSTICE M.S.K. JAISWAL

CRIMINAL APPEAL NO.970 OF 2010

DATED:11-04-2016

Between:

Pathan Shafi ... Appellant

And

The State of A.P.
Rep. by Public Prosecutor
High Court,
At Hyderabad ... Respondent

COUNSEL FOR THE APPELLANT: Smt. A. Gayathri Reddy

COUNSEL FOR THE RESPONDENT: Public Prosecutor (AP)

THE COURT MADE THE FOLLOWING:

JUDGMENT: *(per the Hon'ble Sri Justice C.V. Nagarjuna Reddy)*

This appeal is filed against judgment dt.26.2.2010, in S.C. No.378 of 2006, on the file of the I Additional District and Sessions Judge, West Godavari, Eluru, whereby he has convicted the appellant – sole accused for the offence under Section 302 IPC and sentenced him to undergo imprisonment for life and to pay a fine of Rs.1,000/-, in

default, to suffer imprisonment for a period of six months.

2. The case of the prosecution is that the appellant/accused is the brother-in-law of one Pathan Vahida, wife of P.W.6. On 26.3.2006 at about 8.30 p.m., the appellant went to L.Ws.10, 11 and 13 and P.Ws.8 and 9, at Ganesh Colony, Chintalapudi, took their assistance by stating that P.W.10 came to the house of his brother - P.W.6 and was in the company of his sister-in-law (the deceased) in the absence of her husband. The accused took L.Ws.10 and 11 and P.W.8 to the house of the deceased where they found P.W.10 in the company of the deceased. The appellant went to the house of the deceased from the front side of her house, by guarding L.W.10 and P.W.8 at the rear side and L.W.11 in front side of the house. After entering the house of the deceased, the appellant saw P.W.10 in the company of the deceased. The appellant tried to catch P.W.10, but he escaped from the house by throwing the accused from rear side door, by pushing L.Ws.10 and 11 and P.W.8 to a side, and ran away through Northern side Maize fields. L.Ws.10 and 11 and P.W.8 chased P.W.10 shouting 'thief, thief..'. The neighbours also chased P.W.10 but they could not catch him. As the appellant became angry over the deceased for her illicit intimacy with P.W.10, he poured kerosene with a plastic tin on the deceased and set fire to her with a matchstick. Resultantly, the deceased was gutted in flames and received severe burn injuries on her body. The thatched house of the deceased was also completely burnt. The deceased came out from her house and raised alarm to protect herself by shouting that the appellant poured kerosene on her and set fire, and this was witnessed by the inmates and neighbours (L.Ws.7, 8, 10, 11, 13, 15, 16, 17, 18, and 19, and P.Ws.7, 8 and 9). Later, the deceased was shifted to Government Hospital, Chintalapudi, through P.W.5 and L.W.21 for treatment and she was admitted therein. While the deceased was undergoing treatment at the Government Hospital, she narrated the incident to P.Ws.1 to 5. On 27.3.2006 at 1.00 a.m., P.W.17, on receipt of hospital intimation, recorded the statement of the victim while she was alive and registered the same as FIR No.35 of 2006 under Section 307 IPC. Earlier, P.W.15 recorded the dying declaration of the deceased before her death at the Government Hospital, Chintalapudi, in the absence of the Mandal Revenue Officer, Chintalapudi, as the regular Judicial Magistrate of First Class post was vacant. On 27.3.2006 at 8.30 a.m., on receipt of the death intimation of the

deceased from the Government Hospital, Chintalapudi, a fresh FIR was registered by P.W.17, by altering the Section of Law from 307 IPC to Section 302 IPC. P.W.18 took up the investigation, visited the scene of offence, got drafted Ex.P.12, the scene observation report, by P.Ws.12 and 13, prepared a rough sketch and got photographed the scene of offence and dead body of the deceased through P.W.11. P.W.18 recorded the statements of the witnesses and continued his further investigation. P.W.16 conducted the inquest over the dead body of the deceased in the presence of P.Ws.12 and 13, and L.W.28, and sent the dead body for post-mortem examination, through L.W.34. On 28.3.2006 at 4.00 p.m., the appellant was arrested near Water Tank, on the outskirts of Chintalapudi Village, by P.W.18, in the presence of L.Ws.29 and 30. The appellant was sent to judicial remand after intimating his arrest to his brother - P.W.6. P.W.14, the Civil Assistant Surgeon, Community Health Center, Chintalapudi, issued Ex.P.14, post-mortem report wherein he has opined that the deceased suffered 96% superficial burns and the cause of her death was hyporalimic shock, approximately 12 to 16 hours prior to the post-mortem examination. P.W.18 has sent the seized material objects to Forensic Science Laboratory (FSL), Hyderabad, through Sub-Divisional Police Officer, Jangareddigudem, with a letter of advice. The Assistant Director of the FSL, issued the report to the effect that no flammable substances were found in the material objects sent to them. After completion of the investigation, P.W.18 filed the charge sheet.

3. The plea of the appellant was one of denial. Therefore, the prosecution has examined P.Ws.1 to 18 and marked Exs.P.1 to P.27. No evidence was let in on behalf of the defence.

4. On appreciation of the oral and documentary evidence, the lower Court has disposed of the case in the manner as stated above.

5. Smt. A. Gayathri Reddy, learned counsel for the appellant, has submitted that all the material prosecution witnesses, including P.W.1 - the father, P.W.2 - the elder sister, P.W.3 - the younger brother, P.W.4 - the junior paternal uncle, P.W.6 - the husband, of the deceased, and all the neighbours, i.e., P.Ws.5, 7, 8, 9 and 10, of the deceased, have turned hostile and that the prosecution case was solely based on Ex.P.16 - purported dying declaration, recorded by the Deputy Mandal Revenue Officer, Chintalapudi (P.W.15); Ex.P.20 - the statement of the deceased recorded by the Sub-Inspector of Police

(P.W.17); and Ex.P.23 - the statement of the deceased under Section 161 of CrPC., recorded by the same witness (P.W.17), a reading of which shows that all the three documents were fabricated and therefore the lower Court ought not to have based its conviction only on these documents.

6. Opposing the above submissions, Mr. Posani Venkateswarlu, learned Public Prosecutor for the State of Andhra Pradesh, sought to support the case of the prosecution and the conclusions drawn by the lower Court regarding the guilt of the appellant. He has relied upon the judgments of the Supreme Court in *Balbir Singh and another v. State of Punjab*^[1] and *Vithal Tukaram More and others v. State of Maharashtra*^[2].

7. As submitted by the learned counsel for the appellant, all the material witnesses, including the kith and kin of the deceased, have turned hostile, and did not support the case of the prosecution. The lower Court has relied upon Exs.P.16, P.20 and P.23, of which Ex.P.16 was recorded by P.W.15, the Deputy Mandal Revenue Officer, and Exs.P.20 and P.23 were recorded by P.W.17, the Sub-Inspector of Police. As the entire case revolves around these three documents, it is necessary for us to carefully consider these documents.

8. Before doing that, the following factual aspects need to be noticed. That the incident took place at about 8.30 p.m. on 23.05.2006 and the deceased was admitted in the Community Health Centre, Chintalapudi at 10.20 p.m. Since it was a medico legal case, intimation thereof was sent by the hospital authorities to the jurisdictional Police as well as to the Mandal Revenue Officer. Ex.P.15 is the intimation sent to the Mandal Revenue Officer, which was dispatched at 11.25 p.m., on 23.06.2006. Ex.P.19 is the intimation sent to the Police at about 11.00 p.m. on 23.06.2006. Ex.P.13 is the inquest report prepared by the Investigating Officer at 12.00 noon on 27.03.2006. Paragraph XV thereof reads as under:

"As per the FIR contents read over in the statements of deceased before her death, on observing the scene of offence and stage of the dead body and also as per the statements of the witnesses and blood relatives stated in column I-B of inquest report that the marriage of deceased Vaheeda was performed with Pathan Hussain of Chintalapudi village about six years back as the said Hussain is working as a Lorry Cleaner frequently used to go on duty by leaving Vaheeda alone on that the said Vaheeda developed illicit intimacy with others previously the same was placed before Muslim elders and on 26.03.2006 at about 08.30 p.m., in the absence of her husband

Hussain when she had illicit intimacy with one Karlapudi Raja Ratnam at her house and the same was noticed by the younger brother-in-law of Vaheeda through his paternal grand-mother Ashabee and the side tenant by name Bathina Sarojini hatched up plan to caught his sister-in-law red handedly with the help of his friends Sayyad Rasul, Shail, Bujji and Shaik Khasim went to the house of Vaheeda and tried to accompanied person of Vaheeda i.e., Raja Ratnam on that he pushed them and escaped from there on that they chased him some distance and then Shafi with angry as she did not mend her attitude picked up kerosene tin from her house and poured the same on her and lit fire to her as a result of which she received burn injuries her entire body and also her thatched house and thatched house situated on the back side of her house and so she was shifted to the Government Hospital at Chintalapudi for treatment and when she was taking treatment she lost her breath is the unanimous opinion of our inquestdars."

Now we consider the three documents on which the lower Court has relied upon in convicting and sentencing the accused. Ex.P.16 is the statement of the deceased allegedly given at the earliest point of time. This document was allegedly prepared by P.W.15, the Deputy Mandal Revenue Officer. It appears that since the Mandal Revenue Officer was not in the Head Quarters, on his instructions, the Deputy Mandal Revenue Officer, has recorded the statement of the deceased. A perusal of this document shows that no preliminary questions were put to the victim by P.W.15, such as the name and status of the victim, so as to satisfy himself that the victim giving the statement is in a position to understand the questions and give rational answers. P.W.15 also did not introduce himself to the victim by disclosing his identity. Ex.P.16 further shows that no answers were elicited by putting pointed questions to the deceased. The entire document is in the form of a statement. The deceased allegedly suffered 90 - 95% superficial burns and within two hours of the alleged recording of the statement, she was declared dead. In such a condition, she gave a detailed description such as the occupation of herself and her husband, her husband being out of station for the past four days, the duration of their wedlock etc. She has further stated that on 26.3.2006 at 8.30 p.m., when she was not well and sleeping in their hut, her brother-in-law came and questioned her as to who was the male person that came to her house and that she has replied that no male person has come. She further stated that the mother of her father-in-law - Pathan Ashabee was waiting outside her house, when her brother-in-law - Shafi has poured kerosene on her and lit the matchstick, due to which she has suffered burns, and that as the fire engulfed the hut also, the same was

guttered in the fire. She has further narrated that she was not observing while Pathan Masthan, Baji and her brother-in-law called the ambulance and admitted her in Government Hospital, Chintalapudi. She has also stated that during the treatment when she was questioned by the Mandal Revenue Officer, she has narrated the above mentioned facts to him which were read over to her and found correct. The other two statements, i.e., Exs.P.20 and P.23 allegedly recorded by P.W.17 are almost on the same lines with detailed narration of the antecedents of the deceased as well as how the events happened leading to her admission in hospital.

9. What makes this Court seriously suspect the genuineness of these documents is the minute details allegedly given out by the deceased, such as the mother of her father-in-law waiting outside the hut, the Deputy Mandal Revenue Officer questioning and eliciting the answers from her etc. If the deceased was sleeping in her hut during night and when she was confronted by the appellant and burnt her by pouring kerosene inside the hut, it is not comprehensible as to how she knew that the mother of her father-in-law was waiting outside the hut. Unless someone has an overview of what is happening around, it is not possible for a person in the position of the deceased to know the said fact. It has come out in the evidence, with respect to which there is no dispute, that not only that the deceased had suffered burns to the extent of 90 - 95%, but also the hut was guttered in the fire. Such being the seriousness of the burns, of which the deceased succumbed in less than 4 - 5 hours of the alleged incident, it is not possible for a person who was admitted with such serious burn injuries such as the deceased to give a detailed narration of the facts as recorded in the three documents referred to above. The suspicion about the genuineness of these documents is further compounded from the fact that P.W.15, who allegedly recorded Ex.P.16, has signed the declaration in green ink under the words 'Recorded by me', written in blue ink. This is suggestive of the fact that not only someone has prepared Ex.P.16, but also P.W.15, unmindful of the mistake he was committing, signed in green ink. That Ex.P.16 was fabricated is further evident from the fact that the Doctor, who was not even examined, has allegedly made a statement on the left side margin of the document in vertical position, which is also suggestive of the fact that he was asked to subscribe to the statement much after preparation of Ex.P.16. In this context, it

needs to be mentioned that P.W.15 has admitted in his evidence that the Doctor made an endorsement (Ex.P.17) on Ex.P.16 that the general condition of the patient is not satisfactory and that the percentage of burns is 90 – 95%, and that there is no endorsement of the Doctor on Ex.P.16 to the effect that the declarant was in a fit state of mind.

10. In *Mannulal Sahu and another v. State of Madhya Pradesh*^[3], three dying declarations were recorded. While in the first two dying declarations recorded by an Executive Magistrate and a Doctor respectively, the victim stated that she suffered injuries by accidental fire, in the third dying declaration recorded by a Tahsildar, the victim alleged that the accused poured kerosene and set her on fire. While dealing with the credibility of the third dying declaration, the Supreme Court held as under:

“This dying declaration (Ext.P-4) has been recorded by the Tahsildar which runs into more than two pages and wherein the entire history from the date of marriage till the date of occurrence has been given in great detail and it was stated that the accused persons poured kerosene oil on the victim and set her on fire. It is not possible to believe such a dying declaration where there is so much narration of facts with meticulous details of everything by a dying person. The said dying declaration said to have been recorded by the Tahsildar is highly doubtful and in our view is an afterthought especially in view of the fact that according to the earlier two dying declarations it was a case of accidental fire and no case for torture was at all made out.”

As noted hereinbefore, in the present case also the dying declarations were replete with minute details similar to the dying declarations discussed by the Supreme Court in *Mannulal Sahu* (supra).

11. Further, P.W.15 after recording the statement under Ex.P.16 obtained the signatures of the two witnesses thereon by names, Sher Ajath Babu and Sheik Yacoobsa. On dying declarations, the signatures of any attesting witnesses are not required and as a matter of fact none should be permitted to be present near the bed side of the victim when the statement is recorded.

Rule 33 of the Criminal Rules of Practice which deals with recording of dying declaration clearly envisages that while recording a dying declaration, the Magistrate shall keep in view the fact that the object of such declaration is to get from the declarant the cause of death or the circumstances of the transaction which resulted in death and 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, and that he should also put simple questions to elicit answers 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.

As noted above P.W.15 has not put any such questions to know the capability of the deceased to make the declaration, nor he has disclosed his identity to the deceased. He has in fact admitted in his evidence that he did not inform the declarant that he is the Mandal Revenue Officer, before recording Ex.P.16 and that somebody has informed the declarant about his status and he does not know the person who informed the declarant of the same. Ex.P.16 contains a recital to the effect that 'during my treatment, on the enquiry of the Mandal Revenue Officer, I revealed these facts.' Though the Doctor allegedly stated that the declarant was coherent, he did not certify that she was in a fit condition to give the statement.

Immediately after Ex.P.16 was recorded by P.W.15, the Investigating Officer, P.W.17, reached the hospital and recorded another statement from the deceased under Ex.P.20. On this statement also the very same persons, as in Ex.P.16, by name Sher Ajath Babu and Sheik Yacooba, have put their signatures as witnesses, and the Medical Officer made a similar endorsement that the general condition of the patient is not satisfactory. The Medical Officer, however, did not certify that the patient is in a fit condition to give the statement. P.W.17 also did not put any preliminary questions to the deceased before proceeding to record the statement for being satisfied about the mentally fit condition of the deponent to give a statement. The statement - Ex.P.16, recorded by the Deputy Mandal Revenue Officer and the statement - Ex.P.20 recorded by the Investigating Officer are identically worded with striking similarity in their pattern and contents.

12. No doubt, in *Vithal Tukaram More and others* (2 supra), the Supreme Court has referred to the earlier case law and has observed that the law does not provide that the dying declaration should be made in a prescribed manner or in the form of questions and answers, and that the certification of the Doctor is a rule of caution. In the face of a specific Rule by the Criminal Rules of Practice in the form of Rule 33, which applies to the States of Andhra Pradesh and Telangana, it is incumbent on the person who records the dying declaration to put preliminary questions in order to know the capability of the declarant to make a declaration. In the absence of such preliminary questions

having been put to the victim, though the declaration cannot *per se* be treated as invalid, it raises a serious suspicion on its genuineness. Having regard to the various suspicious features, as noted above, and in the light of the fact that all the material prosecution witnesses have turned hostile, the three declarations allegedly given by the deceased do not inspire confidence in the Court and it is wholly unsafe to convict the appellant based only on these declarations, when the nearest relations of the deceased, such as her father, brother, sister and her own husband, have themselves turned hostile, and none of them in any way implicated the appellant in the offence.

13. For the afore-mentioned reasons, we are of the opinion that the prosecution failed to prove the guilt of the appellant beyond all reasonable doubt and therefore the conviction and sentence of the appellant made by the lower Court cannot be sustained.

14. In the result, the Criminal Appeal is allowed. The conviction and sentence recorded against the appellant/accused are set aside. Consequently, the appellant shall be set at liberty forthwith, if he is not required in any other case or crime and the fine amount, if any, paid by him shall be refunded to him.

C.V. NAGARJUNA REDDY, J

11.04.2016

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Note: L.R. copies to be marked.
(B.O)
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M.S.K. JAISWAL, J

[\[1\]](#) (2006) 12 SCC 283

[\[2\]](#) (2006) 13 SCC 54

[\[3\]](#) (2005) 10 SCC 259