

IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH
TUESDAY, THE TWENTY NINTH DAY OF MARCH
TWO THOUSAND AND SIXTEEN
(29.03.2016)

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

CRIMINAL APPEAL No.942 of 2010

Between:

Konda Vishnu

..... APPELLANT/ACCUSED

AND

State of A.P., rep.by Public Prosecutor,
High Court, Hyderabad

.....RESPONDENT

Counsel for the Appellant : **Smt.A.GAYATRI REDDY**

Counsel for the Respondent : **PUBLIC PROSECUTOR (TS)**

The Court made the following:

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

CRIMINAL APPEAL No.942 of 2010

JUDGMENT: (per Hon'ble Sri Justice M.S.K.Jaiswal)

This criminal appeal is filed against the judgment dated 26.07.2010 in Sessions Case No.269 of 2009 on the file of the Principal Sessions Judge, Nalgonda, by and under which, the learned Sessions Judge has convicted the appellant/accused for the offence punishable under section 302 IPC and sentenced him to undergo life imprisonment and to pay a fine of Rs.500/- in default, to suffer simple imprisonment for 15 days.

2. The case of the prosecution in brief is that the deceased-Vani @ Manjula was the wife of the appellant/accused, and their marriage took place about 9 years prior to the incident. At the time of marriage, the parents of the deceased gave sufficient dowry, gold and silver ornaments to the satisfaction of the accused. The accused and the deceased lived happily for about 8 years and were blessed with two children. One year prior to the incident, the accused developed illicit intimacy with another woman and started subjecting the deceased to cruelty by harassing her both mentally and physically. Six months prior to the incident, the accused necked out his wife from the matrimonial home and when the matter was placed before the village elders, the accused promised before them to look after his wife properly and took his wife back to his house, but however, there was no change in the attitude of the accused. On the fateful day i.e., on 30.11.2008, both accused and his wife were returning after attending coolie works, and at about 4 p.m, at the outskirts of the village Saidapuram, the accused told his wife that he is going to marry another girl and when his wife raised protest, the accused pressed her neck, killed her and thrown her into a well and went away. The Village Sarpanch informed the incident to PW 1, the brother of the deceased. PW 1 came and found the dead body of his sister in the well and on 01.12.2008 at 10.30 p.m lodged Ex.P1 report before PW 14-S.I.of Police, Yadagirigutta P.S. and the same was registered as Cr.No.202/2008 under Section 302 IPC. On receiving the copy of F.I.R, PW 15-Inspector of Police, conducted investigation, proceeded to the scene of offence, examined the witnesses and on 02.12.2008 he got the dead body of the

deceased removed from the well, held inquest over it in the presence of inquestdars and sent the dead body for post mortem examination. PW 11 conducted autopsy over the dead body and opined that the cause of death is asphyxia due to drowning. On 20.12.2008 PW 15 arrested the accused and he confessed having committed the heinous crime. After completion of the investigation, PW15 filed the charge sheet.

3. The plea of the accused is one of denial.

4. In order to bring home the guilt of the accused, the prosecution examined PWs 1 to 15 and marked Exs.P1 to P14 and M.Os.1 and 2. On behalf of defence, no oral or documentary evidence was adduced. Based on the oral and documentary evidence, the learned Sessions Judge convicted the appellant and sentenced him for the offence under Section 302 IPC, as aforesaid.

5. Learned Counsel appearing for the appellant submits that the prosecution failed to produce any evidence to show that it is the appellant who has committed the murder of his wife as alleged. There is no evidence on record to show that the appellant was in the company of the deceased just before her death and the medical evidence on record rules out the possibility of it being a homicidal death. Learned Counsel submits that the Court below has erroneously convicted the appellant and hence the appeal.

6. Learned Public Prosecutor, on the other hand, submits that the evidence on record is consistent and cogent which is to the effect that the appellant was subjecting the deceased to harassment and cruel treatment and since the deceased was obstructing his intention of marrying another woman, he has killed the deceased and thrown the body in the well. The Court below has taken all the aspects into consideration and has rightly found him guilty of the charge.

7. The point for consideration is whether the prosecution proved its case beyond reasonable doubt so as to sustain the conviction and sentence recorded against the appellant/accused, or whether the same

needs to be set aside, modified or varied?

8. The specific allegation of the prosecution is that having married the deceased nearly ten years prior to November, 2008, and despite having been blessed with two children, the appellant developed illicit intimacy with another woman and was insisting the deceased to consent for his second marriage with that lady. Since the deceased was obstructing the appellant in his infatuation towards another woman, the appellant has eliminated the deceased by squeezing her neck and throwing her body in agricultural well in his village Saidapuram. This is said to have taken place at about 04.00 p.m., on 30.11.2008.

9. The appellant did not deny the fact that the deceased was found lying dead in the well. His case is that on the date of the incident viz., 30.11.2008 he went to Yadagirigutta to obtain electrical connection to his newly constructed house and in his absence, the deceased committed suicide. While this defence was taken by the appellant during the course of cross-examination of the material witnesses, when it came to his examination under Section 313 Cr.P.C., the appellant did not put forward any specific defence except for denying the entire evidence on record.

10. Before proceeding to discuss further, it may be stated that the appellant has taken the plea of *alibi* which is a dangerous plea. Once the appellant is able to prove his plea of *alibi*, and conclusively established that he was not present at the place where the incident took place on the date and time alleged, he will be out of Court. On the other hand, having raised the plea of *alibi*, if the appellant does not establish the said fact, the irresistible inference that can be drawn is that it is he who has committed the crime he having failed to discharge the burden cast upon him that he was not present at the place where the incident is said to have taken place. In the instant case, except for suggesting to the prosecution witnesses that on 30.11.2008 when the deceased committed suicide, he was not in the village but was away at Yadagirigutta to obtain the electricity connection, neither oral nor documentary evidence is produced by him to substantiate his plea.

11. Adverting to the evidence on record, the prosecution relies upon the evidence of PWs.1 to 4 who are the kith and kin of the deceased. No doubt, PWs.1 to 4 are the interested witnesses but the evidence of all the four witnesses is consistent and categoric which is to the effect that having married the deceased about ten years back, the appellant used to harass the deceased and about six months prior to the incident, unable to withstand the torture at the hands of the appellant, the deceased went to her parental home and stayed there for six months. It is also in their evidence that a panchayat was convened and before the elders, two of whom are examined as PWs.5 and 6, the appellant undertook that he will not subject the deceased to any harassment and he also assured the elders that if at all he ventures to marry another woman, he will do so only after transferring all his properties in the name of two children that are born to him and the deceased. It is also in their evidence that after such an assurance only, on 23.11.2008 the deceased joined the consortium of the appellant and on 30.11.2008 the news of the deceased lying dead in the well was received by them. The evidence of PWs.1 to 6 is consistent and convincing on the above aspects. Even though they are elaborately cross-examined, nothing concrete is elicited from them for disbelieving their evidence.

12. As already stated, the contention of the appellant is that the deceased committed suicide. Except for suggesting so, nothing further is brought out on record as to why, for what reasons and under what circumstances, the deceased having joined the appellant just a week prior thereto has resorted to the extreme step of ending her life leaving behind two tender aged children.

13. The allegation of the prosecution is that the appellant firstly squeezed the neck of the deceased and thereafter thrown the body in the well. The post-mortem report Ex.P.2, Ex.P.3 the final opinion and Ex.P.4 the FSL report show that there were no external injuries on any part of the body of the deceased. The body was swollen and there was mud enlargement in liver and gall bladder, spleen and kidney. The Medical

Officer Ex.P.11 opined that the cause of death was asphyxia due to drowning. Therefore the medical evidence on record does not establish that the deceased was done to death before she was thrown in the well.

14. As noticed from the above evidence, the prosecution could not establish that the appellant was seen in the company of the deceased just before her death or that the death of the deceased was due to strangulation.

15. That apart, a perusal of the scene of offence panchanama-Ex.P.6 shows the fact that the chappals of the deceased were found near the well and it indicates that it is a case of suicide but not homicide. If it was a case of a homicidal death, the chappals of the deceased would not have been found at one place just one foot away from the well in which her body was found. The scene of offence panchanama – Ex.P.6 also shows that there was a sickle lying around and ostensibly the deceased might have carried the same for agricultural purposes since it is nobody's case that the said sickle was used in the commission of the crime.

16. After carefully analyzing the oral and documentary evidence we are of the opinion that the prosecution failed to prove beyond reasonable doubt that the deceased met homicidal death at the hands of the appellant. However, the evidence on record clearly shows that the deceased was being subjected to harassment by the appellant, since she was obstructing him in his nefarious design of marrying another woman. The evidence also shows that the harassment of the deceased at the hands of the appellant was of such a magnitude that she was constrained to leave the matrimonial home and stay with her parents for six months just prior to her death. The evidence also shows that the deceased joined the appellant only after a categorical assurance from the appellant which was made in the presence of PWs.5 and 6 and within a week after joining the appellant, the deceased, for the reasons best known to her and also the appellant who is conspicuously silent about it, committed suicide. In that view of the matter, we are of the opinion that even though the appellant cannot be said to have committed an offence punishable under

Section 302 IPC., his acts certainly attract the ingredients of Section 306 IPC.

17. The question that needs to be considered now is whether the appellant while holding him not guilty of the offence under Section 302 IPC., can be said to have committed an offence punishable under Section 306 IPC., for which he is not specifically charged. In this connection, a reference can be made to a Judgment delivered by three Judge Bench of the Supreme Court reported in *Dabir Singh v. State of U.P.*^[1] wherein it is specifically held as under:-

“Here the Court proceeded to examine the question that if the accused has been charged under Section 302 IPC and the said charge is not established by evidence, would it be possible to convict him under Section 306 IPC having regard to Section 222 Cr.P.C. Sub-section (1) of Section 222 lays down that when a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence, though he was not charged with it. Sub-section (2) of the same Section lays down that when a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it. Section 222 Cr.P.C. is in the nature of a general provision which empowers the Court to convict for a minor offence even though charge has been framed for a major offence. Illustrations (a) and (b) to the said Section also make the position clear. However, there is a separate chapter in the Code of Criminal Procedure, namely Chapter XXXV which deals with **Irregular Proceedings** and their effect. This chapter enumerates various kinds of irregularities which have the effect of either vitiating or not vitiating the proceedings. Section 464 of the Code deals with the effect of omission to frame, or absence of, or error in, charge. Sub-section (1) of this Section provides that no finding, sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was

framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby. This clearly shows that any error, omission or irregularity in the charge including any misjoinder of charges shall not result in invalidating the conviction or order of a competent Court unless the appellate or revisional Court comes to the conclusion that a failure of justice has in fact been occasioned thereby. In *Lakhjit Singh* (1994 SCC (Cri) 235) though Section 464 Cr.P.C. has not been specifically referred to but the Court altered the conviction from 302 to 306 IPC having regard to the principles underlying in the said Section. In *Sangaraboina Sreenu* (1997 SCC (Cri) 690) the Court completely ignored to consider the provisions of Section 464 Cr.P.C. and keeping in view Section 222 Cr.P.C. alone, the conviction of the appellant therein under Section 306 IPC was set aside.

This question was again examined by a three Judge Bench in *Gurbachan Singh v. State of Punjab* (1957 CriLJ 1009) in which it was held as under:

"In judging a question of prejudice, as of guilt, Courts must act with a broad vision and look to the substance and not to technicalities, and their main concern should be to see whether the accused had a fair trial, whether he knew what he was being tried for, whether the main facts sought to be established against him were explained to him fairly and clearly and whether he was given a full and fair chance to defend himself."

There are a catena of decisions of this Court on the same lines and it is not necessary to burden this judgment by making reference to each one of them. Therefore, in view of Section 464 Cr.P.C., it is possible for the appellate or revisional Court to convict an accused for an offence for which no charge was framed unless the Court is of the opinion that a failure of justice would in fact occasion. In order to judge whether a failure of justice has been occasioned, it will be relevant to examine whether the accused was aware of the basic ingredients of the offence for which he is being convicted and whether the main facts sought to be established against him were explained to him clearly and whether he got a fair chance to defend himself.

We are, therefore, of the opinion that Sangarabonia Sreenu (supra) was not correctly decided as it purports to lay down as a principle of law that where the accused is charged under Section 302 IPC, he cannot be convicted for the offence under Section 306 IPC.”

18. The above decision was followed subsequently by the Supreme Court in a decision reported in ***Virendra Kumar v. State of U.P.***^[2] holding that when the appellant is charged with an offence under Section 302 IPC., and even in the absence of there being a charge under Section 306 IPC., the appellant can be convicted under Section 306 IPC.

19. Before convicting an accused for the offence for which he is not charged, what is required to be ensured by the Court is that there will be no failure of justice, and that the accused was aware of the basic ingredients of the offence for which he is proposed to be convicted, and that the main facts sought to be established against him were explained to him clearly and that he got a fair chance to defend himself.

20. In the facts and circumstances of the case, it cannot be said that there will be any failure or miscarriage of justice if the appellant is found guilty of having abetted the suicide of his wife even though the prosecution failed to prove beyond reasonable doubt that he has firstly killed the deceased/wife and thereafter threw the dead body into the well to make it appear as a suicide.

21. In view of the above, we have no hesitation in holding that in the peculiar facts and circumstances of the case in hand and the evidence that is produced by the prosecution, the appellant though cannot be held guilty of the offence punishable under Section 302 IPC., he can certainly be said to have committed the offence punishable under Section 306 IPC. He is therefore liable to be convicted therefor even in the absence of there being any specific charge. Accordingly, the conviction of the appellant for the offence under Section 302 IPC is converted to the one under Section 306 IPC.

22. In the result, the Criminal Appeal is partly allowed. The conviction

and sentence recorded against the appellant for the offence punishable under Section 302 IPC., are modified to that under Section 306 IPC., and he is sentenced to undergo rigorous imprisonment for 7 (seven) years. The fine imposed by the trial Court is sustained.

C.V.NAGARJUNA REDDY,J

M.S.K.JAISWAL,J

Date: 29.03.2016

Dsr/Smr

[\[1\]](#) (2004) 5 SCC 334

[\[2\]](#) 2007 AIR SCW 854