

CRIMINAL APPEAL No.1338 OF 2010

Gundigari Krishna. ... Appellant(A-1).

AND

The State of Telangana,
Rep. by Public Prosecutor,
High Court, Hyderabad. ...
Respondent.

Counsel for the appellant : Mrs. A. Gayatri Reddy

Counsel for the respondent : Public Prosecutor (TS).

THE COURT MADE THE FOLLOWING:

JUDGMENT: (*per* Hon'ble Sri Justice G. Shyam Prasad)

1. This Criminal Appeal arises out of the judgment dated 03-10-2010 in Sessions Case No.361 of 2009 on the file of the Court of II Additional District and Sessions Judge (FTC) at Sangareddy (for short, 'the trial Court'). The appellant/Accused No.1 was convicted for the offence under Section 302 of the Indian Penal Code (for short, 'I.P.C.') and sentenced to undergo life imprisonment and also to pay a fine of Rs.2,000/- and in default to undergo simple imprisonment for six months.

2. The brief facts of the case of prosecution are that on 02.07.2009 at 05:00 p.m. the Sub-Inspector of Police, Sangareddy Rural – PW.14 received a telephonic message regarding admission of Smt. Gundigari Vimalatha (Hereinafter referred to as 'the deceased') in the Government Hospital, Sangareddy with burn injuries. He made a general diary entry, visited Ward No.105 of the hospital at 06:00 p.m. and recorded the statement of the deceased, wherein she stated that her marriage was performed with Gundigari Krishna (accused No.1) of Fasalwadi village, three and half years back; that at the time of marriage, an amount of Rs.2,00,000/- was given as dowry, that since the date of marriage, her husband had been harassing her for additional

dowry of Rs.1,00,000/-; that her mother-in-law and father-in-law have also demanded additional dowry; that her husband had altercated with her for additional dowry and sent her to her parents' house at Kandi; that she stayed at her parents house for a week; and that afterwards, her husband and father-in-law came and assured her father that they will not harass her and took her to Fasalwadi village. That even after that, her husband did not stop harassment and that despite several panchayats held before the village elders, there was no change in his attitude. She further stated that on 02.07.2009 at 02:00 p.m. her husband came and asked her to cook food and when she was ready to prepare the food, after cleaning the rice, her husband came from behind and poured kerosene on her and set fire to her, that when she made hue and cry and tried to put off the flames, the neighbours came and put off the flames; and that afterwards, her husband shifted her to the hospital pretending as an innocent. She further stated that at the time of the incident, none of the family members were present except her husband and that her father-in-law came after her husband attempted to kill her. PW.14 returned to the Police station, after recording the statement, and registered a case in Crime No.229 of 2009 under Sections 498-A and 307 I.P.C and issued F.I.R. – Ex.P.9. He had also

recorded the statement of the witnesses and sent a requisition to the concerned Magistrate for recording the dying declaration of the deceased. Smt. P. Mukthida, learned Magistrate - PW.10 visited the hospital on 02.07.2009 and recorded the dying declaration – Ex.P.5 at 06:40 p.m. On 03.07.2009 at 07:30 a.m. PW.14 visited the scene of offence at the house of accused at Fasalwadi, got photographed the scene of offence, conducted scene of offence panchanama - Ex. P.2, seized (1) two burnt match sticks (2) burnt pieces of saree (3) petticoat and (4) blouse, examined the neighbours and recorded their statements. On 11.07.2009, PW-14 received the death intimation of the deceased from PW.13, duty medical officer, Government Hospital, Sangareddy and altered the provision of law from Sections 498-A and 307 I.P.C. to Sections 498-A and 302 I.P.C., which is marked as Ex.P-11 He sent a requisition to the Tahsildar - PW.11 to conduct inquest panchanama and, accordingly, he held inquest over the dead body of deceased in the presence of panch witnesses. After inquest, PW.12 and LW.23 – Dr. A Praveen Kumar, conducted post-mortem examination and opined that the cause of death was due to septicaemic shock due to burn injury. Later, PW.13 took up investigation and arrested the accused Nos.1 to 3. On accused Nos.4 and 5 surrendering before the concerned

Court on 31.07.2009, they were remanded to judicial custody on 01.08.2009. PW.15 has filed charge sheet against the accused Nos.1 to 5 for the offences under Sections 498-A and 302 IPC r/w. Section 34 IPC. against the accused.

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

4. The prosecution had examined PWs.1 to 15 and got marked Exs.P-1 to P-11 and Material Objects 1 to 6. The trial Court relying on the testimony of PWs.1 to 6 and 9 to 14 arrived at the conclusion that the harassment for dowry under Section 498-A IPC is not proved against Accused Nos.1 to 5 and accordingly acquitted them of the said offence. However, after considering the dying declaration, the statement of the deceased recorded by PW.14 and the corroborative testimony of the witnesses PWs.1 to 6 and 9 to 14, the trial Court found the appellant/accused No.1 guilty of the offence under Section 302 I.P.C.

5. Being aggrieved by the conviction and sentence recorded by the trial Court against him, the appellant-accused No.1, preferred this Appeal.

6. The learned counsel for the appellant has submitted that there is no acceptable evidence on record to connect the appellant with the crime, that the dying declaration had not

been proved, as it does not contain the signature of the Magistrate, who had recorded it; that the statement recorded by PW.14, had not been forwarded to the Magistrate immediately and that the delay of one day had not been explained by prosecution which caused prejudice to the rights of accused and that the statement was recorded on 02.07.2009 at 06:00 p.m. and it was forwarded to the learned Magistrate on 03.07.2009 at 10:30 a.m., though the Court of Magistrate is situated at a very near place. He has further submitted that the delay creates a reasonable doubt that the dying declaration is fabricated for the purpose of this case. The learned counsel further submitted that there is no evidence to show that the appellant/accused No.1 poured kerosene on his wife and killed her, except the dying declaration of the deceased, which cannot be relied upon, as PW.4 did not state about the presence of the appellant at the scene of offence i.e., in his house, at the time of the incident, which makes the version of the prosecution untrustworthy. He has further submitted that the deceased suffered burn injuries on her front portion of the body when the accused is alleged to have poured kerosene from her backside, which would go to show that the deceased had not poured kerosene on the deceased and it creates a doubt about the actual manner in which the deceased received the burn injuries.

7. The learned Public Prosecutor has contended that the appellant/accused No.1 had harassed the deceased for additional dowry and killed her. The prosecution had placed reliance on the testimony of the witnesses PW.1 - father, PWs.2 and 3 - brothers and PWs.4 and 5 - residents of the village of deceased, to prove the demand and harassment for additional dowry by the appellant. He has further submitted that the deceased had statement in her statement recorded by PW-14-S.I. of Police as well as in her dying declaration recorded by PW-10 – Magistrate, that the appellant poured kerosene and lit fire to her and hence the trial Court rightly convicted the appellant of the offence under Section 302 IPC.

8. Basing on the material available on record and upon hearing the arguments of learned counsel on either side, the points arise for consideration in this Appeal are:

- 1) Whether the prosecution proved the guilt of the accused No.1 beyond reasonable doubt?
- 2) Whether the judgment of the trial Court is illegal or perverse?
- 3) Whether there are mitigating circumstances for consideration of reduction of sentence?

9. **POINT Nos.1 and 2:** Both these points go together. On appreciation of the evidence on record, the trial Court had totally disbelieved the case of the prosecution relating to the demand of additional dowry by accused Nos.1 to 5 and acquitted them of the charge under Section 498-A I.P.C. The trial Court had also acquitted accused Nos.2 to 5 of the charge under Section 302 IPC. Since all the accused had already been acquitted of the charge under Section 498-A IPC and accused Nos.2 to 5 of the charge under Section 302 IPC, and the State having not preferred any Appeal against the said acquittal, we do not see any reason to upset those findings of the trial Court relating to the said charges, which have become final. However, the acquittal of the appellant/accused No.1 of the charge under Section 498-A IPC is not going to affect the case of prosecution against him for the charge under Section 302 IPC.

10. With regard to the charge under Section 302 IPC, PW-1, the father of the deceased, deposed that when he was in his office, he received a message that the deceased was admitted in the Government Hospital, Sangareddy with burn injuries; that he immediately proceeded to the hospital and found his daughter with burn injuries; that when he questioned her, the deceased stated that on the date of the

incident at about 2.00 p.m, her husband asked her to cook rice for him; that when she was cooking rice on the firewood stove, the appellant picked up the kerosene tin kept aside by her and sprinkled kerosene and lit fire to her with a match stick; that as a result, she suffered burn injuries all over her body; that on hearing her cries, the neighbours and the appellant stopped the fire by pouring water on her and that the appellant shifted her to the Government Hospital. PW-2, the brother of the deceased, deposed that on receiving phone calls from PW-1 that the deceased sustained burn injuries and was admitted in the Government Hospital, Sangareddy, they rushed to the hospital and found the deceased with burn injuries all over her body; that when he questioned the deceased, she stated that the appellant came to the house at 2.00 p.m. and requested her to prepare rice for him; that when the deceased lit the firewood stove, the deceased sprinkled kerosene on her and lit fire to her with a match stick; that when she raised alarm and tried to stop the fire, the neighbours PW-4 (Kavitha) and Sujatha came to the spot and poured water on her and stopped the fire. PW-3, another brother of the deceased also deposed that on his enquiring the deceased at the hospital, she stated that when she was about to cook rice for the appellant, the appellant

sprinkled kerosene on her and lit fire to her and as a result she had sustained burn injuries all over her body.

11. PW-4, is another material witness. She was a neighbour of the deceased. She deposed that she knows the deceased as the wife of the appellant; that on hearing the cries of the deceased, she came out of her house; and that she put off the flames along with others by pouring water on the deceased.

12. The evidence of PW-5 and 6 is not relevant for disposal of this appeal as their evidence relates to the charge under Section 498-A IPC.

13. The panch witnesses PWs.7 and 8 examined for seizure of property from the scene of offence though did not support the case of the prosecution with regard to the seizure of material objects from the scene of offence, they have admitted their signatures on the panchanama - Ex.P-2. The Investigation Officer had clearly testified about conducting of scene of offence panchanama and seizure of material objects from the scene of offence, and we find no reason to disbelieve the testimony of the Investigation Officer in this regard. The testimony of Investigation Officer need not be discarded in every case merely because the

panch witnesses did not support the case of prosecution. The panchas, having admitted the signatures on panchanamas, have turned hostile to prosecution for the reasons best known to them. In the light of the evidence of the Investigation Officer, the admission of their signatures by the panch witnesses on the panchnamas and in the light of other evidence, the recoveries of MOs.1 to 6 are proved. As a matter of fact, there is no dispute with regard to the place of scene of offence and about the deceased receiving burn injuries at that place.

14. The Police conducted the inquest panchanama which had been proved by the testimony the panch witness - PW.9. It is the testimony of PW.9 that the deceased died due to receiving burn injuries, and the same is corroborated by the testimony of PW.10 - the Magistrate, who had recorded the dying declaration of the deceased and PW.14 - Sub-Inspector of Police, who had recorded the statement of the deceased in the Hospital. His testimony is cogent and convincing. The trial Court had also placed reliance on the dying declaration recorded by the Magistrate in the Hospital and arrived at the conclusion that the appellant poured kerosene on the deceased and set fire to her.

15. In this case, while the deceased and the appellant were last seen together in the house, it is the appellant who has to explain the circumstances under which the deceased caught fire. Under Section 106 of Indian Evidence Act, 1872, being the husband of the deceased, the burden is on the appellant to explain the circumstances under which the deceased caught fire in his house. During his examination under Section 313 Cr.P.C. also the appellant did not explain as to how the deceased caught fire. Therefore, it is a strong incriminating circumstance against the appellant. The presence of the appellant at the scene of offence, his extinguishing the flames along with others and taking the deceased to the hospital would definitely make him accountable for the incident. It is not the case of the appellant that the deceased attempted suicide. The irresistible conclusion that can be drawn from these circumstance is that the appellant and the deceased were together at the time of the incident, and, as there is no other explanation coming forth for the occurrence the incident, the circumstance of last seen together theory becomes relevant when the deceased catching fire is proved to have taken place within a short time after the appellant and the deceased were in company together. In ***State of Goa Vs.***

*Sanjay Thakran*¹, the Hon'ble Supreme Court discussed about the last seen theory which is applicable to the facts of this case.

16. Before embarking on the contention of the learned counsel for the appellant that the dying declaration does not contain the signature of the Magistrate and hence the same is not valid, it would be relevant to refer to Rule 33 of the Criminal Rules of Practice, which reads as under:

“33. **Dying declaration:**(1) While recording a dying declaration, the Magistrate shall keep in view of 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.

(2) 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.

¹ 2007 (3) SCC 755

(3) The declaration should be taken down in the words of the declarant as far as possible. The Magistrate should try to obtain from the declarant particulars necessary for identification of the accused. Every question put to the declarant and every answer or sign or gesture made by him in reply shall be recorded.

(4) After the statement is recorded, it shall be read over to the declarant and his signature obtained thereon, if possible, and then the Magistrate shall sign the statement.”

17. Procedure is the handmaid of justice. In the peculiar facts and circumstances of this case, there are good reasons to believe the genuineness of the dying declaration, recorded by the learned Magistrate, as she had taken all the precautions and recorded the same in the presence of the Duty Medical Officer, who had testified to the state of mind and condition of the deceased as coherent and conscious, while recording her statement. PW.10 in fact stated in her cross-examination that she had scribed Ex.P-5 - dying declaration, but she did not put her signature on it. This fact clearly shows that due to inadvertence the learned Magistrate had not put her signature, though the entire statement had been written by her in her own hand writing. Therefore, there is no reason to disbelieve the version of

PW-10, the Magistrate, who had clearly stated about her recording of the dying declaration, and about the endorsement made by the Medical Officer Dr. Y. Viraja about the condition of the patient.

18. At this juncture, when we look into the testimony of PWs.10 and 14, who recorded the statement of the deceased in the Hospital, it is revealed that the deceased stated that the appellant asked her to cook rice and that later, he came from behind and poured kerosene on her and set fire to her. There is no reason for the deceased, being on deathbed, to give false statement against her husband, in that precarious condition. The statement of the deceased is consistent. There is no reason forthcoming to disbelieve the dying declaration of the deceased and the same is trustworthy.

19. On consideration of the entire evidence on record, it is obvious that the appellant poured kerosene and set the deceased on fire on the fateful day. In the light of the testimonies of PW-1, PW-2, PW-3, PW-4, PW-7 PW-8, PW-9, PW-10 and PW-14 and in the light of the consistent statements of the deceased, there is no doubt that the appellant was responsible for the burn injuries suffered by the deceased. There is no other possibility of the deceased

receiving burn injuries other than the manner in which the incident had occurred. Therefore, there are no valid grounds to interfere with the finding of the trial Court that the appellant is responsible for the death of the deceased.

20. **POINT No.3:** The learned counsel for the appellant has taken alternative plea that in view of the mitigating circumstances appearing in the case, the case may fall under Section 304 Part-II IPC. He has further submitted that there is evidence to the effect that the appellant after pouring kerosene and setting fire to the deceased, subsequently he had also taken part in putting off the flames along with the neighbours and had taken her to the hospital.

21. To appreciate the mitigating circumstances appearing in this case, it is appropriate to consider the testimony of PW.1, at this juncture. PW.1 - father of the deceased, stated in his evidence that he received a message that his daughter was admitted in Government Hospital, Sangareddy with burn injuries; that he immediately proceeded to the Hospital and found his daughter with burn injuries and when he questioned her, she told him that on the date of incident at 02:00 p.m., her husband asked her to cook rice for him and when she was cooking rice on the firewood stove, the appellant picked up the kerosene tin kept

aside and sprinkled kerosene on her and lit fire with the match stick, as a result of which, she got burn injuries all over her body and that on hearing her cries, the neighbours and the appellant stopped the fire by pouring water on her and shifted her to Government Hospital.

22. The learned counsel for the appellant placing reliance on the testimony of this witness (PW-1) submitted that the appellant had no intention to kill the deceased; that by the time the appellant went home he might have been hungry, and as the deceased did not cook the rice, he might have become impatient and poured kerosene on her and set fire to her, but, from his subsequent conduct, it is revealed that, immediately, he had realized his mistake and stopped the fire along with the neighbours by pouring water on her and had also shifted her to Government Hospital.

23. In the circumstances of the case, we are inclined to accept the submission of the learned counsel for the appellant on this aspect. If the appellant had the intention to kill the deceased, he would not have poured water on her to stop the fire and would not have taken her to the hospital for treatment. These acts of the appellant would show that he had no intention to kill the deceased, but he had only knowledge that the deceased would die when poured

kerosene and set her on fire. The incident occurred on the spur of the moment and there was no premeditation to commit the offence. More over, the incident happened during the afternoon in the particular situation when the appellant asked the deceased to cook food and as he could not wait, poured kerosene on her and set fire to her and when she was raising cries, the neighbours came and the appellant poured water along with the neighbours and stopped the fire, which could not have been noticed by the deceased. As a matter fact, the deceased herself stated in her statement recorded by PW-14 that the appellant shifted her to the hospital.

24. In *Kalu Ram Vs. State of Rajasthan*², the Supreme Court, in Paragraphs 7 and 8, held as under:

“7. But then, what is the nature of the offence proved against him? It is an admitted case that the appellant was in a highly inebriated stage when he approached the deceased when the demand for sparing her ornaments was made by him. When she refused to oblige he poured kerosene on her and wanted her to light the matchstick. When she failed to do so he collected the matchbox and ignited one matchstick but when the flames were up he suddenly and frantically poured water to save her from the

² (2000) SCC (Criminal) 86

tongues of flames. This conduct cannot be seen divorced from the totality of the circumstances. Very probably he would not have anticipated that the act done by him would have escalated to such a proportion that she might die. If he had ever intended her to die he would not have alerted his senses to bring water in an effort to rescue her. We are inclined to think that all that the accused thought of was to inflict burns to her and to frighten her but unfortunately the situation slipped out of his control and it went to the fatal extent. He would not have intended to inflict the injuries which she sustained on account of his act. Therefore, we are persuaded to bring down the offence from first degree murder to culpable homicide not amounting to murder.

8. We therefore alter the conviction from Section 302 IPC to Section 304 Part II IPC. Both sides conceded that the appellant is continuing in jail. We impose a sentence of rigorous imprisonment for seven years on him....”

25. In similar circumstances, this Court in ***Mohammed Jahangeer Vs. State of A.P.***³, relying on the earlier judgments of the Supreme Court, converted the offence punishable under Section 302 I.P.C. to that of Section 304 Part-II of I.P.C. and reduced the sentence of imprisonment from ten years to that of seven years. In the

³ Criminal Appeal No.932/2010, dated 29.03.2016

said case, the mitigating circumstances were that the accused had tried to rescue the deceased after he poured kerosene and set fire to her and as he was in inebriated stage, the Court felt that he had no intention to kill the deceased.

26. Section 8 of the Act of 1872 is relevant at this stage to consider the conduct of the appellant, which is extracted hereunder for better appreciation:

“8. Motive, preparation and previous or subsequent conduct: Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.

The conduct of any party, or of any agent to any party, to any suit or proceeding, in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.”

27. In the instant case, the appellant did not run away from the scene of offence after setting the deceased on fire. If he was guilty, having *mens-rea*, to kill, he would have escaped from the scene of offence after setting fire to

the deceased. These facts would clearly show that the appellant had no intention to kill the deceased as the incident occurred in a spur of moment in the broad day light of afternoon. If the appellant had any intention to pour kerosene and kill the deceased, there was no need for him to ask her to cook food for him as he could have straight away poured kerosene and set her on fire while she was sleeping during night time so that nobody would suspect him. As observed supra, it is not even the case of the defence that the deceased tried to commit suicide and that the appellant had been falsely implicated in the case.

28. The medical evidence shows that the injuries received by the deceased were 50 to 60%. Obviously, because of extinguishing of the flames by the neighbours and the appellant by pouring water, the magnitude of the injuries was reduced. It is obvious that the deceased had died of *septicaemia* ten days after the incident. In view of the evidence available on record and the mitigating circumstances discussed above, we are of the opinion that the case squarely falls under Section 304 Part-II IPC. Therefore, this is a fit case where the ends of justice would meet if the appellant is sentenced to undergo the

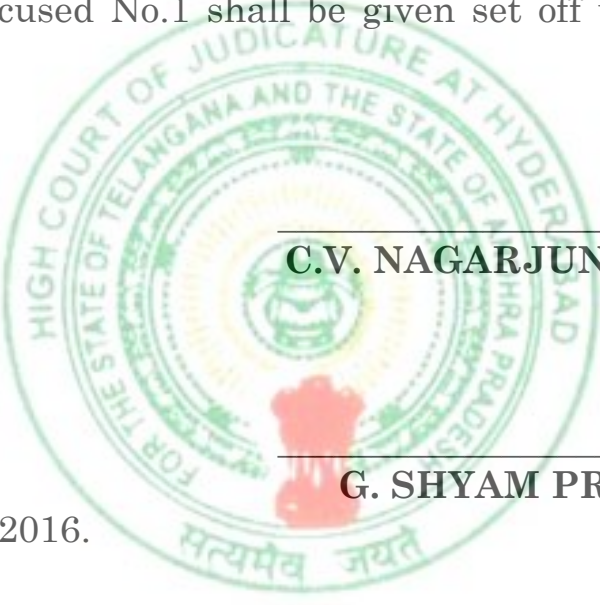
imprisonment for the offence punishable under Section 304 Part-II of I.P.C.

29. Punishment is the consequence of committing an offence. Punishments are imposed on the wrong doers with the object of deterring them from committing offences and to reform them into law abiding citizens. The quantum of sentence has to be decided depending on the facts and circumstances of each case.

30. The appellant is tender aged and there is no material available on record to show that he had any criminal background. In our opinion, if the appellant is confined in prison for a longer period, there is every possibility of his becoming hardened criminal due to mingling with several other hardcore criminals with various backgrounds. Since the appellant had already undergone incarceration for a considerable period and keeping in view the fact that the trial Court had acquitted him of the offence under Section 498-A of I.P.C. and completely acquitted accused Nos.2 to 5 for the offences under Sections 302 and 498-A of I.P.C., we are inclined to modify the sentence.

31. In the result, the Criminal Appeal is partly allowed. The conviction recorded against the appellant/accused No.1 in judgment, dated 03-10-2010, in

Sessions Case No.361 of 2009, on the file of learned II Additional District and Sessions Judge (Fast Tract Court), Sangareddy, for the offence punishable under Section 302 I.P.C. is modified to that under Section 304 Part II I.P.C. Accordingly, the sentence of life imprisonment imposed on him is modified to that of rigorous imprisonment for seven years, while confirming the sentence of fine. It is needless to observe that the period of sentence already undergone by the appellant/accused No.1 shall be given set off under Section 428 Cr.P.C.



C.V. NAGARJUNA REDDY, J

G. SHYAM PRASAD, J

Date: 18-07-2016.

Dsh/Jsk

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

AND

THE HON'BLE SRI JUSTICE G.SHYAM PRASAD

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CRIMINAL APPEAL No.1338 OF 2010
(Judgment of the Division Bench delivered by
Hon'ble Sri Justice G. Shyam Prasad)

DATE: 18-07-2016

DSH

