

HON' BLE SRI JUSTICE P. NAVEEN RAO

AND

HON' BLE SRI JUSTICE M. SATYANARAYANA MURTHY

CRIMINAL APPEAL No.744 OF 2012

JUDGMENT: (per M. Satyanarayana Murthy, J)

The accused in Sessions Case No.251 of 2010 on the file of the III Additional Sessions Judge, Tirupathi, preferred this appeal under Section 374 (2) Cr.P.C., challenging the conviction and sentence recorded by the Court below under the impugned calendar judgment dated 14.02.2012 finding them guilty for the offence punishable under Section 302 IPC, sentencing each of them to undergo life imprisonment and to pay a fine of Rs.1,000/- (Rupees one thousand only), in default to undergo simple imprisonment for a period six months.

2. The case of the prosecution in nutshell, is that A2 borrowed an amount of Rs.1,80,000/- from one Smt. L. Padma (hereinafter referred to as "Padma") and executed a bond Ex.P-1 on Rs.2/- non-judicial stamp paper. A3 and A5 attested the bond. A1 spent away the said amount for his vices. A1 failed to repay the loan amount with interest. When Padma insisted for discharge of the amount due to her under Ex.P.1, the accused threatened to do away her and foist a case under Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, against her. While so, on 14.01.2010 about 4.30 p.m., Padma went to the house of A2 bearing D.No.11-484, Parvathi Nagar, Jeevakonda, Tirupati. At that time, A1 and A5 were also found in the house of A2 and when Padma demanded for repayment of the amount covered by Ex.P.1, all the accused threatened to kill Padma, if she did not leave the house of A2. But, Padma remained at the house of A2, while saying that "she will not

leave the house until the amount is paid.” Then, all the accused decided to kill Padma. Thereupon, A3 and A5 caught hold of the Padma and A2 poured kerosene on her, which was supplied by A4. A1 lit the match stick and set fire to her body in the public street. Due to the flames, Padma sustained burn injuries. On hearing the cries of injured Padma, PWs.3, 4, 5 and 6 and LW.9 rushed to the scene of offence and extinguished the flames. Immediately, injured Padma was shifted to SVRRGG Hospital in 108 Ambulance and admitted for treatment. On receipt of information, police registered crime against the accused and issued IFR for the offence punishable under Section 307 IPC. But, she succumbed to the injuries on 20.01.2010 at 12-25 AM, while undergoing treatment.

3. Initially, the Sub-Inspector registered the case on the strength of the statement of injured Padma for the offence punishable under Section 307 IPC and on receipt of requisition from the Hospital, the Magistrate recorded the statement of Padma. On the basis of death intimation Ex.P-19 from the hospital, the Section of law was altered from 307 read with 34 IPC to 302 read with 34 IPC. After alteration of Section of law, the investigation was taken up by PW.12. PW.12 visited the scene of offence and got prepared rough sketch of the scene of offence. PW.12 seized partially burnt saree piece of the deceased under the cover of Mahazar and recorded the statements of PW.2 to PW.5. Inquest was held on the dead body of the deceased in the presence of the mediators and her blood relatives and thereafter, the dead body was forwarded to the Hospital for Post Mortem examination and on receipt of Post Mortem report from the hospital and after completion of investigation, filed the charge sheet before the III Additional Judicial

Magistrate of First Class, Tirupathi, who inturn took the case on file and committed the case to the Sessions Division, as the case is exclusively triable by the Court of Sessions. The Sessions Judge inturn registered the Sessions Case for the offence under Section 302 IPC read with 34 IPC and made over the same to the III Additional District Judge.

4. After securing the presence of the accused and upon hearing the Public Prosecutor and defence counsel, the III Additional District Judge framed the charge for the offence under Section 302 IPC against A1, and for the offence under Section 302 read with 34 IPC against A2 to A5 and the said charges were read over and explained to the accused, they pleaded not guilty and claimed to be tried.

5. During trial, the prosecution examined PWs.1 to 14 and got marked Exs.P-1 to P-27 and MOs.1 and 2. After closure of prosecution evidence, the accused were examined under Section 313 Cr.P.C., explaining the incriminating circumstances that appeared against them in the evidence of PWs.1 to 14. They denied and reported no defence.

6. Upon hearing the argument of the Public Prosecutor and the counsel for the defence, the Court below found A-1 guilty of the offence punishable under Section 302 IPC and A2 to A5 guilty of the offence punishable under Section 302 read with 34 IPC and convicted and sentenced them as stated supra.

7. Aggrieved by the conviction and sentence under the impugned calendar judgment, the present appeal is filed raising general grounds mostly pointing out the evidentiary value of the evidence of PW.1. It is also contended that the reasons recorded by the trial Court are not in consistent with the law and therefore, in the absence of clinching

evidence to prove the guilt of the appellants-accused for the offence under Section 302 read with 34 IPC, the judgment and the calendar are unsustainable and prayed to set aside the conviction and sentence passed against the appellant-accused for the offence punishable under Section 302 IPC and 302 read with 34 IPC.

8. During hearing, learned counsel for the appellants-accused mainly contended that the deceased herself poured kerosene on her body, set fire herself in her house and came out from her house and died near her house, but the police changed the scene of occurrence from road side to the house of accused No.2 to connect the appellants-accused with the grave offence punishable under Section 302 IPC read with 34 IPC and apart from that for repayment of the due amount under Ex.P.1, one year time was available by the date of incident and in such a case, the question of commission of murder of the deceased in the manner narrated by the prosecution is not acceptable and it is improbable to the natural circumstances. He also contended that no evidentiary value can be attached to the Dying Declaration. He placed reliance on the judgment reported in K. RAMAKRISHNAPPA v. STATE BY BANDUR CAMP POLICE STATION¹ and requested this Court to set aside the conviction and sentence imposed against the appellants.

9. The learned Public Prosecutor for the State of Andhra Pradesh supported the findings recorded by the Court below while drawing attention of the Court to the evidence recorded before the Court below more particularly, the evidence of PWs.1, 2, 4, 5, 6 and 7 and Ex.P.10. He also contended that the statement given by Padma to PWs.11 and 12 is oral dying declaration and no corroboration is required to dying

¹ 2006 CriLJ 4314

declaration recorded by the Magistrate, if it inspires the confidence of the Court.

10. Upon considering rival contentions and after perusing the material available on record, the point for consideration is

“Whether the appellants – accused 1 to 5 committed murder of Padma by pouring kerosene, set fire to her, with an intention to kill her if not the judgment and calendar, conviction and sentence passed thereunder, are liable to be set aside?”

11. POINT: The unnatural death of the deceased is an undisputed fact and she died due to burn injuries received in the incident. The contention of the counsel for the appellants is that Padma poured kerosene herself on her body and lit fire to her body in her house and came out and fell down on the road side, but not in the house of A2. In support of his contention, he would draw the attention of this Court to the memo of evidence annexed to the charge sheet and found fault with the Public Prosecutor in giving up some of the witnesses. It is for the Public Prosecutor to examine any witness and if it is the case of defence that the witness who has given up without examining, before the Court, supports the case of the defence then it will have its own impact on the case of the prosecution, but nothing prevents the appellants to examine them as defence witness, if, they find that they are material witnesses. In any way, the evidence on record is to be appreciated to decide the appeal, in view of the power conferred on this Court by Section 374 (2) Cr.P.C. Therefore, we are adverting to the evidence of the witnesses examined before the Court.

12. PWs.1 and 2 are the sons of deceased, whose testimony is consistent with regard to the information they received from Padma by

then about the offence committed by the appellants- accused and they narrated as to how the incident took place on receipt of information by them and their evidence is consistent that the accused received burn injuries which lead to death. But, the contention of the counsel for the appellants is that they are interested witnesses being sons of the deceased. Their evidence cannot be thrown over head, on account of such relationship, but the Court must scrutinize the evidence with great circumspection, if their testimony inspires confidence of the Court, the Court may rely on it. In the cross examination of PWs.1 and 2, the counsel for the defence before the trial Court could elicit nothing, to disprove the testimony of PWs.1 and 2 with regard to the information they received from Padma, their mother. The evidence of PWs.1 and 2 is not helpful to rope these appellants-accused with the offence, but the evidence of PWs.4 and 5 pointing the participation of accused. According to PW.4, Padma (deceased) fell down with burn injuries in front of the house of A2 on the Sankranthi festival day of 2010. Though the Public Prosecutor cross-examined, nothing was elicited except suggesting the case of prosecution, denied by the witnesses. Moreover in the evidence of PW.5, he stated that when he came out from the house, he found Padma with burn injuries in front of the house of A2 and calling her daughter Parvathi. But, he stated that A1 and A2 were not present there at that time and admitted that A3 to A5 were in the house of A2. Therefore, the evidence of PW.5 confirms the presence of A3 to A5 in the house of A.2. Similarly, PW.6 also testified that she found injured Padma lying on the verandah of the house of A2 with burn injuries. But her evidence is silent with regard to the direct participation of any of the accused. Though they were cross-examined by the public prosecutor, nothing was elicited in their cross examination

to prove the participation of the accused directly, but the evidence of PWs.4 and 5 is neither wholly reliable nor unreliable. Therefore, much reliance cannot be placed on their testimony since they are not wholly reliable witnesses.

13. Coming to the other evidence. PW.11 is the Magistrate, who received requisition from the Hospital and recorded the statement of the injured Padma. The evidence of the III Additional Junior Civil Judge, Tirupathi who was working as Principal Junior Civil Judge, Sddipet, by the date of her examination, specifically disclosed that Padma lent money to A2 and he called her to his house and poured kerosene and set fire. She further stated that Damu, Venkatesu, Syamala, Alivelamma and Saru are the persons who poured kerosene and set fire to her body. But the Magistrate was not cross examined and on the other hand, reported no cross-examination, the Court recorded cross-examination as Nil. Therefore, the uncontroverted testimony of PW.11, the Magistrate, coupled with Ex.P-16 statement of the deceased, is suffice to conclude that the appellants-accused poured kerosene and set fire to the body of Padma. In addition to the evidence of Magistrate, PW.12, the Sub Inspector of Police, who recorded the statement of Padma on receipt of the information about the Medico Legal Case, disclosed that Padma informed that the appellants-accused poured kerosene and set fire to her and PW.12 recorded the statement of the declarant, read over the contents and obtained right hand thumb impression. When PWs.11 and 12 were not cross-examined questioning the coherence and fit state of mind of the declarant i.e. the deceased, it is difficult to disbelieve the statement recorded by PWs.11 and 12, which are marked as P-16 and P-20, directly inculcates the appellants-accused.

14. The learned counsel for the appellants-accused contended that when a person received 95% burn injuries on face, limbs, and other parts of the body, the statement recorded by the police creates any amount of doubt in the mind of Court regarding fit state of mind of declarant. In view of the contention urged before this Court, for the first time, it is relevant to advert to the requisition sent to the Magistrate by the hospital authorities where they noted that Padma received 75% to 85% burn injuries. The correspondence and injuries intimation to the police also disclosed that Padma received thermal burns due to pouring kerosene and burnt by neighbours by 5.00 p.m. and percentage of injuries are 75% to 80%. But in the death intimation, the percentage of burns was noted as 80% to 85%. However, the post mortem report and inquest report are also relevant at this stage. PW.10, who is the Associate Professor, Department of Forensic Medicine, who conducted autopsy over the dead body of the deceased found the following external injuries:

Ante mortem burn wounds of dermo epidermal type, partly infected and partly healing present over (1) face (2) neck (3) chest (4) Abdomen; Front of upper 1/3rd of abdomen an area of 14 x 10 cm in mid line region lower 2/3rd of front of abdomen and back of abdomen. (5) Both upper limbs including both palms and (6) Both lower limbs except both soles,

He opined that the cause of death was due to hypovolaemic shock. The doctor was not cross-examined even disputing the cause of death as opined by him. In such a case, when the injured Padma received 75% to 85% burn injuries though on face, they are superficial in nature and even a person who received burn injuries more than 85% can speak coherently and therefore, in the absence of any suggestion to the

witness either PWs.11, 12 and 10 about the fit state of mind to give statement, the contention raised before this Court for the first time in this appeal cannot be sustained.

15. The Court can record conviction on the basis of dying declaration even without insisting any independent corroboration. But, the counsel for the appellant contended that the dying declaration cannot be the sole basis for recording conviction and relied on the judgment in K. Ramakrishnappa's case, which we referred supra 1. It is not a binding precedent and did not lay down any law and relevant to the present facts of the case, it has no application in view of law declared by Apex court, referred hereunder.

16. The Apex Court in STATE OF RAJASTHAN V. BHUP RAM² held that if the dying declaration recorded by Judicial Magistrate is reliable, there is no legal hurdle in basing a conviction on it even without any supporting material. When doctor and judicial magistrate stated that deceased was conscious when statement was made, when deceased gave her statement in her own language, dying declaration would not vitiate merely because it was recorded in a different language. Dying declaration if found to be true, coherent, consistent and free from any effort to induce the deceased to make a false statement, then it is sufficient for recording conviction without looking for corroboration vide judgment reported in STATE OF RAJASTHAN v. KISHORE³. Move over in the later judgment in NALLAPALTI SIVAIAH v. SUB-DIVISIONAL OFFICER, GUNTUR, A.P.⁴, the Apex Court held that the dying declaration must inspire confidence so as to make it safe to act upon.

² 1997(1) Crimes page 62 (SC)

³ 1996(8) Supreme Court Cases 217

⁴ AIR 2008 SC 19

Whether it is safe to act upon a dying declaration depends upon not only the testimony of the person recording dying declaration, be it even a Magistrate, but also all the material available on record and the circumstances including the medical evidence. The evidence and the material available on record must be properly weighed in each case to arrive at proper conclusion. The Court must satisfy to itself that the person making the dying declaration was conscious and fit to make statement for which purposes not only the evidence of persons recording dying declaration but also cumulative effect of the other evidence including the medical evidence and the circumstances must be taken into consideration. It is unsafe to record conviction on the basis of a dying declaration alone in case where suspicion is raised as regards the correctness of the dying declaration. In such case, the Court may have to look for some corroborative evidence by treating dying declaration only as a piece of evidence. Similarly, in *BHAJJU @ KARAN SINGH v. STATE OF M.P.*⁵, a Division Bench of the Apex Court laid down certain guidelines to be followed while either to believe or disbelieve the dying declaration. They are as follows:

“(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration;

(ii) If the Court is satisfied that the dying declaration is true and voluntary, it can base conviction on it, without corroboration;

(iii) The Court has to scrutinize the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had an opportunity to observe and identify the assailants and was in a fit state to make the declaration;

(iv) Where dying declaration is suspicious, it should not be acted upon without corroborative evidence;

(v) Where the deceased was unconscious and could never make any dying declaration, the evidence with regard to it, is to be rejected;

⁵ 2012 AIAR (Crl.) 400

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction; and

(vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected.”

17. In view of the law declared by the Apex Court, the Court can record conviction, if the dying declaration inspires the confidence and consistent with the medical evidence. Here, the appellants-accused did not suggest to PWs.10, 11 and 12 that the declarant was not in fit state of mind to give statement, in the absence of cross-examination, based on evidence of PWs.10, 11 and 12, Exs.P.16, 20 and 14, taken into consideration of other attendant circumstances, the trial Court believed that the dying declaration recorded by PW.11, marked as Ex.P.16, and recorded conviction.

18. The specific contention raised before this Court is the incident took place in the house of Padma (deceased), but police changed the scene of offence at the house of accused No.2. But, this contention is raised for the first time before this Court during an argument even without urging before the trial Court. When it is the case of the defence that the deceased poured kerosene and set fire to her body, at least the defence counsel would have suggested to the witnesses suggesting their defence to the witnesses. When no suggestion was put to the witnesses, putting their defence, the same cannot be accepted for the first time raised during arguments.

19. In M.B. RAMESH (D) by L.Rs. v. K.M.VEERAJE Urs (D) by L.Rs. and Ors.,⁶ the Apex court relying on the judgment of Calcutta High

⁶ AIR 2013 sc 2088

Court in *A.E.G. CARAPIET v. A/Y. DERDERIAN*⁷, held that when a party to a proceeding raises a specific defence, it must be put to the witness who testified about the facts and if it is not put to the witness by way of suggestion, an inference shall be drawn, that the defence set up by such party is false.

20. In the present case, no suggestion was put to any witness suggesting change of scene of offence, before the trial Court, raising such a plea for the first time during argument would not serve any purpose. Therefore, the contention of the counsel for the appellants is without any legal or factual basis and the same is hereby rejected.

21. The Public Prosecutor for State drawn the attention of this Court to the evidence of PWs.6 and 7 to establish the scene of occurrence. The evidence PW.6 is consistent that she found the injured Padma on the verandah of the house of A-2. At the same time, the evidence of PW.7, who acted as Panchayatdar at the time of observation of the scene of offence, at the request of ASI, would disclose that they found some burnt cloth piece and partly burnt cloth piece in the verandah of A2, and the police seized the saree pieces, under cover of panchanama, marked as Ex.P-10 and MO1 is the piece of saree seized under the cover of Ex.P.10. If really Padma poured kerosene herself and set fire to her body in her house and fell down on the road side due to the burns, the question of finding partly burnt saree pieces in the house of A2 does not arise. This fact probabilises the case of the prosecution that the scene of offence is in the house of A2. Therefore, the contention of the counsel for the appellants that the scene of offence is changed is not acceptable and it is not based on any evidence. Hence,

⁷ AIR 1961 Cal 359

we find no force in the contention raised by the counsel for the appellants-accused, for the first time in appeal.

22. The consistent evidence of PWs.1 to 7 and 11, 12, who recorded the statements of the deceased in the hospital marked as Ex.P-16 and 20, post mortem report marked Ex.P-14 coupled with the evidence of PW.10 cumulatively established that the death of Padma was due to homicidal burns and the appellants-accused perpetrated the murder of Padma (deceased). No other inference can be drawn from the proved circumstances even after reappraisal of entire evidence and we are in total agreement with the finding recorded by Court below. Consequently, we find no merit in the appeal and it deserved to be dismissed.

23. In the result, the appeal is dismissed, confirming the conviction and sentence passed in the calendar and judgment, finding the 1st appellant –A-1 guilty of the offence punishable under Section 302 IPC and appellants 2 to 5, accused Nos.2 to 5, guilty of the offence punishable under Section 302 read with 34 IPC.

P. NAVEEN RAO, J

M. SATYANARAYANA MURTHY, J

November 18, 2017
KTL