

**THE HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO
AND**

THE HONOURABLE SRI JUSTICE T.SUNIL CHOWDARY

CRIMINAL APPEAL NO.465 OF 2012

JUDGMENT: (per the Hon'ble Sri Justice M.S.Ramachandra Rao)

This Criminal Appeal is filed by the appellant challenging the judgment dt.10.02.2012 in S.C.No.521 of 2011 of the IV Additional District & Sessions Judge(FTC) at Mahaboobnagar.

2. The appellant herein is the sole accused in the said case.

3. The prosecution case is that PW1 and accused were married about nine years prior to the incident, that they had two children, i.e., a girl aged about 7 years by name Sandya, whose death the accused is alleged to be responsible for, and a son named Bharathiyudu, aged about three years. It is alleged that on the date of the incident i.e. on 24.12.2010, at about 8.00 a.m., when PW1 was washing utensils in her house, one Kurmaiah came and enquired her about her husband and she informed him that her husband was inside the house; that since the said Kurmaiah spoke to her, the accused suspected her, beat her indiscriminately and thrown her into Maisamma Temple in the Village. It is alleged that since the accused was in angry mood, PW1 handed over her daughter-Sandya to her

mother-in-law/PW6 and left the house to attend agricultural work in cotton fields along with their son. It is alleged that when she was at the fields, PW7 came there and informed her that her husband i.e, accused set fire to their daughter at their house and on receiving the said information, she immediately rushed to the house and found that the villagers have broke open the house, that her husband was also present and on her enquiry, the child informed her that the accused took her inside the house on the pretext of providing toddy, closed the door and then poured kerosene and then set fire to her. It is contended that somebody telephoned 108 Ambulance and the child was taken to Government Hospital. Mahabubnagar and admitted there, where she died at 6.00 p.m., on that day.

4. The case of the prosecution is that an FIR was lodged by the *defacto* complainant, who is the wife of the accused, on 24.12.2010 at 8.00 p.m. against the accused by coming to Jadcherla Police Station alleging that he caused the death of their daughter on 24.12.2010 allegedly by pouring kerosene on her and setting her ablaze by bolting the door from inside; that thus the accused intentionally or knowingly caused her death, which occurred at 6.00 p.m. on that day; and thereby committed an offence punishable under Section 302 of IPC. In the said complaint certain allegations of harassment and

cruelty were also leveled against the accused by PW1 stating that he suspected her character and used to beat her.

5. According to PW15, PW1 came to Jadcherla Police Station and lodged Ex.P1, a Telugu written complaint, and that she had come alone for the said purpose. PW15 then registered it as Crime No.376 of 2010 under Sections 498A and 302 IPC and issued FIR which is marked as Ex.P16.

6. On 24.12.2010, PW17, the Inspector of Police, Jadcherla took over investigation and visited Government Hospital, Badepally, where he found the accused as having been admitted as inpatient for certain injuries. He stated that on 25.12.2010 he visited the scene of offence and prepared observation report, which is marked as Ex.P18. Later he visited the hospital and held inquest over the dead body, which is marked as Ex.P19.

7. On 25.12.2010, on requisition, PW16, the Civil Assistant Surgeon of District Head Quarters Hospital, Mahaboobnagar, held autopsy over the dead body of the deceased and opined that the cause of her death was due to burns. Ex.P17 is the Post Mortem Examination Report.

8. On 27.12.2010, the accused was discharged from the Hospital at Badepally and was apprehended by the Sub Inspector of Police. It is alleged that pursuant to the statement made by the accused and at his instance, a match box, M.O.1, was recovered under Ex.P14 panchanama and thereafter he was sent to judicial remand.

9. On completion of investigation, charge sheet was filed alleging that the accused had committed offences under (i) Sections 498A IPC by suspecting the character of PW1 and harassing her mentally and physically and (ii) also committed the offence under Section 302 IPC by causing the murder of the child, Sandya, aged 7 years by pouring kerosene on her and setting her ablaze by bolting the door inside for which she succumbed in the hospital at 6.00 p.m. on 24.12.2010, and he thereby intentionally and knowingly caused her death.

10. The accused denied the charges and claimed to be tried.

11. In support of its case, the prosecution examined PWs.1 to 17 and marked Exs.P1 to P19. However, PWs.2 to 7 and 9 to 12 did not support the prosecution case and were declared hostile.

12. The plea of the accused is one of denial. He stated that when his daughter caught fire, he was not in the house, that

he went to the fields, that when he came to know about the incident from the villagers over phone, he rushed to his house and found his daughter in flames and that tried to extinguish the fire, in which process he also sustained injuries and received treatment for five days in Badepally Hospital from PW14.

13. The trial Court held that the accused was guilty of both the charges. It therefore sentenced him to undergo imprisonment for life and to pay fine of Rs.1,000/-, in default to suffer Simple Imprisonment for three months, for the offence punishable under Section 302 IPC. It also sentenced him to undergo Rigorous Imprisonment for three years and to pay fine of Rs.500/-, in default to suffer Simple Imprisonment for one month for the offence punishable under Section 498A IPC. It directed both the sentences of imprisonment to run concurrently.

15. Challenging the same this Appeal is filed.

16. It is the contention of the counsel for the appellant that:
(a) the evidence adduced by the prosecution does not inspire any confidence and that the FIR itself appears to have been fabricated and this knocks out the entire fabric of the prosecution case;

(b) according to PW1, the police came to the village on 24.12.2010 when the incident occurred *before* her daughter was shifted to the hospital and they obtained her complaint in the presence of her mother-in-law and other villagers; but, PW15, who had worked as Sub Inspector of Police, Jadcherla Police Station, had stated that Ex.P1 complaint was given by PW1 at 8.00 p.m. on 24.12.2010 at the police station in person and this contradiction between their respective testimonies renders the very giving of complaint Ex.P1 doubtful;

(c) admittedly PW1 could only write her name in Telugu and could not read and write Telugu, but Ex.P1 complaint is a written complaint in Telugu and PW1 herself contended that she did not know its contents and that it was drafted by police;

(d) Ex.P1 complaint was fabricated by the police to incorporate an oral dying declaration of her daughter that it was the accused who took her inside the house to provide toddy to her, closed the door from inside and then poured kerosene on her and set her ablaze, and therefore the entire prosecution case based on Ex.P1 has to be thrown out;

(e) the deceased suffered 97% burns and according to PW1, the deceased, who was in the habit of consuming toddy, had consumed toddy before she was allegedly set on fire. She contended that when the deceased was intoxicated with toddy and had suffered 97% burns, she could not have made any coherent statement implicating the accused;

(f) even according to PW1, the accused was having lot of affection for the child and so there is no valid reason or motive why he would cause harm to her; and there is no explanation from the prosecution as to why the accused should harm the child when his anger is towards PW1 as he suspected her fidelity;

(g) PW16, the Civil Assistant Surgeon of the District Head Quarters Hospital, Mahaboobnagar, who had conducted post mortem examination did not find kerosene smell on the dead body or in the lungs of the deceased at the time of post mortem, and therefore the theory of the prosecution that the accused poured kerosene on the deceased and set her on fire, is not proved.

(h) the prosecution has not explained why no doctor of the Government Hospital, Badepally, where the deceased was initially admitted and treated for 5 days, was examined and

why the FIR was not registered at Mahaboobnagar, where the deceased died at 6.00 p.m., on 24.12.2010; and

(i) there is no necessity for PW1 to go alone to Jadcherla Police Station, which is 20 kms away from Mahbubnagar, to lodge Ex.P1 complaint with PW15.

18. The learned Public Prosecutor appearing for the State of Telangana however refuted the said contentions.

19. He pointed out that:

(i) the accused was quarrelsome in nature and was in the habit of suspecting the fidelity of PW1 and beating her after drinking toddy; that even the day previous to the date of the incident, the accused came home in a drunken mood asking PW1 to get toddy and after he secured the same, he made a galata at the house for which mediation was held in the village; and that PW1 got afraid with his behaviour and slept in another villager's house along with children.

(ii) the oral dying declaration was made by the deceased in the presence of several persons, some of whom were examined by the prosecution, but they turned hostile;

(iii) in ***Vijay Pal vs. State (Voernment of NCT of Delhi***¹ , the Supreme Court held that even if a person suffered with 100% burns, he would be capable of making a dying declaration and there is nothing unusual in the deceased making such a statement, on the basis of which the prosecution was commenced against the accused.

(iv) the accused was badly beaten up by the villagers after the incident on 24.12.2010 and when he was admitted in the Badepally Hospital, the accused was in drunken state and PW14, the Doctor, who treated him also mentioned that his breath was reeking of alcohol.

He contended that the Court below considered all the circumstances of the case and rightly convicted the accused and no case is made out by the accused for interference by this Court with the said judgment.

20. We have carefully considered the submissions of both sides and evidence on record.

21. According to PW1, she did not visit the police station to give complaint and that the police had come to the village on the date of the incident even before the deceased was shifted to Hospital; and then they obtained her complaint which was given in the presence of PW1's mother-in-law and other people.

¹ 2015(4) SCC 749

She also stated in cross-examination that she can only write her name in Telugu and cannot read and write Telugu and that she did not know the contents of Ex.P1 and that it was drafted by the police.

22. Per contra, PW15, who was working as Sub Inspector of Police, Jadcherla at the time of incident, stated that it was PW1 who came alone to the police station on 24.12.2010 at 8.00 p.m. and lodged a Telugu written complaint (Ex.P1) about the death of her daughter.

23. The prosecution has not explained this discrepancy.

24. That apart, if according to PW1, there was a complaint by her to the police when the police came to the village, why that complaint is suppressed by the prosecution, is also not explained.

25. The necessity of PW1 going alone to Jadcherla Police Station at 8.00 p.m. in the night to give Ex.P1 complaint when her daughter died at the Government Hospital, Mahaboobnagar, 20 Kms away at 6.00 p.m., instead of lodging the complaint to a Police station at Mahboobnagar, is also not explained by the prosecution.

26. Even according to the evidence of PW1, the accused was having lot of affection towards the deceased. If so, for what motive he would cause her death is not stated.

27. If the deceased was alive till 6.00 p.m. on 24.12.2010, after being shifted to Government Hospital, Mahaboobnagar, prosecution ought to have examined the Doctor who examined her at that hospital as witness and produce the OP Register relating to the deceased. These were suppressed since they would not support the prosecution's version.

28. It is pertinent to note that in her Section 161 Cr.P.C. statement, PW1 gave a totally new version about the events of 24.12.2010, contrary what she is alleged to have stated in Ex.P1. She stated therein that in the morning of 24.12.2010, she had gone to the cotton fields of one Golla Yadaiah for coolie work, that around 12 noon she came to know from her villagers that her husband had beaten up a person by name Kurmaiah near Maisamma Gudi, that she then went to Maisamma Gudi where the accused was beating Kurmaiah, and that on seeing her, the accused had abused her and accused her of infidelity. It is also stated that after that incident, PW1 came to the house and handed over her daughter to her mother-in-law, and took the son and went to

the fields. In the said Section 161 Cr.P.C. statement there is no mention of the fact that she went to the Jadcherla Police Station on 24.12.2010 and lodged Ex.P1 complaint. These discrepancies shows that the prosecution had projected a distorted version of the events with a view to falsely implicate the accused.

29. Further, Kurmaiah, who is said to be the cause of the entire incident, is not even cited as a witness to the prosecution case.

30. More critically, PW1 herself admitted that her daughter Sandya had consumed toddy before the incident and that she was in the habit of consuming toddy. If this is taken as true, then how the deceased, who is found to have suffered 97% burns by PW16/Doctor(who performed post mortem examination on her) could speak coherently and implicate the accused, is not explained.

31. No doubt in **Vijay Pal's** case(1 supra) cited by the learned Public Prosecutor, the Supreme Court had held that even a person who had suffered 100% burn injuries, cannot be deemed to be incapable of making dying declaration.

32. However, in the present case, the deceased is a child of 7 years, not an adult; she suffered 97% burns; and

she was also said to be under the influence of toddy on that day before the incident according to PW1 herself. In these circumstances, we find it difficult to believe that any oral dying declaration could have been made at all by the deceased.

33. Also the police constables who had brought the accused to Badepally Hospital for treatment were also not examined by the prosecution.

34. The suggestions made to PW1 in her cross-examination seem to suggest that ever since their marriage, the marital relationship between the accused and PW1 was not harmonious and peaceful. PW1 herself admitted that she left her husband's house one month after her marriage and returned within 10 days. She stated that several times she left the house and lived with her parents. Therefore the possibility of PW1 trying to implicate the accused on account of her unhappiness with him, cannot be ruled out.

35. It is also important to note that no relative of PW1 was examined to show that the accused was in the habit of treating PW1 with cruelty, ever since her marriage with the accused.

36. The above circumstances seem to suggest that Ex.P1 complaint was fabricated by the police with a view to

falsely implicate the accused. As held in ***Marudanal Augusti Vs. State of Kerala***², the entire fabric of the prosecution would collapse.

37. Therefore we are of the opinion, that the prosecution has not proved the guilt of the accused for the charge under Sec.302 IPC or Sec.498-A IPC beyond reasonable doubt and that the judgment of the trial Court cannot be sustained.

38. Accordingly, this Criminal Appeal is allowed, setting aside the conviction and sentence imposed against the accused in S.C.No.521 of 2011 on the file of the IV Additional District & Sessions Judge(FTC), Mahabubnagar, and the accused is acquitted of the charges under Sections 498A and 302 IPC. The bail bonds executed by the accused, if any, shall stand cancelled and he shall be set at liberty. The jail authorities are directed to release the accused forthwith, if he is not required in any other cases. The Registry is directed to communicate a copy of this order to the Superintendent, Central Prison, Cherlapalli, R.R. District.

² AIR 1980 SC 638

39. Consequently, miscellaneous petitions pending if any shall stand closed.

M.S.RAMACHANDRA RAO, J

T.SUNIL CHOWDARY, J

21st October, 2017.

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