

HONOURABLE SRI JUSTICE C.PRAVEEN KUMAR
AND
HONOURABLE SRI JUSTICE N. BALAYOGI

CRIMINAL APPEAL No. 1092 OF 2012

JUDGMENT: (per HON'BLE SRI JUSTICE N. BALAYOGI)

1. The appellant, who is arrayed as sole accused in S.C.No.263 of 2009 filed this criminal appeal aggrieved by the judgment dated 19.07.2012 passed by the learned XI Additional District and Sessions Judge, Krishna at Gudivada convicting him for the offence punishable under Section 302 IPC and sentencing him to suffer rigorous imprisonment for life and to pay a fine of Rs.5,000/-.

2. Brief facts of the prosecution case are as follows: The marriage between the deceased Sk.Shamshunnisa and the accused was solemnized about twenty years prior to the incident. The appellant/accused is a carpenter and used to spend his earnings for taking alcohol. He always used to quarrel with his wife/deceased for money and used to beat her. The accused heavily indebted. He also used to return home in drunken state and used to beat the deceased demanding her to dispose of the house property with a view to discharge the loan amount, for which she refused.

3. Three months prior to the date of incident, i.e. on 26.06.2007 the accused picked up quarrel with the deceased in

drunken state and beat the deceased with iron rod on her head causing bleeding injuries. Out of fear, the accused left the house. The deceased got treated her injuries and began to run a small sundry shop at her residence.

4. While so on 26.06.2007 the accused returned to the home in drunken state, picked up quarrel with the deceased through out night with a demand to dispose of the house property to clear his debts, for which the deceased refused and there upon the accused beat the deceased. When Shaik Kowsal and Shaik Afsar came in rescue of her, the accused beat them also. In the early hours of 27.06.2007 the deceased sent a word to her daughter- PW.1. On that, PW.1 and her husband, P.W.2 came to the house of deceased at about 8.00 AM and observed the harassment of the accused towards the deceased for disposal of the house property. P.Ws.1 and 2 told the accused not to dispose of the house property, for which, the accused intimated them that it was their family matter and asked them to go away. Then P.Ws.1 and 2 left the house. The other two children also left the place.

5. Later on the same day at about 10.00 AM the deceased went to the house of Shaik Rameejunnissa @ Razeemunnissa situated near to her house and informed about the harassment of the accused. In the mean time, the accused came there. Then Shaik Rameejunnissa advised the accused not to sell the house property. The deceased informed about the

harassment of the accused to P.Ws.1 and 2. At about 11.30 hours, the accused abused the deceased saying that he would sell the house and clear the debts even by resorting to kill her. Immediately the accused poured kerosene contained in a tin and lit fire to the deceased with match box. Due to burn flames from her wearing saree, the deceased came out of her house by raising cries and fell down on road in front of the house. The accused who came out of the house following the deceased abused '*marjaaree rand marja*' The accused left the place on seeing P.Ws.1,2,5 and others who got extinguished the flames by pouring water. Then the deceased was taken to Government Area Hospital, Gudivada by ambulance.

6. P.W.9-doctor in the Government Hospital send the intimation to the Station House Officer, II Town Police Station, Gudivada and Additional Judicial First Class Magistrate-P.W.8. P.W.8 came to the Government Area Hospital, Gudivada and recorded the dying declaration of the deceased vide Ex.P.16. Later on receipt of the intimation, P.W.12, the Station House Officer, II Town Police Station, Gudivada recorded the statement of the deceased, based on which, he registered the case in Crime No.154 of 2007 for the offence punishable under Section 307 IPC and took up investigation. During the investigation, P.W.12 recorded the statement of the deceased and visited the scene of offence and seized half burnt kerosene tin, saree, jocket under a cover of mahazar report in the presence of P.W.7 and

another, duly signed by them. He also got photographed the scene of offence by P.W.6-photographer vide Ex.P.13 and prepared rough sketch of the scene of offence, Ex.P.23. He recorded the statements of P.Ws.1,2,3,4,5 and another. Meanwhile, the deceased while undergoing treatment in the Government Area Hospital, Gudivada died at 3.40 PM on 28.06.2007.

7. On receipt of the death intimation, P.W.13 altered the section of law from Section 307 IPC to 302 IPC. Thereafter P.W.14—Inspector of Police took up investigation and conducted the inquest over the dead body of the deceased on 29.06.2007 in the presence of inquestdars-P.Ws.7,8 and another, under a cover of inquest report—PW.15. P.W.13 examined and recorded the statements of P.Ws.1, 2 and others. After inquest, he sent the dead body for post-mortem examination.

8. P.W.9, the Civil Assistant Surgeon in the Government Area Hospital conducted post mortem examination over the dead body of the deceased and issued Post Mortem examination report, Ex.P.18 opining that the deceased would appear to have died due to “Hypovolemic shock septioimia’. Meanwhile, P.W.14 sent the material objects to FSL, Hyderabad. The Assistant Director, FSL, Hyderabad gave opinion that the items contained traces of kerosene. During the investigation, on 22.07.2007 at about 4.00 PM, P.W.14 arrested the accused and

recorded his confession statement under a cover of mahazar in the presence of P.W.7 and another. After completing the investigation, he filed charge sheet, which was taken on file as PRC.No.42 of 2007 by the learned Additional Judicial First Class Magistrate, Gudivada.

9. After compliance of Section 207 Cr.P.C. and as the offence alleged is triable by the Court of Sessions, the case was committed to the Court of Sessions which came to be numbered as SC.No.263 of 2009.

10. A charge under Section 302 IPC has been framed, read over and explained to the accused, to which, he denied and claimed to be tried.

11. To substantiate their case, the prosecution examined P.Ws.1 to 14 and got marked Exs.P.1 to 27, Exs.D.1 and D.2 and MOs.1 to 3. After the closure of evidence, the accused was examined under Section 313 Cr.P.C. with reference to the incriminating circumstances appearing against him in the evidence of prosecution witnesses, to which, he dined. No oral or documentary evidence was adduced on behalf of the accused in support of his defence.

12. On appreciation of the entire evidence on record, the learned District and Sessions Judge convicted the accused

in the manner referred to above. Challenging the same, present Criminal Appeal has been filed.

13. Now the point that arises for determination is, *whether the dying declaration itself is sufficient to convict the accused, and whether the conviction and sentence recorded against the accused is legal and valid.*

14. Learned Counsel for the appellant contended that none of the prosecution witnesses support the prosecution case except dying declaration which is suspicious and a tutored statement. The state of mind of the deceased while recording the dying declaration is doubtful and that the circumstances might have lead her to commit suicide.

15. P.W.1 is the elder daughter of the accused and deceased. P.W.2 is none other than the wife of P.W.1. The evidence of P.Ws.1 and 2 is that the deceased was maintaining provisions shop at her house. P.W.1 turned hostile and did not support her 161 Cr.P.C. statement. Her evidence is that her father does not have bad habits and he used to look after well. Further it is her evidence that her mother poured kerosene over herself and set fire. Herself and accused shifted the deceased to Government Hospital and on second day of treatment, her mother died.

16. P.W.2 corroborates P.W.1 that his wife intimated about his mother-in-law received burn injuries, however, she did not furnish any particulars as to how she received burn injuries.

17. Now coming to the evidence of P.W.3 whose house is situated three houses after the house of the accused and she came to know the incident only after the death of the deceased.

18. Similarly P.Ws.4 and 6 used to reside four houses after the house of the accused. Their evidence is that on the day of incident, at about 11.30 a.m. Shamsunnisa/deceased came to the road with flames and they rushed to her, by then, several people gathered there and put off the flames and later shifted the deceased to hospital in Ambulance.

19. P.W.5's house is situated ten houses after the house of the accused. On the day of incident, while she was coming from a shop, Shamsunnisa/deceased came to the road from her house in flames. The neighbours put off the flames and she was shifted to the hospital in ambulance. She further deposed that she do not know about the disputes of her family members.

20. Accordingly, P.Ws.1 to 5 turned hostile and did not support the case of prosecution. P.W.6 was the photographer,

who has taken six (6) photographs of the dead body vide Ex.P.13.

21. P.W.7 is the VRO who speaks about the seizure of kerosene tin, burnt saree and blouse, MOs 1 to 3 vide Ex.P.14- scene observation report in his presence. On 29.06.2007 at about 8.00 AM inquest was held over the dead body in his presence under Ex.P.15-Inquest report. Subsequently on 22.07.2007 the police arrested the accused.

22. P.W.12 is the Sub Inspector of Police. His evidence is that on 27.06.2007 at about 13.00 hours, he received hospital intimation vide Ex.P.20 and proceeded to the Government Hospital, recorded the statement of the deceased Shamshunnisa from 2.00 PM to 2.45 PM. Immediately he returned to the police station, registered the case in Crime No.154 of 2007 for the offence punishable under Section 307 IPC and issued Ex.P.22 FIR. He again proceeded to the Government Hospital and recorded 161 Cr.P.C. statement of Shamshunnisa/deceased. Later proceeded to the scene of offence, prepared rough sketch of scene of offence vide Ex.P.23, got prepared scene observation report vide Ex.P.14 in the presence of mediators and seized M.Os 1 to 3 .

23. P.W.,13, the then Sub Inspector of Police deposed that on 28.06.2007 at about 16.00 hours he received the death

intimation of Shamshunnisa vide Ex.P.24 from the Government Hospital and altered the section of law from Section 307 IPC to Section 302 IPC and issued Ex.P.25 FIR. There is no dispute about the FIR.

24. P.W.14 is the Inspector of Police who conducted investigation in this case. He corroborates P.W.13 that on 28.06.2007 at about 7.00 PM he received information over telephone from P.W.13 and also received the copy of express altered FIR and took up investigation. On 29.06.2007 he visited the scene of offence at 6.30 AM, verified the same with reference to the rough sketch and scene observation report prepared by PW.12 under Ex.Ps.14 and 23 and found them correct. On 02.07.2007 he received Post Mortem Examination report and on 22.07.2007, he arrested the accused at 4.00 PM in the presence of P.W.7 and another. He recorded 164 Cr.P.C. statements of P.Ws.1,2 and another.

25. The facts and circumstances discussed herein above thus do not connect the accused with the alleged offence. There remains only dying declaration of the deceased, which was recorded by P.W.8.

26. The evidence of P.W.8 is that on receipt of requisition vide Ex.P.17 from the Medical Officer of Govt. Area Hospital, Gudivada on 27.06.2007 at 1.15 PM to record the dying declaration of Smt. Sk.Shamshunnisa, wife of Subedar/accused,

he proceeded to the Government Hospital and by the time he reached the hospital, Medical Officer was present there. P.W.8 identified the patient/Shamshunnisa through the Medical Officer. Before going to record the dying declaration of the deceased, he tested the mental capacity of the patient by putting some formal questions and he himself satisfied that the patient is in conscious, coherent and in a fit state of mind to make statements voluntarily. He recorded her statement vide Ex.P.16 Dying Declaration. The Medical Officer also endorsed on the same that the mental condition of the patient is sound, coherent and in a fit state of condition to give statement.

27. Ex.P.16 is the dying declaration, wherein it was stated that on the day of incident, at about 11.00 AM or 12.00 noon at her house, there was a quarrel in between herself and her husband and her husband poured kerosene on her and lit a match stick and threw it on her. When flames started, she came to the road with burn flames and fell on the road, in front of her house.

28. The Doctor who conducted autopsy over the dead body of the deceased was examined as P.W.9. He issued Ex.P.18 Post Mortem report. His evidence supported by Ex.P.18 shows that on 29.06.2007 at 2.00 PM he conducted autopsy of the dead body of the deceased and noticed that burn injuries of 80-90% are ante mortem in nature and opined that the

deceased died due to hypovolemic shock and septiemia due to ante mortem burn injuries.

29. D.W.1 is the neighbour to the accused and deceased, whose evidence is that about five years prior to the incident, Shamshunnisa came out of her house with flames and they poured water on her to put off flames. Shamshunnisa was having a son through her first husband and the said boy was with her and accused till attained the age of 14 years. Thereafter the boy was taken away by the sister of Shamshunnisa. His marriage was settled. At the time of taking the boy, the sister of Shamshunnisa agreed to give his earnings and the dowry amount if any obtained in connection with the boy's marriage to Shamshunnisa to perform the marriage of her daughters. She further deposed that Shamshunnisa was informed by her sister stating that there was no sufficient money to perform the marriage of the boy and refused to pay any thing to Shamshunnisa and gone away.

30. Similarly D.W.2's evidence is that she used to purchase provisions from the shop of Shamshunnisa who told her that it is better to die as there were debts and her sister cheated her. On the day of incident of burning, she supplied water for putting off flames by her husband and others.

31. It is also evident from the evidence of P.W.10 who was working as Superintendent, Government Area Hospital, Gudivada that on 22.07.2007 he examined Shaik Reham, accused, and found the injuries of Hyper melization over right cheek, right zygomatic region and right frontal region and issued Ex.P.19 wound certificate. The burn injury is in healing stage and its age was four weeks. It is evident on record that the incident occurred 27.06.2007 at about 11.00 AM -12.00 Noon. The accused was arrested by P.W.14 in the presence of P.W.7 on 22.7.2007. Thereafter he was examined. There is no explanation from the prosecution as to how the accused sustained injuries. In the usual course it is known that at the time of incident, the accused was in the home and he came after the injured Shamshunnisa fell on the road who came with burn flames. During his attempt to put off flames, he might have sustained the injuries. During 313 Cr.P.C. examination, the accused stated that he along with their three children was in the house when the deceased burnt. He also stated that the deceased was having a son through her first husband and the said boy was with them till attaining the age of 14 years and thereafter his sister-in-law took away the said boy and his marriage was settled. With regard to dowry amount and earnings of the said boy, there are disputes between his wife-shamshunnisa and her sister and both of them quarrelled in regard thereto. Her sister sent intimation three days prior to the said boy's marriage. Then the deceased attended the marriage, but she did not took even a glass of water on the

ground that her sister did not account for the dowry. The deceased stayed without having food for three days and she herself poured kerosene and lit fire. The said fact coupled with material evidence on record, P.W.1 daughter, P.W.2 son-in-law, P.Ws. 3 to 5 neighbours who turned hostile did not support the prosecution case and they did not speak anything against the accused. It is a fact that the deceased with burn flames came out of the house and the accused followed her. He also sustained burn injuries.

32. Exs.D.1 and D.2 are the contradict statements of P.W.1 recorded by PW.14 under Section 161 Cr.P.C. In Ex.D.1, P.W.1 stated that her mother came out of the house with burn flames and fell on the road. On her back, her father came out of the house and abused her '*marjaaree rand marja*' ('*chavu lanjamunda chavu*') and on seeing us, he ran away. Herself and people gathered there poured the water to put off the flames. However, as per Ex.D.2, P.W.1 along with her husband went to the house of her mother/deceased at about 11.30 AM and by the time they reached, her mother came out of the house with burn flames and fell on the road. Thus Exs.D.1 and D.2 are the material contradictions in the evidence of prosecution case. Even if these are excluded, there is nothing on record to connect the accused with the alleged offence. More so Ex.D.1 clearly shows that the accused followed the deceased, when she (deceased) came out of the house with burn flames and fell on

the road in front of her house. These circumstances create a doubt as to whether the accused came out of the house in fear. Further the circumstances create a doubt as to whether the accused poured kerosene on the deceased and set her to ablaze, or whether the deceased herself poured kerosene on her and put herself to fire in order to commit suicide. In this view of the matter, the accused deserves same benefit as his participation becomes doubtful and does not stand corroborated from the material evidence on record. He is thus entitled to benefit of reasonable doubt. Pertinent to see, normally, omissions or contradictions which affect the basic structure of the prosecution case may be considered to be sufficient for giving benefit of doubt to the accused. From the facts narrated above, the evidence of material witnesses does not connect the accused with the alleged offence. Further, on the basis of some contradictions in the prosecution case, no doubt, benefit of doubt is given to two accused.

33. In view of the above narrated shaky and suspicious evidence, the learned judge of the trial Court has erred in holding that the prosecution has established its case beyond all reasonable doubt and convicting the accused-appellant for the offence alleged against him. On appreciation of the material on record, we are of the considered view that the impugned Judgment of conviction and order of sentence passed by the Court below is liable to be set aside.

34. For the foregoing discussion and in the result, the Criminal Appeal is allowed. The conviction and sentence recorded against the appellant/accused in the judgment dated 19.07.2012 in Sessions Case No.263 of 2009 on the file of learned XI Additional District and Sessions Judge, Krishna at Gudivada for the offence punishable under Section 302 IPC is set aside and he is acquitted for the said offence under Section 235(1) Cr.P.C. Consequently, the appellant/accused shall be set at liberty forthwith, if he is not required in any other case or crime.

35. The fine amount if any paid by the accused shall be returned to him forthwith.

36. Miscellaneous petitions pending consideration if any in the appeal shall stand closed in consequence.

JUSTICE C. PRAVEEN KUMAR

JUSTICE N. BALAYOGI

Dated 19th December, 2017
Msnr_x