

**IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH**

Criminal Appeal No.1584 of 2010

Between:

Md. Farooq

...Appellant

And

The State of A.P.,
Rep by its Public Prosecutor,
High Court, Hyderabad.

.... Respondent

DATE OF JUDGMENT PRONOUNCED: 07.04.2017

SUBMITTED FOR APPROVAL:

HON'BLE SRI JUSTICE SURESH KUMAR KAIT

AND

HON'BLE SRI JUSTICE U. DURGA PRASAD RAO

1. Whether Reporters of Local Newspapers
may be allowed to see the judgment? Yes / No
2. Whether the copies of judgment may be
marked to Law Reporters / Journals? Yes / No
3. Whether Their Lordship wish to
see the fair copy of the Judgment? Yes / No

*** THE HON'BLE SRI JUSTICE SURESH KUMAR KAIT**
AND

*** THE HON'BLE SRI JUSTICE U.DURGA PRASAD RAO**

+ Criminal Appeal No.1584 of 2010

% 07.04.2017

Between:

Md. Farooq

...Appellant

And

The State of A.P.,
Rep by its Public Prosecutor,
High Court, Hyderabad.

.... Respondent

! Counsel for Appellant : Ms.Naseeb Afshan

^ Counsel for Respondent : Public Prosecutor (TG)

< Gist:

> Head Note:

? Cases referred:

- 1) 1992 Supp (2) SCC 60
- 2) (2008) 16 SCC 705
- 3) (2010) 8 SCC 514
- 4) (2017) 1 SCC 529



THE HON'BLE SRI JUSTICE SURESH KUMAR KAIT
AND
THE HON'BLE SRI JUSTICE U. DURGA PRASAD RAO

CRIMINAL APPEAL No.1584 of 2010

JUDGMENT: (*Per Hon'ble Sri Justice U.Durga Prasad Rao*)

This appeal is filed by appellant/accused aggrieved by the judgment dated 23.06.2010 in S.C.No.256 of 2009 passed by VI Additional District and Sessions Judge, Medak at Siddipet whereby the learned Judge convicted the accused for the offence punishable under Section 302 IPC and sentenced him to suffer RI for life and to pay fine of Rs.1,000/- in default of payment of fine amount, to suffer SI for three months.

2) The prosecution case is thus:

a) The deceased—Santhoshi was a resident of Palata village of Toopran Mandal, Medak District; she married one Yadagiri of Imampur village; they lived together for one year and thereafter Yadagiri discarded her and since then the deceased was living at Nacharam Gutta and eking out her livelihood by doing coolie work. The accused—Md. Farooq was a resident of Nacharam village and living by selling meat. While so, he developed illicit intimacy with deceased and enjoyed her sexually at Nacharam Gutta for three months and thereafter he shifted deceased to Begumpet and kept her in a rented house of PW1; the accused used to visit the house of deceased at Begumpet frequently for sexual intercourse. While so, parents of the accused decided to perform

his marriage and fixed the match; knowing about the said fact deceased used to quarrel with accused. On that accused thought deceased would not allow him to marry another girl and decided to eliminate her.

b) On 15.03.2009, as usual, he visited the house of deceased and spent that night. On 16.03.2009 at about 7 AM, he poured kerosene on her and set fire and threw away the empty plastic kerosene tin into the bushes behind the bathroom and fled away. On hearing her cries, the neighbours came there and put off the flames and shifted her to Gajwel Government Hospital and thereafter to Gandhi Hospital, Secunderabad for better treatment where she succumbed to injuries on 18.03.2009 at about 10.40 PM while undergoing treatment. PW10—X Additional Metropolitan Magistrate, Secunderabad recorded her dying declaration in Gandhi Hospital.

c) On 19.03.2009 at about 6.30 PM, PW4 gave Ex.P4—complaint to PW11—SI of Police. Basing on the said complaint PW11 registered a case in Cr.No.27 of 2009 under Section 174 Cr.P.C and took up investigation. He examined PW4 and recorded his statement; directed PW13—Head Constable to hold inquest over the dead body of the deceased in the hospital; examined PWs.1, 3 and P.Laxmi—mother of deceased (LW5) and recorded their statements; visited the scene of offence in the presence of PWs.6 and 7; prepared Ex.P16—scene of observation report and Ex.P17—rough sketch and sent the dead body of the deceased for post-mortem examination. PW12—Dr. V.Sandhya Manohar who conducted autopsy over the dead body of the deceased,

issued Ex.P18—post-mortem report and opined that cause of death was due to burns.

d) On 31.03.2009, on receipt of Ex.P13—dying declaration, PW11 altered the section of law from 174 Cr.P.C. to Section 302 IPC and issued altered memo to Magistrate Court and handed over the case to PW14—Inspector of Police for further investigation. After taking charge, PW14 arrested the accused on 09.04.2009 at 6 PM at Nacharam village and basing on the confessional statement made by accused, recovered MO1—empty kerosene tin and after completion of investigation laid charge sheet under Section 302 IPC.

e) On appearance of the accused, the trial Court framed charge under Section 302 IPC against him and conducted trial.

f) During trial, PWs.1 to 14 were examined and Exs.P1 to P22 were marked and MO1—empty kerosene plastic tin was exhibited on behalf of prosecution. No oral or documentary evidence was let in on behalf of defence.

g) After completion of trial, the accused was examined under Section 313 Cr.P.C. and incriminating circumstances revealed in the prosecution evidence were put to him and the accused denied.

3) The trial Court after considering both oral and documentary evidence observed that version of deceased in her dying declaration was convincing, credible and free from all infirmities and accordingly, convicted and sentenced the accused as stated supra.

Hence the appeal.

4) Heard arguments of Ms. Naseeb Afshan, learned counsel for appellant and learned Public Prosecutor for the State (Telangana).

5a) Severely fulminating the conviction recorded by the trial Court in the impugned judgment, learned counsel for appellant would firstly argue that the evidence of PWs.1, 2, 4 and 13 and Ex.P.20—inquest report clinchingly established that the deceased due to poverty and lack of sustenance disgusted with the life and committed suicide by self-immolation and inspite of the aforesaid clinching evidence, the trial Court basing on Ex.P.13—dying declaration came to a wrong conclusion that the accused caused the death of deceased by pouring kerosene and setting her ablaze. Learned counsel argued that the so-called dying declaration was shrouded with many doubts. For instance, learned counsel would narrate, the deceased admittedly suffered 90% burns due to which sedatives and pain killers must have been administered on her to relieve her of the pain and in that critical condition, it was most unlikely that she was in a conscious, coherent and fit state of mind to give declaration before the Magistrate. Therefore, the dying declaration given in such state of mind should not have been made as a sole basis for conviction. Nextly, the mother of the deceased was with her and tutored her to speak ill against the accused and hence the dying declaration was not a voluntary statement of deceased.

b) Secondly, learned counsel argued that even assuming for arguments sake the dying declaration was true, still the prosecution failed to establish that the person Farooq referred by the deceased in her dying declaration and the accused are one and the same. In fact, in Ex.P12—requisition issued by S.I of Police to the Magistrate he referred the deceased as wife of one Yadagiri. Therefore, it is quite unknown whether the deceased was the wife of Yadagiri or one Farooq and further, whether the said Farooq is the accused in this case. PW.10—the learned Magistrate who recorded her dying declaration did not elicit the particulars of Farooq who was mentioned by the deceased as her husband. In that view also, it cannot be said that the person Farooq referred in the dying declaration and the accused are one and the same.

c) Thirdly, learned counsel would argue that the prosecution miserably failed to establish the intimacy between the accused and deceased and their leading conjugal life together and motive for the accused to kill the deceased.

Learned counsel thus prayed to allow the appeal and set aside the judgment of trial Court.

6a) Per contra, while supporting the judgment, learned Public Prosecutor would argue that though some of the witnesses did not support the prosecution case to full extent, still the admissible portion of the evidence of PWs.1, 2 and 4 would clearly establish that the accused and deceased lived in the rented house of PW1 and they cohabited

together as wife and husband and therefore, the accused cannot plead total ignorance or lack of intimacy with the deceased and such an argument is too naïve to be believed. Thus, the prosecution could establish the intimacy between the accused and deceased.

b) Then, the motive for accused to commit the offence and the incident are concerned, the deceased had, in Ex.P13 vividly narrated that the accused is her husband and he wanted to have another marriage for which she objected and he got angry upon her and abused her and on the morning of 16.03.2009 he poured kerosene and set her fire. Learned Public Prosecutor vehemently argued that if the accused had no previous acquaintance and intimacy with her, there was no need for her to falsely implicate him in the case. The trial Court rightly believed the version of the deceased who was the victim and convicted the accused and there were no merits in the appeal and appeal may be dismissed.

7) In light of above rival arguments, the point for determination is:

“Whether the conviction and sentence recorded by the trial Court are factually and legally sustainable?”

8) **POINT:** The prosecution case is already narrated supra. As stated, the plea of accused is one of total denial of the offence. He even pleaded lack of knowledge and intimacy with her.

9) Record shows there were no direct witnesses to the incident and the prosecution case pivots mainly on the dying declaration of the deceased and other corroborating evidence. Hence, the evidence of

PW10 and Ex.P13 have to be scrutinised to know whether the prosecution could establish the complicity of accused.

10a) PW10 is the X Additional Metropolitan Magistrate, Secunderabad. He deposed, on 16.03.2009 at about 6.30 PM on receiving Ex.P12—requisition from SHO, Chilakalaguda PS, he went to Gandhi Hospital, Secunderabad and recorded the dying declaration of the deceased—Santhosa at about 7.00 PM. He stated that before recording her statement, he put preliminary questions to her to ascertain her ability to give statement. He deposed that duty doctor who was present at the time of recording dying declaration, had certified that victim was in a conscious, coherent and fit state of mind to give statement and then he recorded her statement. Learned Magistrate further stated that the victim had narrated him that she married Farooq about one year back and they started living in the village near Gutta and she belong to Vaddera community and her husband belonged to Muslim community. She further stated to Magistrate that her husband wanted to marry another girl and she opposed, then he picked up quarrel with her and out of angry, he abused her in filthy language. She further stated, on the fateful day i.e. 16.03.2009 in the morning while she was in the house he poured kerosene on her and set fire with a match stick and fled away from the scene of offence; when she raised hue and cry, he again came and brought her to the hospital. She emphatically stated that her husband was responsible for her death. Learned Magistrate further deposed that before closing the statement the duty doctor who was present through out, had

again certified that patient was conscious, coherent throughout her statement. The Magistrate read over the contents of the statement to the declarant and she admitted it to be true and correct and then he obtained the impression of her left toe as the fingers of her both hands were burnt completely. PW10 further stated that while recording the statement, except himself and duty doctor none others were present beside the declarant. Recording of the statement was commenced at 7.00 PM and closed at 7.15 PM.

b) PW10 was extensively cross-examined by the accused but nothing specific was elicited to impeach the credibility of the dying declaration. In the cross-examination he stated that preliminary questions were in printed format whereas substance of her statement was noted in handwriting. PW10 stated that in Ex.P12—requisition since the name of her husband was mentioned as Yadagiri, he referred the deceased as Santosha w/o Yadagiri at the beginning of dying declaration. The witness said that for question No.2—(*what is your father/husband name*) she answered as 'Farooq' and this witness forgot to strike out the word 'father' at the question and he claimed that it was a his *bona fide* mistake. He further stated that when he went to the hospital none of her relations were at the bed of the victim. He further deposed that according to him, her husband's name is Farooq and earlier entry in the preamble of the dying declaration, referring the victim as w/o Yadagiri has no relevancy in view of statement given by deceased that she was the wife of Farooq. The witness admitted that except giving her husband's name

as Farooq she did not give the particulars of Farooq. He admitted he did not ask the victim whether she begot children through Farooq or Yadagiri as he has no necessity to put such question. PW10 further admitted that as per Ex.P12, the deceased sustained 90% burn injuries and duty doctor informed him they did not give any sedatives to the declarant. He admitted, he does not know whether the patient who suffered 90% burns would have lot of pain and agony as he had no medical knowledge in that regard. He denied the suggestion that his statement that no sedatives were given to the victim is false. He denied the further suggestion that the mother of the deceased tutored her before his visit and Ex.P13 was not a free and voluntary statement.

The above is the evidence of PW10 with regard to dying declaration given by the deceased.

11) Then, a perusal of Ex.P13—dying declaration which was recorded in Telugu by PW10 shows, it is in tune with the deposition of PW10. Now, the crucial questions concerning to Ex.P13 are, whether the dying declaration was recorded at the earliest point of time after the incident and if so, whether it was the free and voluntary statement of the deceased or it was a tutored one and further, whether the contents of the dying declaration were true and infuse confidence in the mind of court to believe the version of deceased.

12) In the above context, Exs.P12, P13 and evidence of PW10 would show that the incident was occurred at 7.00 AM on 16.03.2009 and the

deceased was admitted in Gandhi Hospital in the afternoon and the hospital authorities sent telephonic information at 14.45 hours to police and the police in turn sent requisition to PW10 at 6.30 PM and PW10 commenced recording dying declaration at 7.00 PM. Thus, the whole process would show that the dying declaration was recorded at the earliest point of time and no delay was occurred.

13) PW10 emphatically stated that while recording the statement except himself and the duty doctor none others were present beside the declarant. Therefore, it can be safely concluded that the dying declaration was the voluntary statement of the deceased and not a product of tutoring by any body. Even otherwise, the evidence shows, since after incident, the deceased was shifted from one hospital to another hospital in quick succession and therefore, there could be no occasion for anybody to tutor her to give false statement. On that count also her statement can be believed to be intrinsic.

14) As the contents of her statement are concerned, she emphatically stated that herself and Farooq married about one year back and set up their family near Gutta and her husband wanted to marry another lady for which she opposed and therefore, he picked up quarrel with her and out of anger he abused her and on the morning of the incident, he poured kerosene and set fire on her with a match stick and fled away. Thus, she narrated in clear tone, how the accused perpetrated the crime. If really the accused was a stranger to her as claimed by him, there was no necessity for her to implicate him in a false case. Ex.P13 and the

evidence of PW10 would show the duty doctor had certified that the victim was in a conscious, coherent and fit state of mind to give the statement. Ex.P13 demonstrates that the duty doctor certified her condition before and after recording her statement. Hence, her statement can be safely relied upon.

15) The law on probative value of dying declaration is no more *res integra*. The doctrine of dying declaration as enshrined under Section 32 of Evidence Act, 1872 is an exception to the general rule contained in Section 60 of the Evidence Act which says oral evidence in all cases must be direct i.e. it must be the evidence of a witness who claims he saw the incident. The dying declaration is an exception in the sense that it is the statement of a person who cannot be called as a witness and therefore cannot be subjected to cross-examination. His statement is divulged through the evidence of another person who records such statement called dying declaration. If the dying declaration infuses confidence and the court concludes that the said declaration is free from prompting or tutoring, it can base the conviction on the sole dying declaration without seeking for corroboration from other evidence. Its acceptability is based on the legal maxim *nemo moriturus praesumitur mentire*, which means “a man will not meet his maker with a lie on his mouth”. Generally it is believed that the truth sits on the lips of a dying person and in his last moments of departing from the mundane world, he would not venture to tell lies more so with regard to cause of his death and about his assailant. This belief generally guides the courts to accept

the dying declaration. Of course, if the accused can, by cogent material, able to raise a suspicion about the genuineness of the dying declaration, then the court may reject the dying declaration or seek for corroboration.

16) In ***State of U.P. vs. Shishupal Singh***¹ the Apex Court observed thus:

“Para—5. Needless to say that the law is well settled by the judicial pronouncements of this Court as well as by various High Courts that a conviction can be safely placed on a dying declaration provided the said dying declaration is free from vice of infirmities and if that dying declaration commands acceptance at the hands of the Court.”

17) In ***Samadhan vs. State of Maharashtra***² it is held as under:

“Para—16. A judgment of conviction can be recorded on the basis of a dying declaration alone, but the court must have been satisfied that the same was true and voluntary. Indisputably, for ascertaining the truth as regards the voluntaries of making such a dying declaration, the court is entitled to look into the other circumstances but the converse may not be true.”

18) In ***Lakhan vs. State of M.P.***³ the Apex Court observed thus:

“Para--9. This Court has considered time and again the relevance/probative value of dying declarations recorded under different situations and also in cases where more than one dying declaration has been recorded. The law is that if the court is satisfied that the dying declaration is true and made voluntarily by the deceased, conviction can be based solely on it, without any further corroboration. It is neither a rule of law nor of prudence that a dying declaration cannot be relied upon without

¹ 1992 Supp (2) SCC 60

² (2008) 16 SCC 705

³ (2010) 8 SCC 514

corroboration. When a dying declaration is suspicious, it should not be relied upon without having corroborative evidence. 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 must be in a fit state of mind to make the declaration and must identify the assailants.”

19) In **Ramesh and others vs. State of Haryana**⁴ when the trial Court refused to act upon the dying declaration, the High Court reversed the judgment and recorded conviction on the sole strength of dying declaration. The High Court carped the approach of the trial Court towards dying declaration and observed that the trial Court was required to appreciate as to whether the statement of the deceased was given in a fit state of mind and it was voluntarily given without being influenced by any extraneous circumstances and without any tutoring and if so, the dying declaration could be believed. The High court further observed that doctor had declared deceased was fit to make statement on which the Judicial Magistrate recorded the statement and even after recording of the statement, the doctor again endorsed that the deceased remained fit during the period her statement was recorded and in that backdrop, merely because the deceased had suffered 100% burns that was no ground to discard the dying declaration. The Apex Court ultimately agreed with the High Court.

In the light of above precedential jurisprudence and the dying declaration being free from blemishes and infirmities, we hold on its sole strength, the accused was guilty.

⁴ (2017) 1 SCC 529

20a) Now, coming to the arguments advanced on behalf of appellant/accused, it is true that in Ex.P20 and in the evidence of PWs1, 2, 4 it was stated as if the deceased committed suicide. However, the categorical evidence of PW10—the learned Magistrate who recorded the dying declaration of the deceased manifests that the deceased was set ablaze by the accused and it was not a case of suicide. No motive can be attributed to PW10 who is the Magistrate. In view of his categorical evidence, the evidence of PWs.1, 2 and 4 and Ex.P20 cannot be given weight. It must be noted that PWs.1, 2 and 4 and inquest mediators were admittedly not eye-witnesses and their depositions are only hear say version which cannot compete with the pathological and truthful disclosure of victim.

b) The next argument was that the deceased suffered 90% burns and thereby she must have been administered with sedatives and hence she could not have given statement in a conscious and coherent state of mind. This argument, it must be said, holds no substance for the Magistrate deposed that the duty doctor informed him that they did not give any sedatives to the declarant. Further, PW12—the post-mortem doctor stated that in case of burn injuries patient will speak until a few minutes or few hours before death. Above all, Ex.P13 shows that the duty doctor certified that the declarant was conscious, coherent and in a fit state of mind to give statement both before and after recording of the statement. In the light of strong evidence, there can be no demur about the fitness of the declarant to give statement.

c) It was then argued that the mother and other relations of the deceased tutored her before arrival of the Magistrate. This argument also does not hold water because PW10 categorically stated that while recording statement except himself and duty doctor none others were present. Hence, tutorage is only a myth.

d) Further argument is that though deceased referred one Farooq as her husband, the prosecution failed to establish that the said Farooq and the accused is one and the same person and also the intimacy between the accused and deceased. It was further argued that in fact in Ex.P12 the deceased was referred as wife of one Yadagiri and therefore, it was not clear whether she was the wife of one Yadagiri or one Farooq or some other person. This argument also does not hold conviction as there is no identity problem with regard to accused. It may be noted that though PWs.1 and 2 who are the owner of the house of deceased and his son turned hostile on a different aspect, still they stated that the accused used to visit the house of the accused now and then. Thus, this fact establishes the intimacy between the deceased and accused. Hence, it is futile on the part of appellant to contend that the prosecution failed to establish the intimacy.

23) Thus, on a conspectus of facts and evidence, we hold that the conviction and sentence passed by the trial Court do not suffer from any perversity or illegality.

24) Accordingly, this Criminal Appeal is dismissed by confirming the judgment of the trial Court.

Consequently, miscellaneous applications pending, if any, shall stand closed.

SURESH KUMAR KAIT, J

U. DURGA PRASAD RAO, J

Date: 07.04.2017
Murthy/Scs

