

IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH
CRIMINAL APPEAL Nos.71 of 2011 and 13 of 2013

Crl.A.No.71 of 2011:

Between:

Bejjipalli Reyyamma and another

..... Appellants/accused Nos.1 and 2

And

State of Andhra Pradesh,
represented by Public Prosecutor, Hyderabad.

.....Respondent

Crl.A.No.13 of 2013:

Between:

State of Andhra Pradesh,
represented by Public Prosecutor, Hyderabad.

..... Appellant

And

Bejjipalli Shanmukharao

.....Respondent/accused No.3

JUDGMENT PRONOUNCED ON: 26th July, 2017

THE HON'BLE SRI JUSTICE C.V.NAGARJUNA REDDY
AND
THE HON'BLE MS. JUSTICE J.UMA DEVI

1. Whether Reporters of local
Newspapers may be allowed : Yes/No
to see the Judgments?

2. Whether the copies of
judgment may be marked to : Yes/No
Law Reporters/Journals?

3. Whether their Ladyship/Lordship
wish to see fair copy of the : Yes/No
Judgment?

C.V.NAGARJUNA REDDY, J

J.UMA DEVI, J

***THE HON'BLE SRI JUSTICE C.V.NAGARJUNA REDDY
 AND
 THE HON'BLE MS. JUSTICE J.UMA DEVI**

+ CRIMINAL APPEAL Nos.71 of 2011 and 13 of 2013

% 26.07.2017

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Vs.

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Between:

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..... Appellant

\$ Bejjipalli Shanmukharao

.....Respondent/accused No.3

! Cri.A.No.71 of 2011:

Counsel for the appellant: Mr.G.Vijayasaradhi,
 for Mr.Y.Kanakalingeswara Rao

Counsel for the respondent: Public Prosecutor (AP)

Cri.A.No.13 of 2013:

Counsel for the appellant: Public Prosecutor (AP)

Counsel for the respondent: Mr.A.Ravi Shankar

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> Head Note:

? Cases referred:

1. (2016) 11 SCC 673
2. (2015) 11 SCC 154
3. AIR 1999 SC 3255
4. (2015) 11 SCC 154
5. (2010) 8 SCC 514 = (2010) 3 SCC (Cri) 942
6. AIR 1970 SC 1566 = (1971) 1 SCR 599 = 1970 Cri LJ 1415
7. (2012) 7 SCC 569 = (2012) 3 SCC (Cri) 430

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

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THE HON'BLE MS JUSTICE J.UMA DEVI

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And

State of Andhra Pradesh,
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.....Respondent

Counsel for the appellant: Mr.G.Vijayasaradhi,
for Mr.Y.Kanakalingeswara Rao

Counsel for the respondent: Public Prosecutor (AP)

Crl.A.No.13 of 2013:

Between:

State of Andhra Pradesh,
represented by Public Prosecutor, Hyderabad.

..... Appellant

And

Bejjipalli Shanmukharao

.....Respondent/accused No.3

Counsel for the appellant: Public Prosecutor (AP)

Counsel for the respondent: Mr.A.Ravi Shankar

The Court made the following:

COMMON JUDGMENT: (per the Hon'ble Sri Justice C.V.Nagarjuna Reddy)

Both these Criminal Appeals arise out of judgment, dated 22.12.2010, in Sessions Case No.9 of 2006 on the file of learned II Additional District & Sessions Judge, (Fast Track Court), Srikakulam, whereby accused No.3 was acquitted of all the charges and accused Nos. 1 and 2 were convicted for the offences punishable under Sections 4 and 6 of the Dowry Prohibition Act, 1961 (for short 'the Act') and Sections 498-A read with 34 and 302 read with 34 I.P.C. and were sentenced to suffer (i) rigorous imprisonment for one year each and to pay a fine of Rs.5,000/- each, in default, to suffer simple imprisonment for three months each for the offence under Section 4 of the Act; (ii) rigorous imprisonment for one year each and to pay a fine of Rs.5,000/- each, in default, to suffer simple imprisonment for three months each for the offence under Section 6(2) of the Act; (iii) rigorous imprisonment for three years each and to pay a fine of Rs.5,000/- each, in default, to suffer simple imprisonment for three months each for the offence under Sections 498-A read with 34 I.P.C.; and (iv) life imprisonment and to pay a fine of Rs.5,000/- each, in default, to suffer simple imprisonment for three months each for the offence under Sections 302 read with 34 I.P.C. The Court below further directed that all the sentences shall run concurrently. Further, accused Nos.1 and 2 were directed to refund the dowry amount of Rs.1,00,000/-; Rs.10,000/- given towards television etc., and five tulas of gold or its value to the daughter of the deceased and they all shall be paid to P.W.1 in whose custody the said girl is kept.

2. Feeling aggrieved by the conviction and sentence imposed on them, accused Nos.1 and 2 filed Criminal Appeal No.71 of 2011. The State filed Criminal Appeal No.13 of 2013 against the said judgment

of the Court below to the extent of acquitting accused No.3. Both these Criminal Appeals were heard and disposed of together.

3. For the sake of convenience, the parties are hereinafter referred to as they are arrayed in the Sessions Case.

4. The case of the prosecution, in brief, is as follows:

P.W.1 is the brother, P.W.2 is the sister-in-law (wife of P.W.1) and P.Ws.4, 5 and 9 are the relatives of the deceased. Accused No.2 is the husband of the deceased. Accused No.1 is the mother and accused No.3 is the brother of accused No.2. P.Ws.1, 2, 5 and 9 are the residents of Peddakota Village, while P.Ws.3, 6, 7 and the accused are residents of Thampa Village. The marriage of the deceased with accused No.2 had taken place on 21.05.2003 at Thampa Village. At the time of marriage, P.W.1 gave a cash of Rs.1 lakh, five tulas of gold and Rs.10,000/- for household articles to accused No.2. The couple lived happily for two months and thereafter, the accused started harassing the deceased stating that the dowry and other articles given were not sufficient. That P.W.1 paid Rs.4,000/- to accused No.2 when the accused harassed the deceased for agricultural expenses. When P.W.1 received information from the deceased regarding the harassment, he sent his wife - P.W.2 to bring the deceased, who is pregnant, to the parents' house for delivery and thereafter, the deceased gave birth to a female child. P.W.1 purchased silver articles like waist chain and anklets, one gold chain and two gold rings for the newly born baby on 11.05.2005. Thereafter, the deceased with her baby was sent to the house of the accused. The accused again harassed the deceased demanding her to bring gold necklace, silver glass and one cow and the same was informed to P.W.1.

On 23.05.2005, when P.Ws.1 and 2 went to the house of the accused and questioned him about their high handedness, all the accused stated that unless and until the additional dowry amount and other articles are given to them, they would tie a rope to the neck of the deceased and kill her. P.Ws.1 and 2 approached P.W.3 and informed him that the accused were causing inconvenience to the deceased; that in turn, P.W.3 assured that he would look-after the matter. While things stood thus, on 26.05.2005, at 7.30 hours, all the accused demanded the deceased to bring additional dowry and when she pleaded inability, all of them kept her in the verandah of the house and after bolting the doors outside, accused Nos.2 and 3 caught hold of the deceased restraining her movements from there and accused No.1 poured kerosene on her body, lit a match stick and threw it on the deceased, as a result of which, she sustained burns and she was admitted in the hospital by accused No.2 and others. While undergoing treatment, the deceased succumbed to the burn injuries on 28.05.2005.

It is the further case of the prosecution that the entire case mainly rests on two dying declarations, viz., Ex.P-13 recorded by P.W.15 -Sub-Inspector of Police and Ex.P-12 recorded by P.W.14 - Judicial First Class Magistrate, Palasa. (It is stated in Ex.P-13 that when the deceased asked accused No.1 to give some milk to the child, the latter questioned the deceased "Have you brought cow from your parents' house? The deceased replied that she will purchase milk. Meantime, accused No.1 handed over the baby to the father-in-law of the deceased and sent them outside. Accused Nos.2 and 3 closed the doors, caught hold of the deceased and accused No.1 poured kerosene on her and set fire to her. In Ex.P-12, it is stated that when the deceased requested accused No.2 to

get some milk for the child, he cried by saying that the deceased was always raising disputes and asked accused No.1 to bring kerosene. When the deceased was trying to run away, accused Nos.2 and 3 closed the doors, accused No.1 poured kerosene and accused No.2 set fire to her. Accused No.2 shifted the deceased to the hospital.) On the basis of Ex.P-13, P.W.15 registered a case in Crime No.28 of 2005 on the file of Hiramandalem Police Station against the accused for the offences punishable under Sections 307 and 498-A I.P.C. and issued the copies of F.I.R. to all the officers concerned. After registering the case, at 12 noon again, he visited the hospital and recorded the statement of the deceased under Section 161 Cr.P.C. He also examined and recorded the statements of P.Ws.1, 2, 4 and L.W.5 - Duvvarapu Laxminarayana and L.W.19 - Duvvarapu Neelamma, visited the scene of offence, drew rough sketch of the scene of offence - Ex.P-28 and seized M.Os.1 to 7 from the scene of offence in the presence of P.W.10 and L.W.26 - Chinnababu. P.W.15 got photographed the scene of offence and the photos and the corresponding negatives were marked as Exs.P-15 to P-27. On 29.05.2005, at about 6.00 a.m., P.W.15 received Ex.P-9 - the death intimation and altered the Section of law from 307 and 498-A I.P.C. to 302, 304-B and 498-A read with 34 I.P.C. and Sections 4 and 6 of the Act and issued the altered F.I.R - Ex.P-29 to all the officers concerned.

On 29.05.2005, P.W.16 took up further investigation and on the same day, the Executive Magistrate conducted inquest over the dead body of the deceased in the presence of P.W.10 and others. Ex.P-5 is the inquest report. P.W.16 recorded the statements of P.Ws.1 to 5 and others and later, he visited Thampa Village, where he examined and recorded the statements of P.Ws.6 to 9 and others. P.W.11 and one Dr.P.Anil

Kumar conducted autopsy over the dead body of the deceased and issued Ex.P-8 - post-mortem certificate opining that the death was due to cardio respiratory failure because of burns and that the percentage of burns was 90 to 95. Later, on a memo filed by P.W.15, P.W.16 recorded the statements of P.Ws.1, 2, 4, 6, 8 under Section 164 Cr.P.C. On 30.05.2005, at 5.00 pm., P.W.15 arrested the accused at Dhanupuram junction and sent them for remand. After completion of the investigation and collecting the required documents, the Sub-Divisional Police Officer, Palakonda verified the investigation done by P.Ws.15 and 16 and filed the charge sheet.

5. As the plea of the accused is one of denial, they were subjected to trial, during which, the prosecution examined P.Ws.1 to 16, marked Exs.P-1 to P.W.-29 and produced M.Os.1 to 7. On behalf of the defence, though no oral evidence was adduced, Exs.D-1 to D-3 were marked. On appreciation of the oral and documentary evidence, the Court below has disposed of the sessions case in the manner as stated above.

6. At the hearing, Mr.G.Vijayasaradhi, learned counsel representing Mr.Y.Kanakalingeswara Rao, learned counsel for accused Nos.1 and 2 – appellants in Criminal Appeal No.71 of 2011, has advanced the following submissions:

- (i) That the Court below has committed a serious error in accepting the evidence of P.Ws.1 and 2 on the alleged dowry harassment, ignoring the various omissions in their evidence as spoken to by themselves in their cross-examination and also by P.W.16 – the investigation officer;

- (ii) The fact that the burns were to the extent of 90 to 95% would probablise that the deceased was unconscious and that P.W.9 also testified that the deceased was not conscious and that therefore, it throws serious amount of suspicion on the credibility of Exs.P-12 and P-13;
- (iii) From the evidence of P.W.2, it is evident that she and her husband P.W.1, were in constant touch with the deceased and that therefore, even if the deceased was in conscious state of mind and gave her statements as in Exs.P-12 and P-13, the same were on account of heavy tutoring;
- (iv) P.W.6, who extinguished the flames, did not speak about the deceased revealing the manner in which the incident has taken place, but the prosecution has come out with a completely artificial version in this regard and that except the interested testimony of P.Ws.1 and 2, there was no other evidence to show that accused Nos.1 and 2 subjected the deceased to dowry harassment;
- (v) In view of the inherent contradictions on the material aspects between Exs.P-12 and P-13 and in the absence of any corroborative evidence, it is not safe to rely upon either of these two dying declarations; and
- (vi) No independent witness examined by the prosecution has corroborated the evidence of P.Ws.1 and 2 as to the manner in which the deceased died and that therefore, in the absence of such corroborative evidence, it is not safe to convict accused Nos.1 and 2 for any of the offences for which they have been charged.

7. The learned Public Prosecutor (AP) appearing for the State, while strenuously opposing the above submissions, has submitted that though P.Ws.1 and 2 did not speak about the dowry harassment before the Police during the investigation, as their version sounds natural, the Court below has rightly believed the same. As regards the dying declarations, he has submitted that there was no reason for the deceased to falsely implicate her own mother-in-law and husband especially, in contemplation of death and that the variation in her versions between Exs.P-12 and P-13 not being very material, those dying declarations cannot be discarded. As regards the acquittal of accused No.3, the learned Public Prosecutor has argued that since both Exs.P-12 and P-13 referred to the presence and participation of accused No.3 in the commission of the offence as he shared the common intention with accused Nos.1 and 2, the Court below has wrongly acquitted him.

8. We have carefully considered the submissions of the learned counsel for both the parties with reference to the evidence on record.

9. The motive as set up by the prosecution for the accused to kill the deceased was that the latter failed to meet their demand for additional dowry. No doubt, P.Ws.1 and 2 have made a copious narration of how accused Nos.1 and 2 were demanding cash and gold/silver articles from time to time and how they had harassed the deceased in connection therewith. When the version of these witnesses was considered in isolation, there is a possibility of the Court getting swayed away by the same. Indeed, this is what happened with the Court below. But, if we carefully read the cross-examination of these witnesses, the real picture would emerge.

10. As regards the alleged payment of Rs.1,00,000/- dowry at the time of marriage of the deceased, P.W.1 stated that he was earning daily wage at the rate of Rs.230/- per day in a Jute Mill at Kolkata; that he possessed S.B.I. bank account in Chandanagar Bank, Hugli and also post office account; that he paid Rs.1,00,000/- towards dowry in three instalments; that the first instalment of Rs.30,000/- was paid in his house at Peddakota Village; that about 15 to 20 days prior to the marriage, the second instalment of Rs.30,000/- was paid in a cloth shop, while purchasing the wedding cloths and that the last instalment of Rs.40,000/- was paid at the time of the marriage at Pandal. He further stated that he withdrew Rs.1,00,000/- from his post office account in a piecemeal manner for dowry, prior to the marriage. He, however, did not produce the passbook relating to the post office account though he claimed that he will produce the same. P.W.16 – the investigation officer, in his cross-examination admitted that P.W.1 did not state before him that he gave dowry to accused No.2. The only witness, who tried to lend corroboration to P.W.1 with regard to the payment of dowry is P.W.9, who deposed in his chief-examination that at the time of marriage of accused No.2 with the deceased, a sum of Rs.1,00,000/- was paid towards dowry, besides giving five tulas of gold and one television. In his cross-examination, P.W.9 deposed that at no point of time, he saw accused Nos.1 to 3 except on the day of the marriage; that he has also not visited the house of accused Nos.1 to 3 at any point of time and that at the marriage venue, he heard the purohit announcing payment of Rs.1,00,000/- and gifting of gold towards dowry.

11. As P.W.1 failed to produce any evidence regarding his withdrawal of Rs.1,00,000/- from his post office account and the mediators, if any, in

whose presence the said amount was paid towards dowry, his oral assertion in the absence of any corroboration could not be given any credibility. P.W.9 appears to be a chance witness, who, on his own showing, had no acquaintance, whatsoever, with the family of the accused. Therefore, his evidence has no probative value on this aspect.

12. As regards the version of P.Ws.1 and 2 as to how accused Nos. 1 and 2 used to harass the deceased for additional dowry, in his cross-examination, P.W.1 categorically stated that in their Kapu community, bridegroom has to bear the marriage expenses; that his wife did not pay any dowry to him since her family did not have the financial capacity and that his in-laws gifted one gold ring to his elder issue and one silver chain to his younger issue on their respective barasala functions, though he had not demanded. He further deposed that similarly, accused No.2, at no point of time, demanded to adorn gold or silver ornaments to his newly born child nor demanded to gift any valuables to him on the eve of barasala function. This admission on his part would completely negate his entire version spoken to in his chief-examination about the demands made by accused Nos.1 and 2 for presentation of valuable gifts or money. The only allegation regarding the harassment to the deceased by accused Nos.1 and 2 spoken to by P.W.1 during his cross-examination was that when they attended the barasala function, the accused were unhappy on seeing the gold ring presented by them to the child by stating that the same is insufficient and that altercation ensued for that reason. P.W.1 admitted in his cross-examination that he did not state before the Police or the Mandal Revenue Officer or the learned Magistrate that accused Nos.1 and 2 beat and abused the deceased demanding cash and gold to meet their

agricultural expenses; that accused No.2 used to beat and abuse the deceased, particularly at the instigation of accused No.1; that he came to know about the said fact from the deceased through phone when he was at Kolkata and that on receipt of the said information, he came to Thampa village and enquired with the deceased, who, in turn, confirmed the said information. He further admitted that he did not state before the aforementioned officials specifically that he paid cash of Rs.4,000/- to accused Nos.1 and 2 and that he did not remember whether he stated or not before the said officials that he left to Kolkata requesting accused Nos.1 and 2 to look-after the deceased well. He also admitted that he did not state before the aforementioned officials that the accused did not respond to their phone calls to take back the deceased to their house with newly born child till it attained the age of eleven months; and that on receipt of telephone call from accused No.2 that he will send his people to take back the deceased with newly born child on 11.05.2005, immediately, he purchased silver waist chain and anklets, one gold chain and two gold rings and handed them over to his wife, who, in turn, reached his native village to drop the deceased with the newly born child adorning the above articles etc., In his further cross-examination, P.W.1 stated that he cannot say in which month, he paid Rs.4,000/- to the accused for their agricultural expenses and that as per his memory, he paid the said amount after the paddy crop plantation and at the time of sprinkling urea.

13. P.W.16 – the investigation officer, admitted in his cross-examination that P.W.1 did not state before him that the deceased informed him through phone that accused Nos.1 and 2 used to beat and abuse her demanding cash and gold to meet their agricultural expenses;

that accused No.2 used to beat and abuse her at the instigation of accused No.1; that about his (P.W.1's) mother calling him (P.W.1) by phone and informing that accused Nos.1 and 2 were beating the deceased; that about P.W.1 asking his mother to bring accused No.2 and the deceased to Kolkata to pacify the matter; that accused Nos.1 and 3 hanged a rope to the roof of their thatched house and by showing it they threatened the deceased that she will be hanged to the said rope and that about his (P.W.1) telephoning P.W.2 and asking her to bring back the deceased immediately stating that the deceased was threatened by accused Nos.1 and 3 to be hanged. P.W.16 further admitted that P.W.1 did not state before him that P.W.1 invited the accused and their relatives to barasala function; about accused Nos.1 and 2 and others attending the said function and about their leaving the house without even taking water on the ground that no gold ornaments were adorned to the child. He also referred to the various omissions in the evidence of P.Ws.1 and 2, especially, P.W.2 not stating before him about the deceased telling her that accused No.1 was insisting for silver articles for puja and P.W.1 purchasing the said articles and handing them over to the deceased; about the deceased informing her through phone that at the instigation of accused No.1, accused No.2 beating her demanding gold necklace; about P.W.1 giving instructions to her and on that, she along with P.W.4 going to Thampa village and enquiring the deceased and getting confirmation of the demand; about P.W.1 informing her through telephone that accused Nos.2 and 3 tried to kill the deceased by tying a rope to roof of their thatched house; about P.W.1 informing her through phone that the deceased was not in a good condition and asking her to bring her to the native place of the deceased without waiting for auspicious day; about

P.W.2 offering sweets to accused No.1; about accused No.1 sarcastically replying that the articles presented at the time of the marriage were sufficient enough and about P.W.2 leaving the sweets at the house of the accused and about the accused returning them later. P.W.16 also admitted that P.W.2 did not state before him about accused Nos.1 and 2 attending to barasala function and stating that gold chain was not adorned to the child and leaving the house; about P.W.1 purchasing silver waist chain and anklets, one gold chain, two gold rings and handing them over to P.W.2; about P.W.2 taking all of them along with the deceased and baby and leaving them at the house of the accused; about deceased trying to keep the dresses and articles in the almyrah and about P.W.1 calling P.W.2 through phone and informing that the deceased told through phone that accused Nos.1 and 2 were demanding cow and gold necklace etc.

14. The above noted innumerable omissions as spoken to by P.W.16 would clinchingly establish that P.Ws.1 and 2 have come out with an improved version before the Court in order to show the death as dowry death. No independent witness corroborated the evidence of P.Ws.1 and 2 in this regard. In our opinion, the Court below got carried away by the elaborate narration made by P.Ws.1 and 2 in their chief examination on the alleged demands made by accused Nos.1 and 2 and the efforts of P.W.1 to partially meet those demands. The version of P.Ws.1 and 2 regarding the payment of dowry to accused No.2 and the demand for additional dowry by accused Nos.1 and 2 being in the teeth of various admissions and omissions as noted above, cannot be given any credence, whatsoever, in the absence of any witness corroborating their testimony. On a careful perusal of the entire evidence on record, we have no

hesitation to hold that the prosecution miserably failed to prove that accused Nos.1 and 2 subjected the deceased to dowry harassment.

15. As regards the issue as to whether accused Nos.1 and 2 are guilty of causing the death of the deceased, the whole case of the prosecution is based on the circumstantial evidence, apart from Exs.P-12 and P-13. The learned Public Prosecutor has fairly admitted that no independent witness has supported the case of the prosecution. However, he has placed heavy reliance on Exs.P-12 and P-13 – dying declarations.

16. The alleged incident occurred on 26.05.2005, at about 7.30 a.m. Soon thereafter, accused No.2 took the deceased to the Government Hospital at 10.30 a.m. The statements of the deceased were marked as Exs.P-12 and P-13. The endorsement relating to the consciousness of the deceased as certified by the Doctors on Exs.P-12 and P-13 was marked as Exs.P-11 and 7 respectively. More than 51 hours after Ex.P-13 was recorded by P.W.15 - the Sub-Inspector of Police, Ex.P-12 was recorded by P.W.14 - the Magistrate and at 11.30 p.m. and on the same night on which Ex.P-12 was recorded, the deceased was declared dead.

17. The learned counsel for accused Nos.1 and 2 has strenuously submitted that the post mortem certificate revealed that the percentage of the burns was 90 to 95 and that therefore, there was no possibility of the deceased being conscious while giving her statements as in Exs.P-12 and P-13. He has further submitted that the fact that the toe impression of the deceased was allegedly taken on Ex.P-12 itself would show the serious nature of the burns, leaving no possibility for the deceased to make a statement. Alternatively, he has submitted that both Exs.P-12 and P-13 are the result of heavy tutoring by P.Ws.1 and 2 and therefore, they suffer from inherent contradictions.

18. The learned Public Prosecutor has seriously opposed the above submissions and has stated that P.W.11 certified that the patient was conscious while recording Ex.P-13 statement; that P.W.13 certified that the patient was conscious and was in a fit condition to give statement during recording of Ex.P-12 and that therefore, the fit state of mind of the deceased making statements in Exs.P-12 and P-13 cannot be doubted. He has further argued that there are no material contradictions though there is a slight variation in the two versions of the deceased as reflected in Exs.P-12 and P-13, which does not constitute material variation and that therefore, there is no reason to discard Exs.P-12 and P13 statements. In support of his submissions, the learned Public Prosecutor has relied upon the judgments of the Supreme Court in Raju Devade vs. State of Maharashtra¹ and Sandeep vs. State of Haryana².

19. As regards the fit state of mind of the deceased for giving Exs.P-12 and P-13 statements, the learned counsel for accused Nos.1 and 2 has placed heavy reliance on the evidence of P.W.9, who in his cross-examination, admitted that by the time, he visited the hospital, the Doctor was not present and the patient was not conscious. The learned counsel has also submitted that there is no possibility of the patient suffering 90 to 95% burns to be conscious. The learned counsel, however, has not placed any medical literature, such as standard medical book in support of this submission. In the absence of such material and expert's evidence, it would be hazardous to make a guess, whether a person with more than 90% of burns would be conscious or not.

20. P.W.11, the Doctor, in her evidence, categorically deposed that P.W.15 recorded Ex.P-13 statement of the deceased in her presence; that

¹ (2016) 11 SCC 673

² (2015) 11 SCC 154

she certified that the patient was conscious and coherent while recording the statement and that she made Ex.P-7 endorsement to that effect in Ex.P-13 and identified her signature underneath the said endorsement. In her cross-examination, she stated that generally in burn cases, administration of sedatives will depend on the severity of burns and that generally, 30 mg Fortwin or other sedatives will be administered minimum twice during 24 hours. She denied the suggestion that generally, each dose of Fortwin or other sedatives keeps the patient in sedation for seven to eight hours. She, however, admitted that during the period of sedation, the patient will be in semi-conscious condition. No specific suggestion was put to this witness as to whether there was no possibility of the patient with 90 to 95% burns, being in conscious or fit state to make a statement. P.W.13 - the Doctor, also certified the fit state of mind of the deceased to make Ex.P-12 statement through Ex.P-11 endorsement made after completion of recording the said dying declaration. He admitted that consciousness of the patient is different from fit state of mind and that even if a patient is conscious, he/she may not be in a position to give statement. Nothing could be elicited from these two witnesses, which throw a doubt on the fit state of mind of the deceased to make Exs.P-12 and 13 statements.

21. We must, therefore, proceed on the premise that the deceased was in a fit state of mind to make Exs.P-12 and P-13 statements and consider the contents of these documents.

In Ex.P-13, the earliest statement of the deceased, shorn of avoidable details, the deceased stated that on 26.05.2005 at about 7.30 a.m., after she finished all her works, she requested accused No.1 to handover her child to her for feeding milk to the baby; that thereupon,

accused No.1 sarcastically asked her whether she wants to feed the baby with milk and that it could be possible only if she could bring cow from her parental house; that the deceased replied that she will buy milk; that accused No.1 sent the baby with her husband outside the house and accused Nos.2 and 3 closed the doors and caught hold of the deceased; that accused No.1 poured kerosene on her and lit fire; that as the deceased was suffering burns, she raised cries and four or five persons came and putout the flames; that one Venkata Rao was one among those persons, who arrived and putout flames and that she could not recognize who the other people were. She also stated that during the time she was being taken to the hospital in auto, accused No.2 warned her to inform everyone that she received burns due to gas blast. She also stated that her father-in-law was looking after her well, while accused Nos.1 to 3 used to harass her on the ground that she was not bringing additional dowry and accordingly, they have burnt her.

In Ex.P-12, the later statement, it is stated by the deceased that two days back, she informed her husband (accused No.2) that milk is not available for feeding her child; that thereupon, accused No.2 shouted at her as to why she has been raising dispute for everything and asked her mother to bring kerosene; that when she was trying to run, accused No.2 asked accused No.3 to close the doors; that when accused No.3 was closing the doors, the deceased was running behind him shouting to stop closing the doors; that thereupon, all the accused closed her mouth; that accused No.3 caught hold of the hands of the deceased and stopped her; that her mother-in-law – accused No.1 poured kerosene and her husband - accused No.2 lit fire with a match stick and threw the same on her and when she was burning, all the accused were laughing aloud and after

waiting till she was half burnt, they escaped from the place and went outside; that she begged them to save her and not to kill her; that thereupon, the accused replied that they will get rid of herself and her nagging every day by saying that the child does not have milk and that accused No.2 stated that if she is killed, nobody can do anything to him, and that however, accused No.2 himself brought her to the hospital by auto. She reiterated what she stated in Ex.P-13 that accused No.2 instructed her to inform everyone that she got burns because of explosion of gas and he threatened that if she does not state the same, he will kill her in the auto itself. She further stated that P.W.1 gave dowry of Rs.1,00,000/- and presented five tulas of gold at the time of marriage; that accused No.1 was not permitting her to watch television and was not even giving soap for taking bath and was not allowing her to feed her baby with milk and they harassed her a lot. She, however, stated that her father-in-law is a very good man and he is innocent.

22. On a perusal of both these statements, we find certain things which are missing in each other. While broadly, her statements revealed the harassment by the accused, additions or omissions in both the statements may not be very much relevant. However, these two statements suffer from a serious variation regarding the overt-acts. In Ex.P-13, the deceased was categorical in stating that it is accused No.1, who not only poured kerosene but also lit fire. When it comes to Ex.P-12, the deceased changed her version as per which, accused No.1 poured kerosene and accused No.2 lit fire with a match stick and threw it on her. The learned Public Prosecutor has sought to play down this variation as not being very much material. However, we are unable to view this variation as minor or insignificant as the variation pertains to the role played by each of the

accused. Being not only the victim but also the direct witness as to the manner in which she suffered the attack, the deceased, who as per the prosecution version was in a fit state of mind to make her statements, is expected to give the accurate details regarding the role played by each of the accused. Pouring kerosene and lighting and throwing a match stick being the two most crucial acts of the commission of the offence, the deceased is not expected to come out with varied versions. Interestingly, the Court below framed charge No.4 based on Ex.P-13 and the said charge reads as under:

“Fourthly: That you the above named Accused Nos.1 to 3, on the 26th day of May, 2005, at about 7-30 a.m., at your house in Thampa village in furtherance of your common intention, committed murder of Drakshayani @ Madhavi the wife of A.2 among you, by intentionally and knowingly causing her death, to wit: confined the said Drakshayani @ Madhavi in a room of your house, by bolting the doors and A.1 among you poured kerosene on the person of Drakshayani @ Madhavi while A.2 and A.3 of you caught hold of her tightly and restricted her movements and then A.1 among you lit fire to the said Drakshayani @ Madhavi due to which she suffered severe burn injuries and subsequently, succumbed to those burn injuries while undergoing treatment in the Community Health Centre, Pathapatnam; and you A.1 to A.3, thereby committed an offence punishable under Section 302 of the Indian Penal Code read with Section 34 of the Indian Penal Code and within the cognizance of this Court of Session;”

This necessarily means that the version spoken to by the deceased in Ex.P-12 has not been considered by the Court below when the charges were framed by it.

23. Under the criminal jurisprudence, the dying declaration is treated as an exception to the hearsay evidence and the same is based on the legal maxim “*nemo moriturus praesumitur mentire*”, which means, a man will not meet his Maker with a lie on his lip. This doctrine constitutes the

underlying principle of Section 32 of the Indian Evidence Act, 1872. However, as the dying declarations suffer from inherent weaknesses, such as the same being not made on oath nor in the presence of the accused nor it could be tested by the cross-examination, the law has been laid down that while scrutinizing the dying declarations meticulous circumspection is called for. While dealing with this aspect, in *Dandu Lakshmi Reddy vs. State of A.P.*³, the Supreme Court observed that a dying declaration must be sieved through the judicial cullender and if it passes through gauzes it can be made the basis of a conviction, otherwise not. In that case the Supreme Court has adopted two tests in order to satisfy the judicial conscience that the dying declaration contains nothing but truth; first test is to scrutinise whether there are inherent improbabilities in the version and the next test is whether there are any inherent contradictions therein. While, dealing with the multiple dying declarations, the Supreme Court in *Sandeep vs. State of Haryana*⁴ observed that incompatibility or inconsistency between two dying declarations can be said to arise if the assertions in one dying declaration are so diametrically opposed to statements in the other version, both cannot stand together. Dealing with the said aspect, in *Lakhan vs. State of M.P.*⁵, the Supreme Court held as under:

“A dying declaration recorded by a competent Magistrate would stand on a much higher footing than the declaration recorded by officer of lower rank, for the reason that the competent Magistrate has no axe to grind against the person named in the dying declaration of the victim, however, circumstances showing anything to the contrary should not be there in the facts of the case. (vide [Ravi Chander & Ors. v. State](#)

³ AIR 1999 SC 3255

⁴ (2015) 11 SCC 154

⁵ (2010) 8 SCC 514 = (2010) 3 SCC (Cri) 942

[of Punjab](#), (1998) 9 SCC 303; [Harjit Kaur v. State of Punjab](#), (1999) 6 SCC 545; [Koli Chunilal Savji & Anr. v. State of Gujarat](#), (1999) 9 SCC 562; and [Vikas & Ors. v. State of Maharashtra](#), (2008) 2 SCC 516.)”

...

In view of the above, the law on the issue of dying declaration can be summarized to the effect that in case, the Court comes to the conclusion that the dying declaration is true and reliable, has been recorded by a person at a time when the deceased was fit physically and mentally to make the declaration and it has not been made under any tutoring/duress/prompting; it can be the sole basis for recording conviction. In such an eventuality no corroboration is required. In case, there are multiple dying declarations and there are inconsistencies between them, generally, the dying declaration recorded by the higher officer like a Magistrate can be relied upon, provided that there is no circumstance giving rise to any suspicion about its truthfulness. In case, there are circumstances wherein the declaration had been made, not voluntarily and even otherwise, it is not supported by the other evidence, the Court has to scrutinize the facts of an individual case very carefully and take a decision as to which of the declarations is worth reliance.”

In *Tapinder Singh vs. State of Punjab*⁶, the Supreme Court observed as under:

“The dying declaration is a statement by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death and it becomes relevant under S. 32(1) of the Indian Evidence Act in a case in which the cause of that person's death comes into question. It is true that a dying declaration is not a deposition in court and it is neither made on oath nor in the presence of the accused. It is, therefore, not tested by cross-examination on behalf of the accused. But a dying declaration is admitted in evidence by way of an exception to the general rule against the admissibility of hearsay evidence, on the principle of necessity. The weak points of a dying declaration just mentioned merely serve to put the court on its guard while testing

⁶ AIR 1970 SC 1566 = (1971) 1 SCR 599 = 1970 Cri LJ 1415

its reliability, by imposing on it an obligation to closely scrutinise all the relevant attendant circumstances.”

In *Shudhakar vs. State of M.P.*⁷, the Supreme Court framed the following question for consideration:

“An important question of criminal jurisprudence as to in a case of multiple variable dying declarations, which of the dying declaration(s) would be taken into consideration by the Court, what principles shall guide the judicial discretion of the Court or whether such contradictory dying declarations would unexceptionally result in prejudice to the case of the prosecution, arises in the present case.”

The Supreme Court answered the question, as framed above, as under:

“Having referred to the law relating to dying declaration, now we may examine the issue that in cases involving multiple dying declarations made by the deceased, which of the various dying declarations should be believed by the Court and what are the principles governing such determination. This becomes important where the multiple dying declarations made by the deceased are either contradictory or are at variance with each other to a large extent. The test of common prudence would be to first examine which of the dying declarations is corroborated by other prosecution evidence. Further, the attendant circumstances, the condition of the deceased at the relevant time, the medical evidence, the voluntariness and genuineness of the statement made by the deceased, physical and mental fitness of the deceased and possibility of the deceased being tutored are some of the factors which would guide the exercise of judicial discretion by the Court in such matters.”

24. When we examine the two dying declarations bearing in mind the legal position emerging from the above discussed case law, both Exs.P-12 and P-13 were properly recorded, one by a Police Officer and another by a judicial Magistrate and duly certified by P.Ws.11 and 13 respectively.

⁷

(2012) 7 SCC 569 = (2012) 3 SCC (Cri) 430

Therefore, there is not much to distinguish between the two dying declarations merely because one of them is recorded by a judicial officer. If we are to give higher credibility to Ex.P-12 – the dying declaration recorded by the judicial officer, that will negate charge No.4 framed by the Court below. In these facts and circumstances, it is not possible to follow the course as suggested in Lakhan (6 supra). The only other option available to evaluate the two dying declarations is to consider which of the two versions of the deceased is supported by any other corresponding evidence as laid down in Shudhakar (7 supra). The alleged occurrence has taken place inside the house. There were no direct witnesses to the alleged occurrence. According to the version of the deceased in Ex.P-13, the dying declaration recorded by P.W.15 – the Police Officer, one Venkat Rao and three or four others rushed to their house on hearing her cries and putout the flames. P.W.6 was stated to be one of the persons who extinguished the flames. He deposed that in the morning on the date of occurrence at about 7.00 a.m., while he was going to his fields, he observed flames coming out from the backyard of the house of the accused; that he along with L.Ws.10 and 12 – Mamidi Ramakrishnarao and Kovagapu Govindarao @ Gopi rushed there and observed the deceased in flames and that all of them putout the flames by covering the deceased with gunny bags and towels and he had left the scene. He further deposed that later, he came to know that the deceased was taken to the hospital and died there. In the cross-examination, he stated that he does not know whether the accused rushed to the scene immediately after the deceased caught the flames as he left the place. Thus, apart from the two dying declarations, no other evidence was available before the Court proving the involvement of the accused.

No witness spoke about the presence of the accused when the deceased caught fire. Accordingly, both the dying declarations remained uncorroborated by any other evidence produced by the prosecution.

25. The stand taken by the defence as reflected from the cross-examination of the prosecution witnesses and also from the statements of the accused under Section 313 Cr.P.C. is that the accused are away in the fields when the incident occurred. The following circumstances would probablise this theory of the defence: (i) No witness has spoken about the presence of the accused at the scene of offence when the occurrence has taken place; (ii) None of the three accused suffered any burns as ordinarily, if a person is set on fire, there is a possibility of the victim trying to catch hold of the persons available nearby in the process of looking for a help in his/her bid to save himself/herself. So also in the process of setting fire by pouring fuel, there is a possibility of the offenders also catching fire; and (iii) Had the accused set fire to the deceased, the probability of accused No.2 taking her to the hospital is very remote because the offenders would be generally overcome by the feeling of guilt and fear of being caught and hence, they would not have the courage and the mental stability to take the victim to the hospital.

26. The above noted factors, in our opinion, weigh in favour of the innocence of the accused despite the two dying declarations of the victim. We are, therefore, of the opinion that it is not safe to hold the accused guilty of causing the murder of the deceased solely based on Exs.P-12 and P-13. If we discard these documents, there is no other evidence based on which the accused can be found guilty.

27. In the light of the above discussion, we are of the opinion that the Court below has wrongly convicted accused Nos.1 and 2/appellant Nos. 1 and 2 in Crl.A.No.71 of 2011 for the offence under Section 302 I.P.C. and also under Sections 4 and 6 of the Dowry Prohibition Act, 1961.

28. Coming to the charge for the offence under Section 498-A I.P.C., if the husband or his relatives subject a woman to cruelty, they are said to have committed the offence under said provision. Under Clause (a) to the explanation thereof, any wilful conduct, which is of such nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life (whether mental or physical) of the woman constitutes cruelty. It is manifest from this provision that if by the conduct of a person, he/she causes grave mental agony/injury, he/she is liable to be punished under Section 498-A I.P.C. Though the prosecution failed to prove that the accused have subjected the deceased to dowry harassment, the evidence of P.Ws.1 and 2 considered in its broad perspective suggests that accused Nos.1 and 2 in general and accused No.1 in particular, subjected the deceased to harassment. P.W.3, the independent witness, also deposed that three or four days prior to the death of the deceased, P.Ws.1 and 2 approached him and informed that the accused were causing inconvenience to the deceased. In our opinion, the prosecution was able to succeed in proving that accused Nos.1 and 2 subjected the deceased to mental harassment, which constitutes cruelty within the meaning of Clause (a) of the explanation to Section 498-A I.P.C. Therefore, the Court below has rightly convicted accused Nos. 1 and 2 for the said offence and sentenced them appropriately, while acquitting accused No.3 thereof as there was no specific evidence proving his committing the said offence.

29. For the aforementioned reasons, the judgment of the Court below is set aside except to the extent of the charge under Section 498-A I.P.C. The conviction and sentencing of accused Nos.1 and 2/appellant Nos. 1 and 2 in Crl.A.No.71 of 2011, in respect of all the charges, other than Section 498-A I.P.C. are, accordingly, set aside. The fine amount in respect of all offences other than Section 498-A I.P.C., if any, paid by accused Nos.1 and 2 shall be refunded to them. Accused Nos.1 and 2, who are on bail, shall surrender themselves before the Superintendent, Central Prison, Visakhapatnam, for completing the formalities for their formal release.

30. Having regard to the aforementioned conclusions, we do not find any merit in Crl.A.No.13 of 2013 filed by the State.

31. Accordingly, Crl.A.No.71 of 2011 is partly allowed and Crl.A.No.13 of 2013 is dismissed.



C.V.NAGARJUNA REDDY, J

J.UMA DEVI, J

26th July, 2017

Note:

L.R. copies to be marked.

(B/o)
GHN