

**THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE DR. JUSTICE SHAMEEM AKTHER**

CRIMINAL APPEAL NO.189 OF 2011

J U D G M E N T

(Per Hon'ble Sri Justice Sanjay Kumar)

By judgment dated 09.02.2011, the learned IV Additional Sessions Judge, Kakinada, convicted the sole accused in Sessions Case No.231 of 2009 under Section 302 IPC and sentenced him to undergo life imprisonment apart from paying a fine of Rs.100/-, in default of which he was to undergo simple imprisonment for one month. Aggrieved thereby, the accused is in appeal.

By interim order dated 19.12.2016, following the guidelines formulated in **BATCHU RANGARAO V/s. THE STATE OF ANDHRA PRADESH¹**, this Court granted bail to the appellant/accused.

The case of the prosecution was as under: Mangadevi, Sub-Inspector of Police, Gollapalem Police Station (L.W.17), received intimation on 03.09.2008 from the Government General Hospital, Kakinada, that the deceased had been admitted with burns. She thereupon went there and recorded the statement of the deceased (Ex.P17). She then registered a case in Crime No.63 of 2008 on the file of Gollapalem Police Station under Sections 498-A and 307 IPC. Ex.P16 is the FIR. She also recorded the statements of the mother of the deceased (P.W.1), the cousin of the deceased (P.W.2) and the brother of the accused (P.W.3). On 04.09.2008, she secured mediators, viz., P.W.9 and Janipalli Bhimudu (L.W.12), and proceeded to the scene of the offence, the house of the deceased and the accused at Dhanalaxmipeta, Gollapalem Village. In the presence

¹ 2016(3) ALT 505 (DB) (AP)

of the said mediators, she prepared Ex.P10 scene observation report and seized a burnt piece of saree with green and red design, a bottle with a little quantity of kerosene, an empty bottle, a match box and a burnt green and red coloured saree piece (M.Os.1 to 5). These case properties were seized from the kitchen shed near the house. She prepared two rough sketches (Exs.P18 and P19). She then secured the presence of Bommidi Somalamma (L.W.4), Bommidi Dhana Laxmi (L.W.5), P.W.4, P.W.5 and P.W.8 and recorded their statements. On 06.09.2008, after receiving a copy of the dying declaration (Ex.P14) recorded by the IV Additional Judicial Magistrate of First Class, Kakinada (P.W.10), she again visited the Government General Hospital, Kakinada, and recorded the statement of the deceased. Thereafter, she received information under Ex.P22 report, submitted by P.W.1, that the deceased was no more and altered the provision of law to Section 302 IPC on 30.10.2008. Thereupon, the Inspector of Police, Kakinada Rural (P.W.12), took up investigation. He verified the investigation done by Mangadevi, Sub-Inspector (L.W.17), and found it to be on correct lines. He visited Dhanalaxmipeta of Gollapalem Village on 31.10.2008 and secured the presence of panchayatdars, P.W.9, Janipalli Bhimudu (L.W.12) and Palivela Satyam (L.W.13), and in their presence, he conducted an inquest over the body of the deceased at the house of the accused from 9.00 AM to 11.30 AM. He then examined P.Ws.1 to 8, Bommidi Somalamma (L.W.4) and Bommidi Dhana Laxmi (L.W.5), but did not record their statements as Mangadevi, Sub-Inspector (L.W.17), had already done so. He then sent the body of the deceased for post-mortem examination to the Government General Hospital, Kakinada, on the same day. On 03.11.2008, he secured the presence of mediators and

arrested the accused at his house at 11.50 AM. He also recorded his confessional statement. A portion thereof is Ex.P12. After receipt of the post-mortem report (Ex.P15) and upon completion of the investigation, he laid a charge-sheet against the accused.

Thereupon, the Sessions Court framed two charges against the accused to the effect that he had, on 02.09.2008 at about 9.30 PM, in his house at Gollapalem, committed murder of his wife, Bommididi Saraswati alias Mariyamma, by pouring kerosene and setting fire to her with a match stick, thereby committing an offence punishable under Section 302 IPC and that prior to 02.09.2008, being her husband, he had subjected her to cruelty, thereby committing an offence punishable under Section 498-A IPC.

The accused denied the charges and claimed to be tried.

The prosecution examined 12 witnesses before the Sessions Court and marked in evidence 22 exhibits. Case properties were marked as M.Os.1 to 5. The accused did not choose to lead any evidence, oral or documentary.

P.W.1, the mother of the accused, stated that her husband was no more and that the deceased was their only daughter. She stated that she performed the marriage of the deceased with the accused about ten years back. The accused was stated to have deserted his first wife and married the deceased. They had three sons and resided at Gollapalem Village. The accused was a coolie. According to her, he used to look after the deceased well and there were no differences between them. She deposed that her daughter had died two years back and that her daughter's neighbour telephoned and informed her that she had poured kerosene and set fire to herself. She stated that on the next day morning, she rushed to Gollapalem and found her

daughter with burn injuries at her house. She claimed that she went to Gollapalem with P.W.2 and nine others of her village. They then shifted her daughter to Government Hospital, Kakinada, in an ambulance where she underwent treatment for two months and died while doing so. She stated that she did not enquire from her daughter and she did not inform her as to who had poured kerosene and why she set fire to herself. She stated that she did not know anything about the offence and she did not lodge a police complaint after the death of her daughter. At that stage, she was declared hostile and cross-examined by the prosecution. Thereupon, she said that she did not inform the police as in Ex.P1, that due to harassment and ill-treatment by the accused, her daughter had poured some kerosene on herself and that the accused then stated that he would kill her and so saying, poured more kerosene over her and set her on fire. She said that the case was compromised and that the children were with the accused. She denied that she had stated during the inquest that the accused poured kerosene and lit fire. She further denied the suggestion that due to the compromise, she was deposing falsely. In her cross-examination by the defence, she stated that by the date of the offence, the health of the deceased was not good and she did not know what she was doing sometimes.

P.W.2, P.W.1's cousin, stated that about three years back, he had seen the deceased while undergoing treatment in the Government General Hospital, Kakinada, for burn injuries. He stated that he did not know the reason for the injuries or the cause of death and that the police had not examined him. At this stage, he was declared hostile and was cross-examined by the prosecution. Thereupon, he said that he did not inform the police as in Ex.P2, that

the accused was in the habit of drinking and under its influence, he used to beat the deceased frequently and that, as she could not bear this ill-treatment in his hands, she poured a little kerosene on herself and in the meanwhile, the accused poured more kerosene and set her on fire. He said that the accused and P.W.1 had compromised, but denied that he was deposing falsely due to the compromise.

P.W.3, the younger brother of the accused, stated that the deceased had died two years back due to burn injuries. According to him, the accused and his wife were amicable. He stated that he was not present at the time of the offence and did not join the deceased in the hospital. At this stage, he was declared hostile and was cross-examined by the prosecution. He then stated that he did not inform the police as in Ex.P3, that due to ill-treatment by the accused, the deceased poured a little kerosene over herself and in the meanwhile, the accused poured more kerosene. He said that the matter was compromised before the elders but denied that he was deposing falsely as the accused was his brother and owing to the compromise.

P.W.4, a resident of Gollapalem Village, stated that she knew that the deceased had died but did not know the cause of death or how she died. She said that the police had not examined her. She was declared hostile and was subjected to cross-examination by the prosecution. She then stated that she did not inform the police as in Ex.P4, that the accused poured kerosene on the deceased and set fire to her under the influence of alcohol and that he used to ill-treat her.

P.W.5, a resident of Gollapalem Village, stated that she came to know that the deceased had died but did not know the cause of death or how she died. She stated that the police did not examine her. Upon being declared hostile, she was cross-examined by the

prosecution and denied that she had informed the police as in Ex.P5 that the accused used to beat the deceased frequently and that he poured kerosene and set fire to her.

P.W.6, who was residing with her parents at the relevant point of time, stated that she knew the accused and the deceased who resided behind her parents' house and that the deceased died about three years back due to burn injuries. She stated that she did not know the cause of death and was not in the village on the date of the alleged offence. According to her, the accused was looking after his wife well and she did not know of any differences between them. She said that the police did not examine her. Upon being declared hostile, she was cross-examined by the prosecution and stated that she did not inform the police as in Ex.P6, that there were differences between the couple; that the accused used to beat the deceased frequently and that the deceased poured a little kerosene over her body and the accused poured more kerosene and set fire to her.

P.W.7, a resident of Gollapalem, stated that he was doing embroidery work and was not practicing as a doctor. He stated that he did not provide first-aid treatment to the deceased. He further stated that the police did not examine him. Upon being declared hostile, he was cross-examined by the prosecution and stated that he did not inform the police as in Ex.P7, that he was a private doctor and that, on 02.09.2008, he went to the house of the deceased and provided first-aid to her as she had suffered burn injuries.

P.W.8, a photographer, stated that on 04.09.2008, he took three photographs of the body of the deceased at the request of the police. He confirmed that Ex.P8 was the set of three photographs and Ex.P9 were the corresponding negatives.

P.W.9, the Village Revenue Officer, Gollapalem, stated that in the presence of the police, he observed the scene of the offence on 04.09.2008 at Dhanalaxmipeta, Gollapalem Village. The scene of the offence was the house of the accused. The other mediator, Janipalli Bhimudu (L.W.12), and he were present when the police seized M.Os.1 to 5. He stated that he was the scribe of the observation report of the scene of the offence (Ex.P10). He further stated that on 31.10.2008 at about 9.00 AM, the police conducted an inquest over the body of the deceased at the Government General Hospital, Kakinada, and he along with Janipalli Bhimudu (L.W.12), Palivela Satyam (L.W.13) and Balagam Radha Krishna (L.W.14) were present. He stated that he scribed the inquest report (Ex.P11) and he along with Janipalli Bhimudu (L.W.12), Palivela Satyam (L.W.13) and Balagam Radha Krishna (L.W.14) signed it. He further stated that the police examined the relations of the deceased at the time of the inquest and it was recorded that the deceased had died due to the ill-treatment of her husband who had poured kerosene and set her on fire. He stated that on 03.11.2008, he along with Balagam Radha Krishna (L.W.14) accompanied the police to the house of the accused at Gollapalem and the police arrested the accused in their presence. He further stated that the accused confessed to the offence and he scribed the confessional statement (Ex.P12) and Balagam Radha Krishna (L.W.14) attested the same. The police obtained the thumb impression of the accused on the said statement. In his cross-examination, he denied the suggestion that he was a stock mediator for Gollapalem police and said that he might have written two or three mediators' reports for them. He accepted that M.Os.2 to 4 were available in the local market. He denied that he was deposing falsely

at the instance of the police and that Exs.P10 to P12 were written in the police station. He also denied that the thumb impression of the accused on Ex.P.12 was obtained in the police station.

P.W.10, the IV Additional Judicial Magistrate of First Class, Kakinada, stated that on 03.09.2008 at about 4.00 PM, he received intimation (Ex.P13) from the hospital to record the dying declaration of the deceased. He then proceeded to the hospital and identified the patient with the help of the duty doctor in the casualty ward. He stated that after putting formal questions to her, he satisfied himself that she was in a conscious state and was fit to give a statement. He also obtained a certificate from the duty doctor to this effect and then questioned the deceased as to her sustaining burn injuries. She informed him that when she was in the kitchen to boil milk, the accused came in a drunken state and picked up a quarrel with her and beat her and during this conversation the kerosene bottle fell on her saree, then the accused became angry and set fire to her with a match stick by taking the match box available there. She raised cries and her total saree was burnt. She stated that her husband brought the RMP (P.W.7) of the same village and got her treated. At that time, her children were playing outside the house. On being informed, her mother came to Gollapalem at about 10.00 AM on the next day and she was taken to the hospital in an ambulance. P.W.10 stated that he completed recording of the statement by 4.40 PM on 03.09.2008; that he took all precautions while recording the statement and that except the duty doctor and himself, no other was present. After reading over the contents of the statement to the deceased and upon her admitting the same to be true and correct, he obtained her signature thereon. He stated that he also obtained the necessary

fitness certificate from the duty doctor. Ex.P14 is the dying declaration. He concluded by stating that the deceased informed him that the incident took place on 02.09.2008, Tuesday, at about 10.00 PM. In his cross-examination, he stated that when he went to the hospital, the mother or other relations of the deceased were not present. He stated that the deceased did not furnish her alias name 'Mariyamma'. He admitted that he did not obtain signatures of the deceased on each page and added that pages 1 and 2 of Ex.P14 contained only proforma questions and he therefore did not obtain her signatures thereon. He denied the suggestion that the deceased was unconscious and was not in a position to give her statement and that he had recorded the same without following the procedure.

P.W.11, the Assistant Professor, Rangaraya Medical College/ Government General Hospital, Kakinada, conducted the autopsy over the body of the deceased. He spoke of the ante-mortem superficial, infected, partly healed burnt injuries present on the dead body, which he described at length. He stated that about 37% of the body surface was burnt and the burns were first degree in nature. He stated that, at places, the burnt areas had healed and at places, they were infected with unhealthy granulation tissue and pus. He confirmed that all the injuries were ante-mortem in nature and no other external or internal injuries were found. The age of the injuries was ascertained by him to be about two months prior to death. He opined that the death might have occurred due to septic and toxic conditions, as a result of Wilson's first degree burn injuries over 37% of the total body surface area. He certified that Ex.P15 was his post-mortem certificate. In his cross-examination, he denied the suggestion that the percentage of burns found would not be sufficient

to cause death. He however added that the possibility of survival could not be ruled out and that he could not say whether the deceased had died for not providing treatment.

P.W.12, the Inspector of Police, Kakinada Rural, at the relevant point of time, spoke of the various measures taken by him during the investigation. He stated that Mangadevi, Sub-Inspector of Police, Gollapalem Police Station (L.W.17), was on maternity leave. He further stated that P.Ws.1 to 7 had stated before him as in Exs.P1 to P7. In his cross-examination, he denied the suggestion that he had not arrested the accused and recorded his confessional statement. He denied the suggestion that he had not recorded the statements of neighbours. He denied the suggestion that he had filed the charge-sheet against the accused without proper investigation.

Upon consideration of the aforesaid evidence, oral and documentary, the Sessions Court acquitted the accused of the charge under Section 498-A IPC, having found absolutely no evidence of any such offence being committed. The Sessions Court however found Ex.P14 dying declaration to be reliable and convicted the accused, on the strength thereof, of the offence punishable under Section 302 IPC and sentenced him accordingly.

Sri Nageshwara Rao Pappu, learned counsel for the appellant/accused, would argue that the conviction and sentence by the Sessions Court based on Ex.P14 dying declaration is unsustainable in law as this was a case of multiple dying declarations and one such declaration was not even produced before the Court. He would state that there were contradictions between Ex.P14 dying declaration and Ex.P17 dying declaration recorded by Mangadevi, Sub-Inspector of Police, Gollapalem Police Station (L.W.17). Learned counsel would

further submit that this was not a case falling under Section 302 IPC as the death of the deceased was due to the infection which set in thereafter owing to proper treatment not being given to her. He would therefore contend in the alternative that the conviction and sentence be altered keeping this aspect in mind.

At the outset, it may be noted that all the crucial witnesses examined by the prosecution turned hostile, including the mother of the deceased, the *de facto* complainant. This is however of no real significance in the light of the dying declarations of the deceased. In this regard, it may be noticed that Mangadevi, Sub-Inspector of Police, Gollapalem Police Station (L.W.17), recorded the statement of the deceased at 7.30 PM on 03.09.2008 and the learned IV Additional Judicial Magistrate of First Class, Kakinada (P.W.10), recorded her dying declaration (Ex.P14) at 4.00 PM on the said date. Ex.P.14 reflects that the Magistrate followed the due procedure by obtaining a certificate from the duty doctor that the deceased was conscious and in a fit state of mind to give a statement. He also put questions to her to know her state of mind. He then asked her as to what had happened. The crucial part of her statement was that on the previous night at about 10.00 PM, while she was boiling milk in the kitchen, the accused came home in a drunken state and having found that she had not cooked a meal, he hit her. At that stage, the kerosene bottle which was in front of her fell upon her saree and in a fit of anger the accused picked up the match box which was available there and threw the lit match stick upon her. Immediately, her saree caught fire and her body got burnt. Her husband then put off the flames and brought P.W.7 from the village to treat her. However, in the statement recorded by Mangadevi, Sub-Inspector of Police,

Gollapalem Police Station (L.W.17), at 7.30 PM on the same day, her version was slightly different. She stated that her husband used to hit her without reason and that, on the previous day evening, she had washed and cleaned all the rooms in the house. While so, at around 9.30 PM, her husband came home in a drunken state, scolded and hit her for not having started cooking the meal. As he used to hit her without reason time and again, she called her mother from a phone booth and her mother called her husband on his cell phone. He thereupon gave the phone to her saying that her mother wanted to speak to her. She then asked her mother to come the next day and take her away as she could not stay with her husband as he was hitting her every day. Thereupon, her husband said that there was no need to wait till the next day and that he would take her to her mother's house then itself and dragged her by the hair while hitting her. Unable to bear his beating, she poured a little bit of kerosene on her saree. Upon seeing that, her husband said that there was no need for her to pour upon herself and that he would pour it and thereupon, he poured the remaining kerosene upon her saree, lit a match stick and threw it upon her. Her saree caught fire and she sustained burns. Upon her cries, her brother-in-law (P.W.3) and others came there and put off the flames. On 03.09.2008, her mother, her uncle and relations came and took her by an ambulance to the Government Hospital at Kakinada.

The issue is whether the discrepancies between these two dying declarations would be fatal to the case of the prosecution?

At the outset, it may be noted that a conviction can be recorded on the basis of a dying declaration alone, if it is found to be wholly

reliable. (***KHUSHAL RAO V/s. STATE OF BOMBAY***², ***P.MANI V/s. STATE OF TAMIL NADU***³, ***PREM KUMAR GULATI V/s. STATE OF HARYANA***⁴ and ***RAMAKANT MISHRA ALIAS LALU V/s. STATE OF UTTAR PRADESH***⁵).

Section 32(1) of the Indian Evidence Act, 1872 (for brevity, 'the Act of 1872') deals with dying declarations and states that when a statement, written or verbal, made by a person who is dead, as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death would be relevant in cases in which the cause of that person's death comes into question. Such statements are admitted in evidence on the principle of necessity.

Section 32(1) of the Act of 1872 is distinguishable from English Law on the subject, inasmuch as it does not require the statement to have been made in actual expectation of death. However, the words 'as to any of the circumstances of the transaction which resulted in his death' appearing in Section 32(1) show that contents of the statement must have a proximate relation to the actual occurrence. In other words, such a statement must be sufficiently/closely connected with the actual transaction resulting in death of the person who made it. A dying declaration is given due weight owing to the maxim '*Nemo Moriturus Praesumitur Mentiri*' - a man would not meet his maker with a lie in his mouth. If such a statement is reduced to writing, the scribe must be produced in Court.

It is also relevant to note that the dying declarations, Exs.P14 and P17, were recorded on 03.09.2008, whereas the deceased met with her death on 30.10.2008. There was therefore a gap of nearly

² AIR 1958 SC 22

³ (2006) 3 SCC 161

⁴ (2014) 14 SCC 646

⁵ (2015) 8 SCC 299

two months between the recording of the dying declarations and the actual death. However, in terms of the law laid down by the Supreme Court in **NAJJAM FARAGHI @ NIJJAM FARUQUI V/s. STATE OF WEST BENGAL**⁶, death of the declarant long after making the dying declaration would not mean that such a statement loses its value merely because the person making it lived for a longer time than expected. But to make such a statement admissible, it has to be shown that the statement made was as to the cause of death or the circumstances of the transaction which resulted in the death. The facts mentioned in the statement therefore have to be shown to be connected with the cause of death, directly or indirectly.

In **RATTAN SINGH V/s. STATE OF HIMACHAL PRADESH**⁷, the Supreme Court observed that the expression 'circumstances of the transaction which resulted in his death' in Section 32(1) of the Act of 1872 would mean that there need not necessarily be a direct nexus between such circumstances and the death and even a distant circumstance can become admissible if it has nexus with the transaction which resulted in the death. The Supreme Court observed in this regard as under:

It is enough if the words spoken by the deceased have reference to any circumstance which has connection with any of the transactions which ended up in the death of the deceased. Such statement would also fall within the purview of Section 32(1) of the Evidence Act. In other words, it is not necessary that such circumstance should be proximate, for, even distant circumstances can also become admissible under the sub-section, provided it has nexus with the transaction which resulted in the death.'

⁶ (1999) 2 SCC 45

⁷ (1997) 4 SCC 161

Exs.P14 and P17 therefore do not suffer on the ground of lack of proximity to the date of death. However, so far as Ex.P17 is concerned, the same was recorded by Mangadevi, Sub-Inspector of Police, Gollapalem Police Station (L.W.17), who was not examined. Further, the second statement recorded by her on 06.09.2008 was not even produced before the Court. This is made out to be a major lacuna by Sri Nageshwara Rao Pappu, learned counsel for the appellant/accused, who would argue that an adverse inference should be drawn from the suppression of this statement.

However, we are not impressed.

As the scribe of Ex.P17 dying declaration was not even examined before the Court, the said dying declaration would have no evidentiary value. So too, the suppressed later statement recorded by the same police officer on 06.09.2008. Neither of these aspects therefore impinges upon the prosecution's case to the extent of giving the appellant/accused any benefit of doubt on the strength thereof. That apart, Ex.P14 dying declaration recorded by the Judicial Officer is available and has far greater evidentiary value. Though the same was subjected to challenge on the ground that signatures of the deceased were not obtained on each and every page, P.W.10 explained this by stating that he did not take signatures of the deceased on the first and second pages as they only contained routine questions and answers and the declarations made by him and the duty doctor as to the capacity of the deceased to make the statement. Perusal of the original of Ex.P14 bears out this fact as the actual statement made by the deceased is on two sides of a sheet of paper and her signatures are found on both sides of the said paper.

As regards discrepancies in Ex.P14 and Ex.P17 dying declarations, we find that though there are some changes in the versions put forth by the deceased thereunder, the crucial aspect as to the accused lighting a match stick and throwing it upon her kerosene doused saree finds mention in both. Being the mother of three sons, who stood the risk of becoming rudderless, and having been married to the accused for well over a decade, it is but natural that the deceased would have tried to shield him and that is perhaps the reason why she was not forthcoming with the Magistrate as to all that had happened. We therefore find Ex.P14 dying declaration to be completely credible as it bears a ring of truth.

Sri Nageshwara Rao Pappu, learned counsel, placed reliance on **DANDU LAKSHMI REDDY V/s. STATE OF A.P.**⁸, where the Supreme Court was dealing with two dying declarations in which there were material divergences. The Supreme Court found on facts that the deceased was being brainwashed at the hospital. In these circumstances, it was held that the dying declarations did not withstand scrutiny and that it would be unsafe to convict a person on the strength of such fragile and rickety dying declarations. This judgment does not further the case of the appellant/accused as we find that there is no real disparity between the two dying declarations in the present case, in so far as the crucial act attributed to the accused, i.e., lighting of a match stick and throwing it upon the kerosene doused saree of the deceased, is concerned.

Learned counsel also placed reliance on **BRUNDABAN MOHARANA V/s. STATE OF ORISSA**⁹ which is distinguishable on facts. In that case, the dying declaration was recorded by the

⁸ 1999 CRI.L.J. 4287

⁹ 2010 AIR SCW 7285

investigating officer as a statement under Section 161 CrPC. But the statement of the doctor who treated the deceased was not recorded. The capacity of the deceased to make the statement was therefore rendered doubtful as the attending doctor was not examined. In these circumstances, the dying declaration was held to be unreliable. In the present case, Ex.P14 dying declaration bears the endorsements of the duty doctor that the deceased was conscious, coherent and fit to make a statement, before and after.

Learned counsel also relied upon **PANCHANAND MANDAL ALIAS PACHAN MANDAL V/s. STATE OF JHARKHAND**¹⁰, wherein the Supreme Court found the dying declaration to be riddled with infirmities. The author who recorded the dying declaration was not produced before the Court, but despite the same, the Sessions Court accepted the explanation for such non-production. The Supreme Court observed that non-appearance of the scribe of the dying declaration prejudicially affects the interest of the accused as he is denied the opportunity to cross-examine the scribe. Further, the dying declaration in that case was not certified by the medical officer to the effect that the deceased was in medically fit condition to give a statement. This case is distinguishable as Ex.P14 does not suffer on the ground of either of the aforestated two infirmities.

Learned counsel lastly placed reliance on **ANDUGULA SHANKARAIAH V/s. STATE OF A.P.**¹¹, wherein a Division Bench of this Court found fault with the dying declaration recorded by the Magistrate and refused to rely upon the same as the sole basis for convicting the accused. Facts being entirely different in the said case

¹⁰ (2013) 9 SCC 800

¹¹ 2012 CRI.L.J. 189

as compared to the case on hand, this judgment also does not further the case of the appellant/accused.

On the other hand, the learned Public Prosecutor relied upon **HARJIT KAUR V/s. STATE OF PUNJAB**¹², wherein the Supreme Court upheld the finding of the Courts below that a discrepancy in the two dying declarations merely disclosed an attempt on the part of the deceased to save her husband. He also placed relied on **SAYARABANO ALIAS SULTANABEGUM V/s. STATE OF MAHARASHTRA**¹³, again a case involving discrepancies in two dying declarations. In this context, the Supreme Court observed that criminal cases are decided on facts and on evidence rather than on case law and precedents, and found in the said case that there was ample evidence to show that even prior to the incident in question, the appellant used to beat the deceased and ill-treat her. The Courts below were held to be right in relying upon the second dying declaration of the deceased treating it as true disclosure of facts by the deceased, overlooking discrepancies in the first dying declaration given by the deceased under coercion of her mother-in-law.

Accepting Ex.P14 dying declaration as admissible and relevant under Section 32(1) of the Act of 1872, it has to be necessarily kept in mind that the death of the deceased nearly two months after the incident was not directly attributable to the burn injuries themselves but, as per Ex.P15 post-mortem examination report, it was due to septic and toxic conditions as a result of Wilson's first degree burn injuries over 37% of the total body surface area. Further P.W.11, the doctor who conducted the post-mortem examination of the body of the deceased, confirmed that the possibility of the deceased surviving

¹² (1999) 6 SCC 545

¹³ (2007) 12 SCC 562

with this extent of burn injuries could not be ruled out and that he could not say as to whether she died due to not providing treatment. It is to be noticed that though the injuries were caused by first degree burns, some of the burn injuries had healed and some were infected with pus. Thus, the death was not directly attributable to the burn injuries but to the intervening infection. The post-mortem examination confirmed that septic and toxic conditions were noticed.

In **OGIBOYINA KOTALAH V/s. STATE OF A.P. REP. BY ITS PUBLIC PROSECUTOR, HIGH COURT OF A.P., HYDERABAD**¹⁴, this Court held a conviction under Section 302 IPC unsustainable on the ground that the death in the said case was not caused by the burns suffered by the deceased but due to an intervening infection. In **SHAM MADHAVRAO RUPVATE V/s. STATE OF MAHARASHTRA**¹⁵, the Supreme Court was dealing with a case where the husband set fire to his wife but found that she died not due to the burns but due to septicemia and held the conviction for murder liable to be reduced.

In the present case, the circumstance of the accused actually setting fire to the saree of the deceased is a relevant fact under Section 32(1) of the Act of 1872 and it has nexus with the transaction of the infection and septicemia, which set in thereafter due to such burn injuries, which ultimately resulted in the death of the deceased. In the light of the fact that the death was not directly attributable to the burns themselves but to the intervening infection, the conviction of the accused under Section 302 IPC cannot be sustained. However, the evidence brings out clearly that it was the accused that actually set fire to the saree of the deceased by throwing a lit match stick upon her knowing fully well that the saree was doused with kerosene.

¹⁴ 2007 (1) ALT (Crl.) 260 (D.B.)(A.P.)

¹⁵ 2000 CrLJ 2389

As this act on his part was neither pre-planned nor premeditated and happened on the spur of the moment, when there was an altercation between him and the deceased, we find that the case on hand would fall under Exception 4 to Section 300 IPC, which states to the effect that culpable homicide committed without premeditation in a sudden fight, in the heat of passion upon a sudden quarrel, and without the offender having taken undue advantage or acted in a cruel or unusual manner would not amount to murder.

The next question that would arise is as to whether the case would fall within Part 1 or Part 2 of Section 304 IPC which prescribes the punishment for culpable homicide not amounting to murder.

In ***ALISTER ANTHONY PAREIRA V/s. STATE OF MAHARASHTRA***¹⁶, the Supreme Court drew a distinction between the two parts of Section 304 IPC:

“For punishment under Section 304 Part I, the prosecution must prove the death of the person in question; that such death was caused by the act of the accused and that the accused intended by such act to cause death or cause such bodily injury as was likely to cause death. As regards punishment for Section 304 Part II, the prosecution has to prove the death of the person in question; that such death was caused by the act of the accused and that he knew that such act of his was likely to cause death....”

Again, in ***KASAM ABDULLA HAFIZ V. STATE OF MAHARASHTRA***¹⁷, the Supreme Court observed thus on this issue:

“...Looking at the nature of injuries sustained by the deceased and the circumstances as enumerated above the conclusion is irresistible that the death was caused by the acts of the accused done with the intention of causing such bodily injury as is likely to

¹⁶ (2012) 2 SCC 648

¹⁷ (1998) 1 SCC 526

cause death and therefore the offence would squarely come within the 1st Part of Section 304 IPC. The guilty intention of the accused to cause such bodily injury as is likely to cause death is apparent from the fact that he did attempt a second blow though did not succeed in the same and it somehow missed. In that view of the matter we are of the considered opinion that the High Court has rightly convicted the appellant under Section 304 Part I IPC....”

This being the settled legal position and given the irrefutable fact that the accused himself set fire to the saree of the deceased, knowing fully well that it was doused with kerosene, makes it clear, notwithstanding his state of inebriation, that he was fully aware of his actions and the probable consequences thereof. Even if he had no intention of causing her death, he definitely wanted to cause such bodily injury as was likely, in ordinary circumstances, to cause her death. The case would therefore fall within Section 304 Part 1 IPC, as it transcends mere knowledge and verges on actual intention.

On the above analysis, we find that this was a case of culpable homicide, falling under Exception 4 of Section 300 IPC, attracting Section 304 Part 1 IPC. The conviction of the appellant/accused under Section 302 IPC is accordingly modified to conviction for culpable homicide not amounting to murder under Section 304 Part 1 IPC. The sentence of life imprisonment imposed upon him is consequently reduced to rigorous imprisonment for a term of ten years. The fine imposed upon him shall however remain unchanged and in default of payment of such fine, the sentence of simple imprisonment also remains unchanged. The appellant/accused shall surrender before the learned III Additional Judicial Magistrate of First Class, Kakinada, and shall be sent to the Central Jail, Rajahmundry,

East Godavari District, to undergo the rest of the sentence of imprisonment in terms of this order, as per procedure.

The appeal is accordingly allowed to the extent indicated above.

SANJAY KUMAR, J

DR. SHAMEEM AKTHER, J

17th AUGUST, 2017

Svv

