

*The Hon'ble Sri Justice C.V.Nagarjuna Reddy

and

The Hon'ble Smt.Justice T.Rajani

*Criminal Appeal No.641 of 2012

% 01.10.2018

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

... Appellant

vs

\$Vodde Ramudu

...Respondent

!Counsel for the appellant: Public Prosecutor (AP)

^Counsel for the respondent: None appeared

<GIST:

>HEAD NOTE:

?CASES REFERRED:

1. CrI.A.No.71 of 2011 & anr, dated 26-07-2017
2. AIR 1999 SC 3255
3. (2015) 11 SCC 154
4. (2010) 8 SCC 514 = (2010) 3 SCC (Cri) 942
5. AIR 1970 SC 1566 =(1971) 1 SCR 599 = 1970 Cri LJ 1415
6. (1998) 9 SCC 303
7. (1999) 9 SCC 562
8. 1999(6) SCC 545
9. 2007 SAR (CrI) 941= (2007) 15 SCC 465

The Hon'ble Sri Justice C.V.Nagarjuna Reddy

and

The Hon'ble Smt.Justice T.Rajani

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Date: 01.10.2018

Between:

The State of A.P.,
Rep. by the Public Prosecutor,
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... Appellant

and

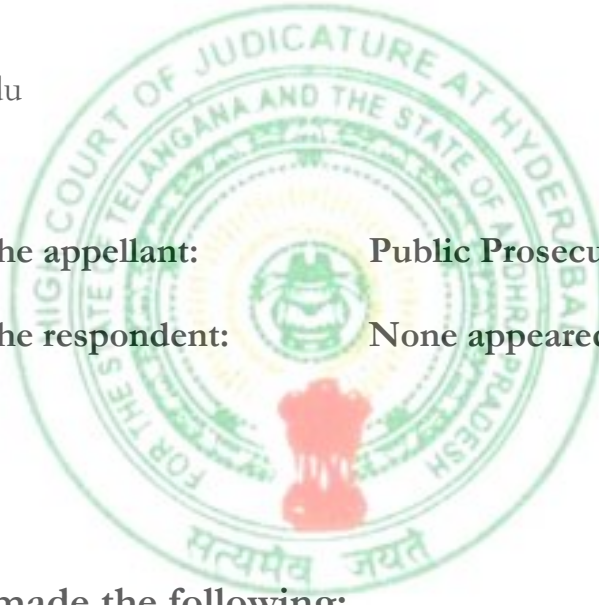
Vodde Ramudu

...Respondent

Counsel for the appellant: Public Prosecutor (AP)

Counsel for the respondent: None appeared

The Court made the following:



Judgment: (Per the Hon'ble Sri Justice C.V.Nagarjuna Reddy)

The State filed this Criminal Appeal against Judgment, dated 26-07-2010, in SC.No.220 of 2018, on the file of the I Additional Sessions Judge, Kurnool, whereby the sole accused was acquitted of all the offences with which he was charged.

Though notice has been served on the respondent, he has not entered appearance. We have heard the learned Counsel representing the learned Public Prosecutor for the State of Andhra Pradesh and perused the record.

The respondent stood trial for allegedly killing his wife on the following charges:

“FIRSTLY:

That you, on 17-2-2007 night at about 23.30 hrs in Atmakur village and town you being the husband of Jammeswaramma used to subject her to harassment suspecting her fidelity during her lifetime, and thereby you committed an offence punishable u/s 498-A of the Indian Penal Code and within my cognizance.

SECONDLY:

That you, on same day, time and place as mentioned in charge No.1 supra you did commit murder by pouring kerosene and set fire to kill her, resulting which she received burn injuries all over her body and died on 10-3-2007 in Govt. Hospital, Nandyal while undergoing treatment that you by intentionally or knowingly caused the death of Jammeswaramma and thereby

you committed an offence of murder punishable U/s 302 of the Indian Penal Code and within my cognizance.”

In support of its case, the Prosecution has examined PWs.1 to 15, got Exs.P.1 to P.21 marked and produced MOs.1 to 4. On behalf of the defence, no evidence was let in.

On appreciation of the oral and documentary evidence, the Court below has acquitted the respondent of both the charges.

As PWs.1 to 3- the parents and brother of the deceased turned hostile, so did the other private witnesses *viz.*, PWs.4 to 8.

The only formidable piece of evidence that stood among the ruins is Ex.P.11- Dying Declaration of the deceased recorded by PW.9- Judicial First Class Magistrate apart from Ex.P.15- statement of the deceased recorded by PW.14- Sub-Inspector of Police, Atmakur Police Station. The lower Court disbelieved Ex.P.11 on reasons, which, in our opinion, are jejune. Before referring to those reasons, we would like to first refer to the contents of Ex.P.11. PW.9 has elicited answers to certain preliminary questions as to the names of the deceased, her husband, the persons, who brought her to the hospital, and whether she knows the identity of the witness. On being fully

satisfied that the deceased was conscious, coherent and in a fit state of mind to give statement as certified by the duty medical officer, he has recorded the statement of the deceased. When asked as to how she has received burn injuries, the deceased stated that she was working as a coolie in a hotel; that on the previous day *i.e.*, on 17-02-2007 at about 10.00 p.m., her husband has unnecessarily quarrelled with her and came upon her by threatening to kill her; that after beating her, he poured kerosene on her and lit fire with a match stick; that after she was engulfed in fire, she raised cries; that on the arrival of neighbours, her husband has put-out the flames by pouring water and escaped therefrom; and that later, her neighbours have brought her to the hospital.

It needs to be noted that on earlier point of time, PW.14 also recorded Ex.P.15- statement of the deceased. When we compare the contents of both these documents, we do not find any conflict between the two though Ex.P.15 is more elaborate in its contents. In the light of Ex.P.11, the question, which falls for consideration is, whether the Court below was justified in disbelieving the case of the Prosecution.

Under Criminal Jurisprudence, the dying declaration is treated as an exception to the hearsay evidence and this 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, if the dying declaration suffers 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.

In **Bejjipalli Reyyamma and another vs. State of Andhra Pradesh, represented by Public Prosecutor, Hyderabad**¹, a Division Bench of this Court speaking through one of us (CVNR, J) referred to various case laws on this aspect. It is instructive to refer to the relevant part of the opinion hereunder :

“While dealing with this aspect, in **Dandu Lakshmi Reddy vs. State of A.P.**², 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

¹ CrI.A.No.71 of 2011 & anr, dated 26-07-2017

² AIR 1999 SC 3255

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**³ 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.**⁴, 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 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

³ (2015) 11 SCC 154

⁴ (2010) 8 SCC 514 = (2010) 3 SCC (Cri) 942

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**⁵, 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 its reliability, by

⁵

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

imposing on it an obligation to closely scrutinize all the relevant attendant circumstances.’

The stage is now set for us to discuss the reasons assigned by the lower Court to reject the dying declaration. In para-22 of its Judgment, the lower Court remarked that the genuineness of recording of Ex.P-11 - dying declaration cannot be doubted as the same is done by a Judicial Magistrate of First Class who has no personal interest in the prosecution or defence. However, having so observed, the Court below has embarked upon ascertaining whether the dying declaration is valid, true and made voluntarily. For rejecting the dying declaration, the lower Court has relied upon the following reasons:

- (i) Though the deceased stated that after her husband set fire to her and on hearing her cries the neighbours came, but she did not give the names of the neighbours.
- (ii) Certain neighbours who were examined by the prosecution did not support the version given in the dying declaration of the deceased.
- (iii) PW-9, the Magistrate, found some persons inside the Ward when he entered and therefore there is a reason

to believe that the deceased must have been tutored by those persons prior to the arrival of the Magistrate.

- (iv) The Doctor who is said to have been present at the time of recording of the dying declaration was not examined to prove the physical and mental condition of the deceased.
- (v) The very parents, brother and sister of the deceased did not support the version in the dying declaration.

We find each one of the reasons assigned by the lower Court wholly fallacious and unsustainable for the following reasons. A person who suffered severe burns almost all over the body must have been suffering from excruciating pain. It is not expected of such a person to give out the names of the neighbours who arrived at the scene of offence on hearing her cries. Therefore, the absence of reference to the names of the neighbours by no means creates any suspicion on the genuineness of the statement of the deceased. Similarly, the fact of neighbours examined as witnesses not supporting the case of the prosecution also would not whittle down the genuineness or truthfulness of the statement of the deceased if the dying declaration otherwise stands the scrutiny of the Court. The mere presence of some

persons inside the Ward of the hospital would not give rise to an automatic presumption that they must have tutored the deceased. The conclusion arrived at by the lower Court in this regard is founded on a baseless inference. When a person was admitted with burns in a serious condition, it is not unnatural for the kith and kin of the victim to be around him/her in the hospital unless the defence is able to bring out circumstances warranting an interference of tutoring. It is highly impermissible for the Court to draw such an inference. As regards the non-examination of the doctor, there is a catena of Judgments holding that examination of doctor to prove the fitness of the patient is not mandatory and that such non-examination cannot be made a ground to reject the dying declaration.

In **Ravi Chandar and others Vs. State of Punjab**⁶, the Supreme Court held that the dying declaration recorded by the Executive Magistrate, if otherwise found genuine, cannot be thrown out merely for not examining the doctor who found the patient fit to give the statement.

⁶ (1998) 9 SCC 303

In **Koli Chunnilal Savji and another Vs. State of Gujarat**⁷, a three Judge Bench of the Supreme Court rejected the submission of the defence that the two dying declarations relied upon by the prosecution cannot be relied upon as the doctor has not only not made any endorsement on the dying declaration about the fit condition of the patient to give the statement but he was also not examined. The Apex Court relied upon the testimony of the Magistrate who recorded the dying declaration wherein she categorically stated that as soon as she reached the hospital in Surgical Ward of Dr. Shukla, she told the doctor on duty that she was required to take the statement of the patient, that she showed the doctor the police yadi, that the doctor then introduced her to the patient and when she asked the doctor about the condition of the patient, the said doctor categorically stated that the patient was in conscious condition. In the said circumstances, the Supreme Court held :

“In view of the aforesaid evidence of the Magistrate and in view of the endorsement of the doctor on the police yadi and no reason having been ascribed as to why the Magistrate would try to help the prosecution, we see no justification in the comments of Mr. Keswani that the dying declaration should not be relied upon in the absence of the endorsement of the doctor thereon.”

⁷ (1999) 9 SCC 562

The Supreme Court relied upon the Judgment in **Ravi Chandar (1-supra)** in rejecting the plea of the defence that non-examination of the doctor is fatal to the case of the prosecution.

In **Harjit Kaur Vs. State of Punjab**⁸, the Executive Magistrate has ascertained from the doctor whether the patient was in a fit condition to make a statement and obtained an endorsement to that effect on an application. While holding that absence of the endorsement relating to the fit statement of mind of the patient on the dying declaration proper would not render the dying declaration invalid, the Supreme Court held as under :

“As regards the condition of Parminder Kaur, the witness has stated that he had first ascertained from the doctor whether she was in a fit condition to make a statement and obtained an endorsement to that effect. Merely because that endorsement was made not on the dying declaration itself but on the application, that would not render the dying declaration suspicious in any manner.”

In **Nallapati Sivaiah Vs. Sub-Divisional Officer**⁹, which is treated as an authority by the trial Court for the proposition that non-examination of the Doctor who was said to have been present at the time of recording of the dying declaration is fatal to the prosecution case, the victim received as many as 63 injuries on

⁸ 1999(6) SCC 545

⁹ 2007 SAR (CrI) 941= (2007) 15 SCC 465

his body, including some injuries on the parietal and occipital regions, on account of which the victim could have gone into coma. Though PW-7, the learned Magistrate certified that the declarant was conscious, coherent and in a fit condition to give statement, in his evidence, however, he deposed that he did not verify from the Doctor as to whether the victim was in a fit state of mind to make the statement before commencing the recording of dying declaration and has also not verified the case sheet. On those facts, while reiterating that though there is no requirement of law that the Doctor certifying the condition of the victim to make dying declaration must be examined in every case, it was held by the Supreme Court that it was the obligation of the prosecution to lead corroborative evidence in the peculiar facts and circumstances of the case. However, in the present case, the lower Court completely misunderstood the said Judgment as holding that the Doctor is required to be examined and that his non-examination is fatal to the case of the prosecution relating to dying declaration.

From the Judgments discussed above, it is manifest that the Apex Court has assigned a high degree of sanctity to the evidence of the Magistrates (even Executive Magistrates) on the conscious

state and fitness of the patient to give statement on the hypothesis that ordinarily the Magistrate would not have any axe to grind against the accused and from that perspective the Courts have not attached much importance to the non-examination of doctor who certified on the fit state of the patient to give the statement. On a careful reading of the contents of Ex.P.11, we have absolutely no doubt in our mind that not only the patient was in fit state of mind but also that the same is free from any exaggerations, embellishments or unnaturalities. For the aforementioned reasons, we hold that the Court below has fallen into serious error while rejecting the dying declaration due to non-examination of the doctor.

Turning to the last mentioned reason, namely, that the very parents, brother and sister of the deceased did not support the version in the dying declaration, it is sad that quite often the kith and kin of the victim ditch the former obviously for extraneous reasons, such as financial gain, fear of reprisal and a host of other considerations. When a dying declaration is pitted against the vagaries of living human beings, the former deserves the highest degree of credibility as a person in contemplation of death is supposed to be free from all the human temptations. Therefore,

the conduct of the family members of the victim cannot be made the anvil on which the dying declaration needs to be tested. If the dying declaration stands all the relevant tests as discussed above, it wins over every other factor, especially the testimony of witnesses who were gained over by the defence.

The learned Counsel for the appellant has advanced an alternative submission, namely, that even according to Ex.P-11 – dying declaration, the appellant himself has put out the flames and therefore he had no intention to kill the deceased. No doubt it is stated in the dying declaration that the appellant has put out the flames, but it needs to be noted that he has not tried to put off the flames on changing his mind. The deceased categorically stated in the dying declaration that on seeing the neighbours, the appellant has put out the flames by pouring water. Therefore, it cannot be stated that the appellant had no intention of causing the death of his wife or such bodily injury which in ordinary course would cause her death.

The further question, however, is whether the appellant had pre-meditated intention of killing his wife or such intention has developed on the spur of the moment. If we carefully go through the dying declaration, it appears that the appellant has first picked

up quarrel and beat the deceased before he poured kerosene and lit fire to her. The facts and circumstances of the case, may, therefore, attract Exception (4) to section 300 IPC and consequently the offence committed by the appellant would fall under Part-I of Section 304 IPC. In the light of the discussion undertaken herein above, the Judgment under appeal is set-aside. The appellant is convicted for the offence under Section 304 Part-I IPC and sentenced to rigorous imprisonment for seven years.

In the result, the Criminal Appeal is allowed in part. The respondent/accused is convicted for the offence punishable under Section 304 Part I IPC and sentenced to undergo Rigorous Imprisonment for a period of seven years. The remand period undergone by him shall be given set off.

(C.V.Nagarjuna Reddy, J)

(T.Rajani, J)

Dt: 1st October, 2018

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