

**THE HON'BLE SRI JUSTICE RAGHVENDRA SINGH CHAUHAN
AND
THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY**

CRIMINAL APPEAL NO.651 OF 2012

JUDGMENT: {Per the Hon'ble Sri Justice Raghvendra Singh Chauhan}

Aggrieved by the judgment dated 05.05.2011, passed by the III Additional District and Sessions Judge (Fast Tract Court), Gadwal, the appellant has challenged the same before this Court. By the said judgment, the appellant namely, Boya Kesharam, has been convicted for offences under Sections 302 and 498-A of the Indian Penal Code (IPC). The appellant has been sentenced to life imprisonment, and imposed with a fine of Rs.500/-, and in default, to undergo a simple imprisonment for a period of three months for the offence under Section 302 IPC. For the offence under Section 498-A IPC, the accused has been sentenced to rigorous imprisonment for a period of two years, and imposed with a fine of Rs.500/-, and in default, to undergo a simple imprisonment for a period of three months.

Briefly stated, on 31.10.2009 Boya Ranganna (PW.1) lodged an oral report (Ex.P.1) with the Aiza Police. According to the complainant (PW.1), his daughter Anjanamma @ Parvathamma was married to the accused about twelve years ago. During their marriage, the couple was blessed with son, Raju, and daughter, Umavathi. On 30.10.2009 at about 09.15 PM, he was informed by Mekala Peddanna (PW.5) of Pulikal Village, who happens to be the neighbour of PW.1, that the accused poured kerosene on his daughter, and grand-daughter and burned them. Immediately, Boya Ranganna (PW.1), his wife, Boya Injamma (LW3), his son –

Boya Narsimlu (PW.2) and Mekala Peddanna (PW.5) went to the Government Hospital, where they found the deceased and her daughter with burn injuries over their bodies. The deceased informed them that the accused had poured kerosene on both of them and burnt them. The said complaint was registered as FIR No.118/2009 (Ex. P. 12), by the Aiza Police Station, on 31.10.2009, for the offence under Sections 307 and 498-A IPC. Subsequently, with the death of Baby Umavathi, and Smt. Anjanamma @ Parvathamma on 01.11.2009, the offence was altered from one under Sections 307 and 498-A IPC, to one under Sections 302 and 498-A IPC.

During the course of investigation, the accused-appellant was arrested; the charge sheet was filed against him for the offences under Sections 307 and 498-A IPC. On subsequent death of the deceased on 01.11.2009, section of law was altered from Sections 307 and 498A IPC to Sections 302 and 498-A IPC.

In order to prove its case, the prosecution examined sixteen witnesses, exhibited eighteen documents, and filed five material objects. After going through the evidence on record, the Sessions Judge convicted and sentenced the appellant for the above mentioned offences. Hence, this appeal before this Court.

Mr Bommagani Prabhakar, the learned counsel for the appellant, has raised the following contentions before this Court:-

Firstly, the conviction under Section 498-A IPC is unsustainable, as there is no evidence that the appellant had ever harassed his wife.

Secondly, there is no motive for the commission of offence under Section 302 IPC.

Thirdly, although Boya Narsimulu (PW.2), the brother of the deceased, has stated that the accused's son, Raju, was present at the time of incident, Raju has not been examined as a witness. Thus, the prosecution has withheld a material witness. Therefore, an adverse inference should be drawn against the prosecution. However, the learned Sessions Judge has ignored this aspect.

Fourthly, some of the witnesses have turned hostile, and have not supported the case of the prosecution. The learned Judge has relied upon the testimony of PW.1 for convicting the appellant for the above mentioned offences.

Fifthly, but for the statement of PW.1, there is no evidence to show that the appellant was an habitual drinker.

Sixthly, although, Junior Civil Judge (PW.9), has recorded the dying declaration (Ex.P.6), but S.I. of Police (PW.14), had also recorded the statement of the deceased under Section 161 Cr.P.C. before her death. However, the statement under Section 161 Cr.P.C. has been suppressed by the prosecution. Therefore, an adverse inference should also be drawn against the prosecution. Moreover, the possibility does exist that there may have been contradiction between the dying declaration recorded by the Junior Civil Judge (Ex.P.6) and the statement recorded by S.I. of Police (PW.14).

Lastly, there may be some other reasons that might have prompted the appellant to commit the alleged crime. According to the learned counsel for the appellant, at worst, it is an offence under Section 304 Part II IPC.

The learned counsel has relied on the case of **Nabi Shareef v State of A.P., rep. by its Public Prosecutor, High Court of A.P.,**

Hyderabad¹, in order to plead that in case of a doubt, in case the dying declaration is surrounded by suspicious circumstances, it cannot be the basis of conviction. Moreover, in case, the accused is convicted under Section 498-A IPC., the dying declaration cannot be held to be trustworthy. Therefore, the conviction of the accused under Section 498-A IPC becomes unsustainable.

Learned counsel for the appellant has also relied on the case of **Tukaram Dashrath Padhen and others v State of Maharashtra**² in order to plead that the dying declaration cannot be accepted mechanically by the Court; in fact, it requires meticulous scrutiny of the evidence for acceptability of the dying declaration.

Therefore, the appellant/accused should be acquitted of the offence under Sections 302 and 498-A IPC.

On the other hand, the learned Public Prosecutor for the State, Mr. C.Pratap Reddy, has raised the following arguments:-

Firstly, the presence of the accused cannot be doubted at the scene of crime as he himself was burned while burning his wife and daughter. Dr. P. Nageshwar Rao (P. W. 13) has clearly stated that he has examined the accused; the accused was suffering from simple burn injuries. This is also supported by the wound certificate (Ex.P.11) of the accused.

Secondly, Junior Civil Judge, Shadnagar (PW.9) had recorded the dying declaration of Smt Anjanamma @ Parvathamma. The deceased, in her dying declaration (Ex.P.6), has clearly narrated the incident by stating that while she was in the house having her dinner, her daughter was in lap. The accused

¹ 2004(2) ALT (CrI.) 520 (D.B)(A.P.)

² III (2012) DMC 808 (DB)

poured kerosene on both of them and burned them. The deceased further stated that the accused was in the habit of assaulting her on daily basis when he would come back home in a drunken state. The learned counsel further reiterated that even Boya Ranganna (PW.1) also stated in his testimony that his daughter was assaulted by the accused when he would come home in a drunken state. Therefore, the prosecution has amply succeeded in proving the case.

Thirdly, in case the dying declaration has been duly recorded by a Judicial Magistrate, then it is to be preferred over a statement recorded by the police under Section 161 Cr.P.C. Moreover, learned counsel relied on the case of **Ramesh and others v State of Haryana**³. Learned counsel pleaded that even in case of 100% burn injuries, if a medical certificate has been issued by the treating doctor that the person is in a fit condition to give dying declaration, the medical certificate should be believed and the dying declaration can be relied upon.

The learned Public Prosecutor also relied on the case of **Kothala Srinu v State of Andhra Pradesh**⁴ that when a dying declaration was already recorded by Magistrate, ordinarily there would be no need for police to record another dying declaration

D. Ramakanth (P.W.9), who is Junior Civil Judge, Shadnagar, recorded the dying declaration of Smt Parvathamma on 31.10.2009 at 12:15 A.M. In his testimony, this witness clearly states that upon receiving the requisition from Dr K.Shobha Rani, Duty Medical Officer, Area Hospital, Gadwal, immediately he reached to the hospital. At 12:25 AM he introduced himself to

³ (2017) 1 SCC 529

⁴ 2016(2) ALD (CrI) 413

Smt. Parvathamma and explained to her that he had come to the hospital in order to record her dying declaration. He also asked preliminary questions to know the mental condition of the injured prior to recording the declaration. He was satisfied with the answers; she was in a fit state of mind to give the declaration. Moreover, he obtained a certificate from the Duty Medical Officer to the effect that the declarant is, indeed, in a fit state of mind to give the declaration. He further states that Smt Parvathamma gave the following statement, which was recorded as dying declaration (Ex.P.6):-

“Today night 8 hours I am taking food my husband Kesharam poured kerosene on me and set fire. At that time my 2 years daughter Uma with me also attacked with fire due to sprinkling the kerosene on her. Due to which I came out with hue and cries. My brother-in-law who is near by came and set off the fire. My husband brought us to hospital.”

To the question why this happened and when your marriage took place? she answered:

“Our marriage took place at about 10 years back. My husband who is habitual of drinking and not do any work. Daily he come in drunken state and beat me. He did not look after my daughter and me.”

This witness further informed the Court that *“after recording the said dying declaration, he read over the contents of the declaration in Telugu and it was admitted by her to be true and correct”*.

A bare perusal of the dying declaration (Ex. P. 6) clearly reveals that the deceased, Smt Parvathamma, clearly states the cause of her injuries, which eventually led her to demise. The defence has never argued that either this dying declaration was

tutored, or was given under pressure. Thus, the dying declaration (Ex.P.6) is a voluntary one.

Moreover, according to Boya Ranganna (P.W.1), and Mekala Peddanna (PW.5) also stated that *“when they reached the hospital, the deceased Parvathamma also informed them that the accused poured kerosene on her and on her daughter and set fire”*.

Considering the fact that the dying declaration (Ex.P.6) was voluntary, the learned Sessions Judge was legally justified in convicting the appellant as mentioned above.

Although, learned counsel for the appellant pleaded that there is no evidence of harassment caused to the deceased Parvathamma by the accused, but the said contention is belied by the evidence available on record. For Boya Ranganna (P.W.1) clearly stated, in his cross-examination, that the accused used to beat his daughter in drunken state. This statement is also reflected in the dying declaration (Ex.P.6) that *‘the accused daily come in drunken state and beat me’*. Therefore, there is ample evidence that the deceased Parvathamma was subjected to physical and mental cruelty by the appellant/accused. Thus, the first contention raised by learned counsel for the appellant is not acceptable.

According to B.Chandra Moha, S.I. Of Police, Siddapur Police Station (P.W.14) on 31.10.2009 at 08.00 AM, he recorded the statement of the deceased Parvathamma under Section 161 Cr.P.C. The same is subsequent to the statement recorded by PW.9-Junior Civil Judge, Shadnagar. In the case of **Lakshman v State of Maharashtra**⁵, the Apex Court opined that since the Magistrate is

⁵ (2002) 6 SCC 710

disinterested witness, and a responsible officer, he has no enmity against the accused. Hence, his testimony and the declaration recorded by him should be accepted. Moreover, in the case of **Kothala Srinu** (supra), the Division Bench of this Court clearly observed that when the dying declaration was already recorded by the Magistrate, ordinarily there would be no need for police to record another dying declaration. In the present case, admittedly, the dying declaration was already recorded by the Magistrate prior to the statement recorded by S.I. of Police (PW.14) under Section 161 Cr.P.C. Therefore, obviously, the dying declaration recorded by the Magistrate has to be taken to be trustworthy; thus, acceptable.

The learned counsel for the appellant has also pleaded that although Boya Narsimhulu (PW.2) has stated in his testimony that the son of the accused, Raju, was present, but the prosecution has withheld the material witness. Therefore, an adverse inference should be drawn against the prosecution. However, even the said contention does not deserve to be accepted. For, in his examination-in-chief, Boya Narsimhulu (P.W.2) clearly states that when the accused poured kerosene on Raju, Raju ran away from the house. Hence, Raju would not have witnessed that the accused has burnt the deceased Parvathamma, and his small daughter. As such, it cannot be held that the prosecution has withheld the material witness. Thus, no adverse inference can be drawn against the prosecution for not examining Raju as a witness.

Although the learned counsel for the appellant has also pleaded that there is no evidence of the fact that the accused used to come home in a drunken state, but suffice it to say that Boya

Ranganna (PW.1) and the deceased, Parvathamma, in her dying declaration (Ex.P.6) state that the appellant used to come back home in drunken state, and assault the deceased, Parvathamma. According to the deceased, Parvathamma, it is almost a daily affair in her marital life. As such, the contention being raised by learned counsel is belied by the evidence available on record.

The learned counsel for the appellant has strenuously argued that there may be other reasons for the accused for having committed the alleged crime. The alleged offence does not fall under Section 302 I.P.C. Hence, he should be, convicted for offence under Section 304 Part II I.P.C. However, learned counsel for the appellant is not able to demonstrate any evidence to take the case out of the four corners of Section 302 I.P.C.

Part third of Section 300 IPC clearly states that, if an act is done with the intention of causing bodily injury to any person, the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, then the act amounts to murder. Similarly, Part fourth states *“if the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid, such act would fall within the definition of ‘murder’.”*

Admittedly, in the present case, the accused person had poured kerosene upon his wife, and upon the small child, and had burned them. Thus, the act is well within clauses three and four of Section 300 I.P.C. Therefore, there are no ameliorating

circumstances that would alter the offence from Section 302 I.P.C. to Section 304 Part II I.P.C.

For the reasons stated above, this Court does not find any merit in the present appeal. The appeal is hereby dismissed. The conviction and sentence passed by the III Additional District and Sessions Judge (F.T.C.), Gadwal vide judgment dated 05.05.2011 in S.C.No.31 of 2010 is, hereby, confirmed.

Miscellaneous petitions, if any, pending shall stand closed.

(RAGHVENDRA SINGH CHAUHAN, J)

(M.SATYANARAYANA MURTHY, J)

28.11.2018
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