

HON' BLE SRI JUSTICE C.PRAVEEN KUMAR

AND

HON' BLE MS. JUSTICE J.UMA DEVI

CRIMINAL APPEAL No.30 of 2013

JUDGMENT : (per Hon' ble Sri Justice C.Praveen Kumar)

The accused who is A1 in Sessions Case No.331 of 2011, on the file of the Additional Sessions Judge, Anantapur, is the appellant. He along with two others were tried for the following charges:

(i) Section 498 A IPC against A1 to A3.

(ii) Section 302 IPC against A1.

Vide judgment dated 10.01.2013, the Sessions Judge, while acquitting A2 and A3, for the offence punishable under Section 498 A IPC, convicted the appellant/A1 and sentenced him to suffer imprisonment for one year and to pay fine of Rs.5,000/- and in default to suffer simple imprisonment for three months for the offence punishable under Section 498 A IPC and also to suffer imprisonment for life and also pay fine of Rs.5,000/-, and in default to suffer simple imprisonment for three months for the offence punishable under Section 302 IPC. Both the sentences were directed to run concurrently. MOs.1 and 2 were directed to be destroyed after the expiry of appeal time.

2. The substance of charge against the accused is that on 16.03.2011 at about 06.00 p.m., in the house of Balija Lakshmi at Kariganipalli Village, A1 caused death of said Balija Lakshmi by setting her on fire.

3. The facts in issue are as under:

(i) The appellant/ A1 is the son of A2 and A3. PW1 is the mother of the deceased. PW2 and PW3 are the elder sisters of the deceased.

(ii) A1 married the deceased about ten years prior to the date of incident. After marriage, the appellant and the deceased led a happy life for about five years and out of the wedlock, they were blessed with a son and daughter. Thereafter, disputes arose between the appellant and the deceased and the accused used to harass the deceased on one pretext or the other. It is stated that about two years prior to the date of incident, the accused necked out the deceased stating that the appellant wanted to marry another woman. It is stated that since last two years therefrom, the deceased was living separately, along with her children in a rented house. On 04.03.2011, the deceased went to Rayadurg to attend her family function and stayed there for ten days and returned back to her village on 14.03.2011. On 16.03.2011, at about 06.00 p.m., A1 went to the house of the deceased, picked up a quarrel with his wife, questioning about her stay at Rayadurg for a period of ten days at her parent's house. Not being satisfied with the answers given, A1 is said to have picked up a quarrel with the deceased and beat her with a stick. Thereafter, A1 is said to have poured kerosene and set her on fire with an intention to kill her. Unable to bear the pain, the deceased came out of the house raising cries. On hearing her cries, the neighbours rushed to the spot and put off the fire on the deceased and called for an ambulance to shift her to Kalyandurg hospital. Immediately, after admission in the hospital, an intimation was received by PW13 the head constable of Kalyandurg town police station with regard to the admission of a woman with burn

injuries in the hospital. Ex.P12 is the said intimation. Immediately, he proceeded to the hospital at 07.30 p.m. and recorded the statement of the injured under Ex.P13. The doctor endorsed on Ex.P13 stating that the patient is conscious and coherent while recording the statement. On point of jurisdiction, Exs.P12 and P13 were sent to Kundurpi Police Station through one Bheemappa. Basing on Exs.P12 and P13, PW14 registered a case in Crime No.13 of 2011 for the offences punishable under Section 498-A IPC and Section 307 read with Section 34 IPC. Thereafter, he went to Kalyandurg hospital, but by then, the deceased was sent to Government General Hospital, Anantapur. On coming to know about the same, PW14 went to Government General Hospital at Anantapur and recorded the statements of the injured, PWs.1 to 3. On the next day, he visited Kariganipalli village, recorded the statements of PWs.4 to 9 and went to the house of the deceased, which was a rented hut and observed the scene of offence. During the said process, he seized MOs.1 and 2 i.e. plastic can and snuff coloured saree pieces under the cover of Ex.P15 panchanama. He also prepared rough sketch of the scene of offence, which is placed on record as Ex.P16. Further investigation in this matter was taken up by one G.Ramakrishna (PW17) the Inspector of Police. At this stage, it is also to be noted here that on 17.03.2011, at about 03.15 a.m., PW15 the Spl.Judicial Magistrate of First Class, Prohibition and Excise Court, received a requisition Ex.P17 from the Government General Hospital, Anantapur, for recording the dying declaration of the injured, who joined the hospital with 80%burns. Immediately, he rushed to the hospital and identified the deceased in the casualty treatment room with the assistance of the duty doctor. None were present in the said room while recording the dying declaration. After obtaining the opinion of the doctor with regard to

the mental condition of the deceased, he recorded the dying declaration of the deceased, which is placed on record as Ex.P18. After recording dying declaration, he read over the contents of the statement to the deceased and then obtained the right thumb impression of the deceased as her left thumb was having burn injuries. On 22.03.2017, PW17 received death intimation of the injured, pursuant to which, he altered the Section of law from Sections 498-A and 307 IPC to Sections 498-A and 302 IPC. Ex.P21 is the altered express FIR. After altering the Section of law, he proceeded to the Government hospital, Anantapur, identified the body of the deceased in the mortuary and thereafter conducted inquest over the body from 10.30 a.m. to 01.30 p.m. in the presence of PWs.4, 9 and 8. He also recorded the statements of PWs.1, 3 and 6, during inquest. Ex.P22 is the inquest panchanama. A reading of the contents of the inquest panchanama would show that on 16.03.2011, at about 06.00 p.m., there was a quarrel between the husband and the deceased as to why the deceased went to Rayadurg without his permission, beat her with a stick, poured kerosene and set her on fire. After conducting inquest proceedings, PW17 sent the body for post mortem examination. PW12 the Assistant Professor, Department of Forensic, Government Medical College, Anantapur, conducted autopsy over the dead body on 22.03.2011 and issued Ex.P11, the post mortem certificate. He found anti mortem burn injuries present over 60% of the body and the cause of death to his knowledge was due to Septicemia. PW17 continued with the investigation and arrested A1 to A3. After completing the investigation and after collecting all the documents, a charge sheet came to be filed on 25.04.2011, which was taken on file as PRC No. 12 of 2011 on the file of Judicial Magistrate of First Class, Kalyandurg. After complying with the requirements of Section 207 of

Cr.P.C., the matter was committed to the Court of Sessions and the same came to be numbered as S.C.No.331 of 2011 on the file of the Additional Sessions Judge, Anantapur. Basing on the material on record, charges for the offences punishable under Sections 498-A IPC and 302 IPC were framed, read over and explained to the accused, to which they denied and claimed to be tried.

(iii) To substantiate their case, the prosecution examined PWs.1 to 17 and got marked Exs.P1 to P22 and M.Os. 1 and 2. Out of 17 witnesses, PWs.1 to 11 did not support the prosecution case and hence were treated hostile by the prosecution.

(iv) After the closure of evidence, the accused was examined under Section 313 Cr.P.C., with reference to the incriminating circumstances appearing against them in the evidence of the prosecution witnesses, to which they denied. No oral or documentary evidence was adduced on behalf of the accused in support of their defence.

(v) While believing the dying declaration recorded by the Magistrate, coupled with the oral evidence, the trial Court convicted A1 while acquitting A2 and A3. Challenging the conviction recorded against A1, the present appeal came to be filed.

4. Sri K.Maheswara Rao, learned counsel for the appellant mainly submits that the statement made by the deceased is an outcome of tutoring and further that she was not in normal senses at the time of making the dying declaration. According to him, initially the deceased was treated at Kalyandurg hospital and thereafter she was shifted to Government hospital, Anantapur. The nature of treatment given at Government hospital, Kalyandurg was suppressed by the prosecution. Therefore, he would submit that the deceased could not have made the statement in the manner recorded by the Magistrate. He would further

submit that the prosecution is not coming forward with the true version of the case and if really the accused alone is responsible for the death and if really dying declaration was made, in the manner in which it is being recorded, nothing prevented the prosecution from examining LW10, the doctor, who treated the deceased at Kalyandurg hospital. In any event, he would submit that even if the version of the prosecution is accepted to be true, the accused cannot be convicted under Section 302 IPC, since the death was due to infection which was developed while she was being treated in the hospital.

5. On the other hand, learned public prosecutor would contend that if really she was given treatment as pleaded by the counsel for the appellant, the said statement which is now placed on record through preliminary statement could not have been made by the deceased. Opposing the argument of the counsel for the appellant that the dying declaration recorded by the Magistrate cannot be accepted, he submits that the same cannot be done when it is clear that the statement was given to the Magistrate in the presence of the Doctor.

6. The point that arises for consideration is whether the accused is responsible for the death and if so whether he can be convicted under Section 302 IPC?

7. As stated earlier, all the material witnesses namely, PWs.1 to 11, who were examined to prove the alleged act of harassment and also about the oral dying declaration, did not support the prosecution case. The entire case now rests on the dying declaration recorded by the Magistrate, which is placed on record as Ex.P18. Insofar the dying declaration recorded by the head constable, the trial Court rejected the same, which is not challenged by the prosecution.

8. Since all the material witnesses turned hostile and since the trial Court rejected the statement of the deceased recorded by the head constable, the entire case now rests on the dying declaration recorded by PW15, the Judicial Magistrate of First Class, Anantapur. The evidence of PW15 would show that on 17.03.2011, at about 03.15 a.m., on receipt of requisition from the Government General Hospital, Anantapur with regard to the admission of the injured in the hospital, he rushed to the hospital and with the assistance of the duty doctor Smt. B.Padmaja, recorded the dying declaration of the deceased. His evidence would show that to know the medical condition of the injured, he obtained the opinion of the duty doctor to certify that the patient was conscious and coherent and in a fit state of mind to give her statement. Though PW15 was cross examined at length, nothing useful was elicited to discredit her testimony. To a suggestion that the duty doctor administered analogin and sedatives to the declarant, was denied by him. However, it has been elicited that the declarant was in a position to give narrative statement. It was further elicited that no one was present in the casualty, when he went there to record the dying declaration. To a suggestion that the said declaration was an outcome of tutoring was denied by PW15.

9. It would be relevant to refer to the contents of the dying declaration which are as under:

“I put the following preliminary questions to the declarant to know the mental condition presently:

“1. What is your name?

Ans. Lakshmi.

2. Name of your husband?

Ans. Srinivasulu.

3. How many years have passed after your marriage?

Ans. Ten years.

4. Children?

Ans. One son and one daughter.

5. Your native place?

Ans. Kariganipalli (V) of Kalyandurg (M)

6. Native place of your parents?

Ans. Rayadurg.

7. Profession

Ans. I am a coolie and my husband is an agriculturist.

8. Where are you for the present?

Ans. In Government Hospital, Anantapur

9. Do you know, who am I?

Ans. Magistrate. You told that.

10. I came here to record your statement?

Ans. Yes.

On considering the above answers of the declarant, I stated that, the declarant is coherent, conscious and in a fit stage of mind to give declaration.

1. What happened?

Ans. One week back, I went to my parents village, Rayadurg and returned back last Monday to my village. With this reason, at about 06.30 p.m., my husband beat me like anything, poured kerosene and set fire on my body and escaped from the spot. By that time my children were present in the house. Due to heavy burnings, I came out of the house and cried. By listening my cry, neighbours of our house came and covered my body with a blanket. Then I have been shifted to hospital of Kalyandurg, then to this hospital. For the last two years my husband is neglecting me with an intention to remarry another lady, my husband with the support of his parents used to beat me, harass like anything and they made me aloof.

2. What are the names of your in-law?

Ans. Hanumakka and Thippeswamy.

3. Anything else to say?

Ans. No."

10. From the above, it is clear that the Magistrate has complied with the mandatory requirements of the Criminal Rules of Practice and after recording the dying declaration, obtained the left thumb impression of

the declarant. It is to be noted that the deceased categorically stated the manner in which she sustained burn injuries.

11. It is also to be noted here that the incident in question is said to have taken place on 16.03.2011 and the death of the deceased took place on 22.03.2011. PW12, who conducted autopsy over the dead body of the deceased on 22.03.2011, opined that he found anti mortem burn injuries present over 60% of the body surface and according to him the cause of death was due to septicemia as a result of burn injuries. A reading of the said dying declaration coupled with the opinion of the doctor amply establish that it was the accused who poured kerosene and set fire on the deceased. The version of the doctor further establish that the death of the deceased was due to Septicemia. From this the counsel for the appellant submits that the act of the accused was not the direct cause of the death of the deceased. He placed reliance on *Ganga Dass @ Godha Vs. State of Haryana*¹ and also the judgment of Karnataka High Court reported in *Girigowda @ Doddagirigowda, S/o. Thimmegowda Vs. State of Karnataka*² to show that in case of death due to Septicemia, the nature of the offence requires to be scale down to one under Section 326 IPC or Section 302 II of IPC.

12. In *Tukaram and others Vs. State of Maharashtra*³, the Apex Court dealt with a case where the accused was tried for offences under Sections 147, 148, 324, 302, 506 and 149 IPC. The doctor in the said case noticed faecal matter coming out from the stomach which led to bursting of the abdomen and as a consequence thereof a second operation was performed on 06.06.1995 and it was at that stage noticed

¹ 1994 Supp. (1) SCC 534

² 2012 Law Suit (Kar) 1230

³ (2011) 14 SCC 250

that the buttock injury was 8.5 cm. deep and that a finger inserted from the rectum could meet a finger inserted into the perforation on the buttocks. Consequent to this development, the patient developed Septicemia and pneumonia and died on 09.06.1995 at about 02.00 p.m. A case under Section 302 was registered against the accused. On the completion of the investigation they were brought to trial inter alia under Sections 147, 148 and 302/ 149 IPC. The trial Court relying on the eye witnesses' account and the medical evidence convicted the accused for the said offences and sentenced them to various terms of imprisonment. An appeal was, thereafter, taken to the High Court and the High Court has, while confirming the conviction, modified the sentence to one under Section 304 I read with Section 149 IPC and maintained the sentences and conviction under the other provisions of IPC. Further, in para 7 it held as under:

“7. It is true that the doctors have tried to cover up their indifference and negligence by deposing that the death could be attributed to the injury caused to the abdominal organs but we are of the opinion that had the doctors been a little vigilant during the 20 days that the deceased stood admitted to the hospital the possibility that he could have been saved cannot be ruled out. In this view of the matter we find that the accused are liable for conviction for an offence under Sections 326/ 149 IPC instead of Section 304 Part I read with Section 149 IPC”.

13. In *Ganga Dass* case (supra), the Apex Court in para 6, held as under:

“6. We find considerable force in this submission. As stated above the occurrence took place on November 18, 1988 and the deceased died 18 days later on December 5, 1988 due to septicemia and other complications. The doctor found only one injury on the head and that was due to single blow inflicted with an iron pipe not with any sharp-edged weapon. Having regard to the circumstances of the case, it is difficult to hold that the appellant intended to cause death nor it can be said that he intended to cause that particular injury. In any

event the medical evidence shows that the injured deceased was operated but unfortunately some complications set in and ultimately he died because of cardiac failure etc. Under these circumstances, we set aside the conviction of the appellant under Section 302 IPC and the sentence of imprisonment for life awarded thereunder. Instead we convict him under Section 304 Part II IPC and sentence him to undergo six years' RI. The sentence of fine of Rs.2000 along with default clause is confirmed. Accordingly, the appeal is partly allowed".

14. In *MANIBEN V/s. STATE OF GUJARAT*⁴, the Supreme Court was dealing with a case where the Terylene clothes of the deceased were set on fire by means of a burning wick of rags. The deceased remained under treatment in hospital for eight days and died thereafter. She had sustained about 60% burn injuries and also developed septicaemia, which was the main cause of death. The evidence on record proved that the action of the accused in throwing the burning wick was preceded by a quarrel between the deceased and the accused. The Supreme Court therefore concluded that it could not be said that the accused had the intention to cause death or such bodily injury to the deceased which was sufficient in the ordinary course of nature to cause death. The Supreme Court therefore opined that the case could not be said to be covered under clause 4 of Section 300 IPC. The conviction was accordingly reduced to one under Section 304 Part II IPC.

15. In *Shanmugam @Kulandaivelu Vs. State of Tamil Nadu*⁵ in para 13, it held as under:

"...He then stated that the immediate cause of death was the infection on account of oozing of excreta from the colon and the wounds becoming septic thereby. His evidence, viewed as a whole, does not lead to a definite conclusion as to the sufficiency of injuries causing death in the ordinary course. The evidence of doctor (PW6) who did

⁴ = 2009 (16) SCC (316)

⁵ AIR (2003) SC 209

post-mortem is also not categorical so as to form a definite opinion that the injuries inflicted on the deceased were sufficient in the ordinary course of nature to cause death. While reiterating the opinion of PW5 that death occurred by reason of onset of septicemia because of puss and infection, he deposed that the wounds on the gall bladder of the deceased were 'capable' of causing death. At the same time, he stated in the cross-examination that it cannot be said with certainty that the wounds on the gall bladder would result in death. It may be noticed that the nature of wounds on the al bladder was 'two tears'. If the gall bladder was wounded on account of stabbing, normally one would find an incised wound there. That is why what he further said in the cross-examination assumed importance. He stated that gall bladder injury could occur "if a person fell or got hit in the stomach with force and kicked by leg". The possibility of such contingency cannot be ruled out in the instant case. Moreover, PW6 did not notice much loss of blood on account of gall bladder injury. In these circumstances, a reasonable doubt arises whether the tear wounds on the gall bladder, which according to PW6 were capable of causing death, were sufficient in the ordinary course of nature to cause death. At the same time, the nature of injuries and the medical opinion unmistakably point to the fact that the bodily injuries inflicted on the deceased were of such nature that they were likely to cause death. There can be no doubt that ht accused intended to cause and did cause the injuries. We are, therefore, of the view that the appellant is liable to be punished under First Part of Section 304 IPC. He is therefore, convicted under Section 304, Part I. In the facts and circumstances of the case, we are of the view that the sentence of 7 years' R.I. and a fine of Rs.1,000/- will be appropriate. In default of payment of fine, he shall suffer further imprisonment for a period of four months. Accordingly, the appeal is partly allowed and the convicted and sentence stand modified. The period of imprisonment already undergone shall of course be set off against the sentence of imprisonment now imposed".

16. The Division Bench of Karnataka High Court in *Girigowda's case* (supra) dealt with a case where the death was due to Septicemia, as a result of burn injuries sustained by the injured. It was a case where the deceased sustained 42%– 44 % burn injuries. While dealing with the said aspect, the Court held that death is not a direct consequence of the act of the accused; that PW17 has given his opinion that the death was

due to Septicemia as a result of poisoning and inhaling of the smoke, which has entered into the lungs and heart of the deceased. Therefore, it is submitted by him that offence does not fall under Section 302 or Section 304 of IPC and it only comes under Section 326 IPC, since the death is not the direct consequence of the act of the accused.”

17. Even in the instant case, incident in question is said to have taken place on 16.03.2011 and nearly six days later i.e., on 22.03.2011, she died because of Septicemia. The doctor categorically stated that death was due to Septicemia. Therefore, it appears that the act of the accused cannot be the direct cause of the incident. Because of improper treatment, the injured might have developed infection which lead to her death.

18. Hence, in view of the judgments of the Apex Court referred to above and since the cause of death was due to Septicemia, which occurred due to 60% burn injuries, we feel that the case on hand is squarely covered by the judgments referred to above and the Conviction of the accused under Section 302 IPC can be scaled down to Section 326 IPC. At this stage, learned counsel for the appellant submits that the deceased is in jail since last five years.

19. Accordingly, the Criminal Appeal is allowed in part. The conviction and sentence recorded against the appellant/ accused in the judgment, dated 10.01.2013, in Sessions Case No.331 of 2011, on the file of the Sessions Judge, Family Court-cum-Additional Sessions Judge, Anantapur, for an offence punishable under Section 498(A) of I.P.C., remains un-altered. The conviction and sentence recorded against the appellant in the judgment dated 10.01.2013, for an offence punishable under Section 302 IPC is altered to one under Section 326 IPC, and the

appellant is sentenced to suffer rigorous imprisonment for a period of six years. Both the sentences are directed to run concurrently. The period of remand underwent by him during investigation, trial and after conviction shall be given set off, under Section 428 Cr.P.C. Consequently, the appellant/ accused shall be set at liberty forthwith, if not required in any other case, on completion of six years of rigorous imprisonment, including remissions, if he is entitled to. Order relating to payment of fine amount and M.Os. shall remain un-altered.

JUSTICE C. PRAVEEN KUMAR

JUSTICE J. UMA DEVI

Date: 22.01.2018
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