

HON'BLE SRI JUSTICE C.PRAVEEN KUMAR

AND

HON'BLE SMT JUSTICE T.RAJANI

CRIMINAL APPEAL No.1423 of 2011

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

1) The sole accused in Sessions Case No.126 of 2010 on the file of IV Additional District and Sessions Judge (FTC) at Mahabubnagar, is the appellant herein. He was tried for the offences punishable under Sections 498-A and 302 IPC, for causing the death of his wife Yadamma by pouring kerosene and setting her on fire. By its judgment dated 20.04.2011, the learned IV Additional District and Sessions Judge convicted the accused and sentenced him to suffer Rigorous Imprisonment for a period of three years and also to pay a fine of Rs.500/- in default to suffer simple imprisonment for a period of three months for the offence punishable under Section 498-A IPC and further sentenced to under go Imprisonment for Life and to pay a fine of Rs.500/- in default to suffer simple imprisonment for a period of three months for the offence punishable under Section 302 IPC. The above sentences were directed to run concurrently.

2) The facts of the case are as under:-

The accused is the husband of one Yadamma (hereinafter referred to as deceased). P.W.1 is the mother-in-law and P.W.2 is the brother-in-law of the accused, while P.W.3 is the son of P.W.1. P.Ws.4, 5 and 6 are residents of the same locality. All the material witnesses including P.Ws.8 to 11 who are the panch witnesses for the inquest and scene of offence panchanamas did not support the prosecution case. The entire case is now based on the Dying Declaration recorded by P.W.15-the then Junior Civil Judge, Mahabubnagar. As per the evidence available on record, on 23.05.2009 at 10.00 a.m, P.W.13-the then S.I. of Police, Jadcherla P.S., received a written report from P.W.1, which was scribed by P.W.6, narrating the manner in which the death took place. As per the said report, the marriage between the deceased Yadamma and accused took place about 14 years prior to the incident and they lived happily for a period of 12 years. Since two years prior to the date of the incident, the accused got addicted to bad vices and used to beat the deceased. On 22.05.2009, P.W.1, who is the mother of the deceased came to Jadcherla on her personal work. At that time P.W.5, who is relative of P.W.1, came to her and informed that her daughter (deceased) is in flames. Immediately thereafter, she rushed to the house of her daughter and on coming to know that her

daughter was shifted to Government Headquarters Hospital, she proceeded to the hospital and there her daughter is said to have informed her that the accused, who has received the chit amount of Rs.20,000/- about 15 days prior to the incident was spending the same towards his vices and when she questioned the accused, he picked up quarrel, poured kerosene and set her on fire. The said report was registered by the S.I. of Police as a case in Crime No.210 of 2009 for the offences punishable under Sections 498-A and 302 IPC. Ex.P-24 is the copy of the FIR. He examined P.W.1 and recorded her statement. Further, the investigation in this case was taken up by P.W.14-Inspector of Police. The evidence of P.W.15-the Junior Civil Judge would show that on 22.05.2009 at about 8.00 p.m., he received a requisition from the police out-post of Government Hospital, Mahabubnagar, for recording the Dying Declaration of Smt. Yadamma. On receipt of the same, he proceeded to the hospital and after identifying the victim by name Yadamma, took the endorsement of the duty Doctor with regard to the coherence and consciousness of the injured and on being satisfied with regard to the mental condition, recorded the statement of Yadamma. After recording the statement, he read over the contents of the Declaration and obtained the right toe impression of the deceased as both hands were burnt. Ex.P-28 is the Dying

Declaration. P.W.14, the then Inspector of Police, Jadcherla, who conducted investigation, deposed that on receipt of a copy of the FIR, he visited the scene of offence, situated at the house of the deceased, and in the presence of P.Ws.8 and 9 prepared a rough sketch of the scene, which is placed on record as Ex.P-25. He also seized one black colour kerosene tin at the scene of offence. Thereafter, he proceeded to the Hospital, in view of the information received with regard to the death of the deceased, and conducted inquest over the dead body in the presence of P.Ws.10 and 11. Ex.P-26 is the inquest report. During inquest, he examined P.Ws.1 to 3 and recorded their statements. He also got photographed the scene of offence through P.W.7. Thereafter, he sent the dead body for Post-Mortem examination. P.W.12, the Civil Assistant Surgeon in the Government Hospital, Mahabubnagar, conducted autopsy over the dead body of the deceased and issued Ex.P-22-Post Mortem certificate. According to him, the injured died due to cardio respiratory arrest and due to 100% burns. After collecting all the necessary documents viz., Post Mortem report, Dying Declaration and after completion of investigation, P.W.14 filed the charge-sheet against the accused before the Court of Judicial Magistrate of First Class at Jadcherla, which was taken on file as P.R.C.No.36 of 2009, who after complying with Section 207 Cr.P.C.,

committed the case to the Sessions Division under Section 209 of Cr.P.C. On committal, the same came to be numbered as S.C.No.126 of 2010.

3) Basing on the material available on record, charges under Sections 498-A and 302 IPC were framed, read over and explained to the accused, to which he pleaded not guilty and claimed to be tried.

4) To substantiate its case, the prosecution examined PWs.1 to 15 and got marked Exs.P-1 to P-28 and MO.1. After the closure of evidence, the accused was examined under Section 313 Cr.P.C., with reference to the incriminating circumstances appearing against him, in the evidence of the prosecution witnesses, to which he denied. No oral or documentary evidence was adduced on behalf of the accused.

5) Out of the 15 witnesses examined by the prosecution, P.Ws.1 to 6, 8 to 11 did not support the prosecution and were declared hostile to the prosecution. Believing the Dying Declaration marked as Ex.P-28 recorded by the Magistrate, the learned Sessions Judge convicted the accused for the offences punishable under Sections 498-A IPC and 302 IPC. Challenging the same, the present appeal is filed.

6) In the instant case, as observed by us earlier, the entire case is based on Exs.P-28-Dying Declaration, which was recorded by P.W.15-Magistrate, since P.W.1 to whom the oral Dying Declaration was made by the deceased and who set the law into motion, did not support the same. A Comment is being made by the counsel for the accused with regard to the manner in which the said Dying Declaration came to be recorded, more particularly having regard to the answers elicited in the cross-examination of the Magistrate.

7) Though the Dying Declaration-Ex.P-28, refer to the manner in which the incident took place, but the third page of the said Dying Declaration contains two toe impressions. One is in black ink and another is in blue ink. The same is evident from the evidence of the Magistrate, who in his cross-examination admits that there are two impressions in Ex.P-28 at page No.3, while one is with black ink, another one is in blue ink. He also admits that both the impressions are toe impressions. He also admits that he never obtained the endorsement of the Medical Officer to the effect that both the hands of the declarant were burnt. Further, both the impressions are not at the same place. One impression is at the bottom of the page i.e., above the words "Rt Leg Great toe impression of Smt. K.Yadamma and second one above the same, on the endorsement". As hands are burnt, not able to put the thumb

impression." No explanation is forthcoming as to why there are two impressions with two different ink colours. The Magistrate, who recorded the Dying Declaration failed to explain as to why the said two toe impressions are in two different ink colours. It is not his explanation that while obtaining the toe impression at the bottom of the page, by mistake the same got affixed at a place where the toe impression has to be affixed. Even assuming that by mistake he got affixed at a different place, there should have been some explanation as to why there was a change in the ink colour in the two toe impressions, more so when both the toe impressions were of right leg only. The Court below brushed aside the said discrepancy holding that it is not a material defect to reject the entire Dying Declaration. The Court tries to explain away the same, which the witness does not do and was not even asked to do.

8) The Apex in **Bhajju alias Karan Singh v. State of Madhya Pradesh**¹ while dealing with admissibility of dying declaration held as follows:

"The law is well settled that a dying declaration is admissible in evidence and the admissibility is founded on the principle of necessity. A dying declaration, if found reliable, can form the basis of a conviction. A court of facts is not excluded from acting upon an uncorroborated dying declaration for

¹ (2012) 4 SCC 327

finding conviction. The dying declaration, as a piece of evidence, stands on the same footing as any other piece of evidence. It has to be judged and appreciated in light of the surrounding circumstances and its weight determined by reference to the principle governing the weighing of evidence. If in a given case, a particular dying declaration suffers from any infirmity, either of its own or as disclosed by the other evidence adduced in the case or the circumstances coming to its notice, the court may, as a rule of prudence, look for corroboration and if the infirmities are such as would render a dying declaration so infirm that it pricks the conscience of the court, the same may be refused to be accepted as forming basis of the conviction."

9) The Apex court in **Arvind Singh v. State of Bihar**² while dealing with a case based on dying declaration held as follows:

"Dying declaration shall have to be dealt with care and caution. Corroboration is not essential but it is expedient to have the same, in order to strengthen the evidentiary value of declaration. Independent witnesses may not be available but there should be proper care and caution in the matter of acceptance of such a statement as trustworthy evidence."

10) The learned Public Prosecutor would submit that since the Dying Declaration was recorded by a Magistrate, there is no reason to disbelieve it. We are afraid to accept the said proposition. It all depends on facts in issue. The Apex Court in **State of Karnataka**

² (2001) 6 SCC 407

vs. Suvarnnamma³ disbelieved the Dying Declaration recorded by a Magistrate and convicted the accused on oral Dying Declaration. It was a case where the Dying Declaration-Ex.D-7 recorded by a Magistrate came to be produced by the accused to prove their case as against the oral Dying Declaration made by the deceased before the family members and Ex.P-9-the Dying Declaration made before the police. In the Dying Declaration recorded by the Magistrate, it was mentioned that the death was accidental. Having regard to the facts in issue, the Apex Court preferred Ex.P-9 the oral Dying Declaration made to the family members by the deceased to the Dying Declaration recorded by the Magistrate. In other words, the Court rejected the Dying Declaration recorded by the Magistrate. From the above, it is clear that merely because the Dying Declaration was recorded by a Magistrate, it does not by itself mean that the same has to be accepted. It all depends on the facts in issue.

11) But having regard to the circumstances stated above, we are not inclined to accept the same when there is no corroboration to the contents of the said Dying Declaration. Things would have been different had the Doctor, who was present at that time, been examined to speak to the said discrepancy or atleast, the Public

³ (2015)1 SCC 323

Prosecutor should have elicited the discrepancies pointed out earlier from the evidence of Magistrate atleast by re-examining him. Fact is that no effort was made in that regard.

12) Having regard to the circumstances stated above and in the absence of any other corroborating evidence, we are not inclined to convict the accused basing on Ex.P-28.

13) In the result, the Criminal Appeal is allowed. The conviction and sentence recorded against the appellant/accused in the judgment, 20.04.2011, passed in Sessions Case No.126 of 2010 on the file of IV Additional District and Sessions Judge (FTC) at Mahabubnagar, for the offences punishable under Sections 498-A and 302 IPC are set aside. Consequently, the accused shall be set at liberty forthwith, if he is not required in any other case or crime.

JUSTICE C.PRAVEEN KUMAR

JUSTICE T.RAJANI

Dt: 07.09.2018
GM