

HON' BLE SRI JUSTICE C.PRAVEEN KUMAR

AND

HON' BLE MRS. JUSTICE T.RAJANI

CRIMINAL APPEAL No.678 of 2013

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

The sole accused in Sessions Case No. 1 of 2013 on the file of the Court of the Sessions, Nizamabad Division, Nizamabad, is the appellant herein. He was tried for an offence punishable under Section 302 IPC, for causing the death of his two daughters on 22.06.2012, at about 0130 hours, at Shyamala Pedda Cheruvu, Dharmora Village of Makloor Mandal. Vide judgment dated 10.06.2013, the learned Sessions Judge convicted the accused for the offence punishable under Section 302 IPC and sentenced him to suffer imprisonment for life and also to pay a fine of Rs.1,000/- in default to undergo simple imprisonment for a period of one month.

2. The facts, as culled out from the evidence of the prosecution witnesses, are as under:

PW1 is the wife of the deceased while PW2 is the grandmother of PW1. The two deceased are the children of PW1 and accused. The accused and PW1 were staying in the house of PW9-Rajula Nagavva. On the date of incident, i.e., on 22nd June, 2012, the accused came home in a drunken condition and insisted that PW1 should not undergo family planning operation, as sought

by her. There was a quarrel, pursuant to which, the accused left to his brother's house. After taking meals, PW1 went to bed. Then, the accused came back to the house, beat PW1 and took both the children along with him, saying that he was going to his brother's house. However, he did not return back. PW1 searched for him and the children in the house of the brother and sister of the accused, but, to no avail. Three days thereafter, she was informed by one Begari Gangaram-PW5 that the bodies of the two children were found floating in Shyamala Cheruvu. She went there and found her two daughters floating in the tank. Subsequently, police came to the spot, and recorded the statement of PW1, which is placed on record as Ex.P1. Basing on the said statement, a case in Crime No. 133 of 2012 came to be registered under Section 302 IPC by PW10-the Assistant Sub Inspector of Police, Makloor Police Station. Ex.P9 is the original First Information Report.

3. Further investigation in this case was taken up by PW14-the Circle Inspector of Police, Nizamabad Rural. After receiving a copy of the F.I.R., PW14 went to the scene of offence, examined PW1 and recorded her statement. Thereafter, he conducted panchanama of the scene and also drew a rough sketch of the scene in the presence of PW7. Later, he got removed the dead bodies of the two children (D1 and D2) and conducted inquest in the presence of PW7, LW11 and LW13. Exhibits P5 and P6 are the inquest reports of D1 and D2. During inquest, he examined PWs 2

to 5 and recorded their statements. Thereafter, he sent the two dead bodies for post mortem examination.

4. PW13-the Civil Assistant Surgeon, Government Headquarters Hospital, Nizamabad conducted autopsy over the bodies of the two deceased and issued Exhibits P12 and P13-the Post Mortem Report in respect of D1 and D2 respectively. According to him, the cause of death was due to drowning.

5. After the post mortem examination, PW14 seized the clothes of D1 and D2 in the presence of PW7. On the same day, PW14 visited the house of PW1 and recorded the statements of PWs 6 and 7. On 29.06.2012, he is said to have apprehended the accused and pursuant to the confession made, he seized a passport (M.O.5) in the presence of PW8. After collecting all the necessary documents, a charge sheet came to be filed, which was taken on file as PRC No. 108 of 2012 on the file of the II Additional Judicial Magistrate of First Class, Nizamabad. On appearance, copies of the documents were furnished and after satisfying the requirements of Section 207 of Cr.P.C., the matter was committed to the Court of Sessions, where it came to be numbered as S.C.No. 1 of 2013 on the file of the Court of the Sessions, Nizamabad Division, Nizamabad. Basing on the material on record, a charge for the offence punishable under Sections 302 of IPC came to be framed, read over and explained to the accused, to which he denied and claimed to be tried.

6. In support of its case, the prosecution examined PWs.1 to 14 and got marked Exs.P1 to P13 and M.Os.1 to 5. 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 by the accused in support of his defence. Out of the (14) witnesses examined by the prosecution, PWs 1, 2 and 12 did not support the prosecution case and were treated hostile by the prosecution.

7. Though PW1 was declared hostile, the learned Sessions Judge convicted the accused under Section 302 IPC, basing on the evidence of PWs 1, 6 and 9. Challenging the same, the present appeal came to be filed.

8. The learned counsel for the appellant mainly submits that there is absolutely no evidence to connect the accused with the crime. According to him, PW1, who is the sole witness to speak about the accused taking away the two children from his house, did not support the version spoken to by her in the chief examination, and as such, the same cannot be made the basis to convict the accused, in the absence of any other evidence to connect the accused with the crime.

9. On the other hand, the learned Public Prosecutor opposed the same, contending that since the sole witness PW1 went back on what has been stated in the chief examination, and since she was

treated hostile in the re-examination, the evidence in chief can be made the basis to convict the accused.

10. As seen from the record, the entire case mainly rests on the evidence of PW1 with regard to accused taking away the children from the house. Though PWs 6 and 9 deposed about the quarrel between the accused and deceased at 5 p.m., on the date of incident, none of them deposed about the accused taking away the children from the house of PW1. Therefore, it would be appropriate to refer to the evidence of PW1, which is as under:

11. PW1, in her evidence, deposed that the accused is her husband and the deceased are her children; her elder daughter was aged about three years and younger daughter aged about three months. It is said that the herself and the accused lived happily for some time, and thereafter, disputes arose between them. On the date of incident, a quarrel took place between them when the accused insisted that she should not undergo family planning operation. Thereafter, the accused left the place. It is stated that while PW1 was sleeping, the accused came back to the house and took the two children along with him. Thinking that the accused would be going to his brother's house, PW1 kept quiet, but, when the accused did not return home on that night, she started searching for him and the children. On the next day, she went to his brother's and sister's house, but of no avail. Three days later, the bodies of the two children were found floating in Shyamala Cheruvu.

12. This evidence in chief was recorded on 19.03.2013. On the very next day, i.e., 20.03.2013, PW1 was subjected to cross-examination. In the cross-examination, she gives a complete go-by to what she has stated in the chief. In the cross-examination, PW1 stated as under:

“My husband returned in the night and did not bring the children. When I enquired my husband about children he said that he kept both the children at his brother's house where his sister-in-law was present. My husband's sister-in-law came and told me that my children are missing from her house. Their house is very nearer to the tank. My husband his relatives and my relatives also joined in search of children. My husband went out station in search of my children suspecting that somebody might have kidnapped children. When the children were found at tank he was not there. After I went to police station my husband also returned. I do not know whether in Ex.P1 it was written as I stated or something else. Now I am regnant. I did not undergo family planning operation. I have no suspicion on anybody as to who killed them.”

13. Thereafter, PW1 was re-examined by the Public Prosecutor and then declared hostile. In the re-examination, she states that what she has stated on the previous day was due to fear of police and that what she has deposed in the cross-examination on that day is true.

14. From the evidence of PW1, it is clear that she went back on her version, on the ground that the version in chief was due to fear of police. She further states that she has no suspicion on anybody as to the person responsible for the death of the two children. She further states that when she enquired her husband about the children, he stated that he kept both the children in his brother's house, where his sister-in-law was present, and later, his sister-in-law came and told PW1 that the children were missing from the house.

15. The argument of the learned Public Prosecutor is that since PW1 went back in the cross-examination and since she was declared hostile during cross-examination, her evidence in chief alone is sufficient, to base a conviction. But, the judgments of the Hon'ble Supreme Court, as well as this Court, on which the learned Public Prosecutor relied, relate to cases where witnesses went back in the cross-examination long after the evidence in chief was recorded. Under those circumstances, the courts held that the evidence in chief can be looked into, if it is supported by any other material on record.

16. The learned counsel for the appellant relied upon the judgment of the Division Bench of this Court in Dudekula Rasool v. State of Andhra Pradesh¹ and also the judgment of the Apex Court in Javed Masood and another v. State of Rajasthan² contending that the evidence in chief of PW1 cannot be made the basis to

¹ Laws (APH)-2018-2-25

² (2010)3 SCC 538

convict the accused, since her version in cross-examination can be made use of by the accused. But the same is strongly opposed by the learned Public Prosecutor, stating that if the practice of this nature is allowed, there will not be any fair trial.

17. In Javed Masood and another's case, the Apex Court dealt with a situation where the witnesses were examined by the prosecution to support the case. Though deposed in chief, but turned hostile in the cross-examination at a later point of time. It was a case where the cross-examination was deferred, and the Public Prosecutor failed to declare them as hostile when the witness resiled from their versions in chief. Under those circumstances, the Apex Court disbelieved their evidence.

18. In Dudekula Rasool's case (2 supra), the Court was dealing with the situation where the entire case rests on the evidence of P.W.2. In evidence in chief, P.W.2 deposed about the manner in which the deceased was caused to death. Three months thereafter the case was posted for cross-examination of P.W.2 and she was accordingly cross-examined on that day. The cross-examination was very brief, in which she totally resiled from what she has stated in chief by giving the complete volteface in her cross. Strangely, in that case, the Public Prosecutor failed to declare the witness as hostile and put questions to her under Section 154 the Evidence Act. In the said case, it was held as under:

“When the evidence of a witness, who was not declared hostile, was found mutually contradictory, the accused is entitled to take

the benefit of the portion of evidence of the witness, which goes in his favour. Therefore, the deposition of PW.2 in the Cross- Examination, which has nullified what she has stated in her Chief-Examination, cannot be ignored. The Court below, in our opinion, committed a patent error in relying upon the Chief- Examination portion of PW.2 without considering her testimony in Cross-Examination. As the evidence of PW.2 considered as a whole is self- contradictory, the same cannot be given any credence at all. Once the evidence of PW.2 is eschewed, there is no other evidence, except Ex.P.12- the alleged confessional statement of the deceased and recovery of broken bangles to connect the accused with the death of the deceased.”

19. In the case on hand, PW2 gave her evidence in chief on 19.03.2013 and was subjected to cross-examination on the very next day, i.e., 20.03.2013, and she was declared hostile only after re-examination. In view of the findings in Dudekula Rasool’s case, when the evidence of PW1, who was not declared hostile, was found mutually contradictory, the accused is entitled to take the benefit of the portion of evidence of PW1, which goes in his favour.

20. In *Rajaram v. State of Rajasthan*³, the Apex Court was dealing with a situation where the Doctor, who was examined as prosecution witness, deposed that the deceased was being told by one ‘K’ that she would implicate the accused or else she might have to face prosecution. The Doctor was not declared hostile. Though the High Court convicted the accused, the Hon’ble Supreme Court, however, held that it was open to the defence to

³ (2005)5 SCC 272

rely on the evidence of the Doctor and it was binding on the prosecution.

21. Similarly, in *Pubi Satyanarayana alias Satteyya v. State of Andhra Pradesh*⁴ a Division Bench of this Court came down heavily on the practice of the defence seeking deferment of cross-examination with a view to manage the prosecution witnesses and make them turn hostile during the cross-examination. In paragraph 16, the Division Bench observed as under:

“The hostile attitude of the witnesses has become the order of the day. It appears that the Courts below are taking a lenient view on the resiling events that take place during the course of the trial. This is a matter of concern because where the witnesses state on oath in the Court in the first instance and after taking adjournment on some pretext, the witnesses turn hostile, which is nothing but blatant manipulation of evidence. It is the duty of the Court in such cases to proceed for perjury against the persons concerned. When the statements have been made in the Court during the trial and subsequently the witnesses resile, the Court is competent to take steps to initiate proceedings for perjury and, in the instant case, the Court below is perfectly justified in taking steps to proceed for perjury. We appreciate the stand taken by the learned Additional Sessions Judge and believe that the same trend will be followed by other Sessions Judges too in similar situations so that the manipulation can be curbed at the initial stage itself.

⁴ 1994(2) ALT 172

22. In the instant case, as already stated, the evidence in chief of PW1 was recorded on 19th March and on the next day, she went back. There is no other evidence on record to establish that the accused took away the two children from his house on the night of 22nd June, 2012. Though it is a case of double murder, but, in the absence of any other evidence on record, we feel that the evidence of PW1, who went back from what she has stated in chief on the very next day, cannot be made the basis to convict the accused.

23. In the result, the Criminal Appeal is allowed. The conviction and sentence recorded against the appellant/accused in the judgment dated 10.06.2013, in Sessions Case No.1 of 2013, on the file of the Court of Sessions, Nizamabad Division, Nizamabad, for the offence punishable under Section 302 I.P.C. is set aside and he is acquitted for the said offence. Consequently, the appellant/accused shall be set at liberty forthwith, if not required in any other case. Miscellaneous petitions pending, if any, stand closed.

JUSTICE C. PRAVEEN KUMAR

JUSTICE T. RAJANI

11.07.2018
DMG