

**THE HON'BLE SRI JUSTICE A.V.SESHA SAI
AND
THE HON'BLE SRI JUSTICE GUDISEVA SHYAM PRASAD**

CRIMINAL APPEAL NO. 56 OF 2014.

JUDGMENT:(Per the Hon'ble Sri Justice Gudiseva Shyam Prasad)

This appeal is arising out of judgment, dated 31.01.2012 passed in S.C.No.391 of 2011 by the learned II Addl. District and Sessions Judge, West Godavari, Eluru, whereunder and whereby the appellant/accused was convicted and sentenced to undergo imprisonment for life and also to pay a fine of Rs.500/- in default to undergo simple imprisonment for one month for the offence punishable under Section 302 IPC.

2. The case of the prosecution is as follows:

Accused is the husband and P.W.1 is the daughter of Kora Gunnamma (hereinafter referred to as 'the deceased'). The accused is native of Cheedivalasa village, Pottangi Mandal, Koraput District, Orissa State and working as labour in Vijayalakshmi Fine Chemical Factory, Ananthapalli village prior to two months of the occurrence and residing in a portion of Asbestos sheet roofed quarters situated within the factory premises along with his wife. The accused used to suspect the fidelity of his wife and used to altercate with her both verbally and physically, for which, the neighbours, P.Ws. 2 to 6 used to suggest the accused not to quarrel with his wife. On 04.12.2010, he raised dispute with his wife and as the deceased was unable to bear the torture, she told the accused that if he does not stop harassment, she will leave him on the next day and went to sleep. On 05.12.2010 at about 4.00 A.M., the accused picked up a quarrel with the deceased and

took out a cement brick-M.O.1 and inflicted a severe blow on her face and immediately, the deceased raised cries and died. P.W.1 woke up and witnessed the incident and also raised cries out of fear. On hearing the cries, P.Ws. 2 to 5 gathered there and on seeing them, the accused had thrown the cement brick and escaped from there. On knowing about the incident, P.W.7 visited the scene of offence and prepared a report under Ex.P1, basing on which, P.W.10 registered a case in Cr.No.204 of 2010, under Section 302 IPC and issued Ex.P6-F.I.R. Thereafter, P.W.11 took up investigation and in the presence of P.W.7 and others examined the scene of offence and seized M.Os. 1 and 2. Thereafter, in the presence of mediators, he conducted inquest over the dead body of the deceased under Ex.P4-inquest report and thereafter, sent the dead body for autopsy. During the inquest, he seized M.Os.4 to 6. P.W.9-Civil Assistant Surgeon conducted autopsy over the dead body of the deceased and issued Ex.P5-post mortem certificate, opining that the death of the deceased was due to Cardio Respiratory failure due to injury to the vital organ Brain Stem. On 08.12.2010, the accused was arrested at his residence. On receipt of Ex.P8-RFSL report and after completion of investigation, charge sheet was filed.

3. The learned I Addl. Judl. Magistrate of I Class, Tadepalligudem, had taken the case on file for the offence punishable under Section 302 IPC and numbered it as PRC No.7 of 2011 and furnished copies of documents to the accused as contemplated under Section 207 Cr.P.C. Since the offence punishable under Section 302 IPC being exclusively triable by Court of Sessions, he committed the case to the Court of Sessions under Section 209 Cr.PC.

The learned Principal District and Sessions Judge, West Godavari, after numbering the case as S.C.No.391 of 2011, made over the same to the II Addl. District and Sessions Judge, West Godavari, Eluru, for disposal in accordance with law.

4. The learned Sessions Judge framed a charge under Section 302 IPC against the accused, read over and explained to him in Telugu, for which, he pleaded not guilty and claimed to be tried.

5. In support of its case, the prosecution examined P.Ws. 1 to 11 and got marked Exs.P1 to P8, besides case property, M.Os. 1 to 9.

6. After closure of the prosecution evidence, the accused was examined under Section 313 Cr.P.C. with reference to the incriminating material appearing against him in the evidence of prosecution witnesses. He denied the offence. No evidence either oral or documentary was adduced on behalf of the accused.

7. The learned Sessions Judge after considering the entire oral and documentary evidence available on record, convicted and sentenced the accused as stated supra. Challenging the same, this appeal is preferred by the accused.

8. The point for consideration in this appeal is- “whether the prosecution proved the guilt of the accused beyond all reasonable doubt for the offence punishable under Section 302 IPC?”

9. Heard the arguments of the leaned counsel for the appellant and the learned Public Prosecutor.

10. Learned counsel for the appellant mainly submits that the entire case of the prosecution rests on the sole testimony of P.W.1, a child witness. The child witness was tutored by the elders of the village and at their instance, she spoke against her own father. It is further submitted that the witness, P.W.2 has stated in her cross-examination that by the date of the incident, she was at Gantavarigudem, which is in Orissa State, whereas the alleged incident occurred in Ananthapalli village, near Rajahmundry. Therefore, it is argued that the presence of P.W.2, and seeing the accused, running away by throwing the brick is not probable. He further submits that the case is based on circumstantial evidence and therefore, the prosecution has failed to prove the offence against the accused.

11. Learned Public Prosecutor submits that the testimony of P.W.1 is cogent and trust-worthy. P.W.1 was present at the scene of offence and witnessed her father holding a brick immediately after the incident. Her testimony cannot be doubted as she is a child witness and there is no need for her to give false evidence against her own father.

12. A perusal of the testimony of P.W.1 reveals that she is a child witness, aged about 12 years. The learned Sessions Judge has put preliminary questions to her and decided her competence to be a witness in this case. The child witness has clearly deposed that she has not witnessed her father beating her mother with a brick. She heard cries of her mother and after beating with the brick, her father came out of the room and thrown away the brick in the same room. Statement of this witness cannot

be doubted at all. The reasons are being that if she is a tutored witness, she would have stated that she had seen her father beating her mother with a brick. There was no need for her to say that she did not witness her father beating her mother and she saw her father while he was coming out of the room throwing away the brick. Therefore, this fact clearly proves that the witness is speaking truth. On the other hand, there is no evidence on record to show that this witness being a child witness is tutored by any body. Nothing is elicited in her cross-examination to discredit her testimony.

13. It is also pertinent to note that this witness stated in her chief-examination that her parents used to altercate everyday as her father used to suspect her mother that her mother may leave him. The motive for commission of offence is also clearly established through this witness. The accused has suspected the fidelity of his wife and used to quarrel with her everyday. The quarrel between the couple was due to suspicion of fidelity of wife, which led the accused to commit the offence. This witness is a child witness and there is no need for her to give false evidence against her own father. Therefore, there are no reasons coming forth to disbelieve her testimony.

14. The evidence of the Medical Officer clearly reveals that the deceased had received the following external injuries:

- (a) Contusion of about 3 x 2 cms on left supra orbital area
- (b) An abrasion of about 2 x ½ cms on left cheek.

The Medical Officer opined that the cause of the death was due to Cardio-respiratory failure due to injury to the vital organ i.e., brain stem. He has also stated that the

injuries recorded in the Post-mortem report, Ex.P5 are possible with material object, M.O.1. In the cross-examination also, he has stated that if anybody beat with a blunt object like M.O.1, there will not be any possibility of object soaking with blood.

15. The F.S.L. report, Ex.P8 clearly reveals that blood was detected on item Nos.1, 3, 4, 5, 6, 7 and 8, but there is no blood detected on item No.2. M.O.1 is corresponding to item No.4. It is not uncommon that any brick is used for beating on the head of a person, there is likelihood of the brick being stained with blood. Therefore, the suggestion by the defence counsel in the testimony of Medical Officer is not relevant in the light of the facts and circumstances of this case. The testimony of Medical Officer clearly reveals that the injuries on the deceased can be caused by a material object like M.O.1. Therefore, the testimony of Medical Officer is corroborating with the testimony of child witness, P.W.1.

16. P.W.2 is the neighbour of the accused. Her testimony reveals that P.W.1 came and told her that her father beat her mother with cement brick. She has also identified cement brick-M.O.1, with which her father beat her mother, which was found at the scene of offence. But, surprisingly, she stated in her cross-examination that by the date of the incident, they were at Gantavarigudem. Therefore, the testimony of this witness does not lend support to the case of the prosecution. However, in the light of the testimony of P.W.1 and the witnesses P.Ws. 3 and 4, it is obvious that the deceased and accused were residing in the sheds in the Chemical factory, which were allotted to them. Therefore, there is clear evidence on

record to show that by the date of the incident, the deceased and the accused were residing together along with their daughter, P.W.1. There is no explanation coming forward from the accused as to how his wife died while he was staying with her in the same house. Except taking a plea that the accused is an innocent person and he was not available at the time of the incident, there is no proof produced in support of the said contention. In the absence of any proof, the presumption under Section 106 of the Indian Evidence Act, 1872 has to be considered. Section 106 of the Evidence Act reads thus:

“Burden of proving fact especially within knowledge:-
When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.”

17. In the instant case, the deceased and the accused were living together in the same house during the night of the incident. Naturally, the accused is expected to speak about the death of his wife. He has not come out with any version about the death of his wife, except pleading innocence. The plea taken by him that he was not available at his house is also not proved by any evidence. On the other hand, the testimony of P.W.1 clearly proves that he was very much available at the house and he has committed the offence. Therefore, in view of the presumption under Section 106 of the Evidence Act, the accused failed to discharge his burden with regard to his knowledge about the incident.

18. It is also pertinent to note that the accused has stated in his examination under Section 313 Cr.P.C. under question Nos.7 and 8 that he was living with his wife and daughter in the tin roof shed within the premises of Chemical factory. Questions put to him under question

Nos. 7 and 8 were accepted to be true and he did not deny the said fact. Therefore, there is ample evidence on record to show that the deceased and the accused and their daughter were living together in the Tin/cement roofed shed by the date of the incident.

19. The learned Sessions Judge has considered all these aspects and arrived at a just conclusion and convicted the accused for the offence punishable under Section 302 IPC. Therefore, we do not see any illegality or infirmity in the judgment of the trial Court and there are no valid grounds in this appeal for consideration.

20. In the result, the Criminal Appeal is dismissed, confirming the conviction and sentence recorded by the trial Court, dated 31.01.2012, in S.C.No.391 of 2011, against the accused for the offence punishable under Section 302 IPC. Miscellaneous petitions, if any pending in this appeal shall stand closed.

A.V.SESHA SAI, J

GUDISEVA SHYAM PRASAD,J

DATED: 24-11-2018

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