

HON' BLE SRI JUSTICE C.PRAVEEN KUMAR

AND

THE HON' BLE SMT.JUSTICE T. RAJANI

CRIMINAL APPEAL No.1444 of 2011

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

Heard Ms.Lavanya, learned counsel representing the counsel for the appellant and learned additional public prosecutor.

2. The present appeal came to be filed by A2, assailing the judgment passed in S.C.No.67 of 2011, on the file of Principal Sessions Judge, Adilabad, wherein the two accused were tried for the offences punishable under Sections 302, 201 read with Section 34 IPC. Vide judgment dated 25.11.2011, learned Sessions Judge, while acquitting A1, convicted A2 and sentenced her to suffer imprisonment for life for the offence punishable under Section 302 IPC and also to suffer imprisonment for a period of three years for the offence punishable under Section 201 IPC.

3. The gravamen of the charge against the accused is that in the intervening night of 06th and 07.12.2010, both the accused caused the death of the deceased by closing his nose and mouth with hands.

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

(i) PW1 is the mother of the deceased. It is stated that the deceased married A2 after the death of his first wife about 13 years prior to the incident. Out of wedlock, they were blessed with a son by name

Gajanand, who was examined as PW2. A1 is the second son of PW1 and his wife is one Sagara Bai. After marriage, the deceased went to Saudi Arabia, during which time, A2 developed illicit intimacy with A1. It is stated that one month prior to the date of incident, the deceased returned from Saudi Arabia. PW2 was staying along with his mother and was studying 5th class, at the time of incident. According to him, there used to be frequent quarrels between A2 and the deceased. On a fateful day, there was a quarrel between the deceased and A2, pursuant to which A2 dragged the deceased holding his legs and thereafter she is said to have caused the death of the deceased by gagging his mouth with cloth pieces. After causing his death, A2 is said to have dragged him outside the house to a lane adjacent to the house, poured kerosene and set him on fire. He categorically stated that A1 was not present in the house at that time. On 07.12.2010, at about 11.00 a.m., PW1 lodged a report, basing on which PW12, the Sub-Inspector of Police, Gudihathnoor, registered a case in Crime No.89 of 2010, for an offence punishable under Section 302 read with Section 34 IPC. Further investigation in this case was taken up by PW13 the Circle Inspector of Police. On 07.12.2010, after receipt of a copy of express FIR from Gudihathnoor Police Station, he visited the scene of offence and conducted a panchanama of the scene vide Ex.P7 and also prepared a rough sketch Ex.P8 in the presence of PW8 and one A.Shankar. He also seized a plastic can which was found near the dead body. He also examined PWs.1 to 6 and recorded their statements. Thereafter, he conducted inquest over the body in the presence of PW9 and one Vilas. Ex.P9 is the inquest report. After conducting inquest, the body was sent

for post mortem examination. PW7 the Assistant Professor in RIMS, Adilabad, conducted autopsy over the body of the deceased on 07.12.2010 and issued Ex.P6 the post mortem report. According to him, the cause of death was due to asphyxia due to smothering. He further noticed that injury Nos.3 and 5 are possible by pressing the mouth and gagging the mouth by inserting cloth or using any external pressure. On 09.12.2010, PW13 apprehended the accused at their houses and recorded their confession, pursuant to which, he seized a plastic can containing kerosene smell. MO2 is the empty plastic can seized at the instance of the accused, under the cover Ex.P13. After collecting all the material, PW13 filed a charge sheet, which was taken on file as PRC No.1 of 2011 on the file of Judicial Magistrate of First Class.

(ii) On appearance of the accused, the documents were furnished to the accused as contemplated under Section 207 Cr.P.C. Since the offence under Section 302 IPC is exclusively triable by the Court of Sessions, the learned Magistrate committed the case to the Court of Sessions as envisaged under Section 209 Cr.P.C. On committal to the Court of Principal Sessions Judge, Adilabad, the same came to be numbered as S.C.No.67 of 2011.

(iii) On appearance, charges referred to above were framed, read over and explained to the accused, to which the accused pleaded not guilty and claimed to be tried.

(iv) In support of its case, the prosecution examined PWs.1 to 13 and got marked Exs.P-1 to P-13 and M.Os.1 and 2. Out of 13 witnesses

examined by the prosecution, PWs.3, 4, 6,10 and 11 did not support the prosecution case and were treated hostile by the prosecution.

(v) After closure of prosecution evidence, the accused were 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. However, they got examined DWs.1 and 2 and marked Ex.D1, in support of their plea.

(vi) Disbelieving the evidence of DWs.1 and 2 and believing the evidence of PWs.1 and 2, the trial Court convicted A2 and sentenced her to suffer imprisonment for life for the offence punishable under Section 302 IPC and also to suffer imprisonment for a period of three years for an offence punishable under Section 201 IPC. However, A1 was acquitted of both the charges. Challenging the conviction against A2, the present appeal came to be filed.

5. Learned counsel representing the counsel for the appellant would contend that there is absolutely no legal evidence on record to connect the accused (A2) with crime. According to her, the evidence of PW2 cannot be made the basis to convict the accused, in view of the inconsistent versions and also the evidence of DW2 Doctor, who categorically stated that PW2 was not in a position to state the facts, as he is mentally retarded.

6. On the other hand, learned additional public prosecutor would contend that the trial Court rightly rejected the evidence of DW2 since he examined PW2 only after his evidence was recorded in the Court and as such the evidence of PW2 can be made basis to convict the accused.

7. The point that arises for consideration is whether A2 is responsible for the death of the deceased?

8. As seen from the record, originally the accused were tried for the offences punishable under Sections 302 and 201 IPC. Believing the evidence of PW2, the trial Court acquitted A1, while convicting A2.

9. In order to appreciate the rival contentions made by the counsels, it would be appropriate to refer to the evidence of PWs. 1 and 2 and also the evidence of DW2.

10. PW1 is the mother of the deceased, who in her evidence deposed that the deceased and her son got married about 13 years back and were staying in a separate house along with their son, who was examined as PW2. Her evidence also discloses that after the marriage, the deceased went to Saudi Arabia, during which period, A2 developed illicit intimacy with A1, who is also the son of PW1 and brother of the deceased. According to PW1, on the date of incident at about 06.00 a.m., when her youngest son's wife Archana was going to a shop, A2 called her, PW1 and the wife of A1 Sagara and asked them to see, as something happened at that scene. On going near, they observed a dead body, which was half burnt and intestines from the left side abdomen were out. On enquiry, PW2 informed that A1 and A2 caused the death of Santhosh, which led to PW1 lodging a report before the police. In the cross examination, it was elicited that A2 called them and showed the dead body, for the first time. She further admits that she has not seen A1 and A2 having sexual relationship. The suggestion that a false case was foisted against the accused and that they have no illicit relationship was denied by her.

11. Coming to the evidence of PW2, who was aged about ten years at the time of examination, he deposed that he knows only Marathi and does not know Telugu or Hindi, hence his statement came to be recorded in Marathi, with the assistance of a Senior Counsel.

12. According to PW2, he was staying with A2, as his father was in Gulf country. His evidence discloses that on that day night there was a quarrel between the deceased and his wife. Thereafter, A2 dragged the deceased by holding his legs. He further states that A2 committed the murder of the deceased by gagging his mouth with cloth pieces, while he was sleeping. After his death, she (A2) dragged the body to a lane adjacent to the house, poured kerosene and set him on fire. According to him, A1 was not present at that time. In the cross examination, it was elicited that he has seen the incident by lying on the cot. The suggestion that he has not seen anything; that A2 did not cause death of his father and that A2 did not set fire on the deceased by pouring kerosene, was denied by him. He further admits that his father was affectionate towards him and that his mother was not showing any affection towards him.

13. From the above, it appears that PW2 claims to have seen the incident by lying on a cot and did not interfere when his mother was trying to kill his father, though his father was very affectionate towards him. It is his case that his mother alone was gagging the mouth of the deceased, when he was sleeping. She dragged him towards a lane adjacent to the house and set him on fire. The acts leading to the death of the deceased were said to have been committed by A2 alone. But the

evidence of PW1 referred to above, would show that when she enquired PW2 as to how the incident happened, he claims to have disclosed the names of A1 and A2 as culprits. But while giving evidence in Court, PW2 exonerates A1 in all respects and fixed the blame on his mother (A2). Keeping this discrepancy in the background, we shall now deal with the evidence of DW2, who was examined to prove that PW2 was mentally retarded.

14. DW2 is the Deputy Civil Surgeon (Psychiatrist) at Head Quarters hospital, Karimnagar. He was one of the Board Members of the Government Hospital at Karimnagar, and has issued certificate, showing the mental condition of PW2. According to him, due to abnormal behaviour of the boy and also abnormal growth of the brain, it can be said that PW2 cannot recollect and the narration given by him cannot be relied upon. The doctor examined PW2 in the open Court and after putting several questions with regard to his capability of understanding the colours, dates and their family background, observed that PW2 was unable to say anything. Ex.D1 is the certificate issued by the Medical Board.

15. Though in the cross examination it was suggested that PW2 was not examined by DW2, but he admits that Ex.D1 certificate came to be issued basing on oral examination and stated that normal tests conducted for giving such certificate are IQ testing and family history testing, etc. The suggestion that the certificate came to be issued without proper examination, was denied. Though the trial Court disbelieved the evidence of DW2 on the ground that certificate Ex.D1 cannot be relied

upon without conducting necessary tests as required to find out the mental condition, but his evidence in chief shows that PW2 was examined in open Court by putting several questions with regard to his capacity and capability to understand things. In view of the answers given, the doctor opined that the evidence of PW2 cannot be taken as true statement of facts.

16. In the absence of any other evidence to connect the accused with the crime and as the entire case rests on the evidence of PW2 whose evidence is inconsistent, the same cannot be taken at its face value in view of the above. Hence, we feel that it may not be safe to rely upon the evidence of PW2 to base a conviction.

17. It is well established principle of law that the prosecution has to prove the case beyond reasonable doubt and there is lot of difference between 'may be true' and 'shall be true'.

18. In *Kailash Gour and others Vs. State of Assam*¹, the Apex Court held as under:

“It is one of the fundamental principles of criminal jurisprudence that an accused is presumed to be innocent till he is proved to be guilty. It is equally well settled that suspicion howsoever strong can never take the place of proof. There is indeed a long distance between accused 'may have committed the offence' and 'must have committed the offence' which must be traversed by the prosecution by adducing reliable and cogent evidence. Presumption of innocence has been recognised as a human right which cannot be wished away.”

¹ AIR 2012 SC 786

19. In *State of U.P. Vs. Krishna Gopal*², the Apex Court observed as under:

‘25... Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth. To constitute reasonable doubt, it must be free from an overemotional response. Doubts must be actual and substantial doubts as to the guilt of the accused persona arising from the evidence, or from the lack of it, as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary, trivial or a merely possible doubt, but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case.’

20. Having regard to the circumstances of the case, the inconsistent evidence of PW2 and the judgments referred to above, we intend to extend benefit of doubt to the accused.

21. Accordingly, the appeal is allowed. The conviction and sentence recorded against the appellant by name Punde Nanda, in the judgment dated 25.11.2011, in Sessions Case No.67 of 2011 on the file of Principal Sessions Judge, Adilabad, for the offences punishable under Sections 302 and 201 IPC, are set aside and she is acquitted for the said offences.

C. PRAVEEN KUMAR, J

T. RAJANI, J

Date:08.08.2018

vhb

² (1988) 4 SCC 302