

THE HON'BLE SRI JUSTICE C.V. NAGARJUNA REDDY
AND
THE HON'BLE SRI JUSTICE GUDISEVA SHYAM PRASAD

Criminal Appeal No.471 of 2011

DATED:20-06-2018

Between:

Kottala Shankar
and another ... Appellants

And

The State of Andhra Pradesh
Rep. by its Public Prosecutor,
High Court of A.P.,
High Court Buildings
Hyderabad ... Respondent

COUNSEL FOR THE APPELLANTS: Smt. C. Vasundhara Reddy

COUNSEL FOR THE RESPONDENT: Public Prosecutor (TS)

THE COURT MADE THE FOLLOWING:

JUDGMENT: *(per the Hon'ble Sri Justice C.V. Nagarjuna Reddy)*

This appeal is instituted by the accused aggrieved by judgment dt.05.01.2011 in Sessions Case No.446 of 2008 on the file of the VI Additional District and Sessions Judge (Fast Track Court), Nizamabad, at Kamareddy, whereby he has convicted both the accused/appellants for the offence under Section 302 of the Indian Penal Code and sentenced them to undergo imprisonment for life and also to pay a fine of Rs.1,000/- each, and in default of payment of the fine, to undergo simple imprisonment for four months.

2. The case of the prosecution as reflected from the charge sheet, in brief, is as under.

(a) That on 13.1.2008 at about 19.30 hours P.W.1 came to the Police Station, Bhiknoor and lodged Ex.P.1 - complaint stating that his father Balaiah got five sons, and that among them P.W.1 is elder one, while Siddaiah, Yellaiah, Shankar and Ramesh are youngers to him. That they all have distributed their landed property equally over a dispute, that his father has handed over the entire bank balance amount of Rs.16,000/- to his brother, namely, Shankar, about fourth months back, and that P.W.1 demanded to distribute the above amount equally among the five brothers, over which his younger brothers;

Shankar – accused No.1/appellant No.1 and Ramesh – accused No.2/appellant No.2 developed enmity against him. That in this connection, the appellants have spread thorn bushes in the open place in front of the house of P.W.1, for which his third daughter, i.e., Narsavva (hereinafter referred to as “the deceased”) raised an objection, over which the appellants bore grudge against her. That suspecting that over small issues the deceased was raising objections, on 13.1.2008 at about 4.30 p.m., the appellants went into the house of P.W.1 in his absence, attacked the deceased, tied her legs and hands, gagged her mouth, poured kerosene on her body and lit fire. That on seeing the smoke coming out of the house and hearing the cries of the deceased, P.Ws.3 and 4 along with other neighbours gathered and put off the flames and on enquiry the deceased informed about the incident. That while P.W.1 was preparing jaggery at his fields, one of his caste boy went to him and informed the incident. That later P.W.1 and his wife came to the house and saw the deceased with burn injuries. That immediately P.W.1 got the deceased admitted in the Government Hospital, Kamareddy, by taking her in ‘108’ ambulance.

(b) Based on the aforesaid said complaint, P.W.11 – Sub-Inspector of Police, Bhiknoor Police Station, registered a case vide Crime No.17 of 2008 under Section 307 IPC read with Section 34 IPC and took up the investigation. During the course of investigation, P.W.11 examined and recorded the statement of P.W.1, proceeded to the Government Hospital, Kamareddy, and that on the intimation of the Medical Officer, P.W.10 – Judicial First Class Magistrate, Kamareddy, visited the hospital and recorded Ex.P.12 - dying declaration of the deceased. P.W.11 found the deceased lying on the bed and raising cries due to burn injuries. On examination, P.W.11 found that the victim was stating that the accused have burnt her, but she was unable to give any other particulars as to how the incident has taken place. P.W.11 then examined and recorded the statement of P.W.2 – mother of the deceased, who corroborated the statement of P.W.1 – father of the deceased. Immediately P.W.11 proceeded to Peddamallareddy Village, visited the house of P.W.1, examined the scene of offence, secured the presence of P.Ws.7 and 8 – mediators, conducted the scene of offence panchanama, and seized a white colour can from which smell of kerosene was coming out, and a partially burnt plastic rope under the cover of panchanama.

P.W.11 also secured P.Ws.3 to 6 and L.W.7 (Manchala Rajamani) and L.W.8 (Putta Nrrasimhulu), examined them in detail and recorded their statements.

(c) On 15.1.2008 at about 01.30 hours while undergoing treatment, the victim succumbed to the burn injuries at Gandhi Hospital, Hyderabad. That on receiving the information, P.W.11 altered the section of law from Section 307 IPC read with Section 34 IPC to Section 302 IPC read with Section 34 IPC and sent the express reports to all the concerned. On receipt of the express report, L.W.19 (M.A. Majeed) – Circle Inspector of Police, Bhiknoor, took up the further investigation from P.W.11 and that on the same day he rushed to the Gandhi Hospital, Hyderabad and found the dead body of the deceased in supine state in the mortuary. P.W.11 secured the presence of the parents of the deceased – P.Ws.1 and 2, and witnesses – L.Ws.7 and 8, re-examined them in detail and found that they rightly corroborated with their earlier versions. Immediately, L.W.19 secured the presence of P.W.9 and L.W.14 (Bathula Siddavva) – mediators and conducted inquest over the dead body of the deceased. During the examination by L.W.19, it was observed that the body of the deceased was totally burnt and skin got peeled off, due to which the identification marks

were invisible. He got the dead body photographed through L.W.9 (Shaik Arif Hussain) and recorded his statement. After completion of the inquest, the dead body was sent for post-mortem examination at Gandhi Hospital, Hyderabad. L.W.15 (Dr. Abdul Sattar) – Medical Officer, Gandhi Hospital, conducted autopsy over the dead body of the deceased and he opined that the cause of the death of the deceased was “shock due to burns”. After inquest, L.W.19 visited the scene of offence on 15.1.2008, secured the presence of P.Ws.3 to 6, re-examined them in detail and found that they have rightly corroborated with their earlier versions which they have made before P.W.11. L.W.19 observed the scene of offence and found to be correct with the scene of offence panchanama conducted by P.W.11. He also examined L.W.10 in detail and recorded his statement.

(d) On 18.1.2007 on reliable information, L.W.19 with his subordinate officers rushed to Domakonda Village, taken the appellants into custody at 14.30 hours, and interrogated them thoroughly. During the interrogation, both the appellants confessed to have committed the offence, as they bore grudge against the deceased, since she was intervening in each and every matter over property disputes between them and her

father. The appellants were brought to the Police Station, Bhiknoor, at 15.30 hours and were issued arrest Memos and sent for judicial remand. That on requisition, L.W.17 – Additional Judicial First Class Magistrate, Nizamabad, recorded the statements of P.Ws.1 and 2 on 23.2.2008. Thus L.W.19 concluded that the acts of the appellants constitute an offence punishable under Section 302 IPC read with Section 34 IPC and filed the charge sheet accordingly.

3. Based on the charge sheet and the material collected during the investigation, the Sessions Court has framed the following charge:

“That you A1 and A2 on 13-1-2008 at about 16.30 hours entered into the house of L.W.1 Nagaiah with white colour plastic can containing kerosene oil and poured kerosene on the body of Narasavva, where Narasavva was sleeping in living room of their house and set ablaze her and fled away and due to which Narasavva sustained severe burn injuries and died in Gandhi Hospital on 15-1-2008 at about 1.30 A.M., and thereby you A1 and A2 committed an offence punishable under section 302 IPC and within my cognizance.”

As the appellants pleaded not guilty, they were subjected to trial during which the prosecution examined P.Ws.1 to 11, got Exs.P.1 to P.16 marked and produced M.Os.1 and 2. On behalf of the defence, no evidence was let in. On appreciation of the oral and documentary evidence, the lower Court has disposed of the case in the manner as narrated above.

4. This is a case based on circumstantial evidence in the absence of eyewitnesses, and Ex.P.12 - dying declaration. As regards the circumstantial evidence, P.Ws.1 to 8, who are the material witnesses, have turned hostile. However, Exs.P.2 to P.7 – Section 161(3) CrPC statements of P.Ws.1 to 6 were marked by the prosecution. Unable to rely upon the evidence of the hostile witnesses, the trial Court based its conviction only on Ex.P.12. It will therefore suffice if we deal with this aspect alone.

5. A dying declaration is an exception to the rule of hearsay evidence for, it is based on the Latin maxim “*nemo moriturus praesumitur mentire*”, which means “a man will not meet his Maker with a lie in his mouth”. In **Lakhan v. State of Madhya Pradesh**¹ the Supreme Court made a lucid exposition of law on the dying declarations. It is instructive to reproduce the relevant paragraphs of the said judgment hereunder:

“9. The doctrine of dying declaration is enshrined in the legal maxim *nemo moriturus praesumitur mentire*, which means “a man will not meet his Maker with a lie in his mouth”. The doctrine of dying declaration is enshrined in Section 32 of the Evidence Act, 1872 (hereinafter called as “the Evidence Act”) as an exception to the general rule contained in Section 60 of the Evidence Act, which provides that oral evidence in all cases must be direct i.e. it must be the evidence of a witness, who says he saw it. The dying declaration is, in fact, the statement of a person, who cannot be called as witness and,

¹ (2010) 8 SCC 514

therefore, cannot be cross-examined. Such statements themselves are relevant facts in certain cases.”

“10. This Court has considered time and again the relevance/probative value of dying declarations recorded under different situations and also in cases where more than one dying declaration has been recorded. The law is that if the court is satisfied that the dying declaration is true and made voluntarily by the deceased, conviction can be based solely on it, without any further corroboration. It is neither a rule of law nor of prudence that a dying declaration cannot be relied upon without corroboration. When a dying declaration is suspicious, it should not be relied upon without having corroborative evidence. The court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased must be in a fit state of mind to make the declaration and must identify the assailants. Merely because a dying declaration does not contain the details of the occurrence, it cannot be rejected and in case there is merely a brief statement, it is more reliable for the reason that the shortness of the statement is itself a guarantee of its veracity. If the dying declaration suffers from some infirmity, it cannot alone form the basis of conviction. Where the prosecution version differs from the version given in the dying declaration, the said declaration cannot be acted upon. (Vide **Khushal Rao v. State of Bombay**², **Rasheed Beg v. State of M.P.**³, **K. Ramachandra Reddy v. Public Prosecutor**⁴, **State of Maharashtra v. Krishnamurti Laxmipati Naidu**⁵, **Uka Ram v. State of Rajasthan**⁶, **Babulal v. State of M.P.**⁷, **Muthu Kutty v. State**⁸, **State of Rajasthan v. Wakteng**⁹ and **Sharda v. State of Rajasthan**¹⁰).

6. Having noticed the true legal position regarding the dying declarations, let us advert to the contents of Ex.P.12. The

² AIR 1958 SC 22

³ (1974) 4 SCC 264

⁴ (1976) 3 SCC 618

⁵ 1980 Supp SCC 455

⁶ (2001) 5 SCC 254

⁷ (2003) 12 SCC 490

⁸ (2005) 9 SCC 113

⁹ (2007) 14 SCC 550

¹⁰ (2010) 2 SCC 85

document contains an endorsement on the first page by Dr. V. Vijay Kaur (not examined) to the effect that the patient is conscious, coherent and (in) fit state of mind. A similar endorsement was found on the second and last page of the statement. Though this doctor was not examined, P.W.10, the Magistrate who recorded the statement, referred to the certificate obtained by him from the doctor to the effect that the patient was conscious, coherent and in fit state of mind. He also stated that he obtained the certificate from the duty doctor with regard to the mental condition of the victim before and after recording her statement. Though a suggestion was put to P.W.10 to the effect that he has not obtained the certificate from the doctor, the same has no merit, as, Ex.P.12, as noted above, itself contains the endorsement of the doctor regarding the fitness of the victim to give statement. It is, however, significant to note that P.W.11, the Investigation Officer, in his evidence stated that on receipt of the report from P.W.1 on 13.1.2008 at 19.30 hours, he registered Crime No.17 of 2008 for the offence under Section 307 IPC read with Section 34 IPC, examined P.W.1, recorded his statement and proceeded to the Government Hospital, Kamareddy and that as the injured was unable to give statement, he recorded the statement of

P.W.2, mother of the injured. The time gap between the recording of Ex.P.12 by P.W.10 and P.W.11's visit to the hospital appears to be about two hours. It is not very clear whether the condition of the deceased has deteriorated after Ex.P.12 was recorded, disabling her to give a statement to P.W.11 when he visited the hospital.

7. Be that as it may, assuming that the deceased was in a fit state of mind to make a statement and Ex.P.12 was given by her in a fit mental condition, we need to examine whether its contents support the case of the prosecution. In the charge sheet the prosecution alleged that the appellants entered the house of P.W.1 at about 16.30 hours with a white colour plastic can containing kerosene oil, tied her legs and hands, gagged her mouth, poured the kerosene on her body while she was sleeping in living room of their house, set her ablaze and fled away. That on seeing the smoke coming out of the house and hearing the cries of the deceased, P.Ws.3 and 4 and other neighbours gathered and put off the flames. This version has been repeated by P.Ws.1 to 6 in their Section 161 (3) CrPC statements marked as Exs.P.2 to P.7. As an omnibus allegation has been made against the appellants without specific overt acts attributed to them individually suggesting as if both the

appellants have participated in the commission of offence equally, the prosecution has registered the case for the offence under Section 302 IPC read with Section 34 IPC. The Court below, however, deleted Section 34 IPC from the charge framed by it. With these facts in mind, we shall now look into Ex.P.12.

8. After preliminary questions, to a question put by P.W.10, as to how the occurrence took place and how she sustained the burn injuries, the deceased has stated that when she was sleeping after meal, the appellants – her paternal uncles, came and poured kerosene and caused burns. In answer to question No.8 as to why they have done so, while expressing her ignorance, she had repeated her statement that the accused poured kerosene on her and lit fire. She, however, added that there were disputes between her father and the accused for which panchayats were also held. The statement of the deceased is very brief and its contents do not support the case of the prosecution as regards the manner in which the appellants committed the offence. In Exs.P.2 to P.7, Section 161(3) statements of the witnesses, all of them have stated that the deceased informed them that the appellants tied her legs and hands with a rope before pouring kerosene and setting her

on fire. The charge sheet went a step further and alleged that the appellants not only tied the hands and legs of the deceased, but have also gagged her mouth. The prosecution seized the alleged rope also. The acts of gagging mouth and tying hands and legs with a rope, constitute an integral part of the offence. If the version of the prosecution in this regard is true, one cannot expect the deceased to fail to narrate this vital act, especially when she was able to explain the reasons for the accused to commit the offence, namely, disputes between herself and her uncles and the fact of holding panchayats in that regard. When the deceased also could give information as to the number of her siblings, we find no reason for her to omit to narrate the fact of the accused tying her hands and legs and gagging her mouth before pouring kerosene and setting her on fire. The omission on the part of the deceased to state the said fact constitutes serious lacuna in the case of the prosecution. As noted hereinbefore, in **Lakhan** (1 supra), one of the grounds laid down for discarding a dying declaration is the difference in the version between the prosecution and that reflected in the dying declaration.

9. We also find an inherent improbability arising from the version spoken to by the deceased in her dying declaration,

which was recorded in Telugu. The deceased in Telugu has stated therein that “...*nenu padukoni vundaga*”. These words yield dual meaning. Its literal translation means “when she was lying”. However, it can also be understood as “when she was sleeping”. The prosecution has understood it in the latter sense. Even the charge framed by the Court below is also in that sense, i.e., “when the deceased was sleeping”. As the offence was stated to have been committed when the deceased was sleeping, it is not possible for her to notice the presence of the appellants and their committing the offence. Neither it is stated in the dying declaration that she was awake while lying down or that she woke up on noticing the appellants, while they were committing the offence. Therefore, the statement of the deceased suffers from the element of improbability as regards her observing the assailants and the manner in which they allegedly committed the offence.

10. Another serious infirmity in the prosecution case is absence of specific overt acts against the appellants. The Police have recovered a kerosene tin and a rope. In Ex.P.12 the deceased has not attributed any individual overt acts to the accused. Normally, when more than one person participated in the commission of an offence, it defies natural human conduct

that both persons will hold the kerosene tin, pour the kerosene on the deceased and both of them jointly light the fire. Failure of the deceased to attribute specific overt acts against each of the appellants does not inspire confidence on the correctness of the statement spoken to by her in the dying declaration. Even otherwise, if the prosecution was not in a position to allege specific overt acts against the appellants, it has to not only charge them with the offence of common intention under Section 34 IPC, but also prove the same. As we noticed hereinbefore, though the prosecution has charged the appellants with Section 34 IPC, for the reasons best known to the Court below, it has deleted the said provision. As a result, even assuming that the appellants have participated in the commission of the offence, in the absence of specific overt acts attributed in the dying declaration, as to whether both of them committed the acts of pouring kerosene and lighting the fire or they have distributed the acts between themselves or one of them remained passive while the other has committed the acts, it is not possible to convict the appellants without being charged for the offence under Section 34 IPC. This view of ours stands fortified by the judgment in **Rahana Begum v.**

State of Andhra Pradesh¹¹ wherein a Division Bench of this Court, speaking through one of us, (Justice C.V. Nagarjuna Reddy) observed as under:

“17. In Ex.P.11 the deceased has made an omnibus allegation that all the three accused came, poured kerosene and lit the fire. This, in our opinion, is contrary to natural human conduct because there is no need for all the three persons either to pour kerosene or to light the fire. Thus, specific overt acts have not been attributed by the deceased to each of the accused and failure in this regard does not inspire confidence on the credibility of the version of the deceased spoken to in the dying declaration. Further, the prosecution has not produced any material objects in support of its case.”

11. Thus, the prosecution case suffers from the defects pointed out by the Supreme Court in **Lakhan** (1 supra) and therefore the judgment of the lower Court in basing the conviction only on Ex.P.12 - dying declaration cannot be sustained in law.

12. For the aforementioned reasons, the impugned judgment of the Court below is set aside. The appellants/accused are acquitted of the offence with which they are charged. The fine amount, if any, paid by them shall be refunded to them. As the appellants are on bail, they are directed to surrender themselves before the Superintendent, District Jail, Nizamabad, for completing the legal formalities for their release, if they are not required in any other case or crime.

¹¹ 2017 (1) ALD (Crl.) 749

13. The criminal appeal is accordingly allowed.

C.V. NAGARJUNA REDDY, J

GUDISEVA SHYAM PRASAD, J

20-6-2018

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