

HON'BLE SRI JUSTICE C.PRAVEEN KUMAR

AND

HON'BLE SMT.JUSTICE T. RAJANI

CRIMINAL APPEAL No.308 of 2012

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

1) Accused No.1 in Sessions Case No.176 of 2010 on the file of the Sessions Judge at Vizianagaram, is the appellant herein. He along with accused Nos.2 and 3 were tried on three charges. The first charge was under Section 302 IPC against accused No.1, the second charge was against accused Nos.2 and 3 under Section 302 read with 34 IPC for causing the death of one Gorle Sidevi and the third charge was against all the accused for the offence punishable under Section 498-A IPC. Vide judgment, dated 15.03.2012, the learned Sessions Judge, Vizianagaram, convicted accused No.1 for the offence punishable under Section 302 IPC and sentenced him to suffer 'imprisonment for life' and to pay a fine of Rs.5,000/- in default to suffer simple imprisonment for a period of six months and further convicted him for the offence punishable under Section 498-A IPC and sentenced him to suffer imprisonment for one year and to pay a fine of Rs.1,000/- in default to suffer simple imprisonment for a period of one month. Accused Nos.2 and 3 were acquitted of the charges under Sections 302 read with 34 and 498-A IPC. The substantive sentences were directed to run concurrently.

2) The substance of the charge against the accused was that on 21.04.2010 at about 7.00 p.m., in the kitchen room of their house situated at Gollalapalem village, the accused No.1 committed the murder of his wife by name Gorle Sidevi (hereinafter referred to as "the deceased") by pouring kerosene and setting herself on fire, while accused Nos.2 and 3 caught hold of her hands facilitating accused No.1 in committing the offence. All the accused also harassed the deceased mentally and physically.

3) The facts as culled out from the evidence of the prosecution witnesses are as under:

i) PW.1 is the mother of the deceased while PW.2 is the husband of PW.1. PW.3 is the daughter of PWs.1 and 2 and sister of the deceased. PWs.5 and 6 are neighbours. Accused No.1 is the husband of the deceased while accused Nos.2 and 3 are parents of accused No.1. The marriage of the deceased with accused No.1 took place about ten years prior to the date of incident. At the time of marriage, PWs.1 and 2 gave cash of Rs.50,000/- and other sare samans, apart from presenting the gold ear studs. After consummation of the marriage, the deceased lived with accused No.1 at Gollalapalem. It is said that accused Nos.2 and 3 were also residing along with accused No.1. Out of wedlock, the couple blessed with two sons. It is stated that accused No.1 used to take alcohol, which was to the dislike of the deceased. Because of his bad vices, the deceased left the company of accused No.1 and

went to the house of PW.1. A dispute came to be raised before the elders. It is said that the elders called accused No.1, and admonished him not to take alcohol as the children may become orphans if he continues with the habit.

ii) Since all the material witnesses including PWs.1 and 2 turned hostile, the other evidence that is available on record is the evidence of investigating officer and mediators, which would reveal that on 22.04.2010 at about 11.15 p.m., the injured was admitted in the casualty of Government Hospital, Vizianagaram. Basing on the information furnished by her husband, PW.14-the Civil Assistant Surgeon, sent a requisition vide Ex.P15, to the Magistrate for recording the dying declaration. Pursuant to the same, PW12-the Principal Junior Civil Judge, Vizianagaram, rushed to the hospital at 12.15 a.m., and after identifying the injured with the assistance of the Duty Doctor; following the procedural requirements and after ascertaining the mental condition of the injured by putting some preliminary questions, recorded the statement of the injured, which was completed at 1.00 a.m. Ex.P16 is the said statement.

iii) PW.15-the head constable, Control Room, received Ex.P19 requisition from the Medical Officer, District Government Hospital, Vizianagaram, pursuant to which he proceeded to the hospital and recorded the statement of the injured in the presence of PW14-the duty doctor. He read over the contents of the statement recorded by him to the injured and obtained her thumb

impression. Ex.P20 is the statement and Ex.P21 is the endorsement of the doctor.

iv) On 22.04.2010 at 4.30 a.m., PW.16-Head Constable, Cheepurupalli, incharge of the police station, received Exs.P19 and 20 from the outpost police station, basing on which, he registered a case in Crime No.56 of 2010 and issued Ex.P23-the first information report. On the same day at 6.00 p.m., the S.I. of Police, who took up the investigation, visited the scene of offence and prepared an observation report, which is marked as Ex.P8. At the scene of offence, he found kerosene tin, half burnt gunny bag, match stick, match box, which were seized under Ex.P8. He also got prepared a rough sketch of the scene, which was marked as Ex.P27. On 22.04.2010, he received intimation about the death of the deceased, which lead to alteration in section of law.

v) Later the investigation was taken over by the C.I. of Police, who was examined as PW.19. According to him, after receiving the altered first information report, he visited the hospital and examined PWs.1, 2, 3 and others and recorded their statements. In the presence of PWs.7 and 13, he conducted inquest over the dead body of the deceased, which is placed on record as Ex.P9. Thereafter, he sent the dead body for postmortem examination.

vi) PW.17-the Civil Assistant Surgeon, District Headquarters Hospital, conducted autopsy over the dead body of the deceased and issued Ex.P26-the postmortem certificate. According to him,

the cause of death was “due to hypovelmic shock resulting from extensive ante mortem burn injuries” .

vii) PW.19-the Inspector of Police, who continued with the investigation, visited the scene of offence, examined the scene of offence and rough sketch prepared by PW.18 and found it to be on correct lines. He examined PWs.4 to 9 and recorded their statements. On 23.04.2010, he proceeded to Ramachandrapuram and Patharlapalli Village, examined and recorded the statements of PWs.10, 11 and another. On 26.04.2010, he arrested the accused. On interrogation, all the accused confessed about the commission of offence. Their confessional statements were recorded in the presence of PWs.7 and 9. Pursuant to the said statements, he seized one lungi and one shirt from accused No.1, one banian from accused No.2 and one saree from accused No.3.

viii) After collecting all the necessary documents, PW.19 filed a charge sheet before the Court of Judicial First Class Magistrate, Cheepurupalli, which was taken on file as P.R.C.No.9 of 2010. After complying with Section 207 Cr.P.C., the learned Magistrate committed the case to Sessions Division under Section 209 of Cr.P.C., which came to be numbered as S.C.No.176 of 2010.

4) Basing on the material available on record, charges under Sections 302 and 498-A IPC came to be framed against accused No.1 and under Sections 302 read with 34 and 498-A IPC came to be framed against accused Nos.2 and 3. The same were

read over and explained to the accused, to which they denied and claimed to be tried.

5) To substantiate their case, the prosecution examined PWs.1 to 19 and got marked Exs.P1 to P33 and MOs.1 to 9. After the closure of 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. No oral or documentary evidence was adduced on behalf of the accused.

6) Relying upon the two dying declarations, the learned Sessions Judge while acquitting accused Nos.2 and 3 of all the charges, convicted and sentenced accused No.1 as stated supra. Challenging the same, the present Criminal Appeal came to be filed.

7) Learned counsel for the appellant mainly submits that the two dying declarations which are made the basis to convict accused No.1 are inconsistent with each other. He further submits that there are material contradictions in the two dying declarations, which go to the root of the matter. He pleads that merely because there is commonality of accused No.1 participating in the offence, the same cannot be made the basis to convict him.

8) On the other hand, the learned Additional Public Prosecutor would contend that there are no variations in the two dying declarations and, as such pleads that the finding of the trial Court, in believing the same, warrants no interference.

9) The point that arises for consideration is whether accused No.1 can be convicted basing on two dying declarations.

10) As seen from the record, all the material witnesses including the parents and family members of the deceased did not support the prosecution case and were treated hostile. The case now rests on the two dying declarations recorded by PW.12 and PW.15. The first dying declaration was recorded by PW.12, which is placed on record as Ex.P16. Learned counsel for the appellant did not dispute the manner in which the dying declarations are recorded. His plea is only that there are material contradictions in the dying declarations, which go to the root of the matter.

11) After putting some preliminary questions and on being satisfied that the deceased was in a fit condition to make the statement, the learned Magistrate proceeded in recording the statement of the deceased. In the said statement (Ex.P16) the deceased stated that on that day at about 7.00 p.m., her husband came home in a drunken state. She asked him as to where he is going, to which he replied that 'who are you, and if you talk more, will pour kerosene'. So saying he poured kerosene and closed the doors. It was further stated by her that her in-laws were also present at a distance. The said dying declaration further shows that after she opened the door, the neighbours came in, poured water and put off the flames. She also stated that her husband accompanied her to the hospital.

12) A reading of the said dying declaration would show that on the date of incident her husband came home at 7.00 p.m., in drunken condition and when she asked as to where he is going, he replied stating that, who is she to ask and that if she talks more, he would pour kerosene. So saying, the accused No.1 is said to have poured kerosene and thereafter closed the doors. According to her, her in-laws were there in the house at some distance. This dying declaration does not anywhere indicate the role played by her in-laws. This dying declaration is also silent as to the person, who set the deceased on fire. As per the version stated therein, the incident happened when she questioned her husband when he was going out.

13) The second dying declaration came to be recorded by PW.15-the head constable, which formed the basis for registering the first information report. A different version came to be given in the said dying declaration. In the said dying declaration, it was stated that her marriage with accused No.1 took place about 9 years back and out of wedlock they were blessed with two sons. It is stated that her in-laws were also staying with them in the same house and that her husband used to beat her. She further stated that her in-laws also harassed her along with her husband. It is said that her husband used to go around as he likes after consuming alcohol without looking after the welfare of the family members. On 21.04.2010 at about 7.00 p.m., while she was in kitchen room, her in-laws came to the kitchen room and started abusing her. While her in-laws caught hold of her hands, her

husband poured kerosene and lit fire. When the body was burning, she raised cries attracting the attention of the neighbours, who came in, poured water and put off the flames. Thereafter, the neighbours shifted her to the hospital. In the later portion of the statement, she categorically states that on that day when she was in the kitchen room, her in-laws came, abused and while they caught hold of her hands, her husband poured kerosene and set fire. This statement which was recorded by PW.15 contains the thumb impression of the deceased.

14) A perusal of the same indicates that the contents therein are totally contrary to the earlier version given by the deceased before the Magistrate. While there is no reference to the role of in-laws in the first dying declaration, she improved her version in the present statement by attributing specific role to her in-laws also. It is not only a case of improvement, but there is lot of variation with regard to circumstances under which the incident took place. As observed by us earlier, in the first dying declaration recorded by the Magistrate, the incident in question took place when she questioned the accused No.1 as to where he was going again, but in the subsequent statement, the version given by the deceased is totally different. According to her at 7.00 p.m., when she was in kitchen room, accused Nos.1 to 3 came there and started abusing her. While accused Nos.2 and 3 caught hold of her hands, accused No.1 is said to have poured kerosene and set her on fire. The material fact as to the person, who set her on fire, is absent in the first dying declaration though attributed to accused

No.1 in the second dying declaration. In view of the above contradictions, it is to be seen whether the said dying declarations can be acted upon to convict accused No.1.

15) An identical situation came up for consideration before the Apex Court in *Dandu Lakshmi Reddy v. State of A.P.*¹ It was a case where Appellant (Dandu Lakshmi Reddy) and his mother Narayanamma were convicted under Section 302 read with Section 34 of the Indian Penal Code only on the strength of dying declarations given by Lakshmi Devi (the deceased) on 7th October, 1997. Both the accused were sentenced to imprisonment for life. They together approached the High Court of Andhra Pradesh challenging the conviction and sentence but in vain. Appellants mother Narayanamma, in her old age, preferred to surrender to her fate by languishing in jail without approaching this Court, but her son the appellant - did not lose heart and he filed this appeal by special leave. After considering the authorities on the subject, the Apex Court held as under:

“3. There can be a presumption that testimony of a competent witness given on oath is true, as the opposite party can use the weapon of cross-examination, inter alia, for rebutting the presumption. But a dying declaration is not a deposition in court. It is neither made on oath nor in the presence of an accused. Its credence cannot be tested by cross-examination. Those inherent weaknesses attached to a dying declaration would not justify any initial presumption to be drawn that the dying declaration contains only the truth.

¹ 1999 Cri LJ 4287

16. Thus the High Court has sidelined such a noticeable discrepancy looming large as between the two different statements made by the same person. When the sphere of scrutiny of dying declaration is a restricted area, the court cannot afford to sideline such a material divergence relating to the very occasion of the crime. Either the context spoken to in one was wrong or that in the other was wrong. Both could be reconciled with each other only with much strain as it relates to the opportunity for the culprit to commit the offence. Adopting such a strain to the detriment of the accused in a criminal case is not a feasible course.

23. As the dying declaration is tested thus on the touchstones available in evidence and permitted by law, it does not stand scrutiny. It will be unsafe to convict any person on the strength of such a fragile and rickety dying declaration.”

16) In *State of Punjab v. Parveen Kumar*² the Apex Court was also dealt with a case of multiple dying declarations. While dealing with the same, the Apex Court held as under:

“10. While appreciating the credibility of the evidence produced before the Court, the Court must view the evidence as a whole and come to a conclusion as to its genuineness and truthfulness. The mere fact that two different versions are given but one name is common in both of them cannot be a ground for convicting the named person. The court must be satisfied that the dying declaration is truthful. If there are two dying declarations giving two different versions, a serious doubt is created about the truthfulness of the dying declarations. It may be that if there was any other reliable evidence on record, this Court could have considered such corroborative evidence to test the truthfulness of the dying declarations.

² (2005) 9 SCC 769

The two dying declarations, however, in the instant case stand by themselves and there is no other reliable evidence on record by reference to which their truthfulness can be tested. It is well settled that one piece of unreliable evidence cannot be used to corroborate another piece of unreliable evidence.”

17) Similarly in *State of Andhra Pradesh v. P.Khaja Hussain*³, the Apex Court held as under:

“There was variation between the two dying declarations about the manner in which the deceased was set on fire. In fact the two dying declarations can be reconciled with each other and since no other evidence was available to connect the accused with the crime, the conviction as recorded was held to be not sustainable.”

18) In view of the ratio laid down by the Apex Court in the judgments referred to above and having regard to the material contradictions pointed out in the two dying declarations more particularly with regard to the manner in which the incident took place and also the role of the accused No.1 in the commission of offence, the said dying declarations cannot be made the basis to convict the appellant.

19) Accordingly, the Criminal Appeal is allowed. The conviction and sentence recorded against the appellant/ accused No.1 in the judgment dated 15.03.2012, in Sessions Case No.176 of 2010 on the file of the Sessions Judge, Vizianagaram, for the offences punishable under Sections 302 and 498-A IPC, are set aside and he is acquitted for the said offences. Consequently, the

³ (2009) 15 SCC 120

appellant/ accused No.1 shall be set at liberty forthwith, if he is not required in any other case or crime.

20) Consequently, miscellaneous petitions, if any, pending shall stand closed.

C.PRAVEEN KUMAR, J

T. RAJANI, J

30.07.2018
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