Godugula Adellu Vs The State of A.P.

Court: Andhra Pradesh High Court

Date of Decision: Aug. 7, 2007

Acts Referred: Criminal Procedure Code, 1973 (CrPC) â€" Section 222, 222(1), 222(2), 313, 374(2)
Evidence Act, 1872 â€" Section 113B
Penal Code, 1860 (IPC) â€" Section 302, 304B, 306, 307, 309

Citation: (2007) 2 ALD(Cri) 762 : (2007) 3 APLJ 199 : (2008) CriLJ 206

Hon'ble Judges: D.S.R. Varma, J; D. Appa Rao, J

Bench: Division Bench

Advocate: Vinod Kumar Deshpande, for the Appellant; Public Prosecutor, for the Respondent

Judgement

D.S.R. Varma, J.
Heard the earned counsel appearing for the appellant as well as the learned Public Prosecutor, appearing for the State.

2. Appellant is the accused No. 1 in the Sessions Case.

3. This Criminal Appeal, by the accused No. 1, u/s 374(2) of the Code of Criminal Procedure, is directed against the judgment, dated

21.03.2005, in Sessions Case No. 447 of 2003, passed by the II Additional Sessions Judge (Fast Track Court), Adilabad, convicting the

appellant for the offence punishable u/s 302 of the Indian Penal Code (for brevity ""IPC"") and sentencing him to suffer imprisonment for life and to

pay a fine of Rs. 5,000/-, in default to suffer simple imprisonment for three months and also convicting for the offence punishable u/s 498A IPC

and sentencing him to suffer rigorous imprisonment for one year and to pay a fine of Rs. 1,000/-, in default to suffer simple imprisonment for two

months, directing to run both the sentences concurrently.

4. The gravamen of the charge is that the deceased, the wife of the accused No. 1, was subjected to cruelty and harassment and was eventually

murdered by the accused No. 1, on 09.06.2002 at about 8 pm., by pouring kerosene on her and setting fire, at the abatement of the accused No.

2, father of the accused No. 1. Ex.P-1 is the complaint given P.W. 1 to the police on 10.6.2002 at 6.00 a.m.

5. The facts of the case, in brief, are that the deceased was working as Anganwadi Teacher and the accused was working as a driver; that their

marriage took place about eight years ago and they were residing in the house of P.W. 1, who is no other than the mother of the deceased, and

were blessed with two daughters; that on the fateful day i.e., 09.06.2002, in the morning, P.W. 1, the deceased and her daughter, P.W. 8, along

with relatives, participated in a festival in the village; that they cooked food at the place of festival and returned back to home and that at about

8.00 p.m., the accused came in an inebriated condition and asked the deceased to serve food with mutton; that since no mutton was served, at

bedtime, he went to the room where the deceased was sleeping, allegedly poured kerosene on the deceased and set her ablaze; that the deceased

came out of the room in flames and fell down. After the flames were extinguished, she was shifted to Government Hospital, Adilabad, where she

succumbed to the burn injuries.

6. Basing on the complaint given by P.W. 1, initially a case in Crime No. 90 of 2002 was registered against the accused Nos. 1 and 2 for the

offences punishable under Sections 498A and 307 IPC. P.W. 21, Judicial Magistrate of First Class, Adilabad, had recorded the dying declaration

of the deceased. After the death of the deceased, during the course of treatment, the section of law was altered to Section 302 and 498A IPC.

After completion of investigation, the police laid the charge sheet against the accused Nos. 1 and 2.

7. In order to bring home the guilt of the accused Nos. 1 and 2, the prosecution examined P.Ws. 1 to 24 and got marked Exs.P-1 to P-23 and

M.Os. 1 and 2 on its behalf and on behalf of the accused Nos. 1 and 2, no oral evidence was let in, however, portions of 161 statements of P.Ws.

3 and 4 were marked as Exs. D-1 and D-2.

8. The Court blow, having considered the entire evidence, both oral and documentary, available on record, particularly the evidence of PWs.2 to

9, said to be the eyewitnesses, and the dying declaration, under Ex.P-16, recorded by P.W. 21, Judicial Magistrate of First Class, Adilabad,

found the accused No. 1 guilty for the offences punishable under Sections 302 and 498A IPC and sentenced him, as stated above. However, the

Court below found the accused No. 2 not guilty and accordingly acquitted him for the offence punishable u/s 498A IPC, with which he was

charged.

9. Aggrieved by the conviction and sentence, imposed against him, the accused No. 1 has preferred this Criminal Appeal.

10. PWs.2 to 9 were said to be the eyewitnesses. PWs.10 to 13 are said to be village elders, who spoke about the existence of disputes between

the deceased and the accused. However, as regards the said fact, it is only P.W. 12, who spoke about the said aspect, but P.Ws.10, 11 and 13

turned hostile. P.W. 21 is the Judicial Magistrate of First Class, Adilabad, who recorded the dying declaration of the deceased, under Ex.P-16.

P.Ws.16 and 17 are panch witnesses for confession and recovery. PWs.18 to 20 and 24 are the Investigating Officers.

11. Among the above, the evidence of alleged eyewitnesses i.e., PWs.2 to 9, is more relevant.

12. P.W. 1, mother of the deceased, deposed that the accused No. 1 came to the house in the evening in a drunken state, on the festival day, and

beat the deceased on the ground that she did not preserve mutton for him and, later, when the accused poured kerosene on her body and set fire,

the deceased raised cries, came out of the house in flames and fell down in front of the house and that the accused No. 1 ran away from the house

through back door. Later, with the assistance of other witnesses, the deceased was shifted to the Government Hospital, Adilabad. P.W. 1 further

deposed that the accused No. 1 used to demand money and used to harass the deceased in that regard; that on many occasions, panchayats were

also held in the presence of elders of the village and the accused was advised not to harass the deceased.

13. In the cross examination, P.W. 1 stated that there are three rooms in their house besides kitchen; that the incident had occurred in the third

room of her house; that the doors were open from where she could see the accused No. 1 beating the deceased and that she did not call any

neighbour for help. Except that, nothing was elicited from P.W. 1 in order to demolish her evidence.

14. The evidence of P.W. 2, who is nephew of P.W. 1, is that some quarrel had taken place between the deceased and the accused No. 1 on the

festival day and, after some time, he saw the deceased coming out of the house in flames and that they shifted the deceased to Government

Hospital, Adilabad, for treatment. Same is the effect of evidence of PWs. 3, 5, 8, 9 and 22, grandmother of the deceased.

15. P.W. 4, who is an auto driver, deposed that he took the deceased to the Government Hospital, Adilabad, after the flames on the body of the

deceased were extinguished.

16. Another important witness is P.W. 8, who is no other than daughter of the accused. She was a child witness and the Court below, having

satisfied with her mental capability to adduce the evidence, posed questions to which she answered that the accused No. 1 beat her deceased

mother and quarreled with her by bolting the door from inside; that after sometime, her mother came out in flames and that her father killed her

mother. Again nothing useful came out from the evidence of P.W. 8 during her cross-examination, in favour of the accused No. 1.

17. Therefore, from the evidence of PWs. 1, 2, 3, 5, 8, 9, 21 and 22, it is evident that two aspects were categorically spoken. Firstly, on the

festival day, the accused No. 1 came back to home in the evening, at about 8.00 p.m., asked the deceased to serve food with mutton and failure

to comply with such demand, resulted in quarrel between the wife and the husband, in another room of the same house, belonging to P.W. 1, who

is no other than mother of the deceased, and secondly, the deceased came out of the room in flames, which were extinguished by the other

witnesses, and was shifted to Government Hospital, Adilabad, where, during the course of treatment, she died.

18. In the instant case, the aspect, which requires consideration is, nobody saw the accused No. 1 really pouring the kerosene against the

deceased and lit her with matchstick. However, the fact remains that all the abovementioned witnesses saw the deceased coming out in flames and

there is any amount of consistency in this regard. Therefore, we are of the view that the accused No. 1 and the deceased alone were in the room

where there was a quarrel between them, resulting in everybody seeing the deceased in flames.

19. Now, the question is, at whose instance the deceased was found in flames? In other words, whether the death of the deceased was homicidal

or suicidal?

20. From the evidence of abovementioned witnesses, the only thing appears to the Court is that the deceased was set ablaze. The fact to be

essentially established by the prosecution is that the accused No. 1 was the only responsible person for the said incident.

21. To this extent, the evidence on record against the accused No. 1, for the offence punishable u/s 302 IPC, is purely circumstantial. Unless the

circumstances are so strong and suggestive of the fact that the death was homicidal, it is not sufficient for this Court to jump at the conclusion that it

was the accused No. 1 alone, who was responsible for the death of the deceased.

22. Therefore, some additional material has to be searched for and, in that pursuit, we found the evidence in the shape of Ex. P-16, dying

declaration, wherein it has been stated by the deceased, in the hospital, while undergoing treatment, that she filed criminal cases against her

husband. It is further stated by her that, on the fateful day, the accused No. 1 picked up a quarrel with her for some curry, as it was a festival day.

According to her, the accused No. 1 asked her to pour kerosene on her body and saying so, he handed over a matchbox to lit herself, and

accordingly, she poured kerosene on herself and set ablaze. She further stated that, at the incitement of her husband, she set herself ablaze. It is her

further evidence that her husband incited her to set herself on fire at the instigation of his father, the accused No. 2. In view of this allegation against

the father of the accused No. 1 i.e., the accused No. 2, Section 498A IPC was added against him along with the accused No. 1. However, as

stated earlier, since the accused No. 2 was acquitted of the offence, with which he was charged, we are not going into the details of his

involvement, in the incident, in this Criminal Appeal.

23. Even from the dying declaration, Ex.P-16, it can be pursued that the deceased poured kerosene on herself and set fire only at the instance of

the accused No. 1. The dying declaration of the deceased, in our view, is a crucial piece of evidence, on record. There is absolutely no doubt

whatsoever that can be expressed from any angle nor doubt the veracity of her statement.

24. A combined reading of the evidence of PWs. 1, 2, 3, 5, 8, 9, 21 and 22, in our considered view, matches with the contents in the dying

declaration.

25. All the eyewitnesses are only partial eyewitnesses. They did not actually see the accused No. 1 setting his wife ablaze. But, the fact remains

that every witness, including P.W. 8, who is no other than the daughter of the accused No. 1, stated that the deceased came out in flames. When

these circumstances are read together with the dying declaration, it is obvious that the involvement of the accused No. 1 is not proved to the extent

of committing offence u/s 302 IPC, but certainly prove to the extent of abetting the deceased to commit suicide creating emotional atmosphere with

sufficient background for the dispute and the resultant provocation for the deceased to commit suicide.

26. In other words, we are of the view that the aspect of homicide, allegedly committed by the accused No. 1, could not be established by the

prosecution beyond all reasonable doubt, but the offence punishable u/s 306 IPC, by beating and instigating the deceased to commit suicide by

pouring kerosene and setting herself ablaze, had been sufficiently and succinctly established. Therefore, we feel it appropriate to differ with the

finding recorded by the Court below, insofar as the commission of offence by the accused No. 1, punishable u/s 302 IPC.

27. As regards the offence said to have been committed by the accused No. 1 u/s 498A IPC, it is again on record that the evidence of P.Ws.l, 5

and 8, including the dying declaration, under Ex.P-16, is categorical to the effect that there was some dispute between the deceased and the

accused No. 1 and the deceased was ill-treated by the accused No. 1 for dowry.

28. Further, the evidence of P.W. 12, who is a village elder and was a party to the panchayath to resolve the dispute between the deceased and

the accused No. 1, shows that there was some complaint made by the deceased about the ill-treatment meted out to her at the hands of the

accused No. 1. There is not much rebuttal evidence to disprove this charge, levelled against the accused No. 1. Therefore, we are of the

considered view that this charge against the accused No. 1 was also proved, punishable u/s 498A IPC, and we agree with the finding, recorded by

the Court below, insofar as conviction and sentence as well, in this regard.

29. The next crucial question, which is rather incidental and forced us to drive at, is, as to whether the accused No. 1 can be found guilty for the

offence punishable u/s 306 IPC instead of the offence said to have been committed u/s 302 IPC?

30. The earlier law, on this subject, was mostly based on the decision in Sangaraboina Sreenu Vs. State of Andhra Pradesh, wherein the apex

Court held thus:

...This appeal must succeed for the simple reason that having acquitted the appellant of the charge u/s 302 IPC - which was the only charge framed

against him - the High Court could not have convicted him of the offence u/s 306 IPC. It is true that Section 222 Cr.P.C. entitles a court to convict

a person of an offence which is minor in comparison to the one for which he is tried u/s 306 IPC cannot be said to be a minor offence in relation to

an offence u/s 302 IPC within the meaning of Section 222 Cr.P.C. for the two offences are of distinct and different categories. While the basic

constituent of an offence u/s 302 IPC is homicidal death, those of Section 306 IPC are suicidal death and abetment thereof....

31. So, the view of the apex Court for a long time was to the effect that Sections 306 and 302 IPC are two distinct and different category of

offences, inasmuch as, Section 302 IPC is absolutely homicidal death, whereas Section 306 IPC is suicidal death owing to the abetment. Here,

again we have to see that there is basic difference between the offences under Sections 306 and 309 IPC. The gravity of offence u/s 306 IPC is

more serious than the one u/s 309 IPC.

32. The basic difference between these two Sections is, to constitute an offence u/s 309 IPC, it shall be an attempt to commit suicide on one''s

own volition, whereas u/s 306 IPC, one commits suicide at the instigation or provocation of the other, as the case be, coupled with some force

from different source. However, the distinction between the offences under Sections 306 and 309 IPC is not very relevant to deal with the present

subject.

33. But, there is a sea change and deviation in law laid down by the apex Court in Sangaraboina Sreenu''s case (1 supra) in the latter judgments of

the apex Court.

34. While assisting this Court, Sri C. Padmanabha Reddy, the learned Senior Counsel, brought to the notice of this Court that the apex Court had

taken a different view in subsequent judgments and the ratio laid down in Sangaraboina Sreenu''s case (1 supra) was held to be no more a good

law. In Dalbir Singh v. State of Uttar Pradesh (2004) S.C.C. 334 the apex Court, while elaborately dealing with Sections 302, 304B and 498A

IPC, held thus:

...In view of Section 464 Cr.P.C. it is possible for the appellate or revisional court to convict an accused for an offence for which no charge was

framed unless the court is of the opinion that a failure of justice would in fact occasion. In order to judge whether a failure of justice has been

occasioned, it will be relevant to examine whether the accused was aware of the basis ingredients of the offence for which he is being convicted

and whether the main facts sought to be established against him were explained to him clearly and whether he got a fair chance to defend himself....

35. It is to be noted that the offences punishable under Sections 304B and 302 read with Section 498A IPC are distinct. Nevertheless, the offence

u/s 304B IPC is slightly inferior to Section 302 IPC. Even though there was no charge framed u/s 304B IPC and the charge was under Sections

302 and 498A IPC only, in the event of the Court coming to the conclusion that the offence allegedly committed by the accused does not amount

to the offence punishable u/s 302 IPC, but amounts to an offence punishable u/s 304B IPC, it is imperative for the trial court to put the accused

while examining him u/s 313 Cr.P.C, which is in a way giving the accused an opportunity of audi alterim partem to explain whether he was liable

for the said offence.

36. In the present case also, the offences charged against the accused No. 1 are both under Sections 302 and 498A IPC. As already expressed

by us, the prosecution had failed to establish the guilt of the accused No. 1 for the offence punishable u/s 302 IPC, but, beyond any doubt, there

was evidence by way of abetting the deceased to resort to the commission of suicide by pouring kerosene on herself and setting ablaze. The

circumstances stated by all the witnesses are totally coherent with each other and support the main and important corroborative piece of evidence

in Ex.P-16, dying declaration.

37. Therefore, in a situation, where both the charges under Sections 302 IPC and 306 IPC cannot be levelled against the accused, but, if the

circumstances suggest conclusively that the offence was sufficiently proved to the extent of the offence u/s 306 IPC, this Court, being an appellate

Court, can always hold that the accused has committed an offence u/s 306 IPC and the conviction for the said offence can safely be recorded. We

are of the further view that the same would not result in the failure of justice.

38. Yet in another judgment, rendered by the apex Court, in Shamnasheb M. Multtani Vs. State of Karnataka, , though the accused was acquitted

for the offences under Sections 302 and 498A IPC, as was originally charged, he was convicted for the alternative charge for the offence u/s 304B

IPC.

39. In such circumstances, it was pointed out by the apex Court, in various terms, that in case of the offence u/s 304B IPC, it is imperative for the

Court to invoke the presumptive jurisdiction, as envisaged u/s 113B of the Indian Evidence Act. The apex Court, at paragraph Nos. 15 and 16 of

the said judgment (3 supra), held thus:

15. ...Section 222(1) of the Code deals with a case ""when a person is charged with an offence consisting of several particulars."" The Section

permits the Court to convict the accused ""of the minor offence, though he was not charged with it."" Sub-section (2) deals with a similar, but slightly

different situation. ""When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the

minor offence although he is not charged with it.

16. What is meant by ""a minor offence"" for the purpose of Section 222 of the Code? Although the said expression is not defined in the Code it can

be discerned from the context that the test of minor offence is not merely that the prescribed punishment is less than the major offence. The two

illustrations provided in the section would bring the above point home well. Only if the two offences are cognate offences, wherein the main

ingredients are common, the one punishable among them with a lesser sentence can be regarded as minor offence vis-a-vis the other offence.

40. Similarly, in the present case also, the accused No. 1 was charged only for the offences punishable under Sections 302 and 498A IPC. But, as

already observed, there is a failure on the part of the prosecution, in establishing its case against the accused No. 1 for the offence punishable u/s

302 IPC, as pointed out in Shamnsaheb M. Multtani''s case (3 supra). Though the offence u/s 304B IPC, cannot, in fact, be treated as a minor

offence, as contemplated u/s 222 of Cr.P.C, the offences under Sections 302 and 306 IPC should be treated as cognate offences, as the

ingredients of both the offences are substantially common.

41. From a conjoint reading of the abovementioned two judgments (2 and 3 supra), it is obvious that even though there is no specific charge

framed and the offence under other section is made out, the Court can record a finding under such a charge, which is punishable with lesser

sentence for a cognate offence.

42. For the foregoing discussion, particularly having regard to the view expressed by us that the offence under Sections 306 and 498A IPC, have

been established by the prosecution, we feel it appropriate to modify the conviction and sentence, imposed by the Court below, against the

accused No. 1, as under:

The appellant ~ accused No. 1 is found guilty for the offence punishable u/s 306 IPC and, accordingly, he is convicted and sentenced to suffer

rigorous imprisonment for six years and to pay a fine of Rs. 5,000/-, in default to suffer rigorous imprisonment for five months. However, the

conviction and sentence, imposed by the Court below, on the appellant--accused No. 1, for the offence punishable u/s 498A IPC, are confirmed.

Both the sentences, for the offences under Sections 306 and 498A IPC, shall run concurrently. The appellant - accused No. 1 is entitled to the

benefit of set off, as contemplated u/s 428 Cr.P.C.

43. Accordingly, the Criminal Appeal is allowed in part, with the above modifications in the conviction and sentences.