(2016) 02 AP CK 0043

Andhra Pradesh High Court

Case No: Criminal Appeal No. 828 of 2010

Kothala Srinu	APPELLANT
Vs	
State of Andhra Pradesh	RESPONDENT

Date of Decision: Feb. 22, 2016

Citation: (2016) 2 AndhLDCriminal 413

Hon'ble Judges: Sri C.V. Nagarjuna Reddy and Sri M.S.K. Jaiswal, JJ.

Bench: Division Bench

Advocate: Mrs. B. Vaijayanthi, Advocate, for the Appellant; Public Prosecutor (AP), for the Respondent

Final Decision: Partly Allowed

Judgement

Sri C.V. Nagarjuna Reddy, J.—The sole accused in Sessions Case No. 21 of 2009 on the file of the learned VII Additional Sessions Judge, Kakinada, East Godavari District, filed this Criminal Appeal against the judgment, dated 25.01.2010, whereby he was convicted for the offence under Section 302 I.P.C. and was sentenced to suffer rigorous imprisonment (R.I.) for life and also to pay a fine of Rs. 500/-, in default, to suffer simple imprisonment (S.I.) for two months.

2. The case of the prosecution, in brief, is that one Kothala Parvathi (hereinafter referred to as ''the deceased'') was the wife of the appellant, that the marriage between them was performed ten years prior to the death of the deceased, that they were blessed with two female children out of their wedlock, that the couple were residing with their children at G. Mamidada Village and that the appellant is habituated to consuming liquor and used to harass the deceased, by way of beating her, without any reason in drunken state everyday.

That on the night of 07.08.2008 at 7.30 p.m., the appellant returned to the house, by consuming liquor and started quarrelling with the deceased as usual and during the quarrel, the appellant picked up kerosene bottle lamp, poured kerosene over the deceased and lit fire to her, with a match stick, as a result of which, flames engulfed

the deceased through the silk sari and silk blouse she wore and she sustained burn injuries on chest, stomach and back. That P.Ws.5 and 6 are the neighbours of the locality, who witnessed the deceased burning in flames, that they extinguished the fire by pouring water and that the appellant absconded. That P.W.1, mother of the deceased, after coming to know about the occurrence of the incident, rushed to the spot and shifted the deceased to the Government General Hospital (GGH), Kakinada, where she succumbed to burns, while undergoing treatment on 12.08.2008 at 6.00 p.m.

That on the statement of the deceased, P.W.11 registered a case in crime No. 70 of 2008 of Pedapudi Police Station under Section 307 I.P.C. on 08.08.2008 at 3.00 a.m. and investigated into the matter. He visited the scene of offence, prepared observation report on 08.08.2008 and seized a bottle containing kerosene, burnt sari pieces, one match box and two match sticks from the scene of offence on the same day at 7.30 a.m. in the presence of P.W.8 and L.W.10 - Peyyala Prakasha Rao. He also prepared rough sketch of the scene of offence and got photographed the same with the assistance of P.W.4. During the course of investigation, he examined P.Ws.1 to 5 and 7 and L.W.6 - Gundupuneedi Venkannababu, and recorded their detailed statements under Section 161 Cr.P.C. He arrested the appellant on 12.08.2008 in the presence of the mediators and recorded his confessional statement, in pursuance of which, he seized the latter''s shirt, containing a burnt piece of sari of the deceased on that day itself at 9.00 a.m. in the presence of P.W.8 and L.W.10 - Peyyala Prakasha Rao. P.W.12, who is the Sub-Inspector (S.I.) of Police, Pedapudi, verified investigation of P.W.11 on 12.08.2008 and recorded the statements of P.Ws.1 to 5, 7, L.W.6 - Gundupuneedi Venkannababu and the deceased. On receipt of the death intimation, he altered the section of law in crime No.70 of 2008 into one under Section 302 I.P.C. from Section 307 I.P.C. on 13.08.2008 at 10.30 a.m. and dispatched the copies of fresh F.I.R. to all the concerned. L.W.16, who is the Inspector of Police, Kakinada Rural, took up the investigation and held inquest over the dead body of the deceased on 13.08.2008 in the presence of P.W.8, L.W.10 - Peyyala Prakasha Rao and L.W.11 - Mandapaka Atchari. He compared the burnt sari pieces seized at the scene of offence with the burnt sari piece on the shirt of the appellant, seized at the latter''s instance on 13.08.2009 at 6.00 p.m., under a cover of mediators report in the presence of P.W.8 and L.W.10 - Peyyala Prakasha Rao.

P.W.9, the III Additional Judicial Magistrate of First Class, Kakinada, recorded the dying declaration of the deceased on 08.08.2008, while she was undergoing treatment in the hospital.

P.W.10, an Assistant Professor, Department of Forensic Medicine, Rangaraya Medical College, Government General Hospital, Kakinada, conducted autopsy over the dead body of the deceased and opined that the cause of death of the deceased was due to septic and toxic conditions as a result of the Wilson''s first degree burn

injuries of 55% of the total body surface. After completion of the investigation, L.W.16 - R.V.S.N. Murthy, Inspector of Police, Kakinada Rural, filed the charge sheet. During his examination under Section 313 Cr.P.C., the appellant pleaded not guilty and therefore, the trial was conducted. On behalf of the prosecution, P.Ws.1 to 12 were examined and Exs.P-1 to P-16 were marked and M.Os.1 to 4 were produced. On behalf of the defence, though no oral evidence was adduced, Exs.D-1 to D-3 were marked.

On appreciation of the oral and documentary evidence, the Court below convicted the appellant and sentenced him as observed above.

3. Smt. B. Vaijayanthi, learned panel counsel for Legal Aid appearing for the appellant/accused, has submitted that the deceased gave conflicting dying declarations and that she stated before the Magistrate, P.W.9, to the effect that the accused in a drunken state, picked up quarrel with her, poured kerosene on her and lit fire with a match stick, due to which she sustained serious burnt injuries, while in the statement recorded by P.W.11, Head Constable, she stated that following a quarrel between herself and her husband, in anger, she has poured kerosene from a bottle on herself threatening that she would die, whereupon, her husband lit fire with a match stick. The learned counsel has further submitted that when there are serious contradictions between the two dying declarations of the deceased and in the absence of clear evidence on record proving the guilt of the appellant, he is entitled to the benefit of doubt. In support of her submissions, she has placed reliance on the judgment of the Division Bench of this Court in Lingaiah v. State of A.P. 1994 Crl.L.J.1242.

4. Opposing the above submissions, Mr. Posani Venkateswarlu, learned Public Prosecutor (AP) appearing for the respondent - State, has submitted that where there are two conflicting dying declarations, the one recorded by the Higher Authority and the earliest version of the deceased recorded must be preferred, that in the present case, the earliest dying declaration was recorded by the Magistrate - P.W.9, who is undoubtedly a higher authority than P.W.11, Head Constable, and that the said statement being the earliest version, it needs to be given more credence and the same deserves to be accepted. In support of his submissions, he has placed reliance on the judgments of the Supreme Court in Laxman v. State of Maharashtra (2002) 6 SCC 710, P.V. Radhakrishna v. State of Karnataka (2003) 6 SCC 443 and Nallapati Sivaiah v. Sub Divisional Officer, Guntur (2007) 15 SCC 465. He has alternatively submitted that even if Ex.P-12 recorded by P.W.11 is accepted on its face value, it is clear therefrom that it is the appellant, who lit the fire with a match stick causing the death of his wife and therefore, he is liable for conviction for the offence under Section 302 I.P.C. and the Court below is justified in convicting the appellant and sentencing him to life imprisonment.

5. Having regard to the respective submissions of the learned counsel for the parties, the point that arises for consideration is whether the judgment of the Court

below is sustainable?

6. As regards the legal position relating to dying declarations, a Constitution Bench of the Supreme Court in Laxman (2-supra) held that the juristic theory regarding acceptability of a dying declaration is that such declaration is made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the man is induced by the most powerful consideration to speak only the truth, that notwithstanding the same, great caution must be exercised in considering the weight to be given to this species of evidence on account of the existence of many circumstances which may affect their truth and that the situation, in which a man is on the deathbed is so solemn and serene, is the reason in law to accept the veracity of his statement. The Supreme Court, however, left a note of caution that since the accused has no power of cross-examination, the Courts insist that the dying declaration should be of such a nature as to inspire full confidence of the Court in its truthfulness and correctness and that the Court must always be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination and it must also further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Dealing with the probative value to be attached to the dying declaration recorded by the Magistrate, the Supreme Court held that the Magistrate being a disinterested witness and a responsible officer and there being no circumstances or material to suspect that he had any animus against the accused or was in any way interested for fabricating a dying declaration, question of doubt on the declaration, recorded by the Magistrate does not arise.

7. In P.V. Radhakrishna (3-supra), the Supreme Court succinctly summed up the legal position relating to dying declaration, at paras 12, 13 and 15, as under:

"(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. [See Munnu Raja & Anr. v. The State of Madhya Pradesh (1976) 2 SCR 764)]

(ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. [See State of Uttar Pradesh v. Ram Sagar Yadav and Ors. (AIR 1985 SC 416) and Ramavati Devi v. State of Bihar (AIR 1983 SC 164)]

(iii) 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 had an opportunity to observe and identify the assailants and was in a fit state to make the declaration. [See K. Ramachandra Reddy and Anr. v. The Public Prosecutor (AIR 1976 SC 1994)]

(iv) Where a dying declaration is suspicious, it should not be acted upon without corroborative evidence. [See Rasheed Beg v. State of Madhya Pradesh (1974 (4) SCC

264)]

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. [See Kaka Singh v State of M.P. (AIR 1982 SC 1021)]

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. [See Ram Manorath and Ors. v. State of U.P. (1981 (2) SCC 654)]

(vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected. [See State of Maharashtra v. Krishnamurthi Laxmipati Naidu (AIR 1981 SC 617)]

(viii) Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth. [See Surajdeo Ojha and Ors. v. State of Bihar (AIR 1979 SC 1505)]

(ix) Normally, the Court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration looks up to the medical opinion. But where the eye-witness said that the deceased was in a fit and conscious state to make the dying declaration, the medical opinion cannot prevail. [See Nanahau Ram and Anr. v. State of Madhya Pradesh (AIR 1988 SC 912)]

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. [See State of U.P. v. Madan Mohan and Ors. (AIR 1989 SC 1519)]

(xi) Where there are more than one statements in the nature of dying declaration, the one first in point of time must be preferred. Of course, if the plurality of dying declaration could be held to be trustworthy and reliable, it has to be accepted. [See Mohanlal Gangaram Gehani v. State of Maharashtra (AIR 1982 SC 839)]"

8. In Nallapati Sivaiah (4-supra), another Bench of the Supreme Court, after a thorough review of the legal position, has undertaken a detailed discussion with respect to case law on the evidentiary value on various aspects of dying declaration and concluded that it is unsafe to record conviction on the basis of a dying declaration alone in cases where suspicion is raised as regards its correctness and that in such cases, the Court may have to look for some corroborative evidence by treating dying declaration only as a piece of evidence.

9. In the light of the law laid down by the Supreme Court, by the judgments referred to above, we need to examine as to which of the two dying declarations needs to be accepted. From the evidence on record, it is not in dispute that the earliest version of the deceased was recorded by P.W.9 - Magistrate at 0.45 a.m. on 08.08.2008, wherein the deceased categorically stated that the appellant used to come home drunk every day and abuse and beat her, that on the day of occurrence also, he came home drunk, started quarrelling with her and beat her and that the appellant

got the kerosene available at home, poured the same on her and lit fire. P.W.11 - Head Constable, recorded one other dying declaration of the deceased on the same day at 2.00 a.m. In that statement, the deceased came out with a different version by stating that during the quarrel between herself and her husband, she poured kerosene on herself, in anger and that her husband lit fire with a match stick. It is noticeable from both these dying declarations that the contradiction or variation in the statements of the deceased was confined to the act of pouring kerosene only.

However, with regard to the act of setting the deceased on fire with a match stick, there is no contradiction between the two dying declarations of the deceased.

10. P.W.1, the mother of the deceased, deposed that one person came to her house and informed her that the appellant poured kerosene on her daughter and set her on fire, that when she came to her daughter''s house, the latter was found with burn injuries all over her body and that when she enquired with her daughter as to how she sustained those burn injuries, she informed that the appellant poured kerosene on her and set her on fire. She denied the suggestion in her cross-examination that the appellant himself came to her house and informed her that her daughter committed suicide, by pouring kerosene on herself and that he himself put off the flames on the body of the deceased. P.W.2, the sister of the deceased, also deposed on the same lines as her mother - P.W.1, did. She also denied similar suggestions that were put to P.W.1 by the defence. P.W.5, whose house is situated on the right side of the house of the appellant, deposed in her evidence that when she was feeding her mother-in-law, at about 7.00 or 7.30 p.m. on the day of occurrence, she heard the cries of the deceased from her house, that when she came out of her house, she saw the deceased in flames in front of her house, that she took a bucket of water and doused the deceased with the same and that similarly, P.W.4 and L.W.6 (Gundupuneedi Venkannababu) also brought water from nearby places and tried to put off the flames on the deceased. She further testified that the appellant used to attend carpentry work during day time, but in the night time, he used to take alcohol and pick up quarrels with the deceased. She denied the suggestion that the appellant also tried to put off the flames on the deceased.

11. On a careful scrutiny of the evidence discussed above, we are of the opinion that the same supports the earliest version spoken to by the deceased through Ex.P-9 recorded by P.W.9, a Judicial First Class Magistrate, rather than the version spoken to by her through Ex.P-12 recorded by P.W.11, a Head Constable. We do not find any inconsistencies in the evidence of these witnesses regarding the conduct of the appellant in coming home during nights after drinking alcohol and picking up quarrels with the deceased. Nothing worth mentioning could be elicited from these witnesses to falsify their versions. Another crucial evidence that needs a mention in this context is the intimation given to the Magistrate - P.W.9 by the Chief Medical Officer (CMO) marked as Ex.P-10 at 0.10 a.m. on 08.08.2008 i.e., 2 ½ hours after the occurrence. This is evidently based on the information collected from the patient.

The CMO mentioned in the said intimation that the burns were inflicted by her husband. Sometime after Ex.P-9 was recorded by P.W.9 and he left the hospital, P.W.11 - the Head Constable, recorded another statement - Ex.P-12, in pursuance of the intimation given by the CMO to the Police. The time lag between Ex.P-9 and Ex.P-11 is just 1 hour and 15 minutes. When a dying declaration was already recorded by the Magistrate, ordinarily there would be no need for the Police to record another dying declaration. However, it appears, due to lack of knowledge of the Magistrate recording Ex.P-9, P.W.11 again recorded another statement of the deceased. In this statement as noted above, the deceased came out with a different version with regard to pouring of kerosene.

12. As held by the Constitution Bench of the Supreme Court in Laxman (2-supra), when there are contradictory dying declarations, unless there are serious suspicious circumstances, the dying declaration recorded by the Magistrate needs to be believed. The Magistrate being a disinterested witness and a responsible officer, the dying declaration recorded by him is not liable to be doubted. The defence did not bring out anything to discredit the version of the prosecution, either of the accused''s drunkardness or his ill-behaviour with the deceased. Here, we need to understand the mind set of the deceased before her death. Over a passage of time, there was a possibility of her retracting her original statement either due to the reason of tutoring by her family members or in realisation of the fact that if her husband is convicted and sentenced to imprisonment, her children may become orphans. Evidently, to reduce the gravity of the offence, the deceased gave a slightly different version in the second dying declaration, by stating that she has poured kerosene on herself. At any rate, as noticed hereinbefore, as regards the act of lighting the fire, the version of the deceased is consistent in both the dying declarations, which is also corroborated by all the prosecution witnesses in general and P.Ws.1 to 4, in particular. In these facts and circumstances of the case, we have no reason to doubt the veracity of the statement made by the deceased under Ex.P-9 and there can be no doubt that the appellant caused the death of the deceased.

13. The further question that remains to be considered is whether the appellant is liable to be convicted for the offence under Section 302 I.P.C. or under Section 304 Part-II I.P.C.?

14. From the consistent evidence of the prosecution witnesses, it is clear that the appellant was not leading a disciplined life. He used to come home after consuming alcohol after his marriage, every night and pick up quarrels with the deceased. Though he appeared to have been harassing the deceased, there is no evidence to show that he had ever attempted to do away with her life. Even according to the version of the deceased, as reflected from her both the dying declarations, even on the fateful day, a quarrel ensued between them, leading to her suffering burns. In the manner in which the occurrence has taken place, as reflected from the evidence

on record, we have no doubt in our mind that the appellant had no intention of killing his wife. However, due to the serious quarrel between them, the appellant probably, in a fit of rage, would have set fire to the deceased. This conclusion of ours is firmed up by the fact that at the time of occurrence, the appellant was in a drunken condition and that he has brought kerosene from a bottle lamp and poured the same on the deceased which shows that he would not have had the premeditation of causing the death of the deceased. The further fact that the burns were only 55% and they have not caused immediate death - the deceased died five days after the occurrence - also shows that the appellant had no intension of causing the death of the deceased. Therefore, we feel that this is a fit case to convict the appellant for the offence under Section 304 Part-II I.P.C. and accordingly, we modify the judgment of the Court below to this effect. As regards the sentence, having regard to the nature of the offence, we feel that interests of justice would be met if the appellant is sentenced for a period of seven years, besides a fine of Rs.500/-.

15. In the result, the Criminal Appeal is partly allowed. The conviction recorded against the appellant/accused in the judgment, dated 25.01.2010, in Sessions Case No. 21 of 2009, on the file of the learned VII Additional Sessions Judge, Kakinada, for the offence punishable under Section 302 I.P.C. is modified to that of the offence under Section 304 Part-II I.P.C. The appellant/accused is, accordingly, convicted and sentenced to suffer R.I. for a period of seven years and to pay fine of Rs. 500/- (Rupees five hundred only), in default of payment of fine, to suffer S.I. for two months. Consequently, as the accused has been in imprisonment since 12.08.2008, he shall be set at liberty forthwith, if he is not required in any other case or crime.