

**(2004) 02 AP CK 0099**

**In the Andhra Pradesh High Court**

**Case No : Criminal Appeal No. 324 of 1998**

P. Srinivasulu

APPELLANT

Vs

The State of A.P.

RESPONDENT

**Date of Decision : 10-02-2004**

**Acts Referred:**

Constitution of India, 1950 — Article 227  
Criminal Procedure Code, 1973 (CrPC) — Section 161, 174, 313  
Criminal Rules of Practice and Circular Orders, 1990 — Rule 33, 33(4)  
Penal Code, 1860 (IPC) — Section 107, 108, 304B, 306

**Citation : (2004) CriLJ 2718 : (2004) 2 DMC 64**

**Hon'ble Judges : S.R.K. Prasad, J**

**Bench : Single Bench**

**Advocate : Praveen Kumar, for the Appellant; The Public Prosecutor, for the Respondent**

**Final Decision : Allowed**

## **Judgement**

S.R.K. Prasad, J.—The accused has preferred this appeal against the Judgment, dated 23-02-1998, passed by the Additional Sessions Judge, Mahabubnagar, whereby the learned Additional Sessions Judge has convicted and sentenced the accused to undergo rigorous imprisonment for a period of seven years and to pay a fine of Rs.1,000/-, in default, to suffer rigorous imprisonment for a further period of one year, for the offence punishable u/s 306 IPC.

2. The factual matrix that is required for consideration can be briefly stated as follows:

The deceased Rama Devi is the wife of the accused. At the time of their marriage, cash of Rs.6,000/- and gold ornaments worth Rs.8,000/- were given to the accused as dowry. After the marriage, the deceased and the accused lived peacefully for about 3 1/2 years at their village and later on shifted to Achampet. The accused was running a sweet stall under the name and style "Devi Sweet House" at Achampet and leading their life. The accused, ever since shifted to

Achampet, started harassing, ill-treating and subjecting the deceased to cruelty, to extract more dowry from her parents and also alleging that they had no issues making her responsible. The deceased informed the said harassment to her parents and brothers, whenever she visited Hyderabad. As they had no issues the deceased was shown at a Nursing home at Hyderabad. While she was under medical check-up and treatment, on 27-03-1992, without paying heed to the request of the parents to keep their daughter with them for Telugu New Year festival, the accused took her forcibly to Achampet. Due to continuous harassment and ill-treatment by the accused, the deceased was disgusted with her life, and on 3-4-1992 during the evening time doused herself with kerosene and set fire to her at her house in Achampet, to commit suicide. The accused who was present at the house extinguished the fire and shifted her to Osmania General Hospital, Hyderabad, for treatment. The Sub-Inspector of Police, Afzalgunj, requested the XIII Metropolitan Magistrate, Secunderabad, and got recorded the Dying Declaration of the deceased. While undergoing treatment the deceased succumbed to the burn injuries on the intervening night of 3 / 4-4-1992 at about 2.50 a.m. On the strength of intimation from the hospital, the Sub-Inspector of Police, Afzalgunj, registered a case and conducted inquest, and thereafter sent the dead body for post mortem examination. Subsequently, the case file was transferred on the point of jurisdiction to Achampet Police Station, which re-registering the F.I.R. u/s 306 IPC. The Medical Officer has given his report opining that the deceased died of burns. Then, Section of Law was altered to Section 304-B IPC. Treating it as dowry death, the accused was charge sheeted.

3. A charge u/s 304-B IPC was framed by the Additional Sessions Judge. The accused pleaded not guilty. The prosecution in all examined twelve witnesses. Exs.P.1 to P.4 are the 161Cr.P.C. statements of PWs.1 to 4 respectively. Ex.P.5 is the scene of offence panchanama, Ex.P.6 is the post mortem report, Ex.P.7 is the inquest panchanama, Ex.P.8 is the F.I.R. received by post from Afzalgunj P.S., Ex.P.9 is the F.I.R. in Cr.No.26 of 1992 of P.S. Achampet, Ex.P.10 is the rough sketch, Ex.P.11 is the Dying Declaration, Ex.P.12 is the requisition by police for dying declaration, Ex.P.13 is the death intimation and Ex.P.14 is the F.I.R.No.138 of 1992 of P.S. Afzalgunj.

4. PW.1 the father of the deceased deposed that his daughter and the accused lived happily at Achampet and that his daughter died due to stove accident. This witness is treated as hostile by the prosecution. PW.2 is the mother of the deceased and she categorically stated that her son-in-law looked after her daughter very well. This witness was also treated as hostile by the prosecution. PW.3-V.Kotaiah, the brother of the deceased categorically stated that the accused worked in a sweet shop at Hyderabad and thereafter they shifted to Achampet and he looked after his sister happily and the deceased died in stove accident. This witness was also treated as hostile. PWs.4 and 5 also turned hostile. PW.6 who is the Civil Surgeon and presently working at Head Quarters Hospital, Sangareddy, deposed that previously he worked as Tutor in Forensic Medicine at

Osmania Medical College, Hyderabad from September 1991 to September 1992. He speaks about conducting of postmortem examination over the dead body of the deceased on the same day of 5-4-1992 at 12 noon. He states that the body was having pugilistic appearance. He also found extensive burns all over the body of the deceased except on the lower part of the abdomen both the hips and left side of the foot. He further found Chireey red spots present on the burns and the scalp hair eye brows, and eye lashes, auxillary hair and public hair sienged. He also found 95% of extensive burns over the body of the deceased and gave an opinion that the death of the deceased was due to extensive burns. PW.7 did not speak anything about the case and he was treated as hostile. PW.8-K.Kedari deposed about holding inquest over the dead body of the deceased on 5-4-1992 from 10.40 a.m. to 12.00 noon and drafting and signing of Ex.P.7. PW.9 speaks about filing of charge sheet. PW.10 deposed that previously when he worked as S.I. at Achampet, on 16-04-1992 at 12 noon, he received F.I.R. by post from the Afzalgunj Police Station and accordingly registered a case in Cr.No.138 of 1992 u/s 174 Cr.P.C. He re-registered the same as a case in Cr.No.26 of 1992 u/s 306 IPC. Ex.P.9 is the F.I.R. registered by him. It is his version that PWs.1 to 4 came to the Police Station on the date when he received the F.I.R. and he recorded their statements u/s 161 Cr.P.C. PW.11-P.Sridhar Rao deposed that previously, when he worked as XIII Metropolitan Magistrate for Railways at Secunderabad, during the year 1992, on receipt of a requisition from the Inspector of Police, Afzalgunj, he proceeded to Osmania General Hospital and put some preliminary questions to the victim, after getting satisfied that the victim was conscious, coherent and was in a fit condition to make a statement, he recorded her Dying Declaration in between 1.50 a.m. to 2.10 a.m. He further deposed that the deceased categorically stated that the accused demanded her to bring money from her parents house and abused her. Ex.P.11 is the Dying Declaration. PW.12-Md.Ismail, who is presently working as S.I. of Police at CCS, Hyderabad, deposes that previously when he worked as S.I. of Police at Afzalgunj P.S. he received a requisition from the Superintendent, Osmania General Hospital, Hyderabad regarding the death of Ramadevi due to burns. On that he registered a case in Cr.No.138 of 1992 u/s 174 Cr.P.C. and took up investigation. Ex.P.13 is the death intimation. Ex.P.14 is the F.I.R. He further deposed that on receipt of inquest report and post mortem examination report, he transferred the case file to S.H.O. Achampet on the point of jurisdiction.

5. After appraisal of the entire evidence, the Additional Sessions Judge found the accused guilty for the offence u/s 306 IPC and acquitted him for the offence u/s 304-B IPC. He has mainly placed reliance on the Dying Declaration given by the deceased to find the accused guilty for the offence punishable u/s 306 IPC, and convicted and sentenced him to undergo rigorous imprisonment for a period of seven years and imposed a fine of Rs.1,000/-, in default, to suffer rigorous imprisonment for a period of one year. Aggrieved by the same, the accused has preferred this appeal.

6. The point that arises for consideration is "whether the prosecution has proved

the case u/s 306 IPC beyond all reasonable doubt"?

7. At the very outset, PW.1-the father, PW.2-the mother, PW.3-the brother of the deceased categorically stated that the deceased lived happily with the accused at Achampet. There is no direct evidence forth coming regarding the alleged abetment made in committing suicide by the deceased. In view of the evidence of PWs.1 to 3, the Additional Sessions Judge has rightly come to the conclusion that it is not a case of dowry death. As per the statement of PW.11 and the evidence of PW.12, the deceased was admitted in the hospital with burn injuries. It is clear from the inquest held by PW.8 that it is not a homicidal death but it is a suicidal death and the cause of death was given as burns. PWs.1 to 3 also stated that the deceased died due to stove accident. It indicates that the death may be either due to accidental or suicidal death. The prosecution has placed the dying declaration before the Court to know the cause of death as well as the reasons for death. PW.11 recorded the dying declaration of the deceased.

8. The Apex Court has laid down the guidelines for judging the dying declarations, in the latest decision reported in P.V. Radhakrishna v. State of Karnataka<sup>1</sup>. The relevant portion at para Nos.11, 12, 13, 14 and 16 reads as follows:

11. This is a case where the basis of conviction of the accused is the dying declaration. The situation in which a person is on deathbed is so solemn and serene when he is dying that the grave position in which he is placed is the reason in law to accept veracity of his statement. It is for this reason the requirements of oath and cross-examination are dispensed with. Besides, should the dying declaration be excluded it will result in miscarriage of justice because the victim being generally the only eye-witness in a serious crime, the exclusion of the statement would leave the Court without a scrap of evidence.

12. Though a dying declaration is entitled to great weight it is worthwhile to note that the accused has no power of cross-examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the Court also insists that the dying declaration should be of such a nature as to inspire full confidence of the Court in its correctness. The Court has to be on guard that the statement of deceased was not as a result of either tutoring, or prompting or a product of imagination. The Court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailant. Once the Court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The Rule requiring corroboration is merely a rule of prudence. This Court has laid down in several judgments the principles governing dying declaration, which could be summed up as under as indicated in Smt. Paniben Vs. State of Gujarat, :

i) There is neither rule of law nor of prudence that dying declaration cannot be

acted upon without corroboration - Munnu Raja and Another Vs. The State of Madhya Pradesh, .

ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it. Without corroboration - State of Uttar Pradesh Vs. Ram Sagar Yadav and Others, and Ramawati Devi Vs. State of Bihar, .

iii) The Court has to scrutinize 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 - K. Ramachandra Reddy and Another Vs. The Public Prosecutor, .

iv) Where dying declaration is suspicious, it should not be acted upon without corroborative evidence - Rasheed Beg and Others Vs. State of Madhya Pradesh, .

v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected - Kake Singh Alias Surendra Singh Vs. State of Madhya Pradesh, .

vi) A dying declaration which suffers from infirmity cannot form the basis of conviction - Ram Manorath and Others Vs. State of Uttar Pradesh, .

vii) Merely because a dying declaration does contain the details as to the occurrence, it is not to be rejected - State of Maharashtra Vs. Krishnamurti Laxmipati Naidu, .

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 - Surajdeo Ojha and Others Vs. State of Bihar, .

ix) Normally the Court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look 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 - Nanhau Ram and Another Vs. State of Madhya Pradesh, .

x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon - State of U.P. Vs. Madan Mohan and Others, .

xi) Where there are more than one statement in the nature of dying declaration, 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 - Mohanlal Gangaram Gehani Vs. State of Maharashtra, .

13. In the light of the above principles, the acceptability of alleged dying declaration in the instant case has to be considered. The dying declaration is only a piece of untested evidence and must like any other evidence, satisfy the Court that what is stated therein is the unalloyed truth and that it is absolutely safe to

act upon it. If after careful scrutiny the Court is satisfied that it is true and free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal impediment to make it basis of conviction, even if there is no corroboration - Gangotri Singh Vs. State of U.P., , Goverdhan Raoji Ghyare Vs. State of Maharashtra, , Meesala Ramakrishan Vs. State of A.P., and State of Rajasthan Vs. Kishore, .

14. There is no material to show that dying declaration was result of product of imagination, tutoring or prompting. On the contrary, the same appears to have been made by the deceased voluntarily. It is trustworthy and has credibility.

15. The residuary question whether the percentage of burns suffered is determinative factor to affect the credibility of the dying declaration and the improbability of its recording. There is no hard and fast rule of universal application in this regard. Much would depend upon the nature of the burn, part of the body affected by the burn, impact of the burn on the faculties to think and convey the idea or facts coming to mind and other relevant factors. Percentage of burns alone would not determine the probability or otherwise of making dying declaration. As noted in Rambai Vs. State of Chhattisgarh, , physical state or injuries on the declarant do not by themselves become determinative of mental fitness of the declarant to make the statement.

9. The Apex Court has observed that where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. It is further observed by the Apex Court that the dying declaration is only a piece of untested evidence and, must, like any other evidence, satisfy the Court that what is stated therein is the unalloyed truth and that it is absolutely safe to act upon it. Rule 33 of the A.P.Criminal Rules of Practice and Circular Orders, 1990, gives guidelines and method of recording dying declaration, which reads as follows:

Rule 33: Dying declaration:-

1. While recording a Dying Declaration, the Magistrate shall keep in view the fact that the object of such declaration is to get from the declarant the cause of death or the circumstances of the transaction which resulted in death.

2. Before taking down the declaration, the Magistrate shall disclose his identity and also ask the declarant whether he is mentally capable of making a declaration. He should also put simple questions to elicit answer from the declarant with a view to knowing his state of mind and should record the questions and answers signs and gestures together with his own conclusion in the matter. He should also obtain whenever possible a certificate from the Medical Officer as to the mental condition of the declarant.

3. The declaration should be taken down in the words of the declarant as far as possible. The Magistrate should try to obtain from the declarant particulars necessary for identification of the accused. Every question put to the declarant

and every answer or sign or gesture made by him in reply shall be recorded.

4. After the statement is recorded, it shall be read over to the declarant and his signature obtained thereon, if possible, and then the Magistrate shall sign the statement.

10. In the above Rule it is not stated that the thumb impression of the deponent has to be taken after the statement is recorded. In Rule 33 (4), it is mentioned that the signature of the declarant has to be obtained thereon, if possible, and then the Magistrate shall sign the statement. There may be cases where certain persons cannot sign. But, in those cases, their thumb impressions have to be taken. There may be cases where hands are fully burnt and it is impossible to take thumb impressions of such persons. The rules are silent as to what the Magistrate has to do when hands are burnt and when thumb impressions of the persons can not be taken. There appears to be a lacuna in the said statutory Rules framed by virtue of the powers vested in the High Court under Criminal Procedure Code and under Article 227 of the Constitution of India.

11. In the present case, as the deponent was unable to put the thumb mark since her hands were burnt, her toe mark was taken. The Court can always take judicial note of the fact that there used to be a practice previously prevailing of taking toe marks when it was not possible to take thumb impressions of the hands of the deponent. By mentioning the word "signature", it causes considerable inconvenience to the Magistrate and creates a doubt whether he can take thumb impressions of the deponent or toe marks. Under the said circumstances, I am of the considered view that the Rule itself requires amendment and it should be clarified that in case of illiterate persons, and when a person is unable to put the signature, thumb marks can be obtained. It shall also be stated that in case hands were burnt, the toe marks could be taken. It is a matter to be considered by the High Court to bring about amendment to the necessary Criminal Rules of Practice and Circular Orders, 1990.

12. It is rightly contended by the accused counsel that the doctor who recorded the endorsement regarding the conscious nature of the deponent, was not examined in this case. PW.11 the Magistrate categorically stated that as the deceased was in conscious, coherent and fit condition, he recorded the dying declaration. In view of the statement of the Magistrate, I find that the dying declaration was recorded when the deceased was in conscious state, I do not agree with the contention of the accused counsel that it is not possible for the deponent to give statement as 95% burns are there. More over, the deceased in her dying declaration stated that the accused abused and asked her to bring money from her parents for taking treatment, as she was childless. Thereafter, she went inside the room and doused herself with kerosene and set fire to her and opened the door. Then, her husband on hearing the hues and cries rushed to her and tried to put off the flames and took her to Osmania Genera Hospital. The statement of the deceased clearly shows that the accused only uttered the words and did not do any act of abetment. The learned Public prosecutor vehemently

urges that uttering those words amount to provocation, which lead to committing of suicide, and hence, it amounts to abetment. The word "Abetment" has been defined u/s 107 IPC, which reads as follows:

107. Abetment of a thing - A person abets the doing of a thing, who\_\_\_

First.- Instigates any person to do that thing; or

Secondly.- Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

Thirdly.- Intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation 1.- A person who, by willful misrepresentation, or by willful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.

Explanation 2.- Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act.

The word "Abettor" has been defined u/s 108 IPC, which reads as follows:

108. Abettor.- A person abets an offence, who abets either the commission of an offence, or the commission of an act which would be an offence, if committed by a person capable by law of committing an offence with the same intention or knowledge as that of the abettor.

Explanation 1.- The abetment of the illegal omission of an act may amount to an offence although the abettor may not himself be bound to do that act.

Explanation 2.- To constitute the offence of abetment it is not necessary that the act abetted should be committed, or that the effect requisite to constitute the offence should be caused.

Explanation 3.- It is not necessary that the person abetted should be capable by law of committing an offence, or that he should have the same guilty intention or knowledge as that of the abettor, or any guilty intention or knowledge.....

13. Now the point that arises for consideration is "whether the abuses amount to abetment".

14. I am of the considered view that abuses cannot amount to abetment, unless something more is done in pursuance of the said act of abuses. I am also of the consider view that the present case does not fall u/s 306 IPC as there is no abetment to commit suicide. In fact no charge has been framed and the accused was not made aware of the offence for which he was tried. It is the duty of the Court to make the accused aware of the offence for which he is being tried, lest it may cause prejudice to the accused. If the Court below feels that the case had

been made out u/s 306 IPC, it ought to have framed a charge u/s 306 IPC and recorded the plea of the accused and then proceeded with further trial, instead of giving punishment directly for the offence u/s 306 IPC. More so, during the course of 313 Cr.P.C. examination the accused was not questioned regarding the alleged offence u/s 306 IPC, which caused prejudice to the accused. In this case PWs.1 to 3 state that it is a stove accident. The dying declaration recorded by the Magistrate shows that because of the abuses of the accused, she committed suicide by pouring kerosene over herself and setting fire. In fact there is no abetment to commit suicide. I am of the considered opinion that uttering of abuses will not amount to provocation to commit suicide and it does not constitute abetment. It is contended that after the police have given the requisition to record dying declaration, the case was registered. Hence, there is every possibility of anti-dating F.I.R. In my opinion, no offence is made out u/s 306 IPC and there is no need to advert to investigation aspect, as it loses much of its importance.

15. On reappraisal of the entire evidence, I find that even if the contents of dying declaration were taken to be correct, it does not constitute abetment. In view of the fact that Rule 33 of Criminal Rules of Practice and Circular Orders, 1990, prescribes only putting of signatures of the deponent, but not of taking of thumb impressions or toe marks by the Magistrate on the dying declarations, I am of the considered view that the matter has to be placed before the Hon"ble the Chief Justice through Registrar Judicial for proposing necessary amendments to Rule 33, so that the Magistrates may not commit any illegality by taking thumb marks which are not permissible under Rule 33. In the facts and circumstances of the case, the conviction and sentence imposed on the accused is liable to be set aside and the accused is entitled to benefit of doubt u/s 306 IPC.

16. In the result, the appeal is allowed by setting aside the conviction and sentence passed by the learned Additional Sessions Judge, Mahabubnagar, on 23-02-1998 and the accused is acquitted for the offence punishable for the offence u/s 306 IPC.