
(1997) 08 AP CK 0051

In the Andhra Pradesh High Court

Case No : Criminal Appeal No. 948 of 1996

Pallapolu Narasimha Rao

APPELLANT

Vs

State of Andhra Pradesh

RESPONDENT

Date of Decision : 01-08-1997

Acts Referred:

Penal Code, 1860 (IPC) — Section 302, 304, 85, 86

Citation : (1997) 2 ALD(Cri) 460 : (1999) 1 DMC 204

Hon'ble Judges : Y. Bhaskara Rao, J; V. Rajagopala Reddy, J

Bench : Division Bench

Advocate : C. Praveen Kumar, for the Appellant; Public Prosecutor, for the Respondent

Judgement

V. Rajagopala Reddy, J.—The sole appellant in this case was convicted for the offence u/S. 302, I.P.C. and sentenced to undergo imprisonment for life.

2. The facts of the case, in brief, are as follows : The accused was working as an Attender in the City Civil Court, Hyderabad. He was a married person having children. The husband of the deceased, who was working as attender in the City Civil Court, died and after his death the deceased was given the job of Attender, on compassionate grounds and she was working in the Metropolitan Sessions Judge's Court, Hyderabad. The accused developed illicit intimacy with the deceased and ultimately married her at Yadagirigutta. The accused and the deceased were residing at Dhobigalli, Malakpet, Hyderabad. The accused used to come home fully drunk and beat the deceased, suspecting her fidelity. On 23-3-1994, when the deceased returned home from duty at about 6 p.m., the accused questioned her as to why she came late. The deceased in reply, stated that there was traffic-jam at Afzulgunj and the bus came late. Thereupon, the accused picked up quarrel with the deceased and took out kerosene tin and poured kerosene on the deceased and lit with match stick. The deceased came out of the house raised hue and cry, when the neighbors gathered and extinguished the fire. P.W. 12 received a telephonic message from the locality

people and rushed to the house of the deceased and shifted her to Osmania General Hospital. He recorded the statement of the deceased at the hospital and basing upon it he registered a case u/S. 307, I.P.C. After the usual investigation, he gave a requisition to the IV Metropolitan Magistrate, Hyderabad (P.W. 4), for recording the dying declaration of the deceased and accordingly the magistrate recorded the dying declaration of the deceased, Ex. P. 5. Witnesses were examined, at the scene of offence panchanama was drafted, and incriminating material was seized by P.W. 12 in the presence of P.W. 8 and another. During the investigation the deceased succumbed to the burn injuries and thereafter the offence was altered to S. 302, I.P.C. P.W. 14. Inspector of Police, took up the further investigation by holding the inquest over the dead body of the deceased and getting the post-mortem examination done on the dead body on 24-3-1994. Since the accused also sustained burn injuries he himself got admitted in Osmania General Hospital. But, he thereafter absconded. However, the accused was arrested on 25-3-1994. After investigation the charge-sheet was filed.

3. The prosecution examined 15 witnesses, P.Ws. 1 to 15 and marked Exhibits P1 to P23, to Prove its case. When examined u/S. 313, Cr. P.C., the accused pleaded not guilty. After considering the entire evidence on record, the learned Sessions Judge convicted and sentenced the appellant as stated supra.

4. The point in be considered in this case is whether the learned Sessions Judge was right in convicting the appellant for the offence u/S. 302, I.P.C.

5. The case of the prosecution is that on 23-3-1994, when the deceased came late to the house, the accused, who is her second husband, questioned her for coming late and not satisfied with the reply given, after a brief quarrel, the accused set fire to her by pouring kerosene with an intention to kill her. It is its case that the accused used to come home drunk and beat her suspecting her fidelity. P.W. 1 is the landlady of the house, where the deceased and the accused were residing. P.Ws. 2 and 3 are the son and daughter-in-law of P.W. 1. They were all treated as hostile witnesses since they did not support the case of the prosecution P.W. 6 is the sister of the deceased. she deposed that the accused used to beat the deceased coming in drunken state. She saw bleeding injury on the face of the deceased on one occasion P.W. 5 is the brother-in-law of the deceased. P.W. 5 turned hostile. P.W. 4 is the IV Metropolitan Magistrate, who recorded the dying declaration. He deposed that on the intervening night of 23/24-3-1994 at 12.20 midnight he received a requisition from the police for recording the dying declaration of the deceased. The said requisition contained endorsement of the doctor that the patient was conscious and coherent and was able to give dying declaration. Ex. P. 4 is the requisition. He received the requisition at O.G.H. when he went there to record dying declaration of one Smt. Padmavathi. After completing the recording of the said dying declaration, he commenced recording of the dying declaration, he commenced recording of the dying declaration of the deceased in the present case. Before commencing his proceedings he obtained an endorsement from the doctor P.W. 13, at 0.25 a.m.

in order to satisfy himself about the mental condition of the declarant. He put formal questions and after noting those answers, he was satisfied that the deceased was capable of making the statement. Then he recorded her statement in question and answer form in Telugu. It is Ex. P. 5. After completion of recording of Ex. P. 5, he read over the statement and she admitted that the statement was correctly recorded and in token of it, he obtained the big toe impression of left leg of the deceased on the statement, since thumb impression of the hands of the declarant were not in good position to take impression, due to burns. At the time of recording her statement there was nobody else, except P.W. 4, the duty nurse and the duty doctor. The witness was cross-examined at length, but nothing was elicited to discredit his evidence. It was only questioned that the doctor, who made the endorsement on Ex. P. 5, P.W. 13, was not a doctor working in the hospital. But the witness stated that he was the duty doctor and his endorsement was sufficient compliance for recording the dying declaration. P.W. 13, in his evidence, stated that he was working as Senior Resident in Plastic Surgery in NIMS and he worked previously as MCH, Post-Graduate in Plastic Surgery in Osmania Medical College and Osmania General Hospital from March, 1994 to February, 1996. He stated that the deceased was admitted in O.G.H. Female Burns ward on 23-3-1999. He was the duty doctor for that recording dying declaration of the patient. Accordingly at about 12.25 a.m. the Magistrate visited the ward and recorded the dying declaration in his presence. He certified that the patient was conscious and coherent and was in a fit condition to give statement. The said endorsement was Ex. P. 22. By 1 a.m. the Magistrate completed the recording of dying declaration. Ex. P5 was the statement recorded by the Magistrate. In the cross-examination he stated that on the relevant day he was post-graduate in MCH Plastic Surgery. He denied the suggestion that he was not a full-fledged doctor on the date when Ex. P5 was recorded. He stated that he was drawing stipend as a post-graduate student. His Professor would be issuing circulars entrusting to the post-graduate students duties of Surgical Officer. He denied the suggestion that consciousness and coherence do not mean mental fitness and physiological condition was not different from mental condition, as suggested. He denied the suggestion that he was not a qualified doctor nor authorised to make endorsement Exs. P22 and P23, P.W. 12 is the S.I. of Police. He stated that after receiving the telephonic message he went to the scene of offence and shifted the deceased to hospital. She was admitted in the Female Burns Ward. He recorded the statement given by the deceased, Ex. P. 20, and on the basis of Ex. P. 20 he registered the case u/ S. 307, I.P.C. and issued FIR, P.W. 14 is the Inspector of Police. He took up the investigation from P.W. 12. He took up the investigation from P.W. 12. He stated that after examination of witnesses and conducting inquest over the deceased body, he seized the M.Os. Ex. P8 is the seizure report. The accused was absconding and was traced on 25-3-1994 at Ashwini Nursing Home and was brought to the Police Station. Since the accused was suffering from burn injuries, he was sent to hospital on 26-3-1994. On completion of investigation, he filed the charge-sheet.

6. It is contended by the learned senior counsel Sri Padmanabha Reddy, that since the material witnesses were turned hostile, there was no substantial evidence on record, except the dying declaration and the dying declaration having not been properly recorded, it cannot form the sole basis for conviction of the appellant. Learned Public Prosecutor, however, submits that though there was no other evidence on record in the shape of oral evidence, the dying declaration Ex. P. 5, can be relied upon for convicting the appellant.

7. It is true that all the material witnesses have turned hostile and there is practically no evidence in this case, except the dying declaration by the deceased to P.W. 4, the Magistrate. The law is the same footing as any other piece of evidence. But it has to be, however, judged with reference to the principles governing the appreciation of recorded by a competent Magistrate in a proper manner and it does not surround by any suspicious circumstances, there can be no good reason why a conviction cannot be based solely upon it. It is, therefore, necessary to see whether the dying declaration Ex. P. 5, was properly recorded.

8. When the deceased was admitted in O.G.H. Female Burns Ward, P.W. 13 was the attending doctor for her. On his evidence and on the requisition sent, P.W. 4 the Magistrate, recorded the dying declaration in the presence of P.W. 13. He certified that the patient was conscious and coherent and that she was in a fit condition to give the statement. Thereafter, the Magistrate commenced the recording of the statement and after the conclusion the doctor again certified that the patient was conscious, coherent and also in a fit condition during the period of recording the statement. In order to satisfy himself about the mental condition of the declarant, the Magistrate put relevant questions to her and after satisfying himself that the declarant was mentally agile and was able to understand the nature of the questions and to give cogent answers, the Magistrate commenced recording of her statement in question and answer form. The Magistrate has clearly stated in Ex. P. 5, that he was satisfied that the declarant was capable of giving the statement. After the completion of recording, the Magistrate has endorsed as follows :

"The doctor endorsed that the declarant is conscious while recording the statement. Throughout the declaration, I ensured that except duty doctor and duty nurse, other is present at the time of recording the statement. I took the Big Toe impression of left leg of declarant on each page after reading over the contents to her and she admitted that the declaration is correctly recorded. The left thumb and right thumb are not in good position to take the impression. I closed the proceedings at 1-05 a.m. on 24-3-1994."

9. From the above it is clear that the Magistrate has taken all care to see that none were present other than the duty doctor and duty nurse during the recording of the statement. He also satisfied himself that the declarant was conscious enough to understand the questions and give the answers. The Statement was recorded in question and answer form. He has also taken the endorsement of the duty doctor about the mental condition of the declarant.

Thus, the dying declaration was taken duly following the procedure laid down in Rule 33 of Code of Criminal Procedure.

10. However, learned senior counsel for the appellant contended that P.W. 13 was not a qualified doctor and his endorsement on the statement was, therefore, not a valid one to be attached any weight. Thus, there was no valid endorsement of the duty doctor concerned about the fitness or mental condition of the declarant to give the statement.

11. This contention is wholly misconceived. P.W. 13 deposed that at the relevant time he was working as MCH Post-Graduate in Plastic Surgery in Osmania Medical College and in Osmania General Hospital. He was the attending doctor for the deceased when she was admitted on 23-3-1994. On his advice only the Magistrate was called for the dying declaration was recorded. In the cross-examination he stated that he was post-graduate in MCH Plastic Surgery. Though he had no official designation and there would be a Duty Surgical Officer for the Burns Ward, he clearly stated that his Professor entrusted to him as a Post-Graduate student, the duties of Duty Surgical Officer. He has denied the allegation that he was not a full-fledged doctor. He stated that he was drawing stipend as Post-Graduate student. Though he was grilled in the cross-examination that the patient was not in a fit condition, he answered the questions clearly to say that the patient was in a fit physical and mental condition and fully conscious to give the statement. P.W. 13, having passed M.B.B.S. and completed House Surgeon training and after completing the P.G. Degree in Plastic Surgery, was appearing for MCH, which is a super speciality in Plastic Surgery. To say that he was not a Specialised Doctor, is wholly untenable. He was attending on the patient as Duty Surgical Officer. Except that he was no a Government servant, he was having all the qualifications and authority to act as a Medical Officer in the Burns Ward. Thus, his endorsement has got all the authenticity about the fitness of the declarant to give the statement. Further under Rule 33(2), Cr. P.C., the Magistrate was enjoined to ask the declarant by putting simple questions to elicit answer from the declarant to know his/her state of mind and to record his own conclusions in the mater. This procedure has been adopted by P.W. 4, the Magistrate. Sub-rule (2) further says that "Whenever possible" a certificate from the Medical Officer as to the mental condition of the declarant should be obtained. This certificate, thus was only as an additional precaution. In case where there was no doctor at all and the declarant likes to give his/her statement, it is not necessary to await the arrival of a qualified doctor, if the Magistrate was satisfied, by putting questions and eliciting answers, that the declarant was capable of answering the questions in a clear state of mind. Hence, even in the absence of a certificate from the Medical Officer, the requirements under sub-rule (2) of Rule 33, Cr. P.C., should be held as satisfied. In the instant case, the concerned medical officer should only be the attending doctor on the patient and P.W. 13 being the concerned doctor, who has been entrusted with the duties of Duty Surgical Officer, should be held as a "medical officer" within the meaning of sub-rule (2) of Rule 33, Cr. P.C. Thus, the

Magistrate has clearly followed the procedure to be adopted for recording the dying declaration to get from the declarant the cause of death, and other circumstances and transactions which result in death. In the circumstances, it has to be held that the dying declaration Ex. P. 5 can be safely relied upon for conviction of the appellant.

12. It is next contended by the learned senior counsel that the appellant was not liable for conviction u/S. 302, I.P.C., since the appellant was deeply intoxicated while setting fire to the deceased pouring kerosene, and realising immediately thereafter his fault, he tried to save her extinguishing the fire and in that process received several burn injuries himself, though she ultimately succumbed to the injuries. It should be held that the accused had no intention to kill the deceased. He relied upon several decisions in support of his contention.

13. Learned Public Prosecutor, however, submitted that the appellant was not properly treating the deceased and he has no love lost for her and he has been always suspecting her fidelity, beating her coming home drunk and forcibly poured kerosene and lit up match with an intention to kill her. It is, therefore, a clear case of murder and no interference is warranted with the judgment of the Court below.

14. P.W. 1 is the landlady. She stated that the appellant and deceased were her tenants. When she saw the deceased in flames the appellant was extinguishing the fire and he also sustained burn injuries. P.W. 2 is the son of P.W. 1. He also stated that the appellant was trying to extinguish the flames and he also sustained burn injuries. P.W. 6 is the sister of the deceased. She deposed that on 3 occasions the deceased visited her home and told her that the appellant used to beat her by coming in state and used to snatch her salary. P.W. 14, the Inspector of Police, stated that after the appellant absconded he was traced in Ashwini Nursing Home. He was suffering from burn injuries and hence he was admitted in the hospital for treatment. In Ex. P. 5 the deceased stated immediately before her death, that at the time when she returned home on the fateful day, her husband was found drunk, he abused her for coming late and when she has given the reason for coming late, he poured kerosene and set fire to her. From a combined reading of the evidence of P.Ws. 1, 2, 6 and 14, as stated supra, and the dying declaration, it is clear that the appellant used to come home fully drunk, abuse her and beat her and on the date of occurrence also he came home drunk and for the simple reason that the deceased came late, he poured kerosene and set fire to her. We do not find anywhere in the evidence that the appellant was having any malice or any strong motive against the deceased to have killed her. Ex. P. 5 also does not contain any recital that the appellant tried to kill her on any other previous occasion. The only allegation was that he used to beat her fully drunk.

15. Learned senior counsel for the appellant relied upon S. 85, I.P.C. in support of his contention to argue that the appellant by reason of intoxication should be imputed only with the knowledge of the consequences of his act and not with any

intention of committing murder of the deceased.

16. Drunkenness is not an excuse for committing any offence. However, to seek protection on the ground of intoxication, one has to establish the ingredients of Ss. 85 and 86, IPC. In *Basdev Vs. The State of Pepsu*, learned Judges have considered several authorities on the true meaning and content of Ss. 85 and 86, IPC. It was held that deep intoxication causing the effect of insanity would be an excuse for any charge. In other cases it is necessary to consider the fact of drunkenness to see whether specific intention required to constitute a crime was proved or not. But so far as knowledge is concerned the same knowledge has to be attributed to an intoxicated man as if he was quite sober. A Division Bench of this court, consisting one of us Sri Y. Bhaskara Rao, J. in *Mavuri Surya Satyanarayana v. State of A.P.* 1994 (2) ALT (Cri) 695, considering the facts of that case found that the accused was habituated to drinking and on the date of incident he went out and brought a Brandy bottle and consumed the liquor. Thereafter, he asked his wife to sign on a white paper stating that he should write whatever he wishes. When she refused to do so, the accused caught hold of her and the accused caught hold of her and beat her and when she tried to go, he caught hold of her dragged into room and lit fire to her blouse. Upon that, when she put off the flames and tried to run away, again the accused in a drunken state of mind, caught hold of her, poured kerosene and set fire to her. On the above facts, considering the ratio in *Basdev's* case (*supra*) and other decisions on the point, the Bench held that the accused had not lost all his mental capacity due to intoxication, not to have constituted the requisite intention for murder. The view of the Bench was based upon the peculiar facts in the said case, where it was found that the accused had prevented the deceased from going out when she caught fire to see that she would be succumbed to burn injuries. However, in a later decision of this court in *Mirza Ghani Baig v. State of A. P.* 1997 (1) ALD (CrI) 620, it was held that though the accused was responsible for the death of the deceased, he was not found guilty under S. 302, IPC. In the said case the accused was drunk at the time of causing death of his wife by pouring kerosene and setting fire to her. But soon he realised his fault and tried to extinguish the fire and thus he himself sustained burn injuries. Taking into consideration the state of drunkenness and other attendant circumstances it was held that there was no intention on the part of the accused to kill the deceased, yet he had a knowledge that such an act would definitely be dangerous to her life. He was held liable to be convicted under S. 304, Part-II, IPC. Similar circumstances are found in the instant case. There were no earlier occasions when the appellant tried to harm her life, except causing simple injuries when he was intoxicated. On the date of incident, he was also drunk and without much quarrel, he set fire to her. Immediately realising the seriousness of his act and the consequences thereof, he tried to extinguish the flames and in that process sustained burn injuries. He was in hospital for some time taking averment for the burn injuries.

17. Taking into consideration the circumstances in the case, including the state of

intoxication on the date of incident, the appellant cannot be imputed with the intention of committing murder of the deceased. However, he should be attributed with the knowledge of consequences of his action of pouring kerosene and setting her on fire. Hence, he cannot be held liable for murder but only to the offence of culpable homicide not amounting to murder and is liable to be convicted under S. 304, Part-II, I.P.C.

18. Accordingly the appellant is convicted under S. 304, Part-II, I.P.C. and is sentenced to undergo R.I. for a period of seven years.

19. With the above modification of sentence, the criminal appeal is partly allowed.

20. Appeal partly allowed.