
(2006) 03 AP CK 0154

In the Andhra Pradesh High Court

Case No : Criminal Appeal No. 388 of 2004

Peddi Kumara Swamy @ Muthyala Kumara Swamy and Others

APPELLANT

Vs

State of A.P.

RESPONDENT

Date of Decision : 08-03-2006

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161
Dowry Prohibition Act, 1961 — Section 3, 4
Evidence Act, 1872 — Section 32, 32(1), 6, 8
Penal Code, 1860 (IPC) — Section 201, 300, 302, 304, 498A

Citation : (2006) 1 ALD(Cri) 767 : (2006) 2 ALT(Cri) 164 : (2007) 1 DMC 373

Hon'ble Judges : Seshasayana Reddy, J; D.S.R. Varma, J

Bench : Division Bench

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

Judgement

B. Seshasayana Reddy, J.—This Criminal Appeal is directed against the judgment dated 31.1.2004 on the file of the III Additional Sessions Judge, Karimnagar, whereby the learned III Additional Sessions Judge found A-1 Peddi Kumaraswamy @ Muthyala Kumaraswamy, A-2 Peddi Sadaiah, A-3 Peddi Kanakaiah and A-4 Peddi Iylamma guilty for the offences u/s 498A, IPC and Section 4 of Dowry Prohibition Act and further found A-1 Peddi Kumaraswamy @ Muthyala Kumaraswamy guilty for the offence under Sections 302 and 201, IPC and convicted them accordingly and sentenced A-1 to A-4 to suffer rigorous imprisonment for two years and pay a fine of Rs. 500 in default to suffer S.I. for one month each for the offence u/s 498A IPC, rigorous imprisonment for two years and pay fine of Rs. 500 each in default to suffer simple imprisonment for one month for the offence u/s 4 of Dowry Prohibition Act. Further sentenced A-1 to suffer imprisonment for life and to pay fine of Rs. 500 in default to suffer one month S.I. for the offence u/s 302, IPC and rigorous imprisonment for three years and fine of Rs. 500 in default to suffer S.I. for one month for the offence u/s 201, IPC.

2. The appellants are A-1 to A-4 in S.C. No. 753 of 2003 on the file of III Additional Sessions Judge, Karimnagar. They were put on trial for the offence under Sections 498A, 302 and 201, IPC and Sections 3 and 4 of Dowry Prohibition Act.

3. The gravamen of the charge against the accused is that on or prior to 4/5.8.2003 all the accused subjected one Pedda Vijaya Laxmi (wife of A-1) to cruelty on the ground of additional dowry and on the intervening night of 4/5.8.2003, A-1 caused her death by strangulation and hanged the dead body of the deceased with a Saree to a rafter to screen of the offence committed by him and made the people to believe the death as suicidal.

4. The prosecution case, in brief, is as follows:

P.Ws. 1 and 2 are parents, P.Ws. 3 and 4 are sons of the deceased. A-1 is her husband, A-3 and A-4 are her in-laws and A-2 is her brother-in-law. The marriage between A-1 and the deceased was performed about 15 years prior to the date of incident. At the time of marriage, cash of Rs. 2,00,000 and Suzuki Motor Cycle were given as dowry to A-1. After the marriage the deceased joined with her husband-A-1 and they had three children out of the wedlock. After the birth of the second child, according to prosecution, A-1 started harassing the deceased at the instance of A-2 to A-4 for the additional dowry of Rs. 1,00,000. The deceased informed the same to her parents and thereupon a complaint came to be lodged with the Station House Officer, Manakonduru Police Station. P.W. 7, the Sub-Inspector of Police advised the accused not to harass the deceased and treat her properly and further advised them to settle the matter with caste elders. Accordingly, a Panchayath was held in the year 2001 wherein A-1 to A-3 assured that they would treat the deceased properly and their assurance came to be reduced in writing, which has been exhibited as Ex. P-1. The disputes between the deceased and A-1 did not subside and, therefore, another Panchayat was held in the presence of P.Ws. 6 and 7, wherein A-1, A-3 and P.W. 1 came to certain understanding which reduced into writing vide Ex. P-2. As per the said understanding, P.W. 1 who is the father of the deceased agreed to pay Rs. 25,000 within one month out of Rs. 1,00,000 demanded by the accused. On the intervening night of 4/5.8.2003, P.W. 3, A-1 and the deceased slept in one room and whereas P.W. 4 along with L.W. 6 Peddi Srikanth, his younger brother, slept in another room. While so, A-1 throttled the deceased and hanged the dead body of the deceased with a saree to a rafter so as to make the people to believe her death as suicidal. On receiving the death intimation, P.Ws. 1 and 2, who are the parents of the deceased, rushed to the house of the accused and found the deceased dead. P.W. 1 went to the Police Station on 5.8.2003 and returned home as no one was available to receive his report. He again went to the Police Station on 6.8.2003 and presented Ex. P-3 report. P.W. 11 the Sub-Inspector of Police received Ex. P-3 report and registered a case in Crime No. 253 of 2003 for the offence u/s 302, IPC and issued Ex. P-9 FIR. He inspected the scene in the presence of P.W. 9 and prepared Ex. P-4 crime details form. While observing the

scene, he prepared rough sketch of scene of offence which has been exhibited as Ex. P-10. He got the scene of offence photographed. Ex. P-11 is the bunch of photographs numbering four. He examined P.Ws. 1 to 3 and recorded their statements. Later, he conducted inquest on the dead body of the deceased on 6.8.2003 at 10.00 a.m. in the presence of P.W. 9 and two others. During the inquest he seized wearing apparels of the deceased, which have been exhibited as M.Os. 1 to 4. Ex. P-5 is the inquest report. After the inquest, the dead body was sent for post-mortem examination. P.W. 10 Dr. A. Narendra Babu along with L.W. 18 Dr. Y. Suryasri Rao conducted post-mortem examination on the dead body of the deceased and found ligature mark of 3" width around the neck and knot mark on the left side of the neck. He opined that the deceased died due to asphyxia due to strangulation between 38 to 48 hours prior to the post-mortem examination. Ex.P-8 is the postmortem report issued by him. P.W. 12 K. Surender Reddy, Inspector of Police, Godavarikhani P.S. arrested A-1 to A-4 at Ramnagar at their residence on 7.8.2003 and sent them for remand. He examined P.Ws. 5 and 6 and seized Exs. P-1 and P-2, on being produced before him. After completing the investigation, he laid the charge sheet before the Judicial First Class Magistrate, Godavarikhani.

5. The learned Magistrate took the charge sheet on file as P.R.C. No. 40 of 2003 and committed the case to the Court of Session as the offence u/s 302, IPC is exclusively triable by the Sessions Court.

6. On committal, the learned Sessions Judge, Karimnagar, took the case on file as Sessions Case No. 753 of 2003 and made over the same to the III Additional Sessions Judge, Karimnagar, for disposal according to law.

7. On appearance of the accused and on hearing the prosecution and the accused, the learned III Additional Sessions Judge, Karimnagar, framed the following charges.

Charge No. 1 against A-1 to A-4 for the offence u/s 498A, IPC.

Charge No. 2 against A-1 for the offence u/s 302, IPC.

Charge No. 3 against A-1 for the offence u/s 201, IPC.

Charge No. 4 against A-1 to A-4 for the offence u/s 3 of Dowry Prohibition Act.

Charge No. 5 against A-I to A-4 for the offence u/s 3 of Dowry Prohibition Act.

8. The defence of the accused is that on 4.8.2003 at about 10.30 p.m. he returned home and found his wife-the deceased in the company of Raymallu, and on noticing his arrival, Raymallu pushed the door and fled away and thereby he received an injury on his eye. Thereafter, he strangled his wife with her saree and he consumed sleeping pills to commit suicide and thereby he lost consciousness and he did not know what happened subsequently. In a way, he took the plea that he committed the offence in grave and sudden provocation, on seeing his wife in the company of Raymallu at the odd time in his house.

9. To bring home the guilt of the accused for the offences with which they stood charged, prosecution examined 13 witnesses and marked 13 documents and exhibited 4 material objects.

10. The learned III Additional Sessions Judge, on considering the evidence brought on record and on hearing the prosecution and the accused, found A-1 guilty for the offences under Sections 302, 201 and 498A, IPC and Section 4 of the Dowry Prohibition Act and A-2 to A-4 guilty for the offence u/s 498A, IPC and Section 4 of Dowry Prohibition Act and convicted them accordingly and sentenced him as detailed above by judgment dated 31.1.2004. Hence, this criminal appeal.

11. Heard Mr. C. Padmanabha Redd., learned Senior Counsel appearing for the appellants/accused and learned Public Prosecutor appearing on behalf of the State.

12. Learned Senior Counsel submits that P.W. 3 is a child witness and his admission in the cross-examination of his giving evidence as per the instructions given by her maternal grand parents is sufficient to draw the conclusion that he is a tutored witness. He further submits that P.W. 3 has categorically stated that on the date of incident he had his supper at 10 p.m. and went to bed and woke up on the next day morning, thus his witnessing the incident does not arise. It is also submitted by him that the Trial Court having treated the statement of A-1 before the Magistrate and accepted the same as relevant on the principle of res gestae committed error in not considering the circumstances under which A-1 resorted to commit the offence. He would contend that even if the entire evidence is accepted, there is no case against A-2 to A-4 and thus their convictions and sentences for the offences u/s 498A, IPC and Section 4 D.P. Act are unsustainable and accordingly they are liable to be acquitted of the same. His further submission is that the statement made by the deceased to P.Ws. 1 and 2 does not relate the circumstances leading to her death thus it stands outside the purview of Section 32 of Indian Evidence Act and therefore their evidence is inadmissible. In support of his submissions, reliance has been placed on the decision of this Court in Union of India (UOI) and Others Vs. K. Gopala Krishana (died) and Others, , the decision of Karnataka High Court in Madaiah Vs. State, , and the decision of Supreme Court in Shri Murli alias Denny Vs. State of Rajasthan, .

13. In the first cited decision, a Division Bench of this Court held in para 7 of the judgment as follows:

7. All the witnesses in the present case, who have deposed, have only stated what according to them was told by the deceased to them with respect to the harassment meted out to her by her husband. None of these statements comes within the purview of Section 32 of the Evidence Act. Therefore, these statements, in view of the judgment of the Supreme Court referred to above, are not at all admissible in evidence. There is not a single witness who has stated that he/she had personal knowledge of the harassment of the deceased by the

appellant. Even the father of the deceased, who stated that the accused had demanded Rs. 10,000 for the purpose of filing an appeal in the High Court, did not state that a demand for money was made to him by the accused. He stated that the demand was made on telephone by his own daughter, the deceased. According to him, the accused had asked his wife that is the deceased, to demand money from him. Again the evidence is not admissible u/s 32 of the Evidence Act. Therefore, conviction u/s 498A, I PC also cannot sustain and is set aside.

In the second cited decision, a Division Bench of Karnataka High Court has held when the accused acted in all probability and grave and sudden provocation by the conduct of wife he could be convicted u/s 304, IPC and not u/s 302, IPC. It is further held that there is nothing in the Indian Evidence Act that precludes an accused from relying upon his confession for his own purpose. Thus, the confessional statement made to the Police Officer at the Police Station but also the statement made to witnesses adumbrated in their deposition, can be relied on by the accused at least to spell out a stand that the offence committed by him was not murder but something less than that. In the third cited decision, the Apex Court held that murder on sudden provocation comes under, Exception (1) of Section 300, IPC and thereby punishment would be u/s 304-Part I, IPC. Para 5 of the judgment needs to be noted and it is thus:

(5) Having examined the circumstances on record, we are satisfied that it was the accused who inflicted injuries on the deceased person, as a result of which he died. But the learned Senior Counsel, Mr. Sibal submits that there are any number of circumstances indicating that the accused acted on a grave and sudden provocation and, therefore, Exception No. 1 to Section 300 is attracted. We find considerable force in this submission. To start with, the prosecution evidence itself indicates that the deceased was a man of violent nature and had no regard for law and was creating terror and fear in the minds of common people. In such an aggressive mood, he must have gone to the shop of the accused. As to what exactly preceded the attack is not borne out by the evidence. However, there is a clear indication in the first statement given by the accused himself which formed the FIR in this case to the effect that the deceased in an aggressive manner went to the shop of the accused and showered virulent abuses. It may be mentioned here that we are not using the statement of the accused before the SHO for any purpose in favour of prosecution and against the accused. The only admission which we find in the statement in favour of the accused is being taken into account to examine whether the case falls under Exception No. 1 to Section 300, IPC, particularly, in view of the fact that there is no other evidence disclosing as to how the quarrel ensued and attack took place. Having carefully considered the entire material, we are of the view that Exception No. 1 to Section 300 is attracted in this case. The Exception lays down:

Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person

who gave the provocation or causes the death of any other person by mistake or accident.

This Exception is no doubt subject to certain limitations. In the instant case, the provocation is not sought or provoked by the accused. The medical evidence also shows that most of the injuries were found on the hips and the possibility of having received injuries by the deceased during grappling cannot be ruled out. In such case, it cannot be said that the accused caused the injuries by way of an excuse for killing the deceased. Accordingly, we set aside the conviction of the appellant under Section. 302, Indian Penal Code and imprisonment for life awarded thereunder and, instead, we convict him u/s 304, Part I, Indian Penal Code and sentence him to undergo rigorous imprisonment for 10 years.

14. To bring home the guilt of the accused for the offences with which they stood charged, prosecution examined P.Ws. 1 to 13, marked Exs. P-1 to P-13 and exhibited MOs. 1 to 4. P.Ws. 1 and 2 are the parents of the deceased. P.Ws. 3 and 4 are the children of the deceased and A-1, P.W. 5 is the panch witness for the mediation held to settle the differences between the deceased and A-1 with regard to dowry demand. P.W. 6 is the panch witness for the mediation with regard to the dowry demand of A-1. P.W. 7 is the Sub-Inspector of Police, Manakondur Police Station who advised P.W. 1 on 22.2.2001 to settle the disputes through caste elders. P.W. 8 is the panch witness for the inquest held on the dead body of the deceased and seizure of wearing apparels of the deceased, which have been exhibited as MOs. 1 to 4. P.W. 9 is the JFCM, Godavarikhani who recorded Ex. P-6-dying declaration of A-1 on 7.8.2003. P.W. 10 is the doctor who conducted post-mortem examination on the dead body of the deceased and issued Ex. P-8 post-mortem report opening that the deceased died of axphyxia due to strangulation between 38 to 48 hours prior to the date of post-mortem. P.Ws. 11 and 12 are the Investigating Officers. P.W. 13 is the Doctor who has been examined to prove the signature of one Dr. B.S.P. Yadav appearing on Ex. P-13 hospital intimation.

15. The case of the prosecution against A-2 to A-4 is that they instigated A-1 to harass the deceased on the ground of additional dowry, P.Ws. 1 and 2 are the parents who speak of the statement made to them by the deceased that A-1 demanded additional dowry of Rs. 1 lakh at the instance of A-2 to A-4. The question is as to what extent the statement made by the deceased before P.Ws. 1 and 2 is admissible. Undisputedly, P.Ws. 1 and 2 are not the direct witnesses to speak of the dowry demand of A-1 at the instance of A-2 to A-4. Unless the statement of deceased person would fall within the purview of Section 32 of Indian Evidence Act, there is no other provision under which the same can be admitted in evidence. In order to make the statement of a dead person admissible in law (written or verbal) the statement must be as to the cause of her death or as to any of the circumstances of the transactions which resulted in her death, in a case in which the cause of death comes into question. By no stretch of imagination can the statement of the deceased made to their parents

who have been examined as P.Ws. 1 and 2 can be called as statements made as to the cause of her death. Therefore, the evidence of P.Ws. 1 and 2 with regard to the statement of the deceased made to them is inadmissible as they do not come within the purview of Section 32(1) of Indian Evidence Act.

16. The other evidence available on record is statements of the mediators who have been examined as P.Ws. 5 and 6. Ex. P-1 and P-2 are the documents said to have the outcome of the mediation held by P.Ws. 5 and 6. P.W. 5 speaks of Ex.P-1 and whereas P.W. 6 speaks of Ex. P-2. They categorically stated that the dispute was between A-1 and the deceased. They did not state anything against A-2 to A-4. Even in Ex. P-1 and P-2, the allegation is against A-1 and nothing is stated against A-2 to A-4. There is absolutely no evidence on record to show that A-2 to A-4 instigated A-1 to harass the deceased on the ground of additional dowry. The Trial Court thoroughly misread the evidence of P.Ws. 1, 2, 3, 5 and 6 and thereby erred in finding that A-2 to A-4 are guilty for the offence u/s 498A, IPC and Section 4 of D.P. Act and accordingly their convictions and sentences under the said offences are not legal and proper and they are liable to be set aside.

17. With regard to the participation of A-1 in the commission of the offence, the prosecution placed reliance on the direct evidence of P.W. 3 and circumstantial evidence of P.W. 4 and the medical evidence. P.W. 10 is the doctor who medically examined the deceased and conducted the post-mortem examination. He noticed ligature mark of 3" width around the neck and knot mark on the left side of the neck. He opined the cause of the death of the deceased as axphyxia due to strangulation. The very presence of ligature marks around the neck rules out the possibility of the death of the deceased being suicidal by hanging. The evidence brought on record clearly establishes that the death of the deceased was homicidal.

18. Learned Senior Counsel appearing for the accused submits that the statement of A-1 recorded by the Magistrate probabilises the defence of A-1 that he committed the offence under grave and sudden provocation and therefore the offence committed by him would not be characterised as murder and at the most it would come under the category of culpable homicide not amounting to murder. He would further contend that the Trial Court having recorded a finding that the statement of A-1 is admissible u/s 6 of Indian Evidence Act ought to have taken it in toto and accepted the defence put forth by A-1 to the effect that he committed the offence under grave and sudden provocation.

19. It is a matter of record that A-1 consumed sleeping pills soon after the occurrence and he came to be removed to the hospital for treatment immediately.

20. The material witnesses to speak of the participation of A-1 in the commission of the offence are P.Ws. 3 and 4. They are no other than his children. Of the two, the former is the younger and the latter is elder. P.W. 4 was sleeping along with his another brother in the front room and whereas P.W. 3 was sleeping in one

room along with his mother (deceased) and father (A-1) on the night of the occurrence. P.W. 3 admits in the cross-examination that he took supper at 10 p.m. on that day and went to bed and that by the time he had his supper, he did not see his father (A-1) and he saw his father (A-1) only on the next day morning. He further admits in cross-examination that police asked him to give evidence as per Section 161, Cr.P.C. statement and that Section 161, Cr.P.C. statement was read over to him on the day of serving summons. For better appreciation, we may refer the cross-examination of P.W. 3 in his own words and it is thus:

Cross by defence:

I am studying U.K.G. in Manakondur. P.Ws. 1 and 2 brought me to the Court.

Question: Have you deposed before the Court as per instructions given by P.Ws. 1 and 2?

Ans. The child nodded his head.

Question: Were you not there and did you not see the incident?

Ans. He answered - See - I was there.

I received summons from the Court 10 days back.

Question : Did the police bring CD file containing your statement, to you at the time of service of summons, and the police read over the evidence as per that statement?

Ans. Yes.

We took supper at 10 p.m. on that day. At that time my father A-1 was not present in the house. Immediately, I went to bed. On the next day morning only I saw my father (A-1). I saw my deceased mother hanging to a rafter. A number of persons gathered in the morning one hour after police came to the spot. The police examined us. At about 8 a.m. the dead body was laid on the ground. It is not true to suggest that I have not seen my father throttling the neck of my deceased mother and hanging her to a rafter and that no quarrel took place between my deceased mother and my father (A-1) and that on her accord she committed suicide by hanging herself to a rafter and that my deceased mother was not hanged with M.O. 1 by A-1.

21. It is well settled that although legally there is no bar to accepting the uncorroborated testimony of a child, yet prudence requires that Court should not act on the uncorroborated evidence of a child whether sworn or unsworn. The testimony of a child witness should only be accepted after great caution and circumspection. The rationale for this is that it is common experience that a child witness is most susceptible to tutoring. Both on account of fear and inducement, he can be made to depose about things which he has not seen and once having been tutored; he goes on repeating in a parrot like manner what he has been

tutored to state.

22. The Trial Judge has recorded the demeanor of the child (P.W. 3). The child was vacillating during the course of his deposition. From a child of 5 years of age absolute consistency in deposition cannot be expected, but if it appears that there was a possibility of he being tutored, the Court should be careful in relying on his evidence. P.W. 3 has categorically stated in his cross-examination that he did not see his father (A-1) when he went to bed and he saw his father (A-1) only on the next day morning. Therefore, the evidence of P.W. 3 that he saw the occurrence does not inspire confidence.

23. Undisputedly, the deceased and A-1 were inmates of the house. The medical evidence brought on record clearly established that the death of the deceased was homicidal. At this moment, the defence of A-1 needs to be noted. It is his version that on the date of the incident, he returned home at about 10.30 p.m. and saw his wife in the company of Rayamallu and the said Rayamallu, on spotting him, took to heels and thereupon the (A-1) strangled the deceased. The statement of A-1 came to be recorded by the Magistrate, who has been examined as P.W. 9. His statement has been exhibited as Ex. P-6. The signature, of the doctor who certified the state of mind of deponent (A-1) has been proved through P.W. 13. It can be said without any controversy that A-1 was shifted to the hospital on 5.8.2003 at 6.50 a.m. Ex. P-13 is the requisition sent by the duty doctor to the Magistrate to record the dying declaration of A-1.

24. The question that arises for consideration is whether the statement recorded by the Magistrate can be used by A-1 to advance his defence version. It is relevant at this stage to point out that u/s 8 of the Indian Evidence Act the conduct of the accused subsequent to the occurrence is very relevant. Taking that aspect of the matter into consideration, the fact of A-1 consuming sleeping pills soon after the incident and making statement before the Magistrate explaining his conduct in that behalf would certainly be made use for his own purpose.

25. It is well settled that it is not necessary for the defence to prove its case with the same rigor as the prosecution is required to prove its case and it is sufficient if the defence succeeds in throwing a reasonable doubt on the prosecution case which is sufficient to enable the Court to reject the prosecution version.

26. The statement of A-1 recorded by the Magistrate (P.W. 9) which has been exhibited as Ex. P-6, probalises the defence of A-1 that he committed the offence out of grave and sudden provocation. The Trial Court having recorded a finding that the statement made by A-1 before the Magistrate is admissible u/s 6 of the Indian Evidence Act committed error in not taking into consideration the circumstances under which the offence came to be committed by A-1.

27. We are in no doubt to conclude that A-1 committed the offence out of grave and sudden provocation and therefore his act is covered within Exception (1) of Section 300, 1PC and thus the offence committed by him is punishable under

Section. 304, Part I, IPC.

28. In the result, this criminal appeal is partly allowed setting aside the convictions and sentences of A-2 to A-4 for the offences under Sections 498A, IPC and Section 4 of Dowry Prohibition Act and they are acquitted of the same. The fine amounts paid by them, if any, are ordered to be refunded and their bail bonds shall stand cancelled. We also set aside the conviction and sentence of A-1 u/s 302, IPC and instead we convict him u/s 304-Part I, IPC and sentence him to undergo R.I. for seven years and pay a fine of Rs. 1,000 (one thousand only) in default to suffer SI for 6 months. The convictions of A-1 for the offence u/s 498A, IPC and Section 4 of Dowry Prohibition Act are hereby confirmed.