
(2011) 11 AP CK 0137
In the Andhra Pradesh High Court
Case No : Criminal A. No. 146 of 2008

Thota Bikshalu and another	Vs	APPELLANT
The State of A.P.		RESPONDENT

Date of Decision : 21-11-2011

Acts Referred:

Penal Code, 1860 (IPC) — Section 302, 498A

Citation : (2012) 2 ALT(Cri) 281

Hon'ble Judges : R. Kantha Rao, J;A. Gopal Reddy, J

Bench : Division Bench

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

Final Decision : Allowed

Judgement

R. Kantha Rao, J.—This appeal is directed against the judgment passed by the II Additional Assistant Sessions Judge, (Fast Track Court-I), at Khammam on 27.11.2007 in S.C.No.323 of 2007.

2. The first appellant-Thota Bikshalu was tried by the learned Additional Sessions Judge for the charges under Sections 498-A and 302 of IPC. Whereas, the second appellant-Thota Vana Rajyam was tried for the offence u/s 302 of IPC.

3. After conclusion of the trial and upon hearing the prosecution and the defence, the learned trial Judge convicted A-1 for the offences under Sections 498-A and 302 of IPC and also convicted A-2 for the offence u/s 302 IPC. The learned trial Court sentenced A-1 to undergo rigorous imprisonment for a period of one year and to pay a fine of Rs.1,000/- for the offence u/s 498-A of IPC and further sentenced A-1 and A-2 to undergo imprisonment for life and to pay a fine of Rs.500/- each for the offence u/s 302 of IPC.

5. Challenging the said order of conviction and sentence, both the appellants-A-1 & A-2 preferred the present appeal.

The brief facts necessary for considering the criminal appeal may be stated as follows:

The deceased-Ramulamma is the wife of the first appellant. The second appellant is the sister-in-law of A-1. It was the case of the prosecution that the first appellant developed illicit intimacy with the second appellant who is his sister-in-law and in view of the same, he was subjecting the deceased to cruelty and was harassing her. The deceased requested the first appellant several times to sever his illicit relationship with A-2, but he did not pay heed to her words. It is said that at the instance of the brother of the deceased, a panchayat was convened in the village whereat the elders admonished the first appellant and the first appellant agreed before them to treat the deceased properly and to lead matrimonial life with her peacefully, but the first appellant continued his illicit contact with the second appellant. On 28.07.2006 between 12 noon and 1 p.m. the deceased visited the house of her elder sister in the same village and returned back to her house and she found A-1 and A-2 together in the house. On seeing both of them together, she questioned A-1 about his attitude in continuing illicit contact with A-2. On that it is said that both the appellants decided to do away with the deceased. The second appellant picked up a kerosene tin, poured the kerosene over the body of the deceased and thereafter, the first appellant lit a match stick and set the deceased on fire. Soon after that, the deceased was caught in flames, raised cries and came out of the house. The neighbours gathered and thereafter the deceased was shifted to Government Hospital, Sathupally.

6. While the deceased was undergoing treatment, according to the prosecution, she made a statement as to her cause of death and also the circumstances, which resulted in her death to PW-15, Dr.Kiran Kumar who initially treated her. PW-17, the Assistant Sub-Inspector of Police who registered the case, investigated into the offence and also before PW-18, the Judicial Magistrate of First Class who on requisition from the Medical Officer, Government Hospital, Sathupally recorded her statement. However, the prosecution did not bring on record the statement of the deceased recorded by PW-17, though PW-17 admitted in his evidence that he recorded the statement of the deceased while she was undergoing treatment in the hospital. The statement made to PW-15, the doctor who initially treated the deceased is only oral and it was not reduced to writing. The only dying declaration-Ex. P-29 is the one recorded by PW-18, the Judicial Magistrate of First Class.

7. The material part of investigation in this case was conducted by PW-17, the Assistant Sub-Inspector of Police. PW-19, the Inspector of Police, Sathupally only verified the investigation conducted by PW-17, the Assistant Sub-Inspector of Police and filed the charge sheet.

8. Before the learned trial Court, the prosecution in order to prove the guilt of the appellants, examined PWs.1 to 20, marked Exs.P-1 to P-29 and M.Os.1 to 3.

9. PWs.1 and 2 are the brothers, PW-3 is the sister, and PW-4 is the mother of the deceased. PWs.5 to 9 the independent witnesses did not support the prosecution version. They did not even speak about their knowing the illicit intimacy between A-1 and A-2 and also the fact that A-1 was harassing the deceased. They stated in one voice that the deceased and the first appellant were living amicably. PW-1 to whom the deceased allegedly told about the cause of her death did not speak about the same. He only stated that after knowing that her sister was admitted in the Government Hospital, Sathupally, he rushed to the hospital and found the deceased alive, but she was not in a position to talk to him. He stated in his evidence that he came to know through somebody that his sister poured kerosene over her body and set herself on fire. PW-3 who is the sister of the deceased also stated in her evidence that while the deceased was undergoing treatment in Government Hospital, Sathupally, she informed PW-3 that she poured kerosene on her body and set herself on fire and did not assign any reason for doing so. PW-15, the doctor who treated the deceased in Government Hospital, Sathupally initially stated in his evidence that while the deceased was admitted in the hospital for treatment, she informed him that her husband poured kerosene on her body and burnt her. According to PW-15, the deceased was in a conscious state at the time when she was admitted into the hospital. PW-15 was also present at the time when the Magistrate recorded the dying declaration of the deceased and certified that the deceased was conscious and in a fit state of mind to give a statement.

10. PW-18, is the Judicial Magistrate of First Class who recorded the dying declaration of the deceased on a requisition sent from the Government Hospital, Sathupally. His evidence as well as the dying declaration recorded by him shows that on being satisfied about the fact that the deceased was in a conscious state and was in a fit state of mind to give a statement and on being certified by PW-15, the doctor of the said fact, he proceeded to record the dying declaration. The dying declaration recorded by PW-15, the Magistrate as per his evidence is like this:

Since two years, her husband (A-1) developed illicit intimacy with her co-sister (A-2), he used to beat the deceased, used to abuse her and was moving freely with A-2 day and night without looking after the welfare of the deceased. On 28.07.2006 in the morning time, the deceased went to her elder sister's house and returned back to her house at 12 noon, by that time, A-1 and A-2 were found at her house and when she questioned the husband and co-sister (A-1 and A-2) about their behaviour, her husband and co-sister jointly beat the deceased, poured kerosene over her body and set her on fire, on further being questioned by the Magistrate, the deceased stated that she came out of the house, the neighbours gathered and witnessed the incident.

11. In Ex. P-1 report lodged by PW-1, the brother of the deceased also he only stated that while the deceased was serving food to her children, the first appellant poured kerosene on her sister and set her on fire, saying so, he

requested to take necessary action against the first appellant.

12. From the entire material available on record, it is therefore obvious the prosecution case initially started showing only the first appellant as the author of crime, but at a subsequent stage, because of the dying declaration given by the deceased to the Magistrate, the prosecution developed the story to the effect that both A-1 and A-2 beat the deceased, both of them poured kerosene over her and set her on fire. Since all the material witnesses did not support the case of the prosecution, while they were examined before the Court, the case mainly rested on Ex. P-29 dying declaration recorded by PW-18, the Magistrate. The statement of the deceased recorded by PW-17 was not brought on record nor did he speak anything about the statement given by the deceased to him, though he admitted in his evidence that the deceased gave a statement to him while she was undergoing treatment in the hospital. Ex. P-29, the dying declaration given by the deceased to the Magistrate, if considered in its entirety, it involved both A-1 and A-2 as the offenders who caused the death of the deceased. A dying declaration, if the court considers to be voluntary and truthful, can form the basis for conviction. At the time when the deceased was admitted in the hospital, she gave a statement to PW-15, the doctor, but the statement was not reduced to writing. According to the evidence of PW-15, the doctor who treated the deceased, the deceased only stated to him that the first appellant poured kerosene on her and set her on fire. There is no hard and fast rule that the court has to either accept the dying declaration to be true in toto or reject the entire dying declaration. By examining the facts and circumstances of the case, the Court can accept part of the dying declaration which is consistent with the circumstances borne out from the record. The initial version of the prosecution is that A-1 alone was responsible for the murder of the deceased. We can gather the same from the evidence of PW-15, the doctor who initially treated the deceased. Subsequent to the admission of the deceased into hospital, the close relatives of the deceased came to the hospital and it might be at their instance, the deceased included the name of A-2 as the person who caused her death along with A-1. The court is under a duty to scrutinize the dying declaration with great care and caution and upon scrutinizing the same, we are of the considered view that the indictment against A-2 is only an afterthought and it is not safe to convict A-2 mainly basing on the dying declaration Ex. P-29 given by the deceased to PW-18, the magistrate. Upon subjecting the dying declaration of the deceased to thorough scrutiny, we arrive at a definite conclusion that the said dying declaration can be believed insofar as A-1 is concerned. But, as against A-2, it is only an afterthought and cannot be acted upon. The learned trial Court failed to scrutinize the dying declaration carefully and convicted both A-1 and A-2 for the offence u/s 302 of IPC.

13. For the foregoing reasons, the conviction and sentence passed by the trial Court against the second appellant/A-2 for the offence u/s 302 of IPC are hereby set aside. The second appellant who is undergoing jail sentence in connection with this case, shall be set at liberty, forthwith, if she is not required in any other

case. The fine amount, if any, paid by the second appellant shall be refunded to her.

The conviction and sentence passed against the first appellant/A-1 for the offences under sections 498-A and 302 of IPC are hereby confirmed.

The criminal appeal is allowed in part.