

**Hyder Ali Vs. State**

**Hyder Ali Vs. State**

**SooperKanoon Citation :** [sooperkanoon.com/436680](http://sooperkanoon.com/436680)

**Court :** Andhra Pradesh

**Decided On :** Feb-19-2008

**Reported in :** 2008(1)ALD(Cri)685; 2008(2)ALT(Cri)78; 2008CriLJ3369

**Judge :** B. Prakash Rao and ;L. Narasimha Reddy, JJ.

**Acts :** [Evidence Act, 1872](#) - Sections 103 and 138; [Indian Penal Code \(IPC\), 1860](#) - Sections 302 and 498A; Code of Criminal Procedure (CrPC) - Sections 161 and 313

**Appeal No. :** Cri. Appeal No. 277 of 2006

**Appellant :** Hyder Ali

**Respondent :** State

**Advocate for Def. :** Public Prosecutor

**Advocate for Pet/Ap. :** C. Padmanabha Reddy, Adv. for ;Mohd. Moin Ahmed Quadri, Adv.

**Disposition :** Appeal dismissed

**Judgement :**

**L. Narasimha Reddy, J.**

1. The sole accused in S.C. No. 62 of 2005 on the file of the learned I Additional Metropolitan Sessions Judge, Hyderabad is the appellant. He was charged with the offences punishable under Sections 302 and 498-A, IPC. Through its judgment, dated 30-1-2006, the trial Court acquitted the appellant of the charge under Section 498A, IPC but convicted him for the one, under Section 302, IPC. Sentence of imprisonment for life and fine of Rs. 1,000/- in default to suffer simple imprisonment for two months was imposed. Hence, this Appeal.

2. The appellant was married to Abbasi Begum; and the couple had three sons and a daughter. The lady was admitted in Osmania General Hospital with serious burn injuries on 7-6-2004. P.W. 8, the XXIII Metropolitan Magistrate, Hyderabad recorded the dying declaration of the said woman under Ex. P. 10. In the said declaration, Abbasi Begum stated that her husband, the appellant herein, married another woman and thereafter, started neglecting her and her children. She further stated that when she insisted on providing necessary funds for maintenance, he became angry, poured kerosene and set her on fire. According to her, P.W. 1, her sister, who was there with her before the arrival of the appellant, left for Hotel to bring tea and arrived the spot, after the appellant caused burn injuries and ran away. Almost at the same time, her statement was recorded vide Ex. P. 7 by the Assistant Sub-Inspector of Police, Bhavani Nagar Police Station, P.W. 6 and it was treated as complaint. A case was registered. On the same lines, P.W. 7, the S.I. of police recorded another statement under Section 161. Cr. P.C. from Abbasi Begum vide Ex. P.8. Abbasi Begum died on the same day, late in the night, on account of burn injuries. The provision of law in the FIR was altered and investigation was taken up. The charges, as indicated above, were framed. The appellant pleaded not guilty and the trial Court convicted and sentenced him for the offence punishable under Section 302, IPC.

3. Sri C. Padmanabha Reddy, the learned Senior Counsel for the appellant submits that there are no eye-witnesses to the occurrence and all the circumstantial witnesses, such as P.Ws. 1 to 5, have turned hostile. He contends that though there are three dying declarations in the form of Exs. P.7, P.8 and P. 10 they do not gain the confidence of the Court, in view of the contradictions contained therein. Placing reliance upon the judgments of the Supreme Court in

Nallapati Sivaiah v. Sub-Divisional Officer, Guntur, A.P. : AIR 2008 SC19 and State of A.P. v. Shaik Moin : (2004)6SCC34 and a judgment rendered by this Court in Bhaskar v. State of A.P. 2004 (2) ALD (Cri) 177, the learned Senior Counsel submits that the dying declarations, in this case, are liable to be discarded from consideration. He contends that the very reason assigned by the trial Court for acquitting the appellant of the charge under Section 498A, IPC would hold good for acquitting him of the charge under Section 302, IPC also.

4. The learned Additional Public Prosecutor, on the other hand, submits that though the witnesses, who have been examined to speak about the circumstances, under which the deceased died, have turned hostile, the dying declarations recorded from the deceased, in this case, are so consistent and truthful that they can constitute the basis for sustaining the conviction against the appellant. He contends that having taken a plea of divorce from the deceased, the appellant has not taken any steps, to prove the same, except by making a suggestion to P.W. 1, who did not say, a word against the appellant. He further submits that the ratio laid down in the cases cited by the learned Senior Counsel appearing for the appellant, does not apply to the facts of the present case.

5. P.W. 1, the sister of the deceased, and P.Ws. 2 to 5 did not support the case of the prosecution and as such, they were declared hostile. P.W. 6 is the ASI of Police, who on receipt of the information about the incident proceeded to the Hospital and recorded the declaration of the Abbasi Begum, marked as Ex. P.7. Just before that, the XXIII Metropolitan Magistrate, P.W. 8, recorded the statement, marked as Ex. P. 10. The statement of the deceased was also recorded by P.W. 7, marked as Ex. P.8, for purpose of registering the case etc. P.W. 9 is the Mediator for the inquest conducted on the dead body of the deceased. P.W. 10 is the Doctor, who conducted the post-mortem. P.Ws. 11 and 12 are the police officials, who took up the investigation at different stages.

6. Important among the various exhibits marked by the prosecution are Exs. P.7, P.8 and P. 10, statements recorded from the deceased by P.W. 6, P.W. 7 and P.W. 8 respectively, Ex. P. 13, the inquest panchanama and Ex.P.14, the post-mortem examination report. The trial Court based its conclusion, about the

involvement of the appellant in the offence under Section 302, IPC, mostly on the dying declarations. The learned Senior Counsel has made extensive submissions mainly on these aspects.

7. It must be clarified at the outset that while Ex. P. 10 assumes the description of a dying declaration, pure and simple, Exs. P.7 and P.8 are in the form of complaint and statement under Section 161, Cr. P.C. respectively. Further, there is not much of corroboration for the dying declaration, recorded from the deceased. Therefore, it needs to be examined as to whether the dying declaration, by itself, can constitute the basis, to convict the appellant.

8. In Nallapati Sivaiah's case : AIR 2008 SC19 (supra), the Hon'ble Supreme Court reviewed the cases, decided up to that point of time, on the law relating to dying declarations. In paragraph 21 thereof, the manner, in which the dying declaration must be appreciated and acted upon by a Court, was summed up, under as many as 10 headings duly mentioning the relevant precedents covering the principles.

(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration (Munnu Raja v. State of M.P.) : 1976 CriLJ1718 .

(ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration (State of U.P. v. Ram Sagar Yadav) : 1986 CriLJ836 ; Ramavati Devi v. State of Bihar : 1983 CriLJ221 .

(iii) This Court has to scrutinize the dying declaration carefully and must ensure that the declaration is to the result of tutoring, prompting or imagination. The deceased had opportunity to observe and identify the assailants and was in a fit state to make the declaration (K. Ramachandra Reddy v. Public Prosecutor) : 1976 CriLJ1548 .

(iv) Where dying declaration is suspicious it should not be acted upon without corroborative evidence. (Rasheed Beg v. State of M.P. : 1974 CriLJ361 ).

(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 v. State of

M.P.) : 1982 CriLJ986 .

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. (Ram Manorath v. State of U.P.) : [1981]3SCR195 .

(vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected. (State of Maharashtra v. Krishnamurthi Laxmipati Naidu) : 1981 CriLJ9 .

(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 Oza v. State of Bihar) : 1979 CriLJ1122 .

(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 has said that the deceased was in a fit and conscious state to make this dying declaration, the medical opinion cannot prevail. (Nanahau Ram v. State of M.P.) : 1988 CriLJ936 .

(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. v. Madan Mohan) : 1989 CriLJ1485 .

9. From the above, it becomes clear that if a dying declaration gains the confidence of the Court, it can constitute the basis to convict a person, without the necessity of any corroboration.

10. It has already been pointed out that Ex. P. 10 was recorded by P.W. 8, the Magistrate. It is relevant to mention that by the time the deceased was admitted in the hospital, P.W. 8 was recording the declaration of another person, by the side of the deceased. On a requisition given by the duty Medical Officer, P.W. 8 recorded Ex. P. 10 from the deceased. His evidence, in this regard, reads as under:

On 7-6-2004 while 1 was recording dying declaration at Osmania General Hospital acute Burns Wards in other case, duty Medical Officer gave a requisition to me to

record the dying declaration of Smt. Abbasi Begum W/o. Hyder Ali, R/o. Talab Katta, Bhavaninagar, Hyderabad. I identified the person with the help of duty Medical Officer. The Duty Medical Officer examined the patient and made an endorsement by mentioning that the patient is conscious and coherent and in fit condition to give the dying declaration. I received the requisition at 10.25 p.m. Then I avoided the presence of all the other persons except duty Medical Officer. After putting the preliminary questions I satisfied myself that the patient is coherent and in a fit state of mind to give the dying declaration. Accordingly I recorded the dying declaration of injured.

The relevant portion of Ex. P. 10 reads as under:

1. How do you sustained burn injuries ?

Ans. Today evening at 7.00 p.m. my husband having picked up a quarrel with me, poured kerosene over me and lit a match stick.

2. Why did your husband lit you up ?

Ans. My husband is harassing me every day. He is beating me severely having performed another marriage. Today evening when I asked for money for giving food to children, a quarrel caused between us. He poured kerosene oil over me and burnt me.

3. Who extinguished the flames ?

Ans. My neighbours.

4. Who brought you to the hospital ?

Ans. My sister Farzana Begum.

5. Do you wish to say anything more ?

Ans. My husband beat me severely and having poured kerosene over me and set fire to me, he ran away.

After P.W. 8 left the place, P.W. 6 recorded Ex. P.7 from the deceased. It reads thus:

I am residing in H. No. 18-7-425/63/7, road No. 1 along with my husband, My marriage was performed with Hyder Ali 20 years back. I blessed 4 children, namely Farha age 8 years Humayen Ali age 6 years. Shabbir Ali 5 years Samer age 3 years. My husband working wall painter work. Six month back. He performed 2nd marriage since the 2nd marriage he is not maintained my house, and not coming to my house.

Today i.e. on 7-6-2004 at 7 p.m. my husband Hyder Ali came to my house. My children was playing out side of house, my sister Farzasse went hotel for tea, my husband quarreling with me, and poured kerosene one sit fire, and ran away, on my house owner Shabaz and sister came in my room and poured water on me and put off flames. I received burn injuries and body and chest.

There does not exist any difference in the content of the two, except that the condition of the patient was certified by the Doctor, before Ex. P. 10 was recorded. At the most, the deceased revealed her sad story in a more precised form in Ex. P. 10, when compared with the one under Ex. P.7.

11. It is no doubt true that from P.W. 6, it was elicited that he recorded Ex. P-7 statement almost at the same time, when Ex. P. 10 was recorded by P.W. 8 and that he did not see P.W. 8. The fact, however, remains that Ex. P.7 was recorded soon after P.W. 8 left the place, where the deceased was being treated and the time mentioned by P.W. 6 is only approximate.

12. It was strong urged on behalf of the appellant that P.W. 8 is not conversant with Urdu language; and though the deceased gave her statement in Urdu, he has reduced the same into English. After referring to the evidence of P.W. 8, it is pointed out that he does not know to read or write Urdu and on this basis, it is urged that a serious defect has crept into Ex. P. 10. Reliance is placed on the Judgment of the Supreme Court in State of A.P.'s case (supra) and the judgment rendered by this Court in Bhaskar's case (supra).

13. In State of A. P.'s case (supra), a finding was recorded to the effect that the Magistrate, who recorded the statement, did not know Urdu language at all and still, he has chosen to translate the statement made by the deceased in Urdu to Telugu. Almost on the same lines, is the judgment of this Court in Bhaskar's case (supra). In this case, P.W. 8 stated that he knows Urdu. The mere fact that he was not able to write or read Urdu, does not render the translation made by him, of the statement of the deceased, unacceptable in any way. Further, it was not even suggested that P.W. 8 does not understand Urdu. On the other hand, certain suggestions are made to the effect that the translation of some of the statements was not accurate, without mentioning the particulars. Therefore, we are of the view that no illegality has crept into recording of Ex. P. 10 by P.W. 8.

14. It is urged that the non-examination of the Doctor, who certified the condition of the patient before Ex. P. 10 was recorded, is fatal. There is a clear answer to this contention in the judgment of the Supreme Court in Nallapati Sivaiah's case : AIR 2008 SC19 (supra). In paragraph 20 thereof, it was observed that it may be desirable to examine the Doctor, who certified the condition of the person, who made the statement, but failure to examine is not fatal. Reference is made to a judgment of a Constitution Bench of the Supreme Court in Laxman v. State of Maharashtra : 2002 CriLJ4095 .

15. For acquitting the appellant of the charge under Section 498A, IPC, the trial Court relied upon the statement made by the appellant, when examined under Section 313, Cr. P.C. Apart from denying the allegations made against him, the appellant filed a written statement to the effect that he divorced the deceased on 16-9-2003, and in that view of the matter, the question of his causing harassment to her does not arise. The trial Court accepted the same. The relevant paragraph reads as under:

As regard to the second charge Under Section 498A, IPC, it has been seen from the evidence of P.W. 1 and also from the dying declaration that the accused married another women as second wife. From the documents filed by the accused while he was examined Under Section 313, Cr. P.C. it is found that, he gave divorce to Abbasi Begum on 16-9-2003 and the same is evidenced by divorce cum

settlement deed and the Abbasi Begum put her thumb impression on it and the Abbasi Begum also received some amount towards Iddat period and the prosecution also failed to adduce any evidence that the deceased was being subjected to cruelty and harassment, therefore, the charge fails. Therefore, the accused cannot be found guilty for the offence Under Section 498A, IPC.

On the basis of this, the learned Senior Counsel submits that if there was no subsisting marriage between the appellant and the deceased, the allegation as to the mere visiting the latter, almost one year after the alleged date of divorce, is unbelievable. He has drawn our attention to the suggestion made to P.W. 1 about the divorce.

16. We are of the view that the parameters in this case for examining the charges levelled against the appellant for the offence punishable under Section 498A, IPC on the one hand and Section 302, IPC on the other are totally different. The acquittal of the appellant of the offence under Section 498A, IPC does in no way, relieve him from the charge under Section 302, IPC. Apart from that, we are compelled to observe that the trial Court was not justified in taking into account the document mentioned in paragraph 28 of its judgment, without making it, part of the record. It is highly doubtful as to whether it was open to the appellant to file a petition narrating certain facts, when he was being questioned under Section 313, Cr. P.C. Be that as it may, if the effort of the appellant was to take the plea that he divorced the appellant, the burden, in this regard, squarely rested upon him, as is evident from Section 103 of the Evidence Act. Independent evidence ought to have been adduced, to prove that fact. Mere filing of a written statement, without mentioning any provision of law and not making the documents mentioned therein as part of record, coupled with the fact that no witnesses were examined to speak to the fact, renders the whole exercise almost futile.

It is no doubt true that a suggestion was made to P.W. 1 that the appellant divorced the deceased and the said witness answered in affirmative. An important aspect that needs to be taken note of is that P.W. 1 did not utter a word against the appellant and on finding that her evidence is not supportive of the case, the prosecution got her declared hostile. Section 138 of the Evidence Act, while

directing that examination and cross-examination of a witness must relate to the relevant facts, provides that the cross-examination need not be confined to which the witness testifies in his chief examination. It becomes debatable as to whether the burden placed upon an accused under Section 103 of that Act can be discharged exclusively by putting questions to the witnesses, who have turned hostile, particularly when they did not depose anything against the concerned party. In the facts of this case, that question becomes almost academic and it need to be addressed to in an appropriate case.

17. We are of the view that the acquittal The appellant of the charge under Section 498A, IPC does not have any bearing on the charge under Section 302, IPC.

18. The Criminal Appeal is, accordingly, dismissed.

**SooperKanoon - India's Premier Online Legal Search - [sooperkanoon.com](http://sooperkanoon.com)**